Neutral Citation Number: [2026] CIGC (FSD) 20

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD 134 of 2022 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2025 REVISION)

AND IN THE MATTER OF UPHOLD LTD

1. WILLIAM LAGGNER
2. BEARING VENTURES LLC
3. WEST END CAPITAL II LLC
4. CHARLES SIMMONS
5. PETER KEARNS
6. MICHAEL ZAITSEV

Petitioners

1. UPHOLD LTD
2. ADRIAN STECKEL
3. UPHOLD HOLDINGS LLC
4. ASP CAPITAL SUB I INC
5. AMHERST HOLDINGS LIMITED

Respondents

Before: The Hon. Mr Justice Segal

Appearances: Mr Ben Valentin KC, instructed by Mr Bhavesh Patel and Mr Ian Huskisson of Travers Thorp Alberga for the Petitioners

Ms Clare Stanley KC, instructed by Mr Malachi Sweetman and Mr Ryan Hallett of Maples and Calder (Cayman) LLP for the First Respondent

Mr Graham Chapman KC, instructed by Mr Liam Faulkner, Mr Harry Shaw and Mr Jordie Fienberg of Campbells LLP for the Second to Fourth Respondents

Heard: 28 April to 16 May 2025

Draft Judgment circulated: 16 March 2026

Judgment delivered: 24 March 2026

JUDGMENT

Introduction

1. This is my judgment setting out my reasons for dismissing the Petitioners' Re-Amended Petition dated 14 June 2024 (the ***Petition***) presented against Uphold Ltd (the ***Company***).

2. The background to the Petition is set out in my judgment dated 25 April 2024 (the ***Strike-Out Judgment***) dealing with and dismissing an earlier application made by the Second, Third and Fourth Respondents (***R2-R4***) to strike out an earlier version of the Petition (the Fifth Respondent was successful in his application to strike out the Petitioners' claim for a buy-out order against him).

3. The order dated 10 June 2024 giving effect to the dismissal of R2-4's strike-out application gave directions for the filing of further pleadings, in particular that the Petitioners file the

Petition (thereby amending the previous version of the Petition) and points of claim, that the Respondents file a defence to the points of claim and that the Petitioners file a reply thereto. The Petitioners filed the Re-Amended Petition and their points of claim (the ***Points of Claim***) on 14 June 2024; the Company and R2-R4 filed separate points of defence on 23 July 2024 (the ***Company's Points of Defence*** and ***R2-R4 Points of Defence***) and the Petitioners filed points of reply on 30 August 2024.

4. On 18 December 2024 I directed that there be a trial to determine the issue of whether the Petitioners had established that it was just and equitable to wind up the Company based on the grounds (the ***Pleaded Grounds)*** pleaded in the Petition.

5. The trial took place between 28 April and 16 May 2025. Mr. Ben Valentin KC appeared for the Petitioners; Mr Graham Chapman KC appeared on behalf of R2-R4 and Ms Clare Stanley KC appeared for the Company.

6. On 1 August 2025 I confirmed that I had decided to dismiss the Petition and that my written reasons would follow.

7. On that day my Personal Assistant sent the following email to the attorneys acting for the parties:

> "*I refer to my email of yesterday and now write to set out briefly the Judge's decision on and determination of the Petitioners' Re-Amended Winding Up Petition (the* ***Petition****).*
>
> *The Judge has decided that the Petition should be dismissed. He has concluded that the Petitioners have failed to satisfy the threshold test that it is just and equitable that the Company be wound up. The issue of whether to grant alternative relief pursuant to section 95(3) of the Companies Act therefore does not arise.*
>
> *The Judge wishes to point out that despite reaching this decision he does not consider that the Petitioners' complaints are entirely without foundation and that he considers that the Company's corporate governance has historically failed to meet acceptable standards, particularly in relation to the May 2017 Third Amendment to the RCA.*

> *The Judge's reasons will be set out in his written judgment. He has prepared a working draft of the judgment but will need some time to complete it. The Judge will be working on the judgment during the Long Vacation but has one other judgment which takes priority and hearings in Hong Kong during September and October so that the judgment will probably not be distributed until October (if he is able to distribute it before then he will do so).*
>
> *It is because of this delay that he has provided a note of his decision to the parties at this stage. However, while the Judge understands that the Company in particular will wish to inform all its shareholders of the outcome of the Petition, the Judge considers that it would be premature for there to be a public announcement of his decision before his full judgment has been distributed to the parties and handed down. The decision therefore will need to remain embargoed on the usual basis until the judgment is formally handed down."*

8. I now set out and explain my reasons for dismissing the Petition.

The Petitioners and the relief sought in the Petition

9. The Petitioners seek relief pursuant to section 92(e) of the Companies Act (2025 Revision) (the ***Act***) which provides for the winding up of a company if "*the Court is of opinion that it is just and equitable that the company should be wound up.*"

10. As the Petitioners made clear in the prayer in the Petition, they sought orders pursuant to section 95(3)(d) of the Act for:

> "*the purchase of the Petitioners' shares by Mr. Steckel and/or the First and/or Third and/or Fourth Respondents for fair value, to be determined by the Court if not agreed and making all necessary adjustments to the composition of the Company's shareholdings to take into account the disproportionate number of shares that were acquired by Mr. Steckel and Mr. Chen's companies as a result of the Steckel Transaction and all other necessary adjustments to achieve a fair valuation.*"

11. Section 95(3) is in the following terms:

> *"If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding- up order, namely—*

> *(a) an order regulating the conduct of the company's affairs in the future;*
>
> *(b) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;*
>
> *(c) an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or*
>
> *(d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly."*

The Petitioners' case at the trial

12. The Petitioners' pleaded case was set out in the Petition and the Points of Claim. By the start of the trial, it appeared that the Petitioners had adjusted their case by limiting the number of matters they relied on and focussing their case on a narrower range of topics than had been relied on in the Petition and the Points of Claim. By the time of closing submissions, as I explain below, the Petitioners' case was even more narrowly focussed.

13. In their opening submissions at the trial the Petitioners said that they would seek to establish that just and equitable grounds were made out by reference to three core factual topics which they contended were illustrative of serious mismanagement and a lack of probity on the part of Mr. Adrian Steckel (***Mr. Steckel***) and others involved in the Company's direction and management. These three core factual areas were:

    (a). The 2016 Transaction (which is defined below);

    (b). The dilution of the Petitioners' shareholdings at various times; and

    (c). The Company's treatment of The Bank of London opportunity.

14. Also, in their opening submissions the Petitioners summarised the essence of their complaints and case as follows:

(a). Following the Company's incorporation in 2013, in around February 2014, a group of investors, led by Mr. William Laggner, the First Petitioner, (***Mr. Laggner***) had agreed to invest in the Company through the Series A financing, (Mr Laggner's investment had been made via Bearing Ventures LLC, the Second Petitioner (***Bearing Ventures***)). The Series A fund raising had raised US$5 million. At this time, Mr. Laggner had been appointed to the Company's board.

(b). At the end of 2014, a second round of financing was undertaken, the Series B financing, which had raised US$12 million. At this time, Mr. Ricardo Salinas (***Mr. Salinas***) became a shareholder (through Kylie Company) and Mr. Steckel was appointed to the board as the nominee of the Series B investors.

(c). By the first quarter of 2016, the Company lacked liquidity. There was a dispute as to the nature and extent of the Company's financial problems at that time, what had caused its financial problems and how they could and should have been resolved. However, it was clear that there was a lack of liquidity available to meet monthly costs. Some directors and shareholders, including Mr. Laggner and Mr. Halsey Minor, who was the Company's founding shareholder (***Mr. Minor***), wished to pursue a conservative strategy and to conserve cash. However, Mr. Steckel, Mr. Juan Pablo ("JP") Thieriot (***Mr. Thieriot***), and Mr. Timothy Parsa (***Mr. Parsa***) together with other board members had followed a different strategy that had given rise to or caused the urgent need for further financing.

(d). This had ultimately led to Mr. Steckel, through Uphold Holdings LLC, the Third Respondent) (***Uphold Holdings***) entering into a transaction with the Company (the ***2016 Transaction***) pursuant to which funds were advanced to the Company by way of a high interest secured loan (the ***RCA Loan***) documented in a revolving credit loan agreement (the ***RCA***) and the Company granted an option to acquire up to 50% of the Company's shares (by way of a share warrant (the ***Warrant***)). The 2016 Transaction was highly beneficial to Mr. Steckel, Uphold Holdings and ASP Capital Sub I Inc., (the Third Respondent) (***ASP Capital***) (both Uphold Holdings and ASP Capital being

controlled by Mr. Steckel) and highly detrimental to the interests of the Company, Mr. Laggner and the other Petitioners (as minority shareholders in the Company).

(e). The 2016 Transaction - which the Petitioners contended amounted to a take-over of the Company by shareholders led by Mr. Steckel – had been undertaken without legal advice, in preference to alternative financing options which would have better served the interests of the Petitioners and the Company's other shareholders (including alternative transactions on far better terms), and in breach of the anti-dilution protections previously granted to preference shareholders (including Bearing Ventures) in investment rights agreements (each an ***IRA***) first entered into in 2014 at the time of the Series A financing for the benefit of the Series A Preferred Shareholders (***Series A IRA***) and for the benefit of the Series B Preferred Shareholders (***Series B IRA***). No general meeting had been held to approve the required increase in the Company's authorised share capital or the 2016 Transaction itself. It was, the Petitioners contended, apparent to all parties involved that had such a meeting been held in June 2016, the shareholders would have rejected the egregious terms of the 2016 Transaction. The directors who approved the 2016 Transaction had acted improperly because they had been directed or instructed or possibly persuaded by Mr Steckel to give their approval and they did so without properly considering and taking into account the adverse impact of the 2016 Transaction on the Company and of the dilution on the other independent shareholders so that they failed to act independently and had acted to benefit Mr Steckel/Mr Salinas and not all of the Company's shareholders.

(f). This financing had been advanced by Mr. Steckel as a proxy for Mr. Salinas, who had used the 2016 Transaction to give Mr. Steckel, as his proxy, control of the Company so that it could be managed for their benefit. The evidence was clear that Mr Salinas was in fact the financier behind the 2016 Transaction and that the purpose of the financing was to allow Mr. Steckel (as a proxy for Mr. Salinas) to obtain *de facto* control of the Company. Mr. Salinas had needed to obtain access to new banking facilities and in agreeing to refinance the Company (through Mr. Steckel) Mr. Salinas

had sought to ensure that the Company would acquire a UK banking licence that would solve his banking issues.

(g). Following completion of the 2016 Transaction, Mr. Steckel had sought retrospectively to rectify the breach of the Series A and B IRAs by causing a term sheet to be issued to all preference shareholders offering them the right to participate, after the event, in the 2016 Transaction by acquiring newly issued B2 shares at 25.5 cents per B2 share (as compared with the 1 cent per B2 share offered to Mr. Steckel/Uphold Holdings). This offer had not rectified the breach of the Series A and Series B IRAs because the offer was after the fact and the terms of the offer were not the same as those offered and the terms included in the 2016 Transaction.

(h). In November 2016, at the instigation of Mr. Steckel, Mr. Laggner, who had opposed the 2016 Transaction, and repeatedly questioned its propriety, was removed from the Company's board without good cause.

(i). Mr. Steckel had subsequently reached agreement with an investor (who had previously been part of a funding proposal made by Mr. Laggner), namely Mr. James Chen (***Mr. Chen***), on Mr Chen's participation (through Chen International Holdings Ltd (***Chen International***) and subsequently Amherst Holdings Limited, the Fifth Respondent (***Amherst Holdings***)) in the 2016 Transaction. Mr. Chen had ultimately advanced one third of the US$15 million loan that had been part of the 2016 Transaction.

(j). Following completion of the 2016 Transaction and amendments that the Company had purported to make to its memorandum and articles at an EGM held in February 2017 (the ***February 2017 EGM***), the Company had issued additional Series B3 and Series C preferred shares to Uphold Holdings and to Chen International for no fresh consideration (pursuant to and following the execution of a third amendment to the RCA) that permitted, at the option of the Company, the Company to discharge its obligation to pay interest on the RCA Loan by issuing shares (payment in kind or PIK interest) to Uphold Holdings and Chen International. The Petitioners contended that

no effort had been made to comply with the anti-dilution provision in the Series A and Series B IRAs or to obtain the class consents required by the Company's articles for the issue of such new preference shares. Mr. Steckel and Mr. Chen had, as a result, received vast amounts of shares as PIK interest (in discharge of the Company's obligation to pay interest), which had had the effect of further diluting the shareholdings of other shareholders, including the Petitioners.

(k). There were numerous documentary references to the 2016 Transaction having been structured in a way that ensured that Mr. Steckel had acquired *de facto* control of the Company and that such control had been achieved upon execution on 30 June 2016 (or 1 July 2016) of the documents to give effect to the 2016 Transaction.

(l). Thereafter the Company and the board, under Mr. Steckel's *de facto* control, had been systematically mismanaged for the benefit of Mr. Steckel and others (and at the expense of the Company and the Petitioners).

(m). That mismanagement was illustrated by various decisions to issue large numbers of shares and options to Mr. Steckel, Mr. Thieriot and to companies controlled by Mr. Steckel, Mr. Chen (who had been a director of the Company since 27 January 2021) and Mr. Greg Kidd (***Mr. Kidd***) (a director of the Company between 9 March 2018 and 27 January 2021) (thereby unfairly and improperly diluting the Petitioners' shareholdings) and as a result and the board's subsequent decision (made by its Litigation Committee) not to take any action to seek redress in respect of any of these events.

(n). The mismanagement was also illustrated by the diversion of the Company's substantial and highly valuable interest in The Bank of London (***TBOL***) opportunity/venture to (at least) Mr. Watson and Mr. Steckel (whilst they were both directors of the Company) and the board's subsequent decision (again on the advice of its Litigation Committee) not to take any action to seek redress from either director.

15. The Petitioners contended that taken together this conduct had (a) caused the Petitioners justifiably to lose trust and confidence in the Company's management; (b) constituted a lack of probity in the management of the Company and (c) amounted to oppression of the Petitioners by Mr. Steckel. It followed that there existed grounds that would make it just and equitable for the Company to be wound up, and which therefore engaged the Court's jurisdiction to order alternative relief, in the form of a buy-out of the Petitioners' shares (at an appropriate value, to be decided following judgment on the Petition).

16. In their closing submissions, as I explain further below, the Petitioners primary and almost exclusive focus was on (a) the alleged unfair and improper dilution of their shareholdings in the Company that had resulted from the granting of and the issue of shares pursuant to the Warrant and the subsequent issues of further shares to Mr Steckel (Uphold Holdings) by way of PIK interest and (b) the alleged improper diversion of the TBOL corporate opportunity, which they argued demonstrated that the Company's affairs had been conducted with a lack of probity by reason of the directors having promoted Mr Steckel's interests or having permitted Mr Steckel to promote his own financial interests at the expense of the Company and the other independent shareholders).

17. R2-R4 and the Company (together the ***Respondents***) complained loudly about the Petitioners' change in approach, both because the Petitioners had proceeded to maintain their damaging allegations relating to the integrity of a number of the Company's directors but then dropped them only at the last minute and because the Petitioners had challenged decisions and conduct which they had not identified and particularised in their pleaded case adequately or at all so that the Respondents had been prejudiced by being unable to call additional witnesses to provide responsive evidence. I deal with this issue below.

The Petitioners

Mr Laggner

18. Mr Laggner holds 4,803,890 ordinary shares, representing 1.4714% of the Company's shares on a fully diluted basis.

19. He is the sole managing member of Bearing Ventures, which is a Delaware limited liability company. Bearing Ventures holds 300,000 Series A preferred shares, 22,516 Series B preferred shares and 14,418 Series B1 preferred shares, representing 0.1032% of the Company's shares on a fully diluted basis.

20. Mr. Laggner was a director of the Company between 16 September 2014 and 17 November 2016.

21. Mr. Laggner filed six affidavits. He also filed two witness statements. The first was dated 28 February 2025 (***Laggner-WS1***) and the second was dated 21 March 2025 (***Laggner-WS2***). Mr Laggner was cross-examined on days 2, 3 and 4 of the trial.

Mr Solomon Zlotchenko

22. Mr. Zlotchenko is the managing member of the Third Petitioner, West End Capital II LLC, which holds 50,000 Series B1 Preferred Shares, representing 0.0153% of the Company's shares on a fully diluted basis. Mr. Zlotchenko filed one witness statement, dated 28 February 2025 (***Zlotchenko 1***).

23. Mr. Zlotchenko was cross-examined on day 5 of the trial.

Charles "Chuck" Simmons

24. Mr. Simmons was the Fourth Petitioner. He holds 27,777 Series B Preferred Shares, representing 0.0085% of the Company's Shares on a fully diluted basis. After hearing Mr Simmons' oral evidence, and seeing that his only complaint was that he had not received his warrants, on 7 May 2025 the Company offered on an open basis a compromise of Mr Simmons' claim, namely the renewal of the Company's offer to exercise the warrant issued

on 11 March 2016 on the terms previously proposed (i.e. for the total payment of US$3,825) on the basis that Mr Simmons withdrew as a petitioner with no order as to costs, with appropriate releases in favour of the Company. On 12 May 2025 Mr Simmons accepted that offer.

Peter Kearns

25. Mr. Kearns is the Fifth Petitioner. He holds (jointly with Ana Kearns) 72,815 Ordinary Shares, 12,150 Series B1 Preferred Shares, 12,150 Series B2 Preferred Shares and 4,475 Series B3 Preferred Shares, representing 0.0311% of the Company's shares on a fully diluted basis. Mr. Kearns filed one witness statement, dated 28 February 2025 (***Kearns 1***). Mr Kearns was also cross-examined on day 4 of the trial.

Michael Zaitsev

26. Mr. Zaitsev is the Sixth Petitioner. He holds 12,136 Series B1 Preferred Shares. Mr. Zaitsev filed one witness statement, dated 28 February 2025 (***Zaitsev 1***). Mr Zaitsev was also cross-examined on day 4 of the trial

The Company and its shareholders

27. The Company is an exempted limited company that was incorporated in the Cayman Islands in 2013. It was founded as a start-up by Mr Minor, a technology entrepreneur. Until 23 February 2017, the Company was known as Bitreserve Ltd. The Company operates a multi-asset online exchange for traditional (fiat) currencies, cryptocurrencies, and precious metals, allowing frictionless foreign exchange and cross-border remittances.

28. The Company has issued both ordinary shares and preferred shares. Preferred shares were issued to investors at different times and in different series to coincide with various rounds of fundraising undertaken by the Company. The Company has issued Series A, Series B, Series B1, Series B2, Series B3, and Series C preferred shares. Each series in substance

entitles the preferred shareholders to the same rights *inter se* in accordance with the various IRAs that were entered into between the investors in each series and the Company (so that there is a separate IRA for each such series of preferred shares).

29. The Company has hundreds of shareholders, the majority of whom are the independent shareholders. Most of these shareholders each hold a very small percentage of the issued capital. They comprise individuals, employees, funds and family trusts.

30. The Petitioners hold a small percentage of the Company's issued capital. Their combined stake in the Company on a fully diluted basis is 1.6352%. The Petitioners obtained their respective shares in the Company at different stages between 2014 and 2019. Mr Laggner acquired his 4,803,890 ordinary shares in the Company from Mr Minor on 16 May 2019 following his settlement of a dispute and proceedings regarding those shares. The Company said that it had no record of him holding any beneficial interest in any shares in the Company prior to May 2019.

31. The Company is *now* very profitable and solvent. In 2024, its annual revenue was approximately US$225 million, and it made a gross profit of approximately US$60 million. It was not always profitable. Indeed, the evidence shows that the Company struggled and faced severe financial difficulties at various stages in its development.

The current board of directors

32. The following are the current directors of the Company (at the date of the hearing of the Petition):

 (a). Mr James (Jim) Hilton. Mr Hilton has been a director since 27 January 2021 and has been chairman of the board since 28 April 2021. He is also a member and chairman of various committees of the Company, namely its Litigation Committee, the Risk, Audit and Compliance (***RAC***) Committee, and the Governance Enhancement, Policies and Readiness (***GEPR***) Committee. He is also a member of the Finance Committee. Mr

Hilton is a graduate of Harvard University and the Boston University School of law, and his background is as in-house general counsel (he is a qualified attorney, business executive and consultant in the financial services industry). Mr Hilton prepared two witness statements (***Hilton-WS1*** and ***Hilton-WS2***) and was cross-examined at the trial.

(b). Mr Simon McLoughlin. Mr McLoughlin has been a director since 22 December 2022. He is the Company's CEO and a member of the Litigation Committee and the Finance Committee. Mr McLoughlin's previous roles have been as the Company's COO and President.

(c). Mr Steckel. Mr Steckel has been a director of the Company since 14 October 2015. He is a member of the RAC Committee and the Chairman of the Finance Committee. Importantly, he was CEO (replacing Mr Watson) between 8 August 2016 and 20 November 2018 and his conduct during this period was central to the Petitioners' allegations and complaints. Mr Steckel swore two affidavits (***Steckel-1*** and ***Steckel-2***) and prepared two witness statements (***Steckel -WS1*** and ***Steckel -WS2***) and was cross-examined. He was a key witness at the trial.

(d). Mr Thieriot. Mr Thieriot has been a director of the Company since 13 January 2014. He was CEO of the Company between 20 November 2018 and 19 January 2022. He is a member of the GEPR Committee. Mr Thieriot swore two affidavits (***Thieriot-1*** and ***Thieriot-2***) and prepared two witness statements (***Thieriot -WS1*** and ***Thieriot -WS2***) and was cross-examined. Because of his close involvement with many of the key events relied on by the Petitioners he was also an important witness at the trial.

(e). Mr Peter Chapman. Mr Chapman has been a director of the Company since 14 January 2020. He is also a member of the Litigation Committee, the RAC Committee, and the Finance Committee. He is the founder, CEO and Managing Partner of Rosemoor Capital Management LLC (an investor in the Company).

(f). Mr Chen. Mr Chen has been a director of the Company since 27 January 2021. He is also a member of the Finance Committee.

The First Petition and the establishment of the Litigation Committee

33. On 2 February 2021, Mr Laggner and certain other shareholders of the Company filed a winding up petition (the ***First Petition***) alleging mismanagement by the Company and making allegations in respect of the Company's entry into and handling of both the 2016 Transaction and the TBOL transaction.

34. The criticisms directed at the Company's then current board of directors were (inter alia) that:

(a). The concerns expressed by the petitioners "*have not been addressed and the Company continues to turn a blind eye to the ultra vires nature of the [2016] Transaction, subsequent unlawful constitutional changes, exploitation of the Company's intellectual property by competitors and other failures to take steps to prevent actions which the Petitioners consider to be against the Company and its shareholders' best interests*."

(b). "*The Petitioners have a legitimate concern that the directors of the Company are acting on the instructions of Mr Steckel and may take actions that further reduce and oppress their rights and those of other shareholders*."

35. On 16 February 2021, Mr Steckel made a request to be indemnified from the Company in respect of his costs of the First Petition. His request was made pursuant to the terms of the 2016 Transaction documents and to the Company's Articles.

36. On 24 February 2021, the Company resolved to establish the Litigation Committee for the purpose of (a) considering Mr Steckel's indemnification request and (b) conducting a defence of the First Petition. The Litigation Committee was, as was recorded in the written resolutions of the directors appointing the Committee, to be "*composed solely of members*

of the Board who were not on the Board at the time of the [2016] Transaction and other activity complained of in the Petition…"

37. The First Petition was filed at a time when the Company was considering raising capital by launching an initial public offering through a special purpose acquisition company (***SPAC***) structure. The SPAC transaction (which was ultimately abandoned) could not proceed whilst the First Petition was in force as it would prevent the Company from being able to complete a merger. On 12 June 2021, the First Petition was settled.

The period before the 2016 Transaction

38. From December 2013 to September 2014, the Company raised approximately US$5 million from its initial Series A preferred financing round at a subscription price of US$1 per share. Of the Petitioners, only Bearing Ventures participated in the Series A preferred financing round, subscribing for 580,000 Series A preferred shares for $580,000. Pursuant to clause 2.3 of the Series A IRA, the holders of a majority of the Series A preferred shares were entitled to designate one board representative and Mr Laggner was appointed as a director of the Company at the board meeting held on 1 August 2014 as the nominated representative for the Series A preferred shareholders.

39. There was a further round of financing (the Series B financing) in late 2014, which raised a further US$12 million. At a board meeting held on 15 September 2014 the board (comprising Mr Minor, Mr Parsa, Mr Thieriot and Mr Laggner) resolved that the Company needed additional funding to meet operational costs and unanimously resolved to approve a Series B preferred financing round to raise $11,999,999 million through issuing 6,666,666 million Series B Preferred Shares ($1.80 per share). The majority of the Series B preferred shares were issued by the Company on 12 May 2015. Mr Steckel participated in the Series B preferred financing round in his personal capacity and subscribed for 300,000 Series B preferred shares and paid the Company subscription proceeds of $540,000 (approximately 4.5% of the Series B preferred shares issued). There was a total of 193 different investors who subscribed for Series B preferred shares. Mr. Salinas became a shareholder (through

Kylie Company) at this time. Kylie Company subscribed for 3,333,333 Series B preferred shares, for which it paid the Company subscription proceeds of US$6 million (50% of the Series B preferred shares issued).

40. On 20 May 2015 Mr Steckel was appointed as a director of the Company as the Series B board representative (Mr Steckel's evidence was that his appointment as a non-executive director was approved at the board meeting on 20 May 2015 although the Company's register of directors recorded the date of his appointment as 14 October 2015). Mr Watson was appointed as a director and President and CEO of the Company on 20 May 2015 and Mr Milby was appointed as a director on 22 June 2015. In the period between May 2015 and June 2016 the day-to-day affairs of the Company were managed by Mr Watson.

41. The Series A and Series B preferred shareholders were, as noted above, each parties with the Company to an IRA (governed by Cayman Islands law). Under Section 2.5 of the IRAs these shareholders were granted a "*right of first offer*" as follows (my underlining):

> *"Subject to the terms and conditions specified in this Section 2.5, <u>the Company hereby grants to each Investor a right of first offer with respect to future sales by the Company of its Shares</u> (as hereinafter defined). An Investor shall be entitled to apportion the right of first offer hereby granted it among itself and its Affiliates in such proportions as it deems appropriate. <u>Each time the Company proposes to offer any shares or, or securities convertible into or exchangeable or exercisable for any of it [sic] share capital ("Shares"), the Company shall first make an offering of such Shares to each Investor in accordance with the following provisions</u>:*
>
> *(a) The Company shall deliver a notice in accordance with Section 3.5 ("Notices") to each Investor stating (i) its bona fide intention to offer such Shares, (ii) the number of such Shares to be offered and (iii) the price and terms upon which it intends to offer such Shares.*
>
> *(b) By written notification received by the Company within twenty (20) calendar days after the giving of Notice, each Investor may elect to purchase, at the price and on the terms specified in the Notice, up to that portion of such Shares that equals the proportion that the number of Ordinary Shares that are Securities issued and held by such Investor (assuming full conversion and exercise of all convertible and exercisable securities then outstanding) bears to the total number of Ordinary Shares of the Company then outstanding (assuming full*

conversion and exercise of all convertible and exercisable securities then outstanding). …"

42. When the Series B preferred shares were issued holders of Series A preferred shares were given the right to acquire their proportionate share of the new Series B shares and thereby avoid dilution. Of the 21 Series A preferred shareholders nine participated in the Series B round and accounted for 9% of the total Series B preferred shares issued (with Mr Steckel accounting for half of that amount).

43. The Company's articles of association (adopted by a special resolution dated 28 April 2015 – the ***Articles***) contained a provision (in article 3.2) that attached certain rights to the preferred shares including (in article 3.2(v)(vi)) a requirement to obtain the consent of a majority of the Series A and Series B preferred shareholders to the issue of (or the assumption of an obligation to issue) "*any shares including any other right or security convertible into or exercisable for any such shares having a preference over or being pari passu with any series of Preferred Shares with respect to dividends, liquidation or redemption*."

44. In 2015, the Company licensed certain of its intellectual property to AirTM Ltd (***AirTM***), a digital dollar account platform which was established that year. The intellectual property was an application programming interface (or API) which allowed payments to be completed via the internet by linking AirTM's application with the Company's cloud-based money system. Mr Steckel and Mr Parsa (both then directors of the Company) were also investors in AirTM and their involvement had been considered at a meeting of the board on 31 August 2015. Also in 2015, the Company started its efforts to obtain a digital banking licence in the UK (a ***Banking Licence***). Mr Watson (then the Company's CEO) was tasked with leading that effort (this was formalised by the employment agreement between the Company and Mr Watson dated 8 August 2016). This task included having meetings with regulators from the UK Prudential Regulatory Authority (the ***PRA***) of the Bank of England, and the UK Financial Conduct Authority (the ***FCA***).

45. The Company undertook a further round of financing (the Series B1 financing) from September 2015 to May 2016, which raised a further US$3.7 million.

The financial difficulties in mid-2016

46. There is no dispute that by the end of the first half of 2016 the Company was running out of cash and needed to raise further funds. Mr Laggner accepted during his cross-examination that "*Had the company [during the first half of 2016] not continued to embark on fundraising and receive capital, then at some point it could have become insolvent*" (Day 2, pages 54-55). He also said that "*there was a cash crisis in the summer of 2016*" (Day 2, page 56). There is, however, a dispute as to the reason for the cash and liquidity shortfall/crisis.

47. In June 2016, the directors and officers of the Company were:

    (a). Mr Minor (director between 13 January 2014 and 13 July 2016).

    (b). Mr Parsa (director between 13 January 2014 and 24 October 2016).

    (c). Mr Thieriot.

    (d). Mr Laggner (director between 16 September 2014 and 17 November 2016).

    (e). Mr Watson (director between 20 May 2015 and 17 October 2020).

    (f). Mr Milby (director between 22 June 2015 and 18 October 2020).

    (g). Mr Steckel.

48. It is common ground that Mr Minor orally tendered his resignation as a director on 22 June 2016.

49. Mr Thieriot's written evidence was set out in Thieriot 1 at [12] as follows (my underlining):

> *"By the end of Q2 2016, shortly after the Series B1 funding round, we needed to raise capital again, <u>absent which, the Company was going to become insolvent. I was</u>*

involved in the Company's fundraising efforts from an early stage so I was aware of the difficulties the Company was having in raising funds, which I detail below. The gravity of the Company's position only became clear to the Board in or around 10 June 2016, when it appeared that the Company would become insolvent by the end of that month and as it transpired, the Company was not in a position to pay its employees' monthly salaries for June 2016 until a shareholder named James Chen wired US$540,000 to the Company to cover this cost, on the basis that further shares would be issued in exchange."

50. Mr Thieriot provided more detail in Thieriot 2 at [7] (and see section C of Thieriot -WS1):

> *"7.2 As the Company's Consolidated Financial Statements for 2015 and 2016 show …… its revenues for those years were US$90,052 and US$271,965, against operational losses of US$13,553,613 and US$14,735,575 respectively. At the end of 2015 the Company had a cash balance of US$3,140,921 and average monthly losses in 2016 of ~US$1.23m a month. This does not amount to strong overall financial health – rather this shows that if nothing else had changed, before the end of Q1 of 2016, the Company was going to have to raise a further US$11m in capital to make it to the end of the year;*
>
> *7.3 The Company was almost out of money by June 2016 and required an unsecured undocumented advance of US$540,000 from Mr Chen in order to make payroll for July 2016;*
>
> *7.4 At paragraph 11(a)(iii) of [Laggner 3], Mr Laggner says that the Chen payment of US$540,000 had satisfied payments due to employees with the implication being that there was no particular urgency about finding a financing solution. I could not disagree more. The Chen payment covered only one month's payroll. Within 30 days of that payment, we were going to be in exactly the same position again. If we had missed payroll, it may be that no employee would have taken an action to recover their debts through a formal insolvency process, but they would have just taken positions elsewhere, and once the Company had a reputation amongst its employees that it could not meet payroll, we would probably have lost enough of them to our competitors or others that it would have crippled our business, in my view.*"

51. Mr Steckel's written evidence was set out in Steckel 1 as follows (my underlining):

> *34 The [Petition] alleges that in early 2016 the Company's monthly operational costs were around $1.2 million against approximate monthly revenues of $20,000. This is consistent with the annual operating expenses and revenues as recorded in the Consolidated Financial Statements for the Company and its subsidiaries for the years ended 31 December 2015 and 2016.... In particular, the Company's Audited Financial Statements record annual revenues of $90,052*

and $271,965 in 2015 and 2016 respectively, against operational losses of $13,553,613 and $14,735,575 respectively…. Average monthly operational losses in 2015 and 2016 were therefore $1.13 million and $1.23 million respectively.

35 There was no material change in the Company's monthly operational losses in the run up to June 2016. The Company was a tech start-up company in development mode that was loss making. In the absence of revenues, it was dependent upon third party funding to operate and develop to a point of profitability. The value of the Company's shares on the secondary market as at June 2016 was essentially nil. The start-up expenditure has with the benefit of hindsight proven to be money well spent as the Company was able to turn the corner following the [2016 Transaction] and become both successful and profitable. However, this outcome was highly uncertain as at June 2016 and indeed for an extended period of time following that [2016 Transaction]. It has taken a great deal of hard work and investment post-[2016 Transaction] under new management to get the Company to its current level of performance. With a focus on execution, new management was able to increase revenues to over $16 million in 2017 [1101], a 59 times increase from the revenues realized in 2016."

52. Mr Steckel was cross-examined by Mr Valentin about the company's management, governance and liquidity position in the first half of 2016 and Mr Steckel said this (Day 5 pages 79-80) (my underlining):

A. Yes, the first board meeting was on June 17, 2016, and I thought it was a shambles. The number 1 issue facing the company was lack of liquidity, and 1 management, and particularly [Mr Watson] had a binder of 120 slides or more. We went through hours and hours of presentations about this potential transaction and this very shiny thing, and the notion of we'd run out of money was just an afterthought at the tail end of the meeting, when it should have been front and centre, the number one thing. And so I was not impressed by management. I thought that they'd been on the cusp of illiquidity during the first six months. And it was always big things, funding that's going to happen…. But when you think about the things that I will agree with Mr Laggner today is that there are things that we could have managed much, much better.

Q. Did you find it strange that the company had not held any board meetings between October 2015 and June 2016?

A. Yes. [Mr Minor] and I were - talked about it on several occasions. I think we sent an email to [Mr Watson] .... there was supposed to be a board meeting in January. That didn't happen. And there's a certain slack that you give to people in the sense that they're very busy, they're running around. But finally we ... got them to do a board meeting a little too late, I think.

Q. You've been talking about 2016, haven't you, and Mr Watson's performance in the lead-up to that, and you've talked about cash flow issues, running out of money and that sort of thing?

A. I think ... the cash flow issues were real. I'm greatly offended by the Petitioners' allegation that I engineered those cash crises. I think that's revisionist history. It's made up. It's not true. I think the record shows that.

53. Mr Laggner's written evidence in Laggner 1 was as follows (my underlining):

"*41. By the first quarter of 2016, the Company was in something of a mess. I would describe the management style of Messrs Watson, Parsa and Thieriot as flying blind. They failed to provide quarterly financials or detailed shareholder updates, while deviating from the 2015 business objectives. This destroyed stakeholder interest and trust.*

42. As CEO, Mr Watson should have realized this. In the first quarter of 2016, monthly expenses were running at $1.2m against revenue of $20,000. Mr Watson should have deferred his $85,000 monthly salary (which I asked him to do) and made other cuts to better manage cash flow in the crisis. He and Mr Thieriot instead went full steam ahead with extravagant spending and unauthorized M&A activity. For example, I found out in late Spring of 2016 that Messrs Watson and Thieriot were trying to raise $50M in a convertible note in order to buy a bank in England as well as a financial technology company without board approval or knowledge. In essence, Mr Watson and Mr Thieriot had spent nearly all of the Series B money without building any real enterprise value.

43. By the spring of 2016, several of my investors had loaned the Company money in order to help with payroll and other expenses or participated in the convertible note offering (which was not approved by the BODs). By this point, my group had provided financing of roughly $6m over 24 months, or 27% of total capital raised by the company, and still couldn't get updated financials I pleaded with Mr Watson to cut the burn rate, forego salary, be transparent and execute on the 2015 business objectives.

44. All of this fell on deaf ears. The approach taken was so irrational, given the Company's financial condition, that I now believe that this was likely to be because a plan had been formed to engineer an unnecessary cash crisis as a means of justifying the Steckel Transaction. Had the board done what any regular board would have done in the circumstances, cut costs, run the company conservatively and seek financing on the best available terms, the justification used for the Steckel Transaction would not have arisen, and the transaction would never have taken place."

54. During his cross-examination, Mr Laggner accepted that had the Company not continued to embark on fundraising and receive capital or other funding, then at some point it could have become insolvent during 2016 (Day 2, pages 49-55).

55. In Laggner 3 at [22] Mr Laggner reiterated and expanded on his view that the liquidity problems faced by the Company were generated deliberately in order to create the conditions in which a low takeover offer from Mr Steckel (and Mr Salinas) would be favourably received:

> *"I believe the purported cash crisis in the spring/summer of 2016 was manufactured by Mr Steckel's faction as a means of enabling Mr Steckel and Mr Salinas to justify their take over the Company on egregious terms because by the time funding was sought, the Company was supposedly in dire straits and desperately needed funding. As with any start up business, there were some challenges. However, the Company's business fundamentals and outlook were very sound. The Petitioners consider that, knowing there were cash flow issues in late 2015, the directors and in particular Messrs Watson, Steckel, Thieriot should have called meetings more promptly to review the proposed funding terms earlier than June 2016, as well as taken action to reduce costs until the company proved out more of their business fundamentals. Instead, meetings were postponed for months.*"

56. Mr Laggner was crossed-examined by Mr Chapman on this issue, in particular as to what he meant by, and the basis for, his statements in [22] of Laggner 3 (Day 2 pages 57-61) (my underlining):

> *Q. And you say that the cash crisis was manufactured. By "manufactured", or "engineered", you mean that Mr Steckel and his faction created this cash crisis, do you?*
>
> *A. I think they were part and parcel of running the company out of money, yes.*
>
> *Q. That's not the same thing, Mr Laggner, is it? Come on. You are suggesting that Mr Steckel and his faction manufactured the cash crisis. You must mean they created it and they are responsible for it?*
>
> *A. In the end of 2015, the company was spending an inordinate amount of resources on a remittance product with Grupo Elektra, which is a company that Mr Steckel worked for. Mr Salinas' company. Mr Salinas does a lot of remittance business in Mexico. We had built a product to compete with that. And by building that product, according to Mr Steckel and the shareholder letter at the end of 2016,*

we were spending a lot of resources, and we were ready to launch that product. That was part and parcel of the increase in expenses year over year in early 2016 versus 2015.

Q. My question was, in this paragraph you are suggesting that Mr Steckel and his faction manufactured the cash crisis and that you must mean that they created it and are responsible for it?

A. I think the misallocation of resources to that particular - that was Uphold's product to go to market: connect to the banking system and disrupt the remittance industry.

Q. And - that is not what you're saying in this paragraph. What you're saying is that they manufactured it, and you are suggesting that they manufactured it as a means of enabling them to justify the takeover of the company.

A. That's what they - by allocating those resources – we had very limited resources, as we just got done discussing. And by misallocating those resources to Grupo Elektra - in fact, Halsey Minor even sent an email to everyone about this: this is crazy; we're spending all this time and money. And by doing that, they got themselves into a cash - … Uphold was building a remittance product that would compete with Western Union. Western Union was a partner of Mr Salinas in Mexico, with a sizeable amount of market share in the remittance market. We were building something that was highly disruptive, that would basically change the remittance industry as we know it. And by doing that, the company, Uphold, with limited resources, was spending an inordinate amount of capital on this product.

Q. But what you're suggesting in this paragraph - and tell me if I'm misreading it - - is that Mr Steckel and his faction did something wrong by manufacturing this cash crisis. So they manufactured a cash crisis, and they did so for the purpose of trying to take over the company. Is that what you're saying here or not?

A. By manufacturing the cash crisis and subsequently killing off that product - the product was called "Astra", I believe -- "Astro", "Astra", I can't recall the exact spelling of their name. But that's what really hurt the company.

Q. Can I try one more time and then we will have a break. What you're suggesting in this paragraph is that Mr Steckel and his faction did something wrong by manufacturing this cash crisis and manufacturing a cash crisis for the purpose of trying to take over the company. Is that what you're intending to say here or not?

A. They manufactured the cash crisis.

Q. And in doing that, you are saying they acted wrongfully; correct?

A. *Had we launched the product, the cash-burn would not have been there, correct.*

Q. *Well, are you saying they acted wrongfully or not in manufacturing that cash crisis?*

A. *They manufactured a cash crisis which hurt all the shareholders of the company.*

Q. *So you are saying they acted wrongfully?*

A. *They acted wrongfully.*

Q. *And you are saying that they acted wrongfully in manufacturing that cash crisis because their purpose in manufacturing that cash crisis was to enable them to take over the company. That's what you are saying, correct?*

A. *Correct.*

The 2016 Transaction

57. As I have noted shortly after the completion of the Series B1 financing in May 2016 the Company urgently needed further funding. The position was explained by Mr Thieriot, who had been involved in the Company's various fundraising exercises, as follows in Thieriot – WS1:

> *"18 By the end of Q1 2016, shortly after the Series B1 funding round, we needed to raise capital again, absent which, the Company was going to become insolvent. I was involved in the Company's fundraising efforts from an early stage so I was aware of the difficulties the Company was having in raising funds, which I detail below. We were in constant fundraising mode (which required the very travel and meetings that I understand that the Petitioners have criticised as unnecessary). None of the potential investors listed in the investment leads document exhibited at JPT1 / pages 255-258 who were investors that we were soliciting investment from at the time ultimately invested in the Company, despite our best efforts:*
>
> *18.1 Some of the potential investors were recorded as having a very wide range of possible involvement, with US$500,000 at the bottom end. In my experience, investors are more likely to invest at the bottom rather than at the top of the end of their ranges, especially for tech start-ups, and I was mindful of that point at that time;*
>
> *18.2 Some of the potential investors are recorded as declining the invitation to invest in the Company; or their interest is conditional*

only (such as Mike Novogratz, about whom it is said "Escher is Key"). Escher was a long running potential transaction which ultimately did not complete;

18.3 The reference in the spreadsheet to "[e]xpressed interest, waiting to hear" usually means, in my experience, that nothing more is going to come of that lead – not every potential investor gives you a straight "no"; and

18.4 The Board's view in June 2016 was that none of these investors would realistically lead to a timely investment on the scale of the Steckel Transaction (see below), and that level and certainty of funding was what the Company needed at the time.

58. In May 2016 discussions were taking place with investors for a bridging loan. Mr Salinas had been approached and told by Mr Watson on 13 May 2016 that "*After many months we're now formally entering the final phase of our UK Bank application, which commences the week of the 13th of June 2016. Assuming there are no issues - and we've been informally advised there are none - we expect to be formally approved on or before 30th of August 2016 for full UK clearing banking licence - the first one issued in 80 years - as advised by to the Bank of England and the Financial Conduct Authority.*" On 20 June 2016, Mr. Thieriot reported to Mr Steckel and Mr Parsa about the results of meetings he had had with potential investors. He said that he was "*incredibly confident we raise $25mm at the new reduced valuation within 60 days... Never had two better meetings: Soros, IA Capital...*" Earlier that day, and in advance of a meeting in Mexico City, Mr. Parsa, Mr. Steckel and Mr. Thieriot had discussed by email the terms of proposed further funding from Mr. Salinas.

59. Mr Thieriot explained the status at or near the time of the 2016 Transaction of the various discussions he was having with the different potential funders (which he said had been flagged with the Company's board at its meeting on 17 June 2016). As regards Sovereign Capital, he said that on 23 June 2016 Sovereign Capital had emailed him to say that they would revert within 48 hours with an investment decision, but he heard nothing further from them. As regards the discussions via Ms Hess (an investment fundraising consultant with the Company) apparently with Prince Al Waleed, at the time of the 2016 Transaction, no firm commitment had been received to invest in the Company, and Mr Thieriot was clear that the

board could not wait and hope for the best that the Prince would invest (in fact after the closing of the 2016 Transaction, in late July 2016, he again pursued a potential investment from the Prince but no such investment ever transpired and indeed ultimately it transpired that there was no such Prince).

60. Mr Thieriot said that ultimately in June 2016 there were three fundraising proposals which the board had considered. These were what he described as the Salinas Proposal, the Steckel Proposal and the Laggner Proposal (referred to by Mr. Laggner as the White Knight Proposal). I use this terminology in the discussion below.

61. As regards the Salinas Proposal, Mr. Parsa, Mr. Steckel and Mr Salinas had met in Mexico in the late spring/early summer of 2016 to discuss a potential financing proposal although Mr Thieriot had not attended these meetings and so was unaware of precisely what had been discussed. But on 22 June 2016, Mr. Parsa had sent an email to the board setting out the terms of the offer on behalf of Mr Salinas. The terms of the Salinas Proposal were as follows: a US$10 million bridge loan at 2% interest per month, repayable after one year, with a senior lien (security interest) on all the assets of the Company (not pre-payable, i.e. guaranteed full-year interest); an option to purchase 20% of the Company (fully-diluted) for US$1 which would be exercised immediately upon grant; a five-year option to purchase 30% of the Company (fully-diluted) from Mr. Minor and Mr. Watson for US$10 million and board and operating control. Mr Parsa had also said that alternatively Mr. Salinas was willing to provide US$15 million in return for 51% of the Company, with an initial US$2 million in funding to be provided on 27 June 2016. Mr Thieriot noted that in return for US$15 million of debt financing, the Salinas Proposal would have given Mr. Salinas 51% of the Company with 30% of the shares coming from Mr Minor and Mr Watson. Because the proposal involved the sale by Mr Minor of his shares it was immediately recognised that it was unlikely to be accepted. Mr Brooke, the Company's General Counsel, had noted in an email on 23 June 2016 that an alternative transaction needed to be considered. He asked for advice on whether "*If [Mr Minor] doesn't want to do this deal, can we move forward with an alternative $15mm bridge loan with $1 option for % of shares required to give Salinas control... realize this will significantly wipe out common after preferred allowed to participate but don't know there's*

really any other options out there…" Mr Brooke also emphasised the need to consider alternatives and the urgency of the situation in an email he sent to the board on the same day:

> *"I believe it is sensible for the board to discuss and approve any alternative proposals as a backup to the current proposal pending discussions with Halsey. I believe the board should also discuss and agree a timeframe for accepting any alternative/backup proposals as well as a timeframe by which the first proposal needs to be executed or the company will then act on any approved backup plan.*
>
> *There is an alternative path forward with Salinas that can be pursued as one backup so at a minimum the BOD should meet to discuss this further. In light of the urgency with which the company needs to act, I strongly encourage that the BOD agree to meet this afternoon. Please let me know what your availability is like. Tentatively, I would propose anytime from 3pm PDT onwards."*

62. Mr Thieriot said that at the time he was also sceptical that the Salinas Proposal would be accepted given that it relied on Mr. Minor's support. But nonetheless he recognised that it would provide US$15 million in much needed financing and so he wrote to Mr. Chen to say that he thought that they should push to get as close to a $15mm financing as possible.

63. The Salinas Proposal was considered at a board meeting on 22 June 2016 (there were board meetings on 22, 23 and 24 June 2016). The minutes of that meeting record that it was attended by Mr Minor, Mr Steckel, Mr Parsa, Mr Thieriot, Mr Watson, Mr Milby and Mr Laggner (and that Mr Brooke attended by phone and kept notes). The minutes state that "*Mr Steckel did not participate in the Board meeting given his direct interest in the matters before the Board.*" Mr Minor resigned as chairman and a director (which was accepted) and Mr Steckel was appointed as the new chairman. The minutes further record that Mr Watson and Mr Thieriot proposed a resolution that the Salinas Proposal "*submitted by Mr Steckel*" be accepted and that the resolution was "*approved by all board members present*."

64. The board met again on 23 June 2016 and once again Mr Steckel did not participate because of his interest in the Salinas Proposal. The minutes record that "*the Board discussed the current state of financing options and the Company's need for immediate additional capital. The Board agreed that it would reconvene June 24 to consider financing proposals submitted in writing by no later than 5:00PM PDT. Proposals would require a minimum of $2.5mm in*

immediate financing to address solvency issues and additional operational funds to adequately capitalize the Company near term."

65. After the board meeting on 23 June 2016 Mr Brooke had sent an email to the board to identify what he considered to be the minimum conditions which any funding proposal needed to satisfy in order to be acceptable:

> "*Per discussion and agreement by the BOD, all funding proposals must meet these minimum requirements:*
>
> *-Be received in the form of a signed term sheet no later than 2:45pm Friday*
> *-Term sheet is nonbinding except must include a binding provision to negotiate in good faith definitive agreements based on the nonbinding terms with execution by EOD Tuesday and funding Wednesday*
>
> *While not discussed during the BOD meeting, based on some of the preliminary work done to build an operating plan, it is my recommendation that any funding proposal provide a minimum of $10mm in working capital to the company.*
>
> *The BOD will meet at 2:45p tomorrow to review all proposals that meet the minimum requirements and vote on whether to proceed forward with a financing option.*
>
> *Absent any agreement to move forward at that time on a proposal that meets the BOD requirements, it is my recommendation that the BOD meet Monday morning to review and discuss emergency measures to be taken."*

66. On 23 June 2016 Mr Brooke had also sent an email to Mr Steckel and Mr Parsa commenting on how the Salinas Proposal could be implemented even without the support of Mr Minor. He said this (my underlining):

> *"The primary goal for Salinas can be accomplished if you are unable to negotiate an arrangement with Halsey for his shares.*
>
> *Same basic deal, loan with option to purchase controlling interest for $1... all shares just issued by company. This won't require shareholder approval so Halsey couldn't block. Ideally, loan value would increase to account for the increase in company shares issue. <u>Would cause significant dilution to common but it is a path forward</u>.*
>
> *In terms of concern about any potential action by Halsey to try and block, the key consideration in a shareholder suit is whether a company has acted in a way prejudicial to a specific shareholder or its class. <u>In this context, the company is acting</u>*

> *to try and salvage the company and separately is negotiating directly with Halsey as a part of a path forward. Should that deal not succeed, then this alternate path treats Halsey on same terms as all common and as such has less dilutive impact as the direct deal being negotiated. It is defensible and there would be no credible argument or mechanism for Halsey to block.*
>
> *In terms of control, noting that preferred shares have same voting rights as common and with cumulative voting Salinas would be able to control the board post transaction.*

67. Also on 23 June 2016 Mr Laggner had sent a text to Mr Thieriot saying that he "*may have a competing offer*" and Mr Thieriot had immediately responded to flag that time was of the essence so that "*The 'may' there probably makes it untenable...*" Mr Laggner confirmed that he was working on a term sheet. Also on 23 June Mr Laggner sent an email to Mr Minor to say that he wanted to put forward a counter proposal before 6:30pm that day and proposed a call with Mr Minor.

68. On 24 June 2016 Mr Bechtel, with whom Mr Laggner was working, sent an email to Mr Minor attaching a draft bridge financing term sheet for his comments. Mr Bechtel said that if Mr Laggner and he were "*going to bring all of this together structuring, reputation, ongoing monitoring, capital formation to avoid a Salinas putch [sic], the way [they – Mr Laggner and Mr Bechtel - proposed] proceeding [was] with an agreement that (i) each of us purchase from you for nominal consideration 7% of the company's fully-diluted common shares (7 x 2 =14%), which should leave you with 30% of the common, and (ii) you are on board with the provisions of the Voting Agreement section of the attached term sheet. What is left unsaid in the TS is that Bill and I would like you to be one of our Board appointees going forward*." The term sheet also provided for a secured loan of US$5 million and participating preferred stock of US$2.5 million and that the holders of the preferred stock would have the right to control the majority of the board until the loan had been repaid, and a qualified financing had occurred at which point they would have the right to appoint two-fifths of the board. Qualified financing was defined as a capital raise in the sum of at least US$25 million at a pre-money fully diluted valuation of US$150 million. The term sheet also required that Mr Minor agree with the lenders/holders of the preferred stock to vote his shares in accordance with their instructions and not to act as the Company's CEO. Mr

Laggner during his cross-examination accepted that the term sheet gave the lenders/holders of the preferred stock operational control (Day 3, pages 62-63).

69. This draft term sheet was not presented to the Company's board on 24 June. As Mr Laggner accepted during his cross examination (Day 3, pages 65 – 66) at that time he and Mr Bechtel were still negotiating with Mr Minor and had not yet raised the US$7.5 million.

70. On 24 June 2016 Mr Minor sent an email to the other directors confirming that he had rejected the Salinas Proposal and noting that as a result "*there was no viable offer in front of the board*." On the same day, Mr Minor also sent an email to Mr Sharp, copied to Mr Thieriot and Mr Laggner, which usefully summarised how the directors saw the difficult situation they were facing at this time and when weighing up how to proceed (my underlining):

> *"Richard, I hope this funds you well. Do you have time to speak about the Uphold UK banking license tomorrow. At our last board meeting this week [Mr Watson] disclosed for the first time that the company had run out of money.*
>
> *We are working with investors to solve the problem but their solutions will likely require management changes and we need to understand where we are in the process and the importance of existing management to the process.*
>
> *The company unfortunately went 1 year without a board meeting and directors were only just informed at the board meeting that the companies' [sic] resources had been exhausted. Currently emotions are high, obviously, but we will get through it but not without management changes.*
>
> *The UK bank is a pillar in the company's strategy and we as a board need to better understand the process and where the company is in that process. Today the only information the board has heard to date is from Anthony and it would unanimously like an independent point of view.*
>
> *This has all come as a great shock to the board and time is off the essence in better understanding the funding necessary to continue the company's mission and hopefully get back on track to address the significant opportunities that remain. Many thanks."*

71. The board meeting on 24 June 2016 was attended by Mr Parsa, Mr Thieriot, Mr Watson, Mr Milby and Mr Laggner. Once again, the minutes recorded that Mr Steckel did not participate in the meeting given his direct interest in the matters before the board. Mr Brooke, as General

Counsel, once again attended the meeting by telephone and kept notes of the board's deliberations. The minutes record that the board discussed a financing proposal submitted by Mr Steckel (the ***Steckel Proposal***). A copy of the term sheet was annexed to the minutes. The Steckel Proposal involved Uphold Holdings extending a revolving credit facility to the Company up to the amount of US$15 million (an initial amount of US$10 million with an option at Uphold Holdings' election to increase the loan amount to US$15 million), at an interest rate of 2% per month, for an initial period marginally in excess of 2 years; Uphold Holdings would receive in addition and independently of the Company's liability to repay the loan a warrant entitling it to purchase up to 50% of the issued and outstanding shares of the Company on a fully diluted basis at a purchase price of US$0.01 per share (a penny warrant where the value placed on the stock is a penny). The minutes record that (a) the board discussed the Steckel Proposal and *"[considered] that [it] provided for the Company's liquidity needs*"; (b) "*No other written financing proposal was submitted for Board consideration*"; (c) that the board approved the Steckel Proposal with Mr Laggner dissenting and (d) that "*Counsel and management were instructed to proceed to close the transaction in accord with [the term sheet] as soon as practical*."

72. Mr Thieriot summed up his assessment of the Steckel Proposal at the time in Thieriot – WS1 as follows:

> *"50. I did consider that the loan terms (including the interest rate of 24% p.a.) were objectively aggressive. I understood that Mr. Steckel did not have US$15 million of his own funds available to invest in the Company, and so I assumed those funds would have come from Mr. Salinas. However, I do not know the true nature of the relationship between Mr. Steckel and Mr. Salinas.*
>
> *51 Although the Board attempted to improve on the terms in discussions with Mr. Steckel, it was presented very much on a take it or leave it basis, and they represented the best – indeed the only – terms which were reliably available to the Company at that time.*
>
> *52 All parties were aware that Mr. Steckel was effectively a lender of last resort, and that there was very little time for back and forth. It was formally put before the Board for consideration on 24 June 2016, with Mr. Laggner dissenting (as per the meeting minutes …).*

> *53 The Steckel Proposal, in return for US$15 million of debt financing, would give Uphold Holdings 50% of the Company if the full amount of the lending was provided by Uphold Holdings.*
>
> *54 Following further discussions on 27 and 28 June 2016, I wrote to Mr. Steckel and Mr. Laggner to summarise the Steckel Proposal as it then stood, noting that Mr. Steckel had dropped any provision for prepayment penalties on the loan."*

73. Mr Thieriot in Thieriot -WS1 (at [48]) said that "*As the point person for fundraising for the Company, [he was] satisfied that the Company had exhausted all potential alternatives before going to Mr. Steckel regarding his back up alternative proposal*."

74. Mr Thieriot's evidence in respect of the purpose and justification for accepting the Steckel Proposal during his cross examination by Mr Valentin was as follows (Day 8, pages 21-23) (my underlining):

> *"Q. .... the purpose of [the 2016 Transaction] was to give Mr Steckel and Mr Salinas control of the company, wasn't it?*
>
> *A. No.*
>
> *……*
>
> *Q. What was its purpose?*
>
> *A. To serve as a vehicle for taking in capital that would keep the company afloat.*
>
> *Q. Would you accept that the transaction had achieved a situation in which Mr Salinas and Mr Steckel had control of the company?*
>
> *A. "Achieve" sounds like it was a primary objective that was achieved. And so no, it wasn't. It was a feature of receiving funding.*
>
> *Q. The effect - one effect of the transaction was that they gained control?*
>
> *A. Yes.*
>
> *Q. And that was something, I think, that you said contemporaneously, if we just have a look at a July email from you … And this is you, early in July 2016, just after the [2016 Transaction] is executed. At the bottom of the*

page you're sending an email to Mr Steckel. And the point I just wanted to identify for you is that third bullet point: "You'll have managed Salinas' best outcome: max control for min cash outlay." That reflects the fact that, as you say, a feature of the transaction, one of its effects was that Mr Salinas now had control?

A. *Yes. So I guess - I guess there's two types of control. The type of control that I think you're trying to establish is a strategy to go out and control something. Whereas the type of control that I think is in question is a control that allows one to police a further contribution of their own capital, given the history of mismanagement in their eyes, or hesitance around throwing good money after bad. They're both control, but they are different strategies, aren't they, I think?*

…….

And I think genuinely, to another point we touched on earlier, the reality of the disposition of Salinas and Steckel, they've been portrayed as calculating takeover artists, and in fact, I think they were tepid provisioners of capital. And if somebody else could step into some of that obligation, all the merrier, from their point of view." [Day 8, page 67]

75. As I have noted, the minutes of the 24 June 2016 meeting recorded that Mr Laggner was the only director who voted against approval of the Steckel Proposal. Mr Laggner was closely cross-examined by Mr Chapman as to his reasons for voting against the Steckel Proposal, as to what he had disclosed to the board about his and Mr Bechtel's negotiations with Mr Minor and the personal benefits he would receive if the transaction with Mr Minor went ahead on the terms proposed and as to the real-world choice that the board had to make at that time (Day 3, pages 69 – 71):

"*Q.* *….. Your proposal to Mr Minor at this stage, which he had not yet accepted, was that you and Mr Bechtel would get 7% of the company each for "nominal consideration". So it was in your personal financial interest to stop Mr Steckel's proposal, wasn't it?*

A. *No, it was the - the idea was to present a competing term sheet to prevent a Salinas takeover.*

Q. *Under which, you had a direct personal interest, in that you hoped to acquire 7% of the company for next to nothing; correct?*

A. *For a lot of work, as we alluded to in that earlier email, our reputation, the amount of time, etc.*

Q. *Is that a yes, Mr Laggner?*

A. *Repeat the question.*

Q. *…. under …. your proposal, you had a direct –*

A. *Well, this is Mr Bechtel's proposal and my proposal.*

Q. *Under the proposal that you and Mr Bechtel had put together, you had a direct personal interest in that proposal, in that you hoped to acquire 7% of the company for next to nothing; and that's right, isn't it?*

A. *Well, it's not next to nothing. I mean, I don't know how you're saying –*

Q. *Nominal consideration?*

A. *For all the work and time, etc, that's nominal?*

Q. *Your proposal to Mr Minor was to acquire 7% each for nominal consideration –*

A. *Our proposal was to present a term sheet with better terms, to prevent the takeover of the company.*

Q. *In which you had a direct personal financial interest - yes or no?*

A. *Yes, I had an interest in –*

Q. *And that interest was 7% of the company for next to nothing, in terms of cash?*

A. *In terms of cash.*

Q. *Yes. Did you disclose that direct personal interest to the board when you voted against Mr Steckel's proposal?*

A. *Maybe not that day, but the day or leading up to the presentation of our term sheet, I did.*

Q. *You sat there and voted no, concealing that it was in your personal financial interest to do so?*

A. *No, because I knew the terms were pretty egregious and that the shareholders could present something better.*

Q. *What else was the board to do other than to approve the terms on 24 June?*

A. *Consider other term sheets from shareholders; maybe call a shareholders' meeting –*

Q. *There were no other term sheets from anyone else.*

A. *Maybe notify the shareholders of the dire straits of the company and the people responsible for running the company into the ground.*

Q. *The [2016 Transaction] was the only show in town.*

A. *On that day."*

76. On Sunday 26 June, after Mr Thieriot had suggested that (implicitly in view of the lack of further developments at that time) there was no point in having a further board meeting that afternoon, Mr Watson emailed Mr Laggner (copied to Mr Thieriot and Mr Milby) and asked Mr Laggner "*do you have something to come back to the Board with?"* During his cross-examination, Mr Laggner accepted that this indicated that Mr Watson was trying to ensure that any proposal which Mr Laggner wished to put forward was considered (Day 3, page 79).

77. Also on 26 June, Mr Brooke emailed Mr Laggner and asked: "*Do you have an indication of when you expect to send through term sheet? Just mindful of time differences and schedules and want to be in a position to schedule call with sufficient notice to all Directors. Lmk when you can*." Mr Laggner replied: "*Awaiting [Mr Minor's] lawyers so give us another several hours. I'll send you the term sheet and [Mr Thieriot] suggested we do a call in the AM. I think he suggested 10 AM PT [27 June]. I think the plan is very compelling for all stakeholders*." Mr Brooke's response was: "*Thanks for update Bill. Look forward to receiving.*"

78. Further, on 26 June 2016 Mr Laggner entered into the stock purchase transfer and voting agreement (the ***SPTVA***) under which Mr Minor agreed to sell 4,843,890 common shares in

the Company for US$1 to each of Mr Laggner and to Mr Bechtel's company, Outpost Capital Management (a total of 9,687,780 shares). As Mr Lagner said at [58] of Laggner 1 "*On 26 June 2016, Halsey Minor and I signed an agreement by which he would transfer 4,843,890 of his ordinary shares to me for $1, conditional upon the Board of the Company approving the Company's next financing round*." Mr Minor agreed to vote his remaining shares in accordance with the recommendation of the board until the Company had completed a financing raising at least US$15 million at a pre-money valuation in excess of US$85 million. As Mr Chapman pointed out to Mr Laggner during his cross-examination this meant that Mr Laggner was to receive 4.8 million shares for US$1 or US$0.00000021 per share.

79. Completion of the SPTVA was subject to a condition as follows. Closing would only take place when the board approved the Company's "*next financing (the Approval Date)*."

80. On 27 June 2016 emails were exchanged between Mr Laggner and Mr Bechtel regarding the status of their proposal and of their efforts to obtain commitments for the US$7.5 million that their proposal required. Mr Bechtel told Mr Laggner that Mr Ling had suggested that he might offer US$300,000 firm and perhaps another US$200,000 as a backstop and that he (Mr Bechtel) would call Mr Chen and ask him for US$2.5 million firm and between another US$0.5 and 1 million as a backstop. It is clear that intensive discussions were continuing with Mr Chen and Mr Ling on that day. Mr Ling emailed Mr Laggner (copied to Mr Thieriot) as follows:

> *"James messaged me and I just called him back and had a talk.*
>
> *Final result of the conversation:*
>
> *I said I will do firm commitment of USD300,000, and a maximum commitment of additional USD200,000 (total USD500,000).*
>
> *James then said he would firmly commit USD1.5 million, and a maximum additional commitment of USD500,000 (total USD2 million).*
>
> *NOTE 1 - this is based on the premise that there is a strong probability of attracting minimum investment of USD25 million in the the [sic] short term at the USD150 million valuation, which I think will be a piece of cake... and I showed this to James.*

> *So we hope the additional commitments from both of us will end up not being called.*
>
> *NOTE 2 - We were a little bit lost with regards to the Escher deal. James mentioned that JP had asked him to reserve some money for that deal. That's why he was hesitant to firmly commit the full USD2 million. But I called his attention that the priority is to have this 2nd offer get through, then we get the min. USD25 million investment, and then he will have his money to invest in Escher."*
>
> *So please send both of us the term sheets so we can sign and send you back ASAP."*

81. With these discussions unresolved and continuing, Mr Laggner emailed Mr Brooke with a request to delay that day's board meeting by a few hours as he "*was awaiting feedback from two of Uphold's largest investors*." Mr Brooke replied that no meeting had in fact been scheduled *"as I've been waiting until I hear back from you and a proposal is ready to be submitted for consideration. What I would suggest is this... once the offer is ready to be presented, please forward to the current board + me. We'll then look to schedule a call later today*."

82. On 29 June 2016 Mr Laggner wrote to the board and said that "*Shareholders want to present the following. I'm working with several now on funding schedule but will need another 1.5-2 hours. Will send along with Halsey Minor voting agreement*." The White Knight Bridge Summary of Terms (which is part of the White Knight Proposal) was probably provided to the Company on 27 June although the complete set of signatures were only available by 29 June. The White Knight Bridge Summary of terms was signed (but undated) by Mr Ling with a minimum commitment of US$300,000 and a maximum commitment of US$500,000; by Mr Laggner (also undated) (Bearing Ventures) with a minimum commitment of US$100,000 and a maximum commitment of US$250,000; Julian Lee (confirmed by email on 29 June) also with a minimum commitment of US$100,000 and a maximum commitment of US$250,000; Mr Peacock (confirmed by email on 29 June) with a minimum commitment of US$100,000 and a maximum commitment of US$200,000; Mr Karahalios, with a minimum commitment of US$200,000 and a maximum commitment of US$2,000,000; Mr. Zlotchenko with a minimum commitment of US$750,000 and a maximum commitment of

US$1,000,000; Mr Chen with a minimum commitment of US$1,500,000 and a maximum commitment of US$2.7 million and Innovasia Capital Partners LLP with a minimum commitment of US$500,000 and a maximum commitment of US$1 million (but after deducting US$103,000 of Series B-1 preferred shares that were to be applied to the new bridge financing units).

83. Mr Laggner explained during his cross-examination that White Knight Bridge Summary of Terms had amended the terms of the draft bridge financing term sheet (Day 3, page 97):

> *"I think the initial US$7.5-million target was raised to 8.5 million, and that was a dialogue back and forth between Mr Parsa and myself, Mr Watson. And it was a subjective number. I didn't even think the company needed 8.5. I was leaning more towards the 7.5. But that's how we got to the 8.5 million. So they're moving the goalposts on me, by the way, at this point in time."*

84. The White Knight Bridge Summary of Terms like the draft bridge financing term sheet still included a term that the holders of preferred stock would have the right to control the majority of the board until the loan had been repaid and a qualified financing had occurred.

85. Mr Chapman explored with Mr Laggner during his cross-examination the extent to which the White Knight Bridge Summary of Terms had been conditional (Day 3, pages 98 – 100) (my underlining) and the difficulties caused by Mr Minor's involvement with Mr Laggner's investors and the Company:

> *Q. [The Summary states as follows] "Notes to Investor" (a): "The size of this offering will requiring aggregate commitments of at least $8.5 [million] to proceed." So <u>if you don't get to 8.5, the deal was off</u>. That's right, isn't it?*
>
> *A. <u>At least 8.5, that's correct</u>.*
>
> *Q. "Initial funding of" -- sorry, deal with all of it. (b): "Maximum Commitments will serve to backstop the credibility of the financing and be allocated only if there is availability." And then the initial funding of 20% of the commitment is required by 1 July. So just under 2 million or so is required by 1 July; is that right?*
>
> *A. Correct.*

Q. *Now, you did not have commitments of $8.5 million on 27 June, did you?*

A. *I don't believe we did.*

Q. *So although this was being presented to the board on 27 June, it was not actually a proposal that could be taken forward, because you didn't have the 8.5 million?*

A. *Well, we were raising money and had raised, yes, capital. It wasn't the whole amount, but –*

Q. *No. So as a result, as at 27 June, this was not an offer that could be taken forward, because you did not have the minimum 8.5 million?*

A. *No, it says initial funding 20% of the total.*

Q. *But the whole proposal is conditional on getting 8.5 million as a minimum, isn't it?*

A. *Aggregate commitments.*

Q. *Yes. And you didn't have that?*

A. *Not on that day.*

Q. *No. And as at that day, you'd provided no proof of funds at all, had you, for any sum?*

A. *I think I may have had a call with Thieriot or two, just about some of the people that were considering investments.*

Q. *But you hadn't provided any proof of funds, had you?*

A. *Well, they're existing shareholders.*

Q. *You hadn't provided any proof of funds, had you?*

A. *I didn't think I needed to. I mean, Mr Ling is a multi-billionaire, he had committed over $400 million to the company.*

Q. *And this includes, doesn't it, on page {C1/362/2}, the voting agreement we see there. This is the voting agreement with Mr Minor, isn't it? [The SPTVA]*

A. *Correct.*

……

Q. <u>*Which, again, is an acknowledgment that Mr Minor is a problem. You need to have it in the term sheet, what you're doing with Mr Minor*</u>*?*

A. <u>*Well, the board is requiring it*</u>*.*"

86. Mr Chapman also asked Mr Laggner about what the Company's board would reasonably have understood as at 27 June 2016 regarding the prospects of a Qualified Financing being achieved (and therefore the period during which those investors would have control of the board) and Mr Laggner accepted that it was likely to take at least six to ninth months (Day 3, page 102). Mr Chapman also reviewed with Mr Laggner what Mr Chapman described as the onerous covenants to be given by the Company under the White Knight Bridge Summary of Terms including the covenant that the Company would not without the consent of the investors' Representatives incur any additional indebtedness or contract liabilities or issue any additional shares, options or warrants or sell assets unless part of a Qualified Financing.

87. Mr Chapman also cross-examined Mr Laggner regarding the comparison, from the Company's perspective, between the Steckel Proposal (the 2016 Transaction) and the White Knight Bridge Summary of Terms (Day 3, pages 105-108). The following exchange took place:

"Q. And those terms, don't they, fall to be contrasted with the Holdings terms….. Under the Holdings terms, there was a warrant, wasn't there, where Holdings could purchase stock equal to 50% of the company's issued and outstanding stock at a price of $0.01 per share?

A. Correct.

Q. So if the warrant's issued, Holdings has to pay another $650,000-odd to the company for the stock that it's acquiring?

A. Correct.

Q. Under your term sheet the investors pay nothing for their 33%?

A. Correct.

Q. Correct. And as a result of that – and … under your proposal you are providing $8.5 million of funding as against a maximum of $15 million which Holdings is committed to?

A. It committed to - Holdings committed to 10.

Q. Which could be increased to 15?

A. Could be.

Q. Yes. And –

A. But not guaranteed.

Q. The result of that, given that investors under your term sheet are not paying for their stock, is that the price per percentage of the company being paid under your term sheet is higher than the price being paid under the Holdings term sheet. Your deal is more expensive.

A. I don't think so.

Q. Well, if under your proposal you can get 33% of the company for putting up $8.5 million, then you are getting 3.9% of the company for every million dollars that you advance. Under the Holdings term sheet, if you invest $15 million and then have to exercise the warrant, paying another $640,000-odd for the shares, then you're paying $15,600,000-odd for 50% of the company, which is only 3.19% of stock for every million advanced.

A. I think the way it worked with Holdings, they advanced some money and immediately exercised a warrant to account for the company.

Q. But looking at the cost, the cost to the company –

A. It's not the ultimate cost.

Q. As the terms stand side by side, your deal is more expensive than Holdings', isn't it?

A. I think it depends on whether or not we're successful in doing a qualified financing.

Q. Just looking at the terms side by side, under your deal, 33% for providing the 8.5 million, no further consideration for the 33%; under the Holdings deal, up to $15 million, plus they're actually going to do the decent thing and pay for their shares. The Holdings transaction is actually cheaper for the company than your transaction.

A. I don't think so.

Q. Explain why I've got it wrong.

A. Well, because I think this term sheet gives the – gives the investors a chance to entertain a qualified financing, to repay the loan, and so there's only so much stock that's actually being issued.

Q. That's not an answer, is it, because the qualified financing only reduces the liquidation preference. It doesn't alter the entitlement to the 33% for nothing.

A. It repays the loan. I mean, qualified financing would repay the loan. Part of this a loan and part of it is equity.

Q. But just looking at the cost of acquiring the shares, if the shares are acquired, your deal is more expensive, isn't it?

A. If the shares are acquired, it may be perceived to be more expensive.

Q. It's not perception; it is. It is more expensive, isn't it?

A. I'd have to look at that again.

Q. It's not surprising in those circumstances, Mr Laggner, is it, that the board entirely reasonably rejected your proposal on 27 June, is it?

…….

A. The board had no interest in addressing the needs of the shareholders or the voice of the shareholders, not just on the 27th, but leading up to the 27th."

88. At the board meeting on 27 June 2016 Mr Thieriot, Mr Parsa, Mr Watson, Mr Milby, Mr Steckel and Mr Laggner attended. Mr Brooke and the Company's external legal adviser Mr Friedberg were in attendance and Mr Ling was also invited to attend. Mr Steckel confirmed that he was prepared to proceed with the closing of his financing that had been approved on 24 June but agreed that the board should nonetheless consider the alternative financing proposal put forward by Outpost Capital Management. Mr Steckel informed the board he would not participate in the board discussion but wanted to know immediately if the board planned to rescind the deal agreed to on June 24 and then dropped from the call. Mr Laggner as a party interested in the alternative financing proposal also left the call. There was a dispute as to whether Mr Laggner had disclosed the terms of the SPTVA to the board by the

time of that meeting. During his cross-examination Mr Laggner said that he believed that "*Mr Bechtel did or I did on that day at some point. It was part and parcel to the voting agreement, putting Halsey in a box. Everyone was informed of what was going on*." In Laggner-2, in response to Mr Steckel having said in his written evidence he (Mr Laggner) had failed to disclose the SPTVA, Mr Laggner had said that he "*considered that this was a private matter between Mr Minor and me. It did not in any way affect my ability to act in the best interests of the Company at all times*." When presented by Mr Chapman with this apparently inconsistent evidence Mr Laggner responded that "*I didn't disclose it to Mr Steckel. Mr Bechtel, in presenting it, I believe, disclosed it to the board*." Further, Mr Brooke's email to Mr Friedberg of 7 July 2016 (discussed below) suggests that the first time that Mr Brooke had heard of Mr Laggner's deal with Mr Minor was on 7 July (see the final paragraph of that email). It seems to me that Mr Laggner's answers were evasive and unconvincing/disingenuous and that the evidence such as it is indicates, and I find, that he did not disclose at the 27 June 2016 board meeting his personal interest under the SPTVA (namely that he was going to acquire 7% of the Company and that this might affect his ability independently to assess the Steckel Proposal).

89. The board minutes for the 27 June 2016 meeting recorded the decision to reject and the reasons for rejecting the Outpost/White Knight Proposal. "*Upon motion by Tim Parsa and seconded by JP Thieriot and agreed to by the unanimous vote of Directors then present, the alternative [Outpost] financing proposal was rejected by the Board as inadequate for various reasons including that, unlike the proposal approved on 24 June 2016: (i) it did not provide for sufficient capital on a timely basis; and (ii) funding timing and success was somewhat uncertain in that it was dependent on Outpost Capital Management securing written subscriptions and funds from third party investors that Outpost considered committed but who were not yet under written contract*." The minutes also recorded that the directors had instructed the Company's legal advisers to close the Steckel Proposal as soon as practicable.

90. It is clear that despite this instruction discussions to see whether the requisite level of committed funding for the Outpost/White Knight Proposal could be obtained and whether

the terms of that proposal could be improved to match or better the Steckel Proposal continued for a number of days.

91. Two days after that board meeting Mr Laggner, on 29 June 2016, emailed Mr Ling and Mr Chen to acknowledge that the full level of funding commitments had still not been obtained. He said "*Guys, we are close but a few operating questions remain. Quick question, other investors have been asked to commit (soft circle) additional dollars in order to get this done and if the two of you combined could commit to additional $2,250,000 over the next 60-90 days then we can get this done tonight. In that period of time I can continue to raise capital and lower your commitment (your option) but we need to go to the board with $8.5M to get this over the line*." Accordingly, Mr Laggner was still trying to obtain the requisite US$8.5 million commitments even after the 27 June 2016 board meeting but was struggling.

92. Discussions between Mr Steckel and Mr Bechtel and Mr Laggner were also taking place. There were clearly negotiations taking place to see if the Outpost/White Knight Proposal could be improved and a compromise reached.

93. Mr Laggner said during his cross-examination that he had had a call with Mr Steckel in June or July and an email on 27 June 2016 from Mr Thieriot to Mr Milby (and perhaps the other directors) recorded a conversation that Mr Thieriot had had with Mr Steckel in which the latter had said that he was going to try to speak to Mr Bechtel in the next few hours. According to Mr Thieriot, Mr Steckel sounded "*quite reasonable about hearing a potential better offer.*" Further, on 27 June 2016 Mr Thieriot recorded that discussions were taking place between Mr Steckel and Mr Bechtel. In an email to Mr Laggner, Mr Milby, Mr Watson and Mr Ling, Mr Thieriot said that Mr Bechtel and Mr Steckel "*may have reached compromise wherein Adrian can unilaterally better terms without need for Board consideration. Dave has used the chit of potential $XXmm co-participation vs potential shareholder lawsuits. He is usually a very good negotiator. We will shortly see the result. If Dave's minimum points are not conceded by Adrian, and Dave/Bill's group decides to step-up their offer to address the four-point observations from our prior conversation, THEN we will have a Board Meeting to consider*."

94. On 28 June 2016 Mr Thieriot emailed Mr Steckel and Mr Laggner to record in bullet point form a possible compromise financing proposal: "*$10mm to $16mm (driven by the amount Bill & Dave have hard circled); Basic Steckel Term Sheet Commercial Points - 2% Monthly interest - 2 Year maturity - 50% Dilution - Deal is funded 50%/50% between the two shareholder groups - 3 Board Seats to the Class - 3 person Operating Committee - Steckel controls 2/3 until his 50% of the loan is paid back, after which 2/3 passes to the Bill & Dave Shareholder Group - Once Entire Loan is paid off, reversion to basic cumulative share Board Control - Steckel has to sign off on Halsey Trustee Share Agreement - Bill & Dave have sign-off on Steckel Legal Doc Covenants, etc*"

95. But no agreement was reached between Mr Bechtel/Mr Laggner and Mr Steckel because there was a disagreement as to governance and rights to control board decision making. There was then some confusion and concerns that Mr Laggner was not accurately and honestly reporting the result of the negotiations with Mr Steckel to other board members. In emails on 28 June 2016 to Mr Baptista, Mr Parsa was critical of Mr Bechtel and Mr Laggner and responded to Mr Baptista's report that Mr Laggner had confirmed that a deal had been reached with Mr Steckel as follows:

> *"They are lying to you. I'm on the phone with Steckel now. Bechtel is presenting something that Adrian has not agreed to. I don't trust Bechtel and Laggner. They are not being forthright.*
>
> *……*
> *What's possible is that Adrian adjusts the control provision so that there's an operating committee with Adrian having deciding vote until loan repaid back and some restrictions on some corporate decisions like sale of company.*
>
> *But that's a really far cry from Adrian agreeing to invest in Dave's deal. That is a lie and the lie says a lot about Dave and Bill and their motivations.*
>
> *I don't trust them and I really don't like these kinds of BS manoeuvres when the company is on the brink of bankruptcy….."*

96. On 29 June 2016, Mr Laggner emailed Mr Bechtel as follows (my underlining):

> *"I've thought about this after a long run. <u>They rejected our offer of $8.5M because they don't think we can deliver over several weeks to one month.</u>*

> *Short sighted fools! If they adopt Salinas plan Watson is fired, litigation begins, etc. Stockholders start suing, etc.*
>
> *Accept our deal even if we only have $8M hard and then support us in raising another $2M in the next 30-45 days in order to avoid litigation, keep company culture intact, etc. And we help raise money for them."*

97. Mr Bechtel provided a suitably prudent response to Mr Laggner suggesting that candour was required as to the level of commitments received but also acknowledging that the possibility remained of a deal still being done. Mr Bechtel said: "*Whatever you do it's imperative to avoid overstating commitments received. Level with them and I think even with lower numbers we still have the upper hand*."

