Claim No. BL-2021-000313

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

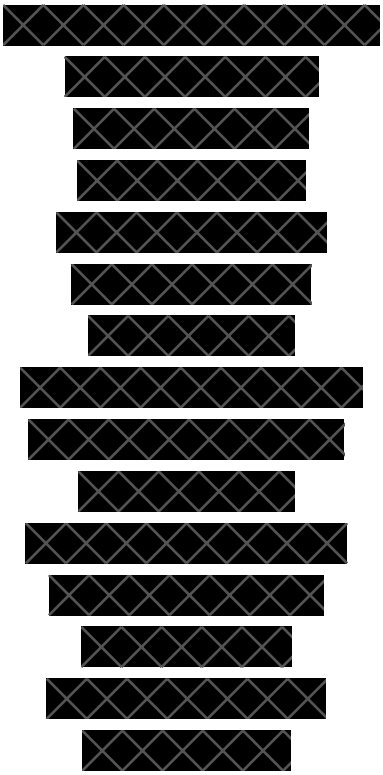
B E T W E E N:

(1) TULIP TRADING LIMITED (a Seychelles company)

Claimant

- and –

(1) BITCOIN ASSOCIATION FOR BSV (a Swiss verein)



Defendants

SECOND WITNESS STATEMENT OF TIMOTHY WILLIAM ELLISS DATED 15 SEPTEMBER 2023

I, **TIMOTHY WILLIAM ELLISS**, a solicitor of the Senior Courts of England and Wales, of Enyo Law LLP, Fifth Floor, 1 Tudor Street, London, EC4Y 0AH, **WILL SAY** as follows:

1. I am a partner of Enyo Law LLP and I am instructed in these proceedings by the Second to Twelfth Defendants (the "**Enyo Defendants**").

2. I have day-to-day conduct of the proceedings and am duly authorised to make this witness statement on behalf of the Enyo Defendants.

3. I make this witness statement in reply to the Claimant's evidence filed on 29 August 2023 ("**Lee 4**") in response to the Enyo Defendants' applications dated 11 July 2023.

4. By way of preliminary formalities:

   4.1. Except where I indicate to the contrary, the facts and matters contained in this witness statement are within my own knowledge. Where the facts and matters are not within my own knowledge, I have indicated my sources of information and belief.

   4.2. Nothing in this witness statement is intended to, or does, waive any privilege belonging to the Enyo Defendants.

   4.3. There is now produced and shown to me a bundle of copy documents marked TWE-2, that contains paginated copies of documents to which I shall refer to in this witness statement. Where I refer to documents in this witness statement, I refer to these as Exhibit TWE-2/page number(s).

5. I deal with TTL's evidence in response to the Preliminary Issue Application in Part A. I then deal with TTL's evidence in response to the Enyo Defendants' security for costs application in Part B.

6. Much of Lee 4 consists of argument that is appropriately dealt with by way of submission. Where I do not address a point raised by TTL in Lee 4, it should not be assumed that I agree with it or that it is accepted by the Enyo Defendants.

A. THE PRELIMINARY ISSUE APPLICATION

7. The Enyo Defendants have sought to have the question of whether TTL owns the Digital Assets (and consequently whether this claim is brought on a knowingly false basis and is therefore an abuse of process) (the "**Ownership Issue**") as a preliminary issue for the reasons set out in my First Witness Statement ("**Elliss 1**"). In short, this is because (i) it is the Enyo Defendants' case that this is a fraudulent claim (which question should be determined as early as possible), and (ii) an analysis of the factors set out by Neuberger J in *Steele v Steele* shows that they weigh heavily in favour of ordering a preliminary issue.

8. TTL opposes the Enyo Defendants' application. It does for the following reasons:

   8.1. The need for the determination of the Ownership Issue and the Non-Ownership Issues to coincide;

   8.2. Delay;

   8.3. Additional costs;

   8.4. No increased likelihood of settlement; and

   8.5. The allegedly important and novel points of law raised in the claim.

9. Underpinning TTL's focus on these issues is TTL's contention that the Court should ignore entirely the very serious, credible and compelling allegations of fraud advanced by all of the Defendants against TTL in its conduct of this Claim. TTL says that if the Court determines that TTL does not own the Digital Assets, then it will dismiss the claim without considering whether TTL brought the claim fraudulently.