98. On 28 June 2016, Mr Chen had emailed Mr Thieriot to report on a call with Mr Laggner and to express various concerns and frustrations regarding the negotiations (my underlining):

> *"I had a call with Bill earlier and he told me that Adrian wanted operational control to be part of the consortium hence they rejected it.*
>
> *I have to confess I am not 100% comfortable with Bill and Dave exerting control (through controlling the disbursement of funds) and I have told them there should be no need for a separate arrangement and that the reconstituted board should exert control. Also, in order to arrive at $8.0M (which he said Anthony agreed to), he asked me to make a soft commitment of $1.2 M despite having told us he had $6M committed already prior to our commitment when we last spoke, I am not keen to make that additional soft commitment but did so only in order to get to the finish line and move on. All full of intrigue and half truths...*
>
> *Look forward to talking to find out how we can get this done in the right way and behind us so we can get the business sorted out and compete with Circle!*

99. Mr Thieriot replied on the same day copying Mr Ling and commented on the difficulties in getting an agreement in part because of the personalities:

> *"Well put! It's all very exhausting... and revealing of peoples' characters. If ego and greed could be put just a little to the side, Circle would be in the rear-view mirror within a year.*

100. On 29 June 2016 Mr Chen had sent Mr Laggner and Mr Bechtel (with Mr Ling copied) his signed term sheet by email in which he identified certain conditions that needed to be satisfied. He said this:

> *"I have attached my signed commitment to the term sheet attached. This would be subject to an agreement by you that:*
>
> *a. the three members of the operating committee would consist of either one of you, Adrian Steckel and Winston*
>
> *b. Any incentive received from Halsey would be shared 20% by Chen/Ling and 80% by Laggner/Bechtel*
>
> *Lets get this put to bed and allow the company to focus on execution before we lose further ground to the competition."*

101. Mr Chapman put it to Mr Laggner during his cross-examination that Mr Chen had clearly imposed two conditions on his agreement to participate, which were never accepted or satisfied. Ultimately, after some evasion, Mr Lagger accepted that this was so. The following exchange took place (Day 3, pages 136-138):

> "*A* *Well, based on this email, but then he had a conversation with Mr Bechtel and he walked away.*
>
> *Q.* *On the basis of this email –*
>
> *A.* *On the basis of this email, yes, but he subsequently had a discussion with Mr Bechtel.*
>
> *Q.* *I put it to you that that's a fabrication. It just didn't happen. The first condition in this email, Mr Laggner, is that you and Mr Bechtel agree that the three members of the operating committee would be you or Mr Bechtel, Mr Steckel and Mr Ling. That's the first condition, is it not?*
>
> *A.* *That's what it says there.*
>
> *Q.* *And you were never able to provide that agreement, were you, Mr Laggner?*
>
> *A.* *The operating agreement?*

Q. *Correct.*

A. *We just discussed it over the telephone. It was very loosely talked about, what an operating –*

Q. *You were never able, Mr Laggner, to provide the agreement at condition 1, were you?*

A. *It was mentioned in the term sheet, but there was no definitive things around it.*

Q. *Last chance, Mr Laggner, to answer the question. You were never able to provide the agreement at condition 1, were you?*

A. *We did not have an operating agreement that – for condition 1.*

Q. *Is the answer no, Mr Laggner?*

A. *No.*

Q. *Thank you. Condition 2. Mr Chen says that: "Any incentive received from Halsey [that's Mr Minor] [should] be shared 20% by Chen/Ling and 80% by Laggner/Bechtel." So he's saying any incentive provided to you by Mr Minor should be shared with him, Mr Chen, and Mr Ling. That's the second condition, isn't it?*

A. *Yes, it is.*

Q. *And you never agreed to that either, did you?*

A. *I didn't agree to that.*

Q. *No. So the two conditions of Mr Chen's commitment were never fulfilled, were they, Mr Laggner?*

A. *They were not."*

102. Mr Chapman also closely cross-examined Mr Laggner regarding the level of committed support that had been provided for the Outpost/White Knight Proposal on the critical dates of 27 and 29 June (Day 3, pages 152-157):

Q. *So as at 27 June, you had firm commitments, on the minimum contribution basis, of 1.1 million, and that's all.*

A. *Well, the maximum was what they were willing to –*

Q. *Shall I give you the maximum? 3.75.*

A. *Okay.*

Q. *Nothing like 8 or 8.2 or 8.5 –*

A. *Well, we had –*

Q. *- or 7.5.*

A. *We had verbals from the others. They had not gotten their documents back by the 27th.*

Q. *And they never did.*

A. *Yes, some did.*

Q. *These are all the written commitments that we had?*

A. *We had some verbal commitments as well.*

Q. *Well, as Mr Ling told you, verbals aren't actuals, are they? ….*

A. *Well, I guess nothing is actual until the money is in the bank, correct?*

Q. *Correct, and it's worthless if you haven't got –*

A. *No, I wouldn't say it's - they are existing shareholders that already committed millions of dollars into the company. I would say that their verbal, before they actually get the money in, is probably pretty good. You asked earlier about proof of funds. These are people that had already invested significant amounts of money in the business.*

Q. *Which you would think, if they were committed to funding more, would make it easier not more difficult for them to sign a commitment?*

A. *They are busy and we had four days to put everything together. Four days.*

Q. *You were running round telling people you had $8 million, when you had 1.1 million to 3.75 million on 27 June at best.*

A. *2.7 from Mr Chen, 500,000 from Mr Ling. That's 3.2. How much was –*

Q. *Mr Chen is not in on 27 June. I'm going to come to the 29th in a moment.*

A. *Okay. But I'm just saying, between the 25th, 26th, 27th, verbals signed, it's all coming in, in a short period of time. Again, we're raising a lot of money in a very short span of time.*

Q. *And by the time you get to 29 June, if we include all of the other contributions, you have minimum contributions 3.447 million, and maximum contributions of 7.797 million, including Mr Chen. So –*

A. *I think we had some verbals from Mr Kearns. There were several other verbals where we had not - Mr Kearns was on vacation. We were .... We had - these are existing shareholders that had just put in money that were willing to commit more money.*

Q. *Even with Mr Chen, you did not have –*

A. *We had over 8 million with the verbals. We did not have the signed term sheets as of the 29th with that $8-million number, if that's what you are asking.*

Q. *Which is why you never provided the signed term sheets to the board –*

A. *No.*

Q. *- because it would be exposed that you'd been talking nonsense.*

A. *I did not go to the board because of the solicitation by Mr Thieriot of some of my investors.*

Q. *Nonsense, Mr Laggner –*

A. *It's not nonsense.*

Q. *- you didn't go to the board because you were spinning them a lie.*

A. *No, no –*

Q. *You were telling them: I've got 8.2, I've got 8.5. You had nothing of the sort.*

A. *I had verbal commitments. I had signed commitments. We did all of this in four or five days. Think about that. If we were able to raise that amount of money in four to five days, what could we do over 30 days? Did the company need 7.75 or $8 million in 30 days? No.*

Q. *Even assuming you had your so-called "verbals", you did not have written commitments of 8 or 8.5 million, did you?*

A. *We had over $8 million of committed capital from investors.*

Q. *You did not have written commitments –*

A. *We did not have - by 29 June, we did not have all written confirmations of the 8.5 million.*

Q. *Or of 8 million.*

A. *We had 8 million between the signed letters, commitment letters you are referencing here, and verbals from people that are on holiday.*

Q. *Mr Laggner, listen to the question ...... The question is: you did not have written commitments of 8 or $8.5 million, did you?*

A. *On that day, I did not have the written commitments for the 8.5 million.*

Q. *And you never had written commitments for 8 or 8.5 million?*

A. *I eventually did, yes.*

Q. *Well, there's no evidence of that in the bundle. These are the only written commitments that we see.*

A. *It might have been an email that you missed.*

Q. *I see. And of course, we have seen that Mr Chen's commitments were subject to the terms which you were unable to comply with?*

A. *He signed a term sheet with the terms that were in that term sheet. Those were the terms that he was signing off on.*

Q. *And you were never able to satisfy his terms. So he did not have a binding commitment, did he? …….”*

103. It appears that discussions of both proposals continued up to and even beyond 30 June 2016 with a view to seeing whether the White Knight Bridge Proposal could be finalised and with a view to there being a fair and proper comparison between the competing proposals. For example, on 29 June Mr Ling emailed Mr Thieriot to say this: “*I suggest you pre-schedule a Board Meeting 8 hours from NOW, so all Board Members are able to schedule and be prepared. If Bill does not deliver you can just cancel, the same way as it happened today. For the sake of fairness and equal conditions, I would like to see all these detailed new*

conditions put upon Bill's proposal be equally fulfilled by Salina's proposal. We need to be able to compare oranges to oranges. The concern with regards to credibility needs to be equally applied to both groups of investors." On 30 June 2016 Mr Thieriot had emailed Mr Laggner and Mr Ling in supportive and encouraging terms as follows (my underlining):

> *"I just caught a massive lawyer error in the execution docs and have spent an hour on the phone with Adrian and the lawyers correcting it. Net result: Winston, as stated - your $2.1mm Convertible steps into this financing as part of the $15mm denominator with the 50% dilution numerator. The lawyers had sunk it into these docs as INCREMENTAL and separate dilution (which would obviously have given everyone a heart attack).*
>
> *Clearly Adrian has been right & honorable in agreeing that it should step-in. (A good sign). Furthermore, I think I got his view that they'd probably be happy being $5mm of the $15mm, so Bill, the inclusion of the $2.1mm doesn't lower the amount you are free to raise in the Participating Preferred. Amended docs (or a correcting Side Letter) will come later."*

104. It also appears that the transaction documents which needed to be signed in order to bring the Steckel Proposal into effect were being drafted by Mr Fontg, the US attorney advising Uphold Holdings and Mr Steckel and were being finalised in discussions with Mr Brooke and the Company's US external counsel Mr Daniel Friedberg of Riddell Williams (and a colleague of his). There are a series of emails on 29-30 June 2016 in which Mr Fontg circulates updated drafts of the documents which he says Mr Steckel is in the process of reviewing. On 29 June Mr Brooke updated the others as to the status of the board's discussions:

> *"Our BOD did not meet as originally scheduled. The call has been rescheduled for 800pm Central. It may or may not occur. We continue to focus exclusively on this transaction. Please send through your edits as soon as you can and then if needed we can schedule a call to discuss further."*

105. While there are no minutes of any further board meeting after 27 June 2016 and before 11 July 2016, on 30 June 2016 or 1 July 2016 (the documents state that 30 June 2016 is the effective date and as I discuss below it appears likely that they were actually signed on 1 July) Mr Thieriot signed the suite of documents giving effect to the 2016 Transaction. These included the RCA, the Security Agreement, the Intellectual Property Security Agreement,

the Guaranty and the Warrant (Mr Thieriot signed the Promissory Note for up to US$10 million and the Security Agreement as a director).

106. In Thieriot-1 Mr Thieriot said that "*The Revolving Credit Agreement provided for under the Steckel Transaction was entered into on 30 June 2016 (pp. 475-505), which I signed on behalf of the Company, as I was authorised to do by the Board. The Warrant was executed on the same day …*" He did not say when and how he was authorised by the board to sign the transaction documents.

107. On 1 July 2016 Mr Brooke sent an email to all members of the board as follows (my underlining and emphasis):

> *"Dear BOD Members,*
>
> *I am pleased to announce that the Loan Facility approved by the BOD was* ***closed today****. We have received all executed documents back and confirmation that the initial funding request has been initiated. I am attaching the Loan documents to this email.*
>
> *I want to thank all BOD Members for working extraordinarily hard in very difficult circumstances to help manage the company through this difficult time. It's not been easy but step one needed to be getting adequate financing in place to allow the company to move forward, and this has been accomplished.*
>
> *It goes without saying that Adrian Steckel and his group have been instrumental in this process. In addition to working to provide the basic solution, they have worked in a very collaborative way to allow all preferred shareholders to participate on the same terms as the Lender and protect their ownership interest in the company.*
>
> *I would also like to acknowledge the very hard work of our outside Counsel, Dan Friedberg and Ryan Straus, who worked extremely hard and well into many nights, to help manage us to the finish line.*
>
> *There is much work to be done, and it is critical that everyone continue to work together to serve the interests of all shareholders and help the company move forward. I would also ask that Directors refrain from any separate communication with staff until such time as the BOD has the opportunity to meet again, discuss and agree to next steps."*

108. The Warrant entitled Uphold Holdings to acquire Warrant Shares, those being referable to 'Stock' in the Company, namely: "*Ordinary Shares par value US$0.0001 and any capital stock into which such Stock shall have been converted, exchanged or reclassified following the date hereof*." At [90] of Thieriot -WS1, Mr Thieriot explained that the Warrant was never intended to convert the Company's borrowings under the RCA into equity. Instead, it was additional consideration for the lending and exercisable at any time. The Company's Articles of Association as at the date of the Warrant provided at Article 3.1 that the Directors "*may allot, issue, grant options over or otherwise dispose of Shares … to such persons, at such times and on such other terms as they think proper…*" Article 3.2 contained restrictions on the board's power to issue preference shares. So far as material this was included in Article 3.2(a)(v)(6) which provided at the time that: *"…neither the Company nor the Board of Directors shall without first obtaining the approval or consent of the majority of the Preferred Shares then outstanding: […] (6) authorize or issue, or obligate itself to issue, any shares including any other right or security convertible into or exercisable for any such shares having a preference over, or being pari passu with, any series of Preferred Shares with respect to dividends, liquidation or redemption…*"

109. As Mr Thieriot confirmed in Thieriot-WS1 at [83.3], Mr. Steckel and Uphold Holdings only loaned the Company US$10 million. But it was agreed in and by way of a series of Participation Agreements with Mr. Chen that Mr. Chen would lend the other US$5 million in exchange for a share of the benefit of the Warrant. As it transpired, Mr. Steckel took approximately 42 million of the shares available under the Warrant (as amended) and Mr. Chen took approximately 21 million.

110. On 2 July 2016 Mr Thieriot emailed Mr Ling and Mr Chen to explain the current state of play. He said as follows (my underlining):

> *"Pursuant to our conversation this morning, the current state of play can be summarized as follows:*
>
> - *The Company has closed on a Loan Structure with Adrian Steckel's investment group*

- *This Structure allows for a 'Bill [Laggner] Proposal' to exist alongside and partake pro-rata in the 50% dilution accepted as a part of the Steckel structure*

- *The Steckel structure is currently subordinate to the $2.1mm Convertible in which you, Rosa and Stephen are the participants. As such, not only are all of your original options still intact, but a new and important option has been negotiated on your behalf which allows you to participate pari passu in the Steckel structure, either:*

    - *Directly (which is straightforward), or*

    - *Through Bill's Proposal (<u>assuming it can reach the point where it is funded and the Board approves it</u>)*

- *If you elect not to participate in the Steckel structure through either of the two options above (<u>Adrian has given you until July 14 to decide</u>), then your Convertible remains EXACTLY as it did before*

The above describes the objective facts. Below are my opinions:

- *<u>The Company's most urgent needs have now been addressed (no immediately looming payroll crisis, BK, etc</u>)*

- *It was INCREDIBLY DIFFICULT to achieve this in a manner that:*

    Preserved all the optionality described above
    <u>Provided Steckel with the minimum control safeguards to immediately fund, without</u>

    <u>Locking the Company into long-term Steckel control</u>

From this point forward, what I now believe to be in the Company's best interest is:

- *<u>That the already funded $5mm from the Steckel Group be the last capital drawn down from that source</u>*

- *<u>That Bill's Proposal be the vehicle for the remaining $10mm</u>*

- *That your $2.1mm convert into that $10mm, which means that:*

    - *<u>Bill has to raise exactly $7.9mm in new capital</u>*

    - *<u>Money that goes directly into the Steckel structure is debt that has to get paid back in order to return the Company to straightforward cumulative vote shareholder board control</u>*

- *Once the debt is paid back the direct participants receive COMMON STOCK*

- *Money that goes directly into the Steckel structure is potentially incrementally impairing to the next round of finance (a $25mm B2 Preferred at a $150mm valuation)*

- *Money that goes into the Bill Proposal (assuming the terms don't drift) receives senior PREFERRED STOCK, held in escrow until the Steckel debt is paid off.*

Here would be the resulting math from that scenario:

- *Steckel Structure = $15mm = 50% Dilution*
- *Steckel Funding = $5mm = 16.66%*
- *Bill Proposal Funding = $10mm = 33.33%*

Assuming the above plays out, your $2.1 Convertible would receive 6.99% of the Company, fully diluted. To put this in perspective, let's see what would happen if you decided not to participate and instead converted into the B2 equity raise:

- *70% x $150mm = $105mm*
- *$2.1mm / $107.1mm = 1.96%*

Putting aside any possible minor adjustments to the above math (I'm not exactly sure whether the discount would be calculated off a post or pre-money valuation, or even whether that would make a difference) it is quite clear that participating in what has been negotiated for you is more than 3x better than what you had before in a conversion scenario: 6.99% vs 1.96%.

In a non-conversion scenario (a scrap sale, BK [bankruptcy] or worst-case outcome... which would now be $12.9mm-in-new-capital-less-likely) instead of having a $2.1mm senior claim, you would be pari passu with the rest of the participants in a $15mm senior claim……

<u>I hope the above provides you with the requisite data to make an informed decision</u> (and hopefully calms your nerves).”

111. It is clear that on 2 July 2016 Mr Thieriot was of the view that implementation of the Steckel Proposal and completion of the 2016 Transaction did not preclude the White Knight Bridge Proposal or at least a variation of Mr Laggner’s proposal being implemented and that he wanted and anticipated that further discussions would take place. This was also clear from Mr Brooke’s email which treated the 2016 Transaction as the first stage of the necessary

refinancing of the Company. The door was not shut on, and a further opportunity was afforded for, amendments to be made to and/or the requisite confirmations to be provided in respect of the White Knight Bridge Proposal.

112. Mr Laggner maintained his objections to the Steckel Proposal and on 6 July 2016 he emailed the other directors setting out his issues and pressing for approval of his proposal. He referred to a term sheet relating to the Steckel Proposal having been signed by Mr Thieriot (which had been done on 24 June) and appears to have failed to appreciate or acknowledge that the binding transaction documents had also already been signed. He said as follows (my underlining):

> *"Several shareholders and I are deeply concerned at what's transpired since last Friday as a term sheet (different from what was accepted by board) was signed with the expectation of funding coming today or tomorrow at the latest.*
>
> *Uphold s GC sent a note out last Friday, specifically stating: "I would also ask that Directors refrain from any separate communication with staff until such time as the BOD has the opportunity to meet again, discuss and agree to next steps.*
>
> *No BOD meeting was ever called to review and consummate the financing and we agreed to this request. But I understand that Adrian was in San Francisco meeting with staff Tuesday, having flown some staff members in from both London and Braga. In addition, one of the shareholders in our proposal (acting in good faith at Tim's insistence to me last week before he would even consider a counter proposal) wired $540k to the company enabling the company to make payroll and other liabilities.*
>
> *Last week I called a BOD meeting where the shareholder offer was stymied by several of you who wanted Halsey in a box (done last week) and a funding schedule along with $8.5M firm commitments.*
>
> *All that said I can confirm the majority of shareholders don't approve of the term sheet signed last Friday by JP [Mr Thieriot] only and want a board meeting today to discuss/vote on their amended proposal (amended at the request of BOD) to their original proposal submitted last Wednesday.*
>
> *Here are the main points of the amended proposal term sheet:*
>
> *· $10M Firm Commitments. Immediately, with $4.5M funded on Tuesday July 12th (With $540k having already funded last week).*
> *· Enclosed Schedule of Shareholder and Firm Funding Commitments (Full Schedule).*
> *· 60%+ of Shareholders Approve this Proposal.*

· Zero Interest Loan
· Halsey Minor & His Trust Executed Agreement. No longer Chairman, No Longer a Member of the BOD.

Unfortunately, given everything that has transpired the shareholders I represent have serious concerns that Uphold s current GC may be compromised and as such we request that Uphold s external counsel, Riddell Williams is also present at this BOD meeting."

113. On the same day (6 July 2016), Mr Thieriot responded to this email, emailing Mr Laggner and copying all the other members of the board including Mr Steckel and also Mr Ling. He said this (my underlining):

> *"This process has gotten ridiculous. Everybody gets tarnished in a fight, most of all the Company... and Bill keeps insisting on having one, when none is necessary.*
>
> *People are emotional and operating under the toxic spell of stirred-up, unfounded fears, narrow interests and greed.*
>
> *After much agonizing negotiating, manoeuvring and endless conversations, a compromise solution was reached last Friday. Now, for the second or third time, one side has walked away from a conversation in which consensus was apparently reached, only to return with a renewed sense of combativeness and reinvigorated irrationality.*
>
> *The Board had three choices early last week, and was operating under the extreme time pressure of seeking to meet its already delinquent payroll obligations:*
>
> *1. Accept a proposal from Adrian Steckel*
> *2. Accept a proposal from Bill Laggner*
> *3. Declare itself insolvent and enter an ABC or BK situation*
>
> *As was relayed to Bill, repeatedly, in order for his proposal to be considered 'legitimate' it needed to be devoid of uncertainties and 'I know a guy who could...' and elevate to a certainty-of-close on par with the Steckel proposal. When, by his own acknowledgment, his proposal failed to meet these conditions under extreme time pressure, very late Thursday, a compromise deal was reached. This deal entailed Steckel acceding to allowing a side-by-side structure wherein:*
>
> *- Bill would have time to pull his Proposal together*
> *- Terms would be essentially pari passu and devoid of any promote*
> *- Bill's structure would be free to participate up to 2/3*
> *- Furthermore, in response to unfounded fears that Steckel's terms would constitute embarking on a one-way road to becoming someone's subsidiary, the compromise structure is very clear around how initial Steckel control devolves back to cumulative*

shareholder voting, upon the payment of a $5mm loan.

In short, Steckel has proven to be tractable and accommodating, wherein Bill, after acceding to the compromise, has repeatedly returned to, and finally insisted on, a hostile us vs them set-up. At this point, Bill's actions have caused doubt among Steckel's lawyers, destabilized the Company, and delayed the Company's moving on to address the real issues at hand: operations instead of board Room drama. The only possible motive for such irrationality is obviously some form of undisclosed remuneration... which is unconscionable."

114. Mr Watson responded on 7 July to Mr Laggner's email as follows (my underlining):

"Thanks for sending this in.

As Board members I believe we all have fiduciary responsibility to at least hear what the potential offer Bill has constructed with other shareholders especially as Bill states his offer enjoys over 60% of shareholder support.

That being said, in order for the Board to properly consider your offer Bill I would request you have for the Board meeting proof of funds, otherwise I don't believe there is actually anything for the Board to discuss, let alone consider.

Jenna, can you please work with Bill to schedule this call for tomorrow morning PST please, or Saturday if Friday does not work for Board members."

115. Mr Thieriot summed up his assessment of the position that had been reached by this point in Thieriot-1 as follows (my underlining):

"33 On 6 July 2016, Mr Laggner sent an updated proposal offering to fund US$10mm and confirming that he had firm commitments. Mr Watson responded on 7 July 2016 asking for proof of funding but Mr Laggner was unable or unwilling to provide proof of funds.

34 Without proof of funds to substantiate an alternative, and Mr Steckel and Uphold Holdings, LLC already having made significant funds available to the Company (thereby proving, if proof be needed, that there was commercial reality to the Steckel Transaction) the Board could not, in considering what was best for the Company, entertain the Laggner Proposal any further. This did not mean that we were not open to individual preferred shareholders (including those who supported the Laggner Proposal Term Sheet) from participating in either the Steckel Loan directly or in Series B2 share issuance. Accordingly, the Laggner Proposal could not go forward.

……..

48 *The RCA and Warrant were negotiated and executed under acute time pressure at a time of extreme financial stress for the Company. Directly after the RCA was entered into, it was realised by the Company that the provision in Section 3.3 that Preferred Lenders would receive Ordinary shares other than through the Warrant, when combined with the fact that Uphold Holdings could still potentially benefit from all of the Warrant (and the right to receive half of the issued share capital of the Company) could lead to a situation where more shares would be issued as a result of the Steckel Transaction than was originally intended (and dilute the existing shareholders unduly). Accordingly, on 1 July 2016, the RCA was amended for the first time.*

49 *The First Amendment to the RCA (p. 721) provided that the Warrant Shares would be shared amongst all participants in the Steckel Loan as follows:*

> *"The parties acknowledge that the Warrant, and any Warrant Shares issued to the Lender upon exercise of the Warrant, will be shared amongst all the Loan Participants on a pro-rata basis in accordance with principal contributed by each of them in accordance with this Amendment."*

50 *Again, the First Amendment to the RCA did not cap the participation of the holders of Preferred Shares in the Warrant. Preferred shareholders had until 31 July 2017 to participate in the RCA.*

51 *Copies of the executed Loan documents, including the First Amendment to the RCA, were sent to the members of the Board on 1 July 2016 by Thomas Brooke, the Company's General Counsel. The cover email (p. 726) makes clear that:*

51.1 *These documents were sent to Mr Laggner as well as the other directors;*

51.2 *That the initial funding request (for US$5m) had already been initiated; and*

51.3 *That the terms of the Steckel Transaction permitted preferred shareholders to participate on the same terms to avoid being diluted.*

52 *I took steps to ensure that key Preferred shareholders, including Mr Ling and Mr Chen were made aware of their ability to participate in the Steckel Transaction. This, to my mind, along with the fact that Mr Laggner (and by extension his claimed group of White Knight investors) was on notice of the terms of the RCA, meant that of the investors who were most likely to want to participate in the Steckel Transaction would have an opportunity to do so. From my recent fundraising attempts as part of the B1 share issuance, I believed that the appetite from some other shareholders to invest in the Company was at a low ebb, and it made more sense to focus on those who had already expressed interest.*

53 *Consistent with this, the Company continued to work with Mr Laggner to determine if his proposal could co-exist alongside the Steckel Transaction. To my mind, if Mr Laggner had been able to obtain funding, it would have been preferable to have him provide US$10 million of financing rather than taking the full amount from Mr Steckel. Indeed, I actively sought to persuade certain investors to invest through Mr Laggner rather than through Mr Steckel. On 2 July 2016, I forwarded Mr Brooke's email to Winston Ling and James Chen that same day. I spoke to Mr Ling the following day, and then, at his request, sent him an email summarising the position as I saw it (pp. 728-731). The main points to note are that:*

53.1 *I expressly flagged the possibility of Mr Laggner's proposal existing side-by-side with the Steckel Transaction, saying "this structure allows for a "Bill Proposal" to exist alongside and partake pro-rata in the 50% dilution accepted as part of the Steckel Structure";*

53.2 *That Mr Laggner's proposal getting to participate was dependent on "it...reach[ing] the point where it is funded and the Board [sic] approves it"; and*

53.3 *I was supportive of the Steckel Transaction being limited to the US$5m already drawn, and that further funding should come from Mr Laggner's proposal. This would have limited the dilutive effect of Mr Steckel's participation in the Transaction to 21m shares approximately.*

54 *As these discussions were going on, Mr Laggner continued to raise objections to the Steckel Transaction. On 6 July 2016, he sent the Board (copying Winston Ling) his email (pp. 459- 460) in which he complained (though in my view, incorrectly so) about the approval of the Steckel Transaction and the circumstances in which his proposal had been rejected."*

55 *This email prompted a response from Uphold Holdings, LLC, on 7 July 2016 (pp. 732-733) in which it was said that:*

55.1 *Adrian Steckel had recused himself from the consideration of the competing proposals;*

55.2 *That the Company had represented that they had been approved and executed in accordance with the Articles of Association, and did not require an EGM for approval; and*

55.3 *That the terms of the Steckel Loan permitted the participation of preferred shareholders.*

56 *I am not aware if Mr Laggner formally responded to this letter. However, the Board responded to Mr Laggner's email by convening a Board meeting. On 7 July 2016 Mr Watson responded ……*

57 Ultimately, Mr Laggner was unable to provide proof of funding, and no holder of Preferred shares elected to participate in the Steckel Transaction directly at this time (although Mr James Chen did so later that year) ….”

116. On 7 July 2016 Mr Brooke sent an email to Mr Friedberg headed "*Privileged and Confidential*" in which he set out, in response to Mr Laggner's questions and challenges, his account, based on his own involvement, of the board's deliberations and decision making. He said this (my underlining):

"I note this record was created contemporaneously in my capacity as General Counsel as an aide to the Board in recording Board minutes. I have transcribed here in response to questions raised by Bill Laggner about my conduct and the validity of the Board's actions in approving the Steckel Loan facility.

6/22/16 - 1:00pm Board Meeting to Hear/Consider Board Proposal from Steckel

- *Tim Parsa describes proposal*
- *Board requests that proposal be submitted in writing; decision to reconvene at later time after proposal submitted*

6/22/16 - 7:00pm Board Meeting

- *Halsey Minor announces resignation*
- *Board present unanimously accepts resignation and nominates Steckel to Chairman in replacement of Minor (subject to Steckel acceptance)*
- *Board present unanimously approves the Steckel proposal*

6/23/16 - 3:00pm Board Meeting

- *Board discusses financing options in light of component of Steckel proposal that was rejected by Minor*
- *Board agrees to reconvene on 6/24 to consider and deliberate on alternative financing proposals submitted in writing*

6/24/16 - 2:45 pm Board Meeting

- *Board discusses and deliberates on the only alternative financing proposal submitted to the Board, the Steckel alternative proposal.*

- *Board approves the Term Sheet for the Steckel alternative proposal, with only Laggner in dissent. Term Sheet executed by Vice Chairman JP Thieriot.*

6/27/16 - 7:30 pm Board Meeting

- *Board discusses and deliberates on a Term Sheet for an alternative proposal introduced by Laggner and represented as the Outpost Capital Management Financing Proposal.*

- *Board present unanimously rejects the Outpost Capital Management Financing Proposal as inadequate based on previous agreed criteria.*

- *Board instructs General Counsel, Brooke, and Outside Counsel, Dan Frieberg, present on the call, to complete definitive agreements so that previously approved Steckel proposal can be executed in timeline to address solvency issues of the Company*

6/29/16

- *By email, I advised all Board Directors that negotiation of definitive agreements of the Steckel alternative proposal had been completed and that final documents were being prepared so that closing could occur in accordance with Board approved timeline. No Board Director responded with any questions or concerns.*

7/1/16

- *Final definitive loan documents were provided to Vice Chairman JP Thieriot for signature. Thieriot executes definitive agreements, and the alternative Steckel Loan facility closes*

- *I message to the Board regarding closing of the transaction*

I feel it is appropriate to note a few other matters as a part of this record. Throughout this process, I have provided instruction to the Board with respect to issues regarding the Company's solvency. Consistent with this instruction, the Board determined that adequate financing would be required to close no later than July 1, 2016.

Separately, on June 27, Bill Laggner contacted me to discuss efforts to put forth an alternative proposal. I made it very clear to Bill Laggner that relying on constructs he put forth to me like "hedging Bitcoin" or the ability to sell Voxels would not, itself, satisfy the fundamental issue of solvency that the Company was facing. I made it very clear that the Company would need to close on adequate financing of a minimum of $2.5mm by no later than July 1, 2016.

As a part of those discussions, Bill Laggner also indicated to me that he had a direct interest in the alternative financing proposal he was working on, referring to a deal he had negotiated with Halsey Minor and acquiring shares at a discount. Bill Laggner also indicated to me that he would disclose his interest to the Board. I am not aware whether he has or has not at this time."

117. On 8 July 2016 Mr Watson emailed the directors to convene a board meeting for 11 July. He said this (my underlining): "*I'd like to have a formal Board Meeting for Monday morning at 8am PST for two hours to discuss the implementation and logistics of <u>Adrian's approved offer</u> <u>(as of June 24th)</u> - <u>and/or discuss any other potential offers and/or side-by-side offers, as per Bill's email this week</u>. I am confident we shall achieve the right outcome for all shareholders….*"

118. On 11 July 2016, but as I understand it, before the board meeting, Mr Laggner sent an email to Mr Parsa and Mr Watson copied to Mr Thieriot, Mr Steckel, Mr Friedberg, Mr Brooke, Mr Milby and Mr Ling as follows: *"As I mentioned my discussion with Dan [Mr Friedberg] last week was misinterpreted regarding the ratification process. Based on our dialogue today I agree that the ratification process was correct."* In an email to Mr Fontg of the same Mr Laggner said: "*I withdraw my earlier concerns expressed in my e-mail dated July 6, 2016, and at other times, that the company did not properly authorized the financing transactions with Uphold Holdings, LLC. My concerns were based on my misunderstanding, that the board needed to ratify final transaction documents prior to the consummation of the transaction. By way of this email, I acknowledge that the board of directors properly considered such transactions at a duly convened board meeting, and it approved such transactions (despite my vote against the proposed transactions)*."

119. The further meeting of the board took place on 11 July 2016 (the ***11 July Meeting***) for which minutes (the ***11 July Minutes***) were also prepared after the event by Mr Brooke. The board at this meeting considered amendment to the RCA and the need to allow other preferred shareholders to participate in the financing. The 11 July Minutes recorded that the board "*discussed the state of the current loan facility …. [and that] it would be prudent to modify the loan documents to allow for additional time for the preferred shareholders to participate in a side-by side financing and to clarify that interest for a period could be paid by forbearance of the exercise price under the Warrant*." After passing the following resolutions the board went on to discuss *"the process for the side-by-side financing.*"

> *"RESOLVED, that the terms of the revolving credit facility shall be amended to allow a maximum period of 60 days to allow preferred shareholders and others approved by*

> *the lender to participate in the financing, provided that the Company will move forward to complete this process as soon as possible; and*
>
> *FURTHER RESOLVED, that the exercise price of the Warrant held by the lender may be paid by the holder by offsetting future interest payments otherwise owed by the Company under its Revolving Credit Promissory Note."*

120. Board approval for (and ratification of Mr Thieriot's) execution of the 2016 Transaction documents was subsequently confirmed and formalised at a board meeting on 15 July 2016 (the ***15 July Meeting***) (it is unclear why the board did not provide these confirmations and approvals the 11 July Meeting). The board minutes (the ***15 July Minutes***) record that the board "*discussed the current status of the current revolving Credit Facility [and] that such Facility* ***had closed July 1, 2016****, and that that US$5 million had been advanced by [Holdings] under such facility*." The minutes went on to record that "*for the avoidance of doubt*" the board unanimously resolved that the 2016 Transaction Documents were approved and that "*all actions taken to date by management in connection with [those documents] [were] authorised and approved and it [was] confirmed that [those documents contractually bind both the Company and the [Uphold Holdings]."*

121. The 15 July Minutes recorded that Mr Steckel, Mr Parsa, Mr Thieriot, Mr Watson, and Mr Laggner had participated in the 15 July Meeting by telephone conference (Mr. Milby was unable to attend) with Mr Brooke as General Counsel (who "*kept notes of the minutes of the meeting to present to the Secretary for approval*"), Mr Friedberg and Mr Straus of Riddell Williams PS, outside counsel to the Company and Mr Fontg, counsel to the lender, also attending by telephone conference.

122. There was a dispute as to whether Mr Laggner had approved the minutes of these board meetings and the ratification of the 2016 Transaction. In Laggner-3, Mr Laggner said as follows:

> *"32. In his affidavit Mr Steckel repeatedly alleges that I approved the Holdings Transaction and relies on minutes prepared on his behalf. As I have explained in my previous affidavits (see paragraph 72 et seq. of my first affidavit), this is incorrect. Whatever our differences, I cannot understand how Mr Steckel or any*

of his associates could ever have been left with the impression that I in any way supported their transaction. I consistently and vociferously opposed it, trying everything I could to secure better terms for the Company. I believe it was my opposition of the transaction that led to me being removed from the board.

33. In his affidavit Mr Steckel attempts to paint a picture of him recusing himself from key meetings to discuss the Holdings Transaction, purportedly to avoid any suggest of conflict or undue pressure being place on the board. In paragraph 125 of his affidavit he claims he was determined to ensure the Holdings Transaction was independently assessed free from any influence from him. He in fact did the exact opposite, pressuring the board not to consider other options under threat that otherwise the offer would be withdrawn.

34. I note that the 15 July minutes where the board is recorded as purporting to ratify previous decisions in respect of the Holdings Transaction are not signed. To the extent they purport to record any ratification on my part, then they are false.

35. Subsequently, after receiving challenges by a number of shareholders, I emailed the Company's general counsel Thomas Brooke and external attorney Dan Friedberg, about getting clarification from Cayman counsel as to the legality of the Holdings Transaction. The responses I received were less than satisfactory as they did not respond to the shareholders' legitimate concerns regarding whether the Company had the requisite power to enter into the Holdings Transaction, and if so what formalities would be required. It has since become apparent that there was no Cayman law advice received by the Company on the Holdings Transaction, as was confirmed by the Company by their attorney's letter and email to TTA from July 2020."

123. In Laggner-WS2, Mr Laggner clarified his evidence as follows: "However I do accept that I signed the minutes when they were sent to me, long after the event. When signing the minutes I did not check over them in detail, assuming that my position had been correctly stated."

124. It seems to me that the evidence shows that Mr Laggner's conduct was sufficient to constitute approval of the 15 July Minutes and a confirmation that he accepted and had approved of the ratification of the 2016 Transaction. The 15 July Minutes had been sent to him in draft by Mr Brooke on 30 August 2016 (when Mr Brooke had circulated to the directors drafts of the minutes of all the board meetings held between 17 June and 8 August). Mr Brooke asked recipients of his email to let him know if they had any questions/corrections and otherwise to sign and return the minutes. After being repeatedly chased by Mr Brooke, Mr Laggner

had on 14 September 2016 returned to Mr Brooke his (Mr Laggner's) signed copy of the written consent form. This recited that the minutes for the board meetings from 17 June 2016 to 8 August 2016 had been prepared by Mr Brooke and reviewed and submitted to Mr Thieriot and confirmed by their signature the approval of those minutes by each director. When asked by Mr Chapman during his cross-examination whether he had carefully reviewed the minutes Mr Laggner was evasive but ultimately confirmed what he had said in Laggner-WS2, namely that while he recalled looking at the minutes, he could not confirm that he had read them carefully. It seems to me that if, as he now claims, Mr Laggner really had registered at the 15 July Meeting his opposition to ratification of the 2016 Transaction and that he had been consistently pursuing a policy of objection and resistance to board approval of that transaction, he would have carefully read and scrutinised the minutes to check, rather than assume, that they correctly reflected his opposition and views on this critical issue. Accordingly, I find Mr Laggner's denial that he had gone along with the board decision at the 15 July Meeting as unreliable and in these circumstances I conclude that there is no basis on which Mr Laggner can deny that he approved, and now seek to challenge the accuracy of, those minutes.

The Series B2 share issue – permitting other preferred shareholders to subscribe for new preferred shares following the closing of the 2016 Transaction

125. As I have noted, the board resolution passed at the board meeting on 11 July 2016 confirmed (with Mr Steckel's and Uphold Holdings LLC's consent) that preferred shareholders and others would be permitted to participate in the financing by means of Series B2 shares in the amount of US$6,631,861. On 20 July 2016 there was a further board meeting at which the board approved the term sheet for this Series B2 Preferred Financing. On 21 July 2016 an email was sent to the preferred shareholders offering them the opportunity to acquire Series B2 preferred shares. The email stated as follows (my underlining):

> *"We want to inform you of an internal bridge financing round that has been effected by [the Company], <u>as well as inform you of your anti-dilution rights therein</u>.*

> *Uphold has secured a $15mm debt and equity financing from some of its key shareholders. Under the Investor Rights Agreement, you are entitled to participate in the equity portion of that financing.*
>
> *If you do not participate, the total dilution to you that is attributable to the financing will be 50%. Below please note the exact number of shares and the cost of exercising your anti-dilution rights in order to maintain your current percentage ownership. The vehicle through which preferred shareholders will be able to exercise their anti-dilution rights is a Series B2 Preferred. The Series B2 Term Sheet is attached. Also attached is an Indication of Interest Form.*
>
> *Number of Series B2 Preferred Shares to Avoid Dilution: 20,000*
>
> *Cost per share: $0.255*
>
> *Aggregate cost: $5,100.00*
>
> *If you are interested in participating, the calendar is as follows:*
>
> *-July 25 (Monday) - Shareholder Call ….*
> *-July 29 - Deadline for receiving Indication of Interest*
> *-August 1 Delivery of Subscription Documents*
> *-August 24 - Deadline for funding…"*

126. On 21 July 2016 Mr Thieriot emailed one of the shareholders (Mr Peacock of Hanover) and gave a helpful and candid contemporaneous summary of the history leading up to and the terms of the 2016 Transaction as how the other shareholders were to be treated (my underlining):

> *"I apologize for the lack of communication through what has been an arduous few weeks for the company. I did have a call with your brother and Julian a couple of weeks ago, to which you were invited.*
>
> *Most pertinently, the ground has been shifting so quickly, that any snapshot the Company might have been able to provide throughout this period would have been tenuous at best.*
>
> *Ironically, your email comes as we are sending out the investor communication that is intended to serve as the punctuation mark on all that's happened. To provide some color on what you will shortly receive, I'd describe the highlights as follows:*
>
> - *The Company ran out of money*

- *A Bridge Loan was put on the table, along with a serious rebuke to senior management, namely Halsey & Anthony*
- *The terms of the initial Bridge were:*
- *$10mm Loan*
- *2% monthly interest*
- *20% Dilution*
- *Prepayment Penalty*
- *$10mm option on 30% in 'secondary' shares held by Halsey*
- *Control held by Lender until such time that loan is paid off*

- *Halsey's response to this was, in line with his roundly discussed character flaws, to essentially throw his toys out of the pram and suggest that bankruptcy was a better alternative*

- *He then started a campaign to smear the bridge scenario as a one-way road to becoming the subsidiary of a sharp-elbowed billionaire, and he essentially bribed a couple of shareholders to promote his agenda and block emergency financing into the Company, required to make payroll, avoid declaring insolvency, etc*

- *In the face of this total lack of reason, which essentially set off a three-week Game of Thrones episode: Halsey was removed from the Board*

- *A compromise was then struck that was probably harder to arrive at than what was achieved at the Yalta Conference*

- *In essence, the lender proved sufficiently tractable to remove those features of the financing that were credible causes for consternation (as opposed to the 90% that was conspiracy theory, dangerous noise and brinksmanship)*

- *The upshot (which is described in the email all preferred shareholders will be getting shortly) is as follows:*

  - *We have put in place a $15 Bridge Facility*
  - *The facility carries with it 50% dilution*
  - *The facility involves a combination of debt and equity*
  - *The debt piece will carry zero interest for the first 4 months*
  - *Preferred shareholders will have the opportunity to exercise their anti-dilution rights through a new B2 series, at a price of $.255 per share*
  - *There will be some room for people to participate above their pro rata*
  - *The Board's intent is to cap the debt side of the facility (so as not impair future rounds of finance) at the level which has already been funded*
  - *The Primary Lender will hold the voting rights of the entire $15mm facility, including the preferreds, until such time that their $6mm portion of the loan is paid back (at which point the Company returns to cumulative shareholder control... thereby dispelling dark theories around a grab for permanent control... i.e.. fearful shareholders control their own destiny*

insofar as fully subscribing the Preferred. If, in the unlikely event the Preferred is not fully subscribed, then the Company will eventually be forced to draw down on the rest of the credit facility, at which point control indeed becomes (more) permanent

Meanwhile, on the operating side of the equation:

- *An entirely new Operating Plan has been drafted that focuses on those three areas that are currently showing the greatest traction, and are judged to be the most efficient route towards near-term value creation, as well as a fourth silo that is being folded in through an acquisition (that is both cash accretive as well as bringing in much-needed senior management talent and engineering):*
- *Remittance*
- *PaaS, Platform as a Service*
- *The US and UK bank licenses*
- *Uphold Merchant Services (the acquisition)*

Adrian Steckel (most recently the CEO of iUSACell, which he sold to AT&T [sic] to $2.5b last year) has effectively taken over the reins as acting CEO

Anthony Watson will (likely) transition to heading up the UK challenger bank, which is expected to enter its challenge sessions phase in August

The monthly burn has been reduced by some 25% through the paring back of personnel and costs not directly related or critical to the four business areas described above

In short, despite the amazing anguish in getting things to their current point, and despite the obvious unpleasantness of a down round, the Company has its first accomplished 'manager' in place, it has plenty of capital to see it through to its next round of finance, and it has its first business plan that is sufficiently focused to produce the near-term metrics required to ensure a successful Series C campaign.

Probably 95% of the start-ups I've been involved with, sooner or later experience this nature of episode. As a reminder of far worse possible outcomes: Jumio was picked up out of bankruptcy for $850k about a month ago. So while this has not been smooth, and people are being asked to swallow a bitter spoonful, there's probably no other route that could have led to where we are today... which is hopefully where this internal round is a blip, inept management and toxic personalities have been excised, management we could otherwise never have afforded will have its time at the helm, and we'll be able to resume a financing track that is at least as ambitious as it was before the reset.

Lastly, you can expect that shareholder communications, like regular board meetings, will be a part of this new chapter. Additionally, as ever, I will always respond promptly to emails and phone messages."

127. There was a shareholder call with preferred shareholders on 25 July 2016 to explain the 2016 Transaction (Thieriot-WS1 at [100]).

128. On 8 August 2016, Mr Watson was replaced by Mr Steckel as the CEO of the Company. Mr Watson entered into an employment contract with the Company which provided that the Company would transfer its whole interest in a company called MSBB Money Ltd (***MSBB***) into a new entity (TBOL, then called Uphold Group plc)), in exchange for the Company owning 95% of the shares of TBOL

129. On 17 August 2017, Mr Thieriot executed the Second Amendment to the RCA on behalf of the Company. This provided that in lieu of participating in the loan made by Uphold Holdings and taking the ordinary shares available under the Warrant, the holders of preferred shares who wished to invest would receive Series B2 preferred shares. The time for participating was extended and the amount of the ordinary shares available under the Warrant was adjusted to take account of the Series B2 shares.

130. On 23 August 2016, Mr Steckel sent a CEO update letter to all shareholders explaining, among other things, that the RCF had been put in place and the need for the Company to raise further funds through a Series C preferred financing round. The letter also explained why in Mr Steckel's view Mr Laggner's proposal would not have been satisfactory in that it would not have funded the Company to a stage where it was able to break-even. The letter also explained how $6m had already been drawn down under the RCA and used to fund the Company's expenses and discharge liabilities.

131. On the following day, 24 August 2016, a revised B2 term sheet was sent to all shareholders showing the financing amount had increased to $9,354,042 (to be raised through the issuance of 36,682,520 Series B2 Preferred Shares at the same price per share of $0.255). The revised B2 Term Sheet introduced the entitlement for a liquidation preference equal to the purchase price plus interest at the same rate being paid to Uphold Holdings until the RCA Loan was paid off. After that loan was paid off, the liquidation preference would no longer increase by

the interest rate. The revised B2 Term Sheet also clarified that voting rights would be controlled by Uphold Holdings until the RCA Loan was paid off.

132. Mr Thieriot in Thieriot-1 at [60] said that the Series B2 subscription documents which were provided to the holders of preferred shares had stated that 36,682,520 Series B2 shares were available at a purchase price of US$0.25.5 cents per share and that if fully subscribed, this would have meant that holders of preferred shares would have provided the Company with US$9,354,042 of the US$15m available under the RCA, and would have reduced the number of shares taken by Mr Steckel/Uphold Holdings LLC under the Warrant by more than half.

133. Only some of the existing shareholders of the Company (including Mr Chen, Mr Ling and Mr Peter Kearns) subscribed for 3,061,957 B2 shares in total, in the amount of US$780,799. The largest investor in the Series B2 round was Mr Ling through WinTech Ventures Limited, which subscribed for 1,000,000 Series B2 shares for $255,000 (approx. 33% of the total Series B2 shares issued). Of the Petitioners, only the Fifth Petitioner, Mr Kearns (again together with his wife, Ana Kearns), participated in the B2 Preferred Financing subscribing for 12,150 Series B2 shares for subscription proceeds of $3,098.25. This was the same number of Series B1 shares held by Mr and Mrs Ana Kearns and as such they avoided dilution of their shares at a cost of $3,098.25. No other Petitioner participated in this round (although Mr Laggner was not a shareholder at this time).

134. On 17 August 2016, Mr. Steckel (as the authorized manager of Uphold Holdings) had sent an exercise notice to the Company exercising the Warrant and requesting the Company deliver a certificate in respect of all the ordinary shares, representing 50% of the issued capital of the Company, on a fully diluted basis, to Uphold Holdings' counsel (Fontg & Hansen LLC). Mr. Thieriot countersigned the exercise notice on behalf of the Company.

135. Mr Steckel was asked during his cross-examination by Mr Valentin as to whether his and Mr Salinas's main objective or purpose in entering into the 2016 Transaction had been that they would acquire and be able to use for their benefit de facto or operational control of the Company. Mr Steckel said as follows (Day 5, pages 125-129):

Q. ….. *Now, what I want to put to you is that one purpose of the 2016 transaction was to give you and Mr Salinas de facto or operational control of the company. Do you agree with that proposition?*

A. I agree and disagree…. I think that you're putting together two different concepts that are not the same. So the - and as you've seen in discovery, the company had very little revenue and very little traction and had not fulfilled promises of performance. And so what I was most concerned about and what Mr Salinas was most concerned about is you want to invest in a company that's actually doing the things that - it's being managed on a day-to-day basis responsibly, in the sense of operationally. So that's why I said you had two concepts: de facto and operational. For me, the operational part is pricing, execution, you know, what are you spending your money on, those sorts of things. I think that you use de facto control as something going on at the board level or the shareholder level, and that was not my primary concern. My primary concern was to become the CEO of the company and make sure that I could affect pricing. And I did that in August, where the things that were free, and I'll - I don't want to speak French in this Cayman courtroom, but there was a meeting in Braga, and I put - and everybody in the company still knows it, which is "NFF". The first word stands for "no". The last word stands for "free" and the other one - well, effing. ….. But I wanted to get it away from getting things away for free. Even after that, it was a struggle because the engineers, who live in basically a socialist country, were all about: well, we should charge for it at cost plus. And I was like -- we started off that way, so cost plus 20%. But then I got to no, we should charge for currency conversion at what the market rate is, no matter what the cost is. That's what the fairer margin is. So, Mr Valentin, and my Lord, I would say you really should focus on what I was most focused on, which was operational control while I was CEO.

Q. What's the difference between de facto control and operational control?

A. Well, your Petitioners, Mr Valentin, seem to create this notion I controlled the board, controlled its vote, controlled the company in all of its doings. And on many occasions, I had notions that I thought I wanted to do, and my fellow board members told me no; or even 30 days after the closing of the [2016] transaction, the board modified the terms of the amount of debt that should be put on the company and did the B2, and I went along. I was willing to give up a majority of the warrant to others and stay at $5 million. So this notion that I was hellbent on - and this is a [loaning to own]. If I'd have wanted to [loan to own] I would have foreclosed - …. If I had been bent on loaning to own, on June …. 16th or 17th, when Mr Thieriot sent over a term sheet saying, you know, "We've got other people doing this; will you do this?" It was 8% per month, matures in six months, get control of the company, 51% - I wouldn't do it. I was happy to have other people to do it, because the problem was a lack of execution of the company. If I'd wanted to loan-to-own, I would have foreclosed on the debt of the company in June of 2018 when it came due. And when it came due, [I] gave it six months

more. It came due in December of 2018, and I capitalised it at $1.13 per share. So this notion that there's this hellbent focus on owning at any cost and controlling at any cost to the detriment of others is not correct.

Q. So your evidence is that, really, that this was about getting control on things like pricing, not on being able to ensure that when the company did financing rounds, for example, you acquired large numbers of shares from the company, of the company?

A. No, it was about –

Q. It had nothing to do with that?

A. The focus was on having a business that worked, and for that it was operational control. And if you look at the history after that, I mean, there's an argument – you all argue about certain aspects. But this was not about starving the company for capital or trying to get all the capital for myself, no."

Completing the formalities and the need for legal advice

136. It appears that certain steps were then taken at the end of August and in early September 2016 to complete the formalities associated with the Company's corporate governance and entry into the 2016 Transaction. I have already noted that on 30 August 2016 Mr Brooke had prepared and circulated to the directors draft board minutes for the board meetings held between 17 June and 8 August 2016 with a request that each sign a certificate confirming the accuracy of and agreeing to each set of minutes. In addition, it appears that at about the same time the Company's Cayman attorneys, Maples and Calder (***Maples***) were asked to prepare a legal opinion in relation to the 2016 Transaction. Mr Thieriot dealt with this in Thieriot-WS:

"109. I have been provided with an email chain between Dan Friedberg of Fenwick & West LLP (the Company's United States counsel), and Grant Dixon (a partner of Maples) between 29 August 2016 and 1 September 2016. Mr. Friedberg sent Mr. Dixon a copy of the [2016] Transaction Documents and sought a typical legal opinion confirming the Company's capacity and authority to execute and perform those transactions, and that those documents contained enforceable obligations.

110. By way of response, Mr. Dixon confirmed, among other things, that:

110.1 The Company had all requisite power and authority under the Articles to enter into, execute and perform its obligations under the Transaction Documents; and

110.2 The execution, delivery and performance of the Transaction Documents had been authorised by and on behalf of the Company, and they were duly executed, and binding and enforceable on the Company

111. I do not know the reason why this advice was sought some time after the Company's entry into the Steckel Transaction. Even though Mr. Dixon's opinion is headed as "Draft: Subject to review and amendment", I understand that no further draft of the same was sought or provided."

137. On 21 September 2016 Mr Laggner emailed the board of directors and raised the issue of whether shareholder approval was required for the capital raising associated with the 2016 Transaction:

> *"I've had numerous conversations with existing shareholders and a question that came up tonight at dinner was the following:*
>
> *Doesn't the board of Uphold have to offer shareholders a vote on any significant capital raise which potentially materially changes their ownership in the company under Cayman law?*
>
> *I'm asking that the BOD get Cayman counsel to comment on this and enter into board minutes."*

138. On 22 September Mr Brooke responded as follows:

> *"Under Cayman law, there is no such requirement of general shareholder approval for transactions that result in material changes in ownership. The Steckel loan facility with warrant issuance does not require general shareholder approval under Cayman law. We will have a shareholder meeting and vote to approve amending [the Company's] Memorandum of Association to authorize issuance of B2 shares once that offering is complete.*
>
> *Separately Cayman Counsel is already working on an opinion letter of the overall Steckel transaction and once provided will be submitted to BoD and noted in minutes."*

139. As I have noted, Mr Thieriot confirmed that no opinion letter was ultimately ever provided by Maples.

140. On 18 November 2016, Mr Laggner filed proceedings in South Carolina against Mr Minor (amongst others) (Mr Minor subsequently filed proceedings against Mr Laggner and others in 2018). These proceedings were subsequently settled. In Thieriot-WS Mr Thieriot noted that he understood "*from the recital to [the] settlement agreement reached between Mr. Minor and Mr. Laggner in May 2019 (which he exhibited to Thieriot-WS) that [Mr Laggner's] claim was expressly predicated on the completion of the [2016 Transaction]*" (as satisfying the condition in the SPTVA that the Company's board had approved the next round of financing for the Company). Immediately following the board meeting on 20 July 2016 which had approved the Series B2 offering and after notice had been sent out to all preferred shareholders, Mr Minor had sought to terminate the SPTVA on 22 July 2016 and on the following day (23 July) Mr Bechtel had emailed Mr Brooke (copying Mr Laggner and Mr Steckel) attaching the SPTVA and requesting an update to the Company's share register, reflecting the transfer of 4,843,890 Ordinary Shares from Mr Minor to each of Outpost Capital and Mr Laggner. Mr Bechtel had relied on the board's approval of the Series B2 Preferred Financing as having satisfied the condition to the SPVTA. He had said that "*Given the Board's approval of a specific term sheet for the B-2 financing … the Approval Date as defined in the [SPTVA had] occurred….*" Mr Laggner and Outpost Capital had received the 4,843,890 shares in the Company as part of the settlement and paid the contract price of US$1.

Mr Laggner removed as a director

141. By a board resolution on 17 November 2016, Mr Laggner was removed as a director of the Company. There is a factual dispute as to the reasons for his removal. In Thieriot-1 Mr Thieriot explained his understanding of the position as follows:

> "*73. Mr Laggner was removed from the Board on 17 November 2016, by way of a board resolution, for cause. At that time, the Board had become aware that he and Mr Bechtel were planning on commencing litigation against Mr Halsey*

Minor, and the Board were concerned that this would create a conflict of interest. By way of email dated 16 November 2016, Mr Thomas Brooke, the Company's then General Counsel, said that he would strongly recommend Mr Laggner's removal from the Board if that was necessary, as he had acted in a manner that warranted his removal.

74 At the time of Mr Laggner's removal from the Board on 17 November 2016, the Series A shareholders had already lost the right to appoint a director, and the Board was therefore entitled, under Article 28 of the Articles then in force (dated 28 April 2015) to remove him by way of an Ordinary Resolution, which was done."

142. Mr Milby gave the following account in Milby-WS (my underlining):

"44 Mr Laggner was removed from the Board in November 2016 as a result of his ongoing litigation with the Company's founder, Mr Minor. The reason for Mr Laggner's resignation was clear to the Board at the time and was not contentious. Mr Laggner never contested the Board's decision to have him removed or the reason for his removal. Rather, Board members (including Mr Laggner) understood why Mr Laggner could not continue on the Board.

45 Following his resignation as a director, Mr Laggner was retained by the Company as a consultant on terms which compensated him for introducing new investors to the Company. There was no visible rift between the Company and Mr Laggner (at least not one I was privy to). Rather, Mr Laggner continued to have a normal relationship with the Company and the Board members, and I did not notice any change in the relationship which the Company and its directors had with Mr Laggner. This was a complete non-event at the time, and business carried on as usual."

143. Mr Laggner had a different view. He asserted that there was no proper basis for his removal. He was not in a position of conflict and his acquisition of shares from Mr. Minor, or the prospect of litigation between shareholders, did not create any difficulty. In Laggner-WS2, Mr Laggner said as follows (my underlining):

"My view at this time was that the litigation against Mr Minor did not require me to resign from the Board. This was the reason why I did not sign the draft resignation letter which Mr Brooke sent to me on 14 November 2016. I recognize that the reason given was my dispute with Mr Minor but maintain the real reason was my opposition to the [2016] Transaction. There seemed no point at the time in complaining further, especially since I had already been relieved of my position on the board and did not consider there to have been any prospect of a change of mind."

144. Mr Laggner noted that Mr. Steckel had not stepped down from the board despite the existence of these proceedings and nor had Mr. Chen. Mr. Laggner believed, and believes, he says with good cause, that the reason for his removal was that he had continued to scrutinise and question aspects of the 2016 Transaction.

Further financings and increasing the Company's authorised capital – the February 2017 EGM

145. In early 2017, there was a further financing round – Series B3 – which raised a further $183,231.

146. On 24 January 2017 a participation agreement (the ***Chen Participation Agreement***) was entered into between Uphold Holdings and Chen Holdings whereby Chen Holdings agreed to contribute US$2,540,000 to the RCA Loan in exchange for a 20.26% participation interest in the Warrant. In effect, Chen Holdings (a vehicle for Mr Chen) shared in the 2016 Transaction with Uphold Holdings.

147. The three financing rounds and the related share issues resulted in the need for the Company to increase its share capital which was purportedly done by resolutions passed at an EGM held on 23 February 2017. The Company issued a circular to shareholders dated 17 February 2017 giving notice of an EGM and of the resolutions to be proposed at the EGM. The circular stated that in addition to a change of the Company's name, the Company proposed to increase its authorised share capital (the ***ASC Increase***) to provide for four additional classes of preferred shares, being the series B1 preferred shares of US$0.0001, the series B2 preferred shares of par value of US$0.0001 each, the series B3 Preferred Shares of par value of US$0.0001 each and the series C preferred shares of US$0.0001 (together, the ***New Preferred Shares***) and to adopt amended and restated memorandum and articles of association (the ***A&R M&A***) in substitution of the Company's existing memorandum and articles of association (the ***Current M&A***) such that the A&R M&A would reflect the change of name and the ASC Increase and set out the rights and restrictions attached to the shares in the capital of the Company, including the New Preferred Shares (which were to have a

respective preferred entitlement to both dividends and the proceeds of a winding up in priority to the existing shares in the capital of the Company).

148. Mr Thieriot explained the Company's position in Thieriot-WS as follows:

> *"129. Since the Steckel Transaction the Company has carried out three rounds of financing. This required the Company to increase its authorised share capital and issue new shares, and retrospectively authorise the issuance of the Series B1, B2 and B3 share classes (see (as per the Company's 2015...) (2015 Articles), in which Article 17.1 (a) is expressed as being subject to the protective provisions for preferred shareholders at Article 3.2 (a)(v)). The Company did so by way of written resolution of the shareholders of the Company at an Extraordinary General Meeting ("EGM") held on 23 February 2017 (a copy of the minutes of which are at JPT1/pages 1327-1339). The EGM was quorate.*
>
> *130. As point two of the minutes of that meeting show, the Company notified all holders of Ordinary shares, Series A shares and Series B shares of its intention to hold the meeting to amend its Articles of Association, stating that the purpose of this amendment was to permit the issuance of new classes of shares. A copy of that notice is at JPT1/pages 1340-1351.*
>
> *131. Given that the EGM would involve votes to ratify the issuance of the Series B1, B2 and B3 shares (in addition to creating the Series C shares), the Company did not provide notice of the EGM to shareholders who only held Series B1, B2 or B3 shares, as they were not permitted to vote on those resolutions.*
>
> *132. I understand that Mr. Zaitsev, one of the Petitioners who held Series B1 shares was not given notice, because one of the purposes of the meeting was to ratify the Company's issuance of the Series B1 shares…. All of the shares voted at the EGM were either ordinary shares or Series A or Series B preferred shares, and those voting in favour of the amendment to the articles included Mr. Steckel and Uphold Holdings, Mr. Chen (as holder of 12,979,974 ordinary shares) and Kylie Company (a holder of 3,000,000 ordinary shares and 3,333,333 Series B shares) (as per the EGM minutes annexing the forms ….).*
>
> *133. Insofar as there is any allegation that the Petitioners were wrongly not notified of the EGM held in February 2017, this is incorrect, and I would note in particular that:*
>
> *133.1 I understand that Mr. Laggner has previously claimed that Mr. Simmons did not receive notice of the EGM despite being an eligible shareholder (holding Series B series). Assuming that is true, I do not know why Mr. Simmons did not receive notice of the EGM. His name and email address (chassin@att.net) are listed at row 103 of the*

distribution list for Series B shareholders who were entitled to receive notice of the EGM.

133.2 I am not aware of any other eligible shareholders who were entitled to receive notice of the EGM not receiving such notice. In any event, I understand that under Article 20.2 of the Company's Articles of Association in force at that time provided that the accidental omission to give notice of a general meeting of the Company to any person so entitled did not invalidate the proceedings at that general meeting ……

133.3 The notice of the EGM was emailed to eligible shareholders on 17 February 2017, five clear days before the date of the EGM in accordance with Article 20.1 of the Company's Articles of Association in force at that time…… That notice made clear that the purpose of this was to permit the issuance of new classes of shares. By way of example, the email from the Company to a shareholder on a BCC basis notifying them of the EGM is at (JPT1 / page 1399). This is a pro forma email which, to the best of my information and belief, was sent to all shareholders by the Company; and

133.4 I am not aware of any intention on the part of the Company to not send this information to any shareholder.

134 Ultimately, a majority of the shareholders who voted at the EGM approved the amendment to the Company's Articles of Association and retrospectively approved the creation and issuance of the Series B1, B2 and B3 shares, and the creation of the Series C shares (as per the minutes at JPT1 / pages 1327-1339).

…….

137 In paragraph 52(3) of their Points of Claim, the Petitioners allege that Caroline Turner was not a member of the Company. This is incorrect, and the Company's Register of Members/Capitalisation Table shows her as being the owner of 1,000 Series B shares…. I believe she invested in the Company via the Crowdcube investment referred to in paragraph 15.3 above, along with 138 other investors, as per the document at JPT1 / page 1411. On 23 February 2017, Ms. Turner emailed Mr. Brooke a copy of her signed proxy form for the EGM (a copy of that email is at JPT1 / page 1413.

138 A majority of shareholders who voted at the EGM (including Ms. Turner) approved the amendment to the Articles of Association in February 2017, which retrospectively approved the creation and issuance of the Series B1, B2 and B3 shares and the creation of the Series C shares. A copy of the EGM minutes is at JPT1 / pages 1327-1339. These amendments were supported by a majority of shareholders (not including the Series B1, B2 and Series B3 shareholders) in

> *accordance with the Company's Articles of Association. No Series B2 shares were subscribed for by Mr. Steckel or Uphold Holdings, and Uphold Holdings did not receive its Series B3 shares until 31 December 2018."*

149. The EGM minutes record that the EGM was held as a meeting at Maples' offices in George Town on 23 February 2017 at 1pm. They were signed by Mr Brooke in his capacity as chairman and secretary but he did not date his signatures. The minutes record that those who were present were Mr Brooke and "*shareholders by proxy – see Schedule*." In the Schedule and annexed to the minutes were copies of proxy forms given and signed by Mr Steckel in respect of ordinary shares, and Series A and Series B shares (dated 21 February 2017); given by Kylie Company Limited and signed by Mr Steckel in respect of ordinary shares and Series B shares (also dated 21 February 2017); given by Uphold Holdings and signed by Mr Steckel in respect of ordinary shares (also dated 21 February 2017) and given and signed by Caroline Turner and dated 23 February 2017 but which did not identify any shares held by her. The minutes record that notice had been given to "*all the members of record (the Members)*" and that *"those Members present constituted a quorum for the purpose of Article 21.1 of the Articles*" and accordingly the Chairman "*declared the Meeting duly constituted*." The minutes record that the meeting had been convened to consider the three resolutions set out in the circular to shareholders dated 17 February (the Notice):

    (a). the first resolution related to the increase in the Company's authorised share capital from US$51,166 divided into 500,000,000 ordinary shares of US$0.0001 each, 500,000,000 series A preferred shares of US$0.0001 each and 6,666,666 series B preferred shares of US$0.0001 each) into US$75,219 comprising seven classes of shares: (i) US$50,000 divided into 500,000,000 ordinary shares of a par value of US$0.0001 each; (ii) US$500 divided into 5,000,000 series A preferred shares of a par value of US$0.0001 each: (iii) US$666 divided into 6,666,666 series B preferred shares of a par value of US$0.0001 each; (iv) US$393 divided into 3,936,561 series B1 preferred shares of a par value of US$0.0001 each; (v) US$304 divided into 3,049,807 series B2 preferred shares of a par value of US$0.0001 each; (vi) US3,356 divided into 33,564,477 series B3 preferred shares of a par value of US$0.0001 each and (vii) US$20,000 divided into 200,000,000 series C preferred shares of a par value

of US$0.0001 each, each having the rights set out in the amended and restated memorandum and articles of association.

(b). resolution 2 was to change the Company's name to Uphold Limited.

(c). resolution 3 was to approve the amended and restated memorandum and articles of association.

150. The minutes recorded that "*on a poll of those present in person or by proxy called by the chairman it was declared that 100% of the shares held by the shareholders present in person or by proxy were voted*" in favour of the three resolutions.

151. As the extract from Thieriot-WS shows, Mr Thieriot's evidence was that Ms Turner was registered as a member and a holder of 1,000 Series B shares.

The amendment of the Chen Participation Agreement and the RCA – the Third Amendment to the RCA

152. The Chen Participation Agreement was amended on 11 May 2017. Chen Holdings agreed to increase its funding of the RCA Loan up to US$5 million in exchange for a 33% participating interest in the Warrant shares. Uphold Holdings was required to pledge all of its Warrant shares and grant various other rights to Chen Holdings. The effect of the Chen Participation Agreement as amended together with the B2 Preferred Financing was to reduce Uphold Holding's percentage shareholding.

153. Also in May 2017 the Third Amendment was made to the RCA. The Company said that this amendment was made to reflect the effect of the Chen Participation Agreement and to allow the Company to elect to pay interest accruing under the loan after 1 March 2017 by issuing new ordinary shares as payment-in-kind (PIK) based on a company valuation of US$48 million. Under the Third Amendment, in addition to the PIK interest provision, the Warrant share number was set at 64,066,997, an increase from the 61,250,155 provided for in the July 2016 clarifying amendments to the loan documents.

154. Paragraph 2 of the Third Amendment reads as follows (my underlining):

> "*Interest and Fees. Section 1.2 Interest and Fees, (a) Interest, of the Loan Facility Documents, shall be amended on and from the date of this Third Amendment to read as follows:*
>
> *Subject to the application of the Default Rate (as defined below), all Advances made hereunder shall bear interest at a rate equal to two percent (2%) per month (the "Interest Rate"), provided however that, in respect of interest which accrues or has accrued under this Agreement on or after March 1, 2017, Borrower may elect to pay such interest by way of payment-in-kind ("PIK") Interest by way of the issuance in favour of the Lender (or any sub-participant nominated by the Lender) of new ordinary shares in Borrower, based on a company valuation of the Borrower of $48,000,000. If Borrower elects to pay PIK Interest on any date on which interest is payable under this Agreement, it shall notify Lender accordingly, then the applicable interest rate for such PIK Interest shall be two-point five percent (2.5%) per month, and the number of shares in Borrower to be issued will be calculated accordingly, taking into account the valuation described above. If the Borrower elects to pay PIK Interest, such PIK Interest will be due at the end of each calendar quarter, subject to prorations for any partial calendar quarter, and will be calculated on the basis of the actual number of days elapsed in a 360-day year. The Borrower is deemed to have notified Lender of its election to pay PIK Interest for the interest period commencing on March 1, 2017. The Borrower agrees to pay cash interest (and, if it has elected PIK Interest, to deliver the requisite number of shares in the Borrower) directly to the Participant (as defined below) in respect of Advances which have been funded by the Participant.*"

155. There is a dispute as to whether the board ever approved the Company's agreement to the Third Amendment and whether the directors ever properly considered whether it was in the Company's interest and reasonable to agree that the basis for converting interest into shares (thereby fixing the quantum of shares to be issued in return for the discharge of the Company's obligation to pay interest) would be (a) by reference to a valuation of US$48 million and (b) fixed at that figure without the right for the Company to require an adjustment over time to reflect changes in the Company's financial position.

156. As regards the first issue, no board minutes were prepared confirming that a board meeting had been held to consider the Third Amendment and recording the board's deliberations and decision making. However, the evidence of Mr Steckel and Mr Thieriot was that a meeting had taken place.

157. During Mr Steckel's cross-examination (Day 6 – pages 209-211) the following exchange took place with Mr Valentin (there is a reference to a report and advice subsequently prepared and dated 7 September 2021 by Kleinbard LLC, the legal advisers to the Litigation Committee of the board, which I discuss below; Kleinbard were appointed to advise on various matters including whether board approval had been obtained for the Third Amendment) (my underlining and emphasis):

> *"A. Again, I go back. This was a matter - this was a time period of great stress. Again, I go back. I had to put up two-thirds of my stock in guarantee to Mr Chen. And if there was a default on that $2.5 million, he became the owner of that for no consideration.*
>
> *Q. But none of that justifies, does it, not having a board approval of a transaction that involves - (overspeaking) –*
>
> *A. It was approved by then –*
>
> *Q. This transaction involves, doesn't it, Mr Steckel, the company agreeing with you, your entity, to pay the loan interest in shares, on the basis of a valuation at that time that has resulted in the enormous numbers of shares that you, through your company, and Mr Chen have received? It doesn't justify that transaction or that outcome that it was a time of great stress, which is the point you just made.*
>
> *A. What I'm telling you, Mr Valentin, is that it was approved by the board. That's my best memory of that……*
>
> *Q. When was it approved by the board?*
>
> *A. I don't know. In May of 2017. It was in that time period.*
>
> *Q. There's no evidence of that, and you have said to Kleinbard in 2021 there likely is no evidence of that.*
>
> *A. I don't remember that. I'm sorry. I just –*
>
> *Q. We just saw it. It's at the top of that page [Mr Valentin had referred Mr Steckel to and quoted from a page in the Kleinbard report].*
>
> *A. I don't remember saying that to them.* ***And I don't remember that period. So I just - I believe that there was a board meeting. We wouldn't do stuff without a board meeting****.*

Q. *At the time, in 2021, when it was being investigated, you say - you acknowledge that: "... no such written approvals likely exist [...] ('Most probably, the board minutes do not reflect the agreements but that is function of change ...'). " So are you saying that there was a board meeting but there's no minute of it?*

A. *That's what I suppose, yes."*

158. During Mr Thieriot's cross-examination by Mr Valentin, the following exchange took place (my underlining) (Day 8 – pages 57-59) (my underlining and emphasis):

"*Q.* *Now, can we just look at what Mr Steckel says in his witness statement about this in paragraph 188 of Steckel 1. He's dealing here with all of the amendments, so all five amendments to the RCA together. And at the top of the page he says: "... [they] were negotiated between Holdings ... and the Company on an arm's length basis between commercially-minded parties." Does that sound right to you? Mr Steckel is the owner of Holdings and he's also the chief executive and chairman of the company at this stage?*

A. *My assumption is that in anything having to do with Holdings, he is taking the - his commercial interest in Holdings as the state of mind and that contra to that in that instance it would logically have been Lee Westerfield or myself, etc.*

Q. *Someone independent looking at it, you would expect to find, in order for there to be capable of being an arm's length negotiation. Then he says he did not exercise any powers in his capacity as a minority shareholder or single member of the board. And he recused himself from any board meeting in relation to these amendments. But of course, what we know in relation to the third amendment is that there isn't any evidence of a board meeting having taken place, and you don't recall one?*

A. *No, but it would sort of - it wouldn't be the Occam's razor supposition to assume that we didn't have a board meeting.* ***There's unfortunately no written record of it, but it is most likely what happened****.*

Q. *Then he says: "I took ...Holdings was entitled to act in its own commercial interests ... I was ... entitled to represent Holdings' interests. In entering into these amendments, the Company acted by a majority of its Board ... with the support of the company's general counsel, Mr Brooke. I took no part in my capacity as a director ... given my interest in Holdings ..." Then he says he wasn't able to exert control. Whether or not that's right would depend on whether there was a board meeting, wouldn't it?*

A. *The thing I was going to add - …… **If I signed the third amendment, and I did, I would never have done that outside of the context of a board meeting. There's no situation in which I would have taken it upon myself to sign - there's no written consents, therefore there was a board meeting if I signed that. And, unfortunately, the gap in the minutes is because of a period in time between having a permanent, as supposed to acting, GC at the company**."*

159. In re-examination Mr Thieriot was taken to an email invitation to a conference call with the subject line "*BOD call to discuss/review/approve additional Chen loan participation on Thursday March 09, 2017*" where the covering email from Mr Brooke to the board said that *"…the primary issue for Uphold Ltd. is PIK interest: - at this point, we've settled on 2.5% PIK which would convert to ordinary shares at a $48m valuation*."

160. During his cross-examination by Mr Valentin, Mr Milby was asked whether he recalled being involved in the board's consideration and approval of the Third Amendment. He said this (Day 7, pages 167- 168) (my underlining) (I note that Mr Milby's evidence on this issue was not dealt with in re-examination by Mr Chapman and that Ms Stanley did not put any questions to Mr Milby):

"Q. Now, you don't deal in your witness evidence with the various amendments that were made to the revolving credit agreement, do you?

A. No.

Q. Are you aware that there's an issue in this case about the Third Amendment? Perhaps you would have heard me asking questions about it?

A. Yes.

Q. Did you have any involvement in the approval of the Third Amendment?

A. I don't believe so.

……

Q. Mr Milby, before the break, I was just asking you about the amendments to the RCA, and you said you didn't recall any involvement in the third

amendment. You don't, therefore, recall a board meeting being held in relation to that issue?

A. *No, I don't."*

161. Mr Steckel's oral evidence regarding the justification for the Company agreeing to have the option of paying PIK interest and to use the US$48 million valuation as the benchmark for calculating how many ordinary shares had to be issued to pay the interest, and also how the decision was made whether and when to pay PIK interest rather than pay in cash was as follows (Day 6 – pages 211-215) was as follows (my underlining):

Q. *Kleinbard continue in their findings ......: "The Third Amendment set the conditions moving forward ... for the Company being permitted to pay ordinary shares in lieu of cash ... no detail is provided in the Third Amendment regarding how the Company was supposed to exercise its option to settle PIK interest ... or who was to make that decision on the Company's behalf." You were chief executive officer of the company at this time?*

A. *Yes. I certainly never interfered with Lee, wanting to - at one point, Lee Westerfield, as CFO, was going to pay in cash, and then he decided he couldn't pay in cash because we didn't have the money. We had no liquidity.*

Q. *"... when issuing these PIK shares, the number of shares awarded was to be calculated using a valuation ... fixed at $48 million. However, no detail was provided in the Third Amendment regarding the basis of the ... valuation at the time of the ... Amendment or ... the circumstances that would necessitate a revision to that valuation. According to email correspondence from 9 May 2018, the $48 million [there is no email trail] valuation 'ended up in the legal documents' through 'lawyer to lawyer' discussions, so there [was] no 'email trail regarding $0.36 per share or the calculation of the number of shares.' [...] "... six months after [it] was executed, in November 2017, the Board unanimously approved the issuance of warrants to a company called Synthetic ... doing so, the Board used a pre-money valuation of ... $75 million, or 50% more than the valuation set forth in the Third Amendment. There was no discussion in the approval of the grant of warrants to Synthetic ... [of] the impact on the updated pre-money valuation on the ... terms of the [RCA]. It ... does not appear that equity investors in the Company were ever informed about the Third Amendment ...being used ..." And you can see that Mr Kearns, one of the petitioners, wrote in May 2017: "... The last [shareholder] call was very unprofessional given that the company was in deep financial trouble and was bailed out by inside shareholders and board members without any*

prior notification to shareholders.' ... In addition, in October 2017, another shareholder [called] George Karahalios specifically challenged the PIK interest terms as being paid at 'a very depressed valuation'." .... And then: "In 2018, the Company approved the Fourth Amendment ..." Which makes the changes. There was a board meeting for that. You recused yourself. No documents indicate that the board was advised of the PIK interest calculation concerns raised following the adoption of the third amendment. No adjustment to the calculations. Then you can see who was involved in that. The report goes on at significant length and in considerable detail to identify why the lawyers who have investigated this transaction consider that there are a number of things that are fundamentally wrong with it. Do you agree with their conclusions, or disagree?

A. *I do not agree with their conclusion. I think that the valuation was something that was forced on [the Company] by Mr Chen. The Litigation Committee investigated this. They found that to be true, and we were going to go under. And we had a liquidity problem and that - and if this was something that I was in control of, I would not have put up two-thirds of my stock in guarantee. Now, having done that deal with the company, that deal is a deal.*

Q. *Now, the decision by the company to enter into the third amendment was made by you, because there was no board discussion of it?*

A. *There was -- I acquiesced to it and did it because we needed the money. We were beggars.*

Q. *And the decision to do it at a $48 million valuation was made by you at Mr Chen's suggestion?*

A. *No.*

Q. *Which you just agreed?*

A. *He was the one that wanted that price...... He wanted the PIK interest payable in shares. That was not part of the structure that I had - I had come up with.*

Q. *You reluctantly went along with it? You were reluctant to be taking shares, rather than cash? Were you reluctant with this arrangement?*

A. *Yes, absolutely. This was not something - if things worked out – (overspeaking) –*

Q. *It worked out pretty well, didn't it?*

A. *<u>It's great to be a Monday morning quarterback and revisionist history and look at things after the fact. The fact was, is we were going under</u>.*

162. Mr Thieriot summarised his recollection and evidence on the decision to adopt the US$48 million valuation and the consequences of doing so in Thieriot-2 at [20.3]-[20.4], which I discuss and quote from below.

163. In his oral evidence regarding the decision-making process relating to the decision to use of the US$48 million valuation figure, Mr Thieriot confirmed that Mr Westerfield, as a director and CFO, was independent and playing an important role including in relation to the decision as to whether and when to pay PIK interest (Mr Thieriot had, as I have already noted, previously given evidence that he believed that he had signed the relevant Third Amendment documentation after having obtained full board approval) although Mr Fontg (the legal adviser to Mr Steckel and Uphold Holdings) was assisting the Company (in the absence of Mr Brooke) and the record of discussions involving the directors was limited. Mr Thieriot said that he thought that US$48 million represented a proper valuation at the time and therefore was fair but he accepted that it would have been preferable for a clause to be inserted which stipulated that the US$48 million valuation would be revisited and adjusted over time. It seems to me to be implicit in what he said that the benefits of including such an adjustment mechanism did not occur to him at the time. The following exchange took place during Mr Thieriot's cross-examination by Mr Valentin (Day 8 – pages 45-50) (my underlining and emphasis):

Q. *[Referring to the Kleinbard report] Can we look at the top of next page. What it says here is that: "The Board members at the time of the execution of the Third Amendment were ..." Mr Steckel and you, Mr Westerfield, Mr Watson, Mr Dennings and Mr Milby. Mr Dennings ... was identified in certain records as a director, but other documentation indicates that he attended Board meetings as an invited officer ..." He wasn't a director, I think?*

A. *No, he wasn't.*

Q. ***<u>Mr Milby was described by the then chief financial officer Mr Westfield as the only 'independent' director at the time of the Third Amendment ... it appears that Westerfield attempted to work with Milby on behalf of the</u>***

Company in negotiating the terms for the PIK interest in the Third Amendment with Steckel ... However, as with many other matters involving the Company, it appears as though the discussions between Westerfield and Milby happened via conference call without any written record ... it does not appear as though Milby was emailed or copied on any drafts of, or discussions about, the Third Amendment. Do you have any knowledge of that at all?

A. ***I don't***.

Q. ***And then there's a reference to the available documents, including no evidence that an independent person with authority acted on the company's behalf.*** *Mr Fontg worked on drafting, revising and finalising the amendment on behalf of the company. Is that your recollection, that Mr Fontg was involved at this stage in drafting company documents?*

A. *I think Mr Fontg filled a time lapse between Mr Brooke and Mr Sherwin.*

Q. *Then there's a reference to the fact that he was – he had been Mr Steckel's attorney for the purposes of drafting the original RCA. Do you remember that?*

A. *Yes.*

Q. *Then you signed the Third Amendment on behalf of the company as a director, but there isn't any evidence that you specifically approved the aggressive loan term, I suppose, beyond you signing them; is that fair?* ***Are you aware of any knowledge that you considered whether the terms were fair at the time and said: I have thought about this, this looks fair to me***?

A. ***Well, I think that was the valuation of the company at the time. So yes***.

Q. *The point really is that there wasn't any provision that enabled the valuation to be varied. That's the point you were really aggrieved by, if I can put it that way?*

A. *Yes.*

Q. *And then you can see down the page: "... in contrast to the records regarding the [RCA] in June ... there is no ... record of [Mr] Steckel having recused himself from voting on the Third Amendment. Indeed,* ***there were no known Board minutes from January 2017 [to] September 2017, when the Board met and was advised by legal counsel that 'the Company has historically failed to properly document minutes from prior Board meetings.' Detailed Board approvals are available for the First, Second,***

***Fourth and Fifth Amendments ... [none for the Third] ... [Mr] Steckel has acknowledged that no such written approvals likely exist.*" *There's nothing in there that you, sitting here now, would disagree with*?**

A. ***No*.**

Q. *The next paragraph, the point is made that the amendment set the conditions moving forward as of March for the company being permitted to pay shares in lieu of cash interest payments due. However, there's no detail in the third amendment regarding how the company was supposed to exercise its option to settle PIK interest in shares or who was to make that decision on the company's behalf. Who did make the decision on the company's behalf that the interest should be paid in kind rather than in cash?*

A. *I mean, ultimately, that would be a determination of the CFO primarily and our cash position at the time.*

Q. *With Mr Steckel's knowledge, you would expect?*

A. *Yes.*

JUSTICE SEGAL: *Would that have been confirmed by a board discussion or decision?*

A. *Are we referring to the Third Amendment?*

JUSTICE SEGAL: *No, you're saying the decision as to whether to pay in cash or to pay in kind, which you say would have been taken in practice by the CFO.*

A. ***Yes, that's a very good question. I don't know if that rises to the level of a board decision. I imagine it does. But it was a strong recommendation from the CFO, who would have present the cash position of the company*.**

Q. *And then you can see a reference to different valuations of the company going forward. So a change from the 48 million, if that was the right valuation in May, to another reference point, $75 million, the Synthetic Liquidity. Do you remember there being – at the time there being a sort of increase in the value of the company?*

A. *Yes. I don't know if it's worth pointing out, but the company today, as you've, I think, heard repeatedly, is in very good shape. It did a $100 million quarter. Tremendous growth. And yet, today, being a much more mature company than it was at that stage, a price per share could be anywhere from a 409A valuation to what a secondary site is listing a share*

for. And to give you an idea of that range today, it's anywhere from $1.59 to $7. And it's very hard - start-ups are more art than science in general. ***But with respect to valuation, you know, again, could one go back in time, I wish we had stuck in a sentence to suggest that this was not a fixed permanent valuation. But in the absence of that sentence, it is, unfortunately, a position that can be taken****.*

164. There are various references in Mr Steckel and Mr Thieriot's evidence that Mr Brooke's involvement in the process of negotiating and drafting the Third Amendment was limited. This, it appears, was because he had delivered his resignation letter in April 2017 before his employment was formally terminated in June 2017. He had started working for a competitor (AirTM) by at least March 2017. The Third Amendment was signed in May 2017. Mr Mark Anderson, by then the Company's General Counsel, said in an email dated 2 September 2021 to Ms Moran of Maples that he doubted that Mr Brooke was actually functionally representing the Company as General Counsel at the time of the amendment. He said that this timing went some way in explaining why Mr Fontg was seemingly representing both Mr Steckel and the Company concurrently at the time. Mr Anderson said that "*As [Mr Steckel] was CEO and the disinterested members of the Board were not formally involved, it seems that Lee Westerfield as CFO who reported to [Mr Steckel] was the only one looking out for the company's interests at the time, and he may have simply been overruled*."

165. Mr Thieriot was asked by Mr Valentin about Mr Anderson's email of 2 September 2021 and asked further questions about Mr Westerfield's role and his concerns having been overruled. He said this in his cross-examination (Day 8 – pages 60-64) (my underlining):

> *"Q. [On 3 September 2012 Ms Mary Beth Gray of Kleinbard sent an email to Ms Moran at Maples and said] "Overall, our response to this is not that we dispute your approach to the facts, but using [Mr Anderson's email of 2 September 2021 as an example], the current board's concern is that the overall impact of the Third (and Fourth) Amendments was materially adverse to the shareholders, and there is no written order (other than what you've described below) supporting an independent and objective review of the documents ... In particular, the only person who seems to have voiced concerns ([Mr] Westerfield) was repeatedly overruled (by his direct superior, who was the beneficiary of the agreements)." So Mr Westerfield there was the CFO, wasn't he, at the time of the third amendment?*

A. Yes.

Q. And he was the individual who would have, I think you said a few minutes ago, been involved in the issue of whether or not the company should elect to pay interest in kind rather than in cash. That was him, wasn't it?

A. Yes.

Q. …….. capturing this point that I put to you a few minutes ago, I think, that whether or not something can now be done about it because of the Fourth Amendment, the position and the [current] board's concern [as expressed by Ms Mary Beth Gray] is that the overall effect has been materially adverse to shareholders, including you as a shareholder?

A. Yes.

Q. And they're right about that?

A. Yes. I mean - yes. Just in terms of the - again, the quantum of pain, in this case it's presumably the delta between - it's the 13 million shares, right? But there's a further argument, right, which says that - and this is why I think it goes beyond [what was] Mr Westerfield's role, what did he do on that day. There's a general theme between Mr Steckel and myself as to, apart from management issues and a bunch of other realms of argument -- around how constructive it is to clip every ticket that comes by and be constantly aggressive. Always, in my view, very proper, very documented, very legally thought out, but also maybe anathema to, again, the sort of art versus science of a start-up. Do we really need to push everything right to the hilt? And you can make the argument: well, if it hadn't been my money on that day, the company wouldn't have been around the next day. Very true. But then the toll you exact for it, you know, that's a grey area, and there are philosophies, and ours were always very, very far apart.

Q. You and Mr Steckel?

A. Yes. And so it might be Mr Westerfield in this letter, but it would have been a theme in our relationship dating back to the first Steckel investment. Was the company saved? Yes, it was. Was the price very, very high? Yes, it was. In this instance, could we have paid in cash instead of running up this horrible tab? Unfortunately, not. It was in a period where we didn't have an abundance of cash. Was the toll very high? Yes, it was. Did we have an alternative? No. Would I have pushed for that alternative as hard as possible? Yes.

Q. *But Mr Steckel had an alternative, didn't he, because he could have said in May 2017 in respect of the payment of interest in cash: let me have a word with Mr Chen?*

A. *I think you mean in 2021.*

Q. *Well, in 2021 perhaps as well.*

A. *His argument in 2017 would have been: I have had to put myself at risk. You know I've rolled the dice, I've, you know, I have made myself vulnerable, uncomfortable, no rosy outcome in the future is going to have changed that reality at that moment. That's the argument.*

Q. *And the question really then is whether the price exacted for that, looked at over time, and you have to look at it now where we stand, looking backwards, because that's where we are, has been fair to shareholders or not. And your argument, I think, is it hasn't been?*

A. *That is my view. But, unfortunately, I think there is also another valid - equally valid opinion, different view of life, but legal, and not limited to Mr Steckel and Mr Chen. It is a way of conducting business.*

Q. *Are you aware of any negotiation between Mr Steckel and Mr Chen at the point that this transaction was executed in May 2017? Could we do it some different way?*

A. *Well, back then, I don't think there was anything wrong with the nature of 48 million at that point and giving the optionality to the company to not default, which we would have, because we didn't have the cash. At that point, there's nothing inherently wrong with that. It's just, with the progression of time and, you know, ironically, the success of the company, it becomes a worse and worse trade that was made.”*

The Fourth Amendment to the RCA

166. The RCA Loan was due to mature and to be paid in full on 29 June 2018. Mr Thieriot explained at Thieriot-WS1 at [104.2] that the Company was under a legal obligation to pay the sums due under the RCA and was not in a position to repay these amounts in cash, and so was at risk of defaulting on the RCA Loan. To avoid this a further amendment (the Fourth Amendment) to the RCA was agreed and signed on 29 June 2018. This provided for an extension of the maturity date of the RCA Loan to 31 December 2018 and that in return the Company would issue Series B3 preferred shares and Series C preferred shares as a fee for

that extension (the amended section 1.2(a) of the RCA which incorporated the Company's obligation to issue these shares was headed "*Fees and Interest*"). The Company agreed to issue on the first business day after 30 June 2018 (a) to Uphold Holdings 14,092,379 Series B3 preferred shares (each a Series B3 Share) (and in the event that any Series B3 Shares are not available for issuance, then an equivalent number of Series C preferred shares in Borrower (each a Series C Share) in lieu of the Series B3 Shares) and (b) to Chen International Holdings Limited 5,836,589 Series B3 Shares (and in the event that any Series B3 Shares are not available for issuance, then an equivalent number of Series C Shares in lieu of the Series B3 Shares). The Fourth Amendment once again incorporated and used the fixed US$48 million valuation for the purpose of determining the amount of PIK interest shares that the Company would need to provide if it elected to pay interest in kind rather than in cash. The Fourth Amendment provided that "*in respect of interest which accrues or has accrued under this Agreement after June 30, 2018, Borrower may elect to pay such interest by way of payment-in-kind interest ("PIK Interest") by way of the issuance in favor of the Lender (and Participant, as applicable) of Series B3 Shares (and in the event that any Series B3 Shares are not available for issuance, then an equivalent number of Series C Shares in lieu of the Series B3 Shares), in either event based on a company valuation of Borrower of US$48,000,000, on a pre-money fully diluted basis*."

167. The Fourth Amendment was approved by the directors signing a document titled a "*Written Consent in Lieu of a Meeting*" dated 28 June 2018 to be signed by all the directors (a copy of Mr Milby's signature page was in the evidence). This document stated as follows (my underlining):

> *"WHEREAS, on or about June 30, 2016, the Company and Uphold Holdings, LLC, a Delaware limited liability company ("Holdings"), entered into that certain Revolving Credit Agreement, as amended (the "Credit Agreement") whereby Holdings advanced $10,000,000 to the Company as documented by that certain Promissory Note (the "Promissory Note") <u>with all principal and unpaid and accrued interest due and payable in full on June 29, 2018 (the "Maturity Date</u>"); and*
> *WHEREAS, <u>the Company has, at the direction of the Board of Directors, explored various financing options to fund the operations of the Company and to repay its outstanding indebtedness</u>; and*
>
> *WHEREAS, <u>Lee Westerfield, the Chief Financial Officer of the Company, has</u>*

advised the Board of Directors of the various financing alternatives sought by the Company and that the Company believes, in consultation with the Board of Directors, that the terms of any contemplated financing either would not be on better terms that the amendment of the Credit Agreement and the Promissory Note or could not be expected to close prior to the Maturity Date; and

WHEREAS, the Company, Holdings and Chen International Holdings Limited ("Chen International"), as a participant under that certain Participation Agreement entered into by and between Holdings and Chen International, dated on or about December 2016, as amended by the First Amendment to Participation Agreement dated as of May 11, 2017, desire to amend the Credit Agreement and Promissory Note to extend the Maturity Date to December 31, 2018 and to incorporate certain additional terms and conditions as agreed to by the parties thereto, including the provision that the Company be required to use unrestricted cash in excess of $5,000,000 to repay borrowings under the Promissory Note; and WHEREAS, two (2) certain Directors, Adrian Steckel, the sole owner of Holdings, and Dan Schatt, as designee of Chen International, are recusing themselves from consideration of the amendments to the Credit Agreement as set forth in the Fourth Amendment to Revolving Credit Agreement and the First Amendment to Revolving Line of Credit Promissory Note; and

WHEREAS, after due consideration, the Board of Directors (other than those recusing themselves) deem the Fourth Amendment to Revolving Credit Agreement, substantially in the form of Exhibit A hereto, and First Amendment to Revolving Line of Credit Promissory Note, substantially in the form of Exhibit B hereto, to be in the best interest of the Company.

NOW, THEREFORE, BE IT RESOLVED, that the Board of Directors of the Company, excluding those two (2) certain Directors who have recused themselves from this consideration, do hereby approve the amendments to the Credit Agreement as set forth in the Fourth Amendment to Revolving Credit Agreement and the First Amendment to Revolving Line of Credit Promissory Note, including, without limitation, extending the Maturity Date to December 31, 2018; and be it further

RESOLVED, that Leland Westerfield, or either of them, are each further authorized and directed on behalf of the Company, at any time and from time-to-time hereafter and without further action by or authority or direction from the Board of Directors, to execute, deliver and perform, or cause the execution, delivery and performance, of the Fourth Amendment to Revolving Credit Agreement and the First Amendment to Revolving Line of Credit Promissory Note, and to do so or cause to be done all such other and further acts and things which said officers in their reasonable discretion may determine to be necessary or advisable in order to consummate the transactions contemplated by the Fourth Amendment to Revolving Credit Agreement and the First Amendment to Revolving Line of Credit Promissory Note, and to undertake and carry out the duties and obligations of the Company under the above described agreements, and to effectuate the purposes of the foregoing resolutions, and

that the execution by Leland Westerfield of any such contract, agreement, amendment, assignment, statement, instrument, certificate or document or the doing of any such act or things shall, in the absence of fraud, bad faith or collusion, conclusively establish such officer's authority
therefor from the Company and the approval and ratification by the Board of Directors of the Company of the documents so executed and the action so taken.

168. In Thieriot-2 Mr Thieriot discussed the approval of the Third Amendment and the Fourth Amendment, the inclusion and use of the US$48 million valuation in both and the consequences of doing so. He said that he was "*quite shocked*" when he appreciated the extent to which Mr Steckel and Mr Chen had benefitted by the continued and unadjusted use of that valuation (which equated to a conversion price of US$0.36 per share when calculating the amount of shares to be issued in paying interest). He noted that if a conversion price of US$1.13 had instead been used in financings in 2018 then Mr Steckel and Mr Chen would have received approximately 13 million fewer PIK shares. He said that he had raised his concerns with others including Mr Steckel who had refused to agree to a change in the valuation figure and methodology. Mr Thieriot considered that the issue had however been resolved as result of the decisions taken by and the legal advice given to the board's Litigation Committee. In fact, as I explain below, the valuation methodology was eventually adjusted to US$1.13 per share pursuant to the Fifth Amendment to the RCA dated 3 December 2018.

169. Mr Thieriot's evidence on this issue in Thieriot-2 is as follows:

"*20.3 I had been concerned that Mr. Steckel and Mr. Chen had enriched themselves by insisting upon the Company using an outdated share price to calculate the number of shares to be issued as payment in kind for the repayment of the interest owing under the Steckel Transaction, which resulted in their companies receiving up to 13 million excess shares in respect of the same:*

(a) The original formula for calculating the number of shares to be issued to repay the PIK interest had been initially set to the original mark-to-market rate (being paid on a fully diluted basis at a valuation of the Company at US$48 million – as per clause 2 of the Third Amendment – which at that time equated to US$0.36 per share) which was adopted for the Company's Series B3 financing round (in respect of which a 20% discount was applied for investors funding before a certain date).

(b). *I do not recall why there is no record of the Board approving the Third Amendment to the RCA in May 2017, or whether investors in the Company were informed about that amendment.*

(c). *In 2018, a price of US$1.13 per share was used for financings completed around this time, including the transactions with Hard Yaka (which I explain further below at paragraphs 32 to 38 of this witness statement). In light of that, I recall that Mr. Westerfield (the Company's CFO at the time) flagged this issue to Mr. Steckel, suggesting that the formula for calculating the shares to be issued to repay the PIK interest be updated. I recall arguing strongly against keeping the original price of US$0.36 per share in respect of the PIK interest shares, as they would mean that Uphold Holdings and Chen Holdings were effectively receiving shares as repayment of PIK interest under the Steckel Transaction based on a share price that was three times lower than the price at which the Company was offering other shares to new investors.*

(d). *I recall raising my concerns with a number of people, in particular Mr. Steckel, Mr. Westerfield, and Mr. Chen. I recall that Mr. Westerfield agreed with me that the outdated price should be updated. I recall that Mr. Chen said that he was not aware of the price issue, and that if there were excess shares that had been granted to Uphold Holdings and/or Chen Holdings, then they should be returned to the Company. However, Mr. Steckel insisted that the outdated price be maintained, and he stonewalled any efforts to update it.*

(e). *On or around 29 June 2018, I signed a written consent approving the Fourth Amendment to the RCA. The Fourth Amendment allowed the Company to issue Series B3 and Series C shares as PIK shares and effectively enshrined the outdated share price for the PIK shares.*

(f). *In 2021, Mr. Hansen (the Company's current CFO) sent Mr. Steckel and I his analysis setting out the number of PIK shares that had been issued to Uphold Holdings and Chen Holdings, and the amounts of the PIK shares that would have been issued if a price per share of US$1.13 had been applied. It was from this analysis that I had concluded that around 13 million excess PIK shares had been issued to Uphold Holdings and Chen Holdings. I recall that this was the first time that I had seen the extent to which the outdated share price had benefitted Uphold Holdings and Chen Holdings, and I was quite shocked. I had not been aware that this was the practical consequence of keeping the outdated share price when I signed the Fourth Amendment consent, and had I known at that time, I would not have signed it.*

20.4 *However, I understand that the Company engaged a law firm, Kleinbard LLC, to independently investigate, among other things, the Company's issuance of shares*

> *to repay PIK interest. I further understand that the Litigation Committee, with the benefit of legal advice, determined that the Company did not have any reasonable basis to bring any claim against Mr. Steckel or any other parties in respect of this issue."*

Mr Steckel's resignation as CEO

170. At a board meeting on 6 September 2018 Mr. Steckel advised the board that he was resigning as CEO with immediate effect. He said that he was doing so in order to take on a new role with another company and he assured the board that his new role was taken on out of necessity related to a separate business matter. Mr. Steckel proposed that Mr. Thieriot succeed him as CEO and the board subsequently approved Mr Thieriot's appointment.

The tensions between the directors

171. During his cross-examination, Mr Hilton mentioned and gave an overview of the tensions and conflicts between senior members of the Company's board and management when he first started to work for the Company in late 2020 - early 2021. He said this (Day 8 – page 150):

> "*I had done some work for the company as a consultant, I believe very late in 2020, maybe early into 2021, had joined the board in January, and became the chairman, I believe, late in April 2021. At the time, there were, to be fair, lots of bad feelings in the company. The First Petition had been filed. As Mr Thieriot said, I think there were bad feelings between Mr Thieriot and Mr Steckel. Both significant members of the board and investors of the Company. As, you know, it was clear from the statements of Mr Hansen, there were some bad feelings between the executive management of the board at that point. And I felt like there was an awful lot of work to do to make things more stable, to sort of regularise relationships among board members and improve the relationship among management and the board and improve the relationship with shareholders. It felt like there was a lot going on*."

TBOL

172. The very lengthy and complex story of the Company's involvement with TBOL can be summarised as follows. In late 2015, the Company conceived the idea of submitting an application for a UK banking licence. Obtaining such a licence was likely to be very lucrative

for the Company. Subsequently, the Company embarked on a lengthy and complicated process to obtain a licence. The Company failed (it says it was unable) to obtain a licence itself (there are disputes as to precisely what the UK banking regulators said about the role that the Company could play and the size and nature of the interest in any licenced entity that it could hold) but was able to obtain a right to 9.8% equity interest in a company that could and which was expected to obtain the licence (TBOL). TBOL came to be owned and controlled by Mr Watson, a director and employee of the Company (and also the CEO of the Company until mid-2016), with whom Mr Steckel and Mr Thieriot were close. Mr Steckel made loans to Mr Watson who repaid those loans by arranging for shares in TBOL to be granted to Mr Steckel and various discussions took place between Mr Steckel, Mr Thieriot and Mr Watson as to the equity interest in TBOL that they each might acquire. The Company also made a personal loan to Mr Watson. However, a dispute with Mr Watson arose as to whether the Company was entitled to receive the 9.8% equity interest in TBOL and Mr Watson failed to repay the loan made by the Company. The Company received legal advice and considered whether to claim 100% of the equity interest in TBOL (on the basis that TBOL was the product of the Company's corporate opportunity) but decided that doing so could jeopardise TBOL being granted a licence and therefore be wholly unproductive. Eventually, a settlement agreement, approved by the litigation committee, was entered into on 24 June 2022 which involved the majority of the 9.8% equity interest being held in escrow and to be transferred to the Company upon TBOL being granted a licence.

173. The Petitioners raised various concerns and challenges to the way in which the Company's directors had handled the whole process of seeking a banking licence and of dealing with TBOL. They claim, as I explain further below, that the Company should have obtained the full or a much higher percentage of the equity interest in TBOL and therefore of the value of the banking licence; that Mr Watson, Mr Steckel and Mr Thieriot had clear and serious conflicts of interest which were not properly disclosed or managed and which resulted in the Company failing to realise the fair and proper value of its plan (an asset) to obtain a UK banking licence (and instead allowing the Company's corporate opportunity to be exploited by Mr Watson and Mr Steckel) and that the ultimate settlement with Mr Watson and TBOL was also inadequate.

174. The process for seeking a UK banking licence was complicated because there were doubts as to whether the Company would be permitted (a) to hold a UK banking licence directly and (b) have more than a 10% equity interest in the entity which did hold such a licence. Ultimately, the Company accepted that it could have no more than a 10% interest and so another vehicle had to be found which would be granted the licence and in which the Company and others would take an interest. Complications also arose because the process was to be led by Mr Watson, who was at the time still a director and who had almost all the relevant expertise, experience and contacts needed to obtain a licence, but who was also and was increasingly concerned about his own separate interests as a manager and investor in the vehicle which would hold the licence.

175. The history was explained clearly although at some length by Mr Hilton in Hilton-WS1. While what follows is a lengthy extract, quoting it provides in my view the best way to set out the basic facts (Mr Hilton in my view, while setting out an account from the Company's perspective, provides a balanced and comprehensive overview of developments) (my underlining):

> "*111. Mr. Watson, who was then the Company's CEO, was tasked with leading this effort, and he continued to do so after he was replaced as CEO of the Company by Mr. Steckel in August...... The Company understood this process to be slow and arduous, involving a considerable number of meetings with regulators (in particular the Prudential Regulatory Authority (**PRA**) of the Bank of England, and the UK Financial Conduct Authority (**FCA**)), adopting feedback from those meetings in applications to regulators for approval, and further meetings to discuss and amend those application papers ......*
>
> *112. The Company's original plan was to acquire another company, MSBB Money Limited, (**MSBB**) which had represented itself to the Company as being well-advanced on this process, having already had an application pending in the UK. Therefore, I understand that it made sense for the Company to capitalize upon the work that MSBB had done, rather than starting from scratch itself. In late December 2015, Mr. Thieriot met with Marcelo Sacomori (the owner of MSBB) to discuss this plan.*
>
> *113 The Company had initially investigated the process, costs and timings of submitting its own application for a small speciality bank license, rather than through MSBB. As is made clear in that email, I believe that was done for two*

reasons – to explore the possibility of securing a license for the Company, and to also use it as leverage in negotiating a deal with MSBB.

114. *On 13 April 2016, the Company and MSBB signed a Memorandum of Understanding which set out the general terms and conditions of a proposed acquisition of MSBB by the Company. It included provisions which provided for the purchase price for MSBB to be paid by the Company at various milestones, including $500,000 upon MSBB's filing with the FCA/PRA once the FCA submitted to MSBB an "invitation to file" its application for a banking license. The Company had previously considered acquiring the whole Choice Group of companies (of which MSBB was a part) …... I do not know the reason why that acquisition did not go ahead, but I presume that was considered to be unnecessary for the purposes of obtaining MSBB in order to obtain the UK banking license, given that it was MSBB which was the prospective applicant.*

115. *On 17 May 2016, the Company acquired the right to purchase MSBB to accelerate this process, entering into a Stock Purchase Agreement (**MSBB SPA**) with Hotwire Holdings Ltd (the holding company for MSBB) and Mr. Takamori, the sole owner of Hotwire Holdings Limited. There were two amendments to the MSBB SPA – the first dated 16 May and the second dated 30 June 2017. I understand from those documents that the purpose of those amendments to the MSBB SPA was to extend it to allow for the potential acquisition of MSBB by the Company. However, the Company did not ultimately acquire MSBB.*

116. *On 8 August 2016, Mr. Watson was replaced by Mr. Steckel as CEO of the Company. On that same date, the Company and Mr. Watson entered into an employment agreement, effective 1 September 2016, which noted that as of 31 August 2016 Mr. Watson stepped down as President and CEO of the Company "by mutual consent and further the parties agree Watson is to transition to a new role for and on behalf of the Company as detailed herein." In addition, that agreement further provided that the Company would transfer its whole interest in MSBB into a new entity, Uphold Group PLC (which would ultimately become TBOL), in exchange for 95% share ownership of Uphold Group PLC, which was the only consideration offered to the Company (Recital 5). In addition to being a Director, Chairman and CEO of Uphold Group PLC, it provided that Mr. Watson would be employed as a Director of the Company (Recital 6), and Mr. Watson would immediately take a 5% share ownership of Uphold Group PLC (Recital 11).*

117. *Uphold Group PLC engaged KPMG to assist it with taking forward an application in its own right, and to that end, KPMG met with representatives of the PRA in November 2016 and filed a revised business plan on 30 November 2016 on behalf of Uphold Group PLC which built upon the previous filings of MSBB.*

118. *I understand from the Company's records that the Company had understood that it would hold 95% of the shares in Uphold Group PLC. That figure was reflected around this time in investor primer presentations, in emails to investors, and by Mr. Watson himself to Mr. Thieriot in respect of the potential creation of a UK Holdco (Access Digital Financing Ltd) to hold the Company's majority stake in Uphold Group PLC ……. Ultimately, that Holdco was never created for reasons explained below in this witness statement.*

119 *On 6 March 2017, I understand that there was a meeting held between the Company (Mr. Watson, Mr. Milby, Ms. Grey-Smith, and Mr. Dennings) and the representatives of the PRA regarding the progress of TBOL's application for a UK bank license. Giles Adams from the Company's advisors KPMG also attended, as per Mr. Watson's email to Mr. Steckel summarizing that meeting.*

120 *I further understand from my review of the Company's records (as explained further in the paragraph immediately below) that the involvement of Mr. Minor as the founder and major shareholder in the Company, was viewed as problematic by the UK authorities, and that the indications were that a banking license would not likely be issued to a wholly owned subsidiary of a party in the Company's position.*

121 *During that meeting, the PRA advised [that] the Company was at the next stage of the application process, however it also laid down conditions to be resolved urgently. I refer to Mr. Watson's summary of the meeting to Mr. Steckel, in which he noted that the PRA's "clear expectation is that we solve for Halsey [Minor] if they are to ever approve our application and – in addition – in so much as they also directed that should [the Company] be the parent shareholder moving forward, that they have non-voting shares in [TBOL]. Further they also mandate[d] that [TBOL] will be run as an autonomous, independent company with no outside influence of any nature from [the Company] and commercial arrangements between Uphold and [TBOL] must be done on clear, objective market terms. with clear open commercial rationale". Mr. Watson further noted the PRA's view that "Halsey Minor is not a "fit and proper" person in the eyes of the Bank of England. Specifically, they cited Halsey's latest legal issues with Bill Laggner and Dave [Bechtel], his bankruptcy and the constant and numerous legal issues Halsey has had since the late 1990's." His update further noted that the PRA "have advised that within the next 10 working days (so March 22nd) that they will formally document their observations we have two weeks to address and resubmit our business plan" (his emphasis).*

122 *Mr. Watson shared his proposed summary with the Company's other employees who had also attended the meeting (which was the same as his summary as sent to Mr. Steckel referred to immediately above), and Mr. Dennings responded stressing the PRA's concerns with Mr. Minor. I am not aware of any of the other attendees correcting that update. Mr. Watson's summary is also consistent with the PRA's feedback letter to Mr. Watson following the meeting.*

123 *Consistent with that, I understand that the PRA informally notified Uphold Group PLC that it would not award a banking license to a cryptocurrency company which was based offshore (or whose holding or parent company was based offshore). I understand from page 5 of the Kleinbard TBOL Timeline (as defined below) that this slide formed part of a PowerPoint presentation which Mr. Watson sent to Mr. Steckel, and Mr. Thieriot on 26 September 2017 in the context of a potential update to the Company's shareholders.*

124 *In September 2017, I understand that the Board was also advised by Paul Hastings, the Company's English solicitors, that the maximum ownership stake that the Company could have in a company that owned a licensed UK bank without triggering increased scrutiny of its ownership as a control person was less than 10%.*

125 *This memorandum relevantly stated the following: "As part of the application process (and as a condition to the grant of [banking authorisation from the PRA]), the PRA must independently assess and approve any person who holds – or expects to hold – 10% or more of the shares and voting rights in the Bank or any parent undertaking of the Bank (each a "**Controller**")." "Taking the abovementioned criteria into account and given that the PRA has already expressed concerns about Uphold's ownership structure, we think it likely that the PRA would have reservations over a proposal to have Uphold as a Controller of the Bank. From past experience, when the PRA is considering a proposed bank Controller, the following issues tend to arise:*

(a) *"It is likely that PRA will pay close attention to the proposed Controller's past dealings with regulators having regard to information available from public and non-public sources, and will be sensitive about approving the authorisation of a bank whose ownership can be criticised."*

(b) *"Where there have been some issues in a proposed Controller's history (including financial irregularities on the part of any previous shareholder, director or senior manager), the PRA will also have regard to the likely influence that the proposed Controller will have on the bank and, in particular, whether he will have the ability to direct the business of the bank (e.g. through the exercise of voting rights)."*

"Obtaining formal approval as a Controller of the Bank would involve Uphold disclosing details of its historic financial losses, its business model (in particular, its past dealings in the cryptocurrency space) and the fact that it is located in an offshore jurisdiction. Accordingly, we expect it would be difficult (without substantial effort and expense) to obtain PRA approval to Uphold as a Controller of Bank. In any event, we note that this issue has already substantially slowed the authorisation process for the Bank with the PRA."

126 *Through the second half of 2017, I understand from the Kleinbard TBOL Timeline that Mr. Watson sought investment for Uphold Group PLC (also known as Uphold Bank). In November 2017, Uphold Group PLC changed its name to TBOL PLC and is now known as The Bank of London Group Holdings Limited.*

127 *In mid-2017, in line with the PRA's directive, the Company conducted due diligence with a view to acquiring MSBB (per pages 5 and 6 of the Kleinbard TBOL Timeline). I understand from pages 6 and 7 of the Kleinbard TBOL Timeline (JJH1 / pages 588- 589) that Mr. Thieriot and Mr. Watson negotiated the terms of a term sheet for Uphold Group PLC to acquire MSBB from Hotwire, which would terminate the MSBB SPA and set forth terms for Uphold Group PLC to cause MSBB to file an application for a banking license from the PRA and the FCA..... This appears to have included an agreement for Mr. Sacomori to stay on as a consultant to the Company.*

128 *I further understand that in August 2017, Mr. Thieriot continued to discuss the terms of the proposed acquisition of MSBB with Mr. Watson. On 28 August 2017, I understand that Mr. Watson and Mr. Steckel met for a lunch meeting in Los Angeles to discuss the same. Further to paragraph 69 of this witness statement, I believe that this was the lunch meeting from which Mr. Watson stormed out. As per Mr. Steckel's email to Mr. Watson summarising that meeting, the proposed deal structure involved:*

> *"Uphold retains 9.8% ownership in the UK bank Co. a) We discussed that this ownership could not be diluted until there was a value or a raise of $X. b) Also discussed mgmt share grants. 2) Concept of "schmuck" insurance in the form of payment to Uphold if value of bank ex $Y million within a certain period of time. This would be triggered by a capital raise or other such qualified event. Payment to Uphold of US$3 million within 60 days of grant of license. Bank agent agreement for Uphold with penalties for that agreement not being in place for whatever reason, even a regulatory reason. Board seat at UK Bank Co. Commitment of Investor Group to fund moneys necessary for achieving of license which you estimate to be around US$22 million. As of a certain date, your salary and all expenses related to the bank project will be paid for by Uphold Group PLC."*

129 *On 5 October 2017, Uphold Group PLC and the Company executed a memorandum of understanding noting the intended termination of the SPA, and terms and conditions to allow Uphold Group PLC to enter into a new SPA with Hotwire to acquire MSBB. It includes a provision noting that "Uphold Group shall issue to Uphold Limited shares of capital stock representing 9.8% of the issued and outstanding capital stock of Uphold Group, on a fully diluted basis (including management equity plan), after taking into consideration full issuance of the shares available for its 5,000,000 British pounds initial capital*

raise." It further provided for Uphold Group PLC's initial capital raising to be available to shareholders of the Company.

130 *As is clear from the meeting minutes, the MOU was approved by the Company's board on 27 September 2017. Mr. Steckel noted at that meeting that it was in the Company's best interests to support the efforts of Mr. Watson and Uphold Group PLC in order for the Company to get access to a bank license in the UK, and to recoup the Company's expenses incurred in pursuing the transactions in its own right.*

131 *I understand that Mr. Watson resigned his position as an employee of the Company on 31 December 2017 (as per his Separation Agreement), but he remained a director of the Company until resigning in October 2020.*

132 *The Company entered into the "Share Issuance Agreement" with TBOL dated 1 January 2018 which was made pursuant to the memorandum of understanding made between the Company and TBOL dated 5 October 2017. Pursuant to the Share Issuance Agreement, the Company acquired its 9.8% stake in TBOL in exchange for the Company transferring to TBOL the right to purchase MSBB, ostensibly in furtherance of its pursuit of a UK bank license.*

133 *The Company entered into the Share Issuance Agreement after receiving English law advice from Paul Hastings which suggested that it would be difficult for TBOL to acquire a UK bank license if the Company held a 10% or greater stake in TBOL.....*

134 *Mr. Watson pursued the issue of a banking license in through the TBOL entity, and in November 2021, TBOL became only the 6th clearing bank in the UK. I understand, however, that Mr. Watson ultimately did not use MSBB as the means of doing so, as it transpired that this company was not as far advanced down the licensing application path as had been understood, and MSBB had suddenly withdrawn $3.5 million in capital out of the business, which left TBOL high and dry, and in need of finding new investors to recapitalise it.*

135 *I further note from an email from Mr. Steckel to Mr. Sherwin (the Company's general counsel at the time) on 15 July 2018 that Mr. Watson had indicated to him that TBOL would not close its acquisition of MSBB "because Bank of England has determined it will be easier without. So, Uphold does not need to pay for MSBB. So, Uphold should not have technology agreement. So, Uphold should not have 9.8% of TBOL. That's what he wants."*

136 *I understand from an email sent on 22 August 2018 that Mr. Thieriot met with Mr. Watson to try to resolve the MSBB issue, and that from that meeting, they appeared to have arrived at the following agreement: "No Uphold outgoing ~$3mm payment to MSBB; No TBOL annual payments to Uphold; No %'s for individuals; Uphold's 9.8% preserved through $5mm/$42mm val. seed round; Maturity on ~$800k in convertible loans extended to (?) January (?); Tech*

licensing to be discussed/priced ad hoc; 'Bank Agency' extension to Uphold preserved."

137 *The terms of the Share Issuance Agreement do not require the Company to pay Mr. Watson for the stake it received in TBOL. Therefore, it appears to me that the Company's contribution was limited to the time spent on the project by its executives, funding operational expenses and salaries, and advisors up to that date. The total expenditure by the Company on TBOL-related matters during this period (prior to the signing of the Share Issuance Agreement) was roughly US$2 million.*

138 *On 30 May 2019, Mr. Watson (acting on behalf of TBOL) signed a letter to the Company regarding "the proposed issue and allotment of shares" in TBOL – the "May 2019 Letter"). The May 2019 Letter – which does not refer to the Share Issuance Agreement dated 1 January 2018 – referred to 95,769 shares in TBOL being "available to be issued" to the Company "to be paid for in cash or in kind, including by way of the provision of services, software, licenses and such like", and that those shares were intended to be issued to the Company following receipt of the UK banking license. The May 2019 Letter was signed by Mr. Thieriot on behalf of the Company. I do not know the reasons why this letter was signed, but it was later considered by the Company's English solicitors to be unenforceable.*

139 *I recall that it was initially explained to me by Mr. Hansen that the Company had owned that 9.8% shareholding in TBOL, but that the Company's accountants were waiting for external validation from TBOL before allowing us to recognize those shares as an asset on the Company's books. Therefore, on the understanding that the Company was entitled to those shares, the Company was just seeking that validation from TBOL.*

.....

140 *In the first half of 2021, a dispute arose between the Company and TBOL concerning inter alia the issuance of shares in TBOL to the Company. TBOL and Mr. Watson disputed the Company's rights to any shares of TBOL, and alternatively to the specific number of TBOL shares to which the Company was entitled. I understand that this dispute arose in or around May 2021 when Mr. Watson defaulted on a $500,000 personal loan with the Company.*

141 *At the meeting of the Company's board on 18 May 2021, I reported that "while there was an understanding that a deal with TBOL with respect to the Share Issuance Agreement, executed by the Company and TBOL, had been agreed to, that no longer appears to be the case. The major issue appears to be TBOL's rejection of the Company's right to 9.8% of the issued and outstanding capital stock of TBOL (subject to certain dilution…), pursuant to the Share Issuance Agreement due to a claim of insufficient consideration. In fact, TBOL's counsel*

had proposed that the Company pay £21.6 million for the shares to which we considered the Company was already entitled.

142 *In light of that, I presented the following options to the Company's board:*

142.1 Agreeing to pay to TBOL the above amount for those shares;

142.2 Offering to pay TBOL for those shares, albeit for a lower amount than that sought by TBOL; or

142.3 Commencing legal action in New York for anticipatory breach of the Share Issuance Agreement.

143 *The Company's board did not consider legal action to be a preferred approach – really, we wanted to focus externally on further developing and growing the business, and in doing so, ensuring that any disputes were resolved fairly but expeditiously. Therefore, I agreed to proceed exploring the other two options, with a view to the Company responding to TBOL more formally through its counsel if no progress was made.*

144 *On 11 June 2021, I chaired a meeting of the Litigation Committee. At that meeting, I updated the Litigation Committee regarding the TBOL dispute and recommended that the Company's decision to proceed with acquiring TBOL shares would need to be reviewed by independent outside counsel, while noting that due diligence on the transaction would be continue with a view to the Company's board potentially making a decision by the end of the following week.*

145 *To that end, the Litigation Committee engaged Kleinbard to investigate and report on the TBOL Transaction, in particular to provide a "comprehensive narrative timeline of the facts and circumstances surrounding (a) the Company's pursuit of a UK banking license through TBOL PLC… and (b) the Company's changing and evolving ownership interest in TBOL as the licensing process progressed".*

146 *I recall that I and the rest of the Litigation Committee found it very difficult to determine what exactly had happened in respect of TBOL, as the story and document trail was very complicated. Therefore, the Kleinbard TBOL Timeline (as defined below) would be very helpful to allow the Litigation Committee to fully understand these issues, which would inform the Company's actions in respect of, and potential claims against, TBOL and Mr. Watson.*

147 *On 30 June 2021, Dentons provided a memorandum of advice to the Company. In summary, Dentons considered that the Company was more likely than not to succeed in any claim against TBOL in respect of the Company's claim for 9.8% of the issued shares of TBOL under the MOU and Share Issuance Agreement, while flagging certain complexities and that any such claim should be brought*

in England (notwithstanding the governing law of those documents being New York law). Furthermore, it referred to the view of the Company's New York counsel, noting that "[w]e understand that Meister Seelig & Fein [the Company's New York counsel] are of the view that consideration was given under these documents as a matter of New York contract law and that a New York court would not look behind that consideration to assess whether it was adequate."

148 By letter dated 3 August 2021, Signature Litigation (TBOL's English counsel) wrote a letter to Dentons suggesting that the Company had no right to be issued with TBOL shares because the Share Issuance Agreement had been superseded by another agreement signed by Mr. Thieriot in 2019. Dentons advised Mr. Anderson and me that the 3 August 2021 letter was not likely to have a substantial impact on their previous 30 June 2021 advice.

149 I chaired a further meeting of the Litigation Committee on 22 August 2021 to discuss the current status of the Company's dispute with TBOL and Mr. Watson. During that meeting, among other matters, I noted the letter from TBOL's English counsel, and Dentons' response that it did not have a substantial impact on their previous advice. The Litigation Committee unanimously agreed to proceed with engaging English counsel to respond to the most recent communications from TBOL's counsel.

150 By their letter to Signature Litigation dated 26 August 2021, Dentons reiterated the Company's entitlement to shares in TBOL, denying that the May 2019 Letter was enforceable or that it varied the Share Issuance Agreement, and asking TBOL to confirm inter alia that it will issue the shares to the Company in accordance with the Share Issuance Agreement, and deliver up a capitalization table and the necessary executed share certificate.

151 On 1 October 2021, Hard Yaka Limited offered to purchase the Company's rights and claims against TBOL in exchange for cancelling 6 million shares in the Company held by Hard Yaka (which were valued at either approximately $18 million or $36 million).

152 On 6 October 2021, Mr. Anderson sent the Litigation Committee a note summarizing the Company's claim against TBOL, Hard Yaka's proposal (including certain tax consequences and legal costs for the Company), and the specific matters for the Litigation Committee to consider. That same day, I chaired a meeting of the Litigation Committee to discuss Hard Yaka's proposal. The Litigation Committee agreed to further negotiate with Hard Yaka.

153 On 29 November 2021, Mr. Anderson and I attended a call with Mr. Neilson of Dentons and Ms. Gray of Kleinbard. As reflected in my email to them titled "Takeaways from our call" I noted that, among other points, Ms. Gray would

assemble the facts and documents which support the Company having a claim to 100% of the shares in TBOL (at least when it was formed).

154 *On 30 November 2021, I drafted a note to the Litigation Committee, which I sent to Ms. Gray for comments. In respect of our litigation strategy regarding TBOL, in point 4 of the note, I wrote that the Company's English solicitors had suggested that its case against TBOL would be a lot stronger if it argued that it was entitled to 100% of the shares in TBOL given the Company's funding of its formation, even though we recognized that we would only be actually entitled to a 9.8% share of TBOL. As I recall, this was the first time that it had been suggested that the Company could be entitled to 100% of TBOL, subject of course to the realities of the situation, including third party investors in TBOL, and the PRA's clear requirements for the bank license application.*

155 *I believe that Kleinbard commented on that draft but I do not have a record confirming that point. In drafting that note, I considered that the Company was not arguing that it should receive 10% or more of the shares in TBOL (because we would need to settle for a 9.8% stake so as not to frustrate the bank license application), but just recognizing that there were good reasons for the Company to argue that it was entitled to all of the shares in TBOL.*

156 *On 13 December 2021, Kleinbard provided to Mr. Anderson (for circulation to the Litigation Committee) a detailed 16-page narrative timeline in respect of the Company's pursuit of a UK banking license through TBOL, and the Company's evolving interest in TBOL (the "Kleinbard TBOL Timeline"). The exhibits to the Kleinbard TBOL Timeline were provided by Kleinbard separately. I understand that the Kleinbard TBOL Timeline was drafted on the basis of Kleinbard's review of underlying transaction documents and relevant emails which its ESI vendor had extracted from the Company's servers.*

157 *The Kleinbard TBOL Timeline set out the relevant facts regarding each step of TBOL's and/or the Company's pursuit of a UK banking license, including:*

157.1 *The Company's planning to obtain a UK banking license from October 2015, including its intended acquisition of MSBB (which claimed to have such an application pending), which did not eventuate;*

157.2 *Mr. Watson's assumption of responsibility for the Company's pursuit of the license, now to be done by the newly formed entity Uphold Group PLC, aka "Uphold Bank", which would be 95% owned by the Company;*

157.3 *Shareholders' questioning of "Uphold Bank" and its ownership structure*

157.4 *The 6 March 2017 meeting between the Company and the PRA… It further notes that following that meeting, Mr. Watson received further feedback from the PRA and the FCA, which he relayed to the Company's board –*

namely that Uphold Bank should be separated from the Company given their concerns about Mr. Minor, and that the MSBB transaction should be completed and funded. The Bank of England allegedly further criticized the Company for being a cryptocurrency company incorporated in an offshore jurisdiction, making statements to the effect that such a company would not be granted a bank license;

157.5 Uphold Group PLC's proposed acquisition of MSBB, and its termination of that acquisition;

157.6 The Company's sale of its controlling interest in Uphold Group PLC;

157.7 Mr. Watson's letter to the Company in May 2019 referring to the Company's shareholding in TBOL being allotted but unissued, yet not referring to the Share Issuance Agreement) – Kleinbard noted that "if anything, the May 2019 Letter can only be reasonably construed as clarifying that the shares to be issued to the Company would be non-voting shares subject to limitations by the Bank of England"; and

157.8 Mr. Watson's resignation from the Company's board, and his default on a personal loan from the Company.

158 On 26 February 2022, I wrote to Ms. Gray and Mr. Anderson to ask that the Company write to TBOL's lawyers to signal its intention to commence proceedings against TBOL in New York (in respect of its breach of the Share Issuance Agreement) and discuss that filing with the legal teams.

159 On 1 March 2022, I chaired a meeting of the Litigation Committee. In my note to the Litigation Committee, I noted my two recommendations – "we file a lawsuit against [Anthony Watson] for repayment of his loan immediately in [New York]" and "we consult with counsel on our TBOL lawsuit, stating our preference to file in [New York]". I understand that no such claim was ever actually filed in the New York courts.

160 However, I recall that the Litigation Committee considered that litigation against Mr. Watson and TBOL in respect of the TBOL transaction would not be in the Company's best interests, as our chances of success for such a claim were probably no greater than 50/50. More importantly, any such claim would likely prevent TBOL from obtaining a banking license, thereby negatively impacting upon the value of TBOL (thus defeating the purpose of the litigation, being to recover a valuable asset of the Company). It would also trigger regulatory concerns given the PRA's previous statements, which could further impact upon TBOL's value. Litigation would also require a considerable amount of time and money to be spent with an uncertain outcome.

161 *I remember feeling strongly, and I still believe now, that there was no point in suing Mr. Watson and TBOL for the Company to receive a greater shareholding in TBOL (i.e. higher than 9.8%) as it would have likely destroyed all value in TBOL. TBOL had obtained its UK banking license in late November 2021, and the Company bringing a claim against TBOL – in light of the PRA's clear indications – could endanger the value in TBOL as a result of it obtaining that license. It was clear to me – and I believe to the rest of the Litigation Committee – that the Company was better off holding 9.8% of a valuable company, rather than 90% or 100% of a company with limited value, having no UK banking license, and no reasonable prospect of obtaining such a license, given the PRA's clear representations noted above.*

162 *Moreover, I recall that there was no straightforward way in which a majority stake in TBOL (or 80% - 90%) could be transferred to other entities. If that stake were transferred to other entities in the Uphold group, the same regulatory considerations as to applying to the Company would apply, and TBOL would not be granted a UK banking license. I further understand that transferring a considerable number of shares to the Company's shareholders would cause a massive tax liability for them without any liquidity. I understand that the PRA had made clear that a UK clearing bank could not be owned by a parent company offshore, and would need to be majority owned by UK-incorporated entities paying UK tax. In this vein, whilst I was not present at any such discussions, I suspect that TBOL made progress with the licensing process once it had attracted high-profile UK investors who met the requirements outlined by the PRA.*

163 *TBOL had attracted many third-party shareholders (who, to the best of my knowledge, were unaffiliated with either Mr. Watson or the Company) who had invested their own money in TBOL. That meant that the Company's chances of getting 100% (or near 100%) ownership of TBOL were effectively zero. The most that the Company could realistically hope for in a best- case scenario was Mr. Watson's remaining shareholding, which I understand was substantial. However, that solution would ignore two hard truths: (i) the PRA's clear indication that it would not issue a UK banking license to an entity in which the Company held a 10% or greater stake, thus greatly limiting the potential value of TBOL to the Company, and (ii) even if the PRA's position changed (and I do not consider that there was any reason why it would do so) and the Company held a greater share of TBOL, it would have a bank in name only, without Mr. Watson spearheading its management team.*

164 *The Litigation Committee passed resolutions, effective 23 June 2022, approving the Company's entry into the TBOL Settlement Agreement (which was not yet signed at that point, and so these minutes are privileged). This was done with regard to the fact that the Company's potential claims against TBOL and Mr. Watson in respect of the TBOL Transaction were not strong (insofar as the Company was seeking a stake of more than 9.8%).*

165 *On 24 June 2022, the Company and various other entities in the TBOL group entered into a Settlement Agreement with TBOL and Mr. Watson (JJH1 / pages 1784-1799) (the "TBOL Settlement Agreement"). In summary, the TBOL Settlement Agreement provided, among other things:*

165.1 Mutual releases in respect of any claims regarding the matters in dispute, including regarding the Share Issuance Agreement (in particular, the Company's entitlement to shares of TBOL) and certain other matters;

165.2 TBOL's requirement to issue 90,503 shares to the Company;

165.3 TBOL's requirement to pay $750,000 to Uphold Cortex Acquisition, Inc, a subsidiary of the Company, being the consideration of the sale of two entities – Uphold AM, Inc, and Cortex MCP Inc – from the Company to TBOL;

165.4 Mr. Watson's requirement to pay $500,000 to the Company as full and final settlement for the outstanding balance due and owing on a loan by Mr. Watson;

165.5 The Company's requirement to pay Mr. Watson $274,000 as full and final settlement for outstanding business expenses due and owing to Mr. Watson from when he was employed by the Company; and

165.6 Certain amendments to the Banking Services Agreement (as defined below).

166 *The Company did receive its shareholding in TBOL [shortly after] the execution of the TBOL Settlement Agreement, four years after TBOL promised to transfer the same to the Company pursuant to the Share Issuance Agreement. By that stage, its shareholding had been diluted somewhat from 9.8% to a slightly lower figure.*

167 *On 19 July 2022, I chaired a further Litigation Committee meeting. In addition to considering potential claims against Mr. Steckel in respect of the [2016] Transaction (as explained above), the Litigation Committee also considered potential claims against Mr. Steckel in respect of TBOL. In this respect, the Litigation Committee considered the factual findings of Kleinbard's investigation.*

168 *Having considered those findings, the Litigation Committee determined that any potential claims which the Company might have against Mr. Steckel in respect of the TBOL transaction were weak and unlikely to be successful. Moreover, commencing such a claim would be expensive and divert important effort and resources of the Company, and potentially have a negative effect on the Company's ongoing fundraising efforts.*

> *169 I also note that on 28 January 2018, TBOL and an affiliate of the Company (Uphold Europe Limited) entered into an agreement pursuant to which inter alia TBOL agreed to provide banking services to Uphold Europe Limited and its affiliates in exchange for a monthly fee ("Banking Services Agreement").*
>
> *170 In clause 2.2 (b) of the TBOL Settlement Agreement executed on 24 June 2022, the Company and TBOL had agreed to execute certain amendments to the Banking Services Agreement within 60 days, including providing for the Company to pay TBOL £300,000 plus VAT per month for banking services (JJH1 / page 1788). However, I further note that the parties also agreed in a side letter that, notwithstanding the provisions of the TBOL Settlement Agreement and its associated escrow agreement, if no such amendments were executed within 60 days, then 18,100 shares in the capital of TBOL held on escrow would be released to TBOL and the Company would cease to have any interest in those shares, and all other obligations under the Banking Services Agreement would cease to have any effect. I recall that it was considered that the Company was better off to give up those shares, and having the Banking Services Agreement voided, then to go ahead with the Banking Services Agreement with those amendments, including the Company having to pay a monthly fee to TBOL for banking services.*
>
> *171 Ultimately, following a refinancing conducted by TBOL in mid-2024, around which time TBOL was under threat of insolvency, the Company's shareholding in TBOL (together with those of TBOL's other existing shareholders) was significantly diluted.*
>
> *172 I am disappointed to see TBOL's recent financial troubles, in particular its impact on the value of the Company's shareholding in the same. However, it ultimately vindicates the firm and principled approach which I and the rest of the Litigation Committee took in negotiating and ultimately settling the Company's dispute with TBOL and Mr. Watson. I remain convinced that commencing litigation so that the Company could obtain a greater stake of TBOL would have only destroyed any value in that entity by undermining its application for a UK banking license application, and ultimately risking the revocation of that license once granted."*

176. The meeting with the PRA/FCA on 6 March 2017 was a focus of the Petitioner's case and submissions and there were five particularly important documents that recorded what had been discussed, the PRA's/FCA's position at and after the meeting and Mr Watson's communications regarding these matters and his approach.

177. The first is an email from Mr Watson to Mr Steckel dated 6 March 2017. This appears to have been copied to Mr Milby, Mr Thieriot, Ms Grey Smith and Mr Dennings. Mr Watson reported as follows (my underlining):

> *"I wanted to let you know how today s meeting with the Bank of England went with regard to our Bank application.*
>
> *In attendance from Uphold was myself, Jim Milby, Diane Grey-Smith, Bill Dennings and Giles Adams from KPMG (Our advisors through this process).*
>
> *Meeting was for 1.5 Hours at the Bank of England s Prudential Regulatory Authorities Offices in the City of London today.*
>
> *It was a pretty robust meeting - albeit with a positive outcome - in so much as they will allow our application to move toward approval provided that we resolve the following issues urgently:*
>
> *1) Their clear expectation is that we solve for Halsey if they are to ever approve our application and in addition - in so much as they also directed that should Uphold be the parent shareholder moving forward, that they have non-voting shares in the Bank. Further they also mandate that the Bank will be run as an autonomous, independent company with no outside influence of any nature from Uphold and commercial arrangements between Uphold and the Bank must be done on clear, objective market terms with clear open commercial rationale. In addition, their view that Halsey Minor is not a fit and proper person in the eyes of the Bank of England. Specifically, they cited Halsey s latest legal issues with Bill Laggner and Dave Bectel, his bankruptcy and the constant and numerous legal issues Halsey has had since the late 1990's.*
>
> *2) They want to see a transaction with MSBB complete and final (with whatever party) before the application gets approved. They do not believe it is proper that a contract is in place that only completes when the license is issued - they expect that the contract is complete before we move to the next stage of the process.*
>
> *3) They expect that myself and Jim Milby resign from the BoD of Uphold before approval to avoid a conflict of interest.*
>
> *4) They want to see a clear and clean capitalization funds for the Bank and understand the financial structure of the patient organization.*
>
> *5) They recommend that I relinquish the role of Chairman and we appoint an independent Chairman to the Bank.*

> *6) They had several other questions, comments and observations, but those are fully manageable, expected and in line with our assumptions going in - so we are good there/*
>
> *They have advised that within the next 10 working days (so March 22nd) that they will formally document their observations we have two weeks to address and resubmit our business plan. Assuming we address the aforementioned, the time line to authorization looks like invited to submit our ICAP and ILAP documents (which we have already created) within 30 days with a view to final challenge session within May/June time-frame before formal and final deliberation and approval.*
>
> *Jim, Diane & Bill - feel free to add any color may have left out - As soon as Giles sends me his thoughts through I'll send over too.*
>
> *I suggest we have a call in the next 24/48 hours to discuss."*

178. The second is an email dated 7 March 2017 from Mr Dennings in which he commented on Mr Watson's email and provided his own view on how the meeting with the PRA/FCA had gone. He said this:

> *"I think this captures it well.*
>
> *Just to add my thoughts to give color to the meeting, I was surprised how the meeting started, with the major items below coming up in the first 15 minutes. The very first question was where is MSBB for this meeting and once explained the very next comment was, "so when we google Uphold and see Halsey Minor and lawsuits"...then came capitalization questions given Halsey's past.*
>
> *The next question was about CEO and Chairman roles.*
>
> *It was obvious these were the pressing concerns and those three items did take up a good portion of the first half of the meeting. Other comments were made but are manageable and for the most part were already included in our submission.*"

179. The third document is an email dated 7 March 2017 timed at 06:23 from Mr Adams of KPMG to Mr Watson providing his "*initial thoughts*" in the meeting with the PRA/FCA (my underlining):

> *"As requested here are my initial thoughts on the meeting with the PRA and FCA yesterday afternoon.*
>
> *They started off not appearing to understand the proposed timing and application arrangements that we had explained in the RBP in relation to Uphold and MSBB. They would clearly prefer Uphold to apply if our intention is that Uphold will own the bank by the end of the authorisation process so we will need to accelerate the acquisition of MSBB I have asked Scott to think about that, what the FCA regulatory requirements would be as part of that given that they are the current regulator of MSBB as a payment services firm and how that will interact with the PRA/FCA application for bank authorisation. If Uphold does buy MSBB in advance of submission, then technically the application would be for a variation of permission for MSBB to become a bank.*
>
> *After that was cleared up, none of the remaining questions or issues that they raised were unexpected we had covered all of them in our preparation sessions (Uphold as a controller, the Board composition, your role as Chairman and CEO, IT, details and assumptions behind the financials, products and sales, risk management). It wasn't clear that they understood that the RBP we had sent them was for Uphold and will apply/is the basis for our application. The frustrating thing was that many of these areas had already been covered in the RBP that we sent in so as discussed I will call both PRA and FCA this morning to confirm what more they want in those areas or whether effectively they hadn't picked up or read what we had previously told them. Their final point about making sure that we had covered their previous points to Marcello in the earlier feedback was galling as we had sent a detailed table with the RBP in November stating the places in the new RBP where we had addressed their points.*
>
> *So in conclusion I think that we are in a reasonably good place: there is nothing in their detailed points that we had not previously discussed and we should be able to address them with some reworking and signposting of what we want to do and the provision of more detail in a number of places. We will get a better sense of that following my calls with PRA and FCA today. The only aspect which may be complicated is what we have to do if Uphold needs to acquire MSBB in advance of submission and what FCA will expect as part of that process given it is intertwined with the PRA/FCA bank application."*

180. Mr Adams' email was forwarded at 10:41am on the same day by Mr Watson to Mr Steckel, Mr Milby, Mr Thieriot, Ms Grey Smith and Mr Dennings. Mr Watson said that he "*highlighted the salient points*" in bold (I have underlined the different wording added by Mr Watson and put in square brackets the wording he omitted):

> "…..

***They started off not having any confidence in Halsey Minor or desire to work with an application which included Halsey Minor on it**. This then set the tone for the rest of the meeting. As such, they did not appear to understand the proposed timing and application arrangements that we had explained in the RBP in relation to Uphold and MSBB. They would clearly prefer Uphold to apply if our intention is that Uphold will own the bank by the end of the authorisation process **so we will need to accelerate the acquisition of MSBB I have asked Scott to think about that, what the FCA regulatory requirements would be as part of that given that they are the current regulator of MSBB as a payment services firm and how that will interact with the PRA/FCA application for bank authorisation**. [If Uphold does buy MSBB in advance of submission, then technically the application would be for a variation of permission for MSBB to become a bank].*

*After that was cleared up, none of the remaining questions or issues that they raised were unexpected we had covered all of them in our preparation sessions (Uphold as a controller, the Board composition, your role as Chairman and CEO, IT, details and assumptions behind the financials, products and sales, risk management). It wasn't clear that they understood that the RBP we had sent them was for Uphold and will apply/is the basis for our application. **The frustrating thing was that many of these areas had already been covered in the RBP that we sent in so as discussed I will call both PRA and FCA this morning to confirm what more they want in those areas or whether effectively they hadn't picked up or read what we had previously told them**. Their final point about making sure that we had covered their previous points to Marcello in the earlier feedback was galling as we had sent a detailed table with the RBP in November stating the places in the new RBP where we had addressed their points.*

***So in conclusion I think that we are in a reasonably good place**: there is nothing in their detailed points that we had not previously discussed and we should be able to address them with some reworking and signposting of what we want to do and the provision of more detail in a number of places. We will get a better sense of that following my calls with PRA and FCA today. **The only aspect which may be complicated is what we have to do if Uphold needs to acquire MSBB in advance of submission and what FCA will expect as part of that process given it is intertwined with the PRA/FCA bank application and of course the issue of Halsey Minor**....”*

181. The fourth document is a WhatsApp message dated 18 March 2017 from Mr. Parsa to Mr. Steckel commenting on and being highly critical of Mr Watson's honesty and approach (my underlining):

“*After everything Bill [Dennings], JP [Thieriot], Anthony [Watson] and Lee [Westerfield] have done and not done I do not want to be exposed to the risk of more of their bad judgment, incompetence, unethical behaviour and fraud. They have*

committed fraud before and I do believe they are committing it now and will commit fraud in the future. I'm sure Bill is cooking the AML audit and that Anthony is lying about shit related to the U.K. Bank. JP was inducing investors even as he burnt an undisclosed 2mm+hole in the reserve. Bill supervised the insolvency and fraud that occurred. I'm sure Thomas' report documents all of this and is now thanks to that idiot Bill discoverable in any legal action. Bill lies, bullies, bullshits, and is a horrible operator. These are not theoretical risks. They are documented historical and I'm sure ongoing. That US bank deal is going to bankrupt the company and its totally unnecessary. Anthony and Bills salaries are unjustified and an insult to shareholders after all their fraud and fuckups. As are JPs and Lees. … These are facts. Documented and discoverable facts. This isn't idle speculation."

182. The fifth document is the letter dated 20 March 2017 from the Bank of England/PRA to Mr Watson (my underlining):

"Feedback letter following Feedback Meeting with Uphold Ltd (Uphold)

Thank you for meeting us on the 6th March 2017; we hope you found it useful. As discussed, please find our feedback below which incorporates feedback from both the PRA and FCA. If you wish to progress to the next stage of the pre-application process, you should consider how to incorporate our feedback into your plans.

High level issues

At a high level, our comments are:
You will need to provide us with a clear outline of how Bitreserve Ltd (Uphold) will acquire MSBB Money Ltd. and the subsequent mobilisation plan for the new entity. This includes further information on the terms of the acquisition and sequencing of the acquisition and submission of a banking application.

We will need additional information regarding the ultimate controller/s of Uphold Bank Plc. (Uphold Bank). Specifically we want to see the financials and governance structures of Uphold Group, as it will be the source of capital for Uphold Bank. As well as this there needs to be further detail on how Uphold Bank will be operated separately from Bitreserve/Uphold Group. Given the proposed acquisition of MSBB Money Ltd. it is important to emphasise the fact that the controllers at the time of the formal application need to be the same as when the firm is authorised.

We will need further information on the composition of the board, including any shareholder NEDs, and senior leadership team. This includes increased level of detail regarding both the governance structures and backgrounds/roles of the individuals involved. As discussed in our meeting, further consideration needs to be given to the appointment of Anthony Watson as Chairman and CEO as this combination of roles would not provide sufficient independence for the role of Chairman.

Information provided on Uphold s products is generic. We would like to have an increased understanding of the principle [sic] terms applicable to products Uphold plan to provide. This would include relevant charging structures, distribution channels and information on what products Uphold intend to outsource. We also need to understand what drives the projected performance of Uphold Bank and the underlying assumptions behind the figures in the Regulatory Business Plan (RBP).

Please see the Appendix for a more detailed list of issues.

Next steps

Please incorporate the comments in this letter and the previous pack you submitted into a RBP. Once you are ready, please send the RBP to the PRA and FCA for review; we will then arrange a further meeting, to discuss the plan.

The next iteration of the RBP should give a stand-alone narrative of your plans for the bank and how you plan to deal with the transfer of business from the current API. We understand that the firm intend to go through mobilisation and that much of the proposition detail (including policies and procedures, copies of contracts, sample reports etc.) will follow during this phase. However, in the interim, we need sufficient detail about the firm s plans to make an informed decision. For example, in relation to customer journey, we will need to see details of how the firm plan to on-board customers, their proposed products (including product features and high level terms and conditions), and an outline of pricing structures.

Whilst we will be guided by you as to when you feel you are sufficiently prepared to hold the next meeting, we do encourage you to take adequate time in this preparation depending upon the amount of work you have already done, certain of the matters above may take some time to work through. It would be helpful for us to have as much notice as possible of when you plan to submit revised or additional documents for the next session.

<u>*Appendix*</u>

Controllers

- As we discussed during the meeting, please can you provide a detailed rationale for wanting to set up a bank.

- Please explain how the arrangement for Bitreserve to purchase MSBB has come <u>*about. What are the terms of the purchase and when will this transaction take place*</u>*?*

- A structure chart has been provided on page 19 of the last version of the RBP. Is this the complete group structure? We will need to have sight of all entities within the group.

- Please provide the assumptions behind Uphold s five year growth estimates.

- Please provide copies of the last three year s accounts for Bitreserve Limited.

- On page 20 of the RBP, it states that the Group will gain an entity with a banking licence and therefore, would not have to commence the application process if the Group wanted to offer these services in the future and allows it the future flexibility to offer or utilise these banking services on an arm s-length third-party basis the firm need to be aware that the permissions only apply to the bank that is authorised and not to the Group. Please clarify this statement.

- We also need to understand the voting rights of Uphold Inc. in relation to the Bank and if there will be shareholder representation on the Board of the Bank.

- Please provide the most recent set of audited accounts and a complete structure chart for Bitreserve Limited, including Uphold Holdings Inc and HMB LLC.

- Please clarify the continuing involvement of Mr Halsey Minor and Mr Robert Prioleau with the Uphold Group and any interactions they may have with Uphold Bank?

- What due diligence has Uphold carried out on its proposed new controllers?

- What links will Uphold Bank have with Marcelo Sacamori s bank in Brazil (MS Bank) and how dependant will Uphold be on this bank as a source of business given the planned focus on the Brazilian Real?

Governance

We discussed governance and we would like to see the relationship between all entities within the Uphold Group fully explained. The responsibilities of each entity should be described in full and detailed structure charts included, explaining linkages between all controllers, the firm itself and other entities within the Group.

- A number of the Board and Executive Team have responsibilities elsewhere and in other locations. Please can the firm prove that they all have the capacity to devote sufficient time to Uphold Bank.

- What is the firm s assessment of potential conflicts of interest that might arise between different entities within the Group? How will these conflicts be mitigated?

- As discussed in our meeting, further consideration needs to be given to the appointment of Anthony Watson as Chairman and CEO as this combination of roles would not provide sufficient independence of the role of Chairman. In what role does

Anthony plan to stay with the Bank? We note that during the meeting Anthony indicated that he would probably apply to be the CEO of Uphold Bank

- Are there any updates on planned recruitment of staff, including a new Chairman, CRO, Chief Legal and Compliance Officer, MLRO and Chief Credit Officer? How are these roles being covered in the interim?

- How many of MSBB s current staff are expected to join the Uphold Bank and how many of those who will move have held senior management positions at MSBB?

- When authorised, the firm s Board will need to have appropriate independent retail banking experience, with at least some of those individuals recruited before authorisation.

Please confirm each member of the Board and Senior Management team s connection with the parent.

- As noted, there is a risk of cross contamination within the entity. This can affect the makeup of the Board how will you ensure the Executive and Non-Executive Board complement the needs of the Bank with the needs of the wider Uphold Group and avoid conflicts of interest?

- We will need to see detailed CVs for all senior people, demonstrating in particular their experience of payments and deposit-taking. In the interim, it would be very helpful if a skills gap analysis of the Board and senior management team could be included in the next version of the RBP.

" On page 71 of the latest version of the RBP, the proposed main board structure includes 5 NEDs and 2 iNEDs. However, we understand that this structure has changed since the plan was submitted. Please provide up-to-date details.

……..

Financials

- We would like to see further information on what determines the underlying projected profit in products like FX and Net Interest Income (NII) for the new entity (for example, between Y1 and Y5 the NII doubles, what numbers drive these projections?)

- We would need to see financials for the controller/s of Uphold Bank for the past 5 years and more information on their business model/s and products offered.
" Uphold is projected to make a profit by its 2nd year of operation. Can you please provide us with further information of how this is achieved?

………

Business Plan

- Lending

- Please provide detail into how the lending will be conducted.
- How will you ensure your customers understand the products offered?
- In what circumstances would a potential client be refused borrowing?

.....

Deposits……..

Products

The information that has been provided in relation to Uphold s products appears to be a generic product definition, rather than details of how those products will be designed to fit the Uphold business model. While we appreciate that the finer details will be finalised during mobilisation, we need to gain a better understanding at this stage of the process about the principal terms applicable to these products, the charging structure, distribution channels etc.

………

Customer Due Diligence

Given your business model, we would expect a strong focus on Anti-Money Laundering (AML) and Fraud prevention in your control framework. You intend to combine the Legal, Compliance and Anti-Money Laundering functions under the responsibility of the Chief Legal and Compliance Officer. Please explain your rationale for combining these functions, and the skills and experience that Ana Esther Martinez has to fulfil this role. Has a gap analysis been carried out of her skills and experience? How will you address any gaps identified?

……..

Permissions

- The permissions requested should be reviewed to ensure that they cover all of the activities that the firm plans to undertake, including lending related activities.

……..

IT

……..

Risk Management and Controls

The RBP needs more detail on all the risks impacting on your proposed business. The majority of risks appear to have been identified at a high level, however we will need to see how the firm plan to manage these risks and the mitigants you propose to put in place to minimise these risks.

……

Outsourcing

…….”

183. The fifth document was an email dated 21 March 2017 from Mr Watson to Mr. Steckel, Mr. Westerfield, Mr. Thieriot, Mr. Milby and Mr. Brooke (marked "Confidential – Privileged – Private. DO NOT FORWARD") in which he said as follows:

"NB: Given that Uphold, LTD is no longer an owner of the application itself or the legal entity applying for a bank license I'm sending this note by way of a courtesy communication. I will not be sending out any further communication on this matter to the Uphold, LTD. BoD.

Dear BoD,

Yesterday we received and reviewed the feedback communicated by the Bank of England's PRA and FCA on UpholdBank's application to be authorised as a Bank following the meeting on 6 March.

All in all, we're in a good position and expect to get to formal application submission in June.

… Overall there are only two major issues we need to address and they are as follows:

1) Separation of Uphold Bank from Uphold LTD, driven by the Bank of England significant concerns regarding Halsey Minor (We've already completed this action, as approx. a week after we met the Bank of England at a Board meeting separating the legal entities wherein Holdings took on the legal obligations and liabilities …

There were the main points the require specific focus – still a long way to go, but we're in good shape overall."

184. On 27 September 2017 Paul Hastings sent Mr Thieriot a memorandum setting out the firm's legal advice in relation to the PRA's assessment of the Company as controller. The following is an extract from that memorandum (my underlining):

"Introduction

1.1 Uphold Limited (Uphold), a company incorporated in the Cayman Islands, currently owns the entire shareholding of Uphold Bank (the Bank), a UK incorporated company which is currently applying for a banking authorisation from the UK Prudential Regulation Authority (PRA). Uphold has also entered into a services arrangement with the bank to operate and support its technology platform.

1.2 Uphold is planning to sell its shareholding in the Bank to Anthony Watson (CEO of the Bank), with a view to conducting a third-party equity fundraising, which shall result in Uphold retaining a minority shareholding below 10%, i.e. 9.8 9.9%. It shall continue to provide the Bank with technology services, for which it shall receive a fee.

1.3 We understand that management's decision to dispose of its shareholding in the Bank has been driven by regulatory matters, namely that the PRA would be unlikely to approve Uphold as Controllers of the Bank. You have asked us to confirm our assessment of the likelihood of Uphold being approved by the PRA as a Controller of the Bank.

…….

Uphold as a controller

3.1 Taking the abovementioned criteria into account and given that the PRA has already expressed concerns about Uphold's ownership structure, we think it likely that the PRA would have reservations over a proposal to have Uphold as a Controller of the Bank. From past experience, when the PRA is considering a proposed bank Controller, the following issues tend to arise.

3.1.1 It is likely that PRA will pay close attention to the proposed Controller s past dealings with regulators having regard to information available from public and non-public sources, and will be sensitive about approving the authorisation of a bank whose ownership can be criticised.

3.1.2 Where there have been some issues in a proposed Controller s history (including financial irregularities on the part of any previous shareholder,

director or senior manager), the PRA will also have regard to the likely influence that the proposed Controller will have on the bank and, in particular, whether he will have the ability to direct the business of the bank (e.g. through the exercise of voting rights).

3.1.3 As a key concern for the PRA is its ability to effectively supervise an authorised bank, it will look at the amount of visibility which it has over the activities of a proposed Controller whose main business interests are outside the UK. As a result, having an offshore presence may be regarded as more high risk than a controller having its place of business in the UK (or even the EEA).

3.2 Obtaining formal approval as a Controller of the Bank would involve Uphold disclosing details of its historic financial losses, its business model (in particular, its past dealings in the cryptocurrency space) and the fact that it is located in an offshore jurisdiction. Accordingly, we expect it would be difficult (without substantial effort and expense) to obtain PRA approval to Uphold as a Controller of Bank. In any event, we note that this issue has already substantially slowed the authorisation process for the Bank with the PRA."

185. Mr Steckel dealt with the TBOL issue in detail in Steckel-WS at [317]-[342]. The following extracts set out the main parts of his evidence (my underlining):

"327 Mr Watson reported on these matters to the Board from time to time between April and September 2017. The Board received corroborating advice from Paul Hastings on 27 September 2017, which confirmed that the PRA would independently assess any "controller" of a bank, who held 10% or more of the shares and voting rights; that firm opined that the PRA would have reservations approving of the Company (and would need to investigate its historic financial losses, business model (including its past dealings in cryptocurrencies) and the fact it is located in an offshore jurisdiction.

328 Based on the approval requirements imposed by the BoE/PRA and the advice received, the Company formed the view that it was unable to progress the banking licence application via TBOL whilst holding more than 9.8% of its shares. By this time, the Company had already invested significant time and resources into pursuing the UK banking licence, and continuing with the application based on the existing ownership structure at the time would only have resulted in further time and money being lost. At that time, it was projected that TBOL would require a further GBP 5 million to cover the costs of the project for the further 12 months, without any guarantee of actually obtaining the UK banking licence and would need a further GBP 35 million contractually committed before the project would receive regulatory approval. Even if the approvals issues could be managed (which they could not), the Company would

have had to raise significant further capital to support the TBOL application, which would have detracted from investing in the Company's core business.

329 *In any event, given the PRA's recommendation that the acquisition of MSBB be concluded, TBOL, Hotwire and Mr Marcelo Sacomori (MSBB's founder) continued to discuss the deal structure and ultimate entered into a new term sheet dated 1 August 2017 which had the effect of terminating the sale and purchase agreement from 17 May 2016 which the Company was a party to (noted above). By this new term sheet, it was agreed TBOL would acquire MSBB for $500,000 in cash, a two-year promissory note equal to the amount on MSBB's balance sheet as at the closing date (payable in stages and subject to certain conditions) and a 2.5% interest in TBOL. This term sheet directed that TBOL would prepare a new sale and purchase agreement and related documents before 15 August 2017. During August 2017 the Company continued to broker an agreement with TBOL and MSBB.*

330 *It was around this time when Mr Watson indicated his unwillingness for the Company to retain 9.8% of TBOL or enter into a technology agreement because the Company's acquisition of MSBB was no longer going ahead. I met with Mr Watson and Mr Thieriot at a lunch meeting in Los Angeles on 28 August 2017 to discuss matters relating to TBOL. Following that meeting I emailed Mr Watson a summary of what we had discussed. My email noted: the Company cannot own more than 9.8% of TBOL (as much as I and others believed in the prospect for a UK bank, this was the reality); the UK regulator was waiting for the application to be filed; the MSBB transaction had been negotiated, which required $500,000 up front and $3 million upon grant of the banking licence. However, more investment was needed to get the licence. The additional capital estimated by Mr Watson was around $22.5 million; the Company's primary goal from the UK bank from an operating perspective was regulatory coverage in the UK, and the Company was looking to be rewarded for its investment on the project to date.*

331 *Mr Watson and I exchanged further email during 28-30 August and on 4 September 2017, and landed on headline terms which we instructed Mr Fontg to document in an agreement. During these exchanges Mr Watson said TBOL needed $17 million to get a bank licence with restrictions. Meetings of the Board were convened on 16 and 27 September 2017 to discuss these terms. The minute of the 27 September 2017 meeting reflects the terms discussed (which differed slightly from those outlined in the above paragraph) and that the Board approved of the same.*

332 *This then culminated in a Memorandum of Understanding being entered into between the Company and TBOL dated 5 October 2017 ("TBOL MOU"). The recitals to the TBOL MOU reflected the Company's understanding regarding the BoE's position, its desire to enter into a new sale and purchase agreement*

(the original May 2016 one having been terminated), and the fact that an entity I controlled was providing acquisition finance to TBOL to acquire MSBB in the form of a promissory convertible note………

333 *On 1 January 2017 the Company entered into a Share Issuance Agreement with TBOL (the "SIA"), which superseded (but was substantially the same as) the TBOL MOU. One of the differences between the TBOL MOU and the SIA was that where the former had provided that shareholders in the Company would be invited to participate directly in TBOL through the initial capital raise (which was an agreement subject to being vetted by the BoE and satisfying the requirements of being fit and proper persons), the SIA provided that this would be done at the discretion of TBOL. The notion of the Company's shareholders receiving a dividend of shares in TBOL was also discussed, but did not progress. Mr Laggner was involved in the initial fundraising round for TBOL and was provided with promotional materials to assist with onboarding potential investors for TBOL.*

334 *Mr Watson informed me in a meeting in mid-July 2018 that the BoE had indicated to TBOL that it would be easier to obtain the licence without MSBB. I do not recall the precise reasons for why that was the case. In any event, Mr Watson's position (which I recorded in email correspondence with the Company's General Counsel, Benjamin Sherwin, and Ricardo Fontg on 15 July 2018) was that because MSBB did not need to be acquired, the Company (i) did not need to pay for MSBB, (ii) should not have the technology agreement and (ii) should not have the 9.8% shareholding in TBOL. My view, which is recorded in these email exchanges, was that it was fair that the Company did not receive the $800,000 annual technology fee (which was a way of reimbursing the Company for funding the $3 million purchase of MSBB) if the MSBB purchase was not proceeding. I otherwise disagreed with Mr Watson's position, particularly in relation to the 9.8% shareholding. The internal advice from Mr Sherwin was that TBOL's obligation to issue 9.8% of its shares to the Company, while subject to certain conditions, was not conditional upon TBOL acquiring MSBB.*

335 *I sent a related email to Mr Sherwin, Mr Thieriot and Mr Westerfield on this subject on 29 July 2018, noting that while I was prepared to surrender the technology agreement, I was not willing to surrender our rights against TBOL. Given Mr Watson personally had a loan falling due to the Company, and our view was that the requirement to issue the 9.8% shareholding to the Company had been triggered by TBOL raising $5 million for its initial raise, I proposed that we (particularly Mr Thieriot and/or I) would seek to negotiate an outcome with Mr Watson during August 2018. I also noted that Mr Watson was still on the Company's board, but maybe should not be if he was not complying with his obligations. He ultimately resigned in October 2020 but this was for unrelated reasons.*

336 TBOL ultimately obtained a UK banking licence three years later in November 2021, becoming one of only six clearing banks established in the UK in the past 250 years.

337 The Company was entitled to 9.8% of the shares in TBOL following its first capital raise, however those shares were not issued to the Company for many years due to various disputes with Mr Watson. The Company's shareholding was also diluted below 9.8% over time as a consequence of further financing rounds undertaken by TBOL.

…….