10. This is an issue which will be addressed further in argument, but it is right to note that TTL fundamentally mischaracterises and oversimplifies the nature of the Enyo Defendants' Application. As I explained in my first statement, it is the Enyo Defendants' case that this claim is fraudulently advanced in reliance of forged or otherwise falsified documentary evidence. That is a fully pleaded part of the Enyo Defendants' Defence: see paragraphs 1, 30 and 54 of their Defence.

11. I address the core factual points relied upon by TTL below.

<u>Alleged need for coincidence of determination of Ownership and Non-Ownership Issues</u>

12. TTL's position is that it is necessary for the Ownership Issues and Non-Ownership issues to be determined together. It says that unless this occurs, then TTL could be left in a position where it obtains a declaration as to ownership against the Defendants, but by the time a trial of the Non-Ownership Issues occurs, some or all of those defendants could cede the control that TTL alleges they have over BTC (or BCH in the case of D14-16), to other developers. TTL says that this could result in a lacuna whereby it could not obtain the injunctive relief it seeks because the new developers would not be bound by the earlier judgment on ownership. It says it therefore must be at liberty to add defendants "*up to the point of judgment in order to protect itself against the Defendants giving up their alleged control…in a bit to avoid being subject to Injunctive Relief (or indeed, so as to seek deliberately to preclude TTL from obtaining effective Injunctive Relief)*."[1]

13. TTL's position does not withstand scrutiny:

[1] Lee 4, paragraph 25.

13.1. First, TTL advances no evidence at all to support the contention that there is any risk of the Enyo Defendants (or any other defendant) seeking to subvert an order of this Court. That is quite extraordinary given the seriousness of the underlying premise of the submission.

13.2. Second, the Enyo Defendants are named defendants who have been found to be subject to this Court's jurisdiction. TTL's primary case is that the Enyo Defendants owe it the alleged fiduciary duties irrespective of the Court making a declaration as to ownership.[2] The consequence of this is that if TTL were to succeed in establishing that the duties were owed and breached, each of the Enyo Defendants could be personally liable to TTL in respect of the Digital Assets (the value of which currently exceeds £2.3bn).

13.3. Third, these proceedings have been on foot since April 2021 yet TTL has not sought to add (or remove) a single defendant to the claim. This is notwithstanding:

13.3.1. That the BTC Core client software is developed openly on Github. TTL is able to identify those individuals that are contributing to its development (as it purported to do when it issued this claim).

13.3.2. Many of the Enyo Defendants have ceased contributing to BTC Core prior to or following the commencement of these proceedings (and thereby could no longer possibly be said to have the control that TTL alleges that they do). Each of the Enyo Defendants' past and present involvement in BTC Core was pleaded to by the Enyo Defendants in their defence filed over five months ago yet none of these parties have been removed and no additional party added.

13.3.3. D14's (Roger Ver) defence[3] provided a list of 15 other individuals or aliases who were part of the BCH 'Team' responsible for its development and maintenance. This defence was also filed over five months ago and none of these additional persons has been added to the claim.

13.3.4. Most telling of all, TTL has extensively pleaded to the very issue of whether it is pursuing the correct defendants in its Reply to the Enyo Defendants' Defence at paragraphs 20 and 79-90 inclusive. Nowhere is this new point pleaded, including any reservation in relation to the addition of new defendants. On the contrary, as this pleading is understood, TTL's case is that the Enyo Defendants (and indeed the

[2] POC, paragraph 47.

[3] D14 Defence, paragraph 13.4

remaining defendants) are the only correct defendants to this claim and will remain so through to any judgment.

13.4. The fact that TTL has not added (or removed) a single party from the claim (or even given an indication that it might need to do so before now) is a clear indication that this is not a substantial concern, but rather a spectre which is simply intended to discourage the resolution of the Ownership issues at the earliest possible opportunity.

13.5. Fourth, TTL could not "*add defendants up to the point of judgment*" in any event. Any new defendant that TTL wished to add to its claim would be entitled to participate in the claim and defend it. TTL could not add new defendants after a trial without the need for a new trial involving those defendants that had not participated in the earlier trial. Further, there would be a difficult balancing exercise that would be required at each stage that any additional defendant was added to the proceedings. The Court would need to consider whether an adjournment of any trial listed was necessary to allow the new parties to fairly participate in the trial.

13.6. Finally, and perhaps most importantly given the purpose for which this argument is being raised, even if it was to be assumed that any or all of the Enyo Defendants (or any other developer added to the proceedings) would seek to relinquish their alleged control in order to avoid being subject to injunctive relief, TTL's proposed solution – to have the Ownership and Non-Ownership issues determined together – will not prevent this. If the Defendants were genuinely intent on subverting the Court's order to prevent TTL from obtaining injunctive relief they could all relinquish their alleged control at any point prior to judgment.

14. Accordingly, this is not an issue which is relevant to the question of whether the Court should exercise its discretion to order a Preliminary Issue Trial. It is, however, notable that the basis of this entire argument is directly inconsistent with TTL's pleaded case that the Enyo Defendants are a small and identifiable group that "controls" BTC.

<u>Delay</u>

15. TTL relies heavily on the delay it says will be caused to the ultimate determination of the proceedings if a Preliminary Issue Trial is to be ordered. It says that this will cause it "*severe prejudice*".

16. Mr Lee addresses how this alleged delay is likely to occur over a number of paragraphs. Ultimately, how different trials might be listed will depend on the Court's diary at the time that the parties are seeking to list. This issue is therefore best addressed in advance of the CMC when the parties will have the Court's

actual availability to hand. That said, I do feel it is likely to be helpful to the Court to make some brief comments on Mr Lee's analysis with reference to the current availability of Mr Justice Mellor.

17. My team have made enquiries at the Chancery Listing Office as to Mr Justice Mellor's availability. On the basis of these enquiries, I understand Mr Justice Mellor has the following availability:

    17.1. 5-to-7-day application hearing: May to July 2024

    17.2. 5-day trial: October 2024 to February 2025

    17.3. 7-to-10-day trial: November 2024 to March 2025

    17.4. 8-week trial: April/May 2025

    17.5. 10-week trial: October 2025

18. If the Court were to order a full trial of all of the issues, the earliest such a trial could be listed would be October 2025. However, if a preliminary issue trial was ordered it could be heard as early as May 2024 (if Mr Justice Mellor considered it appropriate to list a trial in the window allocated to applications), or October 2024 (in the ordinary course). This would leave a full 12 months before a full trial of all the issues could presently be heard.

19. As I explained in Elliss 1,[4] any delay to the ultimate resolution of the claim (should TTL ultimately be successful) could be limited by the Enyo Defendants' proposal that a window for both the Preliminary Issue Trial and the trial of the Non-Ownership Issues be listed now. A trial of the Non-Ownership issues could be listed 12-18 months after the trial of the Ownership Issue, resulting in minimal delay. This would address the concern raised by TTL that it would have to seek to find available time to list a trial of the remaining issues only after judgment has been given in the preliminary issue trial in its favour (which it says will cause further delays).

20. TTL has raised three further points in relation to delay that I address briefly below:

    20.1. Prospect of appeals. TTL relies on the prospect of an appeal as raising the likelihood of further delay. The Ownership Issue is a matter of fact. There is therefore very little prospect that any party will be able to obtain permission to appeal. However, in the event permission is granted, the appeal could proceed on an expedited basis, and an appeal by the Defendants could proceed

[4] Elliss 1, paragraph 97.5

in parallel with the preparation for the Non-Ownership Trial. In my experience appeals are regularly expedited for such reasons and the Court of Appeal currently has very good availability to deal with appeals promptly.

20.2. Delays to date. TTL relies on the Defendants' jurisdiction challenge and the time it took to serve D14 as a reason for why any further delay should not be countenanced. The Defendants' jurisdiction challenge succeeded at first instance. Simply because the Defendants did not choose to cross-appeal on any of the points they did not succeed on is not indicative of those points being without merit. Indeed, the costs order ultimately made is consistent with the Court taking the view that the jurisdiction challenge was pursued appropriately. It was not suggested by TTL that the challenge to the jurisdiction by the Enyo Defendants on which they failed was tainted by unreasonable or improper conduct and the Court did not express any such view, nor reflect any such view in the orders it made on hand down of the jurisdiction judgment. As to D14, my firm does not act for D14 and I therefore cannot comment on his approach to service. That said, there is nothing in Mr Lee's evidence that indicates that Mr Ver acted improperly. Importantly, none of the defendants has any incentive to delay these proceedings unnecessarily. There is no benefit to be gained by them from a delayed determination of the issue.