340 The Petitioners also alleged that rather than pursuing an alternative transaction with TBOL for the benefit of the Company and its shareholders, the Company (at my instigation) altered the licence application to cause the Company to acquire only 9% and carved our "significant equity" for myself, Mr Salinas and Mr Watson. This is untrue, and a fabrication. In reality:

340.1 I did not instigate any decision by the Board, and it is not understood how I could have done so where, in 2017, [Uphold] Holdings was only a minority shareholder and I held one of five Board seats. There was no shareholder vote taken or required in respect of the Company's inability to hold an interest in TBOL beyond 9.8%. I did not take any actions as a shareholder in respect of this matter and nor did Holdings. ASP Capital Sub I Inc was not a shareholder of the Company at the time. Rather, a commercial decision was taken by the Board (which, in early-2017, was comprised of Mr Thieriot, Mr Watson, Mr Milby, Mr Westerfield and myself). As the largest (indirect) shareholder in Uphold, I was motivated for the Company to maximize its stake in TBOL, and the Company did so by receiving 9.8%.

340.2 I have never held "significant equity in TBOL." I didn't acquire any interest of any nature in TBOL in 2017, let alone as a consequence of the Company being required to reduce its shareholding to below 9.8%. I did personally explore options to acquire TBOL as it was a project I believed in, however this never eventuated. One of the options which was discussed during 2017 was for TBOL to raise money independently from the Company, and for Holdings and CIHL to receive an ownership interest in TBOL in exchange for a reduction in debt owed by the Company under the RCA (i.e. converting the debt at the Company level to equity in TBOL).

However, this never materialised, principally because there was a lack of investor commitment and TBOL could not raise the necessary funds. This was never a factor in the Board's decision-making

process in relation to its ownership interest in TBOL (which resulted from the BoE's position in relation to the approvals criteria).

340.3 *In September 2020, approximately three years after the Company was advised of the limitation withholding more than 9.8% of the shares in TBOL, I (through ASP Capital Sub I, Inc) acquired 24,431 shares of TBOL through a private transaction with Mr Watson for consideration of $305,000. For context, I had made a personal cash loan to Mr Watson in June 2017 for that sum, which was secured against Mr Watson's shares in the Company and in TBOL. This was at a time when Mr Watson was having liquidity issues and I considered his personal financial issues may adversely impact upon the application for the UK banking licence. This was an interest free loan intended to be repaid within one year. However, he was unable to repay this in cash, so the loan was enforced several years after the maturity date against Mr Watson's personal shares in TBOL. TBOL had 994,065 total shares outstanding at the time, so ASP's shareholding constituted a 2.46% shareholding in TBOL. However, ASP's shareholding has been substantially reduced since that time as a result of further dilution, including in 2024 when the equity in TBOL was substantially wiped out as a result of the issues described above. I therefore acquired a small minority interest in TBOL for proper consideration, years after the matters complained of by Mr Laggner, and this interest is now of nominal value. ASP's shares in TBOL are likely worth much less than my investment of $305,000. I believe my shareholding in TBOL is significantly less than 0.001% of the total issues shares, and is worth less than $100,000.*

340.4 *To the best of my knowledge Mr Salinas does not have any shares in TBOL and never has. The allegation that I 'carved out significant equity" in TBOL for Mr Salinas and myself is entirely baseless. I have no inkling of how or why the Petitioners (and Mr Laggner specifically) could have come to believe this is true (to the extent they actually do believe it to be true).*

340.5 *As the largest shareholder in the Company, the reduction of the Company's interest in this corporate opportunity impacted Holdings the most of anyone."*

186. Mr Steckel was closely cross-examined by Mr Valentin (Day 6) as to his understanding of the PRA/FCA's position, the Company's options and the basis for the decisions that the Company took in respect of the TBOL investment (my underlining):

"Q. ….. What we've seen so far is KPMG's feedback on the meeting, which doesn't make any reference to the 10% point or the need for – (overspeaking) -- In the KPMG summary of the meeting, which is provided the day after the meeting, or contemporaneously with the meeting on 6 March …... and you accepted that it …... doesn't refer to a need for the company to sell or dispose of its interest in the Uphold Bank, as it was to become. That's KPMG's view. And they are objective, aren't they? That's an objective view of the meeting?

A. I told you that was a fair reading. But if you take a fair reading of that sentence here …. The one about ultimate controllers of Uphold Bank Plc. When they say "ultimate", they don't mean final; they mean ultimate beneficiary.

Q. But all they are saying -- okay. But all they are saying here is: we will need additional information. They are not saying: what we know, we know that it prevents the company owning the bank. They are not saying that. They just say: we need more information. You can see in the schedule to this letter –

A. Mr Valentin, I have dealt with regulators in Mexico, the United States, the UK, Europe, on different things, in telecom and banking, etc. They don't always put in writing that their key issues are.

Q. But KPMG would have done, wouldn't they?

A. … I tell you that you may be right there…... And my only way that I can -- the conclusion I came to with being a reasonable person to offer was the feedback I got from management in the context of all this information. And I may not have read in detail all of these, and dependent on what the -- my managers, the people that worked for Uphold said, which included, you know, Mr Dennings.

……

A. Listen, we are looking back over time. My point of view would have been driven by the feedback I got from them. I also had a meeting with Doug Wurth, who was somebody we tried to get interested in injecting capital in the bank process. I looked at how to finance this. And when I met in person with KPMG at their London office - I believe they are at Canary Wharf - I can't remember whether it was April or May of 2017, it was clear that we couldn't own the bank there. That was what I understood, and that was verbally said to me.

Q. *If that was KPMG's view, you would have expected them to have recorded that somewhere, wouldn't you?*

A. *I don't know. That was not my central ...*

Q. *There is a reference in this letter, in the appendix, to Halsey Minor……: "Please clarify the continuing involvement of Mr Halsey Minor and Mr Robert Prioleau with the Uphold Group and any interactions we may have with Uphold Bank." And the gentleman named there…. was Mr Minor's trustee in bankruptcy, I think, wasn't he?*

A. *That's correct……..*

Q. *But what, again, is being asked here, and it's under the heading "Controllers", a whole sees of questions are asked. One of those questions is a clarification involving the continuing involvement of Mr Minor with the Uphold Group and any interactions that they may have. What isn't being said is: Mr Halsey Minor is not fit and proper; he can't be anywhere near this banking licence application?*

A. *It's not there on paper. Listen, the feedback I got was we can own it. I was incentivised as the largest shareholder of Uphold.*

Q. *You have made that point - (overspeaking) –*

A. *But it's a central point, because I have - there is no incentive to cheat myself out of something, none, zero. It makes no logical sense. And therefore, why would I do it? I'm aligned with shareholders. And I do remember this suggestion: oh, let's dividend this out. That was - I couldn't figure out how do I get around dividending something out that doesn't exist, in the sense that there's nothing to dividend out. There's not an asset to dividend out. And second, how do I dividend something out by ignoring a 25% shareholder? It doesn't work. And so the incentives are - on the reverse, the incentive is for me to have this owned by us.*

Q. *There's no reference in this letter, is there, to the points that you made yesterday, that the regulators were opposed to the continuing ownership of the company in what became Uphold Bank because it was a cryptocurrency-related business? No reference to that here?*

A. *I will take your word for it. I haven't read the whole letter.*

Q. *No reference to the fact that the company is offshore, i.e. this company is offshore, it's incorporated -- that's not something that's raised in the letter?*

A. *If you say so. But again, many times, my experience with regulators are that they don't put things on paper that they really care about, because they don't want to take on liability.*

…….

Q. *But Mr Fontg is asking [Paul Hastings] for this opinion or suggesting it's obtained in order to support your conclusions, which by this point are we cannot own the bank?*

A. *It is to see if this is reasonable and standard, whether we're coming to the right conclusion or not. And this is not something where we're hiring somebody to give us the answer we want. Again - I'll be repetitive - I didn't have an incentive to do it - this a way that was bad for me.*

………

Q. *So it's apparent, isn't it, that on 20 August Mr Laggner and the shareholders that he represented, his investor group, didn't know that the bank was about to be handed over to Mr Watson?*

A. *That would appear to be correct.*

Q. *As you've referred to already, you discussed in September 2017, perhaps it's 28 August 2017, in Los Angeles, at a lunch, an arrangement that involved the company transferring all but 10% of its shareholding to Mr Watson and you, JP and Mr Dennings, receiving 8% of the shares in the former –*

A. *That was the offer that Mr Watson made. That was not something that I - that was something that a year later I made clear, no percentages for individuals.*

Q. *You agreed that privately between yourselves in September 2017?*

A. *I didn't accept it. That was not something that I accepted. That was [not] something I acted on.*

Q. *It's what you wanted because we saw that from July, and it's what you agreed in September 2017?*

A. *When I was talking to JP, we were talking about management options for a company that we would – that would be a subsidiary of ours, and that seems consistent with management options like 20% in a start-up.*

……..

Q. *Why had the company spent two years pursuing this opportunity from 2015 through the MSBB transaction in April/May 2016, through the board meetings in 2016 when it was said to be important, to you describing it as a massive breakthrough in December 2016, to meeting with the Bank of England in March 2017, to September 2017, just giving it to Mr Watson?........*

A. *Well, I think the problem at the company is that we were pursuing many things, from inception to those first two years……. There are all sorts of efforts we did, and one of the efforts that we were looking to do was this bank. And when you think about what was core to driving revenues - and you, Mr Valentin, sort of minimised the role of CEO in terms of pricing - it's pricing, it's systems, it's audit, it's dealing with the reserve, dealing with MTL licences, audits, etc. A lot of these things really were unnecessary efforts and really weren't core. My interest in the bank and all of these things was that I believed that if we could get the banking licence, it represented an asset that had value in the marketplace. And Uphold business at that point had no asset value. We were small, we were loss-making. And I thought if we could get that, that was something attractive, particularly because there was debt due. So I looked at it more in terms of financial gain than in terms of its impact on our operation.*

Q. *Why was the answer though to hand it over to Mr Watson? Why not try and sell it in the market as an opportunity to a neutral independent buyer at arm's length?*

A. *Because there was nothing there. All you had was an idea and - look, MSBB, we had a - we had a deal to buy MSBB for $3 million. That deal fell apart, Mr Valentin, because in fact their business fell apart, and then Marcelo Sacomori, if memory serves me correctly, was asked to leave the UK. ..... It was a shell with nothing in it. This is not something where they had IP or they had an in to getting this. And the person that we were entirely reliant on was Anthony. It was his connectivity with people in the Labour Party and his connectivity in the UK that was key to forming that board and pushing through that licence. It wasn't - I wasn't going to get a licence. It wasn't because we were a crypto company that they were going to give us a licence. It was all based on him. When you talk to Mr Thieriot tomorrow, he might say that the bank was his idea. But the person that could deliver this was Anthony. So there was nothing to sell. I can't sell anything."*

187. Mr Thieriot also gave evidence regarding the TBOL issue, in particular in Thieriot-WS2 at [9]-[21].

188. In Thieriot-WS2 (at [15]-[16]) Mr Thieriot referred to his email to Mr. Parsa copying Mr. Steckel dated 22 June 2016 in which he had said that the *"[m]ost important feature of UK bank is DIRECT access to rails... Zero dependence on goodwill of Barclays, Wells Fargo, BONY, etc. This is the holy grail, equates to control of one's own destiny, access to global banking, etc.* " He said that what he meant by those words was that existing traditional banks like Barclays had considerable concerns banking cryptocurrency companies, which they had often considered to be risky, and so having access to one's own clearing bank would avoid that issue. This was his experience with banks' general approach to the Company, and so being able to bypass those banks would be especially beneficial – and indeed the "holy grail" for the Company.

189. In Thieriot-WS2 Mr Thieriot also dealt with the discussions with Mr Watson regarding the issue of shares in TBOL to the Company's management (my underlining):

> "*18. I understand from Maples that the Petitioners have not pleaded any allegation in respect of me being involved with or having benefitted from any such conspiracy or diversion of TBOL as a corporate opportunity from the Company in these Proceedings ...... However, without prejudice to any arguments which the Company and/or the other Respondents may make in respect of the Petitioners' failure to plead my involvement in or benefit from any such alleged conspiracy or diversion of corporate opportunity:*
>
> *18.1 I wholly reject any suggestion that I received shares personally in TBOL, or that I was part of any such conspiracy.*
>
> *18.2 I deny that I attended the lunch meeting on or about 28 August 2017 that is referred to at paragraph 26 of Laggner 1. I would add that this is clear from Mr. Steckel's email to Mr. Watson summarising their discussion, in which he notes that "[t]he deal structure that we discussed is almost identical to the one discussed with JP." It is true that I had discussed with both of them the proposed deal structure, which included the Company holding a 9.8% shareholding in the entity which became TBOL, and a payment to the Company of US$3 million within 60 days of TBOL being granted a UK banking license. <u>I did so in my capacity as the then-Vice Chairman of the Company, and given that the development of a UK banking license had been my idea, and something that I had worked on since late 2015….</u>*
>
> *18.3 At paragraph 27 (a) of Laggner 1, Mr. Laggner refers to an email exchange between Mr. Steckel and me in mid-July 2017. In that exchange, we*

considered what compensation and stock options to which we each thought that we should be entitled. As is noted in my email therein at 5:19am on 16 July 2017, I had done a lot of work for the Company, and Uphold Bank/TBOL was my idea, and I was angry that Mr. Steckel – who had not done much work apart from securing the US$15 million through the Steckel Transaction, and who had no foundational role in Uphold Bank / TBOL whatsoever – was being avaricious and had suggested in those emails that he should be entitled to the same compensation as me. My view was reflected when I wrote:

> *"Now, to the comp part: You and I cycle between my original ask and your mirror image thing. The problem I have with your mirror image thing is that I don't participate in your carried interest and, frankly, the mirror regime starkly reminds me that while you are genuinely (and sweetly) concerned with my receiving what's fair - it's secondary to [Mr. Steckel] getting everything he can... which leaves me with a desolate feeling. I detest laying out all I've done because there's been a grotesque amount of such rubbish at this company, and because I think it should be obvious, but people have very short memories. Quite apart from having raised nearly all the money that hasn't come from you, there'd be no synthetic market depth algorithm, no tiered reserve, no UK bank, no CNB, no Escher [a long running potential transaction which ultimately did not complete], no Robin ["Robin" is Robin O'Connell, a key employee of the Company who I had brought to the Company, and who is the current CEO of the Company's Enterprise division, which sells other Uphold services to businesses]".*

18.4 *As highlighted by Mr. Laggner, Mr. Steckel then suggested "[r]egarding compensation for me, I want 300k and 4%. Same for you. And same % at bank. (You forgot bank subsidiary)." As is evident in the top email in that chain, I understood that whilst I was angry at Mr. Steckel, I had made my views known that I was not comfortable with Mr. Steckel receiving as much compensation and options as me, and I could not persuade him to receive less than me, whilst understanding that the compensation package was ultimately a matter for the Company's board to approve.*

18.5 *At paragraph 27 (c) of Laggner 1, Mr. Laggner quotes an email which Mr. Hilton sent to Mr. Watson on 8 December 2021 which refers to a discussion Mr. Hilton had with me regarding Mr. Watson holding 2% of the shares in TBOL for me personally. I did speak with Mr. Hilton and told him that Mr. Watson had advised me that he was holding 2% of the shares in TBOL for me personally. <u>As long as TBOL was a Company asset, I had an expectation that I would be appropriately compensated for my role in having conceived the general TBOL concept, negotiated contracts, and engaged and worked with service providers). As is standard in such</u>*

scenarios, my expectation was that the Company would give me options and/or shares in the entity which would hold the UK bank license. After Mr. Watson and TBOL continued the pursuit of the UK bank license, with the Company holding 9.8% of the shares in TBOL. After that shareholding had been agreed, as an olive branch, and perhaps in implicit recognition that TBOL had been my idea and that I had worked hard on it, Mr. Watson offered to give me 2% of his personal stake in TBOL at some point in the future. We had various high-level discussions to that effect from 2018, and which continued through to 2021. Mr. Watson had repeatedly told me that he would be true to his word and transfer those shares in TBOL to me, however unfortunately this share transfer was never executed. This was a lingering frustration for me given my foundational role at what became TBOL.

19 *At paragraph 28 of Laggner 1, Mr. Laggner refers to an email from Mr. Fontg to me on 13 September 2017 copying Mr. Steckel and Mr. Watson. It appears to me that Mr. Laggner sought to imply that we considered that a formal legal advice on the regulatory risk of the Company owning 10% or more of TBOL would only be needed if the Company's shareholders asked questions about the Company only being transferred 9.8% of the total shares in TBOL. I reject that suggestion. There are several points here which should be noted:*

19.1 *It was clear from the meeting between the Company and the PRA in March of that year that the PRA would likely not provide a UK bank license to an entity in which the Company was a control person (holding a 10% stake or higher).....*

19.2 *Mr. Laggner quoted only part of the wording of an initial email from Mr. Fontg. Mr. Fontg's email further noted that "JP or Anthony... would you be able to coordinate a call with UK counsel to help with this support analysis? Also, it might be helpful if counsel from Paul Hastings [the Company's English solicitors] would be available at least for a portion of the board call on Friday. I have dealt with Matthew Poxon previously but not sure if he is the right person on bank regulatory matters."*

19.3 *As per Mr. Watson's response in the same chain (to which I responded "Let's get this rolling gents!") dated 14 September 2017, I had spoken with someone at Paul Hastings (it was Matthew Poxon, who was then an associate in their corporate department), and Mr. Poxon indicated his view supporting our understanding of the regulatory constraints of the Company holding a large stake in TBOL, and that a letter summarising the same would be provided later that day……"*

190. Mr Thieriot was cross-examined by Mr Valentin on the TBOL issue. Mr Valentin asked Mr Thieriot about the discussions with Mr Watson for the issue of shares in TBOL to the Company's management. The following exchange took place (Day 8, pages 79-83):

> *"A. ..... The middle phase. And punctuated by such things as Adrian and Anthony getting into a theatrical fight at some restaurant in Los Angeles and my trying to patch that up, and all that good stuff. But the end result of that is Uphold is going to own 9.8%, and that starts the longest phase of the whole thing. <u>And I think somewhere in there, likely when Anthony needed something from us, and in the vein of being a good sport, I suppose, there was the promise of 2</u>%....... <u>It was never formalised, and it only came back into existence when there was a very protracted once - Anthony is a pugilist, and so everything is a fight at every stage, and I was reminded by reading through the things that even the 9.8%, he ultimately - it has to be non-voting</u>. It's just more, you know, constantly fighting everything. And ultimately it became Jim Hilton's fight, and when I was CEO at the time, I remember being irritated that it was going on and on and on. And so at one point or other I think I checked in with Jim and said, "Where are we with this?", and it was, you know, "Anthony is insisting that it's 5%, and we're holding out for 7%", and my response was, "Let me see if I can resolve this", because there is this promise of Anthony's from multiple years ago. And so I called Anthony, and said, "Anthony, do you recall this?" "Yes, I do?" "Do you plan on honouring it?" "I do." So I suggested, "Well, great, your issue with Jim is resolved. Use my 2%", and that was the end of that arc.*
>
> *Q. And then Mr Hilton has a word with you. You discuss it with him, and then Mr Hilton reaches out to Mr Watson to see whether he's holding the 2% for you, and whether he's holding anything else for anyone else.*
>
> *A. I think so.*
>
> *Q. Do you remember what the answer to that was?*
>
> *A. .....I don't.*
>
> *Q. But would Mr Watson ever come back and say "No, I'm not holding 2% for you"?*
>
> *A. Is that what he did?*
>
> *Q. I don't know. I'm asking whether you remember.*
>
> *A. That would be in character, but I don't know.*

Q. *The theatrical lunch that you mention, the argument, what was the argument about?*

A. *I think Anthony being a pugilist, being perhaps ungrateful. There was the - when things reach their extremes, I think there was the Anthony point of view of, well, the MSBB deal didn't work out, so I'm just going to go and do this on my own. I think that was always the most extreme position, and one we obviously wanted to avoid, given the sunk costs and our having fathered the idea.*

Q. *Just to look at one of, the sort, of points in what you've just told us, the December conversation with Mr Hilton, or email exchange ...... This is Mr Hilton to Mr Watson in December 2021. This is after the licence had been granted, I think, isn't it?*

A. *I believe so.*

Q. *"Anthony, "I had a conversation with JP this morning. I wanted to reach back out to you and close the loop on that, and ask for some additional information. JP indicated that you are holding 2 percent of the shares of TBOL for him personally. These are shares that everyone agreed he would receive at about the time the SIA was executed. JP indicated that these might be available to enrich the existing settlement offer." Now, the reference there to the "SIA" is the share issuance agreement, and that was the beginning of January 2018……. And he asks -- Mr Hilton asks Mr Watson: "... I wanted to confirm that you are holding these shares for JP and that, if JP agrees, they could be transferred to Uphold as part of a settlement (in addition to what has already been offered) ...... I wanted to ask whether you are holding any additional shares for the benefit of others who acquired their interests as a result of their work for Uphold." And you don't know what response was received to that. I think, if we scroll up the page, I'm not sure we get much of an indication here…. All that happens here is that Mr Hilton forwards the exchange on to Kleinbard and the English lawyers, Dentons, and the general counsel, confirming the conversation and they just say "thank you." So we don't get a response here. I may be wrong, but I don't think we find Mr Watson coming back and saying: I'm holding shares for X, Y and Z; please may I hand them over. We don't get that. Indeed, I think we get from your evidence that you were aggrieved by this, by Mr Watson not honouring what he said he would do; is that fair? The words you use - I think "lingering frustration" are the words you used?*

A. *Gotcha.*

Q. *Which is paragraph 18.5, I think, of your witness statement ...... It's 18.5, last sentence: "Mr Watson had repeatedly told me that he would be true to*

> *his word and transfer those shares in TBOL to me, however unfortunately this share transfer was never executed. This was a lingering frustration for me given my foundational role ..." When did you last speak to Mr Watson?*
>
> *A. Oh, more than six months ago, I would guess."*

191. Mr Milby, who himself is a person regulated by the PRA and an experienced banker, also gave evidence on the TBOL issue in both Milby-WS1 and Milby-WS2. He was also cross-examined by Mr Valentin on this issue. His evidence dealing with the discussions with the PRA/FCA can be seen from the following.

192. First, in Milby-WS1 he said this (my underlining):

> *"53 Our initial discussions with the PRA and the FCA, prior to the "Feedback Meeting" was very opaque. The limited feedback we received suggested that they had concerns regarding MSBB's Regulatory Business Plan and operating model, which we sought to address during our informal discussions and in the draft Regulatory Business Plan submitted in March 2017 in connection with the feedback meeting. However, the BoE's regulators were never transparent about the precise nature of their concerns, making it difficult to effectively identify and address them. I got the sense, from our discussions with the PRA and the FCA around the Initial Meeting, that the BoE was not going to grant a licence to MSBB although this was never explicitly stated.*
>
> *54. On 6 March 2017, Mr Watson, Diane Grey-Smith (CFO of Uphold), Bill Dennings (COO of Uphold) and I, along with our advisors from KPMG, attended the "Feedback Meeting" with the PRA and the FCA to discuss the draft Regulatory Business Plan to be submitted by MSBB and more generally the progress of TBOL's application for a UK clearing bank license. The PRA and the FCA expressed concerns about the Company's involvement given that it operated in the crypto sector. We were also informed that Mr Minor's significant shareholding in the Company was an issue as they did not deem him to be a fit and proper person due to his bankruptcy. Because he held more than a 10% interest in the Company, he was subject to regulatory approval from the PRA (as was the Company as TBOL's parent). Mr Watson sent a summary of what was discussed at this meeting to the rest of the Board on 6 March 2017.*
>
> *55 Concerns were raised by the PRA over the Company's ability to control and direct TBOL and stated that any shares held by the Company in TBOL would need to be non-voting shares and that TBOL would need to be run independently from the Company. It was suggested that there should not be common directors*

on the Boards of the Company and TBOL in order to ensure clear separation of each entity's decision-making process.

56 *On the following day, Mr Watson forwarded an email from Giles Adams of KPMG to Mr Steckel, Mr Thieriot, Mr Dennings, Ms Grey-Smith and myself, which summarised his initial observations from the meeting with the PRA and the FCA. Mr Adams noted that the regulators expressed a lack of confidence in Mr Minor and had no desire to work with an application connected to him, and also had views about the ownership structure. KPMG concluded that the issues raised were manageable with additional detail and reworking, but the matter might be complicated if the Company needed to acquire MSBB in advance of the submission and by the issue of Mr Minor. At this point in time, the Company had a right to acquire 100% of the issued shares in MSBB subject to certain conditions, however over subsequent months it became clear that MSBB was not needed and that the application could be pursued by TBOL directly, with the effect that the Company did not need to close on the acquisition or pay the closing consideration.*

57 *In or around May or June 2017, the BoE informally notified TBOL that they would not support a clearing bank license being issued to a cryptocurrency company, or an entity that was based offshore (including its holding or parent company). However, it indicated that up to 9.8% of TBOL's issued shares could be held by the Company without any issue (an interest below 9.8% was not regarded as a controlling interest and was not subject to the same regulatory scrutiny). This position was also confirmed by KPMG and TBOL's legal counsel, Paul Hastings. If TBOL wanted to pursue the clearing bank license, it was clear that it would need to change its structure to address the criteria identified by the BoE's regulators. There was no realistic prospect of the Company (an offshore cryptocurrency venture) being able to successfully obtain a clearing bank license in its own right or through a subsidiary in which it held more than 9.8%....*"

193. Secondly, in Milby-WS 2 Mr Milby responded to Mr Laggner's evidence (in Laggner-WS at [16]-[32]). Mr Milby said (at [5]) that while he did not know whether Mr Watson had amended the original draft of KPMG's email as Mr Laggner had alleged, he considered (as someone who had attended the meeting with the PRA/FCA) that his own recollection was "*entirely consistent*" with Mr Watson's account in his email which he considered to have been accurate. He also referred to Mr Watson's email sent or around 6 March 2017 which was different from the KPMG email which had been mentioned by Mr Laggner. Mr Milby also noted that Mr Brooke's email to Mr Minor and his wife dated 31 January 2017 in which Mr Brooke expressed an opinion as to whether the PRA/FCA would have a problem as a

result of Mr Minor's shareholding had pre-dated the 6 March meeting. Mr Milby estimated that there had been five in-person meetings with the PRA/FCA and many phone calls, none of which Mr Laggner had attended. Mr Milby also clarified his evidence in relation to the PRA's concern about the Company operating in the crypto space; he was unsure in view of the passage of time precisely when the issue had first been raised.

194. When cross-examined by Mr Valentin, Mr Milby said this (Day 7, pages 181-190):

Q. *…. Is it true that that was also your perception even after the feedback meeting in March 2017?*

A. *Well, it was - that's really what you had, that perception. You know, the opaqueness from the PRA/FCA is, quite bluntly, kind of how they work. And we experienced it as we got our own application put together, in that there was an individual who was immensely qualified to be on the board … they wouldn't approve the board candidates, and we kept going around and around. And we really honestly never figured out what they didn't like about this individual, because they just don't give it to you in kind of a very black and white response.*

Q. *They don't say you can't do this, but they are not saying you can do this. They are just asking questions, asking for information?*

A. *Well, they are uncomfortable, you get the sense that they're uncomfortable because they haven't said you can go. Oftentimes, they won't say no. They just won't let you go, which I realise isn't a very good way to describe it, but .... Just that they were quite cautious about (a) crypto because this is - we are now sequentially, this is when the "crypto winter" began, when crypto went from something like $70,000 a coin down to around 5. And so anything that touched on crypto was something they were terribly wary of. The 10% rule is standard for anyone, in the sense that any individual, almost regardless of nationality, owning more than 10% of a bank goes through an additional level of scrutiny. The bankruptcy that he had gone through would have been a red flag, because obviously it would indicate someone that has had some financial difficulty in the past.*

Q. *What I think you're saying in paragraph 55 is that you were told at some point by the PRA that if the company was going to hold shares in TBOL, they would need to be non-voting shares?*

A. *Exactly.*

Q. *And that they would need to be - it would need to be run independently from the company. That means having a separate board with separate people on it?*

A. *That's right. And that was all contained in the regulatory business plan.*

Q. *And ultimately, when Mr Watson and you stepped down from the Uphold board, there wouldn't have been .... it's obviously later in the story - an issue about you and Mr Watson, or Mr Watson on his own, being on the board of the bank, because he wasn't then a director of the company?*

A. *That's correct.*

Q. *What you're not saying in paragraph 55[of Milby-WS1] is that the concerns that were being expressed at the meeting on 6 March were the company cannot own - cannot have shares in the bank. The point you're making is that if it does, they have to be non-voting shares?*

A. *That's correct.*
Q. *And also that the board would have to be run independently?*

A. *That's correct. And the only limitation on the ownership ended up being the 10% hurdle, which ultimately became 9.8. And that differential there, I don't quite recall how that fell off.*

Q. *Did you - were you involved in any consideration by the company in 2017 as to how the company might continue to own the TBOL, as it became, opportunity by having non-voting shares?*

A. *No, I don't remember any discussion in that regard.*

Q., *And what about the point about having a separate autonomous board? Was that something that was discussed in your presence?*

A. *It was discussed in my - putting together the application that we were submitting, that there would be a board for the bank.*

………

Q. *... in paragraph 57 of your statement, paragraph 15 you say: "In or around May or June 2017, the [Bank of England] informally notified TBOL that they would not support a clearing bank licence being issued to a cryptocurrency company, or an entity that was based offshore (including its holding or parent company). However, it indicated that up to 9.8% of [the] issued shares could be held by the Company without any issue ..."…. You don't say that you were notified of this personally?*

A. *No, I was not personally notified.*

Q. *Is it something that you would have learned from Mr Watson perhaps?*

A. *Mr Watson and Giles.*

Q. *Do you remember how you learned about this?*

A. *Not specifically.*

Q. *I think you also refer here to -- it's perhaps over the next page - the position being confirmed by KPMG and TBOL's legal counsel?*

A. *Mm-hm.*

Q. *If I said to you that there isn't any documentary evidence of KPMG saying this, would you accept that?*

A. *I would be very surprised, because the 9.8 was a number that we built into the .... we then ultimately spent three and a half years putting this application together. The 9.8 was in every version that application. I would be shocked if somehow Giles "missed" it.*

Q. *Yes, I'm not saying he missed it. I suppose what I'm putting to you is that - we're dealing here with 2017, and the question of whether the Bank of England had said the company cannot own more than 9.8% of the shares?*

A. *I believe what it said was 10%.*

Q. *But earlier in your statement, at paragraph 55, you talk about non-voting shares?*

A. *Mm-hm.*

Q. *And the point I think you're making there is that there isn't any difficulty from a control perspective if the shares are non-voting. That's right, isn't it?*

A. *From a control perspective, absolutely right.*

Q. *No one at the Bank of England or the PRA said to you at any stage the company cannot own more than 9.8%?*

A. *Not that I recall……"*

The Board's Litigation Committee

195. The appointment and actions of the Litigation Committee are addressed by Mr Hilton in Hilton-WS1.

196. As noted above, on 24 February 2021, at Mr Hilton's suggestion, the board resolved to establish the Litigation Committee, its primary purpose being to manage the Company's response to the First Petition.

197. The Litigation Committee comprised Mr Hilton, Ms Slemmer, Mr Chapman and Mr Thomas. Mr Anderson, as I have noted the Company's current General Counsel, attended the meetings which were confidential.

198. Mr Hilton confirmed (and was unchallenged) that he had been able to act independently of Mr Steckel, and he had not seen any evidence that other board members had been the subject of any undue pressure or control from Mr Steckel (Hilton-WS1 at [67]-[68]).

199. In light of concerns expressed by Mr Lee Hansen (the Company's CEO) and those identified in the First Petition, the Litigation Committee considered it prudent to investigate the Company's issuance of ordinary shares to Mr. Steckel and Mr. Chen in settlement of PIK interest in respect of the RCA Loan and the 2016 Transaction (Hilton-WS1 at [71]). These investigations continued notwithstanding the compromise of the First Petition on 12 June 2021.

200. Kleinbard (which is a US law firm) was instructed to conduct an independent investigation into these matters: Ms Mary Beth Gray, the firm's managing partner was well known to and trusted by Mr Hilton and neither she nor her firm had had any prior involvement with the Company or its directors/management). The engagement letter stated that "*the Board is most interested in determining: (a) whether the Company could pursue viable legal claims against the Company's former Chief Executive Officer and Board Chair related to the issuance of the PIK shares; and (b) what, if any, remedies might be available for the Company to pursue*

against the former Chief Executive Officer and Board Chair related to such claims." Kleinbard was given wide-ranging access to the Company's documents, which included some 50,000 emails.

201. Kleinbard advised:

   (a). By a presentation to the Litigation Committee on 3 August 2021 (Hilton-WS1 at [74] – [77]).

   (b). By a draft investigative report to the Litigation Committee dated 30 August 2021 (Hilton-WS1 at [78]).

   (c). By a final investigative report (***Kleinbard's Final Report***) to the Litigation Committee dated 7 September 2021 (Hilton-WS1 at [83]- [88]).

202. The Litigation Committee also received Cayman Islands law advice from Maples.

203. Kleinbard's Final Report discussed the Third Amendment to the RCA as follows (my underlining):

> *"The Board members at the time of the execution of the Third Amendment were Adrian Steckel, JP Thieriot, Leland Westerfield, Anthony Watson, William Dennings, and James Milby. (William Dennings was identified in certain records as a Director, but other documentation indicates that he attended Board meetings as an invited officer of the Company, and not as a Director.) James Milby was described by then-Company CFO Lee Westerfield as the only independent director at the time of the Third Amendment…. To this end, it appears that Westerfield attempted to work with Milby on behalf of the Company in negotiating the terms for the PIK interest in the Third Amendment with Steckel (who was to recuse himself from the Board vote). See id. However, as with many other matters involving the Company, it appears as though the discussions between Westerfield and Milby happened via conference call without any written record. ..And it does not appear as though Milby was emailed or copied on any drafts of, or discussions about, the Third Amendment.*
>
> *As described in more detail below, <u>the available documents include no evidence that an independent person with authority acted on the Company s behalf for purposes of negotiating the Third Amendment and interpreting the loan documents. Attorney</u>*

Ricardo Fontg worked on drafting, revising and finalizing the Third Amendment on behalf of the Company. Attorney Fontg had acted as Adrian Steckel's attorney for purposes of drafting and negotiating the original Revolving Credit Agreement. … JP Thieriot ultimately signed the Third Amendment on behalf of the Company as a Director, but there is no evidence that he specifically approved the aggressive loan terms…. In contrast to the Board minutes memorializing the discussions and approvals of the original Revolving Credit Agreement and the First Amendment and Second Amendment to the Revolving Credit Agreement, the documentary record does not include written Board minutes regarding discussion and approval of the Third Amendment. Similarly, in contrast to the records regarding the approval of the Revolving Credit Agreement in June 2016, there is no written record of Adrian Steckel having recused himself from voting on the Third Amendment. Indeed, there are no known Board minutes from January 2017 until September 2017, when the Board met and was advised by legal counsel that the Company has historically failed to properly document minutes from prior Board meetings. See 9/15/17 Minutes, attached as Exhibit 9. 5 Detailed Board approvals are available for the First, Second, Fourth, and Fifth Amendments to the Revolving Credit Agreement. No such Board approvals are known to exist for the Third Amendment. And, in an email from this year, Adrian Steckel has acknowledged that no such written approvals likely exist. See 3/15/21 Email Chain, attached as Exhibit 11 (Most probably, the board minutes do not reflect the agreements but that is a function of change at the GC position than anything else).

The Third Amendment set the conditions moving forward (as of March 2017) for the Company being permitted to pay ordinary shares in lieu of cash interest payments due on the outstanding principal balance of the loan. However, no detail is provided in the Third Amendment regarding how the Company was supposed to exercise its option to settle PIK interest in shares or who was to make that decision on the Company s behalf. Moreover, when issuing these PIK shares, the number of shares awarded was to be calculated using a valuation of the Company fixed at $48 million. However, no detail was provided in the Third Amendment regarding the basis of the $48 million valuation at the time of the Third Amendment or regarding the circumstances that would necessitate a revision to that valuation. According to email correspondence from May 2018, the $48 million valuation ended up in the legal documents through lawyer to lawyer discussions, so there is no email trail regarding $0.36 per share or the calculation of the number of shares… The $48 million valuation also was never amended or updated in subsequent amendments to the Revolving Credit Agreement.

Approximately six months after the Third Amendment was executed, in November 2017, the Board unanimously approved the issuance of warrants to a company called Synthetic Liquidity…. In doing so, the Board used a pre-money valuation of the Company of $75 million, or 50% more than the valuation set forth in the Third Amendment. There was no discussion in the approval of the grant of warrants to Synthetic Liquidity regarding the impact on the updated pre-money valuation on the existing terms of the Revolving Credit Agreement….

It also does not appear that equity investors in the Company were ever informed about the Third Amendment or the valuation being used for purposes of calculating the issuance of PIK shares. Indeed, in a May 2017 email from shareholder Peter Kearns (an ally of William Laggner) to the Company, Kearns states: The last [shareholder] call was [] very unprofessional given that the company was in deep financial trouble and was bailed out by inside shareholders and board members without any prior notification to shareholders… In addition, in October 2017, another shareholder by the name of George Karahalios specifically challenged the PIK interest terms as being paid at a very depressed valuation. See 10/14/17 Email Chain, attached as Exhibit 16. In response, the Board members attempted to defend the valuation by stating: This valuation was the equity valuation that was part of the B-3 [Series] round, which is the then current valuation. This arrangement was shareholder friendly as it was meant to avoid triggering any interest payment defaults on the loan facility…

In 2018, the Company approved the Fourth Amendment to the Revolving Credit Agreement. The Fourth Amendment confirmed the provisions of the Third Amendment, including that the calculation of PIK interest would be made on a fully-diluted basis. The Fourth Amendment was approved by the Board, with Adrian Steckel recusing himself from the decision. There were no available documents indicating if the Board was advised of the PIK calculation concerns raised following the adoption of the Third Amendment. The prior calculations of the PIK interest were not adjusted. The Board members at the time of the execution of the Fourth Amendment were Adrian Steckel, JP Thieriot, Leland Westerfield, Anthony Watson, James Milby, Greg Kidd and Dan Schatt. Dan Schatt was James Chen's representative on the Board, and he recused himself from approval of the Fourth Amendment."

204. Kleinbard's Final Report discussed the PIK interest issue as follows (my underlining):

"As stated previously, the $15 million loan under the Revolving Credit Agreement was funded with $10 million from Adrian Steckel and $5 million from James Chen. Thus, beginning in March 2017, both Steckel and Chen received PIK interest shares from the Company in lieu of cash interest payments. Again, the PIK shares were issued based on a Company valuation of $48 million. At each monthly issuance of shares to pay for the current month s accrued interest amount on the loan, the number of PIK shares issued in prior months was added to the denominator. Shares were always issued using the larger denominator reflecting the previous issuance of PIK shares, without adjustment of the $48 million valuation. Thus, with each successive PIK interest payment to Steckel and Chen, the number of outstanding shares in the Company increased, meaning the value of each share decreased (as the valuation was fixed). Consequently, each subsequent PIK interest payment to Steckel and Chen was satisfied by the issuance of an increasing number of shares.

All in all, from March 2017 until December 2018, Adrian Steckel received a total of

18,863,702 shares (Series B-3 and Series C) in settlement of PIK interest..... Meanwhile, during that same time period, James Chen received a total of 7,470,791 shares (Series B-3 and Series C) in settlement of PIK interest….In 2018, when the entire outstanding loan balance was finally settled, the accrued interest amount on Steckel s portion of the loan was $6,464,074, and the accrued interest amount on Chen s portion of the loan was $1,974,067………

Depending on the valuation and dilution calculations used, it is possible to interpret that as many as 13 million excess PIK shares may have been issued to Adrian Steckel and James Chen, if the PIK share issuances had been calculated without the substantial benefit to the lenders of the valuation and dilution protection…. The PIK share issuances as calculated in the first illustration above were the direct result of the Third Amendment and the favorable interpretation of the loan documents exhibited by the former officers and directors of the Company. Importantly, it is not clear from the available records who was acting on the Company s behalf for purposes of negotiating the Third Amendment and interpreting the loan documents. Although the former Company CFO Lee Westerfield repeatedly raised concerns about the aggressively lender-friendly terms being interpreted to benefit the Company Chairman and CEO, he was not successful in pushing his interpretation, as discussed below.

Emails reflect that Westerfield regularly raised questions about the negotiation of the Third Amendment and the proper interpretation of the loan documents related to the issuance of PIK shares. Indeed, in one email regarding the negotiation of the Third Amendment, Westerfield expressly states: The PIK interest at 30% a year will agitate shareholders, or worse, resulting [sic] in a lot of time consuming and costly legal matters; I doubt I could support this PIK for stock with these conditions[.]… Rather than respond directly to Westerfield s concerns via email, the Board members and counsel at the time avoided putting anything in writing and instead set up conference calls to discuss Westerfield s issues….

In another email [5/11/18] regarding the interpretation of the loan documents, Westerfield explains:

The PPS for the $48M equalled the $0.36 for Series B3 Preferred issued in January and early February of 2017; I believe that valuation level was adopted because it was proximate to the loan in early March 2017. As I recall, the intention was to PIK in the same form of securities (in B3 shares) and value per B3 shares ($0.36 = $48M pre-money). I'm sure that's how Adrian and JP and I have understand the construct for PIK interest, as we talk about this interest nearly every week.

And it appears that Adrian Steckel kept in regular contact with Westerfield about the PIK shares due and owing him, and Steckel would approve of the numbers calculated by Westerfield. ……Indeed, it appears that both Steckel and James Chen had their own interpretations of the loan documents that they did not hesitate to share with

Westerfield in order to influence his decision regarding making payments on behalf of the Company…. And, at one point in June 2018, Westerfield noted that: In fact the Borrow[er] retained the choice whether to pay Cash or PIK under the Third Amendment. In practice, Borrower has never had sufficient cash to pay cash interest.""

205. The Investigative Conclusions set out in the Kleinbard's Final Report were as follows (my underlining):

"A. There is no evidence that the Third Amendment was formally reviewed, considered or approved by an independent Board.

Unlike the other amendments to the Revolving Credit Agreement, there is no written documentation that the Board reviewed, considered or approved of the Third Amendment. Again, this is in stark contrast to the other amendments (including the Fourth Amendment, which confirms certain provisions of the Third Amendment), and to the original Revolving Credit Agreement itself. Although the Board Vice-Chairman did ultimately sign the Third Amendment, there is no evidence that the other Board members, and particularly any truly independent, non-conflicted Board members, reviewed, considered or approved of the Third Amendment prior to the document's execution. Moreover, there is no written documentation that the Board Chairman at the time, Adrian Steckel, actually recused himself from consideration or debate of the Third Amendment by the Board, let alone the final vote of the Board on the proposed amendment. Finally, it appears that Ricardo Fontg, who had acted as Adrian Steckel s counsel in drafting the original Revolving Credit Agreement, drafted the Third Amendment, seemingly in his capacity as counsel to the Company.

The only known evidence of a potential independent Board member reviewing, considering or approving the Third Amendment is email correspondence between the former CFO Lee Westerfield and Board member James Milby, in which Westerfield requests a quick call with Milby to discuss the terms for PIK interest on the Holding Loan. See 3/1/17 Email Chain …. However, what was discussed on that call and the results of that call are unknown. And there is no known evidence of follow-up or subsequent calls between Westerfield or Milby on the Third Amendment. As alluded to previously, there was a clear pattern amongst Board members at the time to reroute important, substantive discussions of Board issues from email to a conference call when sensitive matters were to be discussed. Simply put, there is no evidence that James Milby was provided drafts of the Third Amendment for review, or that he was advised of the potential negative impact on other shareholders of the interpretation of the PIK interest provisions.

B. Circumstantial evidence establishes that Adrian Steckel engaged in self-dealing and conflicts of interest with regard to the Third Amendment.

As stated previously, the Third Amendment to the Revolving Credit Agreement set forth the conditions moving forward (as of March 2017) for the payment by the Company of shares in lieu of cash to settle the interest payments due on the outstanding principal amount of the loan. However, based on the documentary evidence available, it appears that one individual namely Adrian Steckel was acting as the Company s chief creditor, CEO and Board Chairman and was the sole individual negotiating the terms of the Third Amendment on his own behalf as the Lender and on behalf of the Company as the Borrower. Indeed, there is no evidence other than some failed attempts by the former CFO Lee Westerfield that an independent person was even attempting to negotiate the terms of the Third Amendment in the best interests of the Company.

It is our understanding that, under Cayman law, the Company was not explicitly required to form and seek approval of the Third Amendment by a special (disinterested) committee of the Board. However, Cayman law does require that a transaction involving a potential conflict between a director and the Company be disclosed and approved by disinterested directors. There is no evidence of any specific discussion or involvement by disinterested Company directors with regard to the Third Amendment. Again, there are no known Board minutes or Board records reflecting Board discussion or approval of the Third Amendment in any manner whatsoever, and certainly not with the degree of care that may have been appropriate given the material benefits the Third Amendment provided to the Lenders. Similarly, there is no written record of Adrian Steckel having recused himself from voting on the Third Amendment and, in fact, it seems that his advisors played an instrumental role in pushing the Third Amendment to execution. Although the Fourth Amendment was approved by the Board without the participation of the interested directors, there are no records indicating that the Board understood the impact of the prior interpretations of the Third Amendment and the possibility that the Company had been interpreting the Third Amendment provisions both incorrectly and adverse to the interests of the Company.

As the sole negotiator of the Third Amendment on behalf of both Lender and Borrower, it appears that Steckel created favorable conditions for himself in the terms of the Third Amendment vis-à-vis the substantially discounted Company valuation of $48 million (coupled with the ballooning dilutive provisions described above), while also leaving ambiguity in the Third Amendment as to how the Company would exercise its option to settle PIK interest in shares. This permitted Steckel to influence the interpretation of the Third Amendment and underlying loan documents without the presence of an independent Company advocate. Indeed, at one point in May 2018, the former CFO Lee Westerfield expressly noted that that he would talk to Steckel nearly every week about the construct for PIK interest. See 5/11/18 Email… The structure also gave Steckel the opportunity to effectively choose between being repaid in cash or PIK interest from the Company at his own discretion. At the very least, Steckel s apparent involvement on both sides of negotiating and later interpreting the Third Amendment would arguably amount to self-dealing and conflict of interest.

C. Adrian Steckel potentially violated one or more of his legal duties as a director and officer of the Company with regard to the Third Amendment.

A viable legal argument could be made that Adrian Steckel breached one or more of his duties as a director and officer of the Company concerning the Third Amendment to the Revolving Credit Agreement, including, but not limited to, his duty of good faith, his duty to act with a proper purpose, his duty to avoid secret profit, and his duty to give attention to the business.

*For instance, an argument could be made that Adrian Steckel breached his duty of good faith by not recusing himself from the discussions about, and consideration of, the Third Amendment by the Company. Steckel may not have ultimately voted on the Third Amendment as a Board member, but the email correspondence establishes that he was involved in the negotiations and subsequent interpretations of the Third Amendment on behalf of the Company and himself. See 3/8/17 Email, ……
5/11/18 Email.*

Likewise, an argument could be made that Steckel breached his duty to act with a proper purpose by having PIK shares issued to him and James Chen under the Third Amendment using a lower than actual valuation of the Company. In doing so, an argument could be made that he was acting solely in the interests of the creditors, which included himself. See 3/8/17 Email, Moreover, there is no evidence that similar participation rights were offered to all existing creditors, other than himself and James Chen, as would have been required by the relevant Company documents at the time.

*Similarly, an argument could be made that Steckel breached his duty to avoid secret profit, given that the share value associated with the 18,863,702 PIK shares issued to Steckel under the Third Amendment in settlement of interest could be assessed as more than $132 million. Meanwhile, in 2018, when the initial loan was finally settled, the accrued interest amount on Steckel s portion of the loan was nearly $6.5 million. There is no evidence that these amounts, nor the fact that the Third Amendment would substantially expand the rights of the creditors (including
Steckel) in both the magnitude of the overall interest payments and the value of the shares issued in settlement, were discussed thoroughly, completely and independently with the Company s Board.*

*There is also no evidence that the $48 million valuation used in the Third Amendment was properly vetted in the first instance by the Board, or that it was deemed outdated and in need of revision by the Board at any point thereafter. And there is no evidence that any of these figures or amounts were disclosed to new shareholders in the relevant 2017 and 2018 time period. Thus, Steckel appears to
have kept his substantial profits secret from the Board, creditors and shareholders.*

Finally, an argument could be made that Steckel breached his duty to give attention to the business as an officer of the Company. At the time of the Third Amendment, Steckel was acting as the Lender, Board Chairman, and CEO of the Company. From that time

forward, he received the benefit of the PIK interest and share structure as set forth in the Third Amendment, all to the detriment of the Company. An argument could be made that Steckel was wearing too many hats at the time of the negotiation and drafting of the Third Amendment and, therefore, was not acting in the best interests of the Company at the time."

206. Kleinbard's Final Report went on to deal with potential remedies and identified the following: (a) unilaterally to cancel a portion of the PIK shares issued to Mr Steckel and Mr Chen under the Third Amendment; (b) pursue legal recourse against Mr Steckel regarding his receipt of PIK shares under the Third Amendment and (c) pursue a potential settlement with Mr Steckel by using the excess PIK shares as leverage.

207. Mr Hilton reviewed the advice that Maples had given and their discussions with Kleinbard (my underlining):

"*79 [On 31 August 2021, Ms. Gray provided Mr. Anderson and Mr Hilton with a draft of Kleinbard's report]. That same day, <u>Maples responded to Kleinbard's draft by noting their preliminary view that "there is not necessarily a viable claim from a Cayman perspective unless perhaps, as an evidential matter, we can make good the statement in Lee [Westerfield, the Company's then Chief Financial Officer]'s email of 11 May 2018 that Adrian believed PIK interest was payable at .36 per share and demonstrate that Adrian misled the company into signing the contract on a mistaken basis</u>."*

80 The following day, <u>on 1 September 2021, Caroline Moran, a partner at Maples, sent a more detailed analysis as a matter of Cayman Islands law which cast doubt on whether the Company had a viable claim against Mr. Steckel for breaching his duties as a director. In particular, Ms. Moran noted that a major problem with any claim against Mr. Steckel is that the fourth amendment to the RCA (the "Fourth Amendment"), which was approved by the Company's board (with Mr. Steckel recusing himself), expressly resolved any uncertainty as to how PIK interest was to be calculated in Mr. Steckel's favor</u>. <u>Given that the Company had accepted a particular method in the Fourth Amendment, it was "extremely difficult for the Company to argue successfully that it was in some way misled or taken advantage of" by Mr. Steckel</u>.

81 In response to the main points in Kleinbard's draft, Ms. Moran noted the following from a Cayman Islands law perspective:

81.1 <u>With respect to the lack of Company board minutes approving the Third Amendment to the RCA (the "Third Amendment"), this did not necessarily</u>

suggest any breach of directors' duties, as a board can act informally provided that all directors agree with the decision being proposed;

81.2 *Mr. Steckel was not required to formally disclose his interest in any contract in which he was not voting to approve, and he appeared to indicate that he would recuse himself (as he had consistently done previously). Mr. Steckel's position as a counterparty to the Third Amendment was well-known to the Company's board in any event;*

81.3 *There was no indication from the documents provided by Kleinbard that Mr. Steckel was negotiating the Third Amendment on his behalf and on behalf of the Company, adding that "[t]he fact that the Company chose not to get outside legal advice is a matter for them which does not impact on [Mr. Steckel] or result in him being in breach of duty." For that reason and subparagraph 81.2 immediately above, she noted "we do not believe there is a good argument that [Mr. Steckel] was required to recuse himself from discussions about the Third Amendment at the time of its negotiation" so as to suggest that he breached his duty of good faith to the Company (by allegedly failing to recuse himself from the same);*

81.4 *With respect to the allegation that Mr. Steckel potentially breached his duty to act with a proper purpose by having PIK shares issued to him at a low valuation, any such claim would be against the members of the Company's board for having issued those shares, not Mr. Steckel. Any such claim against the members of the board would be difficult as it would be necessary to show that they decided to issue the shares to increase Mr. Steckel's stake in the Company, rather than for the predominant purpose of paying the PIK interest, bearing in mind that the Company had no cash to pay the PIK interest at that time;*

81.5 *There was no clear evidence that Mr. Steckel hid the relevant clause in the Third Amendment from the Company or misled the Company as to its effect in order to show that he breached his duty to avoid a secret profit; and*

81.6 *Mr. Steckel could only be in breach of his duty to give attention to the business of the Company if it was demonstrated that the Company's board was under his control, and the transaction was approved in his best interests rather than those of the Company. However, she added "this is a difficult claim to make good and very fact specific but we should discuss further."*

208. On 19 July 2022, the Litigation Committee met to discuss Kleinbard's findings, especially in light of the filing of the current Petition (in June 2022) on similar (but not the same) grounds to those contained in the First Petition. The Litigation Committee decided that it

was not in the Company's best interests to pursue any claim against Mr Steckel in relation to the 2016 Transaction or TBOL. The minutes of that meeting relevantly provided the following:

> *"4.2 The Special Litigation Committee engaged Mary Beth Gray, an attorney at the firm Kleinbard LLC, to review the documents, information, and materials in the Company's possession to investigate the claims made in the 2021 Petition concerning the Steckel Loan and related transactions, as well as dealings related to TBOL Ltd. Upon conclusion of this review, Ms Gray reported her findings to the Special Litigation Committee and discussed these findings with the Company's Cayman Islands counsel at Maples and Calder.*
>
> *4.3 Ms Gray concluded that there was no evidence of any impropriety in the Steckel Loan itself, but did raise concerns about certain subsequent related transactions. Maples and Calder advised, inter alia, that the subsequent related transactions at issue were subsequently approved by the Board (with Mr Steckel abstaining), which would significantly impair any potential claim against Mr Steckel relating to the Steckel Loan or subsequent related transactions. Ms Gray did not find sufficient evidence to substantiate a claim against Mr Steckel related to the TBOL Ltd dealings.*
>
> *4.4 Mr Hilton and Mr Anderson discussed the potential claims against Mr Steckel with Mr Steckel himself at an in-person meeting. Mr Steckel vehemently denied any wrongdoing, and made clear that he would vigorously defend himself against any claim brought by the Company. He further noted that he would seek indemnification from the Company on an ongoing basis for any costs he incurred in defending himself.*
>
> *4.5 The Special Litigation Committee thoroughly discussed the findings and advice of Kleinbard and the advice of Maples and Calder, as well as the discussion with Mr Steckel, and concluded that it was not in the best interests of the Company to bring a claim against Mr Steckel related to the Steckel Loan or the subsequent related transactions or related to the TBOL Ltd dealings, due to (a) the weakness of the potential claims and relatively low probability of success, (b) the significant cost to the Company in both money and diverted effort and resources of the Company that would be required to bring any such claims, and (c) the potential negative effect on the Company's ongoing fundraising efforts."*

209. Mr Hilton's evidence in Hilton-WS regarding the Litigation Committee's decision making was as follows:

> *"102 The filing of the new Petition in June 2022 on substantially the same grounds as the First Petition made it clear to me, and the Litigation Committee, that we*

needed to come to a firm position as to whether there was any credible basis for the Company to commence any claims in respect of the Steckel Transaction and, in particular, the various amendments to it – which I recognize were perhaps not well understood by either myself or the other members of the Litigation Committee prior to receipt of the Kleinbard Steckel Report.

103 Prior to the 19 July [2022] meeting, the Litigation Committee was again provided with a copy of the Kleinbard Steckel Report, and Maples' advice on those points (referred to above at paragraphs 79 to 88 of this witness statement).

104 Reviewing the minutes of that meeting, I note the following:

104.1 Following the First Petition and the Re-Amended Petition, the Litigation Committee had "resolved to review the concerns and allegations voiced by the Petitioners and to consider and resolve, on behalf of the Board, whether or not it was in the best interests of the Company to bring proceedings arising from the [2016 Transaction or] related transactions… or to take any other steps in this regard";

104.2 The Litigation Committee engaged Kleinbard "to review the documents, information, and materials in the Company's possession to investigate the claims made in the [First] Petition concerning the Steckel [Transaction] and related transactions, as well as dealings related to TBOL Ltd", with their findings being reported to the Litigation Committee and discussed with Maples;

104.3 Kleinbard's investigation concluded that "there was no evidence of any impropriety in the Steckel [Transaction] itself, but did raise concerns about certain subsequent related transactions", namely the Third Amendment and the Fourth Amendment; and

104.4 From a Cayman Islands law perspective, Maples advised inter alia that "the subsequent related transactions were subsequently approved by the Board (with Mr. Steckel abstaining), which would significantly impair any potential claim against Mr. Steckel relating to the Steckel Loan or subsequent related transactions".

105 I recall that the Litigation Committee discussed the findings and advice of Kleinbard and the advice of Maples. We ultimately decided that it was not in the Company's best interests to pursue any claim against Mr. Steckel in respect of the Steckel Transaction and the PIK shares because any such claim was unlikely to be successful, would take up much needed money and resources from the Company, and could affect the Company's ability to attract investors.

106 As I recall, this exercise was important because I had considered that Mr. Steckel (and by extension Mr. Chen) had got a great deal from the Steckel Transaction through the issuance of the PIK shares, and so the Litigation Committee needed

to iron out – through Kleinbard's investigation and Maples' advice – what exactly had happened there, and whether the Company had any reasonably actionable claim against them or any other party, and if so, whether it was in the Company's best interests to pursue such a claim, although I understood throughout on the basis of legal advice that that was unlikely, especially given the Company's board's approval of the Fourth Amendment.

107 *The findings of Kleinbard's investigation and the conclusions in Maples' advice strengthened my belief that the Petitioners' allegations in these Proceedings in respect of this transaction are without merit, such that it is imperative for the Company to forcefully resist such allegations (especially in respect of the Company and its board generally) in the best interests of the Company's independent shareholders who are neither affiliated with the Company's board/ management, nor affiliated with the Petitioners. I understand from general discussions that I have had with the other members of the Litigation Committee that they also hold a similar view to me."*

210. Mr Hilton was cross-examined by Mr Valentin on the Litigation Committee's decision not to issue proceedings in relation to any of the matters considered by it (Day 8, pages 173-181) (my underlining and emphasis):

"*Q.* *Now, despite your concern to get to the bottom of the issue, and the seriousness of the issue, it's right, isn't it, that the litigation committee ultimately then didn't do anything about it for seven months?*

A. *Yes, that's correct.*

Q. *And we see that in your evidence at paragraph 100: "As I recall, from November 2021 to July 2022, the Litigation Committee and I were largely focused on other matters, including settlement discussions with TBOL and Mr Watson ... We [also considered] strategic steps in respect of the [2016] Transaction and the PIK interest issue."*

Q. *Can I just ask what you mean by "considering strategic steps" in respect of those matters?*

A. *…. Whether there was any way to enter into a settlement or pressure Mr Steckel into a settlement regarding the PIK issue.*

Q. *You come back to the issue in July 2022, as you say in paragraph 101, after the issuance of the current petition.*

A. *Yes, that's right.*

………

Q.	*…. you recall the committee discussed the findings and the advice: [You said] "We ultimately decided that it was not in the Company's best interests to pursue any claim against Mr Steckel in respect of the [2016] Transaction and the ... shares because any such claim was unlikely to be successful, would take up much needed money and resources ... and could affect the Company's ability to attract investors." Now, the main reason that was dominant in your view that the claim would be unsuccessful was that the Fourth Amendment had been entered into. That's right, isn't it?*
A.	*It was the Maples advice which was based in large part on the Fourth Amendment and the execution of the Fourth Amendment, that's right.*
Q.	*But it doesn't, in a sense, cure the concern that arises out of the Third Amendment. It just means the view was you could not bring a claim. The issue of whether the Third Amendment had been correctly entered into, whether the valuation was right, whether it should have been amended, all the concerns that led to the Kleinbard report were still there. It's just that the advice was: well, the Fourth Amendment has been entered into; so we can't bring a claim?*
A.	*To be fair, I think all the process concerns that Kleinbard brought up were still there. When we say whether the valuation was right: the valuation was a contract term that was agreed. It can't be right or not right. It was - it was just a term.*
Q.	*... But the point about it not being updated over time, that issue that the Kleinbard report deals with, that issue still remained. It was still something that had gone wrong that had caused prejudice, but the claim -- they couldn't bring a claim, Maples said, because of the Fourth Amendment?*
A.	*To be fair, I think it's more nuanced than that, right. They couldn't - they couldn't bring a claim for the valuation because the contract unfortunately itself was clear. The question was whether the contract itself was validly entered into, and that was made clear by the Fourth Amendment, if it wasn't clear from the process around the Third Amendment…… I hate to - - I don't want to echo JP, but there were two separate issues going on, both of which we were trying to deal with, which was whether there was a claim, whether we had something legally - whether we had something strong that we could use either to bring a claim against Mr Steckel or to force Mr Steckel into a settlement, and what many of the shareholders, employees, other board members would have thought was fair. And I think there are very different conclusions. I think that there was a general feeling, certainly among the Litigation Committee, but others that we had talked to, including Mr Thieriot, Mr Hansen, other members of the Litigation*

Committee, that this may not have been totally fair, but that we didn't have a claim. We didn't have a way of enforcing it, which was going to make it very difficult to force a settlement.

Q. ***Can you see that shareholders listening to that account, which is your evidence, might lose confidence in the management of the company because of what you've just said? In other words, something happened in 2017. There was then an amendment that ratified it in 2018. There was then an investigation that uncovered a number of, as you put it, process points in 2021. And then the conclusion, after a pause of seven months, was – with some advice from Maples: we can't do anything about this, and that's the end of the matter?***

A. ***No, I disagree. I don't see how shareholders lose confidence in the company based on that. If, in fact, we had had a viable claim in 2018, 2019, 2020, that we lost, because the investigation didn't happen until 2022, I can understand losing confidence. The reality is what the investigation showed is that the contract was validly entered into. And although the terms were onerous for the company, they were legal and enforceable.***

Q. *But Mr Steckel and Mr Thieriot were still on the board, weren't they, in 2021, and therefore were part of the management of the company at that stage, and they are the individuals who were responsible for what had happened in 2017, 2018 in relation to the Third and Fourth amendments?*

A. *If what you're suggesting is that they were responsible for entering into a contract that was onerous but enforceable, yes, in fact, they were still on the board, but I don't see why that was an issue. As I understand it, and I wasn't there, the company, once again, was desperate for cash, and this was the cash on offer. If you're talking about the process around the Third Amendment and the fact that minutes should have been clearer, that that process should have been much clearer, yes, I think that is an issue that would maybe give you pause about what was happening in 2017. I don't see how it gives you pause about management of the board of the company in 2025.*

……..

A. *[After a short break] Could I make a brief clarification before we start? … I think the most important answer, we didn't bring an action against Adrian, or James to be fair for recovery of the shares, because we would lose. We had advice that we could bring a claim. We may be able to get to trial. But ultimately, we would lose, and we would pay costs, and we may pay the costs of the respondents. And that would be a waste of time, money, and wouldn't do anything to heal the internal strife inside the company. So*

it would have been a bad decision, and it may be an unpopular decision. It would be nice to be charging at them, but it ultimately would not have been in the company's interest.

Q. *What I put to you though is that, if you're looking at this as a shareholder, from the outside, and what you're being told is: this is what happened in – this is what they're being told now. This is what happened back in 2017: an arrangement was made, Third Amendment, it went through, there was a Fourth Amendment, it went through. The effect of those amendments was that Mr Steckel and Mr Chen's entities have a very large number of shares, which I think is a fact that you must accept.*

A. *Yes*

Q. *The board can't do anything now - the company now can't do anything about that, because of what was done in 2017/2018 by Mr Steckel and the board at the time …. and Mr Thieriot, who was signing the resolution of the amendments, and so on. From a shareholder's perspective, it doesn't really make it any better. I can see the decision not to litigate about it may be taken with the benefit of advice, but it doesn't really mitigate the adverse consequence of what happened in 2017/2018 in terms of the confidence of the shareholders in the management of this company. Do you see what I mean?*

A. *I agree that they are two separate issues, and my answer said nothing about the Third Amendment or why the company entered into it…. Yes, I'm talking about my understanding of Mr Thieriot's decision was there no choice at all. Interest was coming due on a loan. We couldn't pay. We could default or we could enter into terms that were onerous.*

Q. *That wasn't true in the time of the Fourth Amendment was entered into, was it? That's a point that's made in relation to the Third Amendment. At the time the Fourth Amendment was made, in 2018, the position was different than it was in 2017?*

A. *I would have to go back and look at financials. I don't know that we really hit our stride in 2018 either. But I would come back and say the company could pay … had the option of paying the interest in cash according to the original agreement.*

…….

Q. *Your original thought when you asked Mary Beth to do her investigation was that you needed someone of her calibre to do it, because this might be self-dealing by a director?*

A. *Yes.*

Q. *And the investigation ultimately reached a number of factual findings and conclusions that were, at least to some extent, supportive of your view that there had been self-dealing; do you agree with that?*

A. *I agree to some extent. But let me explain what – not I had hoped, but what I may have been led to believe the investigation would uncover. I was led to believe that the investigation might uncover that there were different ways of interpreting the Third Amendment and the Fourth Amendment, and that the company was under pressure and chose the most aggressive interpretation of those amendments. And it turned out that was not the case. There's, as far as I'm aware, no dispute as to the meaning of those amendments and what was due. The case that there was pressure to enter into those agreements, it's a much, much different situation when you're a borrower who can't repay your loan.*

Q. ***But can you see the difficulty, and the reason that I'm standing here in 2025 asking you questions about it, is that this is characterised in materials that we have before the court as an arm's length exercise between two commercial parties, when in reality it was the company CEO, Mr A Steckel, and Holdings owner, Mr A Steckel, on the other side. And what we ended up with in this - these amendments was something that I think everybody agrees, and certainly JP agrees, led to a shocking situation in terms of the number of shares that Mr A Steckel has now acquired**.*

A. *I'm not going to sit here and defend the processes around 2017. Those can and have been improved. And I think it was especially unfortunate that it came at a time where, even if the general counsels weren't doing everything they should have done, came at a time when there was no company general counsel, I think that exacerbated the problem.*

Q. *So your view is it's all a bit unfortunate that it's turned out this way, but there's nothing you can do about it now because of the Fourth Amendment?*

A. *And I would say it's not completely clear to me that if the process had been much more rigorous, that there would have been a different result. It would have been better. All in favour of a better process. I'm not sure we would have ended up in a different place.*

……..

Q. *[The October 2023 Letter] openly acknowledges, doesn't it, various breaches that have in the past, or failures by the company to comply with various obligations it had in the past.... what the letter does is it suggests the solution to the issue is for there to be 8 million-odd shares available to be acquired by existing preferred shareholders; correct?*

A. *That's exactly right, yes.*

Q. *On condition that they waive any claim in respect of any past breaches?.......*

A. *Which, to be fair, I think is a - in my mind, much more attractive than having your rights on the investor rights agreement in a timely way. You effectively have a free option at this point. You get to exercise your rights under the investors rights agreement some period later, and take advantage of positive price changes in the company.*

Q. *But you would accept - I think you must accept, mustn't you, that this is an issue that was a problem that dated back to 2018?*

A. *Dated back to the issuance of the series C, yes.*

Q. *Exactly. And that there had-- were you aware of this - been advice about it in 2021 from Maples?*

A. *Not as I sit here, no. I have seen this come up in court and I knew that there were a series of issues that we were trying very hard to deal with through - as we got ready for the SPAC. I understand now that this was one of them, and ultimately we didn't get it corrected or at least didn't correct it to the SPAC, and was not done when we abandoned the SPAC late in 2021.*

Q. *Why wasn't it done then?*

A. *Yes, there wasn't a decision not to do it. I think part it is we have a very talented but seriously overworked and understaffed general counsel. And I think after the SPAC collapsed or was abandoned, everybody took a deep breath, took one step back and got on with the issues that were coming next. This should have been picked up and just wasn't.*

……

Q. *So your evidence is that this was an [insufficiently] important issue that needed to be resolved in the context of the SPAC?*

A. *Yes.*

Q.	*But once the SPAC fell away, it wasn't that important, so no one did anything about it for two years?*
A.	*No, I don't think that's my evidence. There [was] no decision not to do anything about [it]… There was no decision to ignore it. There was no decision saying: this is unimportant; it can wait. It was a mistake. It should have been dealt with then. It wasn't dealt with then.*
Q.	*The only reason it cropped up again in 2023 was that the Petition had been issued for a second time, and this was an issue in the Petition?*
A.	*I don't think that's correct. This had been brought up earlier. It was taking a frustrating amount of time, in my mind, to get done. So that was not the only reason it came up.*
Q.	*In the [October 2023 Letter it is said that] "The Company believes this is critical to ensure any future continuing transactions the Company may undertake proceed smoothly and efficiently."… The obvious question I'll ask you is that, if it was critical for future financing transactions in 2023, why was it not critical for future financing transactions in 2018 to 2022?*
A.	*It was critical then. It was critical for the SPAC which in some ways was a financing transaction. When that transaction collapsed, we weren't facing another financing transaction imminently, and I'm afraid that's why it was able to fall through the cracks.*
Q.	*What financing transaction was imminently about to occur in October 2023?*
A.	*It wasn't imminent, but in 2022 we borrowed $30 million from an entity called Hard Peach, which was ultimately controlled primarily by Greg Kidd, but also by James Chen. To be fair, under fairly attractive terms. Originally, that loan was set to mature in either 2024 - I think 2024, and we extended the terms so it matures now in the summer of 2026. We were contemplating that we may need to refinance that loan at that point, and wanted to be ready….*
Q.	*I'm just trying to understand why his - that something that is considered critical in 2023 was not critical at any point before that. I just don't understand quite why that makes any sense?*
A.	*… Again, I would have to talk to Mr Anderson and Mr Hansen. It just wasn't done on my to-do list. Mr Hansen brought it up again. It was clear that it was critical, and we pushed very hard to get it done.*

………

Q.	***Can you see that from the perspective of shareholders again, looking at this episode, an issue relating to the C from 2018 that is addressed or about to be addressed with counsel, as we now see, because of course the shareholders couldn't see this at this time, in the middle of 2021, but was then not addressed, and is then ultimately addressed, to the extent it is, by this letter in 2023, might lose confidence in the board of the company, in the management of the company, in the conduct of the company's affairs****?*
A.	*No. That doesn't - the idea that, you know, failure to give notice of a rights under an investors rights agreement is, by itself, what's going to cause people to lose confidence in the board and management of a company that has managed to go from borderline insolvent to very successful, made very dramatic changes in its operations and its personnel over that time, that this is an incident that would cause you to lose confidence in the company? It - frankly, it just is incredible.*
Q.	*One way in which this is unsatisfactory, I would suggest to you, is that by 2023, earlier failures to comply with the IRAs were more than six years ago?*
A.	*That's right.*
Q.	*And you remember, don't you, that the finance committee in looking at this issue before the letter went out explicitly noted: we only need to deal with the series C issue, because everything else is more than six years ago.*
A.	*Yes.*
Q.	*Does that cause you to change your view about whether shareholders looking at this, who aren't beneficiaries of the series C letter, might lose confidence in the management of the company?*
A.	*No.*
Q.	*You say in your evidence at paragraph 218 that you wanted to resolve the oversight. You describe it as an "oversight".*
A.	*Okay.*
Q.	*And you say that you don't know why the oversight occurred, and that's your evidence?*

A. *That's true, yes.*

Q. *Did you ask or investigate why the oversight had occurred?*

A. *I did not.*

………

Q. *…. But the question really is …... the Kleinbard memo is supportive, at least to some extent, factually, of the point that you've been exploring with Dentons?*

A. *It is. I would like to bring out the …. very awkward dichotomy or dilemma, two alternative things, both of which are true and are apparently contradictory. Completely stand by what we said. This was an Uphold opportunity. Uphold owned 100% of this. Also believe, as I sit here today, based on my 30 years' experience as a bank regulator and helping institutions with bank regulatory matters, that the idea that Uphold was going to own more than 10% of a UK clearing bank, honestly, I hate to be extreme, it's ridiculous. A good adviser would have told Uphold please just stop. We were a Cayman crypto company. We weren't even eligible to the licensed in the UK. We were on the verge of insolvency several times. Our major shareholder was insolvent. Our shareholders were suing each other. These just aren't the kind of entities that get banks. I have advised clients very much like this, and you say it's not going to happen. So it is true. I believe that Uphold had 100% of this opportunity, and it ended up with Anthony. But I also believe that Uphold couldn't do anything with this opportunity. It was never going to be the 100% or 90% or 95% owner of a UK clearing bank.*

Q. *And was the answer therefore, the only answer, that Mr Watson should take it forward?*

A. *Well, it depends [on] what "it" is at that point. One answer is that Mr Watson takes it forward. I think the real answer is finding a way for Uphold to own as much as it could, which is just under 10% interest, is the goal, is what you're trying to do. One way to do that is with Mr Watson. Mr Watson certainly has his challenges, being the controller of a bank, but also seems to have great strengths in being able to get there and create political acumen and political connections. And I think that's one option. It wasn't necessarily the only option.*

Q. *Was another option to spin the opportunity out to the company's shareholders?*

A. *According to what we heard from counsel, that wasn't to be an attractive option at that point…… [Mr Anderson] was worried about tax liability and worried about finding - you still need to control the entity……*

………

Q. *…… "Having considered those findings, the ... Committee considered that any potential claims ... the Company might have against Mr Steckel ... were weak and unlikely to be successful. Moreover, commencing such a claim would be expensive and divert important effort and resources of the Company, and potentially have a negative effect on the Company's ongoing fundraising efforts."* ***It would also have been unattractive, wouldn't it, in the context of the petition proceedings****?*

A. *I'm not sure I agree with that. Frankly, in some ways, if we firmly believed it, there's some argument it would have helped the company's position in these proceedings.*

Q. *Although of course Mr Steckel would have pulled out his and said, "You're paying the costs of this"?*

A. *Of course, he would have. But that's a different issue. But to come back to the substance of this, despite the emails that we've looked at, not only could we not find any evidence that Mr Steckel received any interest in TBOL, other than the shares that we've talked about as a result of a personal loan that was foreclosed on that came up, there's an explicit representation in the settlement agreement with TBOL that first we had a cap table, and they certified it was accurate, and Anthony certified that he wasn't holding any shares on behalf of any Uphold shareholder.*

Q. *But what you'd seen, hadn't you, because it's in the Kleinbard investigation, is that reference to an agreement on 11 September 2017 - ...... to Mr Steckel, Mr Dennings and Mr Thieriot -... getting 8% of the company?*

A. *Yes.*

Q. *What efforts were made to discuss this issue with Mr Steckel ......before the litigation committee decided not to bring a claim against Mr Steckel in July 2022, with the benefit of the information it had at that point, was there any discussion or investigation or enquiry of Mr Steckel as to the facts of this issue?*

A. *To Mr Steckel? I don't recall a formal investigation of - with Mr Steckel about the issue. I remember pushing for evidence that there was a shareholding by any Uphold employees or officers or directors - that had*

> *been the allegation - and getting vehement denials that there was anything there."*

The Petitioners' pleaded case

211. The Petitioners' case is pleaded in the Petition and in the Points of Claim.

212. That case had been responded to in the Company's Points of Defence and in R2-R4's Statement of Defence to the Petitioners' Points of Claim.

213. The Petitioners also filed Points of Reply to the Company's Points of Defence and R2-R4's Statement of Defence to the Petitioners' Points of Claim.

214. [35] of the Petition is headed "*Conclusions*" and summarises the Petitioners' grounds for the relief they seek (my underlining):

> *"The Petitioners humbly seek an order pursuant to section 92(e) of the Companies Act (2022 Revision) (the "**Act**") for the winding up of, or alternative relief in respect of, the Company on the basis that it is just and equitable that the Company be wound up for the following reasons:*
>
> *a. Mr Steckel has, through the Steckel Transaction, taken control of the Company, for the ultimate benefit of Mr Salinas, and diluted, and caused the Company to dilute further, the Petitioners' shareholdings, in breach of the IRA and the Articles, and to the detriment and prejudice of the Petitioners.*
>
> *b. In causing the Company to enter into the Steckel Transaction, Mr Steckel (in combination with the Steckel Faction), breached his fiduciary duties as a director and acted with a lack of probity which has caused the Petitioners to lose confidence in Mr Steckel (and the Steckel Faction generally).*
>
> *c. Since the Steckel Transaction, Mr Steckel (in combination with the Steckel Faction) has caused the Company to operate without regard to the principles of proper corporate governance and has continued to cause the Company to prefer his interests (and those of Uphold Holdings LLC, ASP Capital Sub I Inc, the Steckel Faction and Mr Salinas) over those of the Company and its shareholders generally.*

d. *The Steckel Transaction and Mr Steckel's other conduct pleaded in this Re- Amended Petition has also benefitted Mr Chen (whose interest in the Company is now held by Amherst Holdings Limited) to the detriment and prejudice of the Petitioners.*

i. *The Petitioners have therefore justifiably and irretrievably lost all faith and confidence in the directors of the Company and the board's ability to manage the Company's affairs in the best interests of the Company as a whole.*

j. *Consequently, the Petitioners' rights and interests have been oppressed, wilfully disregarded, and undermined.*

215. Further particulars are provided in the Points of Claim (my underlining):

"A CASH CRISIS IS ENGINEERED

22. *By the first quarter of 2016, the Company's financial position was sound. At the end of the previous year, the Company was independently valued at just under US$60 million or 31 cents per share. Conditions at the beginning of 2016 were favourable, as confirmed in an email from Antony Watson ("Mr Watson") dated 17 January 2016 in which he wrote: "We've hit January ON FIRE" and another email dated 11 February 2016 which circulated an article describing the Company as one of the top 20 red hot pre-IPO companies at the time.*

23. *Despite the Company's sound financial position and obvious commercial potential, Mr Steckel (acting together with Mr Thieriot, Mr Parsa and Mr Watson, whom Mr Steckel had persuaded to act and to vote on his instructions and/or with him in order to facilitate a takeover of the Company (the **"Steckel Faction"**)) were determined to run the Company down by maintaining an unsustainable expenses to revenue ratio whilst failing to progress reasonable opportunities to obtain further finance on reasonable terms. By way of example:.....*

24. *It was clearly in the Company's best interests (as Mr Minor and Mr Laggner urged) to pursue a conservative strategy and in particular to conserve cash flow. At the time, however, monthly expenses were running at US$1.2m against revenue of $20,000. Mr Laggner asked Mr Watson to defer his $85,000 monthly salary and make other cuts such as laying off consultants and cutting excess overhead to better manage cash flow. Mr Laggner also requested that an audit of the Company be carried out in 2016 for the purpose of investigating the excessive spending and potential misallocation of corporate funds that he felt was being incurred at the executive level. Mr Laggner's concerns were ignored and the audit request was denied by a majority of the board.*

25. *The Company's failure both to progress reasonable opportunities to obtain further finance on reasonable terms and to conserve cash flow was contrary to the Company's best interests. It is to be inferred that it was part of a plan initiated by Mr Steckel (with Mr Salinas) to engineer an unnecessary cash crisis so that Mr Steckel would be able to acquire a significant stake in the Company through presenting a 'save the day' financing agreement, and in the process diluting the shareholdings of the Petitioners and taking control over the Company. In so acting, Mr Steckel breached his duties as a director of the Company to act in Company's best interests, for proper purposes and in a way that avoided conflicts of interest.*

26. *There was no cash crisis justifying Mr Steckel's actions….*

27. *In connection with this plan, Mr Steckel was acting at all material times for his and/or Mr Salinas' own benefit and with the support of Mr Salinas…*

The Steckel Transaction

28. *In early June 2016, Mr Parsa (a former employee of Mr Salinas) reported to the board that a meeting or series of meetings had taken place in Mexico between him, Mr Steckel and Mr Salinas. These were with a view to Mr Salinas providing finance to the business through Mr Steckel. Mr Parsa emailed the board on 19 June 2016 with a proposed "operating plan that Adrian and I believe will likely be acceptable to Ricardo Salinas and upon which he will extend Uphold additional financing". Mr Parsa followed up with details of the main terms of Mr Salinas' offer in another email to the board sent on 22 June 2016 (headed "Salinas' Terms"), which left no room for any doubt from these terms that this was intended to be a Salinas takeover of the Company. That email described Mr Salinas' terms as follows:*

…….

29 *At that stage, the intent behind Mr Salinas' offer (as communicated to the board in Mr Parsa's email) therefore appeared to be for 30% of the Company's shares held by Mr Minor to be purchased by Mr Salinas and held, on his behalf, by Mr Steckel (or Mr Steckel's company). This would have required Mr Minor's consent, which he had made clear (as evidenced by his email to the board dated 24 June 2016) would not be forthcoming.*

30. *The board met later on the same day that Mr Parsa had purported to communicate Mr Salinas' terms (22 June 2016) to discuss the term sheets.*

    (1) *At the meeting, it appeared to Mr Laggner that a majority of the board had already committed the Company to agreeing Mr Salinas' terms. There was no meaningful examination of the proposed terms, the alternatives, or of what was in the best interests of the Company.*

(2) Mr Minor made it clear that he wanted no part in the takeover and resigned in protest.