21. What TTL says very little about in its evidence is the actual prejudice it will suffer if there is any delay to the ultimate determination of these proceedings. The only point it makes is that the longer these proceedings take to determine the greater the risk that the alleged hackers will manage to "*decrypt the algorithmic masking protecting the TTL private keys*". TTL has not explained what it means by this and therefore it is difficult to test this assertion. However, the fact that the coins have not been moved in the more than three years since the alleged hack is indicative of the limited likelihood of this occurring. Moreover, any movement of coins from the Addresses will be immediately identified by the Bitcoin community (which watches wallets like these closely) and it is therefore unlikely that hackers would be able to deal with them freely. Transactions on the BTC blockchain can be traced and therefore it is not necessarily the case that Injunctive Relief will no longer be available even if the coins were to move to another address (which is highly unlikely).

22. Given this, the only real prejudice that exists is a delay to TTL being able to deal with the Digital Assets. The person or entity that owns the Digital Assets has not undertaken any transactions in the Bitcoin on either address since 2011. Neither TTL, Dr Wright nor any of the related entities that form part of the alleged "Tulip Trust" have asserted any prejudice arising from their inability to use the Digital Assets. In the Passing Off cases, Dr Wright has advanced evidence that Wright International Investments (an alleged sister company of TTL allegedly owned by the same beneficial owner, the trustee of the alleged

Tulip Trust) owns $16,520,402,518 worth of BTC, BCH and BSV (see for example Chesher 1, paragraph 13 [TWE-2/5]). Given the value of the assets allegedly available to Ms Ang as Trustee of the Tulip Trust, it is difficult to see how any prejudice could be suffered by TTL, the Tulip Trust, or any of its alleged beneficiaries as a result of being unable to deal with the Digital Assets pending the determination of these proceedings. Whilst the Enyo Defendants do not believe that the Tulip Trust or Dr Wright in fact own the assets they claimed to own by that evidence and consider Dr Wright's evidence to be knowingly false, Dr Wright cannot on the one hand claim access to great wealth, whilst on the other claim prejudice by reason of an inability to access a relatively small portion of his alleged wealth.

23. In any event, any delay, and any prejudice accordingly suffered, must be weighed against the prejudice of requiring 11 individual software developers to defend a hugely complex claim at very significant expense where there are properly pleaded allegations that the claim has been fraudulently advanced.

Additional Costs

24. TTL asserts that there would be very substantial increased costs if TTL were to succeed at a preliminary issue trial. It has not sought to quantify these costs save as to say that they arise from the inherent inefficiencies in conducting two separate trials.

25. The Enyo Defendants accept that there may be *some* cost increases from having two trials. However, these costs are unlikely to be *material* in the context of the case as a whole. As I have explained in detail in Elliss 1, there is no cross-over at all between the Ownership Issue and the Non-Ownership Issues. The burden of giving disclosure and factual evidence will fall almost exclusively on TTL in relation to the Ownership Issue. Whereas the burden of those two phases will fall almost exclusively on the Defendants in relation to the Non-Ownership Issues. There is no crossover in the expert evidence or in the issues that will need to be argued at either trial. It is notable that TTL does not seek to argue otherwise. As a result of this clear split of issues, the use of a preliminary issue trial would mean that if a second trial was required, it would be shorter: there is unlikely to be any material difference in the total amount of trial time required. Accordingly, any additional costs are likely to be limited and inconsequential when weighed against the costs the huge potential costs saving to all parties in the event the Preliminary Issue Trial resolves the issues.

Prospect of Settlement

26. The Enyo Defendants agree that there is limited likelihood that the prospects of settlement with TTL will increase if TTL succeeds at the Preliminary Issue Trial.

Development of the law and public interest

27. TTL asserts that the claims are legally novel and of public interest. It says that there is therefore a public interest in the development of the common law in relation to digital assets which will be achieved by the determination of all of the issues at the earliest possible opportunity.

28. There is a short answer to this. If there is a meritorious claim that raises these issues then the Court will determine them. Simply because a claim raises novel issues (or ones that are interesting to the legal community) does not mean that the parties to that claim should be put to the significant time, expense and stress that litigating a claim of this nature involves. If TTL does not own the Digital Assets then there is no claim to determine, any determination of the legal issues would be obiter, and highly unlikely to be any appeals court consideration of the novel issues of law.

29. It is notable that, as far as I am aware, there is not a single claim that has been commenced on the basis that this claim has been brought anywhere in the world. This suggests that whilst this claim might be of interest to the lawyers involved in this case (and the legal community generally), it is not seen by those who advise parties in similar situations to be of sufficient merit to justify commencing proceedings on this or a similar basis. The Enyo Defendants say this is because TTL's claim can only be brought on the basis of Dr Wright's (false) assertions as to how Bitcoin works.