(3) Mr Laggner made his objections known (the minutes incorrectly omit this), but decided to remain on the board in order to attempt to protect the interests of the shareholders he represented.

(4) The meeting then resolved to approve the Salinas terms without any qualification and Mr Steckel was appointed as Chairman in Mr Minor's place.

(5) The board meeting was a sham, held for the sake of appearances only, because a majority had already agreed to commit the Company to the Steckel Transaction at the Mexico meetings and had no intention of deviating from their plan.

(6) This was in breach of the duties owed by the directors who formed the Steckel Faction to act in what they honestly considered to be the best interests of the Company.

31. It was at this stage that alternative funding, in the form of what became known as the "White Knight" terms, was formulated, in the following circumstances….

33. Having appreciated there was no prospect of acquiring Mr Minor's shares, the Steckel Faction decided to have the Company issue a warrant which would, upon its exercise, give Mr Steckel (acting on behalf of Mr Salinas) compete control of a majority of the Company's shares for nominal consideration at the same time as borrowing funds advanced by the Third Respondent, Uphold Holdings, on egregious terms, including an annual interest rate of 24%. This decision is evidenced by the fact that, on the same day (24 June 2016) a majority of the board approved a term sheet submitted by Mr Steckel reflecting these terms and eliminating the offer to purchase Mr Minor's shares.

34. On 29 June 2016, Mr Laggner submitted the "White Knight" term sheet to the board as (what he believed was) a competitive alternative to the Salinas offer. This was rejected out of hand by the Company in the following circumstances:

(1) By this point, Mr Laggner had received commitments and signed term sheets from a variety of sources for over US$8m.

(2) This number was based on a spreadsheet Mr Watson prepared and which showed his estimation of the Company's needs.

(3) Mr Laggner even went so far as to ask Mr Chen to wire US$540,000, as a good faith demonstration of the immediate availability of funds and to

address the Company's immediate cash flow needs. Mr Chen duly made that transfer. Mr Salinas had done no such thing.

(4) On the same day (29 June 2016 – the minutes are incorrectly dated 27 June 2016), there was another board meeting at which the White Knight term sheet was rejected out of hand, following no meaningful consideration.

(5) Two reasons were recorded in the minutes as having been given, both of which were incorrect.

(6) The first reason given was that Mr Laggner's terms did not provide for sufficient capital on a timely basis. This was not the case. One member of his group had already advanced over half a million dollars to cover immediate cash flow. This was more than Mr Salinas had been prepared to do at this stage. A capital injection of US$8m would have been more than sufficient to keep the Company afloat, especially if management could be persuaded to act in the best interests of the Company by keeping costs under better control. Further, and importantly, the terms proposed by Mr Laggner were far less dilutive and onerous on the Company when compared with the Salinas proposal.

(7) The second reason given was that funding timing and success was somewhat uncertain in that it was dependent on Outpost securing written subscriptions and funds from committed third party investors who were not yet under written contract. This purported reason was also fictitious. Mr Laggner's investors (who were all existing shareholders at the time) had already signed term sheets and were fully committed. Mr Salinas, by contrast, was not.

………

36. The majority of the board had approved the term sheet on 24 June 2016 (see para 33 above). On 30 June 2016, Mr Thieriot executed the Revolving Credit Facility and Warrant on behalf of the Company.

37. On 6 July 2016, Mr Laggner emailed the other members of the board to express his concern that the Company should not commit to the Steckel Transaction in the face of opposition from a majority of the Company's shareholders (namely, Mr Minor, Mr Bechtel (Outpost), Bearing Ventures LLC and certain other smaller investors, together controlling over half of the voting shares) and when an obviously superior alternative in all material respects (including the terms for interest and not having to give away half of the Company) in the form of the White Knight term sheet was available……

38. *Mr Watson responded by email the next day that the board had a fiduciary responsibility to consider the White Knight terms and supporting a request for a general shareholders meeting.*

39. *At around this time, a call took place between Messrs Bechtel, Steckel, Thieriot and Laggner, in which they discussed the White Knight terms. On the call, Mr Steckel admitted that the White Knight terms were far better terms for the Company but said that they would not be acceptable to his group because they did not give him control of the Company. There was never in fact any prospect of any alternative to the Steckel Transaction being considered because the Steckel Faction had decided to pursue the Steckel Transaction regardless of the interests of the Company. The fact that Mr Steckel himself openly acknowledged that the White Knight terms were far better terms for the Company clearly demonstrates that the terms of the Steckel Transaction were, by contrast, uncommercial and known to be contrary to the best interests of the Company and its other shareholders, including the Petitioners.*

EVENTS FOLLOWING THE STECKEL TRANSACTION

40. *Once the Steckel Transaction was implemented, Mr Steckel had the power to control the Company in general meeting, if he wished, by exercising the Warrant (on behalf of Uphold Holdings). In the event, and having only faced resistance to his plan from Messrs Minor and Laggner, Mr Steckel did not need to call for a majority of shares to be issued under the Warrant because he was able to exercise de facto control over the Company through his influence on the board. This is to be inferred from the board's acquiescence in the Steckel Transaction and the further misconduct particularized below.*

……

42. *In the event, Mr Steckel caused or procured the Company's board to approve terms that:*

    (1) *Uphold Holdings would advance US$10m and Mr Chen (initially through Chen Holdings and subsequently through the Fifth Respondent, Amherst Holdings) would advance US$5m, and that they each subscribe for 42 and 21 million shares in the Company respectively;*

    (2) *they deploy the interest accrued at the extortionate rate of 24% to settle the already heavily discounted price payable per share under the Warrant of $0.01;*

    (3) *they were entitled, in addition, to subscribe for preference shares, which carried additional rights to the ordinary shares that they were to receive under the terms of the Warrant agreed in June 2016.*

In approving these terms, the board paid no regard to the interests of the Company or its shareholders other than Messrs Steckel and Chen and the companies they controlled. There was, for example, no attempt to comply with the IRA or Articles or to seek to secure better terms from any other shareholders or new investors. Instead, Mr Steckel was permitted by the board to amend the terms of his transaction with the Company to suit his needs at the time without taking any account of the best interests or rights of the Company and its other shareholders.

LACK OF PROBITY IN STECKEL TRANSACTION

43. *In causing the Company to enter into the Steckel Transaction, Mr Steckel and those board members that supported the transaction favoured the interests of Mr Steckel over those of the Company and conducted themselves in a manner which lacked probity. In this regard, the Petitioners rely on the following:*

   (1) *The transaction came about following a manufactured and unnecessary cash crisis which gave the false impression that there was no alternative source of funding other than Mr Steckel/Mr Salinas. Numerous other potential sources of funding had been ignored. The Company was in sound financial condition and as such would have been able to secure funding on better terms.*

   (2) *Further the board authorised at least two significant acquisitions in the month before the Steckel Transaction was approved: see paragraph 26 above.*

   (3) *The terms of the Steckel Transaction were not in the Company's best interests, as the board was well aware. They were not negotiated at arm's length. The 24% rate of interest was extortionate and nothing more than a device to ensure that Mr Steckel would not have to pay for the additional shares he would come to be issued under the warrant.*

   (4). *Further the price allocated for the Company's shares was a very significant undervalue having regard to the true potential of the Company's business and its recent valuations. Preference shareholders were later offered the chance to acquire shares at the same time but for over twenty-five times the price to be allocated (but not paid, given the application of the extortionate interest terms) to Mr Steckel.*

   (5) *The terms of the Steckel Transaction were opposed by a majority of the Company's shareholders at the time. Had the Company adopted the prudent course and called a general meeting of the Company's shareholders to consider the transaction before it took place, then it would have been voted down.*

(6) *Proceeding with a transaction that was manifestly not in the Company's best interests and which was opposed by a majority of the Company's shareholders and to whom the board owed its duties demonstrates a serious lack of probity on the part of those board members who supported the transaction (including, in particular, Mr Steckel).*

(7) *Mr Steckel placed undue pressure on the board not only to accept his proposal, but actively to breach their duty to consider alternatives that may have been in the interests of the Company. An email dated 29 June 2016 from Mr Thieriot confirms that: "The mere calling of the Board Meeting has resulted in Adrian, quite logically, taking his finger off the 'funding certainty' button-which is now probably Friday on their side. His strong inclination will be to withdraw the offer at the opening of any Board Meeting to consider a competing bid."*

(8) *The Steckel Transaction amounted to a breach of the Second Petitioner's rights under the IRA, in particular the right to receive notice prior to the granting of any right to receive potentially dilutory shares and the right to purchase shares on the same terms and therefore avoid dilution.*

(a) *On 21 July 2016, preference shareholders were sent an email containing a term sheet for the issue of B2 shares that preference shareholders could acquire and thereby purportedly avoid dilution.*

(b) *This purported offer did not comply with the IRA in that the B2 shares were not offered on the same terms as the shares to be issued under the Steckel Transaction. The former were offered at US$0.255 a share compared to US$0.01 offered to Mr Steckel.*

(c) *Further, the IRA required the Company to offer equivalent shares before and not after they were offered to Mr Steckel.*

(d) *Further, the Company was required (pursuant to Article 17.1.a of the Company's Articles) to hold a general meeting in order to increase its share capital in respect of the B2 shares. No general meeting was ever called and as such the B2 shares were offered and issued in breach of the Company's Articles.*

(e) *Prior to approving the Steckel Transaction, the Company should have both (i) made an offer to the holders of preference shares that complied with the IRA and (ii) held a general meeting to approve the increase in share capital needed to issue additional B2 shares in the likely event that the holders of preference shares exercised their anti-dilution rights under the IRA. The reason that no meeting was called was that the Steckel Faction knew that a majority of the Company's shareholders was vehemently opposed to the Steckel Transaction*

and would have used the meeting as an opportunity to vote against it.

(9) *The Company did not obtain Cayman Islands legal advice as to the ability of the Company to enter into the transaction or its potential consequences. For the avoidance of doubt the Petitioners accept the Company's external United States counsel, Dan Friedberg of Fenwick and West LLP, contacted Grant Dixon, a corporate partner in the Cayman Islands firm of Maples and Calder, to request an opinion purportedly on behalf of a "lender" as to the Company's capacity to enter into the Steckel Transaction and its legal effect. Mr Dixon provided a draft pro forma opinion on 1 September 2016, but no signed opinion was ever provided. In any event, the Petitioners note that legal advice was only requested following Mr Laggner's questioning and approximately one month after the transaction documents had been signed. This confirms that the Steckel Faction had determined to and did commit the Company to the Steckel Transaction regardless of whether it was lawful and/or in the best interests of the Company, which it was not.*

LACK OF PROBITY IN REMOVING MR LAGGNER FROM THE BOARD

44. *Mr Laggner continued to question the Steckel Transaction even after the documentation was signed by Mr Thieriot on 30 June 2016. Several months later, on 17 November 2016, Mr Laggner was removed from the board. The reason given for his removal, that he was in a position of conflict given he was in a dispute with Mr Minor, was without foundation. The fact that Mr Minor had agreed to transfer shares to Mr Laggner was of no consequence. It did not affect Mr Laggner's ability to act in the best interests of the Company at any time. Mr Steckel himself had previously acquired shares from Mr Minor without consequence. The real reason for Mr. Laggner's removal was to eliminate a source of scrutiny and questioning of the Steckel Transaction, its consequences and subsequent implementation.*

PRODUCTION OF INCOMPLETE AND/OR FALSE MINUTES

45. *The minutes relating to the Steckel Transaction were produced after the event. They did not provide a fair or accurate picture of the discussions that actually took place. For example, the minutes of the meeting to approve the Steckel Transaction on 22 June 2016 incorrectly recorded Mr Laggner as approving the transaction, which he did not. They also failed to record his numerous and vociferous objections to the transaction as it was proposed at the time.*

46. *In the lead up to the Steckel Transaction, most material communications were conducted in secret, either through Hotmail email accounts or face to face meetings with Mr Salinas (who was not a board member or shareholder) in Mexico. None of these discussions were ever minuted or shared with the entirety*

of the board as they should have been were the relevant members of the Board to have acted with probity in accordance with their duties as directors.

47. *Following the Steckel Transaction and up until the present day, the Company has failed properly to record its decision-making. Continuing failures of governance, including failing to comply with the requirement properly to minute meetings has remained a constant theme. On 17 October 2020, Mr Watson resigned from the board. He explained the reason for his resignation was that: "I do not have confidence in management's ability to effectively ensure basic governance". The next day, Mr Milby resigned citing his concern that the Company was unable to effect "even simple, standard governance such as the issuance of board minutes".*

48. *The failure properly to record important decision-making is indicative of the atmosphere and culture generated by Mr Steckel following his acquisition of de facto control. As a result of this and the other matters pleaded below the Petitioners have lost all confidence that the Company will conduct itself in accordance with accepted standards of corporate behaviour.*

LACK OF PROBITY IN HOLDING 2017 EGM

49. *On 23 February 2017, the Company purported to amend its Memorandum and Articles to create five additional classes of shares and to give the board authority to issue additional Series A and Series B Preferred Shares, which were required to be issued as a result of the Steckel Transaction.*

50. *As pleaded in paragraph 43 above, the Company should have called a general meeting before it approved the Steckel Transaction. It did not do so because Mr Steckel knew full well that a majority of members would have voted against it. Instead he caused the transaction to be pushed through in the circumstances described above and attempted to rectify the situation after the event and once he had eliminated any potential board opposition and secured control of a voting majority which only had as a result of the transaction.*

51. *Pursuant to the Articles, issuing further preference shares required the approval of the shareholders in general meeting. Although a meeting minute of an EGM dated 23 February 2017 was prepared (and was signed by Mr Steckel), notice of the meeting had not been given to all shareholders in time or in one case at all, and no meeting in fact took place.*

52. *Instead, the minute records that the amendments were purportedly passed on the basis of shares voted by proxy form, all but one of which was signed by Mr. Steckel.*

(1) *There is no evidence that Mr Steckel had authority to execute the resolution on behalf of any shareholders other than himself and Uphold Holdings.*

(2) *Neither Uphold Holdings nor Chen Holdings should have been allowed to vote at the EGM in any event, because they had only acquired their shares as a result of the Steckel Transaction. In the event, they were allowed to vote the very shares that the meeting itself was purporting retrospectively to authorize the Company to issue. Unlike Mr Steckel, holders of other shares issued following the Steckel Transaction were not allowed to vote.*

(3) *The only other proxy form was signed by an individual called "Caroline Turner", whose name did not appear on the Register of Members at the time.*

53. *The notice period required for the meeting was five days under the Company's Articles. However, notice was sent out after hours on Friday evening, and the meeting then took place on the fifth day. At the very least, a prudent board of directors, acting in accordance with its duties, should have appreciated that there was a risk that the meeting would take place without shareholders having been given proper notice of the EGM. There was no explanation as to the reason for the urgency in calling the EGM on such short notice in any case.*

54. *In these circumstances, the general meeting was conducted as a paper exercise retrospectively to validate the consequences of the Steckel Transaction that could never have been approved beforehand or contemporaneously, as they should have been. Both the context in which the meeting occurred and the manner in which it was conducted display a lack of probity on the part of Mr Steckel and those board members that were complicit in his actions.*

MR STECKEL SUPPRESSES A REPORT INTO A HOLE IN CLIENT RESERVES

55. *In early 2017, the Company's General Counsel, Thomas Brooke ("**Mr Brooke**"), sent a draft report to outside counsel, Ryan Straus, with whom he was working on an investigation into the creation of a "hole" in client money of around US$2m. According to a draft email he prepared in July 2017 Mr Brooke believed the draft was intercepted by Bill Dennings under false pretences, sent to Mr Watson and then to Mr Steckel.*

56. *The working draft identified cogent evidence of consumer and securities related fraud along with basic breaches of fiduciary obligations by executive officers of the Company. Upon receiving the draft, Mr Steckel instructed Mr Watson that he should not focus on wrongdoing and instead he should change the focus since the "hole" in the reserve had been filled by the funding made available as a result of the Steckel Transaction.*

57. *Mr Brooke attempted to persuade Mr Steckel that he was missing the point. He explained to Mr Steckel that as a regulated entity these sorts of failures and wrongdoings could not be simply swept under the carpet. Mr Steckel responded with a direct challenge: "Who would judge us?" Mr Brooke explained that shareholders and regulators to whom these obligations were owed would judge these actions. Mr Steckel disputed this idea, saying it was only an issue if the Company made it one. Mr Brooke insisted that the Company needed to investigate this issue as well, but was met by indifference from Mr Steckel who then pressured Mr Brooke to produce a report in order to try and sanitize what had happened, making it clear to Mr Brooke this was needed for the purposes of the UK banking license application (which is addressed further below).*

58. *Mr Steckel's conduct in intercepting the Company's General Counsel's emails, ignoring his concerns and advice as to the very serious and potentially criminal activity that taken place and then pressuring him to cause the Company to breach its obligations to its regulators and stakeholders by suppressing the reporting of serious misconduct falls far below the level of probity that the Petitioners are entitled to expect of him. Further, the fact that no other members of the board were willing to stand up to Mr Steckel confirms the Petitioners' lack of confidence in their ability to manage the Company in a proper manner.*

THE BANK OF LONDON ("TBOL")

59. *Obtaining a UK banking license was a key objective of Mr. Salinas.*

60. *In 2016, the Company spent considerable time, money and effort in pursuing the opportunity of acquiring a digital banking license to be able to trade in the UK. This was initially to be pursued through the acquisition of MSBB Money Limited, a company which was itself in the process of applying for a license.*

61. *Later on in 2016, this idea was abandoned in favour of an application by a company within the same group as the Company. Consequently, in December 2016, Uphold Group PLC was incorporated to pursue the license application and to employ its Chief Executive Officer, Mr Watson, who according to his employment contract was to have a 5% stake in that company as an incentive, with the 95% balance to be held by the Company.*

62. *In the event, Mr Watson was involved in incorporating Uphold Group PLC, but for reasons unknown to the Petitioners, appears to have caused all of its shares to be allotted to himself on incorporation. The Petitioners infer that Mr Watson must have held 95% of the shares on behalf of the Company, given that: (a) this was the Company's corporate opportunity, and (b) under his employment contract, Mr Watson was granted only a 5% share in order to incentivise him, with the balance to be held by the Company.*

63. *Uphold Group PLC has since obtained a banking license, and in November 2017 changed its name to The Bank of London Limited. However, for reasons that the Respondents have declined to explain, the Company's interest in TBOL is not [sic], but only between 5% and 9.8%, and Mr Steckel and Mr. Watson now between them have a controlling interest.*

64. *This constitutes the diversion from the Company of up to 90% of its interest in TBOL to Mr. Steckel and Mr. Watson. The adverse impact on the Company, which originally developed the opportunity, is significant since TBOL is now said to be worth in excess of US$1 billion. The Company has dismissed the Petitioners' concerns as historical and trivial and has provided no explanation or evidence to explain why the interest in TBOL was diverted away from the Company or why no action has been taken to recover what is owed to the Company as a result.*

65. *Although Mr Watson left the Company, he remained under a continuing duty to refrain from exploiting confidential information or a maturing business opportunity belonging to the Company. Any profit arising from his exploitation of the TBOL opportunity belongs to the Company, regardless of whether the Company could have pursued the opportunity itself.*

66. *The same applies to Mr Steckel, who also owes additional duties as an existing director to promote the best interests of the Company and to avoid any conflict or potential conflict of interests.*

67. *Accordingly, both Mr Watson and Mr Steckel breached their duties as directors to the Company by exploiting the TBOL opportunity for their personal benefit and are liable to account to the Company for any benefit they have improperly received.*

……..

STOCK ISSUES AND OPTIONS

76. *As a reward for supporting the Steckel Transaction, the Steckel Faction have benefitted from share issues and options since the transaction. For example, Mr Thieriot has acquired the rights to 15.6 million shares following the transaction. This far exceeds any reasonable expectation he may have had in respect of stock options.*

77. *Following the amendments purportedly made to the Company's Articles in February 2017, the Company issued over 40,000,000 Series B3 and Series C shares to Mr Steckel and Mr Chen's companies for no fresh consideration, instead allowing them to deploy the sums which had become owing to them under the egregious terms of the RCA as amended to pay for the shares.*

78. *Further, no attempt was made to comply with the terms of the IRA in respect of the Series B3 or Series C shares. The Company has issued further stock options to Messrs Steckel, Chen and Kidd subsequently.*

79. *This conduct again favoured the interests of Mr Steckel, Mr Chen and Mr Kidd over those of the Company's shareholders generally.*

……..”

The Petitioners' case at the close of evidence and in their Closing Submissions

216. The Petitioners' case however, as I have noted, following the close of the evidence and in their closing submissions, was substantially narrowed. The Petitioners set out and summarised their case in their written Closing Submissions as follows (my underlining):

"4. The central issue for the Court is therefore whether it is just and equitable, in the circumstances of this case, for the Court to order the buy-out of the Petitioners' shares at a fair valuation.

5. As the Petitioners indicated in opening, the evidential record contains - and the Petition identifies - various examples of misconduct and mismanagement on Mr. Steckel's watch. However, the dilution and diversion issues are sufficient, it is respectfully submitted, to engage the Court's powers under s.92(e) and s.95(3)(d) of the Act. In closing, and in the interests of time, the Petitioners therefore focus their attention on these core areas.

6. At the conclusion of the trial, the evidence strongly supports the Petitioners' case that justice and equity require the making of a buy-out order of their shares, on both of the grounds advanced in the Petition: oppression and loss of confidence. The Petitioners respectfully invite the Court to conclude that it is just and equitable to award a buyout of the Petitioners' shares on the basis that (i) their rights as minority shareholders have been oppressed and (ii) they have justifiably lost confidence in the conduct and management of the Company's affairs.

7. In order to reach that conclusion, it is not necessary (even if it were possible) for the Court to reconstruct the history of Mr. Steckel's treatment of the Company's shareholders on a day-by-day basis in the key period between the execution of the Steckel//Salinas Transaction in June 2016 and Mr. Steckel's resignation as Chief Executive Officer on 6 September 2018.

8. That is because it is not in dispute that during that period the shareholdings of the Petitioners (and other early investors) were massively diluted (as the

shareholdings of the entities of Mr. Steckel, Mr. Chen and Mr. Kidd rapidly grew) …….

10. *Nor is it seriously disputed that this dilution occurred as the direct consequence of a succession of decisions taken by or at the instigation of Mr. Steckel, whose shell companies (R3 and R4) were, with Mr. Chen's entity (R5) (and also Mr. Kidd's entity) the principal beneficiaries of the decisions made.*

11. *The task at hand is to identify the means by which this was achieved, and whether, in the process and outcome: (a) the Petitioners were treated unfairly by Mr. Steckel and the Company, and/or (b) their treatment lacked the degree of probity that they were entitled to expect……*

12. *Evaluation of the fairness and/or propriety of these decisions necessarily involves consideration of a range of factors. Of particular relevance on the facts of this case, as explained below, are: (i) whether or not there was compliance with the Articles and Investor Rights Agreements, and legal advice received; (ii) whether or not all shareholders were informed of the decisions that caused the dilution of their shareholdings; and (iii) whether or not all shareholders were permitted to participate and, if so, when and on what terms.*

13. *Mr. Steckel and the other Directors making the decisions in respect of the allotment of shares owed fiduciary duties to the Company, which required (among other matters) that they consider issues relating to the issuance of shares fairly and in a manner that was both compliant with the Company's obligations and in the interests of all groups of shareholders.*

14. *The evidence establishes, it is respectfully submitted, sustained disregard by Mr. Steckel for the interests of the Company's (other) shareholders. Although he repeatedly sought under cross-examination to justify the (June 2016) Steckel/Salinas Transaction, the (May 2017) Third Amendment to the RCA and its egregious consequences for other shareholders and the (remarkable) diversion (agreed in September 2017) to Mr. Watson of the Company's opportunity to acquire a UK banking license, as all decisions that were unavoidable and taken for the benefit of the Company and its shareholders, the truth is different. Whilst the Company may have regularly needed to raise funds throughout this period (in large part on account of the spending decisions it made), the decisions taken (by Mr. Steckel, having taken control of the Company from 1 July 2016) which resulted in the dilution of other shareholders were all effected in a way that, as he knew, would unjustifiably benefit his own position as a shareholder (through R3 and R4) at the expense of the shareholders as a whole. The diversion of the Company's UK banking license opportunity to Mr. Watson was neither necessary, nor justifiable.*

…….

16. *Having aggressively pushed through the Salinas/Steckel Transaction in June 2016, each of the dilutive decisions that followed were taken by Mr. Steckel with the same approach that was, as the Petitioners submit, unfair to them as shareholders, and a breach of his duties as a Director. The decisions to issue and allot more shares involved, moreover, a variety of breaches of the Company's Articles and Investor Rights Agreements, as was pointed out to the Company on various occasions by Maples, the Company's Cayman Counsel since (at least) 2015, and which even now it seems, remain unrectified. This is, again, indisputable given, for example, the terms of the Company's own letter of 26 October 2023, which sought to sweep the problems away in respect of Series C shareholders (no attempt was made, even then, to address the position of shareholders of Series B2 or B3 shares, but the Company took the view that this was defensible – any claims they might once had were already time-barred).*

17. *The Company's 2021 investigation of the PIK Interest issue, prompted at least in part by the First and Second Petitions, has further perpetuated the unfairness. The view of the Company's Chairman, Mr. Hilton, was that it involved an allegation of "self-dealing" on the part of Mr. Steckel, which the Litigation Committee "needed to get to the bottom of"; but, following Mr. Steckel's vehement denial of wrongdoing at a meeting on 15 November 2021, the Committee then "focused on other matters" (for eight months) until July 2022, 12 at which point the Second Petition had recently been issued (in June 2022). At that stage, however, the Committee simply decided that "it was not in the Company's best interests to pursue any claim against Mr. Steckel." That decision was based for the most part, Mr. Hilton testified, on advice that the Company's entry into the Fourth Amendment to the RCA (thereby ratifying the Third Amendment) made a claim unlikely to succeed. That the Board itself had, by its action, rendered any claim against Mr. Steckel less likely to succeed (if that is indeed the position) is no answer to the criticisms made of the Third Amendment. The decision was also said to be based on the view that a claim would "take up much needed money and resources" and "could affect the Company's ability to attract investors". Neither justification alleviates the unfairness to shareholders in Mr. Steckel acquiring many millions of shares in lieu of interest. Nor does Mr. Hilton's candour in acknowledging that Mr. Steckel (and Mr. Chen) had "got a great deal from the Steckel Transaction through the issuance of the PIK shares." Nor does Mr. Thieriot's "shock" on discovering the scale of the shareholding received in 2021. Despite all of that, despite his position (throughout) as a Director of the Company, and despite Mr. Chen's willingness to rectify the situation voluntarily, Mr. Steckel's has adamantly refused to do so: "a deal is a deal".*

18. *At trial, the Petitioners also focused on Mr. Steckel's conduct in respect of the diversion of the Company's UK banking license opportunity to Mr. Watson.*

19. *Although this episode remains murky in parts - partly due to the bizarre and self-interested behaviour of Mr. Watson, also a Director of the Company - the central*

fact is not in dispute: a decision was taken in September 2017, by Mr. Steckel, Mr. Thieriot and Mr. Watson, that the Company should transfer its interest in the project to Mr. Watson in exchange for, among other things, agreement that Mr. Steckel, Mr. Thieriot and Mr. Dennings would, in due course, receive shares personally in the proposed bank. Although that agreement also included reference to "all current Limited shareholders [being able] to participate in" fundraising, there is nothing to suggest that this offer was ever made to all of the Company's shareholders. Nor is there any evidence that the agreement in respect of their personal shareholding in the proposed bank was disclosed to Mr. Milby when the Board met on 27 September 2017.

20. *On 13 September 2017 (two days after the agreement was reached), Mr. Fontg, Mr. Steckel's US attorney since 2004, considered that "correspondence or memoranda from Paul Hastings would be useful to have in the transaction file if questions arose down the road", noting as an aside that "this issue is also important if any shares are ultimately set aside for management at the bank where such individuals may also be on the Uphold Ltd. Side." It is not difficult to understand why this was thought desirable.*

21. *To reach an agreement of this kind, and not to disclose it to the Board at the 27 September 2017 meeting or to the shareholders, was self-dealing (to adopt Mr. Hilton's word, albeit used in a different context). Yet the Litigation Committee again concluded that the Company should not pursue a claim against anyone involved in it, and should settle with Mr. Watson on terms that greatly understated what had occurred.*

22. *The significance of the diversion issue is threefold: (i) it again illustrates Mr. Steckel's contempt for the position of the Company's shareholders, (ii) it may constitute a relevant adjustment factor in the correct valuation of the Petitioners' shares, and (iii) (together with the dilution issue) it fully justifies the Petitioners' loss of confidence that such an issue should have arisen in the first place, and then upon investigation, not been pursued in some way in order to achieve proper compensation (from Mr. Watson and/or Mr. Steckel) for the benefit of its Company and its shareholders.*

23. *The Petitioners also note that this case concerns the proper management of an apparently valuable Cayman Islands company, with many small investor shareholders. To that extent, the case puts into focus the reputation of the Cayman Islands as an offshore corporate jurisdiction. There was a tendency in parts of the evidence of the Respondents and their witnesses to seek to explain away the most egregious examples of misconduct and mismanagement as oversight or slip ups, or as matters which are now historic and/or were justified at the time by the need to raise money to enable the Company to survive. None of these justifications explains away or excuses the dilution and diversion issues. In advancing them, and seeking instead to put in issue the integrity of the Petitioners for raising these issues, the Respondents make a mockery of the*

> *principles and rules that are aimed at ensuring the proper conduct of companies, and their directors, in this jurisdiction…."*

The Petitioners' submissions

Overview

217. Mr Valentin in his oral reply submissions noted that R2-R4 and the Company had strongly argued that the Petitioners' case at the end of the trial and in closing was fundamentally different from their pleaded case and that as a result and because they (R2-R4 and the Company) would be seriously prejudiced by having been unable to call additional witnesses and deal with the new allegations in cross-examination, the Petitioner should not be permitted to rely on its new case.

218. Mr Valentin accepted that the Petitioners' pleading could have been better particularised but submitted that the two core elements of the Petitioners' case as put after the trial, namely that the board had repeatedly improperly approved and authorised the dilution of the independent shareholders' rights in the Company and permitted and authorised the diversion of the valuable UK bank opportunity to Mr Watson were in the Petitioners' pleaded case. He accepted that the way in which the Petitioners' case was now put was more precise in a few important respects. But he rejected the claim that the Petitioners had put forward a new and unnotified case. This was made clear in relation to the improper and unfair dilution claim by the First Petition (as was made clear in recital (B) to the settlement agreement relating to that petition: see [271] of the Petitioners' Written Closing Submissions). The First Petition had included an allegation that "*by a series of transactions commencing with a Revolving Credit Agreement and Warrant dated 30 June 2016 the Company ... conspired with Adrian Steckel, Uphold Holdings ... and others acting in concert with them to misappropriate the Petitioners Shares; and ... issued Adrian Steckel, Uphold Holdings ... and others acting in concert with them Shares, which had the effect of substantially and unlawfully diluting the Petitioners' shareholding in the Company*."

219. Accordingly, Mr Valentin submitted, the core allegation of dilution was in the First Petition and had been summarised in a way that identified Mr Steckel and Uphold Holdings as being the parties involved and involving a series of transactions *commencing with* the RCA and the Warrant that gave rise to the dilution.

220. Mr Valentin also submitted that it was important to note following the completion of discovery in December 2024 or January 2025, by February 2025 it was clear that the Respondents had refused to contemplate any extensions or any delay to the trial. It was very clear to the Petitioners that any delay to the trial would be opposed. Accordingly, the Petitioners understood that any application to make further amendments to the pleadings and to add new material would be strongly opposed (and would be said to delay the trial). Mr Valentin accepted that the Petitioners' case could have been reduced in certain respects, in particular in respect of the later transactions that were still in the Petition, certainly after the exchange of witness statements and this may have cost consequences. But the Petitioners had now formulated and refocussed their case having listened to the evidence and tested the witnesses at the trial. Their case as now formulated is in its material parts pleaded. Furthermore, it was clear that R2-R4's and the Company's witnesses had been able to deal and in fact had dealt with all the core factual disputes arising in respect of the Petitioners' case as now formulated. As regards the focal points of the Petitioners' case, on dilution (resulting from the Warrant, the Third and Fourth Amendments to the RCA, the Series C Shares and the October 2023 Letter) and diversion (TBOL), Mr Steckel, Mr Thieriot and Mr Milby had dealt with those points in their witness statements and had been cross-examined about them.

221. In his closing submissions, Mr Valentin summarised the Petitioners' position and view of the relevant history as follows:

(a). they are minority shareholders who wish to be bought out of their shareholdings at a fair price, following a very significant dilution of those shareholdings, about which they were not consulted and in relation to which they were never given the opportunity to participate, for the most part either at all or in any event on terms that were in any

objective sense fair. They had each, in their own ways, patiently pursued those concerns about the Company's mistreatment of them, initially by asking questions of management to try and work out what was going on within the Company and then through pre-action correspondence and the First Petition in 2021.

(b). bringing the First Petition had prompted the Company itself in 2021 to investigate two matters in particular, namely, first the question that arose from the Third Amendment to the RCA and PIK interest, which was an issue that dated back to 2017, and secondly the Company's dealings with The Bank of London and Mr Watson, which also dated back to 2017.

(c). the First Petition was settled in June 2021 by the offer made by Mr Thieriot of 9 million shares in the Company and the payment of the petitioners' costs but not Mr Laggner's costs. In 2021, the Company wished to do a SPAC transaction and in consequence needed the First Petition to be settled. The Company at this point had also realised that it needed to clean up a variety of difficulties relating to the improper way in which it had issued shares in the past. Mr Anderson, the Company's General Counsel had been consulted and he sought advice from Maples in July 2021. The Company had previously consulted and received advice on similar issues from Maples in 2015.

(d). however, once the First Petition had been settled (in June 2021) and the SPAC transaction had fallen away (also in 2021) the Company's Litigation committee had stopped work on investigating these issues.

(e). on 14 June 2022, the current Petition had been filed and ten days later the Company had settled with Mr Watson, on 24 June, releasing all claims against him, thereby making it, for all practical purposes, very difficult to bring further claims against him in future. In addition, a decision was taken around the same time (the summer of 2022) not to seek to rectify either the PIK interest issue or to pursue Mr Steckel in respect of a claim involving the TBOL diversion issue.

(f). the Petitioners argued that there were three main reasons why the Company had taken these steps. First, it did not wish to air its dirty linen in public at a time when the very same issues were being litigated in the current Petition. Secondly, Mr Steckel had made it very clear to Mr Hilton and to the Company that any action against him would be aggressively resisted at the Company's expense. Thirdly, advice had been received from Maples that (a) because the board had entered into and approved the Fourth Amendment it would be very difficult to challenge the validity of or bring claims in respect of the PIK interest provisions included in the Third Amendment and (b) a claim arising out of the TBOL transactions would be difficult to bring albeit by no means hopeless.

(g). but it was only nearly a year later, in September/October 2023, that the Company sought to take remedial action resulting from previous breaches and failures to comply with the ISAs, which the Company admitted in the October 2023 Letter – and even then the company had only sought to compensate a limited class of shareholders, namely those who had been issued Series C Shares, as the Company decided that compensation did not need to be offered to other shareholders since the breaches of the IRAs as they related to other share issues that had taken place more than six years previously and so were no longer actionable (they were time-barred).

(h). the material that the Petitioners relied on resulted from discovery in these proceedings and from applications in the United States under the section 1782 procedure. The process of litigating the Petition had, among other things, elicited Mr Thieriot's evidence Thieriot-WS2 in March 2025 (but not in Thieriot-WS1 in February 2025) that he had realised in 2021 that Mr Steckel and Mr Chen had (in his words) been enriching themselves by being given huge numbers of PIK interest shares. When asked about this in cross-examination Mr Thieriot had confirmed that this had been unfair for all shareholders, including himself.

(i). this central issue had only emerged because of the current (the second) Petition because no shareholder had been told anything about this at the time in 2017 or in 2021. The

independent shareholders were not told about this and the resulting very significant dilution and if they had been told no doubt they would have been concerned about it. Mr Kearn's email to Mr Steckel on 17 May 2017 showed that shareholders were not properly updated and uninformed and felt ignored. He had said: "*Is there an agenda for the meeting? Will any updated financials be sent prior to the call? The last call was a very unprofessional given that the company was in deep financial trouble and was bailed out by inside shareholders and board members without any prior notification to shareholders. I should hope we are in better shape as now that the banking license is about to be approved. This is the only private company I'm invested in which doesn't t provide regular shareholder updates. It is very disappointing to say the least*."

(j). if shareholders were not told about what was happening in terms of the issuance of shares it was very difficult for the Company to turn round now and say that everyone has been treated fairly in relation to that. Shareholders may decide when they are told that they do not wish to participate but unless they are told they cannot act and exercise their rights. Even Mr Laggner was unaware in 2021 about the position with respect to the Series C round (dating back to 2018) and Mr Parsa had raised concerns on various occasions about the treatment of shareholders. His email to shareholders on 22 July 2020 is representative. Mr Parsa emailed other shareholders and said that "*Maybe these questions are all pointless because the overarching theme here is bafflingly bad management and corporate governance. The board is packed by the same managers that resulted in the company running out of money twice. (I resigned from the board in protest when Watson was deemed indispensable to secure a UK banking license for UH, which proved to be the opposite of prescient)*." This is an illustration of the fact that there was obscurity about the way in which the Company had issued shares and the extent to which individual shareholders had been able to understand what had happened or able to participate.

(k). Mr Steckel and Mr Chen received, and were granted by a board controlled by Mr Steckel, PIK interest shares in a way that put the Mr Steckel's and Mr Chen's interests above and over the interests of the Petitioners. It could not have been right to do this

without offering the independent shareholders the opportunity to participate in the bonanza that Mr Steckel and Mr Chen enjoyed.

(l). despite Mr Thieriot having seen the light, the Company has submitted that it and the Litigation Committee's hands were tied because the board had ratified the PIK interest share giveaway to Mr Steckel and Mr Chen in the Fourth Amendment to the RCA. It did not matter that Mr Chen had for his part fairly offered to hand back his shares or that Kleinbard in their memorandum in September 2021 had proposed a number of routes to get the shares back.

(m). the position of Mr Steckel - a director when the Third and Fourth Amendments were entered into and in 2017-2018 when his company enriched itself by taking millions of shares without any other shareholders being told about it – appeared to be that a deal between his company and the Company was a deal and binding and that was it.

(n). what matters for the Petitioners' oppression case is the decision that was taken by the board at the relevant time and whether it was unfair to shareholders in the sense that they had expectations and rights that were not met or complied with and was improper in the sense that it involved a decision that should have been taken consistently with a fiduciary duty, in a different way. The subsequent actions and decisions of the Litigation Committee did not affect this.

(o). on this issue, as to whether the decisions made in respect of the PIK interest issue constitute oppression, Mr Laggner's evidence has no bearing on that whatsoever. The Court has the relevant documents and the evidence of the individuals involved. Mr Milby had no useful evidence to give in respect of the PIK interest issue because his evidence was that he did not remember being involved in any decision to approve the Third Amendment and he had only learned about the volume of shares given to Mr Steckel and Mr Chen during the trial. Mr Thieriot's evidence was that if he had known what impact agreeing to the PIK interest terms would have had, he would never have signed the Fourth Amendment. Mr Steckel's position was essentially that this is what

was agreed, and therefore I was and am entirely entitled, standing on my rights, to enforce what was agreed.

(p). the evidence of Mr Laggner and Mr Kearns showed them raising issues contemporaneously about what was going on with the share capital position of the company and as to the treatment of the independent shareholders, which concerns were expressed at a point where the Company had little value or was a lot less valuable than it is now. This showed that the concerns were really about being treated fairly that emerged before the Company was doing very well. This undermines the argument made by R2-R4 and the Company that Mr Laggner and the other Petitioners were focussed entirely on financial gain (a "*shakedown*"). Further, other individuals had raised questions about the share capital issues of the Company including Mr Thieriot and Mr Parsa (who had referred to the Company printing "*shares like Venezuela*").

(q). as regards the agreement to the US$48 million valuation in the Third Amendment, the Petitioners accepted that it was not possible for the Court in these proceedings to form a view as to the basis for and the reasonableness of the board's commercial and business decision-making back in 2017. But what the Court could do, looking at the matter from the perspective of unfairness and probity was to assess the impact of this board's decision and conduct on the treatment of shareholders and to ask whether at the time they were given any opportunity to participate in what was (although it was dressed up as essentially repaying loan interest) ultimately a share allotment exercise (that involved millions of shares going to Mr Chen and Mr Steckel's companies).

(r). as regards the issue of control, which is an issue of significance in the case, the Petitioners argued that it was indisputable that following the 2016 Transaction Mr Steckel and Mr Salinas had control of the Company. The significance of this was that when the board was making key decisions, for example relation to PIK interest, Mr Steckel is able to call the shots because ultimately decisions are made in a situation where he has control of the Company. The evidence showed that in the relevant period between August 2016 to the end of 2017 Mr Steckel was the CEO and calling the shots

so that if he wanted something to happen in the Company it happened. He did not need to exercise the right to replace shareholder directors on the board because, ultimately, they went along with his decisions. Mr Steckel's denials that his position as controlling shareholder was significant and gave his views great weight or that he understood this were not credible and affected the credibility of his evidence.

(s). Mr Milby's presence on the board during the relevant period did not affect this or result in independent decision making. Mr Milby's position was that he was essentially out of the loop from the outset, as an independent director. He was a director of the Company for five years. At the end of his tenure his resignation email had said that "*I can't do my job because I just don't get the information I need to discharge my duties*." At the outset of his tenure he spent a year entirely in the dark, not receiving a board pack about his duties or the information about the Company, not having a board meeting in that year. In respect of the key moments in the course of 2016 and 2017, it was very difficult to conclude that he was exercising a fully informed level of scrutiny on what was occurring. Mr Milby did not remember the Third Amendment and was not involved in the private agreement to receive shares in TBOL. So the fact that Mr Milby is on the board in June 2016, May 2017 and September 2017 does not constitute, as R2-R4 had argued, a roadblock to the Petitioner's complaints. The truth was that Mr Milby was uninformed and disengaged.

(t). the evidence also showed a marked and repeated failure by the board to obtain adequate or to follow legal advice.

(u). discovery had revealed the agreement between Mr Watson, Mr Steckel and Mr Thieriot on 11 September 2017 to hand over the Company's valuable banking opportunity to Mr Watson's company in exchange for a much-reduced shareholding, and not much else. But the agreement included a term (that was a binding agreement) which was never disclosed to the board or to the shareholders that Mr Steckel, Mr Thieriot and Mr Dennings would take shares personally in the UK bank in due course. It did not matter that these shares were never received or that the agreement was later

renegotiated. The agreement was made and should have been disclosed to the board before on 27 September 2017 the decision was made to hand the opportunity to Mr Watson's company. The evidence clearly showed that this was deliberately concealed from the other members of the board, namely Mr Milby and Mr Westerfield, and that it was then deliberately concealed from shareholders.

(v). this was the Company's opportunity, not Mr Watson's opportunity. Mr Watson had developed the opportunity during 2016 and 2017. There was no good reason why the Company could not have completed the process for its own benefit. Why was Mr Watson in any better position to raise money in respect of this entity? The justifications given for the Company's give-away were not that doing so would be too expensive and we cannot raise the money – the primary justification was that the regulator had said that the Company could not own the bank.

(w). the Company handed the opportunity and the financial upside in the opportunity to Mr Watson in circumstances where Mr Watson had agreed with Mr Steckel and Mr Thieriot that they would be given shares personally in the bank in due course. This was improper.

(x). the Company had for a long time expected to be able to be granted and have the full financial benefit of the UK bank licence. Then suddenly in the middle of 2017 something happens. R2-R4 and the Company say that the Bank of England had said that the Company was unable to own the UK bank and the emails following the 6 March meeting confirm this. The Petitioners denied that the Bank of England had said this or that these emails confirm that that was the position of the PRA/FCA. Mr Steckel's oral evidence for the first time that there was a meeting at KPMG in May or June 2017 was not credible.

(y). the Petitioners were not seeking to prove on a balance of probabilities that these events occurred in this way. As regards the diversion and TBOL complaint, the Petitioners' position is that looking at what clearly took place in September 2017, the independent

shareholders including the Petitioners are justified, objectively, in losing confidence in Mr Steckel, at the very least. His conduct (and that of Mr Thieriot) lacked probity because he (they) entered into a secret agreement, not disclosed to the board, to take a personal shareholding in the UK bank as part and parcel of an agreement under which the Company hands over the valuable opportunity over to Mr Watson.

(z). so in September 2017 there was a diversion of a corporate opportunity that lacked probity in these respects and the Petitioners say that they have lost confidence in the Mr Steckel and Mr Thieriot because of this misconduct. Since then the board had changed, in part in response to the Petition and the matters that have been investigated. R2-R4 and the Company say that the Petitioners cannot now claim to have lost confidence in the management of the Company's affairs because the current board has made an honest decision not to pursue a claim. But the Petitioners submit that the mere addition of new directors to the board cannot restore the confidence that the Petitioners lost in the management of the Company's affairs arising out of the September 2017 diversion or require a wiping out of the bad acts that took place then.

(aa). if the Petitioners were seeking an order that the Company be wound up on the basis of conduct that had occurred in the past and the Litigation Committee had reasonably reached the conclusion that it was not in the Company’s interests to take action in respect of that past conduct, then the decision of the Litigation Committee might well be relevant to the Court’s exercise of its discretion as to whether to make a winding up order. But where as in this case the Petitioners only seek a buy-out order on the basis of oppression and a reasonable loss of confidence in management by reason of improper conduct the focus is exclusively or primarily on the past conduct.

(bb). nonetheless, the Petitioners also maintained that the Litigation Committee had improperly failed to take steps to obtain recompense for the TBOL diversion and that the inaction and flawed decision-making process of the Litigation Committee had also caused them to lose confidence in the current board. The Petitioners submitted that the Litigation Committee’s decisions had been irrational in that they failed to take full

account of the factors that militated in favour of pursuing a claim, whether by litigating it or at least approaching Mr Steckel in relation to it and to investigate properly what he had said in response.

Applicable law

222. As regards the law governing the making of a winding up order on the just and equitable ground, the Petitioners' position was as follows:

(a). as Lord Wilberforce had noted in 1972 in the leading decision on just and equitable winding up, *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, at 374H:

> "*there has been a tendency to create categories or headings under which cases must be brought if the [statutory clause] is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances.*"

(b). that observation is of particular relevance in a jurisdiction such as the Cayman Islands where cases that might elsewhere be advanced as unfair prejudice petitions must be advanced under the just and equitable jurisdiction.

(c). the applicable principles had been set out by Lord Shaw in *Loch v John Blackwood Ltd* [1924] AC 783 at 793 (a decision of the Privy Council) quoting Lord Clyde in the Scottish case of *Baird v Lees* [1924] SC 83 (HL) at 92 (my underlining):

> *"A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. The third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide*

> *them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company …"*

(d). one such principle of commercial administration is that a company's affairs will be conducted in accordance with (a) the articles, (b) the company's other contractual arrangements with its shareholders, and (c) in accordance with the fiduciary duties owed by its directors.

(e). there are a number of well-established grounds by reason of which the Court may be of the opinion that it is just and equitable to make a winding up order in respect of a Cayman Islands company. The Petition is advanced on two such grounds: (a) a justifiable loss of confidence in the conduct and management of the company's affairs and (b) oppression.

223. As regards the first of these grounds:

(a). the Petitioners cited the judgment of Lord Shaw of Dunfermline in *Loch*:

> "*It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."*

(b). they also cited the judgment of Martin JA in *Tianrui v China Shanshui* [2019] (1) CILR 481 at [22] where he stated as follows:

> "*It is well established that a company may be wound up on the just and equitable ground if it is established that there has been a justifiable loss of trust and confidence in management, for example on account of serious*

misconduct or serious mismanagement of the affairs of the company by its directors or the majority shareholders: see Loch v John Blackwood Ltd [1924] A.C. at 788."

(c). the Petitioners noted that the relevant principles had recently been stated in the Court of Appeal's judgment in *Aquapoint LP v Fan* (CICA Appeal No. 0014 of 2022, 4 October 2023). As Field JA had noted at [72]: "*It is important to appreciate that the establishment of this just and equitable ground is not dependent on there being a relationship akin to partnership in accordance with Lord Wilberforce's judgment in Ebrahimi*."

(d). a justifiable loss of trust and confidence based on lack of probity does not require a petitioner to prove the conduct on which it relies on the balance of probabilities. The Petitioners relied on the judgment of Kawaley J in *Re Principal Investing Fund I Limited* (FSD Cause No. 268, 269 and 270 of 2021) (12 June 2023) where he said that "*a justifiable loss of confidence may in legal terms potentially be based on well-founded suspicions of misconduct.*" Mr Justice Kawaley had referred to the decision in *Loch* where the Privy Council had approved the finding of the trial judge that the directors, by omitting to hold general meetings, submit accounts and recommend a dividend, had "*laid themselves open to the suspicion that … their object was to keep the petitioners in ignorance of the truth and acquire their shares at an undervalue*" so that it was just and equitable to wind up the company. He had also referred to the Scottish case of *Hyndman v RC Hyndman Ltd* 1989 SCLR 294, at 298 (Glasgow Session Court) where the pursuer sought the winding-up of a company on the just and equitable ground, in reliance among other things on a suspicion of lack of probity. The respondent contended that this was insufficient and that, if the ground for the petition was fraud on the part of the directors, then fraud had to be specifically averred. The court rejected that submission as contrary to *Loch*, which "*show[ed] that mere suspicion of wrongdoing may suffice if it leads to a justified lack of confidence in the way the company is being run*."

224. As regards the oppression ground:

(a). the Petitioners accepted that the applicable principles were correctly set out in the Strike-Out Judgment at [42].

(b). oppression must include a lack of probity or fair dealing to a member.

(c). there could hardly be something more oppressive to the interests of a shareholders than the dilution of their shareholdings in a manner that is secret or which does not permit their fair participation. As I had noted in *Jian Ying Ourgame High Growth Investment Fund v Ourgame International Holdings* (FSD 218 of 2021) at [44] the improper issue of shares may be difficult, time-consuming and expensive to unwind. The power to allot shares was, moreover, a fiduciary power, which gave rise to fiduciary duties. The Petitioners submitted that it was therefore unsurprising that such conduct had regularly formed the basis for unfair prejudice petitions (in England) and they submitted that such conduct also fell squarely within the definition of oppression in the context of a just and equitable winding up petition. For example, where the directors had acted secretly to dilute the minority's shareholding, without offering the shareholder the opportunity to participate, this constituted an improper exercise of their fiduciary power to allot shares and was therefore capable of constituting both breach of fiduciary duty and unfairly prejudicial conduct: see *Re a Company (No. 005134 of 1986) ex parte Harries* [1989] BCLC 383. It also amounted to oppression.

(d). where the director making a decision with respect to the allotment of shares is the beneficiary of the decision, the relevant principle was that stated by Lord Wilberforce in *Howard Smith v Ampol* [1974] AC 821, at 834G:

> "*… where the self-interest of the directors is involved, they will not be permitted to assert that their action was bona fide thought to be, or was, in the interest of the company; pleas to this effect have invariably been rejected … just as trustees who buy trust property are not permitted to assert that they paid a good price*."

(e). where a director pursued an opportunity that belonged to the company of which he is a director, he placed himself in a position where his interests conflicted with his

fiduciary duty. In that context, it was no answer to an allegation of breach of fiduciary duty founded on such a conflict that the company itself might have been unable to take advantage of the opportunity: see *IDC v Cooley* [1972] 1 WLR 443, per Roskill J, at 452A-454C.

The witnesses

225. *Mr Laggner*: The Petitioners said that Mr. Laggner's evidence was that he vociferously opposed the 2016 Transaction in the summer of 2016 and sought to persuade the board to pursue alternative and less dilutive alternatives, including his own "White Knight" Term Sheet. Following his removal from the board in November 2016, Mr. Laggner had continued to seek to assist the Company with fundraising under a consultancy agreement arrangement. Despite the existence of this arrangement, Mr. Laggner has received nothing from the Company in respect of his efforts to raise funding (since 2014). Mr. Laggner had been cross-examined by Mr. Chapman on behalf of R2-R4 on days 2, 3 and 4 of the trial and despite a large number of questions put to him on the thesis that he was lying under oath, Mr. Laggner had calmly, clearly and persuasively demonstrated that his evidence was truthful, consistent and accurate, and that he had no incentive to do anything other than tell the truth. The Petitioners submitted that the conduct of Mr. Laggner's cross-examination, which was no doubt formed as a continuation of Mr. Steckel's aggressive litigation strategy, undertaken at the Company's expense, had sought to give the impression that the Petitioners, at Mr. Laggner's instigation, were engaged in the "*shakedown*" referenced in the opening submissions of R2-R4. However, the Petitioners said that the opposite effect had been achieved: the longer it went on, the more apparent it became that Mr. Laggner's concerns about Mr. Steckel's conduct were well founded and fully justified, and that he simply wishes to be bought out at a fair valuation.

226. *Mr Steckel*: Mr. Steckel's cross-examination had taken place on days 5-7 of the trial. As a witness, Mr. Steckel tended to give long speeches, which seemed aimed at making as many of his advocacy points as he could remember, whilst attacking the *bona fides* of the Petitioners. He had sought to explain away criticisms made by Mr. Parsa and Mr. Brooke as

the rantings of disgruntled individuals with their own axes to grind, which was unedifying. He had played up his own contribution to the success of the Company, which was said to have been given at the sacrifice to his own personal interests yet his shareholding in the Company, following the massive dilution of other shareholders, showed this was self-serving evidence and that any sacrifice had been amply and overly rewarded.

227. *The missing witnesses:* R2-R4 had called two witnesses: Mr. Steckel and Mr. Milby. The Company had called two witnesses: Mr. Thieriot and Mr. Hilton. However, although the Petitioners made no criticism of the decision not to call other witnesses, they noted that others had given evidence, on paper, at earlier stages in the present Petition proceedings, notably (on the Company's behalf) Mr. Anderson and (on behalf of R2-R4), Mr. Kidd, Mr. Brooke and Mr. Parsa. The Petitioners said that the previous involvement, doubtless at the request of Mr. Steckel, of Mr. Brooke and Mr. Parsa, and their agreement to give evidence under oath in support of his summons to strike out the Petition in 2023, gave the lie to his attempt under cross-examination to portray them as individuals with a personal grievance against the Company (such that their various, highly critical comments about his own management of the Company were therefore untrue or unfounded).

The 2016 Transaction

228. In their Written Closing Submissions the Petitioners disputed the claim that the Company was facing a serious and immediate cash crisis in mid-2016. They noted that by mid-June 2016, it was apparent to all involved that further financing would be required. Even at that stage, however, the 61-page Board Pack for the meeting of the board on 17 June 2016 and the board minute contained no reference to any immediate cash crisis.

229. The Petitioners claimed that the board failed had properly to consider the White Knight proposal or to give Mr Laggner and his co-investors a proper opportunity to finalise the terms of an offer. The Board had a fiduciary obligation to consider the White Knight Term Sheet proposed by Mr. Laggner and Mr. Bechtel. Despite the fact that the lender behind the 2016 Transaction did not yet exist, the board rejected this alternative proposal on the ground that the commitments made were not contractually binding. At the further meeting of the board

on 27 June 2016 the grounds recorded for its rejection were that (a) it did not provide for sufficient capital on a timely basis, and (b) funding timing and success was somewhat uncertain, as it depended on written subscriptions and funds from third party investors not yet under written contract. In reality, however, the White Knight Term Sheet was backed by commitments of approximately US$7 million by the date of the board meeting on 27 June 2017, the board had shifted the goal posts on what was required, there was nothing to suggest that the Company in fact needed any more than the money offered by the White Knight Term Sheet in the immediate future and Mr. Chen had wired US$540,000 to the Company that week, so any immediate cash shortfall had already been addressed. It was neither urgent nor critical that the board approve the 2016 Transaction on 24 or 27 June 2016. The Petitioners said that the true position was that by 27 June 2016 the board had already committed itself to the 2016 Transaction and Mr. Steckel was poised to take control of the Company. Mr. Steckel was so determined that the board should approve Mr. Salinas' terms that he threatened to withdraw the proposal if it was not signed within a very short time frame or if other funding options were considered. The Petitioners argued that at the time there was no shortage of alternative financing options available to the Company.

230. The Petitioners said that it was highly relevant that the board did not obtain independent and adequate legal advice. There was no evidence that the Company or the board took any advice on Cayman law before approving the 2016 Transaction. In his email of 23 June 2016 to Mr. Parsa and Mr. Steckel (headed "*Alternative Path Forward*") Mr. Brooke had written that the "*primary goal for Salinas can be accomplished if you are unable to negotiate an arrangement with Halsey for his shares*" and had discussed how Mr Salinas and Mr Steckel could obtain control of the Company without shareholder approval and therefore without Mr Minor's consent. He had even highlighted and considered the significant dilution of other shareholders that would result: "*Ideally, loan value would increase to account for the increase in company shares issue. Would cause significant dilution to common but it is a path forward*." On 24 June 2016, Mr. Steckel introduced Mr. Brooke to Mr. Fontg email to initiate the process of documenting the 2016 Transaction. The Petitioners submitted that Mr. Brooke, the Company's General Counsel, was, in effect, advising Mr. Steckel how best to structure a transaction which would give Mr. Salinas control of the board following the

transaction. This was not advice that was being given to the Company with any objectivity, or regard for the interests of other shareholders

231. The Petitioners said that it was clear that the board and Mr Brooke were aware of the damaging dilutive effect on the independent shareholders. This was clear from Mr Brooke's email of 23 June. The dilutive effect of the Warrant shares was also noted by Mr. Brooke in an email to Mr. Steckel on 30 June 2016 (50% dilution). As Mr. Brooke had also noted, the lender (Uphold Holdings) would have the exclusive voting power over all such shares until the loan was repaid in full. Mr. Steckel responded: "*We will include others in loan facility at our sole discretion*." The Petitioners noted that the only participant to be included in due course would be Mr. Chen.

232. The Petitioners noted that Mr Milby had suggested that Mr. Laggner had concealed the terms of the SPTVA executed with Mr. Minor on 26 June 2016 from the board at the meeting on 27 June 2016. However, this suggestion was misconceived given that the White Knight Term Sheet made explicit reference to the "*Voting Agreement*" for which the board's acknowledgement and approval was sought. The Petitioners said that had Mr. Laggner wished to conceal the existence of this agreement from the board, it would not have been mentioned in the Term Sheet. In any event, the board had asked that any proposal from Mr. Laggner and Mr. Bechtel put Mr Minor "*in a box*" and the SPTVA had been the means by which by 27 June 2016 that had been achieved. Even Mr. Milby was aware of the dealing with Mr. Minor's shares, because he had referred to it in his email to Mr. Watson on 29 June 2016.

233. The board was aware that the 2016 Transaction was opposed by the majority of the Company's shareholders (as was admitted at [37.2] of the Company's Points of Defence: "*the 2016 Transaction was opposed by several shareholders … who comprised a majority of the total voting shares of the Company but not a majority of each class of preferred shares*").

234. The Petitioners submitted that the contemporaneous evidence showed that the purpose and effect of the 2016 Transaction, as structured, was to enable Mr. Salinas (via his proxy, Mr.

Steckel) to take control of the Company (i.e. its board). That the 2016 Transaction gave board control to Mr. Steckel and Mr. Salinas was obvious from section 4.18 of the RCA which provided that Uphold Holdings would have the majority of board seats (3 out of 5 appointed with the prior written approval of the lender). Mr. Steckel accepted that this was the effect of section 4.18 during his cross-examination but had asserted that he had not taken control because he never exercised this right and had even forgotten it existed at the time. This position was not credible (see Day 5, pages 130-131).

235. The Petitioners argued that the reason why Mr. Steckel did not have to exercise his contractual right to appoint directors in 2017 and 2018 was simply that the board voted with him on anything that mattered to him. The only changes to the board following the 2016 Transaction until the Series C round in early 2018 were Mr. Parsa's resignation in October 2016 and the removal of Mr. Laggner in November 2016. The Petitioners noted that both had been vocal critics of the 2016 Transaction and, in Mr. Parsa's case, of Mr. Steckel's refusal to exclude Mr. Watson from any further involvement in the Company.

236. R2-R4 had suggested that Mr. Steckel had lost the right to appoint the majority of the board as a consequence of Mr. Chen's participation in the RCA loan facility, however there was no evidence of an amendment to (of a document amending) documents section 4.18 of the RCA having been made. It appeared that although Mr. Chen had acquired the right to one board seat (and was then appointed to the board on 27 January 2021) Uphold Holdings retained its contractual right to appoint three of five directors.

237. The Petitioners noted that by the Autumn of 2016 Mr. Steckel and Mr. Salinas also controlled a majority (54.7%) of the Company's shares.

238. Despite the clear and well understood effect of the 2016 Transaction being to cause significant dilution to all independent shareholders with ordinary shares, the Company did not call a shareholders meeting (or even inform shareholders that the 2016 Transaction was taking place) and did not address the issue of class consents under the Articles or the rights of first refusal under the IRAs (that was intended to protect Series A and Series B investors

from unwanted dilution). The board wanted to avoid consulting with shareholders in advance of the execution of the Transaction as Mr. Friedberg had signalled in his email to Maples in September 2015 (that the Company wished to avoid calling a shareholders' meeting).

The issue of the Warrant and of shares pursuant to the Warrant involved a breach of the Articles

239. The Petitioners argued first that the granting of the Warrant had involved a breach of the Company's obligation under its Articles to call and hold a general meeting *before* increasing its capital. Article 17.1a of the Articles provided as follows:

> *"Subject to Article 3.2(a)(v), the Company may by Ordinary Resolution:*
>
> *(a) increase its share capital by such sum as the Ordinary Resolution shall prescribe and with such rights, priorities and privileges annexed thereto, as the Company in general meeting may determine; …"*

240. The Petitioners argued that the Company and R2-R4 were wrong to contend that this obligation was complied with (some eight months later) and the defect in the issue of the ordinary shares pursuant to the Warrant was cured by the passing of the resolutions at the EGM in February 2017 at which this share issuance was retrospectively approved. The Petitioners said that, as Mr. Dixon had advised on 20 January 2017, the amendment could not take retrospective effect.

The issue of the Warrant and of shares pursuant to the Warrant involved a breach of Bearing Ventures' rights under the RCA

241. The Petitioners submitted that the issue of the Warrant and of shares pursuant to it resulted in a breach of the Second Petitioner's right under the RCAs to receive notice prior to the granting by the Company to any third party of a right to receive potentially diluting shares and to purchase shares on the same terms and thereby avoid dilution.

242. The Petitioners said that the issue of the ordinary shares pursuant to the Warrant gave rise to a breach of the Series A and Series B IRAs. Under the IRAs the shareholders who were

parties to the IRA, which included Bearing Ventures, were granted a "*right of first offer*" as follows (Section 2.5):

> "*Subject to the terms and conditions specified in this Section 2.5, the Company hereby grants to each Investor a right of first offer with respect to future sales by the Company of its Shares (as hereinafter defined) …. Each time the Company proposes to offer any shares or, or securities convertible into or exchangeable or exercisable for any of it [sic] share capital ("Shares"), the Company shall first make an offering of such Shares to each Investor in accordance with the following provisions:*
>
> *(a) The Company shall deliver a notice in accordance with Section 3.5 ("Notices") to each Investor stating (i) its bona fide intention to offer such Shares, (ii) the number of such Shares to be offered and (iii) the price and terms upon which it intends to offer such Shares.*
>
> *(b) By written notification received by the Company within twenty (20) calendar days after the giving of Notice, each Investor may elect to purchase, at the price and on the terms specified in the Notice, up to that portion of such Shares that equals the proportion that the number of Ordinary Shares that are Securities issued and held by such Investor (assuming full conversion and exercise of all convertible and exercisable securities then outstanding) bears to the total number of Ordinary Shares of the Company then outstanding (assuming full conversion and exercise of all convertible and exercisable securities then outstanding). …"*

243. The 2016 Transaction had involved the issuance of ordinary shares to Uphold Holdings and the prospect of 50% dilution to the shareholding of other preferred shareholders. It therefore involved the issuance of "*Shares*" within the meaning of Section 2.5 of the IRA, to which the right of first offer, and the anti-dilution protection, were applicable.

244. But the Company failed to comply with its obligations under Section 2.5. No "*Notice*" was issued to shareholders until 21 July 2016, some three weeks after the 2016 Transaction (contrary to the requirement to offer the right "first", i.e. before any other issuance).

245. The Petitioners argued that the Company had failed to rectify the breach of the IRAs by causing a term sheet to be issued to preference shareholders offering them the right to participate in the 2016 Transaction (after the event) by acquiring newly issued B2 shares at 25.5 cents per B2 share. The offer plainly did not rectify the breach because it was after the

fact and the terms of the offer were not the same. The B2 Shares were offered at a higher price (US$0.255 a share) to those issued under the 2016 Transaction (US$0.01 a share) contrary to the requirement to make the offer at the same price and on the same terms. In any event, any shares issued to Series B2 shareholders would have no voting rights until the RCA Loan had been fully repaid.

The issue of the B2 Shares was in breach of the Company's Memorandum and Articles

246. The Petitioners argued a shareholder resolution was needed to increase the Company's share capital and to amend the Memorandum and Articles to allow for the Series B2 round.

247. The Petitioners noted that on 18 January 2017 Mr. Brooke had asked Mr. Grant Dixon (of Maples) about the need to amend the Company's Articles to authorise the issuance of all the new preference share issues after the Series A and Series B Shares. Mr Brooke had said (my underlining):

> *"- one of the items we need to address is amending articles to authorize new preference shares … the company has been remiss in dealing with formalities here and I believe current articles only include A and B rounds… company has subsequently done B1, B2 and currently doing a B3 round. I would guess that those investors who have purchased shares not currently covered under articles (B1, B2) would not be eligible to vote since technically they wouldn't be included on the share register. Is this the case?"*

248. Mr Dixon replied on 20 January 2017 as follows (my underlining):

> *"On the basis of the summary you provide below of the number of issued shares currently, it is more likely than not that the purported issue of the subsequent rounds were not validly undertaken, as there was no such shares contemplated within the authorised capital of the company. If so, and the desire is to have those shares validly issued, then the M&As will need to be amended following which the directors will need to approve their issue again (which cannot take retrospective effect)."*

The failure to obtain Series A Shares and Series B Shares class consents as required by the Articles

249. The Petitioners also argued that the Company had failed to obtain the class consents required by the Articles. Under the Articles in force at the time (article 3.2(v) of the 2015 Articles) the Company and the board were unable to authorise or issue or oblige the Company to issue "*any shares, including any other right or security convertible into or exercisable for any such shares' having a preference over, or being pari passu with, any series of Preferred Shares with respect to dividends, liquidation or redemption*." Even assuming that the written resolutions purportedly passed at the 2017 EGM were valid, no consent had been obtained from the majority of the Series A preferred shareholders and the majority of the Series B preferred shareholders to the issuance of the new shares.

250. The Petitioners referred in particular to an email exchange in July 2021 between Mr Anderson, the Company's General Counsel and Mr Sweetman of Maples (which also referred to Mr Davis of Maples).

251. On 15 July 2021 Mr Anderson emailed Mr Sweetman and Mr Davis (my underlining):

> *"After our discussion the other day, I looked through our files, and could not find a formal "Register of Members/Shareholders" for the period between 2015-2017, i.e., the period from before the B1 was sold until after the M&As were amended. I did, however, find the attached string of emails + attachments from the summer of 2017 (post-amendment of M&As) showing that the actual share certificates for B1, B3, and 3 (and a bunch of B) were never actually issued until then. With this, do you think an approval/ratification from the As & Bs is required to ensure the B1, B2 and B3 shares were in accordance with the M&As/? As for compliance with the IRA, we're actually going to need to get Kylie Company and Winston Ling to sign on to this as additional signatories to the attached IRA ROFR waiver letter agreement, as when originally drafting it, I misread the IRA as holders of Ordinary shares having a vote. They do not, so the only people whose votes on this document actually count are Steckel and Chen.*
>
> *If you count all the votes with Chen and Steckel abstaining for their own transactions, there would be enough votes to cover all but the various Steckel transactions. That's where Kylie and Ling come in; they would push it over the top.*
>
> *However, if the PIK shares are to be corrected and there are 12M less of them (8M for Steckel and 4M for Chen), we'd again have the votes for all but the various Steckel*

transactions, but we'd need to also get votes from Steadfast Capital's various entities and Y90 Opportunity Group. Couldn't hurt to get these no matter how long I wait.

252. Mr Sweetman replied, following some further brief email exchanges, as follows on 20 July 2021:

> *"Mark, further to our call yesterday our responses to your questions below are:*
>
> *1. <u>Given that the share certificates for the Series B1, B2 and B3 shares did not issue until after the EGM in February 2017, is it necessary to get formal assents from the Series A and Series B shareholders to retrospectively ratify that share issuance</u>?*
>
> *<u>Yes, it is necessary and advisable. The 2017 EGM did not obtain the consent of the majority of the Series A and the majority of the Series B to the issuance of the new shares, either anticipatorily or retrospectively, as required under Article 3.2(v) of the 2015 M&A. A simple majority is not sufficient</u>. Article 3.2(v)(5) does provide that the directors may increase the number of Preferred Shares "with the prior approval of a majority of all the outstanding Shares". This right is limited to subsequent series of Preferred Shares that have a higher Original Preferred price that than the prior issued series. This is the case with Series B1 (subscription price of $2.05 as opposed to $1.80 for Series B) but not for B2 or B3.*
>
> *<u>That being said, a majority of the Series B shares (being Kylie Holdings and Steckel) did vote in favour at the EGM so strictly it is only the votes of the Series A shares that is required. However, it is no harm to get a majority of the B's at the same time, for the avoidance of doubt. There is nothing improper about only approaching those shareholders whose votes are required. Although consent to the issuance of the Series B1 shares may arguably be said not to be required, for completeness, it is preferable to get this now as well</u>.*
>
> *An indicative class consent is attached for your review.*
>
> *2. What steps does the Company need to get to obtain waivers of the rights of first refusal under the IRA in relation to the issuance of the Series B1, B2, B3 and C shares?*
>
> *In order to comply with the IRA, and to be able to provide the necessary warranties and reps for the Merger, the Company will need to get retrospective waiver of the first refusal rights contained therein. Clause 3.7 of the IRA provides as follows:*
>
> *"Any term of this Agreement may be amended and the observance of any term of this Agreement may be waived (either generally or in a particular instance and either retroactively or prospectively) only with the written consent of the Company and Investors holding a majority of the Securities held by all Investors."*

> *Investors is defined on the first page of the IRA as "the investors of Series A Preferred Shares and Series B Preferred Shares listed on Schedule A hereto, each of which is herein referred to as an "Investor.""*
>
> *Securities are defined in Clause 1.1(i) as "(i) the Ordinary Shares issuable or issued upon conversion of the Preferred Shares and (ii) any Ordinary Shares of the Company issued as (or issuable upon the conversion or exercise of any warrant, right or other security that is issued as) a dividend or other distribution with respect to, or in exchange for, or in replacement of, the shares referenced in (i) above. The number of shares of "Securities" outstanding shall be determined by the number of Ordinary Shares outstanding that are, and the number of Ordinary Shares issuable pursuant to then exercisable or convertible securities that are, Securities."*
>
> *As discussed, it seems perverse to me that the right of waiver under the IRA is conferred on those Preferred Shareholders who also own the majority of the Ordinary Shares (as opposed to a majority of the Preferred Shares) but that is what the IRA seems to provide for. If this is correct, then your PIK analysis below is not load bearing for the IRA waiver.*
>
> *Given the lack of clarity on this, and as discussed, we agree with your intended approach is to approach this conservatively, and try to get waivers from the majority of the relevant classes. There is no rule to prevent Steckel and Chen using/voting their Series A and Series B shares to waive the terms of the IRA for the issuance of the other Share classes (although obviously they cannot bootstrap themselves by voting their Series B1, B2 B3 or C shares to waive the terms of the IRA).*
>
> *Subject to that, I think the inoperative waiver letter example that you circulated is fine to use a basis for obtaining waivers now of the IRA."*

253. The main issue identified by Mr Anderson and discussed with Mr Sweetman was that the consent of the majority of the Series A Shares and the majority of the Series B Shares was required to approve the issuance of the Series B1, B2, B3 and C Shares at the February 2017 EGM. Mr Sweetman referred to article 3.2(v) of the 2015 Articles. That provision states as follows (my underlining):

> *"Protective Provisions. <u>For so long as the Preferred Shares remain outstanding</u>, notwithstanding any provisions to the contrary in the Memorandum of Association and/or the Articles of Association and in addition to any approvals required by the applicable laws of the Cayman Islands, <u>neither the Company nor the Board of Directors shall without first obtaining the approval or consent of both the majority of the series A Preferred Shares and the majority of the series B Preferred Shares then outstanding</u>:*

.....

(4) *alter or change the rights, preferences or privileges of any series of Preferred Shares so as to affect adversely the rights, preferences or privileges of such Shares;*

(5) *increase or decrease (other than by redemption or conversion) the total number of authorised Preferred Shares; provided however that the Board of Directors, with the prior approval of a majority of all the outstanding Shares, may from time to time establish one or more subsequent series of Preferred Shares if such subsequent shares: (i) have a higher Original Preferred Price than the prior issued series; and (ii) have all the same rights of the prior series of Preferred Shares hereunder except a superior dividend preference under paragraph 3.2(a)(i) and a superior liquidation preference under paragraph 3.2(a)(ii);*

(6) *authorise or issue, or obligate itself to issue, any shares including any other right or security convertible into or exercisable for any such shares having a preference over, or being pari passu with, any series of Preferred Shares with respect to dividends, liquidation or redemption…"*

254. The Petitioners noted that the issue of the need for class consents from the holders of the Series A and Series B Shares had been flagged before the February 2017 EGM. On 3 February 2017, Maples (Mr. Dixon) had provided preliminary drafts of documents required for the 17 February 2017 EGM. He had advised Mr. Brooke that "*the draft contemplates that certain class rights will be obtained to the overall vote of the shareholders at the EGM. This reflects the analysis set out in the attached email correspondence, in particular the email from Lee Davis dated 22 September 2015, which outlines the spectrum of analysis that is possible in terms of how conservative or bullish you wish to be with regards to the need for additional class rights consents. If a less conservative view is taken on these points, such that the class consents are not to be obtained, we can revise the drafts accordingly*." [my underlining]

255. The Petitioners said that the class consents issue was not resolved at the February 2017 EGM and, as the email exchange between Mr Anderson and Mr Sweetman indicated, had remained unresolved even in July 2021, thereby affecting and raising a serious doubt as to the validity of the issue of the Series B1, B2 and B3 shares.

The February 2017 EGM

256. The Petitioners noted that on 18 February 2017 (at 12:32AM, UTC), the Company had issued a Notice and Proxy for the shareholder meeting to be held on 23 February 2017 and that, despite the obvious importance of the meeting to cure a defective share issuance, the meeting was said to be "*narrow in purpose and is undertaken to formalize the following in accordance with the laws of the Cayman Islands: (1) Change of Company name from Bitreserve Ltd to Uphold Ltd (2) Amending Memorandum and Articles of Association to formalize Preferred Rounds previously undertaken and planned over the next 6-12 months.*" The accompanying Notice had contained draft resolutions to this effect.

257. The Petitioners also noted that the minutes of the meeting recorded that the amendments were passed only on the basis of shares voted by proxy forms, all but one of which had been signed by Mr. Steckel. The Petitioners said that they had not seen any documentary evidence that Mr. Steckel had authority to vote shares on behalf of any shareholders other than himself or Uphold Holdings.

258. The Petitioners complained that the EGM Notices to shareholders had been sent out very late (and after business hours) on 17 February 2017 (Cayman time) and that the meeting had been held with only the minimum notice period required by the Articles.

259. The Petitioners argued that evidence established that:

(a). the meeting was held, at the shortest possible notice, in order to address a significant problem.

(b). the effect that the share issuance at the heart of the 2016 Transaction was invalid.

(c). the necessity for the meeting, eight months after the event, further underlined the improper way in which the 2016 Transaction had been forced through by Mr. Steckel (i.e. without legal advice, in breach of the IRAs, in breach of the Articles, on egregious

and dilutive terms and in a manner that was calculated to give control of the Company to Mr. Steckel as proxy for Mr. Salinas).

(d). as Mr. Laggner had observed at the time, had a properly constituted meeting of shareholders taken place in June 2016, the 2016 Transaction (i.e. the share dilution element of it) would not have received shareholder approval.

(e). the February 2017 EGM, having been requisitioned in haste, involved the passage of resolutions with votes that were almost exclusively cast by Mr. Steckel, on his own behalf or acting (purportedly) as proxy for others. Mr. Steckel was the individual with the most to gain from the issuance of the shares, as his company, Uphold Holdings, had received 50% of the issued share capital upon exercise of the Warrant in August 2016.

260. The Petitioners noted that Mr Dixon had emailed Mr Brooke again on 31 January 2017 (my underlining and emphasis) and advised on who was entitled to vote at the February 2017 EGM:

> *"As previously discussed, there is doubt over the issue of any series B1 Preferred Shares, in light of the authorised capital of the company not contemplating such series. As such, arguably only those holders of Ordinary, series A preferred and series B Preferred shares are entitled to vote at the EGM. Once the A&R M&As have been adopted, then the series B1 and subsequent series of Preferred Shares may be issued subject to directors passing resolutions approving such issue."*

The Third Amendment to the RCA

261. The Petitioners noted that the Third Amendment to the RCA provided that from 1 March 2017 at the Company's option PIK interest due on its borrowing from Uphold Holdings could be settled in ordinary shares, based on a Company valuation of US$48m and gave the Company a wide (and unfettered) discretion as to whether or not, and when, to exercise this option. They said that the basis for the US$48m valuation was obscure, appeared to have

been significantly discounted, did not appear to have been supported by any independent third-party process and was not subsequently amended.

262. The Petitioners also criticised the Company for having on 8 March 2017 unquestioningly agreed to Mr. Chen's request to use the US$48m (under)valuation. The Petitioners argued that Mr Steckel knew that the valuation was at least half what it should be (as evidenced by a text exchange with Mr. Chen on 17 December 2017 in which Mr. Steckel had stated that the PIK interest rate of 2.5% per month actually equated to "*5% or more because of the low share conversion price of our PIK.*"

263. The Petitioners submitted that there was no evidence that the board ever had considered the adverse effect of the Third Amendment on other shareholders. There were no board minutes or other records from May 2017 regarding the Third Amendment. This was in stark contrast with other amendments to the RCA. The Petitioners said that the Third Amendment appeared to have been drafted by Mr. Fontg, who had acted as Mr. Steckel's counsel in drafting the original RCA. They noted that there had been an earlier discussion of the PIK interest issue in March 2017 and on 13 March 2017 the board had executed a written consent approving Mr. Chen's additional participation on terms that anticipated Mr. Steckel's negotiation of the Third Amendment with Mr. Chen. However, the PIK interest issue was described only as "*the primary issue for Uphold Ltd*" and it had been noted that "*at this point we've settled on 2.5% PIK which would convert to ordinary shares at a $48m valuation.*" The Petitioners argued that even if this was the correct or a defensible valuation in March 2017 it swiftly became outdated as the Company's value increased and criticised the board for having failed to include in the Third Amendment a mechanism for the valuation to be adjusted over the remaining term of the RCA Loan. The Petitioners said that Mr. Milby, the only independent director, had not been provided with any version of the Third Amendment and, as he confirmed in cross-examination, he did not believe he had had any involvement in its approval (Day 7, page 167) and he had no recollection of any board meeting in relation to this issue.

264. The Petitioners argued that there was an obvious conflict of interest (and breach of fiduciary duty owed to the Company) in Mr. Steckel negotiating the terms of the Third Amendment on behalf of both Uphold Holdings and the Company (of which he was in May 2017 both a director and CEO/Chairman, and a significant shareholder). A further conflict arose from Mr. Steckel's discretion (which even if exercised by the CFO, Mr. Westerfield, Mr. Steckel, as CEO, had power to influence, if not determine) to choose whether and when the Company should repay the loan in cash or by way of PIK interest.

265. Further the Petitioners said that it did not appear that the Company's shareholders were ever informed about the Third Amendment, or the valuation being used for the calculating the issuance of PIK shares. By entering into the Third Amendment and issuing PIK shares pursuant to it the Company committed further breaches of the Articles and the IRAs.

266. The Petitioners noted that between March 2017 and December 2018, despite lending the Company only US$10m and US$5m, Mr. Steckel (through Uphold Holdings) had received 18,863,702 shares (Series B3 and Series C) in settlement of PIK interest and in the same period Mr. Chen (through CHIL) had received 7,470,791 shares (Series B3 and Series C) in settlement of PIK interest. Kleinbard had calculated that Mr. Steckel and Mr. Chen may have received as many as 13 million excess shares.

267. The Petitioners noted that in Thieriot-WS2 at [20.3] Mr Thieriot had expressed his concern at the continued use of the US$48 million valuation and Mr Steckel's attitude. He said as follows: "*I had been concerned that Mr. Steckel and Mr. Chen had enriched themselves by insisting upon the Company using an outdated share price to calculate the number of shares to be issue as payment in kind for the repayment of the interests owing under the Steckel Transaction, which resulted in their companies receiving up to 13 million excess shares in respect of the same*." The Petitioners submitted that this was candid and honest evidence which had been confirmed by his evidence in cross-examination (Day 8, pages 28-55). Mr Thieriot during his cross-examination had said that in stonewalling Mr. Thieriot's efforts to persuade Mr. Steckel to agree to update the valuation used for PIK interests, Mr. Steckel

"*was not interested in hearing my pleas for gentleness and fairness",* by which he meant *"fairness to shareholders … to all of us*."

268. The Petitioners criticised Mr Steckel's approach. Mr. Steckel had demonstrated a complete disregard for the unfairness of the PIK interest issue for the Company's shareholders as a whole. Mr. Steckel had suggested that Mr. Chen had placed him under duress in respect of the Third Amendment and that it was revisionist history to revisit the 2017 deal in 2021 or now (see his cross-examination on Day 6, page 229) but this point, which had not appeared in Mr. Steckel's witness statements, failed to take account of the fact that the PIK interest issue was severely dilutive for other shareholders, who were neither informed nor consulted about it at the time it occurred, or subsequently.

269. Mr. Hilton had stated (at Hilton-1 [253]) that he had been "*surprised by the high number of shares that were issued as repayment of PIK interest*" and (at [106]) that he considered that "*Mr. Steckel (and by extension Mr Chen) had got a great deal from the [2016] Transaction through the issuance of the PIK shares*" but he ultimately recorded (at [105]) that he considered "*it was not in the Company's best interests to pursue any claim against Mr. Steckel.*". That decision was based primarily on the fact that the board had ratified the Third Amendment by passing the Fourth Amendment in 2018 (which had only compounded, the Petitioners argued, the unfairness inherent in the PIK interest issue for other shareholders). But the Fourth Amendment was no answer to the Petitioners' essential complaint based on that unfairness and lack of consultation with the independent shareholders.

The Series C Round

270. The Petitioners noted that the Company had referred at [78] of its Points of Defence to the issuance of 34,708,880 Series C shares to Mr. Kidd's company, now in the name of Hard Yaka Ventures LP. These shares, the Company had stated, were issued at a discount to the price at which other Series C Preferred Shares were sold, as the issuance was part of a series of commercial transactions with Mr. Kidd. The Series C round took place between January 2018 and March 2021, based on a valuation of US$1.13 per

share.

271. The Petitioners said that assuming that the Company's account was accurate, it appeared that once again the Company had failed to respect and comply with the anti-dilution provisions of the IRAs. There was no evidence (or suggestion by the Company) that the right of first offer had been complied with.

The October 2023 Letter

272. The Petitioners noted that between June and October 2023, the Company had again given consideration to its failure to comply with its obligations to shareholders. Mr. Hilton had first learned of this issue from Mr. Hansen at a meeting of the board and the board's finance committee on 27 June 2023. Mr Hilton attended as chair of the board and Mr Steckel attended as a director and chair of the finance committee. The minute of that meeting at item 4 stated as follows (my underlining):

> *"Mr. Hansen noted that the Company may not have historically fulfilled all its obligations concerning a right of first offer in favor of Preferred Shareholders in connection with all its past financings as set forth in the relevant Investor Rights Agreements, but that the majority of the past financings were beyond the relevant six-year statute of limitations. The Series C financings, however, were undertaken by the Company less than six years ago, and thus any failure by the Company to abide by the Investor Rights Agreement or to have properly disclosed the Company's obligations under the Investor Rights Agreement to Series C investors may represent latent liabilities for the Company that could impact future financings or M&A activity. Mr. Hansen explained the Company's plan to remedy this, which is to offer a pool of approximately 10.5M Series C Preferred Shares to all Preferred Shareholders on a pro rata basis at the same terms as the best offer to investors in the Series C round, i.e., at a price of $1.13/share plus additional warrant coverage. Mr. Hansen and Mr. Anderson are drafting a notice to existing Preferred shareholders describing the proposal and the basis for the calculation of the offer. Mr. Anderson noted that to avoid any perception that this offer would constitute a means for current large shareholders to consolidate any level of control over the Company, the Company would seek waivers of the offer from certain key shareholders. Both Mr. Chapman and Mr. Steckel were generally supportive of the plan and agreed that concrete proposals should be drafted for the Board to review and approve."*

273. The Petitioners also noted that at a further meeting on 29 August 2023 chaired by Mr. Steckel the issue was considered again and it was confirmed that Mr. Steckel and Mr. Chen would not participate. But, the Petitioners said, they had already benefited handsomely from the Series C round.

274. On 26 October 2023 the Company sent a letter (the ***23 October Letter***) to all Preferred Shareholders headed "*Participation Rights for Preferred Shareholders*." It was in the following terms (my underlining):

> *"As you may be aware, from January 2018 through March 2021, Uphold Ltd (the Company) entered into several transactions with investors as part of a Series C round of financing.*
>
> *While the Series C transactions were reported to shareholders in due course and all were welcome to participate, we do not believe the Company afforded certain holders of Preferred Shares of the Company the proper notice of these opportunities pursuant to the relevant Investor Rights Agreements.*
>
> *Furthermore, the Series C investors were not properly made aware of the participation rights of earlier investors, and this may result in a dilutive effect on their investment.*
>
> *The Company would now like to rectify this situation, both to honor the Company's contractual obligations as well as to ensure that any latent disputes concerning the Series C financing transactions are resolved.*
>
> *The Company believes this is critical to ensure any future financing transactions the Company may undertake can proceed smoothly and efficiently.*
>
> *<u>The Company would like to offer existing Preferred Shareholders the opportunity to acquire a pro rata share of 5,710,178 incremental Series C Preferred Shares at $1.13 per share, together with warrants to purchase an additional 3,100,118 Series C Preferred Shares (i.e., 54.291092% of the number of Series C Preferred Shares to be purchased) at a strike price of $1.13</u>.*
>
> *<u>Note that the most recent independent valuation of the shares of the Company (as of 12/31/22) placed the fair market value of the Series C Preferred Shares at $1.32</u>.*
>
> *<u>The specific number of shares each eligible Preferred Shareholder is entitled to acquire as part of this offer is based on the number of shares that would have been required for them to maintain their relative percentage ownership of the Company that they had on a fully diluted basis prior to the eligible Series C financings</u> (i.e., excluding shares issued/authorized as part of M&A activity, in connection with employee*

incentive plans, or in connection with a broader business relationship), or in the case of Series C investors, the number of shares that would have been required to obtain the same relative percentage ownership of the Company if earlier eligible holders of Preferred Shares had exercised their participation rights.

The total number of Series C Preferred Shares with warrants being made available pursuant to these offers to eligible participants is 8,810,296, which, if fully exercised, would increase the total number of shares issued in the Company on a fully diluted basis to 324,413,489 as of September 30, 2023.

To ensure that any unasserted claims in connection with the Series C financing transactions are fully resolved, the Company is also seeking a retrospective waiver of rights under the relevant Investor Rights Agreement (for eligible holders of Preferred Shares) or claims based on the prior Series C subscription agreements (for existing eligible Series C investors).

.....

The total number of shares and warrants that you are entitled to purchase pursuant to this offer in the initial exercise period is set forth in Appendix A, attached hereto. All eligible participants are being made the same offer on a pro rata basis relative to their existing shareholdings. .....

Due to the winding up petition sought by certain shareholders that is currently pending in the Cayman Islands that relates in part to the petitioners rights under the Investors Rights Agreements, and to ensure that this offer is not intended to afford the respondents of the winding up petition an opportunity to acquire further interests in the Company, the respondents have agreed to not participate in this offer. The respondents have nevertheless agreed to waive any claims against the Company based on the Series C financing transactions."

275. The Petitioners said the 23 October Letter acknowledged past breaches, offered 8.8 million shares to shareholders at a price of US$1.32 per share, to rectify those breaches, and required any participating shareholder to waive any claims and rights they might have. Mr. Steckel and Mr. Chen had received their Series C shares as PIK principal and interest (i.e. without consideration). Mr. Chen and Hard Yaka had also received their warrants in respect of Series C shares at US$1.13 per share.

276. The Petitioners further noted that Mr Hilton had said at [218] of Hilton-WS1 that he had wanted to resolve the "*oversight*" and ensure that the Company was complying with its obligations. He had acknowledged that he did not know why the "*oversight*" had occurred

but had failed to commission an investigation to establish the facts. Further, the 23 October Letter did not rectify past breaches: it simply asked preferred shareholders to give up their rights, and only did so in respect of the Series C investors. Those whose rights had been breached in earlier rounds were effectively ignored, despite the advice of Maples in 2015, 2017 and 2021, because their claims had, years later, become time-barred.

277. The Petitioners said that the essence of their case in respect of the TBOL diversion issue was that:

(a). obtaining a UK banking licence was a key objective of Mr. Salinas and in 2016 the Company was in the process of applying for a digital bank licence to be able to trade in the UK.

(b). Uphold Group PLC was incorporated in December 2016 in order to pursue the UK banking licence application and to employ its CEO, Mr. Watson, who (pursuant to his employment contract) was to have a 5% stake in that company as an incentive, with the 95% balance to be held by the Company.

(c). Mr. Steckel had insisted that Mr. Watson take forward the UK banking licence project on the Company's behalf (despite objections from Mr. Parsa and the fact that Mr. Milby was better qualified and pre-vetted by the Bank of England).

(d). at a meeting on 6 March 2017 the Bank of England (PRA) had provided generally positive feedback. There had been no suggestion that the Company could not continue to pursue the application, despite Mr. Watson's attempts to misrepresent or (at the very least) overstate any reservations that might have been expressed.

(e). in May 2017 advice was sought as to whether the Bank of England/PRA would approve Mr. Salinas as the ultimate controller of the bank once licensed but the advice from Paul Hastings was that he would not be considered fit and proper.

(f). in July 2017, Mr. Steckel had told Mr. Thieriot in a discussion by email about their compensation package from the Company, that they should each have a 4% stake in the Company's "*bank subsidiary*."

(g). by 11 September 2017 Mr. Watson, Mr. Thieriot and Mr. Steckel had reached agreement on the terms of a transaction that would involve 90.2% of the Company's interest in the UK banking licence opportunity being off-loaded to Mr Watson, in exchange for which, among other matters, Mr. Steckel, Mr. Thieriot and Mr. Dennings would have an 8% personal stake in the future bank.

(h). in order to provide "*justifications*" for this (unusual) transaction, for optical purposes in the event of shareholder questions it was agreed to justify it by reference to various arguments that could be said to prevent the Company's continued 100% ownership of the opportunity, and by seeking a piece of paper for the transaction file in the form of a short memorandum from Paul Hastings that would provide some support for those "*justifications*."

(i). the Board had endorsed the transaction, which was entered into on terms that afforded the Company no prospect of significant recovery in the event that TBOL became a successful bank, at meetings on 15 and/or 27 September 2017 at which no reference was made to the part of the agreement that involved Mr. Steckel, Mr. Thieriot and Mr. Dennings receiving 8% personally in due course.

(j). shareholders were deliberately not told the whole story on the shareholder call held on 29 or 30 September 2017.

(k). in November 2017 Uphold Group PLC was renamed TBOL PLC and in November 2021 the UK banking licence was granted.

(l). the Company did not receive its 9.8% shareholding in TBOL for four years, and made no attempt to recover it until after the First Petition and only then settled with Mr. Watson on highly unsatisfactory terms, waiving all other claims against him.

(m). although consideration was given in light of the investigation by Kleinbard to pursuing a claim to recover 100% of TBOL the Company did not pursue that claim and made no attempt to pursue any of those involved in respect of their undisclosed agreement, made on 11 September 2017 to take shares in the bank personally.

278. The Petitioners submitted that the significance of this episode was threefold. First, it was illustrative of Mr. Steckel's contempt for the interests of shareholders, who were repeatedly told about the valuable opportunity represented by the UK banking licence application. Secondly, it was of potential relevance on valuation of the Petitioners' shares in the event that a buy-out order is made. Thirdly, it has justifiably caused the Petitioners to lose confidence in the management of the Company's affairs.

279. The Petitioners said that from an early-stage Mr. Watson had been permitted to be closely involved in the process by which the Company sought to acquire a UK banking licence. Mr. Brooke's candid view (expressed in his email to Mr. Parsa on 9 July 2017) of the wisdom and propriety of Mr. Watson's involvement in that process was (a) that it exposed the Company to material risk and failure with respect to the application itself as well as potential investors, and (b) that "*Watson has routinely misrepresented his activities in regards to this process as well as misrepresented status of meetings and the process overall*." The Petitioners said that the documentary record strongly suggested that this observation about Mr. Watson, which was shared by Mr. Parsa, was correct.

280. The Petitioners argued that as at August 2016 the position as between the Company and Mr. Watson was clear. Upon the transfer of MSBB to Uphold Group PLC the Company would hold 95% of Uphold Group PLC, and Mr. Watson would hold 5%, and this entity would then be used to pursue the UK banking licence through MSBB as applicant. In the event, Mr.

Watson had evidently wished to have more than a 5% stake in the prospective UK bank and had set out to secure the Company's agreement to this from Mr. Steckel and Mr. Thieriot.

281. The Petitioners noted that an application for a UK banking licence had been submitted on behalf of MSBB at the end of November 2016 and in his email to Mr. Milby on 1 December 2016 Mr. Steckel had noted that (underlining added): "*We filed the UK bank application yesterday ... finally!*" On 6 December 2016, Mr Steckel had written to the Company's shareholders to confirm the progress made by Uphold Group PLC with its application for a banking licence and had said that "*This is a critically important milestone for the Company*" (underlining added). The Petitioners submitted that notwithstanding the initial allocation upon incorporation of the only issued share to Mr. Watson in September 2017 it appeared that Uphold Bank PLC was considered to be an entity that would be owned by the Company the advice provided by Paul Hastings had been based on the Company's instructions in September 2017).

282. The Petitioners further noted that in an email to Mr. Westerfield on 11 December 2016, Mr. Watson had written as follows:

> *"Please let's keep this conversation off email. Formally this is where we are. There is no Uphold Bank PLC yet. It is Uphold Group PLC until such time as we are approved.*
>
> *It's also NOT a subsidiary. Nor will it ever be. As we discussed many times, as per the terms of my own contract and as per the requirement of the Bank of England themselves. It is an autonomous, independent company, with an independent board of directors. The majority shareholder of this independent company will be Bitreserve Ltd.*
>
> *There is NO ROLE within Bitreserve's LTD corp structure and nothing should be stated or documented anywhere to this point until after the Bank of England reply with approval. Bitreserve Receives Two seats on the Board of Directors. Lee Westerfield and Jim Milby.*
>
> *… This is a highly, highly sensitive point for the UK authorities – for all the reasons everyone knows – so if anyone needs further information please call me."*

283. The Petitioners noted that in early 2017 an issue purportedly arose as to the potential for Uphold Group PLC's application for a UK banking licence to be affected by the bankruptcy of Mr. Minor. They said that purported issue, together with the fact of the Company's involvement in the cryptocurrency space, were later used as a justification for the Company diverting 90% of its interest to Mr. Watson. Mr. Minor's shareholding in the Company first arose as a potential issue in the context of the UK banking licence application in around January 2017. On 30 January 2017, Mr. Brooke told Mr. Minor that his "*ownership interest*" had been identified "*as a potential issue to look at and evaluate further. The Company is doing so and will revert to you should it be determined that the issue is real and needs to be addressed in some way in our application.*" Mr Brooke had subsequently on 31 January 2017 told Mr Minor that" "*Regarding the Bank of England application, I personally do not believe your shareholder [sic] will prove to be an issue. BoE ultimately is concerned with Directors of the bank, all of whom must pass a separate Fit and Proper test. Ultimately, the bankruptcy issue given your level of your shareholding and notional control it may offer, isn't relevant since any Director who might be nominated through votes from your shares must ultimately be approved by the BoE in any event. That said, I will keep you updated on this issue once the assessment is complete*."

284. The Petitioners submitted that this showed that Mr. Brooke did not consider that there was any good reason why the Company should not continue to pursue the UK banking licence application notwithstanding Mr. Minor's minority shareholding.

285. The Petitioners noted that the short agenda prepared by KPMG in advance of the meeting with the Bank of England's Prudential Regulatory Authorities Office in London on 6 March 2017 with detailed questions that they anticipated the Bank of England would ask did not mention Mr. Minor or the fact of the Company's involvement with cryptocurrency.

286. The Petitioners submitted that Mr. Watson had doctored his "*initial thoughts*" email of 7 March 2017 in two places to insert two new passages that altered the meaning of the email by (falsely) suggesting concerns had been raised by the Bank of England about Mr. Minor's shareholding in the Company. The Petitioners submitted that this a clear example of Mr.

Brooke's observation (in July 2017) that "*Watson has routinely misrepresented his activities in regard to this process as well as misrepresented status of meetings and the process overall*." They argued that the obvious purpose of the added passages had been to give the false impression to the Company's board that the Bank of England might reject the application if the Company remained involved in it as the principal shareholder and controller of Uphold Group PLC. Mr. Watson was by this point starting to create his justifications for the agreement he ultimately reached on 11 September 2017 with Mr. Steckel and Mr Thieriot. In Mr. Watson's own email about the meeting, sent to the board on 6 March 2016, he had not described the situation as requiring the Company to divest itself of the bank.

287. The Petitioners noted what Mr Parsa had said in what they described as his "*colourful*" WhatsApp message to Mr. Steckel dated 18 March 2017, shortly after the meeting at the Bank of England:

> "*After everything Bill [Dennings], JP [Thieriot], Anthony [Watson] and Lee [Westerfield] have done and not done I do not want to be exposed to the risk of more of their bad judgment, incompetence, unethical behaviour and fraud. They have committed fraud before and I do believe they are committing it now and will commit fraud in the future. I'm sure Bill is cooking the AML audit and that Anthony is lying about shit related to the U.K. Bank. JP was inducing investors even as he burnt an undisclosed 2mm+hole in the reserve. Bill supervised the insolvency and fraud that occurred. I'm sure Thomas' report documents all of this and is now thanks to that idiot Bill discoverable in any legal action. Bill lies, bullies, bullshits, and is a horrible operator. These are not theoretical risks. They are documented historical and I'm sure ongoing. That US bank deal is going to bankrupt the company and its totally unnecessary. Anthony and Bills salaries are unjustified and an insult to shareholders after all their fraud and fuckups. As are JPs and Lees. … These are facts. Documented and discoverable facts. This isn't idle speculation.*"

288. The Petitioners submitted that the Bank of England's feedback letter of 20 March 2017 had raised no specific concerns as to Mr. Minor, his bankruptcy or the Company's involvement with cryptocurrency. Greater focus had been placed on, among other issues, Mr. Watson's likely role in the new bank. This was unsurprising, given Mr. Watson's limited experience for the roles of CEO and Chairman of a new clearing bank.

289. The Petitioners argued that Mr Watson's email of 21 March 2017 to Mr. Steckel, Mr. Westerfield, Mr. Thieriot, Mr. Milby and Mr. Brooke had repeated the misrepresentation by Mr. Watson of the Bank of England's view of the application. Mr. Watson did not share the Bank of England's letter with the Company's Board, other than Mr. Steckel.

290. As part of an investigation undertaken in 2021, an adviser from the Klaros Group made enquiries of Mr. Adams of KPMG, who had led the application process. Mr Adams did not suggest there had been any major issue raised over the Company's potential beneficial ownership of a licensed bank. Klaros had reported as follows:

> *"As promised yesterday, we probed into what Giles knew about regulatory discussions between TBOL and Uphold. Interestingly, Giles said this had not been a major issue in any discussions he'd been involved with. He then added, as if thinking about this from first principles, that since Uphold's ownership was below 10% it would be surprising for the regulators to care that much about it. Since it's hard to imagine that there could have been protracted discussions with the regulators on the subject without TBOL's principal regulatory adviser getting involved, this casts quite a lot of doubt on Anthony's narrative that the Uphold ownership had caused quite a lot of regulatory difficulty and that the regulators had required the shares to be made non-voting."*

291. The Petitioners submitted that this evidence was irreconcilable with Mr. Steckel's evidence (given for the first time under cross-examination) that he had met with KPMG in April or May 2017 and was told that the Company could not own more than 10%. The account of Mr. Adams' view on this issue, a reliable source - that the Company's ownership of a licenced bank had not been a major issue - was to be preferred to the evidence of Mr. Steckel.

292. The Petitioners submitted that Mr. Watson's conduct in misrepresenting the views of the regulator to the board constituted serious misconduct by a company director. The documentary evidence suggested that: (a) he had forged a communication received from KPMG regarding communications with the Bank of England concerning the UK banking licence in order to play up the purported issue about Mr. Minor; (b) he had misled the board about the nature of the Bank of England's concerns and (c) he had told the board that he would no longer be providing updates about the application to them. The Petitioners said that despite the Company's obvious financial interest in pursuit of the UK banking licence,

it appeared that Mr. Steckel had not pushed back against Mr. Watson's increasingly extreme insistence that (despite what he had told Mr. Minor in June 2016 about the solution of non-voting shares) the Company could not own TBOL, or test whether there were other alternatives. The Petitioners said that Mr. Steckel had accepted this in cross-examination (Day 6, page 152).

293. The Petitioners said that despite having said that obtaining a UK banking licence was considered to be of fundamental importance to the Company (and to Mr. Salinas), Mr. Steckel, Mr. Thieriot and Mr. Watson had agreed in September 2017 that the Company would hand all but 9.8% of its interest over to Mr. Watson. This arrangement, which was to have very significant, adverse, financial consequences for the Company, appeared to have been concocted privately, in the first instance, between Mr. Watson and Mr. Thieriot, acting entirely outside the normal process of the Company's board, before taking their plan to Mr. Steckel. Central to the plan, the Petitioners said, was the formulation of certain "justifications" for a transaction which would leave the Company with only 9.8% of a business (and opportunity) it had previously owned outright. As Mr. Thieriot noted, in his email to Mr. Watson of 22 August 2017: "*Uphold receives the following KEY attributes, lines of defence against skeptical [sic] shareholder scrutiny: … 2. 9.9% or 4.9% Uphold Ltd direct ownership (highest % possible with regulators), justifications: 1. Halsey not fit status 2. Crypto allergy 3. Offshore allergy 4.Aversion to Historic Financials Review 5. Tax and other flow-through complications with distribution of bank shares to Uphold shareholders*."

294. On or about 28 August 2017, Mr. Steckel and Mr. Watson had attended a lunch meeting in Los Angeles. Following the meeting, Mr Steckel and Mr Watson exchanged summaries by email of what, the Petitioners said, had been agreed. The Petitioners submitted that the three directors of the Company had agreed that the Company's holding in Uphold Group PLC and therefore the UK banking licence would be reduced to 9.8%, and the Company would also receive: (1) a bank agency agreement, (2) a £1m per year technology license, and (3) a seat on the board of Uphold Group PLC.

295. The Petitioners said that in his email of 11 September 2017 Mr. Watson had recorded that, as part of their agreement, Mr. Steckel, Mr. Thieriot and Mr. Dennings ("Limited Management") would receive: "*8% of PLC for brining [sic] the project to this point and for ongoing advice, guidance in particular around fund raising (JPT 3% and AS 3%) and Compliance BD 2%.*" The Petitioners said that this was confirmation of their agreement, as Mr. Watson had clearly recorded (not something that was being offered, but yet to be accepted).

296. By the time the Board met on 15 September 2017, Paul Hastings had given Mr. Thieriot "*their legal view supporting our approach*." When the board met that day Mr. Watson had provided an update on the "*MSBB transaction and stated that UK counsel had approved the proposed transaction structure*." The Board then resolved (Mr. Steckel, Mr. Watson and Mr. Milby recusing themselves, and therefore only Mr. Thieriot and Mr. Westerfield voting in favour) that "*the Company shall participate in the MSBB transaction on the terms previously agreed upon*." The Petitioners said that it was not clear quite what transaction the board was approving as there did not appear to have been any board papers for the meeting and the minutes contained only a short-form summary of a transaction that had been "*previously agreed*." The Petitioners submitted that whatever the transaction was, there was nothing to suggest that the agreement in respect of the 8% personal shareholding was disclosed to Mr. Milby or Mr. Westerfield. Nor was it clear why Mr. Milby recused himself on 15 September 2017 but was not at the meeting held on 27 September 2017.

297. The Petitioners said that in any event Mr. Watson had been in no doubt what the board had approved. In his email to Mr. Adams of KPMG on 16 September 2017 he had recorded the decision as follows: *"(1) Mr. Watson would "take over the MSBB application and contract"; MSBB and "my company (Uphold Group PLC) have also agreed the SPA*." (2) The Company would receive a 9.8% shareholding in Uphold Group PLC, a seat on the board, and a technology licence fee for use of their technology. (3) "*I [i.e. Mr. Watson] retain 87.7 shareholding*." The Petitioners submitted that if this was what the board had approved on 15 September 2017, the board had not been told that, as an integral part of the same agreement,

Mr. Steckel, Mr. Thieriot and Mr. Dennings would, in due course, receive 8% of the shares personally in the bank.

298. The Petitioners noted that on 27 September 2017, Paul Hastings had provided a short memorandum of advice. They said that in contrast to Mr. Watson's suggestion on 18 September 2017 that he had always owned 100% of Uphold Group PLC, the introductory section to the memorandum noted (presumably on the basis of instructions from Mr. Thieriot, who had contacted Paul Hastings to obtain something for the transaction file) as follows:

> "*1.1 Uphold Limited ("Uphold"), a company incorporated in the Cayman Islands, currently owns the entire shareholding of Uphold Bank (the "Bank"), a UK incorporated company which is currently applying for a banking authorisation from the UK Prudential Regulation Authority ("PRA"). Uphold has also entered into a services agreement with the bank to operate and support its technology platform.*
>
> *1.2 Uphold is planning to sell its shareholding in the Bank to Anthony Watson (CEO of the Bank), with a view to conducting a third party equity fundraising, which shall result in Uphold retaining a minority shareholding below 10%, i.e. 9.8-9.9%. It shall continue to provide the Bank with technology services, for which it shall receive a fee.*
>
> *1.3 We understand that [the Company's] decision to dispose of its shareholding in the Bank has been driven by regulatory matters, namely that the PRA would be unlikely to approve [the Company] as a 'Controller' of the Bank. You have asked us to confirm our assessment of the likelihood of Uphold being approved by the PRA as a Controller of the Bank.*"

299. The Petitioners argued that this memorandum necessarily assumed (upon instructions from the Company) that the PRA had already expressed concerns about Uphold's ownership structure. However, there was no evidence to support this assumption, and there was nothing to suggest that Paul Hastings had undertaken any independent verification, for example by contacting KPMG.

300. The Petitioners said that to the extent that the memorandum contained any advice, it was that Paul Hastings thought it "*likely that the PRA would have reservations over a proposal to have Uphold as a Controller of the Bank*" and that "*it would be difficult (without substantial*

effort and expense) to obtain PRA approval to Uphold as a Controller of the Bank." They said that this advice was premised, however, on the Company being a "controller" which Paul Hastings had defined as "*any person who holds – or expects to hold – 10% or more of the shares and voting rights in the Bank or any parental undertaking of the Bank*." But as to this the Petitioners submitted that (a) no-one appeared to have told Paul Hastings that, as long ago as June 2016, Mr. Watson considered that Mr. Minor would have no control because his shares were in trust and he only had a single vote on the board (and in any event, even if the Company's role as controller was an issue, it was an issue that could easily have been solved) and (b) another solution, identified in an email from Mr. Thieriot to a prospective investor on 24 May 2017, was that: "*Once MSBB is acquired, Uphold Ltd can distribute its shareholding in Uphold Bank to its individual shareholders*."

301. The Petitioners noted that at a further board meeting on 27 September 2017 the potential acquisition of MSBB shares by Uphold Group PLC was discussed. Mr. Steckel was recorded in the minutes as saying that there were two reasons for supporting the continuing efforts of Mr. Watson and Uphold Group PLC, namely (a) to provide the Company with access to a bank licence arrangement in the UK and (b) to recoup prior expenses incurred by the Company pursuing this transaction in its own right. But despite Mr Steckel having said that he wanted full transparency of the facts and disclosure of related parties involved in the transaction for the Board's consideration he had failed to disclose the agreement for Mr. Steckel, Mr. Thieriot and Mr. Dennings to take 8% of the bank in personal shares.

302. The Petitioners further noted that a shareholder call was scheduled to take place on 29 or 30 September 2017. On 29 September 2017, Mr. Steckel and Mr. Watson had agreed *"to limit the data we share with RE: the UK opportunity until we have clarity*." In his email to Mr Steckel, Mr. Thieriot, Mr. Westerfield and Mr. Fontg, Mr. Watson had proposed that "*we keep it super simple*" and then set out a "*Narrative* "focused on "*negative feedback*" said to have been received from the Bank of England. The Petitioners said that there was no reliable evidence that any of the three points that formed part of Mr. Watson's "*narrative*" (Halsey Minor not being "*fit and proper*", cryptocurrency concerns and not giving a licence to a non-UK domiciled company) had emanated from the Bank of England. The most likely

interpretation, they submitted, was that Mr. Watson was seeking to justify to shareholders – that is mislead them – as to the true reasons for the agreement reached in September 2017.

303. The Petitioners said that following the call on 29 September 2017 Mr. Watson had sent another email to Mr. Steckel and Mr. Thieriot proposing to send a letter to shareholders "*explaining our position*": "*Not now, but in a few weeks*." The Petitioners argued that the draft letter was misleading in multiple ways and appeared to have been aimed, again, at justifying the decision that the Company had taken. It was apparent they said from the detail that the draft letter contained about the transaction that none of this information had been imparted to shareholders on the call. Once again, no mention was made of the fact that Mr. Watson, Mr. Thieriot and Mr. Steckel had agreed an arrangement with respect to the personal shareholding of 8%.

304. The Petitioners noted that the MOU of 5 October 2017 (which provided for the Company to receive 9.8% of the issued and outstanding capital of Uphold Group PLC) recorded (in the third recital) that the Company had learned that the Bank of England had expressed certain reservations "*about the ability of MSBB to obtain a banking licence for several reasons, ranging from its participation in cryptocurrency business, the background and identity of certain shareholders of Uphold Limited, and its location in an offshore location*." The Petitioners submitted that there was no evidence that the Bank of England had expressed any such reservations and that even it had done so their concerns were only expressed as "reservations" and did not constitute a bar to the Company retaining its 100% interest.

305. On 1 January 2018 the Company and TBOL PLC entered into the Share Issuance Agreement that related to the 9.8% shareholding in TBOL PLC. The Petitioners noted that as at 5 April 2018 Mr. Watson was recorded at Companies House as a person holding 75% or more of the shares in TBOL PLC and that Mr. Watson had remained a director of TBOL Ltd until 11 September 2024. They said that at its last valuation TBOL PLC was valued at US$1.1bn.

306. They further noted that Mr Steckel had ultimately acquired an interest in TBOL PLC through a convertible promissory note originally dated 5 June 2017, shortly after the advice had been

received that Mr. Salinas would be unable to own Uphold Bank outright, pursuant to which Uphold Holdings had advanced US$300,000 to Mr. Watson, on an interest free basis, secured against Mr. Watson's shares in the Company and Uphold Group PLC. The Petitioners said that unusually for a personal loan, the Promissory Note permitted the lender (Uphold Holdings) at any time to convert and exchange any part of the principal or interest into shares in the Company or Uphold Group PLC. In June 2017, when this arrangement was made (between two directors of the Company), the position seems to have been that that Mr. Watson owned the only registered share in Uphold Group PLC. That single share, the Petitioners said, would only have had any value once the Company agreed (in September 2017) to allow Uphold Group PLC to acquire MSBB in its place. After the Promissory Note had been assigned on 1 July 2018 to ASP Capital in April 2021 it was amended and restated so that it was "*effective as of July 1, 2018*" and the conversion provision was amended so that it expressly provided for conversion of the loan into a maximum of 5% of TBOL's shares. In an email dated 8 April 2021, from Mr. Fontg to Matthew Poxon of Paul Hastings, Mr Fontg emphasised that the lender required 5% of TBOL's shares. In 2021, Mr. Steckel had exercised his conversion right, using, at Paul Hastings' request, a backdated conversion date of 25 September 2020, converting his US$300,000 loan to Mr. Watson into a 2.5% interest in TBOL in 2021. The Petitioners said that assuming a valuation for TBOL PLC of US$1bn, Mr Steckel's US$300,000 "*personal loan*" to Mr. Watson had resulted in his acquisition of a shareholding that was then worth US$25,000,000. The Petitioners submitted that in his cross-examination Mr. Steckel had accepted that the conversion clause was not typical of a normal loan arrangement but had said that Mr. Fontg had probably written the Promissory Note in his favour. But that he had not been aware of the conversion clause until being shown in it during the course of cross-examination, that the clause was unimportant and that he might not have read the Promissory Note before signing it. The Petitioners said that this evidence was incredible and submitted that it was to be inferred that Mr. Steckel had felt it necessary to distance himself from the conversion provision in this way because the arrangement was in truth not merely a personal loan but a means by which he would acquire a shareholding in TBOL.

307. The Petitioners were highly critical of the approach that the board had taken to assessing whether the Company had a claim against Mr Watson and to the shares in TBOL and in the prosecution and ultimately the settlement of such claims.

308. The Petitioners said that in 2021 at the time of the First Petition, the Company had belatedly sought advice from Dentons about bringing claims against Mr. Watson relating to TBOL. On 30 June 2021 Dentons had advised that the Company was more likely than not to succeed in a claim for the recovery of 9.8% of the shares in TBOL. Dentons had also later advised that the Company had good arguable claims against Mr. Watson for the diversion of the corporate opportunity. On 1 July 2021, Dentons sent a letter before action (on behalf of the Company) to Paul Hastings (acting for TBOL) claiming an entitlement, under the Share Issuance Agreement to 9.8% of TBOL's shares. On 3 August 2021, a response was received from Signature Law (acting for TBOL) raising various defences to the Company's claim.

309. The Petitioners said that throughout 2021 Mr. Hilton had considered that the Company had a good claim to 100% of TBOL. On 5 August 2021 he had set out some thoughts on a scratch pad which he sent to Ms Gray of Kleinbard as follows: "*Pursuing a UK banking license was an Uphold opportunity. It is unclear how Uphold went from owning this opportunity to owning no more than 10% of the corporation formed to pursue the opportunity, with two Uphold employees holding equity interests in the newly-formed entity. It seems likely that both Mr. Watson and Mr. Steckel misused Uphold resources to form TBOL*."

310. The Petitioners noted that on 8 December 2021 Mr. Hilton had emailed Mr. Watson and said that Mr Thieriot had indicated that Mr Watson was holding 2% of the shares in TBOL for Mr Thieriot personally and that "*These are the shares that everyone agreed he would receive at about the time the SIA was executed*."

311. The Petitioners further noted that on 24 June 2022, Mr. Watson, TBOL and the Company had entered into a settlement agreement (whose terms I have summarised above). The Petitioners noted Mr Hilton's account in Hilton-1 at [108]-[172] of the Litigation Committee's consideration of the Company's dealings with TBOL and Mr. Watson and

submitted that the Litigation Committee had decided to release all claims against Mr. Watson and not to bring claims against Mr. Steckel notwithstanding the evidence that gave rise to obvious concerns that Mr. Watson and Mr. Steckel had breached their fiduciary duties as directors. They argued that none of the reasons given by Mr Hilton for doing so justified the Company doing nothing to pursue a claim against Mr. Steckel.

The improper dilutions

312. The Petitioners said that it was indisputable that they had suffered the dilution of their shareholdings on various occasions, in circumstances where they were not informed of the dilution before it had occurred or offered the opportunity to avoid dilution on terms which were fair, having regard to the price at which the diluting shares were issued.

313. Dilution had occurred, on a significant scale, on three separate occasions, in a manner that unfairly placed the interests of Mr. Steckel over those of the shareholders generally, and involved various breaches of the Company's obligations to shareholders:

(a). *Dilution in 2016*: an improper and unfair dilution occurred upon the exercise by Uphold Holdings on 17 August 2016 of the Warrant that formed the loan to own part of the 2016 Transaction.

(b). *Dilution via PIK interest*: an improper and unfair dilution also occurred upon the exercise by the Company of its right to issue shares to Uphold Holdings as payment of PIK interest following the execution of the Third Amendment to the RCA in May 2017. It was no answer to the oppression and loss of confidence that arise from this state of affairs that, by reason of the board's own decision to ratify the Third Amendment, the Litigation Committee had decided to do nothing to rectify it. This, the Petitioners argued, simply meant that the prejudice unfairly caused to shareholders by the Third Amendment was continuing.

(c). *Dilution via the Series C Round*: an improper and unfair dilution also occurred in respect of the Series C round, which the Company conceded in the October 2023 Letter had not taken place in compliance with the requirements of the IRAs.

314. These dilutions constituted oppression of the Petitioners and have justifiably caused the Petitioners to lose confidence in Mr. Steckel, who acted in breach of his fiduciary duty in respect of (at least) his self-dealing in respect of the PIK interest issue. In addition, although the oppression ground was sufficient to sustain the Petition, the Company's longstanding and continuing failure to rectify, by any means, the dilution issue (including in particular the PIK interest issue) has also caused the Petitioners justifiably to lose confidence in the conduct and management of the Company's affairs.

315. The Petitioners argued that on each occasion the Company had inexplicably failed to comply, in one way or another, with its obligations to shareholders in respect of class consents required under the Articles and the right of first refusal under the IRAs.

316. The Petitioners submitted that it was no answer to these criticisms that in Mr. Steckel's opinion the 2016 Transaction, the Third Amendment (and resulting PIK interest shares) and the Series C round were in the best interests of the Company, on the basis that his actions and those of the other directors had saved the Company. This was because, as had been noted in *Howard Smith Ltd v Ampol* at 834G "*where the self-interest of the directors is involved, they will not be permitted to assert that their action was bona fide thought to be, or was, in the interest of the company; pleas to this effect have invariably been rejected*." Mr Steckel was a direct beneficiary of each of these transactions and therefore self-interested since he obtained large numbers of shares, in direct consequence of each of the unfairly dilutive transactions.

317. The Petitioners further submitted that in any event, looked at objectively each of the unfairly dilutive events occurred at a time when the urgency or crisis in the Company's financial situation (a) did not justify the terms or manner of implementation of the unfairly dilutive transaction, (b) did not justify, in particular, the decision to act behind the backs of the

Company's shareholders and (c) has been significantly overstated by Mr. Steckel after the event.

318. The Petitioners submitted that the Company was wrong to assert that the 2016 Transaction had not triggered the right of first offer and anti-dilution rights under the IRAs (see the Company Points of Defence at [43.8(a)]). The denial was founded on the proposition that the 2016 Transaction involved debt financing from a bank or similar institution that was approved by the Company's board so that the exclusion in Section 2.5(d)(ix) of the IRAs (which provides that the right of first offer does shall not be applicable to .. *"(ix) the issuance of shares, warrants, or other securities or rights pursuant to any … debt financing from a bank or similar institution….*") applied. But even if the 2016 Transaction could properly be characterised as "*debt financing*" (which the Petitioners doubted) Uphold Holdings - a Delaware LLC, of which Mr. Steckel is sole manager and member - is plainly not a "*bank or similar institution*." It was also noteworthy, the Petitioners said, that the Company's pleaded case was difficult to square with the Notices that were belatedly sent out to Investors on 21 July 2016 which expressly acknowledged their anti-dilution rights under the IRA and did not mention the Company's current argument.

319. The Petitioners also argued that was not an answer to their complaints to say that any claim for breach of the IRAs or Articles in 2016 was now time-barred. They noted that this approach had formed part of the decision-making of the Finance Committee when issuing the October 2023 Letter. First, if the present proceedings were a claim for damages for breach of contract, this point might have some relevance. However, this was a just and equitable winding up petition and the Petitioners relied on this conduct as supporting their justifiable loss of trust and confidence in the Company's management and conduct of its affairs and their case on oppression. It was no defence to a petition on these grounds - where the prejudice unfairly caused to shareholders is necessarily ongoing - to rely on a contractual limitation period. Secondly, in any event, the Petitioners had first complained about many of the same matters in the First Petition (albeit before receiving a significant volume of discovery that had further supported and widened their complaints), which had been issued on 2 February 2021.

The improper diversion

320. As regards the TBOL diversion, the Petitioners submitted that the transaction agreed in September 2017 involved breaches of the fiduciary duties owed to the Company as directors by (at least) Mr. Steckel and Mr. Watson. Aside from agreeing to hand over to Mr. Watson 90% of the Company's UK banking licence opportunity for essentially no consideration, Mr. Watson and Mr. Steckel (with Mr. Thieriot) had agreed, without disclosure to the board on 15 and 27 September 2017, that that they should receive 8% of the shares personally.

321. The Petitioners submitted that it was no answer to the breaches of fiduciary duty arising from the diversion issue that (a) it was said that the Company might not have been able to pursue the opportunity itself. The evidence did not support this conclusion but even if it had done it was no answer to an allegation of breach of fiduciary duty arising from the diversion of a corporate opportunity or (b) the breaches were historic and were not perpetrated by the current board. Mr. Steckel, who (with the Third and Fourth Respondents) was a significant shareholder in the Company, in large part by reason of the dilution issue, was plainly still a dominant force on the board. That was illustrated by the fact that (i) he had refused to return any of the PIK interest shares, (ii) he had apparently dissuaded the Company to bring any claims against him, and (c) he had required the Company to fund his aggressive litigation strategy in defence of these proceedings.

322. The Petitioners said that by reason of the misconduct associated with the diversion issue they had justifiably lost confidence in the management and conduct of the Company's affairs and that their justifiable loss of confidence had been compounded by the Company's decision, despite the obvious breaches of fiduciary duty by Mr. Watson and Mr. Steckel, not to take any action against either individual.

R2-R4's submissions

Overview

323. R2-R4 submitted that the Petitioners had failed to make out a case to the effect that Mr Steckel, or, importantly, the current board, had acted with a lack of probity. Accordingly, the relevant test, whether on oppression or on loss of trust and confidence grounds, had not been met, even taking the Petitioners' case otherwise to be accurate, which it was not.

324. R2-R4 submitted that the Petitioners had accepted that when seeking an order winding up the Company on the ground that they had lost all trust and confidence in the Company's management they must as a matter of law show an objective basis for that loss of trust and confidence in the current board, and that the loss of trust and confidence had to be based on a lack of probity by the current board in its conduct of the company's affairs. However their case had been closed without any suggestion that the current board has acted with a lack of probity.

325. R2-R4 submitted that Mr Laggner's evidence had been unsatisfactory in a number of critical respects. For example, the Petitioners now apparently accepted that the board on 22 June 2016 had unanimously approved the proposal that was before it whereas Mr Laggner had throughout vehemently denied that he approved that proposal. It also appeared that the Petitioners' case was now only that Mr Laggner had $7 million (or even $8m as corrected by Mr Valentin) in commitments at the time of the 27 June 2016 board meeting when Mr Laggner had previously claimed that he had US$8 million, or US$8.2 million, or US$8.5 million. R2-R4 submitted that once Mr Laggner was cross-examined at trial, and once his construct was challenged, the edifice he had sought to build crumbled, and crumbled into dust. Mr Laggner had approved the 2016 Transaction documents, which included the Warrant and the RCA and which had formed the backdrop to the Petitioners' dilution arguments. It was also to be recalled that it had been on the basis of Mr Laggner's evidence, which could now be seen to be without foundation, that the strike-out application had been defeated.

326. The evidence of R2-R4 not only had held up at trial but was largely unchallenged, was consistent with the documentary record, credible and consistent. Mr Steckel had given his evidence in a straightforward way. Mr Milby was an independent witness who gave clear

evidence that corroborated the R2-R4's case, particularly, but not exclusively, when it came to TBOL. Mr Valentin had been wrong to assert that Mr Milby was "*uninformed and disengaged*" when that had not been put to him during cross-examination. In particular, Mr Milby was a member of the board in 2016. He had voted in favour of the 2016 Transaction, and was able to explain why that was and why the competing proposal put forward by Mr Laggner was rejected. He was able to explain why he and the board had taken the decisions that they did in June 2016, and as the documentary record showed he had been heavily involved in the email back and forth and the discussions of the proposals and in giving Mr Laggner more time. He was also absolutely clear about the reasons given by the regulators in the United Kingdom as to why it was effectively a non-starter for the company or an entity owned by the company to secure a UK banking licence. He had candidly admitted not having remembered being involved in the Third Amendment to the RCA but the documentary evidence suggested that he had been, and that he was also involved in the Fourth Amendment which he was not asked about.

327. R2-R4 submitted that it would be wrong for the Court years after the event to sit in judgment on the commercial decisions taken by the board of the Company at different times as it sought to avoid disaster and achieve success. That is what the Petition now boiled down to. The Petitioners had sought to challenge the commercial decisions taken by the board at various times with the benefit of 20/20 hindsight.

328. R2-R4 said that the Petitioners had not only changed their case but had abandoned various allegations and grounds on which it had been based. This could best be seen by reviewing [140] of the Strike Out Judgment, in which I had summarised the core factual allegations made in the Amended Petition which constituted the primary facts in issue which need to be proved at trial. This showed how the Petitioners' case had radically changed during and at the end of the trial.

329. The first factual allegation was that Mr Steckel and Mr Salinas had wanted control of the Company without paying a proper price. R2-R4 said that this claim was not put to Mr Steckel and may have been abandoned. R2-R4 said it was correct that Mr Steckel had wanted

operational control, as indeed Mr Laggner's rival funding proposal did. But there was no suggestion of any intention of not paying a proper price or indeed of a proper price not having been paid. Mr Laggner had accepted that the price paid under the 2016 Transaction was a higher price per percentage shareholding than his counterproposal contemplated. As Mr Steckel had pointed out, he could have obtained control more quickly and cheaply, if that was all he had wanted, by simply purchasing Mr Minor's majority stake for the US$5 million at which he had offered to sell it. The allegation was also inconsistent with the option, which was in the transaction documents from the outset, for other shareholders and lenders to participate in the 2016 Transaction, which then happened with the Series B2 Share issue.

330. The second factual allegation was that Mr Steckel had obtained the support of other directors to control a majority of the board (by way of the Steckel Faction). This allegation was not put and also may well have been abandoned.

331. The third allegation was that those directors had acted to create conditions in which the Company needed to resort to emergency rescue financing, which was effectively an allegation of the engineering or manufacturing of the cash crisis. This allegation had once again not been put to R2-R4 or the Company's witnesses. It was also probably now abandoned.

332. The fourth allegation was that the RCA funding was not at arm's length and was at a premium rate but this was also not put to the witnesses. In any event, Mr Laggner had accepted that the 2016 Transaction was cheaper for the Company than the alternatives.

333. The fifth allegation was that the 2016 Transaction had not been validly authorised by the Company's shareholders. It appeared that the Petitioners now accepted that the 2016 Transaction did not have to go to the shareholders even though they maintained that the IRAs had been breached.

334. The sixth allegation had been that pursuant to the Participation Agreement Mr Chen (through the Fifth Respondent) had been given a share of the (improper) benefits of the 2016

Transaction and Mr Steckel procured the agreement of the Company to this. However, it appeared that this complaint had now been abandoned.

335. The seventh allegation had been that Mr Laggner had been removed from the board to prevent him questioning the implementation of the 2016 Transaction and its consequences. R2-R4 said that this complaint appeared to be maintained but had shown to be without foundation.

336. The eighth allegation had been that Mr Steckel had obtained *de facto* control of the Company through its board and his shareholding (in circumstances where the other large shareholder was Mr Chen, who, after the participation, had cooperated with him) and had since exercised such control. R2-R4 submitted that it was never put to Mr Steckel that he has always controlled the Company or even been in a position at all material times to control the Company since 2016. R2-R4 said that this was clearly not the case. The suggestion that Mr Chen was cooperating with Mr Steckel had not been put to Mr Steckel and was in any event incorrect. R2-R4 argued that the Petitioners had failed to explain precisely how Mr Steckel was able to exercise such control or examples of what he had done when exercising such control. It was now accepted that Uphold Holdings had just over a 22% interest in the Company.

337. The ninth allegation was that Mr Steckel had used his control in his own interests and against those of the Company and its other shareholders and that the board had gone along with this. R2-R4 considered that insofar as the dilution and diversion grounds are part of the Petitioners' remaining case, this allegation is maintained.

338. The tenth allegation identified the actions which it was said Mr Steckel had caused the Company to take. The first was that the Company had failed to comply with proper procedures and its obligations in connection with the February 2017 EGM (and the Third Amendment). R2-R4 said that this allegation was maintained. The second was the alleged failure by the Company to recover from AirTM, and the waiver of, sums owing by it to the Company. R2-R4 said that this allegation had now been abandoned. The third related to

TBOL. R2-R4 said that clearly the Petitioners still maintained that the board's action (or inaction) in relation to TBOL was a ground on which they relied. However, the basis of the Petitioners' complaints had changed. While on the Petitioners' previous case TBOL had been an example of Mr Steckel exercising control, it was now said to be an example of the diversion of a hugely valuable corporate opportunity and of self-dealing. But that case was based on an allegedly undisclosed agreement, insofar as Mr Steckel was concerned, relating to management shares in 2017 which R2-R4 said had never been agreed and also on the alleged irrationality of the Litigation Committee's decision making, which R2-R4 said was unsustainable on the facts. Furthermore, R2-R4 argued that it was very difficult to identify whether and if so in what manner Mr Steckel was said to have exercise control over the board and the Litigation Committee. The fifth action was the issue of options and shares to Mr Steckel (and Mr Thieriot, Mr Parsa and Mr Watson, Mr Chen and Mr Kidd) in amounts to which they were not entitled. R2-R4 said that this allegation had not been put to the witnesses and had been abandoned. The sixth action was the alleged failure to protect the interests of the Company in relation to the Company's participation in the Universal Protocol project and R2-R4 said that once again the allegation appeared to have been abandoned. The seventh was the allegation of an improper payment of Mr Steckel's fees incurred by him in connection with the First Petition, which had also been abandoned. The eighth was the allegation of the disposal of shares held by the Company in Ledger at a significant undervalue, which had also been abandoned.

339. R2-R4 also noted that there was an allegation in the Points of Claim, which was briefly referred to in Mr Valentin's opening, in relation to the reserve or the deficiency in the reserve. But that was not put to Mr Steckel or anyone else and also seems to have been abandoned. In any event, it was wrong, for the reasons given by Mr Steckel in his unchallenged evidence, and was clearly historic.

340. R2-R4 said that the Petitioners revised case still seemed to be premised on Mr Steckel actually exercising control. They submitted that there was no evidence of that and that the particulars of the manner in which Mr Steckel was alleged to have exercised control were never put to Mr Steckel or any other witness.

341. R2-R4 said that it was important to see just how substantially the Petitioners' case had changed (it appeared that the 2016 Transaction no longer took centre stage) and how many allegations had just been dropped, including many of the very many serious allegations made against many individuals.

342. R2-R4 said that the Petitioners' new focus on oppression fell to be contrasted with the pleaded case in the Petition at [35(i)] and [(j)]. The Petitioners' case was consequent upon what was said to be the loss of trust and confidence in the management of the company.

343. R2-R4 agreed that the test for oppression was as set out at [42] of the Strike-Out Judgment. While reference was made to the test being either a lack of probity or unfair dealing, the latter effectively requires the former. It was not just a commercially unfair deal that was required. There had to be some unfair dealing in the operation of the Company (something underhand, where the majority oppresses the minority). R2-R4 said that the Petitioners had correctly recognised at [257] of their Written Closing Submissions that it was the lack of probity in the conduct of the Company's affairs that was the common feature of both oppression and lack of trust and confidence, and that was the touchstone that was being looked for.

344. R2-R4 argued that the essential elements of a case in oppression were missing and in large part were not even put to the relevant witnesses. In summary, their core submission was that oppression required (a) misconduct by the majority, involving a lack of probity; (b) that the misconduct constituting the oppression by the majority must be directed at a particular shareholder, or class of shareholders in particular and (c) that the oppression must be continuing, in the sense of either actually continuing or there being a continuing risk of it being repeated. They submitted that none of those requirements had been made out:

(a). no relevant misconduct had been alleged or put to the witnesses. Breach of fiduciary duty by Mr Steckel alone would not suffice. He was not the majority and was not the majority at the relevant time. Beyond that, *a want of probity* in relation to the PIK interest and TBOL issues was not put to Mr Steckel, Mr Thieriot or Mr Hilton.

(b). the misconduct was not said to be aimed at the Petitioners in particular, or any class of shareholder in particular.

(c). the third requirement was also not satisfied because first there never had been any oppression. But even accepting, for the sake of argument, that there might have been oppression in the past, it was not continuing. R2-R4 said that it was difficult to understand how reference to share issuances years, in some cases very many years, in the past could possibly constitute continuing oppression on the part of the current board. Whatever may or may not have happened in the past it was clear, they said, that there was no continuing threat of oppression, at the time of the trial or in the future. This was for six main reasons: (a) Mr Steckel did not hold or control the majority of the voting shares; (b) there are independent board members in office and actively engaged; (c) the Litigation Committee had properly and reasonably investigated the position and decided not to pursue the matter (not least because it was difficult to see what claim the Company had against anyone in respect of dilution); (d) the fact that there was a proper and independent investigation showed that there was no continuing oppression of the minority by the majority; (e) any continuing oppression was not put or, even seriously argued (and this was fatal to the suggestion that the Petitioners have lost trust and confidence in the current management of the Company) and (f) the highest that the Petitioners' case was put was to suggest that the failure to remedy the dilution constituted continuing oppression. But any failure to remedy the ills of the past did and could not constitute continuing oppression in the sense of continued oppressive misconduct in the management of the affairs of the company. The Litigation Committee and the Company had made their decisions for demonstrably good reasons. Those decisions cannot be characterised as misconduct, still less misconduct attended by a lack of probity and even less misconduct attended by a lack of probity on the part of the majority against minority interests.

345. R2-R4 submitted that proof of mere suspicion will not suffice and the Petitioners were wrong to suggest that it did. Any suspicion had to be well-founded, which in substance required a finding of a lack of probity. There were cases like *Loch* where there had been a good basis

for a suspicion of lack of probity (i.e. it was well founded) coupled with the alleged wrongdoers not cooperating and taking steps to cover their tracks, at which point the Court had been entitled to say that was enough. There was not just lack of probity but fraud in that case. What was required was conduct short of fraud, for which the Court was satisfied there was evidence of a lack of probity to the requisite standard to justify a loss of trust and confidence in the current board.

346. R2-R4 argued that as regards the Petitioners' new case that any approval of the Third Amendment and the approval of the Fourth Amendment to the RCA (and the use of the US$48 million valuation as the basis for determining the number of PIK shares to be issued) was wrongful because that valuation was wholly inappropriate or not properly assessed, this was not pleaded and the failure to do so had caused real prejudice to R2-R4. Had that case been pleaded or even opened with proper particulars, it was likely, indeed inevitable, that further evidence would have been called. If it was being argued that there was something wrong in the Series C issuance and in the price paid or the consideration given by the shareholders, then Mr Anderson may well have been called to give oral evidence. Further, if there really was a dispute about valuation, R2-R4 were likely to have put in expert valuation evidence.

347. R2-R4 submitted that, as regards the Third Amendment, the evidence showed that there had been a proper negotiation, that Mr Westerfield, Mr Thieriot and Mr Brooke on behalf of the Company had been involved in those negotiations and that the US$48 million valuation figure was appropriate to use as it that was the figure that had been used for the most recent funding rounds. If the challenge was focussed on the appropriateness of the US$48 valuation and the reasonableness of including a non-adjustable valuation without a review clause, then there was no evidence on that because the issue had not been pleaded. It had not been the Petitioners' pleaded case that the US$48 million was wrong and that it was necessary to have a review clause. As a result, R2-R4 had not been given a proper opportunity to obtain permission to adduce expert evidence. To the extent that the Petitioners' case now put in issue whether there had been an adequate and proper consideration of a review mechanism, then it was necessary to look at the evidence as adduced. That evidence, R2-R4 submitted,

showed on balance that there was a proper arm's length negotiation of the Third Amendment terms from which it could at least be inferred that the position of the Company as a whole, and the interests of the Company and its shareholders as a whole, had been considered. The evidence showed that Mr Steckel had considered himself bound to advance US$10 million but that the further US$5 million was at his option. His evidence was that the Company had urgently needed additional funds and that Uphold Holdings did not have the ability to fund the payment of critical operating expenses, with the result that Mr Chen's contribution was essential and that Mr Chen had a very strong negotiating position and was able to insist on quite punitive terms. R2-R4 referred to Steckel WS1 at [251-258]) where Mr Steckel had said that *"... by March 2017 the Company was facing another liquidity shortfall and needed urgent funding to pay salaries and Amazon Web Services ... [and] the ... burn rate [per month] was ... $800,000 [per month]*."

348. R2-R4 submitted that it also had to be borne in mind that had a valuation adjustment provision been included it was to be expected that it would also have provided for a downward adjustment as well as an upward adjustment which in the event of a decline in the value of the Company would have resulted in a worse outcome for the Company.

349. R2-R4 submitted that Mr Steckel's and Mr Thieriot's evidence was that these terms were ultimately approved in the Third Amendment by the board and Mr Steckel's unchallenged evidence (see Steckel-WS1 at [188]) was that he had recused himself from that approval process.

350. R2-R4 submitted that whatever criticism might legitimately be made about the Company's record-keeping, when it came to the integrity of the decision-making, there was a reliable documentary basis that supported the reasonableness of the decision-making and the thoroughness of the decision-making.

351. R2-R4 argued that the minutes recording the board's decision to approve the Fourth Amendment showed that the decision had been made in the context of a careful review of alternative funding sources in circumstances where the RCA Loan had become due and the

Company was not in a position to make payment. The board in essence had concluded that the Fourth Amendment terms represented the best deal on offer, and more likely the only deal on offer within the available time frame. The essential *quid pro quo* was that the Company was going to be given more time to pay in return for the terms which included PIK interest. Effectively the PIK shares were being used in part as a forbearance fee in circumstances where the lenders could have enforced but agreed not to do so. Further the minutes recorded that, consistently with his evidence, Mr Steckel had again recused himself. The minutes also recorded that the other directors (Mr Watson, Mr Milby, Mr Thieriot, Mr Westerfield and Mr Kidd) considered that the Fourth Amendment was in the best interests of the Company and noted that they had passed the necessary resolutions to approve it. R2-R4 accepted that Mr Milby had been unable to recall being involved in the amendment process but the documentary record showed that in fact he had been. Furthermore, R2-R4 argued, this record was evidence of the process that was likely to have gone through in relation to the Third Amendment as well.

352. R2-R4 said that the record also showed a proper decision-making process in relation to the Fifth Amendment to the RCA. There were board minutes for the board meeting on 15 November 2018 which attached the detailed resolutions considered and passed by the board and the relevant transaction documents. At this point, Mr Kidd had made his investment by way of the Series C issuance, part of a wider commercial deal with Hard Yaka, and Mr Kidd had invested under the Series C issuance at a price of US$1.13 per share (this was the last fundraising is at US$1.13 per share). The RCA Loan has been extended by Mr Chen and Uphold Holdings. At this stage the parties had renegotiated the PIK interest provision in clause 2(b) so that the PIK interest shares were to be issued at the same price as the Series C shares, namely US$1.13. In addition, part of the RCA Loan owed to Uphold Holdings was to be converted into equity. The record demonstrated that there had been arm's length negotiations and that the board had done the best it could at each stage to obtain the best terms and had considered the position properly. When Mr Chen and Mr Steckel did their further capitalisation, it was the US$1.13 price as well (so that the lenders were not having it all their own way). Further, the minutes were careful to record that Mr Steckel (who did

not attend the meeting) and Mr Chen (acting by his representative Mr Schatt) did not participate in the decision making in relation to the Fifth Amendment.

353. As regards TBOL, R2-R4 said that the Petitioners' case was now put on two bases. First, they alleged a secret agreement between Mr Watson, Mr Thieriot and Mr Steckel in September 2017 that they would receive shares in a new TBOL entity and that that agreement should have been disclosed to the board before it took its decisions on 15 and 27 September. Secondly, the Petitioners complained that the Litigation Committee's decision not to pursue Mr Watson was irrational or more than negligent.

354. The first new basis was not the Petitioners' pleaded case. The case as pleaded in the Points of Claim was as follows:

> *"67 Accordingly, both Mr Watson and Mr Steckel breached their duties as directors to the Company by exploiting the TBOL opportunity for their personal benefit, and are liable to account to the Company for any benefit they have improperly received.*
>
> *68 Despite the Petitioners having repeatedly complained about the above issues, the Company has taken no steps to seek redress, save for asking Mr Watson to transfer some 9% of the TBOL opportunity back to the Company, which he appears to have done only in 2022. This is wholly inadequate since the Company is clearly entitled to 95% of the opportunity, including any other benefits that Mr Steckel and Mr Watson have received in the meantime.*
>
> *69. The Company's failure to take steps to recover what is owed to it by Messrs Watson and Steckel leads the Petitioners to infer that the board is unwilling to operate in accordance with accepted standards of commercial probity, rather it remains subjugated to the will of Mr Steckel and unwilling to challenge or restrain his misconduct and that of his associates."*

355. Further, at [24(e)] of their Reply the Petitioners had averred that "*It is to be inferred that Mr Watson and Mr Steckel seized upon the advice that it may be difficult for the Company to hold more than 10% of the Bank of London project as an opportunity to appropriate the remaining 90% to themselves ...*"

356. R2-R4 said that accordingly, the pleaded case was that Mr Steckel, with Mr Watson, had diverted the opportunity in breach of fiduciary duty to themselves (for the benefit of Mr Salinas) and that the decision not to pursue Mr Watson and Mr Steckel gave rise to the inference that the board was unwilling to operate in accordance with accepted standards of probity and remains subjugated to the will of Mr Steckel.

357. R2-R4 submitted that critically the Petitioners' case ignored the important evidence of Mr Milby and relied on the submission that Klaros' record of what Mr Adams had said, with all its limitations and shortcomings, was to be preferred over the evidence of Mr Steckel. Mr Milby gave clear evidence as to what the regulators' concerns were and had reconfirmed in cross-examination the evidence of his witness statement. He had said that if Mr Adams "*was sitting here, then he would say the same thing*." Mr Milby's written and oral evidence was unequivocal as to what the PRA/FCA were saying about the issue of controllers and of the concerns raised about the Company being in the crypto space and an offshore Company. He had said this in Milby-WS:

> *"57 In or around May or June 2017, the BoE informally notified TBOL that they would not support a clearing bank license being issued to a cryptocurrency company, or an entity that was based offshore (including its holding or parent company). However, it indicated that up to 9.8% of TBOL's issued shares could be held by the Company without any issue (an interest below 9.8% was not regarded as a controlling interest and was not subject to the same regulatory scrutiny). This position was also confirmed by KPMG and TBOL's legal counsel, Paul Hastings. If TBOL wanted to pursue the clearing bank license, it was clear that it would need to change its structure to address the criteria identified by the BoE's regulators. There was no realistic prospect of the Company (an offshore cryptocurrency venture) being able to successfully obtain a clearing bank license in its own right or through a subsidiary in which it held more than 9.8%.*
>
> *58 Against that background, the Company obtained a minority (9.8%) shareholding in TBOL. I understand the terms on which the Company would acquire its 9.8% holding was set out in a memorandum of understanding dated 5 August 2017 ("MOU"), which was approved by the Board on 27 September*
>
> *2017. The Company subsequently terminated its agreement with MSBB.*
>
> *59 In reaction to the Company being informed in the first half of 2017 that it was not going to be possible to obtain a clearing bank licence application whilst controlling more than 9.8% of the shares in TBOL, I recall that the general*

consensus from the Board was that 'something was better than nothing', and the alternative would have been to shut down the project entirely.

60 I considered the Company's acquisition of a 9.8% stake in TBOL to be adequate outcome for the Company in the circumstances, as:

60.1 In the event a clearing bank licence was obtained, the Company would own a share in a valuable partner company that understood its business needs and had developed infrastructure to support those needs;

60.2 The Company was not required to invest further capital into TBOL or fund its growth or capital requirements. TBOL's funding requirements were substantial, and would have been a huge liquidity drain for the Company if it retained majority ownership. This was in circumstances where the Company already had its own serious financial difficulties to overcome in relation to its core business.

60.3 Even partial ownership of the clearing bank licence was potentially lucrative for the Company. I recall that during one board meeting, Mr Watson estimated the licence's value at £50 million, even without the licence being income generating. I cannot confirm the accuracy of that figure but my view at the time, which I believe was shared by the other Board members, was that a 9.8% shareholding in TBOL was potentially of significant economic and strategic value for the Company; and

60.4 The Company was unable to obtain a clearing bank license itself, either directly or indirectly through another vehicle, in circumstances where it had already committed substantial time and money into the project. The clear feedback received from the PRA, and the subsequent advice received from KPMG and Paul Hastings, meant that the largest interest the Company could hold in TBOL was 9.8%."

358. R2-R4 submitted that the evidence showed that there had in fact been no agreement as alleged between Mr Watson, Mr Thieriot and Mr Steckel in September 2017:

(a). Mr Steckel had clearly denied reaching any such binding agreement and had made the point that only proposals were being discussed.

(b). consistently with that evidence, Mr Thieriot's evidence in Thieriot-WS2 at [18.5] was that the agreement that he eventually reached as to Mr Watson holding 2% of TBOL's

shares for him was reached during the course of discussions in 2018 and not in 2017. There had been no mention of shares being offered or issued to anyone else.

(c). Mr Fontg had said in his email of 13 September 2017 that "*As an aside, this issue [obtaining a legal opinion from Paul hastings] is also important if any shares are ultimately set aside for management at the bank where such individuals may also be on the Uphold Ltd. Side.*" This was inconsistent with there already having been an agreement of the kind asserted and relied on by the Petitioners. Mr Thieriot's comment in cross-examination, which the Petitioners had relied on at [218] of their Written Closing Submissions, was to like effect. Mr Thieriot had said that Mr Fontg's statement had meant that "*if eventually there's going to be any shares given to myself or Adrian or Bill Dennings or whomever, he felt it important to have this, not just as a justification for 100% to 9.8, but whatever might happen subsequently with shares going directly to management*."

(d). the email from Mr Watson dated 11 September 2017 which the Petitioners relied on had been overtaken by events in the sense that the proposal referred to was not the one taken forward and considered by the board.

(e). in addition, Mr Watson's email to Mr Fontg dated 14 September was also inconsistent with there having been an agreement that Mr Steckel, Mr Thieriot and he would be granted shares. Mr Watson said that Mr Thieriot had told him that "*Paul Hastings have given their legal view supporting our approach. With a letter pending in the next few days. Good news we can move this forward. Ricardo, when can we have the paper work drawn up to move this forward - its pretty much there as regards Marcello and Group, but in terms of detailing: Limited's 9.8% ownership; Seat on the BoD; Bank Agency Agreement; Technology License Fee of £1M per year (after license approval). I've a meeting with the Bank of England 25th of Sep so we need to have all this in place by then…*" R2-R4 argued that if a deal had been done that the individuals were to be granted management shares, and if the advice from Paul Hastings was being obtained to reflect the deal that had already been done, rather than an idea of something that

might happen in the future, then when Mr Watson had reverted to Mr Fontg saying "*these are the terms*" there would have been no reason for him not to refer to and add a reference to the granting of management shares but he did not do so.

359. R2-R4 submitted that the Petitioners could not justify their failure to plead and clearly disclose their new case in respect of TBOL on the ground that they did not know that they had cause for complaint and concerns in relation to TBOL prior to the First Petition. Mr Kearns' evidence showed that this was incorrect. In his witness statement at [16] he had said that: "*My significant concerns regarding Uphold emerged from various incidents from 2017 onwards. First, during a shareholder call that year, Adrian Steckel projected the Bank of London licence value at approximately $300 million minimum, indicating acquisition of the licence within the year. Approximately 12-18 months later, in 2019 [the First Petition was presented in 2021] … I discovered the Company had relinquished ownership of this licence and/or pursuit of the licence…... This revelation prompted immediate communication with Bill [Mr Laggner] and fellow shareholders*." Ms Stanley had asked Mr Kearns why, if they had concerns in 2019, TBOL did not appear in the First Petition and Mr Kearns' evidence was that he thought that was a tactical decision made by Mr Laggner and/or with their attorneys, with a view to focusing on their best points.

360. As regards the Petitioners' new case based on an allegation of the irrational nature of the Litigation Committee's decision making, R2-R4's position was that there was no proper basis for seeking to criticise or impugn the decision-making of the current board and its Litigation Committee in relation to TBOL. They had adopted as the evidence demonstrated a very careful, measured approach based on detailed investigations and a reasonable settlement with Mr Watson. There was no basis for saying that anything done by the Litigation Committee exhibited a lack of probity and no suggestion beyond the general point that their decision-making was somehow driven by Mr Steckel (who had never been a member of the Litigation Committee). R2-R4 supported the Company's submissions on this issue.

361. Mr Chapman in his oral closing submissions submitted that ultimately it was necessary and important for the Court to assess the Petitioners' case based on a real-world view and ask what was really happening? What was really likely to have been the case on the balance of probabilities? Why would Mr Steckel conspire to take control in the sense of majority control of the shareholding or the board and do so by way of transaction documents which contemplated the participation by others diluting his own shareholding from the outset? Why, then, do exactly as he had contemplated, through Series B2 Share issuance, the transactions with Mr Chen and Hard Yaka, ultimately reducing his shareholding through Uphold Holdings to 22%? Why participate in the diversion of TBOL - if it was a valuable opportunity, to Mr Watson, when that would be in Uphold Holdings' own significant financial disadvantage? What could the Company have really done differently in relation to TBOL and the PIK interest issue, looking fairly at the evidence as a whole? Why are the Litigation Committee's decisions wrong or unreasonable, and how can it reasonably be said that they were lacking in rationality or in probity? And why would the board, composed as it was at any time, but particularly composed as it is now, simply do Mr Steckel's bidding? R2-R4 submitted that none of this made sense, ultimately because the Petitioners' construct and case were untrue.

362. R2-R4 requested that, in view of the serious allegations made in the Petition and the Points of Claim and because the last minute radical revisions to the Petitioners' case had left doubts as to precisely which of those allegations had been fully abandoned, the Court deal in its written judgment with all of them so that the position is made clear and the integrity of the individuals whose reputations had been impugned was protected and vindicated.

The witnesses - Mr Laggner

363. R2-R4 said that he was the Petitioners' key witness. The Petitioners' entire case had been built on the basis of Mr Laggner's analysis and contentions set out in his various affidavits and witness statements. He has been the architect of the Petitioners' complaints. However, R2-R4 submitted, he was an unsatisfactory witness. He had frequently sought to act as advocate in his own cause, was evasive, had failed to answer questions when he appreciated

that a truthful response would be damaging to his case and, regrettably, was willing to be untruthful in an effort to advance his case. The evidence adduced for and at trial from Mr Laggner, the lead Petitioner, confirmed he had not come before the Court with clean hands. Instead of assisting the Court by answering straightforward questions with honesty and candour, Mr Laggner had sought to mislead the Court into believing that (a) documents did not say what they said and (b) in some instances where the documents undermined Mr Laggner's conspiracy theories, that these had been prepared or emails sent as part of some grand cover-up or façade in furtherance of the Steckel takeover effort. R2-R4 said that at times Mr Laggner had been shown to be seeking to disavow in the witness box his own words that he had used in his written testimony or in the pleadings. Knowing that the contemporaneous documentary record (which was put to Mr Laggner in considerable detail) and the totality of the evidence filed in these proceedings by a dozen witnesses were fatal to the Petitioners' claims, Mr Laggner had attempted to advance allegations which his attorneys would not advance, even if this meant, in effect, contradicting himself, the pleaded case and the documentary record.

364. R2-R4 submitted that when one took into account (a) the circumstances in which Mr Laggner had acquired his shares and standing as a Petitioner for $1 (i.e. in reliance upon the very transactions he now complained of, which he approved of at the time), (b) his self-interested promoting of the Company as a consultant for years after the core matters complained of, (c) the fact that he had sold 40,000 shares in the Company for a huge profit, it was difficult to fathom someone less deserving of equity's aid than Mr Laggner. R2-R4 said that of the nine witnesses called at trial, and the other individuals (Mr Parsa, Mr Brooke and Mr Kidd) who had given affidavit evidence, Mr Laggner was a lone voice. He did not even have the support from his co-Petitioners, who had no direct knowledge of the matters complained of and whose views were, they admitted, a corollary of Mr Laggner's own theories.

365. R2-R4 said that in order for Mr Laggner's evidence to be accepted, being evidence which was undermined by the contemporaneous documentary record and the evidence of disinterested and independent witnesses, it would be necessary for the Court to find that (a) every other witness had been untruthful such that their evidence could not be accepted

(notwithstanding that the vast majority of the Respondents' evidence was wholly unchallenged) and (b) the documentary record, spanning thousands of documents over a decade, could not be relied upon for what it showed. Mr Laggner had invited the Court to find there has been a grand conspiracy perpetrated by countless individuals (each with their own motivations) over many years, seemingly (on Mr Laggner's view) not only to takeover the Company and oppress the Petitioners but to ensure that anyone who might investigate such matters years in the future would be hoodwinked by false records of events which did not transpire.

366. R2-R4 said that in circumstances where Mr Laggner had been shown to be willing to use litigation to create nuisance for the Company and the other Respondents, R2-4 invited the Court to make express findings in relation to Mr Laggner's credibility, including that he had knowingly sworn false evidence. They submitted that this was material as to the question of whether Mr Laggner was invoking the Court's equitable jurisdiction with clean hands.

367. R2-R4 submitted that in his oral evidence Mr Laggner had:

(a). confirmed that he and his wife invested only $15,000 - $20,000 into the Company via Bearing Ventures, and the $1 paid to Mr Minor;

(b). claimed to have first lost trust and confidence in the Company's board in 2016 notwithstanding his continued role as a consultant charged with trying to raise funds for the Company;

(c). given inconsistent evidence on the question of the Company's financial position prior to the 2016 Transaction. His cross-examination had confirmed that Mr Laggner would regularly depart from his pleaded case or deny the plain reading of contemporaneous documents when he thought it might serve him:

(i). his view (at least originally) was that there was no insolvency risk in 2015 or early 2016 despite the contrary being pleaded in the 2021 Petition. He had been

unable to provide a straight answer regarding whether or not he maintained the Petitioners' pleaded allegations about the Company being in a "*distressed*" state in Q1 of 2026 and having "*severely depleted cash reserves*" which had led the Court to remind Mr Laggner that the questions being put to him were about his own written testimony or documents that he had previously verified as true. Mr Laggner had then rowed back his first answer and suggested that the Company could have become insolvent in 2016.

(ii). Mr Laggner had readily agreed that in Q1 2016 the Company's financial position was not "*sound*." When he was reminded that the Petitioners alleged the exact opposite in the Points of Claim, Mr Laggner changed his evidence to the Company's position being sound at the beginning of 2016 but not by the end of Q2 2016. Mr Laggner had to then be reminded he was under oath and that false testimony could give rise to criminal prosecution.

(iii). in the exchanges that followed, where Mr Laggner was shown the contemporaneous records, he was forced to admit that the Company was in desperate need of funding to continue operating in 2016 and on the verge of insolvency, including during February, 25 March, 26 April, 27 May 28 and June 29 in the lead up to the 2016 Transaction; and

(d). been forced to improvise on the subject of the alleged cash crisis being manufactured by Mr Steckel's faction as a means of him justifying a takeover of the Company:

(i). Mr Laggner was originally unable to explain this core allegation, and the basis for it.

(ii). while he was forced to admit there was a cash crisis, and that in June 2016 the Company "*desperately needed funding*" he could not explain why he used the words "*purported*" or "*supposedly*" when describing the Company's critical financial position in his Third Affidavit at [23].

(iii). when asked if Mr Steckel and his faction created the cash crisis, he said *"I think they were part and parcel of running the company out of money, ye*s" but when probed further about this allegation, and whether Mr Steckel and his "*faction*" acted wrongfully (which Mr Laggner had said they did), he could not offer any explanation for how this cash crisis was manufactured beyond unveiling the never-before-seen allegation that resources were allocated to a remittance product (referred to as Aztro or Elektra) which never launched, damaging the Company – whereas the documentary evidence showed Mr Laggner in fact extolling the virtues of Elektra to potential investors.

368. At its highest, it could be said that (notwithstanding that he himself was a director at the time) Mr Laggner with the benefit of hindsight blamed the Company's then C-suite, namely Mr Watson, Mr Thieriot and Mr Parsa, for commercial and operational decisions taken in 2015 to early 2016 as a contributing factor to the Company's dire financial position in June 2016 but that complaint was not pleaded; it concerned the competency of the Company's executive directors in office nine years ago which could not possibly give rise to a loss of trust and confidence in the current board and was not caused, "*engineered*" or "*manufactured*" by or at the direction of Mr Steckel in furtherance of a plan to takeover the Company or otherwise.

369. R2-R4 said that when questioned about who were members of the alleged Steckel Faction Mr Laggner's "*creativity and embellishment*" had reached a new low:

(a). for the first time in these proceedings, Mr Laggner had suggested that Mr Milby was also a member of the faction. R2-R4 claimed that when probed further on this Mr Laggner had been evasive and refused repeatedly to answer questions. He had later suggested that Mr Milby had become a member of the faction at a later date, seemingly in connection with TBOL, in 2017 or 2018 (but was not a member of the faction in 2016 when the 2016 Transaction was approved). This point had not been put to Mr Milby by Mr Valentin during his cross-examination.

(b) when Mr Laggner was questioned about why this allegation had never been made in his witness statements, notwithstanding Mr Laggner claimed to have learned of Mr Milby's involvement in TBOL during discovery before his evidence was filed, Mr Laggner had repeatedly refused to answer the questions, promoting a further intervention from the Court. He ultimately admitted to not having done so and that Mr Milby's alleged membership of the faction was never a part of either of the petitions.

(c). Mr Laggner had also alleged that Mr Kidd became a member of the Steckel Faction in 2018 (which was something mentioned in prior evidence but never pleaded in the Petition or the Points of Claim) but added this was in relation to TBOL and that his board nominees Ms Slemmer and Mr Hilton may also have joined the faction by "*doing nothing about it*."

(d). Mr Laggner had refused to give a clear answer on whether Mr Chen was in the Steckel Faction but appeared to suggest that he was by reason of his participation in the RCA.

370. R2-R4 said that Mr Laggner had also been questioned about how the takeover was said to have been perpetrated by the Steckel Faction. R2-R4 submitted that his evidence was that the faction was sharing proposed financing terms in secret emails, and he guessed that a takeover plan formed somewhere around January to March 2016. However when it was shown that Mr Thieriot had emailed Mr Laggner on 9 June 2016 to suggest how they might try to persuade Mr Salinas to invest, which reflected no takeover ploy was in effect, Mr Laggner's improvised answer was that this was "*smoke and mirrors*" from Mr Thieriot. When other emails which were inconsistent with the takeover allegation (e.g. emails showing Mr Thieriot working on competing funding proposals and working with Mr Laggner on these) were put to Mr Laggner he could offer no explanation for this. It did not fit with Mr Laggner's narrative to admit that members of the alleged faction were talking with him about how to persuade Mr Salinas to invest. Further, Mr Laggner admitted that the allegedly secret emails (sent using Hotmail accounts) were in fact shared with him at the time, but failed to admit that his being copied on these emails was entirely inconsistent with his narrative of a secretive Steckel/Salinas takeover plot.

371. R2-R4 submitted that in relation to the board's approvals processes, meetings and minutes in June and July 2016, Mr Laggner had sought to change his evidence and re-write history by arguing that the contemporaneous documents did not say what they said and did not evidence (as they do) his approval of the transaction documents:

(a). he had vehemently denied approving the Salinas Terms as proposed to the board on 22 June 2016 despite the board meeting minutes saying that the relevant resolution was passed unanimously, Mr Brooke having contemporaneously recorded what transpired at the relevant meetings and recording in his notes the unanimous resolution passed on 22 June 2016, despite Mr Laggner having raised concerns in writing with Mr Brooke on 19 July 2016 about the accuracy of the minute of 22 June 2016 on that very issue and subsequently confirming "*OK, sorry that makes sense. Thanks for the clarification*" after Mr Brooke had explained that Mr Laggner had not opposed the resolution on 22 June 2016 but had opposed a subsequent resolution on 24 June 2016 and despite Mr Laggner not subsequently challenging the accuracy of the minute, which he had later signed to confirm its accuracy. Mr Laggner had then suggested that he had a phone call with Mr Brooke to correct him about the minute's accuracy but this had never before been mentioned in his witness statements and, R2-R4 submitted, appeared to have made up in the moment.

(b). on 6 July 2016 Mr Laggner had raised concerns about the approval/ratification process around the 2016 Transaction but had been told by Dan Friedberg subsequently that the process was correct/legal and consequently admitted he was wrong, and sent Mr Fontg an email on 11 July 2016 confirming the withdrawal of his concerns.

(c). Mr Laggner had voted on the resolution at the 11 July 2016 board meeting to approve the modification of the RCA Loan documents to permit a side-by-side financing with preferred shareholders, which lead to the Series B2 financing. Mr Laggner admitted to having had some involvement in shaping the terms of the B2 financing round.

(d). Mr Laggner had attended the 15 July 2016 Board meeting but when the minute was put to him he seemed rather forgetful about whether he voted on the resolution to appoint Mr Steckel as chairman of the board. The minute recorded that this resolution had been unanimously passed, which, R2-R4 said, had led Mr Laggner to accept that he may have voted for it. R2-R4 said that when he was then questioned on why he would support Mr Steckel's appointment as chairman, his original response was to the effect that of all the board members who were derelict in their duties and run the Company out of money, Mr Steckel was not operating the Company (which appeared to be an acknowledgement that Mr Steckel had nothing at all to do with the alleged engineering of the cash crisis and, of all the members of the board, he was blameless in Mr Laggner's eyes at the time). But when Mr Laggner was reminded of his alleged belief that, by this time on 15 July 2016, the Steckel Faction had intentionally run the Company out of money and were the bad guys he had been unable to offer any explanation and he relied instead on his lapse in memory, suggesting that he actually did not recall the vote after all (prompting a clarifying question from the Court about whether he could recall voting against, which he could not). R2-R4 said that it was difficult to know which of these answers were inventions, or if both were.

(e). Mr Laggner had originally not recalled approving the 2016 Transaction documents at the board meeting on 15 July 2016, saying he did so after receiving advice from Mr Friedberg that the process taken was legal. He had at first suggested that he had not raised any objections about the substance of the 2016 Transaction during that meeting but had done so previously with Mr Friedberg. But, R2-R4 said, it was then put to Mr Laggner that if he was genuinely concerned about a takeover plot orchestrated by the Steckel Faction, his concerns would have been raised at the meeting and recorded in the minute, and that if the minute was indeed accurate this was fatal to the Petitioners' case. R2-R4 said that at that point Mr Laggner's evidence had quickly changed to: "*I voiced my concerns, and if it's not recorded that's their fault for - they are the ones in charge of the minutes. I did voice my frustration*."

(f). R2-R4 said that in subsequent exchanges, and consistent with Mr Laggner having fabricated evidence which he thought would best suit his case, Mr Laggner could not give a straight answer to questions as to whether or not the 15 July 2016 minutes were accurate or in which respects they may be inaccurate (having alleged, in terms, in this Third Affidavit at [34] that any ratification on his part recorded in the 15 July 2016 minute was false). He had offered an array of irreconcilable answers in the span of only a few minutes.

(g). R2-R4 submitted that these exchanges about the 15 July 2016 board meeting minutes confirmed beyond any doubt that Mr Laggner was prepared to do and say whatever he thought best served him in the moment, without regard to prior evidence.

(h). R2-R4 also said that Mr Laggner had denied that his stance on the 2016 Transaction and B2 financing had shifted to align with the rest of the board because Mr Laggner was looking to secure his 7% of the Company's shares pursuant to his agreement with Mr Minor by the Company approving its next financing. But, R2-R4 noted, once the B2 financing had been approved by the board Mr Laggner admitted that he and Mr Bechtel had wasted no time in seeking to have the 14% of the Company's shares transferred to them.

372. On the subject of Mr Laggner's fundraising efforts and the origins and terms of the Laggner/Bechtel term sheet proposal in response to the Steckel term sheet R2-R4 said:

(a). Mr Laggner was taken through the email from Mr Brooke dated 23 June 2016 recording the board's four minimum requirements required to be satisfied by any alternative to the Salinas Proposal but had said that he did not recall whether his proposal satisfied them.

(b). Mr Laggner had admitted that the only proposal put to the Board on 24 June 2016, and capable of being taken forward on that date, was the Steckel Proposal.

(c). Mr Laggner had rejected that proposal at the 24 June 2016 board meeting but this was at a time when he was negotiating a 7% interest in the shares of the Company from Mr Minor for $1 and thus had a financial interest in the outcome. He had failed to recuse himself, notwithstanding that he had sought advice from Mr Brooke on recusal.

(d). on 26 June 2016 Mr Laggner had entered into the SPTVA (around the same time as finalising the Laggner/Bechtel term sheet). He had admitted that the only conditions were to pay one dollar and for the Company to approve the next financing.

(e). the Laggner/Bechtel term sheet was agreed by Mr Minor's lawyers on an expedited basis, and around 27 June 2016 Mr Laggner was attempting to secure funding, including from Mr Ling and Mr Chen.

(f). R2-R4 said that Mr Laggner had given evidence that after forming the Laggner/Bechtel proposal, within "*a matter of days, raised, I don't know, $8 million, $9 million, $10 million from various investors.*" However, they said, when he had been pressed on whether these were firm commitments, he had said "*we had a variety of commitments from existing shareholders*" but had quickly conceded that it was "a *matter of weeks to get to that higher number, but initially we raised millions of dollars.*" R2-R4 submitted that no evidence had been produced of US$10 million (or, for that matter, US$8.5, US$8.2 or US$8 million) ever having been committed.

(g). R2-R4 submitted that Mr Laggner had admitted that the Laggner/Bechtel term sheet required aggregate funding of $8.5 million, otherwise the "*deal was off*" and that they did not have commitments of $8.5 million on 27 June 2016.

(h). R2-R4 said that Mr Laggner and Mr Bechtel were afforded further time to try to obtain funding commitments even after 27 June 2016, and continued trying to raise funds over subsequent days. A further board meeting was on hot standby awaiting confirmation of whether the competing proposal could address the four requirements. During this time, Mr Laggner/Mr Bechtel were discussing with Mr Steckel whether he

would invest under their proposal and agree to form an operating committee, and Mr Thieriot was also seeking to broker a deal around this framework. R2-R4 submitted that Mr Laggner had implausibly disagreed that Mr Thieriot's conduct in this regard was inconsistent with Mr Laggner's allegations that Mr Thieriot (and the Steckel faction) had closed their minds to assisting him and to all transactions other than the 2016 Transaction.

(i). R2-R4 said that Mr Laggner had maintained that he had committed cash of $8 million "*firmly in place*" from different investors on 29 June 2016 and also said he had "*minimum $8.2 hard today*." However, R2-R4 submitted, of these sums, the commitment from Mr Chen was stated in an email to be subject to two conditions which Mr Laggner admitted were never satisfied and that there was no documentary evidence for Mr Laggner's claim that one or more of the conditions had been withdrawn in a subsequent call between Mr Chen and Mr Bechtel.

(j). R2-R4 said that when all of the commitment letters in relation to the Laggner/Bechtel proposal were put to Mr Laggner showing commitments of just $1.1 million (minimum) and $3.75 million (maximum) on 27 June 2016, and showing $3.447 million (minimum) and $7.797 maximum on 29 June 2016, Mr Laggner had refused to admit that his sworn evidence and pleaded case about having firm commitments of $8 million or $8.2 million was untrue. He had then asserted that Mr Kearns and others had given verbal commitments but admitted he did not have signed term sheets showing $8 million. R2-R4 said that this was another example of Mr Laggner relying on unevidenced phone calls when shown that the documentary record was inconsistent with his evidence, rather than admitting what was obvious namely that the Laggner/Bechtel proposal never became effective by its own terms, was never capable of being accepted by the board and that the board was justified in rejecting it.

(k). R2-R4 said that in relation to the funding committed under the competing proposals vs. the share consideration (i.e. up to $15 million plus the Warrant exercise price of c.$640,000 for 50% of the shares under the 2016 Transaction, or $8.5 million for 33%

under the Laggner/Bechtel proposal), Mr Laggner did not dispute that the Holdings Transaction was actually cheaper.

The 2016 Transaction

373. R2-R4 said that having alleged since the First Petition that Mr Steckel conspired to engineer his takeover of the Company for the benefit of Mr Salinas, when it came to it at trial the Petitioners lacked the conviction and an evidential basis to even put their core case to him and R2-R4's and the Company's other witnesses. These were the central planks of the Petitioners' claims yet – and fatally – no contemporaneous documents were even put to Mr Steckel about these matters nor was it even suggested to the witnesses that the Petitioners' pleaded case was correct.

374. R2-R4 submitted that following Mr Laggner's oral evidence and the consideration of the comprehensive documentary record put to him about the Company's financial position in 2015/2016, the origins of the 2016 Transaction, its terms compared to the White Knight (Laggner/Bechtel) proposal, and the defects in the White Knight (Laggner/Bechtel) proposal itself it was clear that:

(a). there was no Steckel Faction and this was a pure fabrication. It was not even put to the Respondents' witnesses who were in office in 2016 that they acted on the instructions of Mr Steckel or for his benefit.

(b). the board had entered into the 2016 Transaction acting in good faith and having regard to the best interests of the Company at the time, in circumstances where no viable alternative was available. Far from there being any faction, Mr Milby's evidence was that while the 2016 Transaction terms were expensive and the board would have preferred an alternative the reality was that this was the only avenue for funding and the alternative was likely bankruptcy.

(c). while expensive the 2016 Transaction was the only viable proposal available to the board and in the event was successful in saving the Company.

(d). the board gave Mr Laggner and Mr Bechtel every opportunity to present a viable alternative offer, repeatedly extending the deadline for doing so, but there was, in truth, no viable alternative capable of being accepted or taken forward.

(e). there was no breach of fiduciary duty or want of probity in relation to the 2016 Transaction. The board in 2016 had no alternative option, and, in any event, clearly acted in what they reasonably and in good faith concluded to be (and was) in the best interests of the Company.

The issue of the Warrant and of shares pursuant to the Warrant involved a breach of the Articles and the RCAs

375. R2-R4 argued that shareholder authorisation was not required for the Company to enter into the RCA or the Warrant.

376. R2-R4 rejected the Petitioners' claim that granting the Warrant or issuing ordinary shares pursuant to it required under the Articles general shareholder approval or the approval of preferred shareholders (class consents).

377. The 2016 Transaction, specifically the Warrant, was only concerned with the issuance of ordinary shares and did not involve the issuance of any shares with a preference over or being pari passu with any series of Preferred Shares with respect to dividends, liquidation or redemption. They noted that article 3.2(v)(6) provided that:

> *"(v) …neither the Company nor the Board of Directors shall without first obtaining the approval or consent of both the majority of the series A Preferred Shares and the majority of the series B Preferred Shares then outstanding:*
>
> …..

> (6) *authorise or issue, or obligate itself to issue, any shares including any other right or security convertible into or exercisable for any such shares having a preference over, or being pari passu with any series of Preferred Shares with respect to dividends, liquidation or redemption;"*

378. As regards the Articles, the Company was not required to increase its share capital or authorise any share issuance, as the ordinary shares were already available to be issued.

379. As regards the IRAs, the rights of first offer under the IRAs were not engaged given that the 2016 Transaction was a loan/debt financing transaction and not an equity raising transaction. Nor, properly construed, was the 2016 Transaction a "*sale*" of shares falling within clause 2.5 of the IRA. Parties to the IRA were given the opportunity to participate in the Series B2 Preferred Financing Round and in any event, any breach of the IRAs would not justify an order winding up the Company.

380. R2-R4 noted that the IRAs gave investors various rights including the right of first offer given to investors under clause 2.5 of each IRA. But, R2-R4 pointed out, the right of first offer in clause 2.5 was not applicable to all share issuances, and clause 2.5(d) listed a number of specific transactions which would not trigger the right of first offer in the IRA. The two relevant provisions were as follows:

> *"(viii) the issuance of shares, warrants or other securities or rights to persons or entities with which the Company has business relationships, provided such issuances are primarily for other than equity financing purposes and have been approved by the Board;*
>
> *(ix) the issuance of shares, warrants, or other securities or rights pursuant to any equipment loan or leasing arrangement or debt financing from a bank or similar institution, provided such issuances are primarily for other than equity financing purposes and have been approved by the Board."*

381. The 2016 Transaction was a loan/debt financing transaction from a similar institution to a bank (see [43.8(a)] of the Points of Defence) and not an equity raising transaction and therefore the exception in clause 2.5d(ix) (underlined above) applied. Uphold Holdings had made US$10 million in debt finance available to the Company as part of the transaction

under which it secured rights to shares and no equivalent obligation was imposed on the other shareholders. The 2016 Transaction was also not a "*sale*" of shares falling within clause 2.5 (clause 2.5 stated that the right of first offer applied to "*future <u>sales</u> by the Company of its Shares (as hereinafter defined) ...... Each time the Company proposes to offer any shares of, or securities convertible into or exchangeable or exercisable for any of it share capital ("Shares") ...*"). The 2016 Transaction involved the acquisition of ordinary shares already issued pursuant to the Company's Articles and not the issuance or sale of any Preference Shares.

382. In addition, clause 3.1 of each IRA stated that:

> *"Except as otherwise provided herein, the terms and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties (including transferees of any shares of Securities). Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights, remedies, obligations or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement."*

383. R2-R4 said that when considering the IRAs, it was important to keep in mind who was and who was not a party to them. Of the Petitioners, only Bearing Ventures LLC, and Mr Simmons were parties to the Series B IRA at the time of the 2016 Transaction in mid-2016 (they were also parties to the Series A IRA). West End Capital II LLC, Peter Kearns, and Michael Zaitsev only subscribed for Series B1, B2 or B3 Shares in Q1 2016 or later. Mr Laggner was not a party to an IRA at the time of the 2016 Transaction. Upon becoming the registered shareholder of approximately 4.8 million ordinary shares in May 2019 (as transferee from or the successor of Mr Minor) Mr Laggner had acquired rights under the IRAs in relation to such shares in accordance with clause 3.1 of the IRA but those rights did not extend to a right to enforce any right under the IRA prior to May 2019 given he was neither a party to any IRA nor held legal title to the ordinary shares prior to that date. In any event, if and to the extent that the Petitioners were shareholders who were also parties to an IRA at the relevant time (so, excluding Mr Laggner), they were offered the opportunity to avoid dilution through the Series B2 Preferred Financing Round. Only Mr Kearns exercised

his right to participate in this round and did so at a cost of just over $3,000, avoiding any dilution.

384. R2-R4 rejected the Petitioners' complaint that the offer of Series B2 Preferred Shares did not comply with the requirements and terms of the IRAs because the Series B2 Preferred Shares were not offered on the same terms of the shares issued under the 2016 Transaction, on the same basis. There was no such obligation to make the offer on the same terms since the right of offer under clause 2.5 had not been engaged.

385. As to the complaint about the timing of the Series B2 Preferred Share offering, R2-R4 accepted that this was undertaken after the 2016 Transaction became binding on the Company, but it was done alongside that transaction and everything was done at pace and in the interests of the Company given its pressing funding needs at the time. The RCA expressly provided (at clause 3.3) for shareholder participation, so that the 2016 Transaction contemplated that other shareholders would be able to subscribe for shares to avoid being diluted and the B2 Preferred Financing Round was closely related to the 2016 Transaction.

386. As regards the need to obtain shareholder approval for the issue of the Series B2 Preferred Shares, R2-R4 accepted that article 17.1(a) required an increase in share capital to be authorised by an ordinary resolution but argued that this requirement had been satisfied by the passing of the resolutions at the February 2017 EGM. They noted the board and the Company's legal advisers had accepted the need for such a shareholder resolution. When Mr Laggner had raised the issue on 21 September 2016 of the need for shareholder approval of the issue of shares pursuant to the 2016 Transaction, Mr Brooke in his email reply dated 23 September 2016 had noted that the Company planned to seek shareholder approval to the issuance of the Series B2 Shares. Mr Brooke had said this: "*Under Cayman law, there is no such requirement of general shareholder approval for transactions that result in material changes in ownership. The Steckel loan facility with warrant issuance does not require general shareholder approval under Cayman law. We will have a shareholder meeting and vote to approve amending [the Company's] Memorandum of Association to authorize issuance of B2 shares once that offering is complete….*"

387. R2-R4 further argued that even if the requirement to hold a general meeting to approve the issuance of the Series B2 shares had not been satisfied by the resolutions passed at the February 2017 EGM (which they denied was the case) it was important to take into account the fact that the Petitioners only held a small minority of shares and realistically could not have vetoed the share issuance even if a meeting and vote had been called. Furthermore, the Petitioners should not be permitted to speculate as to how the other shareholders would have voted in a general meeting. The fact that no other shareholders raised any concerns at the time or subsequently suggests that others would not have voted against the B2 Share issuance, particularly as the Company was desperate to raise further funds and a new share offering was the only practical means by which that could occur. Mr Kearns had subscribed for Series B2 Shares and so could hardly be heard to complain in this regard. It cannot seriously be suggested that, if put to a vote, he would have voted against a share issuance in which he participated. Mr Laggner was not personally a member of the Company at the time and had no right to participate in a general meeting of shareholders.

The February 2017 EGM

388. R2-R4 submit that the evidence clearly shows that (a) the EGM was validly convened in accordance with the Articles and the notice requirements were complied with; (b) shareholders were notified in advance of the intention to amend the Articles and that the purpose for the amendment was to permit the issuance of new shares; (c) there were no irregularities concerning the votes; (d) the resolutions passed at the February 2017 EGM were valid; (e) all shares issued by the Company were validly issued and authorised by the Company; (f) the share issues by the Company were *intra vires* and the directors' power to issue shares was exercised for a proper purpose, i.e. equity fundraising; and (g) no Petitioner raised any contemporaneous complaint.

389. R2-R4 argue that the evidence shows that Ms Caroline Turner, who returned a proxy form approving the resolutions, was an investor of the Company entitled to vote at the February 2017 EGM as a holder of Series B Shares. Her name appeared on a Series B investor list

dated 18 February 2017 as one of the individuals who had invested in the Series B round through Crowdcube.

390. The evidence also indicated that notice of the February 2017 EGM had been properly given to all those entitled to receive notice (only the holders of ordinary shares, Series A shares and Series B shares but not shareholders who only held Series B1, B2 or B3 shares, as they were not permitted to vote on those resolutions). R2-R4 noted that Mr Laggner had said that Mr Simmons and Mr Zaitsev had told him that they did not receive notification of the February 2017 EGM and Mr Zaitsev had said as much (albeit very briefly) in his witness statement (at [17]). However, Mr Simmons had not provided any evidence on this issue and it was noteworthy that his name and email address appeared on the same investor list dated 18 February 2017. But on 10 April 2025, several months after swearing and serving his verifying affidavit for discovery on 3 January 2025, Mr Simmons had belatedly given limited discovery of 23 emails exchanged between himself and Mr Laggner, one of which included the email notification sent by the Company to shareholders on 17 February 2017 in relation to the February 2017 EGM. Accordingly, contrary to what he purportedly told Mr Laggner, Mr Simmons did, in fact, receive notice of the February 2017 EGM. Mr Zaitsev had in contrast only acquired Series B1 Preferred Shares consequent upon the February 2017 EGM whereby the issuance of those shares was approved by the Company and therefore was not an existing shareholder entitled to receive notice of or attend the February 2017 EGM.

391. It was also R2-R4's position that the Petitioners were wrong to claim that Mr Steckel and Mr Chen should not have been entitled to vote their shares at the February 2017 EGM. As I have noted, R2-R4 argued that the directors had properly issued ordinary shares to Mr Steckel and Mr Chen pursuant to the Warrant so that these could be voted with the Series A and Series B shares held by them at the February 2017 EGM.

TBOL

392. R2-R4 submitted that the unpleaded allegation that Mr Watson had fabricated or exaggerated the PRA/BOE's concerns about who would control (what would become) TBOL was not an argument open to the Petitioners. But, leaving that important pleading point to one side, this

allegation had been resoundingly undermined by a proper review of the contemporaneous documents, as opposed to a superficial and misleading analysis of documents taken out of context by the Petitioners. Mr Milby's written and oral evidence was unequivocal as to what the PRA/BOE were saying about the issue of controllers, and of the concerns raised about the Company being in the crypto space and an offshore Company. His evidence was also supported by Mr Thieriot. Further and importantly, such arguments did not impugn the current board.

393. R2-R4 submitted that the Court should be particularly slow to make findings against Mr Watson on the basis of the new, unpleaded case that the Petitioners have sought to advance at trial to the effect that he overstated or invented concerns held by the regulators (it was noteworthy that the Petitioners' pleaded case (at [34c] of the Petition) was to the effect that Mr Laggner had learned from Mr Westerfield that "*the Bank of England might be unable to issue a bank license to a cryptocurrency company*" (i.e. that the position within the Company was entirely consistent with what the Respondents say it was as regards the concerns that had been expressed and there being no pleaded suggestion that this was not the case).

394. R2-R4 argued that the allegation that the Company could and should have kept 100% or 95% of TBOL by, for example, only taking non-voting shares in MSBB or TBOL ignored reality and could not be seriously entertained for various reasons:

(a). Mr Steckel, who was accused of acting in his own self-interest, was more financially interested in the Company retaining as much of any banking opportunity as he possibly could, so the suggestion that he would intentionally act against his own interest by taking steps to give up 90.2% of the company to Mr Watson was not credible and was also not supported by the documentary evidence. Mr Steckel's consistent evidence under cross-examination was that he had tried to explore different options but "*couldn't figure it out*."

(b). the documentary record showed that Mr Steckel and the other board members genuinely believed, based on regulatory and legal advice received and upon the

reporting from board members (e.g. the 6/7 March 2017 emails from Mr Watson and Mr Dennings following the meeting on 6 March 2017) that the Company could not retain more than a 10% interest in TBOL (or, more accurately, that if it did retain more than 10% then the application was highly unlikely to be successful because the ultimate controllers were not fit and proper people). By contrast, the Petitioners' reliance on selective passages from a handful of documents was unconvincing and ignored reality. It also relied on selectively misreading passages in those documents (such as what Mr Adams is said to have reported later about the position once the structure involving the Company having only a 10% holding had been adopted - observations which could not be read across or back to when the Company was seeking to pursue the licence on the basis of a 100% ownership interest) and overlooking the clear evidence that the regulators were unlikely to spell out in clear language in writing the sort of concerns that they were expressing orally.

(c). Mr Steckel's unchallenged evidence was that TBOL had raised $120 million by the time it obtained its bank clearing licence in November 2021 and was required to raise more in 2023 ($40 million) and 2024 (when all shareholder interests were materially diluted). R2-R4 said that it would have been impossible for the Company (to raise and even contemplate raising) such sums (the Company had only raised in the order of approximately US$60 million since its inception) or for its individual shareholders to have done so (in the case of a spin out solution). It was also noteworthy R2-R4 said that even after having raised US$160 million by 2023, TBOL still faced serious financial concerns in 2024 such that it needed further rescue financing which had diluted the Company's stake to basically nothing.

(d). R2-R4 submitted that Mr Milby (who was accepted to be a real expert on these matters in view of his extensive experience in the banking sector) had provided insightful evidence as to why the Company would have faced insurmountable issues taking the project forward in the manner envisaged by the Petitioners. He spoke in detail about the banking application process, the steps required to be taken before the project could become a "*fully loaded bank*", the 18-month period of carrying huge costs with only

de minimis revenues while the licence was issued with restrictions (which period only began in November 2021), the difficulties of obtaining customers and the 12-month business plan which provided for one corporate customer. The Company simply did not have, and could not raise, the necessary resources. Even if it had done so, R2-R4 argued, TBOLs' recent history suggested that the Company would have suffered heavy losses.

(e). R2-R4 submitted that Mr Hilton had also offered a valuable and considered view, based on his 30 years' experience as a bank regulator and helping institutions with regulatory matters:

> *"...the idea that Uphold was going to own more than 10% of a UK clearing bank, honestly, I hate to be extreme, it's ridiculous. A good adviser would have told Uphold: please just stop. We were a Cayman crypto company. We weren't even eligible to the licensed in the UK. We were on the verge of insolvency several times. Our major shareholder was insolvent. Our shareholders were suing each other. These just aren't the kind of entities that get banks. I have advised clients very much like this, and you say it's not going to happen. So it is true. I believe that Uphold had 100% of this opportunity, and it ended up with Anthony. But I also believe that Uphold couldn't do anything with this opportunity. It was never going to be the 100% or 90% or 95% owner of a UK clearing bank.*"

(f). R2-R4 submitted that spinning out the banking opportunity to the Company's shareholders was also not viable for the reasons given by Mr Anderson, as reported by Mr Hilton during his cross-examination. Having dozens of minority owners with no ability to capitalise the Company, let alone TBOL, was unattractive (to put it mildly). Even if that were possible, the Petitioners' tiny minority stake would have been diluted to the point of irrelevance in light of the huge amount of capital required to be raised over recent years. It is also difficult to see how this would have addressed the regulators' concerns relating to Mr Minor.

(g). R2-R4 said that it was inaccurate to characterise the position as being one where the Company had the opportunity to develop a bank or own an entity with a clearing bank licence or even an entity with the chance of applying for and successfully obtaining a

licence. The Company had no such opportunity (or no realistic such opportunity). There was thus no "*opportunity*" to divert or give to Mr Watson. Rather, the board had sought to maximise the Company's return on its outlay by supporting Mr Watson's efforts to apply for a banking licence and with a view to securing the maximum possibly equity stake in the entity used by Mr Watson in that endeavour. As the Respondents' witnesses had explained there was nothing proprietary or unique in the idea of applying for a licence (and at least one other entity had successfully done so). Accordingly, it was difficult to see what the Company could have done if Mr Watson had made good on this threat simply to go it alone.

395. R2-R4 submitted that the Petitioners had also failed to evidence, or properly put to the Respondents' witnesses, what they described as the baseless allegations that (a) "*Mr Steckel and Mr Watson now between them have a controlling interest*" in TBOL (Points of Claim at [63]) or (b) the Company (at the instigation of Mr Steckel) had altered the licence application and that Mr Steckel had carved out "*significant equity in TBOL for himself (together with Mr Salinas and Mr Watson)*" (the Petition at [34(c)]). They argued that the Petitioners, with access to the public registry of TBOL's shareholders, must have known that this allegation was false when it was pleaded in the Points of Claim on 14 June 2024. Save for the 25,000 TBOL shares which ASP Capital acquired for $305,000 from Mr Watson following Mr Watson defaulting on a private loan (years after the conduct complained of in 2017), Mr Steckel's unequivocal evidence was that neither he nor Mr Salinas has ever held a single share in TBOL.

396. R2-R4 said that the best that the Petitioners could come up with at trial to support their claims was some emails (e.g. on 11 September 2017) discussing the Company's management sharing 8% of TBOL shares, with Mr Steckel receiving a 3% interest, in light of management of the Company "*bringing the project to this point and for ongoing advice, guidance in particular around fund raising.*" R2-R4 submitted that as was evident from the email itself, that discussion was in the context of a fundraising and ownership structure of TBOL through Access Digital Holdings, which ultimately did not proceed. The email also envisaged the Company having TBOL board representation, which also did not transpire. Mr Steckel's

clear and consistent oral evidence was that the proposal discussed with Mr Watson on 10-11 September 2017 did not materialise or progress and that upon a dispute arising with Mr Watson in July 2018, his duty was to get as much of TBOL for the Company as possible. He also said that he did not receive any shares in TBOL because by July 2018 it was evident that he was not going to be doing any work on or for TBOL which is a reference to the ongoing role and future fundraising upon which the 10-11 September discussion was premised. Mr Steckel's evidence was supported by an email sent on 22 August 2018 from Mr Thieriot to Mr Watson with the subject line "Revised Deal" which records "*Great seeing you today. Here's as brief-as-possible summary of where I think we go to: ... No % for individuals, Uphold's 9.8% preserved through $5m,/$42mm val seed round…*". Mr Watson had replied on the same day saying "*I think that works.*" R2-R4 submitted that the reference to no percentage for individuals in the context of a negotiation between the Company and TBOL could not have been clearer.

397. In any event, R2-R4 submitted, that allegation did not support a finding of any lack of probity or serious misconduct. If a viable solution did exist which would have allowed the Company to keep larger stake in TBOL but this was not properly considered or executed, that might suggest incompetence or negligence on the part of the board in 2017, but the bar for a justifiable loss of trust and confidence was a want of probity or serious misconduct/mismanagement by the current board.

The Company's submissions

Overview

398. The Company noted that it was actively participating in defending the Petition by the Litigation Committee because a buy-out order was sought against the Company and the 800-plus independent shareholders needed a voice and to be protected (they would be economically affected by a buy-out order against the Company). In addition, the Petitioners had made very serious allegations against the board and the Company was liable to indemnify R2-R4 under the very wide indemnity provisions in the Company's articles. The

Litigation Committee after having taken advice had decided that the independent position of the Company and these shareholders needed to be represented at the trial. After the strike-out hearing, Maples had written to the Petitioners' Cayman attorneys TTA asking them if they wanted to delete the relief against the Company for a buy-out order but no reply had been received.

399. In her oral closing submissions, Ms Stanley said that the Company felt that it's active participation had been vindicated because very large parts of the Petitioners' claims had been dropped (her expression was "*gone in the bin*"): the complaints relating to AirTM, Ledger, the 2016 Transaction, Universal Protocol, Mr Steckel's costs indemnity, the removal of Mr Laggner from the board and the production of false minutes had all been abandoned.

400. Ms Stanley submitted that it was clear that the Petitioners had failed to make out their pleaded case and that the Petition therefore fell to be dismissed. She reviewed the grounds relied on in the Petition as set out at [35] (which I have quoted above) and submitted that:

(a). the ground relied on at [35(a)] (that the 2016 Transaction was a breach of the IRAs and the Articles) had been abandoned by the Petitioners as the Petitioners no longer challenged the validity of the 2016 Transaction.

(b). the ground relied on at [35(b)] (that in causing the Company to enter into the 2016 Transaction, Mr Steckel (in combination with the Steckel Faction) had breached his fiduciary duties and acted with a lack of probity) had also been abandoned for the same reason and also because the Petitioners no longer asserted that there had been a Steckel Faction.

(c). the ground relied on at [35(c)] (that since the 2016 Transaction, Mr Steckel in combination with the Steckel Faction had caused the Company to operate without regard to the principles of proper corporate governance and has continued to cause the Company to prefer his interests and those of Uphold Holdings, ASP Capital Sub I Inc,

the Steckel Faction and Mr Salinas) must also be treated as abandoned in view of the Petitioners' decision not to assert that there had been a Steckel Faction.

(d). the ground relied on at [35(d)] (that the 2016 Transaction and Mr Steckel's other conduct pleaded in this Re-Amended Petition has also benefitted Mr Chen to the detriment and prejudice of the Petitioners) was still live insofar as it was based on the improper dilution (arising from the payment of PIK interest) ground asserted by the Petitioners.

(e). in opening the Petitioners' case Mr Valentin had asserted and relied on a lack of probity (which amounted to oppression) (Day 1, page 20). However, Mr Valentin never put to the Company's witnesses that they had acted with a lack of probity and had, quite properly in the circumstances, formally abandoned an allegation of lack of probity against the current board.

401. As regards the Petitioners' new case as relied on in their closing submissions the Company made the following points:

(a). the Company noted that in the Petitioners' Written Closing Submissions their new case was formulated as follows: "*the Petitioners were treated unfairly by Mr. Steckel and the Company, and/or (b) their treatment lacked the degree of probity that they were entitled to expect*." The Company submitted that this was a new case well beyond what was covered by the Petitioners' pleaded case and that the Petitioners should not be allowed to rely on it.

(b). the Petitioners new case based on the Company's asserted failure to inform shareholders of the decisions that caused the dilution of their shareholdings (see [12(ii)] of the Petitioners' Written Closing Submissions) was wrong on the evidence (for example as regards the valuation used to determine the PIK interest payable under the RCA Loan there had been a shareholder Q&A call on 29 September 2017 at which the issue had been discussed). But importantly the point had not been pleaded and the

failure to do so had prejudiced the Company's ability to adduce relevant evidence. Ms Stanley in her oral closing submissions said that had this issue been properly and precisely pleaded she would have cross-examined the Petitioners' witnesses on their knowledge of the PIK interest terms and of the terms applicable to the Series C Shares at the material times and would have had the opportunity to consider whether to call other witnesses to address this issue. Insofar as the Petitioners now asserted or implied that the Company's offer of the Series C Shares in October 2023 was evidence of deliberate wrongdoing or a lack of probity because it represented an attempt to cover up previous corporate governance failures and as Mr Valentin had said in his oral closing submissions to avoid airing its dirty linen at a time when the there was a challenge to the board's conduct in the current Petition (Day 9, page 9), it was impermissible for them to do so without having clearly pleaded the point. The failure to do so had prevented the Company from having the opportunity to ask relevant questions during cross-examination or deal with the issue directly in its evidence. Ms Stanley said that would have called other witnesses such as the Company's CFO, its general counsel, Mr Anderson, and even Mr Sweetman of Maples to explain the circumstances leading to the October 2023 letter. Had the issue regarding the justification for adopting the US$48 million valuation been clearly pleaded it was likely that the Company would have sought permission to adduce expert evidence on the issue. Further, the Petitioners had even failed to put the point squarely to Mr Hilton during his cross-examination.

(d). in their Written Closing Submissions the Petitioners now complained that "*the Company's longstanding and continuing failure to rectify, by any means, the dilution issue (including in particular the PIK interest issue) has caused the Petitioners justifiably to lose confidence in the conduct and management of the Company's affairs.*" But once again, this issue had not been pleaded at all, let alone with particularity. Had this been done, as was necessary, the Company would have considered calling evidence from other members of the Litigation Committee, from Ms Gray from Kleinbard, from Ms Moran from Maples and from Mr Anderson. It was

also wholly unclear what the Petitioners claimed the Litigation Committee could or should have done.

(e). the Company noted that the Petitioners had claimed at [82] of their Written Closing Submissions, without identifying the transcript reference, that Mr Hilton had "*admitted that no approach had been made to even discuss the potential claims in respect of which the Company had received advice with Mr. Steckel, something that could have easily been done as a means of remedying the situation or seeking to negotiate some form of settlement*." But this was without foundation. There was nothing in Mr Hilton's cross-examination which amounted to such an admission. The Company said that had Mr Hilton been asked about discussions with Mr Steckel he would have said that there had been without prejudice discussions the details of which he was unable to disclose without a waiver. Had the point been pleaded, the Company could have considered whether the privilege should be waived and sought the appropriate waivers.

(f). the Petitioners now also unjustifiably asserted that "*Mr Hilton was persuaded not to pursue any form of claim against Mr Steckel*" (see [81] of the Petitioners' Written Closing Submissions). It was not put to Mr Hilton that he had been persuaded by anyone. His evidence was clear that he and other members of the Litigation Committee had considered the legal advice, considered that there was no good claim, and that bringing proceedings would be a bad decision, because the Company would lose.

(g). it was also important to bear in mind that in relation to the claims of improper dilutions in breach of any rights under the Articles or the IRAs, the relevant Petitioners could have brought their own direct claim in connection with an alleged wrongful share allotment or issuance (as regards the claim under the Articles, see *Tianrui* [2024] 3 WLR 986). Ms Stanley noted in her oral closing submissions that the question of dilution had becoming increasingly the focus of the Petitioners' case as the trial had gone on and given that the obvious way in which to resolve a complaint of a wrongful share issuance is by way of a direct claim, it was clear that the Petitioners had an

alternative remedy that was the obvious way to get the relief that reasonable shareholders would want.

(h). the Company noted that the Petitioners' claim in relation to TBOL was now set out at [246] and [247] of their Written Closing Submissions as follows:

> *"246. Notwithstanding the evidence that gave rise (it is submitted) to obvious concerns that Mr. Watson and Mr. Steckel had breached their fiduciary duties as directors, the Litigation Committee decided (a) to release, as part of the settlement agreement, any other claims against Mr. Watson, and (b) not to bring claims against Mr. Steckel. None of the reasons given at Hilton 1, paras 167-168 [B1/33/54-55] justified the Company doing nothing to pursue a claim against Mr. Steckel.*
>
> *247. The Company again seems to have decided that it did not want to pursue a claim against the dominant figure on the Board, who would claim his defence costs under the wide-ranging indemnity negotiated by Mr. Fontg in June 2016."*

(i). Ms Stanley submitted that the Petitioners' challenge could not properly be characterised as a claim of irrationality. Irrationality involved a decision that no reasonably competent board could have made. Instead, the Petitioners appeared to assert a failure in the decision-making process, namely a failure to take into account relevant considerations. But if that was right, and the point was not pleaded, then the obvious remedy would be for the Petitioners to have brought a derivative action against Mr Steckel, because the board's decision not to sue would be vitiated or capable of being vitiated. The Company submitted that in any event the evidence showed that the Litigation Committee had not failed to take into account all relevant material.

(j). the Company also noted that if the Court found, as it submitted was the case, that there had been no agreement between Mr Steckel, Mr Watson and Mr Thieriot, the Petitioner's case failed because it would not have been appropriate to sue Mr Steckel in the absence of such an agreement.

(k). the allegation at [247] that a reason why the Litigation Committee did not bring claims against Mr Steckel was that he was the dominant figure on the board was never put to Mr Hilton and was inconsistent with Mr Hilton's evidence. Further, any criticism of Mr Steckel or the board based on the exercise by Mr Steckel of his legal rights to an indemnity was wholly unjustifiable.

The applicable law

402. The Company's submissions on the applicable law were clearly set out in its written opening submissions and in its written closing submissions (in section D, [49]-[64]) and can be summarised by the following extracts (my underlining):

> *"62. In his oral opening submissions, Mr Valentin helpfully said that the following (which are taken from paras. 56-57 of the Company's Opening Skeleton {F/2/16}) are also common ground {Day1/20:1-3}:*
>
> *(1) <u>The fact that directors are unwise, inefficient and careless in the performance of their duties is not enough</u>. That conduct "may well inspire lack of confidence in them but it does not show lack of probity and does not justify winding up.": French, Applications to Wind Up Companies (4th Ed) ("**French**") at paragraph 8.306 {F/60/16}. See also Re Diamond Fuel (No. 1) (1879 13 Ch D 400 at p. 408 (Baggallay LJ): "mere misconduct or mismanagement on the part of the directors, even though it might be such as to justify a suit against them in respect of such misconduct or mismanagement, is not of itself sufficient to justify a winding-up order." {F/18/9}; Tianrui CICA at [22] {F/53/15-16}. See also Re Saul D Harrison & Sons plc [1995] 1 BCLC 14, especially at p. 31f-h {F/46/18}.*
>
> *(2) <u>In order to reach the required threshold, the misconduct complained of must be serious and persistent and likely to recur in the future</u>: McPherson at p. 270 {F/62/4}; Menard v Horwood & Co (1922) 31 CLR 20 {F/39}; Re Anglo-Greek Steam Co (1866) LR 2 Eq 1 {F/6}; Shillingford v The Penn Syndicate (1958) 1 WIR 58 {F/50}.*
>
> *(3) <u>The misconduct in question must result in a justified, i.e. objectively evaluated, loss of confidence in the conduct and management of the company's affairs. A loss of confidence arising from dissatisfaction at being outvoted on the business affairs of the company is insufficient</u>: Loch v John Blackwood Ltd [1924] AC 783 at p. 788 {F/38/6}. A lack of probity is required: Fortune Nest Corporation (Unreported, Grand Court (PCJ), 5 February 2013) at [15] {F/24/27}.*

(4) *The relevant date for determining whether there is a justifiable lack of confidence is the date of the hearing: Re Fildes Bros Ltd [1970] 1 WLR 592 {F/22}; French at paragraph 8.139 {F/60/3}. See also Fortune Nest at p. 24 {F/24/24}.*

63 *As to oppression, Mr Valentin also helpfully clarified that the Company's summary of the applicable principles for oppression are also common ground [Day1/22/8-17]. Thus, it is common ground the mere fact that those managing the company possess a majority of the voting power and make decisions with which the petitioner disagrees is not enough (and the position is a fortiori where, as in this case, those managing the company are not majority shareholders). In Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227 Lord Wilberforce explained at p 229 {F/35/3} that there is both an objective and subjective element to this:*

(1) *There has to be a "visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made."*

(2) *The alleged oppressor must be aware of the minority's interest and must consciously decide to override it or brush it aside; there must be something more than merely a failure to take account of the minority's interests.*

64 *As to discretion:*

(1) *Misconduct by directors is not enough to justify a winding up if it could be remedied by a claim brought against the directors: French at paragraph 8.310 {F/60/16}.*

(2) *In exercising its discretion "the court will have in mind the drastic character of this remedy, if sought to be applied to a company which is a going concern; it will take into account (a statement which is not exhaustive) the gravity of the case made out…; the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; the interests of other members of the company not involved in the proceedings.": Re Kong Thai Sawmill at p. 233 per Lord Wilberforce {F/35/7}. See also French at paragraph 8.144 {F/60/4-5} for the list of factors the Court should take into account.*

(3) *Laches and acquiescence may operate as a bar: Ming Siu Hung v JF Ming Inc [2021] BCC 438 (PC) at [18] {F/40/7}; Re Grandactual Ltd [2006] BCC 73 {F/27}; Zedra Trust Co at [161]-[162] (Snowden LJ) {F/59/46-47}; Re Gold Co (1879) 11 Ch D 701 {F/26}.*

(4) *A winding up petition ought not to succeed if there exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue.*

Winding up should be a remedy of last resort. See paragraph 57 above, and further In the matter of Seahawk China Dynamic (Unreported, Grand Court (DDJ), 9 August 2022) {F/48}.

(5) The winding up of a solvent company is an extreme step and only appropriate in circumstances where the complaints of the petitioner can only be redressed by a winding up order: Asia Pacific Joint Mining v Allways Resources Holdings Pty Ltd [2018] QCA 48 at [46] {F/9/15} and [58] {F/9/18}. See also Cumberland Holdings Ltd v Washington H Soul Pattinson and Co Ltd (1977) 13 ALR 561 at pp. 566-7 {F/16/6-7}; Re Walter L Jacob and Co Ltd [1989] BCLC 345 at p. 354 {F/55/10}; Bernhardt v Beau Rivage Pty Ltd (1989) 15 ACLR 160 at p. 164 {F/13/5}; Pellarini v Bircher [2020] NSWSC 711 at [78] {F/41/30-31} and [124] {F/41/47-48}."

The need for shareholder approval to issue the Warrant and to allot ordinary shares pursuant to it

403. The Company also referred to article 3.2(a)(v)(6) and further pointed out that its Articles as at the date of the Warrant provided in Article 3.1 that the Directors "*may allot, issue, grant options over or otherwise dispose of Shares… to such persons, at such times and on such other terms as they think proper…"* Since the Warrant only envisaged the issuance of ordinary shares there was nothing in the Articles which prevented the board from exercising its powers to enter into the Warrant, still less did it require the approval of preferred shareholders to do so.

404. The Company said that it was common ground that the board had not sought such approval before entering into the 2016 Transaction. But under the Articles the board had the power to agree to issue and allot ordinary shares. The Company had throughout the period involved its own external counsel (Mr Friedberg) and its general counsel, Mr Brooke (whose integrity at that time the board had no reason to question) in the process.

405. The Company submitted that the high point of the Petitioners' pleaded case was that the Company had failed to give notice to Bearing Ventures in accordance with the IRAs. The Company submitted that this could not amount to a lack of probity and it had not been put or suggested to either Mr Thieriot or Mr Milby in cross-examination that this was a deliberate act/omission on their part. In any event and standing back, the Company submitted, Mr

Laggner had been fully involved in the discussions about the 2016 Transaction and knew perfectly well what was going on. He had had the opportunity to stand on Bearing Ventures' legal rights (for example by applying for an injunction or issuing proceedings for damages for breach of contract). However, he had not done so, in June 2016 or at any time, notwithstanding his full knowledge that formal notice had not been given in accordance with the terms of the IRA. The Company submitted that it was not open to Mr Laggner, wearing his Bearing Ventures hat, to complain about the breach of the IRA now, given that he not only stood by whilst it happened, but then positively relied on the board's subsequent decision of 11 July 2016 to approve the next fundraising (the Series B2 round) when he came to enforce the SPTVA.

The October 2023 Letter and the failure to give effect to the right of first offer in relation to the issue of the Series C shares

406. The Company said that of the Petitioners only Bearing Ventures was able to claim on the basis of an alleged failure to comply with the IRA as regards the issuance of the Series C shares and it was telling that until the First Petition it had never complained of a breach of the relevant IRAs. There was no evidence that Bearing Ventures wanted to invest in the Series C funding round, was prevented from doing so, and/or suffered any detriment or prejudice as result.

407. The only Petitioners who could claim on the basis of an alleged failure to comply with the IRA as regards the issuance of the Series C shares were those remaining Petitioners who were signatories to the IRA, namely Bearing Ventures (Mr Simmons having compromised his claims). Bearing Ventures had never complained about the alleged dilution before the First Petition despite Mr Laggner being aware of the Series C funding rounds at the time. It was also noteworthy that Bearing Ventures had deliberately chosen not to participate in the further offering that would have allowed it to avoid dilution and that the value of its alleged dilution was very small. The Company argued that this showed that the Petitioners' criticism of the Company's board on this issue was not based on a genuine grievance or a point of substance.

408. As regards the value of Bearing Ventures' alleged dilution, the Company said that it was approximately US$61,000. Bearing Ventures claims that it was denied the opportunity to purchase 138,412 Series C Shares and 75,145 warrants at US$1.13 per share, for a total consideration of $241,319.41. The highest price the Company's stock has reached on the secondary market in the past 2 years is US$2 per share, meaning that Bearing Ventures' lost gain, if they were denied an opportunity to avoid dilution in Series C, would be US$61,000. The Company submitted that this should only give rise to a money claim in a (small) writ action and should not be a basis for a winding up petition.

409. In any event, the Company responded to that criticism as follows:

(a). First, Company had never disputed that (as it had conceded in the October 2023 Letter) it had not complied with the IRA in relation to the Series C issuance.

(b). the Petitioners were wrong to assert that the offer made in the October 2023 Letter was not compliant with the requirements of Section 2.5 of the IRAs because it only related to 5 million shares offered in the C round (as opposed to the 61 million Series C shares issued to Messrs Steckel, Chen and Kidd).

(c). the Petitioners were also wrong to assert that the offer made in the October 2023 Letter was not compliant with the IRAs because it was conditional on shareholders waiving their rights under the IRAs. Plainly an investor who accepted the offer and exercised his/her/its rights to invest could not then, in an equitable claim, complain about being denied an opportunity to invest. An investor who did not want to waive such rights could decline to participate and pursue a claim for an alleged breach of those rights (although the Company would say that the appropriate claim would be by writ, not winding up petition).

(d). the Petitioners had speculated that the October 2023 Letter was a crude attempt to improve the Company's litigation position in the Petition. There was no evidence for this, and it was not put to any of the Company's witnesses. The closest that Mr Valentin

had come to doing so was in his cross-examination of Mr Hilton (Day8, page 195) and Mr Hilton's evidence had been that "*this issue had been brought up earlier. It was taking a frustrating amount of time, in my mind, to get done. So that was not the only reason it came up*."

(e). the Petitioners had complained that the October 2023 Letter had offered no explanation as to why the Company had failed to comply with its contractual obligations at the time of the Series C Round. But the Petitioners had only challenged Mr Hilton on his evidence that it was an oversight, which evidence he had elaborated on in some detail in cross examination. Having chosen not to make a challenge Mr Hilton's credibility, the Petitioners were required to accept the answer that Mr Hilton had given, namely:

> "*A.* *And to be fair, it's good practice to have these things fixed. We don't want to always work by fire drill, to have to go fix these things retrospectively as we contemplate a transaction. But in fact, we were looking at whether we would need to refinance the Hard Peach loan.*
>
> *Q.* *I'm just trying to understand why his − that something that is considered critical in 2023 was not critical at any point before that. I just don't understand quite why that makes any sense?*
>
> *A.* *Sure. Again, I would have to talk to Mr Anderson and Mr Hansen. It just wasn't done on my to−do list. Mr Hansen brought it up again. It was clear that it was critical, and we pushed very hard to get it done."*

Discussion and reasons for decision to dismiss the Petition

The applicable law

410. The parties were largely in agreement as to the applicable law although there was a disagreement as to the extent to which suspicion of misconduct involving a lack of probity could be sufficient. I discuss this issue briefly below and make some general comments on relevant features of the just and equitable winding up jurisdiction as it applies in this case.

411. It is clear, and common ground, that "*the gateway to an order under s.95(3) of the [Act] is that the court is satisfied that (but for that order) it would be "just and equitable" to wind up the company"* (see [38] of the judgment of Sir John Chadwick P in the Court of Appeal in *Camulos Partners Offshore Limited v Kathrein and Company* [2010 (1) CILR 303]). Accordingly, as a threshold matter, the Petitioners bear the burden of establishing that it would be just and equitable to wind up the Company. It is only if this threshold condition is satisfied that the Court can then go on to consider whether to make an order for alternative relief pursuant to section 95(3) of the Act.

412. But as Justice of Appeal Martin noted in his judgment in the Court of Appeal in *Tianrui v China Shanshui Cement* [2019 (1) CILR 481] at [25] a member is entitled to use the winding up jurisdiction even when his primary purpose is to obtain alternative relief under section 95(3) of the Act:

> "*The statutory purpose in conferring a right to petition on the just and equitable ground includes the provision of protection to members against improper conduct by the company. This is particularly so, because the fact that in the Cayman Islands the sole gateway to obtaining alternative relief is by bringing a just and equitable petition means that it cannot be an abuse to petition where the primary purpose is to obtain s.95(3) relief rather than the winding up of the company.*"

413. *McPherson & Keay's Law of Company Liquidation* (5th ed.) (*McPherson*) notes as follows at [4-035]

> *"Winding-up petitions have been utilised many times to protect the rights of minority shareholders against fraud, misconduct, or mismanagement of the company's affairs by directors or majority shareholders who control the company. It is not, apparently, fatal to the success of such a petition that the petitioner does not genuinely desire to have the company put into liquidation but is using the threat of winding up mainly as a means of forcing the wrongdoers to come to terms, for the propriety of this course is borne out by the practice of the courts in postponing the making of the final order so as to give the contending parties an opportunity of settling their differences. It is, however, essential that the petition should have been presented in circumstances that would justify a winding-up order without reference to the private motives of the petitioner. The modern law on this subject has its source in Loch v John Blackwood Ltd ..."*

414. It is worth re-quoting the important extract from the judgment of Lord Clyde in *Baird v Lees* that was cited with approval in *Loch*. Lord Shaw in *Loch* said this (my underlining)

> *"Lord President of the Court of Session (Lord Clyde) in Baird v. Lees discusses the section and the ejusdem generis doctrine in exactly the same spirit. His words are as follows: "I have no intention of attempting a definition of the circumstances which amount to a 'just and equitable' cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. …… And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company."*

415. What is needed, as a general matter, is some serious misconduct by those in control of the company which goes to the heart or relationship between corporators so that terminating that relationship to permit the affected shareholders to withdraw is justified. Lord Clyde referred to being deprived of the ordinary facilities which compliance with the companies legislation would provide and which the shareholders were entitled to expect and Mr Justice Harman referred to the proper and legitimate expectations of members having been defeated in *Re A Company (No.00370 of 1987) Ex.p. Glossop* [1988] 1 WLR 1068 at 1076.

416. The authorities make clear that the Court is to make its decision by reference to the facts as at the date of the petition. In *In re Fildes Bros Ltd* [1970] 1 W.L.R. 592 Mr Justice Megarry held that the question whether it was just and equitable to make a winding up order must be determined on the facts existing at the date of the hearing.

417. The Court will not make a winding up order on this ground unless the misconduct is serious, continuing and likely to continue. It is usually necessary to show that the petitioner has lost confidence in the company's controlling management for the future. Isolated actions which constitute misconduct will not suffice (see *Re Diamond Fuel Co* (1879) 13 Ch. D. 400). The point is made in the following passage in *McPherson* at [4-041] (my underlining):

> "*But, despite the availability of some alternative remedy, winding up remains the appropriate form of procedure in cases where fraud or breaches of duty have been serious and persistent and appear likely to recur in the future. It is essential, however, that the misconduct complained of should have reached virtually incurable proportions, for an order will not be made on account of a single insignificant breach of duty. In Menard v Horwood & Co the governing director of the company had been guilty of a minor act of fraud, which was regarded by Street CJ in Eq in the New South Wales Supreme Court as an isolated occurrence and one which failed to convince him that conduct of the company's business would be prejudicially affected by the retention of that director at the head of affairs. The High Court of Australia affirmed the decision and dismissed the petition, but there is little doubt that the result would have been different "if the proper inference to be drawn from the facts was that there was fair ground for anticipating systematic or recurring dishonesty in the future." In Re Anglo-Greek Steam Co Lord Romilly MR held that while the misconduct of the directors was such that it might render them liable if action were taken against them by the shareholders, it was not a ground on which the court will consider it just and equitable to wind up the company, if there is no evidence that their mismanagement has produced insolvency and where there is a reasonable prospect that, under proper management, it may be successfully carried on.*"

418. Of course, once misconduct has been proved it is open to the Court to draw an inference that it is likely to be repeated and there could be cases in which a winding up order is justified and appropriate when its business affairs have been irreparably prejudiced by misconduct on the part of controlling management who have repented and so fully achieved their ends that they are willing to desist for the future (see Callaway, *The Just and Equitable Ground* (Law Book Co., 1978) at 83-84 and *Todd v Todd* [2008] SLT (Sh. Ct) 26 at [54] where it was held that a petitioner was entitled to continue to lack confidence in directors who had misappropriated the company's property despite their having restored the property and promising not to make further misappropriations).

419. As *McPherson* states at [4-041], the mere fact that in cases of serious and persistent breaches of duty, the existence of alternative remedies is not necessarily a bar to a winding up order. A winding up order may still be appropriate. But if the petitioner relies on less serious or more limited misconduct which could be remedied by a claim brought by the company against the directors or by a derivative claim, then a winding up order will generally not be appropriate.

420. Procedural irregularities are relevant and can be sufficient where they were deliberately designed to prejudice shareholders. The point is made in *McPherson* at [4-038] (my underlining):

> *"Another form of misconduct frequently encountered consists of the failure by those who control the company to conduct its affairs in accordance with the procedures prescribed by the Companies Act or the constitution in relation to matters such as the election of officers, appointment of auditors, the convening of annual general meetings of the company, the issuing of balance sheets and profit and loss accounts and the obligation to consult with other members of the board. Irregularities of this kind have been the subject of consideration on a number of occasions, and, although in no case has an order been made solely because of failure to comply with such procedural requirements, there is little doubt that an order would be made where this conduct was deliberately designed to deprive shareholders of their rights*."

421. As both parties accepted, in order to establish that there has been a justifiable loss of confidence in the Company's management the Petitioners must show a lack of probity in the conduct of the Company's affairs and that the burden of doing so is on the Petitioners. But there is some debate in the authorities and textbooks as to the precise meaning and scope of the reference to a lack of probity.

422. It is clear that the fact that the directors are unwise, inefficient or careless in the performance of their duties may well inspire a lack of confidence in them but it does not without more show a lack of probity and does not justify a winding up (see for example *Re Surrey Garden Village Trust Ltd* [1965] 1 WLR 974 at 981). However, a lack of probity does not require actionable dishonesty or actionable breaches of duty by the directors. "*Probity*" embraces concepts both of honesty and of decency. Furthermore, the decision whether to exercise the discretion to make a winding up order on this ground is fact-specific and sensitive to the particular circumstances and equities of the case.

423. Mr Robin Hollington KC in *Hollington on Shareholders Rights* (10th, ed.,2024) notes that there is authority for the proposition that this ground applies if there has been partiality in management or a failure to act in accordance with basic principles of fair dealing citing the Jersey Court of Appeal's judgment *Financial Technology Ventures II (Q) LP v ETFS Capital*

Ltd [2021] JCA 176 (CA: Crow, Anderson and Perry, JJA). Mr Hollington says as follows (at [10-14] (my underlining):

> *"In Financial Technology Ventures II (Q) LP v ETFS Capital Ltd [2021] JCA 176 at [271]–[272] it was confirmed that the availability of a winding-up order on the ground of loss of confidence in management was not dependent on establishing a quasi-partnership, (and perhaps more controversially) nor did it require establishing an actionable breach of fiduciary duty or dishonesty: it was sufficient if there was a lack of probity or, relying in part upon the authority on the unfair prejudice ground Re Sunrise Radio [2010] 1 B.C.L.C. 367 at [4], even a lack of impartiality or a failure to act in accordance with basic principles of fair dealing:*
>
> > ***"Justifiable loss of confidence & partiality***
> >
> > *271. For example:*
> >
> > *a. It has been found that such an order can be made where there has been a justifiable loss of confidence in the probity of the management of a company, particularly where the controlling director treats the business as his own: see for example Loch v. John Blackwood Ltd [1924] AC 783, at 788, cited with approval in Westbourne Galleries, at 367F - G and again more recently in Chu v. Lau [2020] UKPC 24, at §24 and §90.*
> >
> > *b. It has also been held that a winding-up order can be made where a minority shareholder has justifiably lost confidence in the impartiality or probity of the company's management: see Thomson v. Drysdale [1925] SC 311, at 315.*
> >
> > *c. It has also been said that conduct deliberately calculated to 'freeze out' a minority shareholder, driving him to sell his shares at an undervalue, is capable of justifying a winding-up order: see Re Wondoflex Textiles Pty Ltd [1951] VLR 458, at 468, citing Re James Lumbers Co Ltd [1926] 1 DLR 173, at 188.*
> >
> > *We would add three observations on this line of authority which are relevant to the present appeal:*
> >
> > *a. First, it is important to recognise that Loch v. John Blackwood was not a quasi-partnership case, nor was it one in which there was any deadlock in management. Furthermore, although the facts of Thomson v. Drysdale and of Wondoflex Textiles might have justified a finding that they involved quasi-partnership companies, that was not the basis on which they were decided. All of these decisions were based on entirely general statements of principle that any shareholder in any company is entitled to expect its affairs to be managed with probity and in accordance with basic principles of fair dealing: see also Baird v. Lees (1924) SC 83, at 92, and Re Sunrise Radio, at §4.*

b. Second, the use of the word 'probity' in Loch v. John Blackwood, and its conjunction with the word 'impartiality' in Thomson v. Drysdale, were both deliberate and significant. The courts did not confine their observations to cases involving actionable breaches of a director's duty, or of actual dishonesty: see also Westbourne Galleries, at 379C - E and 381H. A want of probity and a lack of impartiality are broader concepts than either breach of fiduciary duty or dishonesty, although they may well include both. In particular, the word 'probity' embraces concepts both of honesty and of decency.

c. Third, the question whether any particular conduct constitutes a sufficient want of probity or lack of impartiality such as to justify a winding-up order on the just and equitable ground will always be context-specific: Re San Imperial Corp Ltd (No 2) (1980) HKC 463, at 467G - 468H. In other words, a plaintiff has no enforceable legal right to demand a winding-up order in circumstances where he has justifiably lost confidence in the probity or impartiality of management: but the court is entitled to take into account any such loss of confidence when exercising its judgment whether it is just and equitable to wind up the company."

424. It seems to me that R2-R4 and the Company are right to say that a mere suspicion of a lack of probity in the conduct of the company's affairs by those in control of its management is insufficient. There needs to be evidence to show that there has in fact been such a lack of probity in the conduct of the company's affairs. The reference and discussion of suspicion in *Loch* supports this view. The Privy Council concluded that there had in that case the petitioners were entirely justified in having lost confidence in the controlling director(s). Lord Shaw in his judgment said this (my underlining and emphasis) at page 794:

> *It only remains to apply the doctrines thus expressed to the circumstances of the present case. Their Lordships forgo unnecessary details. They are of opinion that the learned Greaves C.J. is correct when he says that: "The directors in control since the death of Blackwood Rodger have, I think, **laid themselves open to the suspicion** that by omitting to hold general meetings, submit accounts and recommend a dividend, their object was to keep the petitioners in ignorance of the truth and acquire their shares at an under value."*
>
> *The Board agrees with these views. In the opinion which they have formed, Mr. McLaren, for reasons not unnatural, had come to be of opinion that the business owed much of its value and prosperity to himself. But he appears to have proceeded to the further stage of feeling that in these circumstances he could manage the business as if it were his own. Had Mrs. Loch and Mr. Rodger, or after his death Mr. Rodger's executor, obtained a dividend which year by year represented in any reasonable measure a just declaration out of the undoubted profits of the concern, they might no doubt have been content to allow this state of matters to go on; but although on one or*

> *two occasions Mr. McLaren paid trifling and fragmentary sums to Mrs. Loch, neither she nor the Rodger family have ever obtained any dividend at all.* ***And it is not to be wondered at that in the transaction now about to be mentioned they completely lost confidence in Mr. McLaren, and had only too great justification for doing so****.*"

425. Oppression is also a ground for obtaining a winding up order on the just and equitable ground. Conduct of the company's affairs in disregard of the interests of members is oppressive of those members and the persistent disregard of members' interests for example in receiving dividends may justify a winding-up.

426. All parties accepted that my summary of the law at [42] of the Strike-Out Judgment was correct and that oppression must include either a lack of probity or fair dealing to a member.

427. The position was explained in the judgment of Buckley LJ delivering the judgment of the Court of Appeal in *In Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 in which oppression was alleged but not proved (this was a case where relief was sought under section 210 of the UK Companies Act 1948 which gave a free-standing remedy for oppression but it is generally accepted that oppression for the purpose of a petition based on the just and equitable ground is in substance the same as oppression as used in that section and as discussed in the related cases). Lord Justice Buckley said as follows at pages 1059-1060 (my underlining):

> "*What does the word "oppressive" mean in this context? In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs; and when such conduct is unfair or, to use the expression adopted by Viscount Simonds in Scottish Co-operative Wholesale Society Ltd. v. Meyer [1959] A.C. 324 , 342 "burdensome, harsh and wrongful" to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs: see Scottish Co-operative Wholesale Society Ltd. v. Meyer and In re H. R. Harmer Ltd. [1959] 1 W.L.R. 62 . We do not say that this is necessarily a comprehensive definition of the meaning of the word "oppressive" in section 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition …… Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor. If a director of a company were to draw*

> *remuneration to which he was not legally entitled or in excess of the remuneration to which he was legally entitled, this might no doubt found misfeasance proceedings or proceedings for some other kind of relief, but it would not of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting powers to procure or retain the remuneration or to stifle proceedings by the company or other shareholders in relation to it…"*

428. As the Company noted in its submissions, there has to be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made and the alleged oppressor must be aware of the minority's interest and must consciously decide to override it or brush it aside. There must be something more than merely a failure to take account of the minority's interests.

The principal witnesses

429. *Mr Laggner*: I found Mr Laggner to be an unsatisfactory witness in a number of important respects and accept most of R2-R4's criticism of his evidence.

430. Mr Laggner clearly feels genuinely aggrieved in particular at the board's decision to approve the 2016 Transaction over his White Knight Proposal and thereby allow Mr Steckel to acquire the right (ultimately shared with Mr Chen) to acquire 50% of the voting shares in the Company and at the terms on which PIK shares had been issued to Mr Steckel (and Mr Chen) which had resulted in substantial financial benefits accruing to Mr Steckel (and Mr Chen) and at Mr Steckel's refusal to give-up any of these benefits, and also the material dilution of the Petitioners and other independent shareholders. He also clearly feels genuinely aggrieved at the way in which the Company's attempt to acquire a UK banking licence (or an interest in a company holding such a licence) had been managed and explained to shareholders, as to his removal as a director and as to the failure of the board to give greater weight and take account of his views on these matters and to involve the independent shareholders generally in the board's decision making process.

431. Unfortunately, however, Mr Laggner has allowed these genuine grievances to metastasise into a series of misconceived, exaggerated and ultimately unfounded complaints against Mr Steckel, the other directors in office in mid-2016 and the current board of the Company. Mr Laggner sought in material respects to rewrite history by misrepresenting and being evasive as to his own position in relation to the 2016 Transaction (by seeking to ignore or contradict without any real evidential basis for so doing the documentary record, for example in relation to his approval of the 15 July Minutes), by failing to acknowledge the true extent of the Company's serious financial problems in mid-2016 (when the 2016 Transaction was approved) and mid-2017 (then the Third Amendment to the RCA was entered into) and by distorting the decision making process in relation to TBOL, so as to present difficult or complex commercial decisions taken by the board as involving deliberate and self-serving misconduct by Mr Steckel and other directors. Mr Laggner also exaggerated and misrepresented the extent of Mr Steckel's influence over other directors at the time that the 2016 Transaction was approved (he was unable to sustain and appears by the time the Petitioners' closing submissions were made to have dropped his claim that there was a Steckel Faction) and misrepresented the process by which the board dealt with the White Knight proposal (the evidence at trial demonstrated clearly that the board had acted so as to allow Mr Laggner and his proposed co-investors more time to finalise the White Knight Proposal and to ensure that it could be properly assessed against and compared with the Steckel Proposal).

432. In cross-examination Mr Laggner was frequently forced into evasion and then to change his position when pressed and shown the documentary evidence. I accept the criticisms made by R2-R4, as summarised above, as to Mr Laggner's evidence in relation to Mr Laggner's evidence as to the time at which he said he first lost trust and confidence in the board, as to the Company's financial position prior to the 2016 Transaction and the Company's cash crisis at the time, as to the existence and membership of the Steckel Faction, as to his approval of the ratification of the 2016 Transaction at the 22 June 2016 and the 15 July 2016 meetings and as to the level of commitments supporting, the conditionality of and continuing uncertainties regarding the deliverability of the White Knight Proposal.

433. Mr Laggner's criticisms of the Litigation Committee's decision making also seemed to me to be exaggerated and without foundation, albeit that in relation to this issue he ultimately decided not to challenge the probity of members of the Litigation Committee in relation to the conduct of their investigation or the decisions they reached.

434. However, it should be noted that Mr Laggner had contemporaneously raised proper concerns about the need for the board to seek and obtain Cayman legal advice and, as I discuss below, the Petitioners have shown that in a number of important respects the Company did in the past fail to observe proper corporate governance (for example by failing to hold meetings of directors for extended periods) and that it has failed to comply with its obligations in relation to various share issues. But Mr Laggner and the other Petitioners have not shown that these failures were deliberate or intended to prejudice and treat unfairly the independent shareholders.

435. Nor was Mr Laggner able adequately to explain why, if he was, as he maintained, truly dissatisfied at the time with the actions of the board he had failed to take action to protect his rights at that stage and long before the presentation of the First Petition.

436. *The other Petitioners*: It was also clear that while the other Petitioners were genuinely aggrieved in particular as to past mismanagement and what they saw as the board's failure to keep them, and all the independent shareholders, fully and properly informed of the need for and impact of the agreements to issue PIK shares to Mr Steckel (and Mr Chen), they had nothing of substance to add to Mr Laggner's evidence. In fact, their oral evidence showed, as R2-R4 correctly submitted, that the other Petitioners had relied almost exclusively upon Mr Laggner for their understanding of the matters which they purported in their written evidence to be concerned about, that they each accepted that if the Court found the allegations made by Mr Laggner to be without merit or untrue then they would have no basis separately to assert they had justifiably lost all trust and confidence in the board of the Company and that they had not undertaken any independent analysis of their own.

437. *Mr Steckel*: I found Mr Steckel to be a generally credible witness who sought to give honest answers during his cross-examination. He is clearly a very experienced and successful businessman who is tough and determined in negotiations and a strong personality and presence. He clearly could be combative with colleagues and was occasionally combative during his cross-examination although generally he remained composed and balanced. I found that his evidence as to the action he took, his reasons for doing so and his motives was coherent and convincing. He was clear about the commercial realities and context which provided the background to, and as to the serious challenges that were faced by the Company at the time of, the 2016 Transaction and when further funding was needed from Mr Chen, and his evidence was supported by the Respondents' other witnesses and the documentary evidence. He was also clear about why, in those circumstances, the high interest rate on the RCA Loan and the granting of the right to acquire 50% of the Company's share capital were not commercially unreasonable and as to the risks he (and Uphold Holdings) had been required to take when advancing the RCA Loan and persuading Mr Chen to make his investment. He was also clear and robust in denying that he had ever encouraged or applied improper pressure on any of his fellow directors to accept the Steckel Proposal and in his confirmation that he at all times recused himself from board decisions when his interests gave rise to a conflict. He was also clear and robust in denying that he wanted to divert or that it would make commercial sense for him to permit the diversion of any opportunity for the Company to obtain more than a 10% interest in TBOL or that he had reached a concluded let alone a binding and unconditional agreement with Mr Thieriot and Mr Watson to have a personal interest in TBOL. His recollection of the discussions with the PRA/FCA and with KPMG were sketchy but that was understandable in view of the lapse of time.

438. *Mr Thieriot*: I also found Mr Thieriot to be a credible witness who sought to give honest answers during his cross-examination. In fact, Mr Thieriot repeatedly showed that he was prepared to be candid in admitting his own failings and those of the board and management, as to his own gripes and grievances with Mr Steckel and also as to the personal tensions and animosities between various directors. I found his evidence to be clear and convincing as to the nature and extent of the Company's financial difficulties and substantial commercial challenges faced in 2016 and early 2017 and as to the fundraising process including the

negotiations with Mr Laggner in relation to the White Knight Proposal. Mr Thieriot was also repeatedly clear and convincing in denying that the other members of the board had acted as directed or for the benefit of Mr Steckel or that the key decisions taken by the board which were challenged by the Petitioners had been anything other than genuine and good faith commercial judgments that were focussed on the survival of the Company and ultimately preserving its ability to progress and prosper for the benefit of all stakeholders.

439. *Mr Hilton*: I found Mr Hilton to be an impressive witness who gave clear, honest and convincing evidence. Mr Hilton is legally qualified and has held senior positions in both the private and public sectors. He has had over 30 years of experience in the financial services industry. He is clearly a strong and thoughtful leader of the board (he has been chairman since 28 April 2021) who has led the transformation of the Company's approach to governance, risk and compliance which has sought to reflect best practice for companies of the Company's size and business. His experience and expertise also made him well suited to perform the role as chair of the Litigation Committee and enabled him to act robustly and independently in that role. He clearly acted independently of Mr Steckel. He gave a clear and cogent account of the Litigation Committee's approach to its investigations and work and its decision making.

440. *Mr Milby*: I also found Mr Milby to be an honest and credible witness. He is also highly experienced and well qualified having previously held senior positions with Barclays Bank and Citibank. He was also a regulated person (being approved by the Bank of England). This gave his account of the discussions with the PRA/FCA regarding TBOL and his assessment of the position of the regulators particular authority and weight. I found Mr Milby's account of why the 2016 Transaction was approved and of how the board had sought to give more and adequate time to Mr Laggner and Mr Bechtel to progress and finalise to be reasonable and coherent and consistent with the evidence of the Respondent's other witnesses. He said that the 2016 Transaction was very expensive but was a lifeline that kept the organisation alive and that the board had been more than cooperative in its dealings with Mr Laggner regarding the White Knight Proposal and that deadlines given to Mr Laggner had been extended two, three or possibly four times and yet "*ultimately, we still didn't have confidence*

that we had committed investors that would deliver funds on the [day] - given what was a critical time window, and hence had no option but to move forward with the [Steckel proposal that we had." He confirmed in clear and convincing terms that the board was "*trying to do the best for the Company*" and looking for a deal that was attractive to the Company. He gave a candid account of Mr Watson's management style but confirmed that Mr Watson had not run the process without the active involvement of others and the importance of his own, Bill Dennings' and KPMG's involvement in preparing the application to the PRA/FCA. He said that "*What Anthony is not good at is detail management. What he is very good at is fundraising, working with significant individuals in the UK, and being able to articulate, quite passionately, a vision. In terms of the application, again, just to be very clear on this, because I think it's not, while that - Anthony ultimately held the hat, the development of the application was done by myself, Bill Dennings and KPMG. And while Anthony was what I would term a "spokesperson", he was not, if you will, holding the pen, reviewing the 5,000 pages of documents...*" He also explained the background to his resignation and his resignation email dated 18 October 2020 which made it clear that Mr Steckel shared his concerns and that he did not regard Mr Steckel as responsible for the problems he had identified. He was concerned about operational issues (such as the absence of a clear break-even plan and a robust policy in terms of how the Company hired people) but also governance issues such as the absence of board minutes and the length of time between board meetings (*"particularly when Mr Watson was the CEO. Less so when it was [Mr Steckel]."*)

The Petitioners' case at closing

441. The Petitioners' case, as I have noted, is now (in its closing submissions at the end of the trial) based on allegations concerning conduct relating to two matters. First, the alleged unfair and prejudicial dilutions of the independent shareholders' (including the Petitioners') interests in the Company (the ***Unfair Dilutions***). Secondly, the alleged improper diversion of, and the failure to realise for the benefit of the Company and all its shareholders, the Company's opportunity to set up and own a company holding a UK banking licence (the ***Improper Diversion***).

442. The Petitioners relied on three dilutive events (I refer to these as the ***Dilutive Events***). There were:

(a). *the Warrant Dilutive Event*: the improper and unfair dilution that occurred upon the exercise by Uphold Holdings on 17 August 2016 of the Warrant because the Company's independent shareholders had not been offered the right to subscribe for ordinary shares on the same terms as the issue of ordinary to Uphold Holdings (at 1 cent per share), which had resulted in a 50% dilution to all other shareholders. The Series B shares had been offered at the much higher price of 25.5 cents per share (and Uphold Holdings had been granted and retained voting rights over the Series B2 shares for as long as the RCA loan was outstanding). Mr. Steckel (and the other directors) failed to consider the fairness of the terms on which the Series B round was to be offered to shareholders. Further, the issue of the Series B2 Shares resulted in clear breaches of both the Articles and the IRAs which breaches have never been cured.

(b). *the PIK Interest Dilutive Event*: the improper and unfair dilution that also occurred upon the exercise by the Company of its right to issue shares to Uphold Holdings as payment of PIK interest following the execution of the Third Amendment to the RCA in May 2017. Shareholders were not consulted or ever told about the Third Amendment, or the dilutive impact which the US$48m valuation had on their own shareholdings over the course of 2017 and 2018 as Mr. Steckel and Mr. Chen received millions of Series B3 and Series C shares. Mr. Steckel's receipt of PIK interest shares on the basis of an outdated valuation involved a clear breach of his fiduciary duty to the Company. He was subject to a conflict of interest in relation to the Third Amendment and the Company's subsequent election (at Mr. Steckel's direction as Chief Executive Officer) to pay interest due to his own company in the form of shares on the basis of the outdated valuation.

(c). *the Series C Dilution*: the improper and unfair dilution that occurred in respect of the Series C round which, as the Company had conceded in the October 2023 Letter, had not taken place in compliance with the requirements of the IRAs.

443. As regards the alleged Unfair Dilution, the Petitioners case on closing (as I understand it) can be summarised as being based on allegations that:

(a). Mr Steckel had controlled (or influenced) the board's decision-making process with respect to the three Dilutive Events which had resulted and been designed to result in the issue to Mr Steckel of more shares that he was entitled to (or should have been given) and in consequence an unfair dilution of their interests in the Company of the Petitioners and other independent shareholders. The board when making its decisions to grant the Warrant, enter into the Third Amendment (if there was any such agreement) and to allow Mr Steckel to obtain the PIK shares (and Mr Steckel when causing or influencing the board to make these decisions) had improperly placed the interests of Mr. Steckel (and he had placed his own interests) over those of the Company and all its shareholders generally. The board had deliberately decided not to consult, inform or obtain the approval of the independent shareholders in advance of the Dilutive Events and had deliberately ignored the wishes and interests of those shareholders. As a result, Mr Steckel and the board had acted in breach of duty and caused the Company to breach the Articles and its obligations to shareholders who were parties to the IRAs.

(b) the board had repeatedly shown a disregard of basic principles of proper corporate governance and failed to obtain or act on proper Cayman Islands law advice and as a result had failed to remedy the breaches of the Articles and the IRAs for an inexcusably long period. The remedial action taken in July 2016 by way of the Series B2 preferred share offering was wholly inadequate and the remedial action taken in October 2023 had unfairly ignored the shareholders whose claims for breach of the IRAs to which they had been party were by then time barred. The adverse and unfair consequences of the Dilutive Events remained in effect and the Petitioners, and the other independent shareholders had not been compensated for the prejudice they had suffered.

(c). the Litigation Committee had without sufficient and proper justification (and therefore acting irrationally) failed to take any action to remedy or obtain compensation for the Dilutive Events. The Litigation Committee had been influenced by a desire not to

challenge or offend Mr Steckel as the most powerful member of the board and as a major shareholder and not to become publicly involved in litigation against Mr Steckel while the Petition was outstanding.

444. This conduct, the Petitioners argued, involved a lack of probity in the conduct of the Company's affairs and was a sufficient basis on which to justify a loss of (and one of the reasons why the Petitioners had reasonably and justifiably lost) confidence in Mr Steckel. This conduct also satisfied the test for oppression. The Petitioners said that this conduct was serious, deliberate and repeated.

445. As regards the improper diversion and failure to realise for the benefit of the Company and all its shareholders the UK banking licence opportunity, the Petitioners' case at closing, as I understood it, can be summarised as being that the board's decision making on 15-17 September 2017 (and subsequently in the Share Issuance Agreement of 1 January 2018) – which involved an enormously valuable corporate opportunity which had been generated by and which belonged to the Company being given away to a director of the Company, Mr Watson without adequate consideration - had been flawed because (a) Mr Steckel had controlled or been the dominant influence in the board's decision; (b) the board had been deliberately misled by Mr Watson (and as I understand it Mr Steckel, Mr Thieriot and Mr Dennings) into believing that the PRA/FCA would not permit the Company to hold more than a 10% interest in the entity which was granted the UK banking licence because of various concerns relating to the Company and its shareholder and (c) Mr Steckel had a personal interest in allowing Mr Watson to exploit and take the primary financial benefit from the UK banking licence opportunity because he was a party to an agreement with Mr Watson pursuant to which he was entitled eventually to receive shares in TBOL and that agreement had not been disclosed to the other directors (and Mr. Thieriot and Mr. Dennings were also parties to this agreement and were also conflicted). As a result the conduct of Mr Steckel and because of his control or dominant influence over the other directors, the board was improper and lacking in probity. Once again, the decision of the Litigation Committee to enter into the 24 June 2022 settlement agreement with Mr Watson and TBOL (under which the Company accepted only 9.8% of TBOL's shares and released Mr Watson from all claims)

and not to bring proceedings (notwithstanding the evidence that gave rise to obvious concerns that Mr. Watson and Mr. Steckel had breached their fiduciary duties as directors) were unjustified and irrational.

446. In my view, for the reasons explained below, having regard to the facts and the state of affairs as exists in relation to the Company as at the date of the hearing of the Petition, the grounds alleged in the Petition as modified by the Petitioners during the trial and as presented in their closing submissions do not justify a winding up order and therefore the Petition should be dismissed.

The Pleading Points

447. Both R2-R4 and the Company complained that the Petitioners' revised case as formulated and presented in the Petitioners' written and oral closing submissions went well beyond their pleaded case in a number of important respects and that they had been prejudiced by the lack of notice of a number of key allegations now relied on by the Petitioners.

448. While I have a good deal of sympathy for R2-R4 and the Company because the Petitioners have to some extent adopted an opportunistic approach to their litigation strategy by adjusting the focus of their attack in light of the developing evidence and their changing sense of the weakest points in R2-R4's (and the Company's) defence, and focussed in on detailed points that were not pleaded, and because as a result the Petitioners have dropped or not relied on significant parts of their case, nonetheless it seems to me that it would be wrong to prevent the Petitioners from relying on their case as eventually formulated in closing submissions. The Petitioners did enough, in my view, at least by the time of Mr Laggner's first Witness Statement in February 2025 to give notice of all the main elements and allegations on which they now rely.

449. I was concerned about the Petitioners' increased focus and reliance their allegation of the secret agreement between Mr Steckel, Mr Watson and Mr Thieriot in relation to TBOL, but

reference was clearly made to the allegation of such an agreement in Laggner-WS1 (see [27]).

450. I was also concerned about the focus on and the significance that eventually came to be attached by the Petitioners to the use of the US$48 million valuation in the Third Amendment. This was a point which should have been pleaded so that R2-R4 and the Company could have addressed it in their evidence and considered whether expert evidence was needed. Having said that, it seems to me the Respondents were given sufficient notice of the issue to be able to respond to it and deal with it in their evidence and in particular in cross-examination so that their defence of the Petition was not materially prejudiced. The one exception, as I discuss below, is the allegation of dishonesty made against Mr Watson which should have been particularised and fully pleaded and in the absence of such pleading it seems to me that it is not open to the Petitioners to rely on it.

451. The Respondents also identified a number of other issues which they said had not been properly pleaded, as I have explained above, but in my view the same conclusion applies with respect to them. The Points of Claim combined with the Petitioners' evidence gave sufficient notice to the Respondents of the core features of their case as set out in their closing submissions.

The impact of the Litigation Committee's role and decision making and of the Petitioners' failure to allege that the Litigation Committee had acted with a lack of probity

452. As I have noted, the Court has to make its decision by reference to the facts as at the date of the hearing of the petition and decide whether it is just and equitable to make a winding up order by reference to the state of affairs existing at that date.

453. It seems to me that the Petitioners have failed to show that a state of affairs existed as at the date of the hearing of the Petition that makes it just and equitable that the Company be wound up on the grounds now relied on. One important reason for this is that Mr Hilton's stewardship of the Company's board has resulted in a sea-change and significant improvement in its approach to governance and the work and decision making of the

Litigation Committee is part of this. Ultimately, after assessing the evidence and the results of their cross-examination of the Respondents' witnesses the Petitioners were driven to accepting that they could not challenge the probity of the Litigation Committee's actions but had to say that its decision making was irrational and that its failure to remedy the earlier unfair treatment of the independent shareholders or the partial actions of Mr Steckel and the other directors who had supported him, had compounded the lack of confidence that such earlier actions had caused.

454. The Petitioners rely on two grounds: the justifiable lack of confidence ground and the oppression ground. They rely, for the purpose of establishing both grounds, on the Dilution Events and the Diversion Event. They say that even though these events took place many years ago and have been investigated and dealt with by the current board through its Litigation Committee (which approved the settlement with TBOL/Mr Watson and decided not to bring proceedings against Mr Steckel), they nonetheless establish a sufficient basis justifying the making of a winding up order on the just and equitable ground.

455. As regards the decision making of the Litigation Committee, as I understood the Petitioners' case as set out in their written closing submissions and as explained by Mr Valentin in his oral closing submissions, the Petitioners were not alleging that the members of the Litigation Committee had acted with a lack of probity although they did suggest that the Litigation Committee had been influenced (in reaching their decision to settle with Mr Watson and not to sue Mr Steckel) by irrelevant matters such as Mr Steckel's standing and influence within the Company (see [275(2)] of the Petitioners written closing submission where they allege that Mr Steckel had been able to "*dissuade*" the Company from bringing a claim against him) and the need to avoid adverse publicity. But in their written closing submissions the Petitioners only criticise the Litigation Committee's decision on the basis that their reasons for not bringing proceedings against Mr Steckel and for settling with Mr Watson on the terms agreed did not justify their decision (see [17] and [162(5)]) and they say that the Litigation Committee's failure to bring proceedings to remedy the unfair dilutions and the improper diversion (a) has meant that their effects continue, that there is no realistic prospect of them

ever being put right and (b) justified and compounded the Petitioners' loss of confidence in the Company's board.

456. In his oral closing submissions, as I have noted, Mr Valentin said that the Petitioners' core complaint was that the Litigation Committee had acted irrationally.

457. It seems to me to be clear that the Petitioners did not and cannot claim that the Litigation Committee acted with a want of probity. I have set out at some length above and highlighted the most important passages in Mr Valentin's cross-examination of Mr Hilton. As can be seen from these extracts, Mr Valentin did not put to Mr Hilton that he and the other members of the Litigation Committee had acted with a want of probity. He did not suggest a lack of impartiality or a deliberate and improper favouring of Mr Steckel or Mr Watson. No doubt Mr Valentin properly adopted this approach because the evidence did not support any such allegation. In my view, it is clear that the Litigation Committee acted properly, and adopted a careful and thorough process for investigating the issues that had been identified for investigation, taken full legal advice on these issues and made its decisions based on the results of the investigations and that advice, which decisions were, in my view, based on reasonable, realistic and sound legal and commercial decisions and on a reasonable assessment of the best interests of the Company and all its shareholders.

458. As I have noted, some of the questions raised by the Petitioners involved the suggestion that Mr Hilton had been influenced by irrelevant considerations or considerations which should have been given little weight such as the standing of Mr Steckel within the Company or been improperly persuaded or pressured by Mr Steckel to take no action. I reject any such suggestion as being without foundation. As I have already explained, I found Mr Hilton's evidence to be convincing and that he acted carefully and properly and independently of Mr Steckel.

459. But Mr Valentin in his oral closing submissions said that this did not matter since the Petitioners could still rely on and justify their loss of confidence in Mr Steckel and the other members of the board who had supported him by reference to the past acts of unfair, partial

and improper treatment and the diversion and loss of a valuable corporate asset and opportunity. The Petitioners could also rely on this conduct as giving rise to oppression. Past conduct was sufficient to justify the relief they were seeking.

460. As I have noted above, the authorities make it clear that generally the Court will not make a winding up order on the loss of confidence ground unless the misconduct is serious, continuing and likely to continue. But a petitioner may be able to rely on an inference from the facts that the previous misconduct is so endemic and ingrained in the directors who remain responsible for the management of the company that it is likely to continue in the future. In addition, as I have also noted, there are some cases, which I would label as exceptional, where the unremedied misconduct has been so severe and irreparably damaging to the company and the interests of the petitioners that its effects can be treated in substance as permanent and continuing and therefore a justifiable basis for a loss of confidence in those managing the company.

461. The position may be somewhat different in relation to the oppression ground where there has been conduct which lacks the degree of probity which shareholders are entitled to expect in the conduct of the company's affairs which amounts to oppression, although if at the date of the hearing of the petition it is clear that the oppression has ceased and that the effects of the past oppression have rectified or superseded by subsequent events, the Court will be entitled to decline to make a winding up order.

462. As I understood his submissions, and although he did not take me to any of the relevant authorities, Mr Valentin was relying on the arguments of the kind I have just described. The conduct of Mr Steckel and his supporters on the board who had caused the Company to take, and to the extent that board approval was given, approved the Dilutive Events and the Diversion Event has resulted in serious, permanent and continuing prejudice to the Petitioners which will not be remedied and thereby justifies a loss of confidence in the current board and management of the Company even though the Litigation Committee may itself have not acted with a want of probity. Furthermore, this misconduct constituted oppression of the Petitioners which has not and will not be remedied (as the Petitioners said

in their written closing submissions there could hardly be something more oppressive to the interests of a shareholder than the dilution of their shareholdings in a manner that is secret, or which does not permit their fair participation).

463. In my view, the Petitioners' case on these points fails on the facts.

464. First, I do not consider that even if the Petitioners were otherwise right to say that the Dilutive Events and the Diversion Event involved improper conduct demonstrating a lack of probity that had at the time justified a lack of confidence in the directors who then were managing the Company's affairs (which as I explain below I consider that the Petitioners have failed to do), they can now say, after the appointment of Mr Hilton to the board and his introduction and implementation of the major changes to corporate governance, and the appointment of other independent directors and following the entirely proper and well-run investigation and decision making process conducted by the Litigation Committee, that there is a real and serious prospect that the conduct of the Company's affairs will continue to be undertaken with a lack of probity or a lack of impartiality and without taking and giving effect to proper legal advice, and so as to continue to disregard or subordinate the rights and interests of the Petitioners as shareholders.

465. Second, as regards the oppression ground, even if the Petitioners had been able to establish their oppression case (which as I explain below, I consider that they have failed to do) for the same reason I do not consider that the Petitioners have been able to show that there is any real or serious prospect of the oppressive conduct continuing under the current board or that in the current circumstances the effect of the Dilutive Events and the Diversion Event are so prejudicial and damaging that such past conduct justifies a winding up order. The dilution of which the Petitioners now complain is clearly material and the benefits obtained by Mr Steckel and Mr Chen as a result of the PIK interest agreements are clearly substantial (and seen by many including Mr Thieriot and Mr Hilton as an unjustified windfall) but the Petitioners are in a much better position now than they are likely to have been in had the PIK interest terms not been agreed and the RCA Loan and Mr Chen's further contribution not been made. It is also relevant to note in this context the failure of the Petitioners to take

action prior to the presentation of the First Petition. They clearly had the right to do so but chose not to. This considerably weakens their case for a winding up order now, particularly in a case where there is no real prospect of further oppressive conduct because of the change in board leadership and composition. Indeed, the Respondents have accused the Petitioners (and Mr Laggner in particular) of seeking to cash in on the Company's relatively recent prosperity (as well litigate stale claims) by only making claims once the Company's financial position had radically improved. The failure of the Petitioners to take *any* action in the period from the 2016 Transaction to the presentation of the First Petition (a period of five years from 2016 – 2021) represents a significant delay and taken together with Mr Laggner's dropping of his objections to the 2016 Transaction undermines their case that it is just and equitable to make a winding up order now.

Have the Petitioners established that the Dilutive Events and the Diversion Events constituted past conduct of the Company's affairs with a lack of probity and oppressively towards them?

466. I must now turn to review the Petitioners' various criticisms of the conduct of the Company's affairs and assess whether they have made out the case that the Dilutive Events and the Diversion Event evidence and constitute conduct lacking probity which justified a lack of confidence in the Company's board and oppression.

467. I will consider each transaction or event complained about by the Petitioners including the 2016 Transaction. I consider the 2016 Transaction even though the focus of the Petitioners' case moved away from it by the time of their closing submissions because it formed a central part of and a fundamental reference point for their case in the Petition and Points of Claim and because various serious allegations were made against Mr Steckel and others which R2-R4 have asked me to deal with, and which I consider should be dealt with.

The 2016 Transaction

468. After carefully reviewing all the evidence, both the written and the oral evidence, I have concluded that the submissions made by R2-R4 (supported by the Company) in relation to

the Petitioners' case with respect to the 2016 Transaction are in almost all respects correct and correctly set out the findings of fact to made in light of that evidence.

469. I would summarise as follows the main submissions made by R2-R4 which I accept and with which I agree and which I find as facts (I have made some modifications and adjustments as seem to me to be necessary to reflect the evidence and to spell out and clarify certain points):

(a). there was no Steckel Faction and no basis for the averment and allegation that the other directors involved in the decision-making process with respect to the 2016 Transaction (Mr Parsa, Mr Thieriot, Mr Watson and Mr Milby) had acted on the directions or instructions (given explicitly or implicitly) of Mr Steckel or had made their decisions for his benefit without reference to the interests of the Company as a whole.

(b). the board had entered into the 2016 Transaction acting in good faith and having regard to the best interests of the Company at the time, and had reasonably believed that there was no viable alternative to the 2016 Transaction in the circumstances.

(c). the circumstances included a genuine (and not deliberately manufactured) acute cash crisis and underfunding facing the Company which the board reasonably believed would result in the Company becoming insolvent and being forced to commence an insolvency proceeding if not immediately alleviated and resolved.

(d). while the cost of the RCA Loan was very expensive because the Company became liable to pay a very high rate of interest which could be crippling, the board reasonably considered that the 2016 Transaction was the only viable proposal available, offered sufficient funding to enable the Company to survive and avoid insolvency proceedings (and therefore would preserve the prospects of the shares of all shareholders becoming valuable) and that some provision had been made to ameliorate and manage the damage caused by the high interest rate. First, the original terms of the RCA allowed the Company to pay PIK interest. Secondly, it was envisaged that that shareholders could and would inject further equity funding to reduce the amount of the RCA Loan

and thereby reduce the cost to the Company of the debt financing which was part of the 2016 Transaction.

(e). the board gave Mr Laggner and Mr Bechtel every opportunity to present a viable alternative offer, repeatedly extending the deadline for doing so, but Mr Laggner's and Mr Bechtel's proposal remained subject to various conditions and uncertainties such that it was reasonable for the board to conclude that it did not represent a viable alternative to the 2016 Transaction that was capable of being accepted or completed in time.

(f). accordingly, there was no breach of fiduciary duty by any of the directors or want of probity in relation to the decision to approve and implement the 2016 Transaction.

470. I have summarised the main evidence on this issue above (I have not of course been able to record all of the relevant evidence of every witness, but I have taken that other evidence into account) and have underlined and thereby highlighted the parts of the evidence which seem to me to be most pertinent and which support the factual findings set out above.

471. I am satisfied that was no evidential basis for the Petitioners' original allegation that there was a Steckel Faction, involving at least Mr Thieriot, Mr Parsa and Mr Watson, who had pre-agreed to vote for a takeover of the Company by Mr Steckel/Mr Salinas and who had acted as directed or instructed by Mr Steckel and who took decisions with the object of benefiting and complying with the wishes of Mr Steckel without regard for the interests of the Company (and all its stakeholders). While the evidence shows that there discussions among these directors there is no evidence to support the Petitioners' allegation of in substance a conspiracy and collusion or of Mr Thieriot, Mr Parsa and Mr Watson being given or taking instructions or making their decisions otherwise that in the proper performance of their independent roles as directors. The existence of such an agreement or arrangement was clearly and firmly denied by Mr Steckel, Mr Thieriot and Mr Parsa (see Mr Parsa's First Affidavit at [11]-[15]) and the cross-examination of Mr Thieriot did not seek to challenge his position. The evidence does show that Mr Steckel was a strong and influential presence

on the board and argued and negotiated strongly in favour of the Steckel Proposal. But his interest and role as counterparty in relation to the Steckel transaction was clear and fully disclosed and he recused himself appropriately from board decision making in relation to it.

472. I am also satisfied that the there was no evidential basis for the Petitioners' allegation that there had been "*a plan initiated by Mr Steckel (with Mr Salinas) to engineer an unnecessary cash crisis so that Mr Steckel would be able to acquire a significant stake in the Company through presenting a save the day financing agreement …*" (see [25] of the Points of Claim and see also [23] of the Points of Claim and Laggner 3 at [22]). Mr Steckel denied that this was the case and his evidence was clear and direct on this issue. Mr Milby also denied that this was the case (Milby-WS at [19]). Mr Steckel, Mr Thieriot and Mr Milby were very critical of Mr Watson (as was Mr Laggner), and Mr Steckel noted Mr Watson's failure to focus clearly and sufficiently early on the significance of the Company's liquidity problems and on the corporate governance failures in the absence of board meetings in the period. I found Mr Steckel's evidence on this issue to be convincing and to fit the facts as revealed by the other evidence. Mr Laggner in contrast was evasive and unclear when answering questions during his cross-examination (Day 2 pages 57-61 – see above). When asked for the third time whether his evidence was that Mr Steckel and his faction manufactured the cash crisis and so had created it and were responsible for it all he could say was "*I think the misallocation of resources to that particular - that was Uphold's product to go to market: connect to the banking system and disrupt the remittance industry.*" Mr Laggner was unable to bring himself to confirm the averment in the Points of Claim and in my view accepted that his criticism of management was based on serious commercial and financial misjudgements in particular in relation to the level and types of expenditure that were being incurred. Mr Laggner effectively withdrew or at least failed to maintain the allegation of the deliberate creation of a cash crisis and was unable to point to any evidential basis for it.

473. I am further satisfied that there was no evidential basis for the Petitioners' allegation that the Company did not face a genuine and urgent need for funds in June-July 2016. Mr Steckel's and Mr Thieriot's evidence was clear and convincing on this issue (see the extracts from their written and oral evidence as highlighted by my underlining above - for example Thieriot

WS-1 at [52])). I accept Mr Thieriot's evidence that the payment of US$540,000 by Mr Chen did not satisfy the Company's urgent cash requirements and that absent further substantial funding within a month or shortly thereafter the Company was likely to have had to commence an insolvency proceedings. As Mr Thieriot pointed out Mr Chen's payment only covered one month's payroll so that within 30 days of that payment the Company would once again be unable to pay its employees.

474. Mr Steckel's evidence was that at this stage the Company was a tech start-up in development mode that was loss making. He said that in the absence of revenues, it was dependent upon third party funding to operate and develop to a point of profitability and that the value of the Company's shares on the secondary market in June 2016 was essentially nil. This view was strongly supported by Mr Thieriot and Mr Milby (see Milby-WS at [14]). I find this to be convincing and critical context when assessing the justifications for the approval of the 2016 Transaction.

475. It seems to me that the evidence establishes that the Company was in mid-2016 a start up at a relatively early stage of its development which faced liquidity challenges and tough commercial decisions as how best to survive and develop the Company's business. The Company was managed by a number of strong personalities and the personal conflicts and tensions between them complicated and on occasions disrupted board decision-making. There were clearly strongly held differences of view as to the best way forward, and in particular as to the levels and objects of corporate expenditure and how best to raise the further funding required. It seems to me that the disputes relating to the levels and types of expenditure to which Mr Laggner referred represented genuine differences of view regarding business and commercial issues. In my view, the differences of view over whether to approve the Steckel Transaction were also ultimately grounded in differences of commercial and business judgment (including Mr Parsa's email of 2 January 2018 in which he had said that the 2016 Transaction had "*saddled the company with $15MM in debt, interest on which is being paid in kind*").

476. Mr Laggner supported by the other Petitioners sought to characterise the 2016 Transaction as simply a capital raising exercise in which Mr Steckel had directed or pressured the board into agreeing to issue shares to him and give him the right to appoint the majority of the board at a substantial undervalue and without properly considering alternative cheaper and less dilutive terms. But this is a mischaracterisation. The evidence does not show that Mr Steckel designed and used the loan/warrant structure as a disguised means of obtaining shares at a substantial discount. There is no evidential basis for holding that Mr Steckel (Uphold Holdings) did not want to have the enhanced rights and protections associated with holding debt rather than equity and that the issue of a warrant with the right to acquire 50% of the Company's voting shares was not a proper *quid pro quo* for taking the risk of lending a substantial sum to a company facing financial difficulties and an uncertain future. There is also no evidential basis for concluding that requiring the right to obtain voting control was improper, unfair or wholly unreasonable in the circumstances. As R2-R4 pointed out, and I have noted above, Mr Laggner's White Knight Proposal itself included a term that the holders of preferred stock would have the right to control the majority of the board until the loan to be advanced had been repaid and a qualified financing had occurred, at which point the investors funding the loan would have the right to appoint two-fifths of the board.

477. The evidence also shows that the directors other than Mr Steckel did consider the terms and high cost of the 2016 Transaction but concluded that it was in the Company's (and all shareholders) best interests to accept the terms and proceed. I have quoted, for example, Mr Thieriot's evidence above (see for example Thieriot – WS1 at [50]-[52] in which Mr Thieriot said that the board had attempted to improve the terms but had been unable to do so). It seems to me that the context I have discussed provides an important background for the board's decision making. They were focused on finding a funding solution that would save the Company from insolvency and allow it to continue. That was the corporate and commercial imperative. It did follow that shareholders' interests were to be disregarded and ignored but this context did mean that shareholders' interests ultimately required that a funding transaction be agreed and if, as the evidence shows, the only realistic and viable deal on offer was expensive and dilutive, then that was in the shareholders' interests. The

shareholders were in jeopardy and an expensive and dilutive transaction was ultimately what has preserved the value of their shares and allowed them to grow considerably in value.

478. It also seems to me that the evidence I have summarised and highlighted above shows that the board gave Mr Laggner and Mr Bechtel every opportunity to present a viable alternative offer and repeatedly extended the deadline for doing so. For example, as I noted above, it is clear that despite this instruction at the 27 June 2016 board meeting to the Company's legal advisers to close the Steckel Proposal as soon as practicable, discussions continued with Mr Laggner and Mr Bechtel to see whether the requisite level of committed funding for the Outpost proposal could be obtained and whether the terms of that proposal could be improved to match or improve on the Steckel Proposal. As I have also noted, on Sunday 26 June 2016 Mr Watson had emailed Mr Laggner (copied to Mr Thieriot and Mr Milby) and asked Mr Laggner "*do you have something to come back to the Board with?*" and that during his cross-examination Mr Laggner had accepted that this indicated that Mr Watson was trying to ensure that any proposal which Mr Laggner wished to put forward was considered (Day 3, page 79). Further, as I have pointed out above, on 29 June 2016 Mr Ling emailed Mr Thieriot to point out the need to defer the board meeting for a further 8 hours give Mr Laggner an opportunity to make progress and confirm his position and to ensure that there was "*fairness and equal conditions*" applied as between the competing proposals (see also Mr Thieriot's email of 30 June 2016 also referred to above). I would also note Mr Watson's email of 7 July 2016 to Mr Laggner (which once again is quoted above) and his email of 8 July 2016 to the other directors when he asked for there to be a formal meeting *"to discuss the implementation and logistics of Adrian's approved offer (as of June 24th) - and/or discuss any other potential offers and/or side-by-side offers, as per Bill's email this week. I am confident we shall achieve the right outcome for all shareholders….*" (this last email is also evidence that Mr Watson was focussed on the interests of the Company and all its shareholders).

479. The evidence also shows that there were a large number of parties involved in the White Knight Proposal, that some of them (including Mr Chen) had imposed conditions on their support which gave rise to real uncertainties and the process of finalising the terms took

some time and appeared not to have been concluded by the end of June. Mr Chapman's cross-examination of Mr Laggner regarding the level of committed support that had been provided for the White Knight proposal on the critical dates of 27 and 29 June (Day 3, pages 152-157) revealed that Mr Laggner was relying on a material number of verbal assurances from prospective investors and that it was likely that Mr Chen's commitments were subject to the terms which Mr Laggner was unable to comply with. As the extract from Mr Laggner's cross-examination set out above reveals, Mr Laggner was evasive and sought to avoid admitting what seems to me to have been clear, namely that Mr Laggner had been unable to deliver and confirm a clear unconditional offer of funding above US$8 million supported by written commitments from his investors. In these circumstances, it seems to me that the board acted reasonably and properly in concluding that the White Knight Proposal was not finalised and that in view of the need to have the further funding urgently they could wait no longer for Mr Laggner to attempt to bring the White Knight Proposal to a conclusion.

480 It seems to me that the Petitioners were right to criticise the board for corporate governance failure in the period before mid-June 2016. The absence of board meetings in the period October 2015 and June 2016 was such a failure. I note Mr Milby's evidence that the first board meeting that he had attended following his appointment as a director was held on 17 June 2016 almost a year after his appointment and that although board meetings had been scheduled prior to that date they were all cancelled for reasons unknown to him (see Milby-WS at [13]). Mr Thieriot argued during his cross-examination that these types of corporate governance oversights were normal for and to be expected in small early-stage companies and while regrettable did not indicate deliberate wrongdoing or justify serious criticism. I have some sympathy for this view but consider that boards of companies with outside shareholders, as the Company was because of the Series A and Series B fundraising rounds, need to take greater care in observing corporate formalities and maintaining proper records. The failure to hold board meetings for an 8–9-month period was in my view unjustifiable. I also note that the Company said and that much of the Company's information and formal records from 2015 to 2017 were on Mr Brooke's laptop when he left the Company in acrimonious circumstances in 2017 which laptop was never returned to the Company. But as I commented during the trial, that of itself (having important corporate information and

records in one place which was outside the control of the board) was evidence of inadequate governance and a failure to observe proper practices.

481. However, as Mr Thieriot also noted, the directors had ensured that during the critical period from mid-June 2016 proper attention was paid to the need for board meetings and the recording of board decision making. This did evidence an important showing of a change of approach. There were still some problems and I shall return to these shortly, but I do not consider that there were failures, let alone deliberate and calculated failures, by the board to observe the requirements of proper collective board deliberation and decision making in relation to the decision whether to approve the 2016 Transaction and reject the White Knight proposal. The evidence shows that all board members participated in the deliberations and decision-making and fully discussed relevant matters. I note Mr Brooke's important email on 7 July 2016 to Mr Friedberg headed "*Privileged and Confidential*" in which he set out (following Mr Laggner having raised various questions and challenges) his account, based on his own personal and direct involvement, of the board's deliberations and decision making.

482. One of the problems that did affect the process for approving and implementing the 2016 Transaction relates to the absence of proper independent Cayman law advice. This was a matter which the Petitioners highlighted and complained about. I shall have more to say about this when I come to consider the Petitioners' claims that the Company failed to comply with the requirements of the Articles and breached its obligations under the IRAs when approving and entering into the 2016 Transaction. But looking at the position in the period when the 2016 Proposal was under discussion and being structured, it seems to me that the Company needed but did not obtain the active assistance of Cayman qualified attorneys. Mr Brooke should have appreciated that they needed to be given a more central role in providing advice to the board. Primary reliance on US qualified counsel even though there were some discussions with Cayman attorneys was an error of judgment which resulted in or materially contributed to the failures to comply with the Articles and the IRAs as I discuss below. But I do not consider that the evidence shows that this was deliberate or calculated and part of a

pattern of conduct designed to ignore the rights and damage the interests of the independent shareholders.

483. The Petitioners also criticised Mr Brooke for having engaged in discussions with Mr Steckel's (Uphold Holding's) legal advisers regarding how to proceed with and structure the Steckel Proposal and ensure that Mr Steckel and Mr Salinas were able to acquire the requisite level of control even without Mr Minor's support. I do not consider that Mr Brooke's conduct was evidence of a conflict or his acting (alone or with Mr Steckel) against the interests of the Company. In circumstances where the Company was known to be facing a serious liquidity crisis it was legitimate and proper for Mr Brooke to be focussed on finding a way to make the proposed transaction work and to obtain the funding that the Company needed to survive.

484. As I have also discussed above, I am satisfied that the minutes prepared by Mr Brooke were an accurate and reliable record of what the board had discussed and decided and that by signing and returning to Mr Brooke (on 14 September 2016) the written consent form Mr Laggner confirmed that he agreed and accepted that the board minutes for the 15 July 2016 meeting (at which board approval for and ratification of Mr Thieriot's execution of the 2016 Transaction documents was confirmed and formalised) were accurate. As I have noted above, Mr Laggner's answers during his cross-examination on this issue were evasive and to the extent that he sought to deny that he had given his approval to all the minutes including those for the 15 July meeting, were unconvincing. That Mr Laggner had decided before that meeting to drop any objections to the 2016 Transaction is also evidenced by his emails of 11 July 2016 to Mr Parsa and Mr Watson and to Mr Fontg (which I have quoted from above).

Did the board need or should it otherwise have obtained further approvals before granting the Warrant? Was the granting of the Warrant unfair to and did it result in the proper interests of the Petitioners and other independent shareholders being disregarded or subordinated?

The Articles

485. It seems to me that R2-R4 and the Company were right to say that since the Warrant was only concerned with the issuance of ordinary shares and did not involve the issuance of any shares with a preference over or being pari passu with any series of Preferred Shares with respect to dividends, liquidation or redemption the board was authorised under the Articles to cause the Company to assume an obligation to allot and to allot ordinary shares pursuant to the Warrant (see article 3.2(v)(6)). Further, the Company was not at the time required to increase its ordinary share capital or authorise any ordinary share issuance as the ordinary shares were already available to be issued.

The IRAs

486. However, it seems to me that the Petitioners are right to say that the Company was under an obligation under the IRAs to offer each preferred shareholder who was a party to an IRA their proportionate share of the rights granted by the Warrant. This should have been done before the Warrant was granted.

487. As I have noted, Section 2.5 of the IRAs granted preferred shareholders who were parties to the IRAs a right of first offer "*in respect of future sales by the Company of its Shares*." Under this provision the Company was required *"each time [it] proposes to offer any …. securities convertible into or exchangeable or exercisable for any of [its] share capital ("Shares")*" the Company had first to give such preferred shareholders an opportunity to subscribe for and be granted a proportionate share of such convertible securities. The Warrant was such a convertible security.

488 I do not accept the submission made by R2-R4 that the right of first offer was not triggered or engaged because the exception in Section 2.5(d)(ix) applied. That sub-section provides that the right of first offer did not apply to "*the issuance of shares, warrants, or other securities or rights pursuant to any …. debt financing from a bank or similar institution, provided such issuances are primarily for other than equity financing purposes and have been approved by the Board.*" While the Warrant was issued pursuant to a debt financing, I think that the Petitioners were right to say that Uphold Holdings would not satisfy the

requirement that the financing was from "*a bank or similar institution*." This was not an issue that explored in any depth by reference to the relevant factual matrix background to the IRAs or relevant authorities so that I must deal with the point as a matter of first impression. I take that term to require that the lender was at least an entity whose general business was or included making loans so that it made multiple loans to multiple customers as part of a lending business (and possibly that it was a regulated entity). The exception would therefore not apply to a lender who only made a single or occasional loans. As I understand it Uphold Holdings did not conduct a lending business in that sense.

489. R2-R4 also argued that the right of first offer did not apply because Section 2.5 only applied to a "*sale*" of Shares and the issue of the Warrant did not involve such a sale. It only involved the acquisition of ordinary shares already issued pursuant to the Company's Articles and not the issuance or sale of any preference shares. Once again, this was not an issue that was explored in any depth by reference to the relevant factual matrix background to the IRAs or any authorities. But I am not persuaded that R2's-R4's argument is right. There was a cash exercise price under the Warrant (when the Warrant was exercised Uphold Holdings was required to pay US$0.0001 per ordinary share) so that the shares were acquired for a monetary consideration and can therefore be treated as involving a sale.

490. Of course, it appears that the board did not take Cayman law advice at the time and so did not rely on advice that exceptions to the right of first offer applied. The Petitioners' criticism of the board's conduct was in part based on this failure, as evidencing a complete failure to have regard to and observe basic corporate governance requirements.

Even if shareholder approval was not required by the Articles should the board nonetheless have sought and obtained shareholder approval before approving the 2016 Transaction and granting the Warrant?

491. It seems to me that in the circumstances the board was justified in not seeking shareholder approval before approving and entering into the 2016 Transaction and the Warrant.

492. As I have already noted, the Warrant was granted as a necessary part of the 2016 Transaction in conjunction with the RCA Loan. It had to be granted in order to obtain the emergency funding that the Company needed so as to be able to survive. I have already indicated that I consider that the board acted reasonably and properly in accepting and approving the 2016 Transaction in view of the financial crisis that the Company faced and in the absence of a deliverable alternative financing proposal. The Company, as the evidence in my view indicates, was on the verge of insolvency so that the shares in the Company at that time would have been worthless without the debt funding and after the debt funding were probably of little or no value until the Company's fortunes revived sometime in 2018. In those circumstances, particularly in view of the difficulties and disputes with Mr Minor and the need to obtain the funding immediately, it was reasonable for the board to decide not to seek shareholder approval before agreeing to grant the Warrant.

493. It must have been contemplated at the time that the Company would struggle for a period to pay in cash the very high rate of interest on the RCA Loan and would have to exercise its right to pay interest in kind by issuing shares to Uphold Holding (Mr Steckel) so that Mr Steckel would receive a substantial number of shares over time. But this was justifiable both because the alternative was insolvency and because as Mr Thieriot's evidence made clear, the board hoped that funding raised pursuant to the White Knight Proposal (if it could be put into an unconditional and acceptable form) and the Series B fundraising would raise sufficient funds to reduce the amount and therefore the interest burden of the RCA Loan.

Did the board need further approvals before issuing the Series B2 Shares?

494. There is no dispute that the Company needed under the Company's Articles but failed at the time to obtain shareholder approval in order to authorise the creation and issuance of the Series B2 Shares (as well the Series B1 Shares). There was no prior authorisation to issue preference shares of that class.

495. There is also, as I understand it, no dispute that the Company also needed under the Articles but failed at the time to obtain the approval of the majority of the Series A and of the Series B shareholders pursuant to article 3.2(v) of the 2015 Articles.

Did the offer of Series B2 Shares to preferred shareholders cure the breach of the IRAs?

496. It seems to me that while the offer of Series B Shares on the terms set out in the term sheet and as described to preferred shareholders in the Company's communications in July 2016 did not precisely comply with the first offer requirements of the IRAs it was a genuine attempt to give them shares of substantially similar value (that would fit in with the Company's already complex capital structure) and it was not done in deliberate disregard of their interests and rights or with a view deliberately to diluting them and prejudicing their position. The offer was made after the execution of the 2016 Transaction Documents but only shortly thereafter and while discussions continued as to whether the White Knight Proposal could still be made to work and as an understanding of the impact of the 2016 Transaction and of the Company's remaining funding needs continued.

497. I agree with R2-R4 that the Series B Preferred Share offering was undertaken alongside the 2016 Transaction when the board was operating at pace and under considerable pressure.

498. As I have explained above, the process of putting in place the urgent funding needed by the Company in mid-2016 continued beyond the execution of the 2016 Transaction Documents on 30 June/1 July 2016. It was an ongoing and extended process during which the board attempted to arrange for funding from Mr Laggner/Mr Bechtel and their co-investors in parallel with and to sit alongside (and to reduce the quantum of) the RCA Loan and during which the need to give preferred shareholders the opportunity to subscribe for further shares and avoid dilution was identified and discussed. Mr Thieriot said that he had taken steps in early July to ensure that the key preferred shareholders were made aware of their ability to participate in the 2016 Transaction and that he believed that Mr Laggner and his proposed co-investors were fully informed of what was happening and so were also alerted to the board's thinking that the preferred shareholders would be given an opportunity to participate

(see Thieriot-1 at [52] quoted above). The evidence shows that the board addressed the need to give other shareholders the opportunity to avoid dilution by participating in the 2016 Transaction at a relatively early stage both in the RCA (see clause 3.3) and at the board meeting on 11 July 2016. At this point the overall financing package remained in flux (there were still a number of moving parts) and was just crystallising. Because of this, the board was also conscious of the need to ensure that the preferred shareholders would have adequate time to consider their position, and it was agreed to make provision for them to have additional time to decide whether to participate. As it became clear that the White Knight Proposal could not be relied on and taken forward further work needed to be done as to how to give the preferred shareholders the opportunity to participate and avoid dilution and in a relatively short period a term sheet for the Series B Share offering was prepared. It was considered and approved by the board at the board meeting on 20 July 2016 and an email was sent to all preferred shareholders the following day (21 July 2016).

499. The email dated 21 July 2016 sending the term sheet, as I have noted above, informed each of the preferred shareholders that "*Uphold has secured a $15mm debt and equity financing from some of its key shareholders. Under the Investor Rights Agreement, you are entitled to participate in the equity portion of that financing. If you do not participate, the total dilution to you that is attributable to the financing will be 50%. Below please note the exact number of shares and the cost of exercising your anti-dilution rights in order to maintain your current percentage ownership. The vehicle through which preferred shareholders will be able to exercise their anti-dilution rights is a Series B2 Preferred. The Series B2 Term Sheet is attached. Also attached is an Indication of Interest Form*."

500. This email did not disclose that the lender was a company controlled by Mr Steckel, the key terms of the RCA or refer to the Warrant granted to Uphold Holdings, but it did explain the potential dilutive effect of the Warrant and its impact on the rights of the preferred shareholders.

501. But there were bilateral discussions taking place with preferred shareholders (see Mr Thieriot's email dated 21 July 2016 to Mr Peacock of Hannover which I have quoted from

at [126] above) and a call with the preferred shareholders was held on 25 July 2016. While there is no record of what was discussed and disclosed on that call there is evidence from which it is possible to form a view as to what the preferred shareholders were told.

502. Mr Thieriot, as I have noted above, said (in Thieriot-WS at [100]) that the purpose of the call was to explain the 2016 Transaction and that he recalled that Mr. Watson had explained the 2016 Transaction and why the board had agreed to it in the circumstances "*whilst conceding certain points to concerned shareholders, including regarding the dilution caused by [it]*." Mr Thieriot had also emailed Mr Watson and Mr Steckel on 23 July 2016 (the Saturday before the call on the following Monday) with some preliminary thoughts as to the agenda for the call:

> "- *Opening of call by Anthony Watson*
>
> - *Explanation of Bridge Financing*
>
>   - *Company found itself in a position where it needed to put a bridge in place*
>   - *20% Dilution deal was put on table requiring Halsey to accept an option that would have given him $10mm for 30% of 46% position*
>   - *He refused, stating that he'd prefer to put the Company into bankruptcy*
>   - *He resigned from the Board*
>   - *Board then worked hard to find a solution that provided requisite certainty and speed of close, while conceding many terms to concerned shareholders, and opening participation in the dilution package, on a pari passu basis, to all preferred shareholders*
>
> - *Explanation that company is entering a New Operating Phase, highlighting either (#1 - Anthony move to Uphold Bank PLC, Adrian Steckel assuming the reins as acting CEO) or (#2 - Adrian Steckel the new Executive chairman) - You two guys decide how you want to spin*
>
> - *Introduction of Adrian Steckel*
>
>   - *Personal Background, Credentials*
>   - *General Principles behind New Operating Plan*
>   - *Details on the New Operating Plan*
>   - *PaaS*
>   - *Bank Licenses*
>   - *Remittance*
>   - *UMS*

- *Q&A*
- *Promise to deliver materials"*

503. It seems to me to be likely that the preferred shareholders were given a reasonably full account of the terms of the 2016 Transaction and the reasons why the board had decided to approve and enter into it. The detail provided by Mr Thieriot to Mr Peacock and Mr Thieriot's open and candid discussion of the history of the negotiations surrounding the 2016 Transaction indicates that there was no desire to hide the details of the 2016 Transaction from the preferred shareholders and I consider that there would have been no deliberate withholding of relevant information on that call. The preferred shareholders were certainly alerted to this the dilutive effect of the Warrant and the given an opportunity to raise issues and concerns. I note that Mr Thieriot did not refer in his email to Mr Peacock to the exercise price under the Warrant and point out, as full disclosure required, that it was different from the offer price for the B2 preferred shares but it would have been open to preferred shareholders to ask about this and I note that Mr Thieriot's draft agenda did indicate that there would be a promise to deliver materials to the preferred shareholders.

504. It therefore seems to me that the Petitioners complaint that the preferred shareholders were not told about the 2016 Transaction in a timely manner and that the board (acting under the control/direction of or acute pressure from Mr Steckel) had deliberately sought to keep the preferred shareholders in the dark and to inform them of the dilution of their rights is not made out.

505. I would add that I note that the revised Series B2 term sheet sent out on 24 August 2016 offered improved terms as to liquidation preference.

Did the resolutions purportedly passed at the February 2017 EGM cure the breaches of the Articles?

506. The Petitioners argued that the resolutions considered at the February 2017 EGM were not properly passed so that the Company had failed to amend the Articles and approve the

creation and issuance of the Series B1, B2 and B3 Shares and the creation of the Series C Shares.

507. As I understood their case at closing, the Petitioners no longer claimed that a valid notice of the EGM had not been given. In any event, I accept the submissions made by R2-R4 on this issue as summarised at [390] above. There is no basis for concluding that proper notice of the EGM was not given to all shareholders with a right to attend and vote at the EGM.

508. It also seems to me that the evidence shows that Ms Turner was a holder of Series B shares and entitled to vote that the EGM. There is no basis on which to conclude that her proxy was not validly given and executed (see [389] above).

509. R2-R4 and the Company submitted that the only shareholders entitled to vote (and who did vote) at the February 2017 EGM were the ordinary shareholders and the Series A and Series B preferred shareholders and that valid proxies had been received from shareholders holding shares of these types. They submitted that a majority (all) of the shareholders who voted had approved the resolutions proposed at the meeting.

510. The evidence, as I have explained at [148]-[151] above, shows that there was a meeting at Maples' offices attended by Mr Brooke as chairman and that he proposed the relevant resolutions and relied on the proxies he had received to pass them. All the proxies gave instructions for a vote in favour of all the resolutions. The number of shareholders attending and voting by proxy satisfied the quorum requirement.

511. It appears that voting was undertaken on the basis that holders of ordinary shares and preferred shares each had a vote on each of the resolutions proposed at the meeting. Mr Steckel voted his ordinary shares and his Series A and Series B shares; Kylie Holdings voted its ordinary shares and Series B shares; Uphold Holdings in respect of its ordinary shares and Ms Turner in respect of unidentified shares (which must be taken to be Series B shares as these were the only shares which she appeared to hold).

512. On the face of it, therefore, it appears that the February 2017 EGM was validly convened, quorate and properly conducted so that the resolutions were validly passed.

513. The Petitioners argued (see [52(2)] of the Points of Claim) that Mr Steckel (Uphold Holdings) and Mr Chen (Kylie Holdings) should not have been permitted to vote "*because they had only acquired their shares as a result of the 2016 Transaction*." Further, "*they were allowed to vote the very shares that the meeting was itself was purporting retrospectively to authorise…*".

514. However, neither of these challenges and complaints are justified. First, as I have noted, Mr Steckel voted his Series A and Series B shares which he held and were issued before the 2016 Transaction. Further, at the time there was no challenge to the right of Mr Steckel and Mr Chen to vote their shares. As I have held there was no basis for such a challenge which the Company could maintain. In so far as the issue of the Warrant Shares had given rise to a breach of the IRAs, that was primarily a matter for the preferred shareholders who were parties thereto, but none had complained let alone sought to restrain the issue of shares to Uphold Holdings (and Kylie Holdings). It was also not the case that the shares that were voted at the February 2017 EGM were the subject of the resolutions considered and approvals sought at that meeting.

515. But there was a further problem. As the Petitioners noted, and as Mr Sweetman had advised, under article 3.2(v) of the 2015 Articles the Company was not permitted to "*authorise or issue …. any shares ... having a preference over or being pari passu with any [existing series of preference shares] with respect to dividends, liquidation or redemption"* without obtaining the prior approval or consent of a majority of the holders of both the Series A and the Series B preferred shares. It appears that a majority of the Series B preferred shares was obtained (because of the proxies from and votes of Kylie Holdings and Uphold Holdings/Mr Steckel) but that a majority of the Series A preferred shares was not obtained (see Mr Sweetman's email dated 20 July 2021 referred to at [252] above).

516. Accordingly, all the requirements for passing the resolutions proposed at the February 2017 EGM were not met. The consent of the majority of the holders of the Series A preferred shares was required but was not sought or obtained.

517. The Petitioners alleged that the February 2017 EGM had been "*a paper exercise*" and effectively a sham. The claim was in essence that the meeting had been convened with a view to preventing or making it very unlikely that the independent shareholders would be able to participate. In my view, there is no basis for such a conclusion. It was certainly the case that the EGM was convened on the shortest possible notice and that the other ordinary, Series A and Series B shareholders did not participate (save for Ms Turner). But in my view, they were given proper and adequate notice and had the opportunity to participate or at least to ask for meeting to be adjourned so they had more time or to raise objections. The other independent shareholders chose to do neither of these things, and I do not consider that the Company can be criticised for acting in the way it did. This was not an attempt surreptitiously to pass and push through by underhand means the 2016 Transactions and the share issues made in consequence of it. It seems to me to have been a genuine effort to obtain shareholder approval for those matters that had been identified as requiring it.

518. But the failure to appreciate the need to obtain the approval of the majority of the Class A and Class B preferred shares was a serious failure which was another the result of the board's (Mr Brooke's) failure to obtain Cayman law advice at the time. This was an error and probably negligent. Preferred shareholders had been given a complex set of protections and rights and much more care should have been taken to ensure that the relevant provisions of the Articles and the IRAs were thoroughly reviewed and understood with the benefit of specialist Cayman law advice. However, I do not consider that this failure was deliberate or part of a plan to ignore the rights of the preferred shareholders. It is likely that the individual board members were relying on Mr Brook to check the legal requirements and were unaware that the approvals sought at the February 2017 EGM were incomplete.

Was the Third Amendment properly considered and approved by the board

519. On balance, I consider that the board did consider and approve the terms of the Third Amendment including the use of the US$48 million valuation although the evidence is incomplete. It appears however that the process adopted to negotiate and review the implications of those terms was inadequate. Insufficient independent legal advice was obtained and an important provision, namely the term determining the valuation to be used for determining the quantum of PIK interest shares to be issued by way of payment of interest on the RCA Loan, appears to have been approved without taking the time and independent advice required to assess fully what was needed to protect the interests of the Company and its independent shareholders. The result was a failure to consider whether an adjustment mechanism needed to be included to protect those interests. It was also clearly unfortunate and a corporate governance failure that proper and detailed minutes were not kept.

520. I accept the Company's submissions that the Court should conclude that the evidence shows that it is likely that the board did consider and approve the Third Amendment. Both Mr Steckel and Mr Thieriot stated in evidence that there would have been a board meeting to approve the Third Amendment. I have discussed and quoted their written and oral evidence above. Mr Steckel's recollection was limited. He said he could not remember the relevant period. But he was clear that there would and must have been a board meeting to approve the Third Amendment. Mr Thieriot's evidence was also that he could not actually recall the meeting taking place, but he was clear that one must have been held. He said he would not have signed the Third Amendment document without there having been board approval. Mr Milby was unable to recall there having been any such board meeting.

521. I am prepared to accept Mr Steckel's and Mr Thieriot's evidence because I have found them both to be generally honest and credible witnesses but I also regard it as important that (a) the Company was able to find a contemporaneous email that referred to a board discussion on this issue and (b) Mr Steckel and Mr Thieriot were able to give a reasonable explanation as to why the formal record of the meeting was missing/not produced.

522. As I have noted above, on 9 March 2017, approximately two months before the execution of the Third Amendment, Mr Brooke sent an email to all the directors and Mr Fontg in connection with a forthcoming board meeting by telephone call. The subject heading to the email was (my underlining): "*Conference Created: BOD call to discuss/review/approve additional Chen loan participation on Thursday March 09, 2017 @ 6:30 am (PST)*." In the email Mr Brooke referred to the draft documents and continuing discussions relating to the anticipated participation in the RCA Loan by Mr Chen. Mr Brooke said as follows (my underlining): "*Path forward to initial funding of $1m assumes that we are executing only the binding term sheet at this time. The follow-on documents, including a formal amendment to the loan facility, would follow. Within the binding term sheet, at this point, the primary issue for Uphold Ltd. is PIK interest: - at this point, we've settled on 2.5% PIK which would convert to ordinary shares at a $48m valuation*."

523. It is reasonable to infer and conclude from this email that the board did discuss at a board meeting the terms of what came to be the Third Amendment including the use of the US$48 million valuation. The email also makes it clear that Mr Brooke had highlighted the PIK interest terms including the provision relating to the US$48 million valuation as being important. It seems to me that this shows that the board would have focussed on and considered this issue. This is strong corroboration for Mr Steckel's and Mr Thieriot's evidence. Mr Thieriot's recollection and oral evidence that he had thought at the time that the US$48 million valuation was a fair one also supports the conclusion that the issue was considered at the time. Mr Brooke's email was a little before the Third Amendment was executed and as a result it might be said that it was of less weight in showing that there had been a further board meeting at that time to approve the execution of that document. But the important point to my mind is that Mr Brooke's email is strong evidence that there had been at least one board meeting at which the Third Amendment had been considered. The subsequent agreement and assent of all the directors to the execution of the document even outside a formal board meeting would (as Ms Moran pointed out – see [207] above) be sufficient and it seems to me that Mr Steckel and Mr Thieriot can be taken to have confirmed that board approval by whatever means was given. While Mr Steckel was involved in these board discussions, I see no reason for concluding that he would not have continued the

consistent practice that he had previously observed of recusing himself from participating in the board's decision making on this issue.

524. The explanation given for the absence and failure to produce board minutes was that either (a) they had not been produced because Mr Brooke, who had always had responsibility for taking notes of board meetings and discussions and preparing minutes (albeit after the event) was disengaged at that time and not fully or actively involved in the process surrounding the Third Amendment (see [164] above) or (b) they were on Mr Brooke's corporate laptop which the Company no longer had access to. Mr Brooke, whose role had been critical in keeping a record of board decision making, left the Company in acrimonious circumstances in 2017. He had delivered a resignation letter in April 2017 and his employment was formally terminated in June 2017 (he had filed a complaint alleging discrimination, but the Company suspected him of being complicit in acting to take its code as well as being general counsel for another company). As a result, minutes of the board meeting on 9 March and the subsequent meeting when the Third Amendment had been approved or Mr Brooke's notes relating to the meetings were probably stored in Mr Brooke's company laptop which he never returned after leaving the Company (see Mr Steckel's cross-examination at Day 5, page 95 and Day 7 at page 41). As I noted at the hearing, it seems to me that this was in itself a corporate governance failure because arrangements should always be put in place to ensure that important corporate records are centrally stored in a safe location controlled by and available to the Company and not just held by individual third parties or employees.

525. I do not consider that the board can be criticised for agreeing to having the option to pay PIK interest. As I have already noted in view of the Company's liquidity problems at the time of the 2016 Transaction and when Mr Chen agreed to lend further funds and participate in the RCA Loan, the option was of real benefit to the Company (and in many respects essential to its survival). Mr Thieriot's oral evidence was that "*In this instance, could we have paid in cash instead of running up this horrible tab? Unfortunately not. It was in a period where we didn't have an abundance of cash. Was the toll very high? Yes, it was. Did we have an alternative? No. Would I have pushed for that alternative as hard as possible? Yes*." (Day 8 page 62).

526. The main problem with the board's decision making, as Mr Thieriot and Mr Hilton openly acknowledged, was a failure to think through the consequences and risks associated with agreeing to a fixed invariable valuation as the reference point for calculating the quantum of PIK shares to be issued. Mr Thieriot was candid in admitting that he regretted that this had not been done and he, Mr Milby and Mr Hilton were all clear that the result had been to give Mr Steckel (and Mr Chen) a major windfall. It seems to me likely that had the board been advised by independent Cayman Islands attorneys they would have advised caution and raised the issue of the risk associated with a fixed valuation figure.

527. Independent attorneys would also I think have put down a marker that it was important for the board to demonstrate that it had made an independent assessment of these important terms in the Third Amendment in view of Mr Steckel's involvement and clear conflict of interest.

528. I have noted and taken into account the careful analysis and reasonable concerns expressed by Kleinbard on this issue (see [205] above) as well as the thoughtful and insightful comments made Ms Moran in her email of 1 September 2021 (see [207] above). However, it seems to me that the evidence adduced at trial has advanced matters considerably and that a number of these concerns have been disposed of and dealt with. I must obviously make my findings and decisions by reference to all that evidence.

529. I have also noted Mr Anderson's concern that much weight was placed on Mr Westerfield's shoulders as the main independent director involved in the process and that his position and ability to take an independent view were made difficult and possibly even compromised because he worked for Mr Steckel as CEO. It seems to me that Mr Thieriot's evidence strongly suggests that this concern is unfounded or at least overstated and that it is likely that Mr Thieriot and Mr Westerfield (and the other directors) did separately and independently focus on the US$48 million figure and were satisfied that it was justifiable at the time. But without the benefit of independent counsel (or at least the full engagement of Mr Brooke acting separately from Mr Fontg) they missed the potential downside of agreeing to an invariable and non-adjustable valuation. I note that the Company and R2-R4 pointed out that

such an adjustable valuation would have had to provide for both an upwards and downwards adjustment so that if there had been such a mechanism and events had subsequently been different, the fixed US$48 million valuation would have turned out to be for the benefit of the Company and its other shareholders. But the proper criticism of the board's decision-making process is not that they agreed to a fixed valuation but that they did not assess and discuss the risks of doing so.

530. But once again, it seems to me that the board's failings did not evidence a deliberate disregard for the interests of, or the need to take into account the interests of, the independent shareholders. The process relating to the approval of the Third Amendment and the agreement to the fixed valuation of US$48 million did not involve conduct lacking in probity. I do not consider that Mr Steckel or the other directors acted in breach of their fiduciary duties. They made a mistake in failing to appreciate the significance of agreeing to a fixed valuation and in failing to ensure that they had the benefit of suitable independent legal advice, and ultimately in failing to propose that a suitable adjustment mechanism be included. This might arguably amount to a failure to take reasonable care, but I consider that I should be cautious about forming a view as in circumstances where no valuation evidence has been adduced by the Petitioners and where it is wholly unclear on the evidence that it would have been possible for the Company to have insisted on incorporating an adjustable valuation amount. R2-R4 and the Company have strongly argued that had the US$48 million valuation issue been fully particularised in the pleading they would have wished to call additional witnesses and evidence on the issue. Further, the evidence did not establish that it would in fact have been possible to persuade Mr Steckel and Mr Chen to include such an adjustment mechanism. It appears that the PIK calculations were originally proposed by Mr Chen's representatives and Mr Steckel made it clear that he considered that Mr Chen was insistent that the US$48 million be used. In any event, in my view the conduct of the directors in relation to the Third Amendment certainly does not constitute conduct demonstrating a lack of probity.

531. The Petitioners argued that Mr. Steckel's receipt of PIK interest shares on the basis of an outdated valuation involved a clear breach of his fiduciary duty to the Company. They argued

that his subsequent refusal voluntarily to hand back any of the shares he had unfairly received (in contrast to the position taken by Mr. Chen) underlined his failure to take his responsibilities to independent shareholders seriously and to act in the interests of the Company. The Petitioners also said that the board's subsequent decision (made at Mr. Steckel's direction as Chief Executive Officer) to pay interest due to Mr Steckel's own company in the form of shares on the basis of the outdated valuation was also a breach of fiduciary duty by Mr Steckel. I reject these claims. As I have already said, I am satisfied that the directors did consider and approve the terms of the Third Amendment on the basis of a commercial assessment of what was in the interests of the Company and not Mr Steckel and that the Petitioners have failed to establish that entry into the Third Amendment involved a breach of the directors' fiduciary duties. In those circumstances, as Mr Hilton pointed out and the Litigation Committee ultimately concluded, Mr Steckel had a contractual right to require that PIK interest be calculated by reference to the fixed US$48 million valuation. The Petitioners have also failed to establish that the decision to exercise the option to pay PIK interest was taken by or under the control of Mr Steckel. The evidence shows that the main decision maker was Mr Westerfield (ultimately in consultation with and subject to approval by the board) who based his decision on financial and liquidity grounds. It seems that the Company's poor liquidity made it almost inevitable that the option to pay PIK interest would have to be relied on and exercised.

The Litigation Committee's decision not to bring proceedings against Mr Steckel in relation to the receipt of PIK interest

532. As I have already noted, I consider that the Litigation Committee's decision not to cause the Company to bring proceedings against Mr Steckel in relation to his receipt of PIK interest and his involvement in the process by which the US$48 million valuation was agreed was in the circumstances reasonable and rational. It seems to me that the Litigation Committee properly addressed and took into account the weak merits of a claim and the adverse commercial consequences of such litigation. I can see that it might be said that Mr Steckel's ability to rely on the wide indemnity given to him in the Articles gave him unfair leverage that made it more difficult for the Litigation Committee to decide to bring proceedings but the fact of the matter is that such indemnities in corporate constitutions are permitted in this

jurisdiction, are standard, were legitimately included in the Company's Articles and there was no challenge to their validity. The Litigation Committee was required to treat the indemnity as valid and to take into account its impact on a decision to litigate. I would however add that I have some sympathy with the disappointment felt by many at Mr Steckel's refusal to give up any part of the substantial windfall (the benefits of the "*great deal*" as Mr Hilton described it) that he has received as a result of the use of the fixed US$48 million valuation. I can see why the independent shareholders at least might feel that giving up some of the very large number of PIK shares that he has received (despite his contractual entitlement to receive them) would be an appropriate and fair gesture in the circumstances and would be seen as a contribution to common shareholder loyalty and commitment to the Company. However, this is ultimately a matter for Mr Steckel to decide and I do not consider that Mr Steckel's failure to do so (and his reliance on his strict legal rights and entitlement) can be said to be a breach of his fiduciary duties as a director of the Company.

Were shareholders told about the issue of PIK shares to pay interest and the dilutive impact of doing so?

533. It seems to me that the evidence shows that the Petitioners and other independent shareholders were made aware of the terms on which the Company could pay PIK interest and had an opportunity in 2017 to take action in respect of this had they wished to do so.

534. As the Company pointed out, a shareholder Q&A call took place on 29 September 2017 (to which the Petitioners were invited). Following that call one of the investors, Mr George Karahalios (who was one of the petitioners in the First Petition but who is not a petitioner in the current petition) wrote a letter of complaint to Mr Steckel. Mr Steckel's draft response records that Mr Karahalios' complaint was that "*the Company is paying its interest in shares at "a very depressed valuation*" and Mr Steckel's response was to be that "*This valuation was the equity valuation that was part of the B-3 round, which [was] the then current valuation*."

535. Further, the fact that the Company had made a PIK payment of interest by the issue of shares was also recorded in the Notes to the Company's audited Financial Statements - see for example for the years ending 31 December 2017 and 31 December 2018.

The Fourth Amendment

536. In my view, it is clear that the Fourth Amendment to the RCA was properly considered and approved by the board. The Written Consent document set out the board's reasons clearly and in some detail.

537. The Fourth Amendment did, it is true, involve an agreement to issue a substantial number of additional shares to Uphold Holdings and Chen International Holdings. But this was done in circumstances where the RCA Loan was due to mature (on 29 June 2018) and the Company did not have funds available to pay it. The Company was once again, because of its liquidity problems and the fact that its business had yet to mature, without any real leverage and negotiating power. Mr Thieriot had confirmed at [104.2] of Thieriot 1 that the Company was under a legal obligation to pay the sums due under the RCA and was not in a position to repay these amounts in cash.

538. I have summarised above (see [351]) the characterisation proposed by R2-R4 of what was agreed by the Company and why what was agreed was commercially necessary and therefore reasonable for the board to accept. R2-R4 noted that the Fourth Amendment provided for a six-month extension of the RCA Loan and that the Company had been required to issue the shares as a forbearance fee (which it could not pay in cash). They said that the Fourth Amendment was clearly approved by the board on 28 June 2018 in light of advice from Mr Westerfield that other financing options had been explored but that better terms and alternative funding were not available. R2-R4 argued that there was no basis for criticising the board for continuing to use the US$48 million valuation which had been used previously and required by Mr Chen. They said that the Petitioners had been unable to prove that at the time that the Fourth Amendment was entered into in June 2018 the fair and proper valuation price for the PIK calculation was greater than $48 million such that the agreement was

contrary to the Company's interests or that it could have obtained better terms. It was certainly clear that the board had recorded that they were of the view that the terms of the Fourth Amendment could not be bettered.

539. I accept that the agreement to issue the further shares to Mr Steckel and Mr Chen was the *quid pro quo* for the loan extension and that since the Company was unable to repay or refinance the RCA Loan it had little choice in the matter. There is no basis for challenging or disbelieving the clear statements made in the recitals to the Written Consent document that better terms were not available. This would appear to include an alternative that would avoid a payment of PIK interest by reference to the US$48 million valuation. It follows that the Petitioners have been unable to show that it was not in the interests of the Company to enter into the Fourth Amendment on these terms.

540. I also agree that the Petitioners have been unable to show that the use of the US$48 million figure was at this stage wholly inappropriate and inconsistent with a reasonable valuation of the Company at the time. It is true that different valuations were used for some other financings, but no valuation evidence was adduced, and the Court is simply not in a position to form a view as to whether the US$48 million figure was reasonable.

541. There is once again no evidence that the board considered, or took independent legal advice as to, the risks involved in agreeing to a fixed and non-adjustable valuation sum. This seems to me to an omission. This should have been considered because of the potential impact on the Company's independent shareholders of using a fixed valuation. However, in circumstances where a fixed valuation figure had been used before and the Company was unable to repay or refinance the RCA Loan so that the alternative to agreeing the terms of the Fourth Amendment would have been bankruptcy, it seems to me that there are strong grounds for concluding that even if the board had proposed an adjustable valuation amount it would not have been accepted.

542. Once again, I am satisfied that the Fourth Amendment does not evidence a deliberate disregard by the board for the interests of, or the need to take into account the interests of,

the independent shareholders. Having borrowed the RCA Loan on very expensive terms in circumstances where the Company urgently needed funds in order to avoid insolvency, it was stuck with the financial consequences flowing from that and was unable to extricate itself until its financial performance reached a level which made repayment or a refinancing of the RCA Loan a realistic possibility.

543. Underlying the Petitioners' complaints about the dilution of their interests in the Company is the premise that the board led by Mr Steckel deliberately excluded them and the other independent shareholders from the fundraising exercises and that had they been included they would have been able to protect themselves from and avoid the dilution to which they have been subject. But the evidence does not provide any basis for this. Mr Laggner and his co-investors were, as I have found, given a fair opportunity to put forward a more attractive proposal than the Steckel Proposal but were unable to do so. In addition, there is no evidence that the Petitioners or the independent shareholders wished to or suggested that they could refinance the RCA Loan and thereby avoid or remove the obligation to pay the high rate of interest (and to issue PIK shares for that purpose). Mr Laggner, his co-investors and the independent shareholders were aware of or were able to find out about that high rate of interest and if they wished to avoid the financial consequences of it they needed to find a way of refinancing the RCA Loan, but they never suggested they could or wished to do so.

Dilution via the Series C Round and the October 2023 Letter

544. In the October 2023 Letter the Company offered preferred shareholders the right to subscribe for Series C Preferred Shares in an amount that would enable them to maintain their relative percentage ownership of the Company that they had on a fully diluted basis prior to the earlier issue of the Series C shares (ignoring issues made in connection with M&A activity, employee incentive schemes and other business relationships). The October 2023 Letter involved an offer of 8.8 million shares at a price of US$1.13 per share (and stated that the independent fair market value of those shares was $1.32 such that shareholders would be buying shares in October 2023 at almost a 15% discount to the then-current fair market value of the shares) and required participating shareholders to waive any claims they may have for

breaches of the IRAs. The Company acknowledged that it had failed to comply with its obligations under the IRAs in respect of the Series C share issues and wished to rectify the position. It is important to note though that the Company excluded Mr Steckel and Mr Chen from participation in the offer of further Series C shares.

545. The Petitioners argued that the independent preferred shareholders had been unfairly treated. First, they were only being offered a right to participate in the Series C share issues and not in the earlier issues where their IRA right of first offer had been breached. It was clear from the minutes of the board's finance committee on 27 June 2023 (see [272] above]) that the board had taken the decision to ignore the earlier breaches of the IRAs because they had taken place more than six years before so that claims in respect of such breaches would be time-barred. It was unfair for the Company to rely on the rules of limitation of actions to avoid complying with their obligations to shareholders. Secondly, the offer price was unfair in that it was too high. It was above the price of US$1.13 at which Series C shares had been issued to Mr Chen and Hard Yaka (see [149] of the Petitioner's Written Closing Submissions which stated that the 8.8 million shares had been offered to shareholders at a price of US$1.32 per share).

546. I do not consider that the board's conduct in approving and making the offer contained in the October 2023 Letter constituted or involved conduct involving a want of probity or a deliberate disregard of the interests of the independent shareholders. The offer was made to remedy the breaches of the IRAs in relation to the earlier issuances of Series C shares and was intended substantially to restore and protect the position of affected preferred shareholders. The shares were not, as the Petitioners alleged, offered at a price of US$1.32 per share. They were offered at the price of US$1.13, the same price at which Series C shares were acquired by Mr Chen and Hard Yaka.

547. The board can justly and properly be criticised once again for allowing the earlier breaches to have occurred and I must say that I have been concerned by the repeated failures to observe the requirements of the IRAs. This taken together and cumulatively could be treated as more than just carelessness and instead a persistent and reckless disregard of the Company's

obligations to at least a sub-set of its shareholders. Had these failures gone unremedied then I would have been inclined to find that the board had failed to act properly and there had been a departure from the standards of fair dealing. But the board did, admittedly belatedly, take steps to rectify and remedy the breaches in relation to the Series B2 and then the Series C share issuances.

548. I can see that it is arguable that where the shareholders' rights that are ignored and repeatedly broken arise outside the corporate constitution and under separate contracts, the board's conduct cannot ground a winding up on the just and equitable ground. The shareholders in question are contractual counterparties whose remedies lie exclusively in the enforcement of their contractual rights. I did not understand R2-R4 or the Company to adopt this position and I am not inclined to accept it. R2-R4 took the view, as I understood their case, that where shareholders had such contractual rights and had effective remedies for breach of contract and failed to enforce their rights, then while the conduct of the directors was relevant the Court should take into account the shareholders' failure to exercise these alternative remedies in deciding whether it was just and equitable to making a winding up order. This seems to me to be the right approach.

549. Accordingly, it is relevant that the preferred shareholders who were parties to the IRAs failed to take any action to enforce their rights. The Petitioners proclaimed ignorance of the issuance of the Class C shares but I am not convinced that they had insufficient information or were unable to obtain sufficient information of these issues and therefore of the likely breach of their rights under the IRAs. It also seems to me that the Petitioners had sufficient information regarding the earlier share issues which gave rise to breaches of the RCAs but chose to take no action. In these circumstances their complaints about the related conduct of the directors need to be given reduced weight.

550. This analysis affects the Petitioners' claim that it was unfair for the board not to make an offer to the Petitioners and other independent preferred shareholders to remedy the earlier breaches of the IRAs even though the affected preferred shareholders had lost the right to bring proceedings in respect of the breaches because of the expiry of applicable limitation

periods. I accept that the mere fact that shareholders have lost the right to bring private actions for breaches of their contractual rights does not mean that they are precluded from relying on the related conduct for the purpose of seeking a winding up on the just and equitable ground. While the issue was not dealt with in the parties' submissions, I take it for the purpose of this Petition that there is no limitation period applicable to winding up petitions on the just and equitable ground (see the UK Supreme Court recent decision in relation to unfair prejudice petitions in *THG plc v Zedra Trust* [2026] UKSC 6 - although a creditor can only present a winding up petition in respect of a debt for which the limitation period has not expired). Of course, where the conduct complained of is stale and old and the petitioners have delayed filing the petition, the petition may be struck out (see the Strike-Out Judgment). However, where shareholders have enforceable rights which have lapsed because of the expiry of the limitation period then in order for them to be able to show that action by the Company which ignores those claims is wrongful and can be relied on in support of a winding up petition on the just and equitable ground, they must I think show that the Company's conduct caused or was partly responsible for the loss of their rights. I appreciate that the Petitioners have made that allegation in this case because they say that the board concealed and deliberately failed to provide details of the share issuances that resulted in the breaches of the IRAs. However, I have rejected those allegations as being inconsistent with and not supported by the evidence.

Mr Laggner's removal from the board

551. I do not consider that Mr Laggner can rely on his removal as a director to support the Petition.

552. First, it is well established that removal of a petitioner from the office of director does not justify a winding up order on the just and equitable ground save in the case of a quasi-partnership (see *Re a Company* (No 00314 of 1989) [1991] BCLC 154).

553. Secondly, and more relevantly in this case, I am not satisfied that the Petitioners have been able to show that Mr Laggner was removed for an improper reason. I appreciate that the Petitioners relied on Mr Laggner's removal as evidence of a course of conduct by the board

(controlled by Mr Steckel) to disregard the interests of the independent shareholders whose interests Mr Laggner represented and of whom he was one. However, the evidence as to precisely why Mr Laggner was removed was inconclusive and the contemporaneous documents indicated that the fact that he was a party to litigation involving his dispute with Mr Minor and ownership of shares in the Company was considered to be an important factor.

TBOL

554. I broadly accept the submissions made by R2-R4 on this issue (see in particular [392]-[397] above). I have concluded that the Petitioners have fundamentally mischaracterised the nature of the UK Banking Licence opportunity and the position of the UK banking regulators. I am also satisfied that the Petitioners have failed to establish that there was a concluded agreement between Mr Steckel, Mr Watson and Mr Thieriot that they would be given shares in TBOL or that the decision making of the Litigation Committee was flawed in any material respect.

555. The Petitioners argued that the transaction agreed in September 2017 involved breaches of the fiduciary duties owed to the Company as directors by (at least) Mr. Steckel and Mr. Watson. Aside from agreeing to hand over to Mr. Watson 90% of the Company's UK banking licence opportunity for essentially no consideration, Mr. Watson and Mr. Steckel (with Mr. Thieriot) had agreed, without disclosure to the board on 15 and 27 September 2017, that that they (as the "Limited Management') should receive 8% of the shares personally.

556. The Petitioners' pleaded case was that Mr Steckel, with Mr Watson, had acted in breach of fiduciary duty by diverting to themselves the Company's opportunity to obtain a 100% interest in a very valuable UK Banking Licence. As the Petitioners had averred at [24(e)] of their Reply "*It is to be inferred that Mr Watson and Mr Steckel seized upon the advice that it may be difficult for the Company to hold more than 10% of the Bank of London project as an opportunity to appropriate the remaining 90% to themselves ...*"

557. The Petitioners' case in closing was heavily based on the allegation that there was a secret agreement between Mr Watson, Mr Thieriot and Mr Steckel in September 2017 that they would receive shares in a new TBOL entity and that that agreement should have been but was not disclosed to the board before it took its decisions on 15 and 27 September 2017. The Petitioners relied on this allegation to show that the board's approval of that agreement was tainted and procured by that deliberate non-disclosure which constituted a breach of duty by Mr Steckel and Mr Thieriot.

558. The Petitioners also challenged the Litigation Committee's decisions in relation to TBOL.

559. I have concluded that, as R2-R4 and the Company submitted, the Company was only ever realistically entitled to and capable of acquiring a financial interest of less than 10% in a UK bank; that the UK banking regulators had indicated that they would not be prepared to grant a UK Banking Licence to an entity in which the Company had an interest greater than this and that they would not be prepared to grant such a licence directly to the Company; that it was in the Company's best interests to enter into the 2017 agreements and allow Mr Watson to develop the TBOL proposal since he was best placed to do so and the Company was and would have been unable to fund the very substantial investment and costs that were required in order to constitute and construct a bank that was able and ready to conduct banking business and be ready to be licensed; that the Petitioners have been unable to show that there was a secret agreement between Mr Watson, Mr Thieriot and Mr Steckel in September 2017 that they would receive shares in a new TBOL entity and that the Litigation Committee's decision making was rational and reasonable. I do not consider that the board's conduct in relation to TBOL involved conduct lacking in probity or the improper diversion of or the failure to realise for the Company the value of the TBOL opportunity.

560. I accept that the documentary record and oral evidence of Mr Steckel, Mr Thieriot and Mr Milby show that the board members involved genuinely believed, based on regulatory and legal advice received and upon the reporting from board members who were involved in the discussions with the UK banking regulators, that the Company could not retain more than a 10% interest in TBOL. I do not consider that the Petitioners' challenge to Mr Steckel's

recollection of meetings with KPMG in April or May 2017 affected the credibility of his evidence on this issue. These events took place a long time ago and I am satisfied that Mr Steckel was not deliberately re-writing history to support his case.

561. Furthermore, I am satisfied that the issues and problems which were reported to the board as having been raised by the PRA/FCA had in fact been raised by them. I found Mr Milby's evidence on this to be particularly persuasive. His expertise and experience in dealing with the UK regulators and of the banking sector gave particular weight to his perceptions and understanding of the PRA's/FCA's position. Mr Milby confirmed that the PRA and the FCA had expressed concerns about the Company's involvement given that it operated in the crypto sector and that Mr Minor's significant shareholding in the Company was an issue as he was not treated as a fit and proper person due to his bankruptcy. He did not indicate that he considered Mr Watson's reports to the board to have been misleading.

562. I do not consider that the Petitioners have established that Mr Watson forged and amended documents in order to deceive and mislead the board so as to create the impression that the PRA/FCA had raised issues and concerns which they had not in fact raised and that the Company faced problems with its application which in fact it did not face. I accept the submissions made by R2-R4 that this was not an argument open to the Petitioners in the absence of a particularised pleading to that effect. The Court cannot reach the conclusion that Mr Watson was lying based on the documents relied on by the Petitioners and in any event should not make a finding that Mr Watson behaved dishonestly without Mr Watson having been given an opportunity to defend himself and respond to the allegations of dishonesty in cross-examination.

563. I have set out above (see [177]-[183] above) in full the five documents relating to the discussions with the PRA/FCA relied on by the Petitioners. It is clear that Mr Watson did make material additions to the email drafted by Mr Adams of KPMG, but I am not satisfied that the amended email materially or deliberately misrepresented the true position of, and issues raised by, the PRA/FCA. I do not consider that the report prepared by representatives of the Klaros Group of their conversations with Mr Adams undermines the other evidence

of the PRA's/FCA's general position in relation to the Company's application for a banking licence. It confirmed that it was understood that the Company could only acquire an interest of less than 10%.

564. I found persuasive Mr Milby's evidence that the Company would have faced insurmountable issues taking the TBOL project forward in the manner envisaged by the Petitioners, in particular because of the lengthy banking licence application process, the steps required to be taken before the project could become a "*fully loaded bank*", the 18-month period of carrying huge costs with only *de minimis* revenues while the licence was issued with restrictions (which period only began in November 2021), the difficulties of obtaining customers and the 12-month business plan which provided for one corporate customer. As he and Mr Steckel explained the Company simply did not have, and could not raise, the necessary resources.

565. I also found convincing and rooted in commercial reality Mr Steckel's evidence to the effect that he and the other directors became aware that it would have been impossible for the Company to have undertaken the project to develop a UK bank. As R2-R4 pointed out, Mr Steckel's unchallenged evidence was that TBOL had raised $120 million by the time it obtained its bank clearing licence in November 2021 and was required to raise more in 2023 ($40 million) and 2024 (when all shareholder interests were materially diluted). The Company would have been unable to raise such sums (the Company had only raised in the order of approximately US$60 million since its inception) or for its individual shareholders to have done so (in the case of a spin out solution).

566. I also found Mr Hilton's comments on the prospects of the Company being able to hold more than 10% of a UK Banking Licence, quoted at [394(e)] above, to be persuasive.

567. I consider that R2-R4 were right to say that the evidence showed that spinning out the banking opportunity to the Company's shareholders was not viable for the reasons given by Mr Anderson, as reported by Mr Hilton during his cross-examination. Having dozens of minority owners with no ability to capitalise the Company, let alone TBOL, was unattractive

and unworkable. Even if that were possible, the Petitioners' tiny minority stake would have been diluted to the point of irrelevance in light of the huge amount of capital required to be raised over recent years.

568. It seems to me that the Petitioners were justified in criticising the directors for talking up and overstating the value and prospects of success of the UK Banking Licence opportunity when having discussions with shareholders. Greater care and caution were required in light of what turned out to be the overly optimistic predictions. It was, as a result, important to brief the shareholders and provide them with an update on developments. The evidence showed that there had been a call with shareholders on 29 September 2017 so that efforts were made to provide shareholders with an update. The evidence does not establish precisely what they were told but I do not think that it would be right to conclude that shareholders were deliberately misled. The Petitioners noted that Mr Watson and Mr Steckel had discussed limiting the data to be shared with shareholders but this was consistent with not wanting to mislead shareholders because the situation with TBOL remained fluid (that was why Mr Watson and Mr Steckel had referred to the need to limit what was said "*until we have clarity*" as to where matters stood).

569. I also accept that the Petitioners have failed to establish that there was an agreement as they alleged between Mr Watson, Mr Thieriot and Mr Steckel in September 2017. The evidence relied on by R2-R4 for rebutting the existence of such an agreement (as summarised at [358] above) seems to me to be persuasive. I found Mr Steckel's robust evidence on this issue, which I have set out above, to be completely convincing. The evidence makes clear in my view that the discussions between Mr Watson, Mr Thieriot and Mr Steckel relied on by the Petitioners were preliminary and considered the position that would arise if TBOL became a subsidiary of the Company which was to be managed by the Company's management team. The discussions addressed what incentives management might be given to encourage the success of TBOL and an increase in its value for the benefit of the Company. I make no comment on whether giving management shares in the amount contemplated by these discussions would have been justified. Granting such a substantial package clearly raised

serious conflict issues and would certainly have required full and proper disclosure to and possibly approval by shareholders.

570. As R2-R4 had submitted, the Petitioners were wrong to characterise the position as being one where the Company had the opportunity to develop a bank or own an entity with a clearing bank licence or even an entity with the chance of applying for and successfully obtaining a licence. I accept and agree that the Company had no such opportunity (or no realistic such opportunity) and that there was thus no opportunity to divert or give to Mr Watson. The board had acted to maximise the Company's return on its outlay by supporting Mr Watson's efforts to apply for a banking licence and with a view to securing the maximum possibly equity stake in the entity used by Mr Watson for that purpose. I accept that there is nothing proprietary in the idea of applying for a banking licence and that it would have been difficult for the Company to show that Mr Watson had used his position in the Company or the Company's business, proprietary data and contacts to acquire and develop the idea so as to be able to restrain him from pursuing the Company's corporate opportunity (in reliance on the *Cooley v IDC* [1972] 1 WLR 443 principle). Even if it was arguable that the principle could be applied, if Mr Watson had decided to proceed on his own the Company would probably have only been able to stop him from exploiting the opportunity with the result that if he had decided not to proceed the Company would have lost the opportunity to acquire a 9.8% share in the operation.

571. I also agree with R2-R4 that the Petitioners failed to evidence, or properly put to the Respondents' witnesses, their allegations that "*Mr Steckel and Mr Watson now between them have a controlling interest*" in TBOL (Points of Claim at [63]) or that the Company (at the instigation of Mr Steckel) had altered the licence application and that Mr Steckel had carved out "*significant equity in TBOL for himself (together with Mr Salinas and Mr Watson)*" (the Petition at [34(c)]). Mr Steckel's unchallenged evidence (about which he was cross-examined) was that he had advanced a personal loan to Mr Watson which had contained a right to convert the loan into TBOL equity upon default which right had been exercised but that this was wholly independent and separate from the Company's relationship with Mr Watson and TBOL.

572. As regards the Petitioners' challenge to the Litigation Committee's decision making in respect of TBOL, I am satisfied that the Petitioners' claim that the Litigation Committee acted irrationally in approving the June 2022 settlement agreement with Mr Watson and TBOL is not made out. The Company certainly seems to have had problems with Mr Watson who was in breach of various agreements with the Company. The Company had been slow to take advice on what steps were needed to enforce its rights but ultimately the agreement with Mr Watson and TBOL secured the Company's 9.8% interest, repayment of Mr Watson's loan albeit by way of set-off of sums owed by the Company to Mr Watson and mutual releases of claims. This appears to me to have been a reasonable commercial settlement that was in the interests of the Company and justifiable in the circumstances. It represented a clean break with Mr Watson and a final resolution of the long running dispute. I reject the Petitioners' allegation that Mr Hilton had believed or been advised that the Company's true entitlement was to 100% of TBOL and had failed to take this into account when agreeing settlement terms.

Conclusion and coda

573. Accordingly, in my view the Petitioners have failed to establish the facts to support either their original pleaded case or their modified and narrower case as formulated in their closing submissions. They have failed to establish that grounds exist to make a winding up order on the just and equitable ground and therefore the issue of whether to grant alternative relief does not arise.

574. There is no doubt that the Company has had a history of poor corporate governance and of failing to observe and pay sufficient attention to its obligations to the preferred shareholders. The board in the past has failed to recognise the importance of obtaining detailed specialist and independent Cayman law advice in advance of taking action in relation to the Company's capital. However, as I have explained, I am satisfied that these failures were not deliberate or part of a plan to disregard the interests of the Petitioners or the other independent shareholders or to treat them unfairly. The action of the board in failing to appreciate the need to give effect to the rights of first offer in the IRAs arose in part from the failure to have

such independent advice and was otherwise careless and an error. But the board sought to remedy these failings and in large part did so. Importantly, the new board (following Mr Hilton's appointment) has demonstrated that it will act independently and on the basis of proper advice.

575. I am also satisfied that when making the decisions that resulted in entry into the 2016 Transaction, the board acted reasonably and properly in very challenging financial circumstances when the Company was on the verge of insolvency. The board took proper steps to seek an alternative to the Steckel Proposal but were unable to do so. The board's decision to accept the onerous interest terms of the RCA Loan and the need to grant the Warrant was made under great commercial pressure and was reasonable. Borrowing the RCA Loan and assuming the obligation to pay such a high rate of interest provided the context in which the subsequent issues arising under the Third Amendment and the Fourth Amendment to the RCA arose. Having taken on a large liability in debt and interest to allow the Company to survive and to seek to develop a profitable business, the Company was always going to be in difficulties until it reached the point when it was sufficiently successful to be able to repay or refinance that debt. The Company has clearly struggled for a number of years and its financial position remained precarious until relatively recently. In these circumstances the Company was forced to pay interest by issuing shares and to pay fees for extending the repayment date of the RCA Loan in shares. The dilution of the rights of the Petitioners and other independent shareholders was largely a consequence of that and also the decision of the Petitioners and other shareholders not to subscribe for more shares when they were offered to them.

576. I am also satisfied that the Petitioners have mischaracterised Mr Steckel's role in the Company and on the board. He is clearly, as I have said, a strong and influential force in the Company but he has not taken over decision making in the board and the other directors have not acted and made decisions for his benefit or ignored the interests of the Company and its shareholders. The board has had to make difficult decisions in very challenging commercial circumstances and in my view have done so on the basis of their best commercial judgment of what is in the Company's interests.

577. Many of the events complained of by the Petitioners took place a number of years ago and the Petitioners clearly had the right and opportunity to bring proceedings to enforce their rights and protect their interests. They failed to do so. The Company is now operating with a board most of whom were not involved in the historic decisions complained of which is acting properly. These are factors which I have taken into account in exercising my discretion to dismiss the Petition.

The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands
24 March 2026