30. The public interest is to determine cases in accordance with the Overriding Objective. Whilst the effect on the parties to the case is important, it is important not to disregard the effect of occupying very significant periods of Court time (at the expense of the judicial system and other Court users) on claims that are fraudulent or otherwise without merit. Insofar as the public interest arises, then it is in the public interest to determine fraudulent claims as quickly and at as little expense to the parties and the legal system as possible.

<u>Conclusion on the Preliminary Issue Application</u>

31. TTL's opposition to a Preliminary Issue Trial raises no obstacles that cannot be overcome by a sensible approach to listing the necessary hearings. When all the relevant factors are taken into account, it is clear that they overwhelmingly weigh in favour of ordering a preliminary issue trial. This is the case irrespective of the evidence the subject of TTL's Strikeout Application. At the end of the day, properly made allegations of fraud have been made against TTL in its conduct of this claim. Those allegations need to be determined as soon as possible and before any material costs are incurred defending the substance of the Claim. Doing so is plainly consistent with the Overriding Objective.

B. SECURITY FOR COSTS

32. TTL initially proposed to provide security by way of tokens using a third-party custodian. TTL no longer pursues that relief and accepts that it must provide security for the Enyo Defendants' costs by way of a payment into Court in the usual way. I therefore do not address any of the points made by Mr Lee as to the form of security to be provided.

33. The remaining dispute relates to quantum.

34. The Enyo Defendants maintain their request for security on the indemnity basis. This is the appropriate order if the Court concludes that TTL does not own the Digital Assets upon which it sues. Whilst it is theoretically possible that the Court could conclude that TTL has not established that it owns the Digital Assets, but that the Enyo Defendants have not established that TTL has brought this claim fraudulently, this is highly unlikely in light of the cases which the parties advance. This is particularly so where the Enyo Defendants allege that the documents which TTL relies upon to assert its claim to ownership are forgeries.

35. In response to the specific points on quantum identified at Lee 4, paragraph 54, I note:

    35.1. Grading of fee earners. TTL observes that 70% of the incurred time and 83% of the incurred costs relates to work undertaken by Grade A or Grade B fee earners. It says this is unreasonably top heavy. The incurred time to date relates to the initial analysis of the claim, preparation of the defence, considering and setting strategy in consultation with the Enyo Defendants and settling the evidence in support of the Preliminary Issue Application. That work is necessarily (and appropriately) lead by senior solicitors. In any event, the relevant question is not necessarily the relevant fee earner, but the rate charged by the fee earner for the work. My rate for this matter has been significantly discounted from £950/hr to £650/hr and Ms Spencer (the Grade B fee earner on the matter) has been discounted from £550/hr to £450/hr. These rates are likely to be commensurate to the rates charged by a Grade B and C fee earner at Travers Smith.

    35.2. Reductions for Preliminary Issue Application to be determined at CMC. TTL considers that because the Preliminary Issue Application will now be determined at the CMC, the costs for both the hearing of the Preliminary Issue Application and CMC will need to be revised downward. I do not agree with this. Whilst the Preliminary Issue Application will be determined at the CMC, there will have been two half day hearings in advance of that: the directions hearing of 15 August 2023 (of which the order was costs in the case) and the strikeout application to be heard on 3

October 2023. Whilst there may now be some difference in the allocation of costs between these hearings, the overall result is likely to be the same (if not greater).

35.3. CMC costs. TTL asserts that the Enyo Defendants' costs estimate for the CMC is excessive. The costs estimate for the CMC includes all of the costs involved in completing the CMC documents including the preparation and agreement of the DRD. This is a highly complex and hard-fought claim and it is essential for the proper conduct of complex litigation such as this is for appropriate time to be spent at the outset to ensure that the matter is adequately planned to ensure proper directions to trial are set. Given the Preliminary Issue Application will be determined at the CMC, the Enyo Defendants will need to prepare for a trial of all of the issues and engage with the preparation of S1 DRD and directions to trial on both bases. There are also likely to be a number of applications for determination at the CMC. The estimates provided are a realistic reflection of this. Obviously, if these require updating in advance of the CMC we will do so.

35.4. Responsive evidence on PIT Application. TTL considers that 120 hours of solicitor time is excessive for the purposes of reviewing TTL's responsive evidence and preparing any reply evidence. As a consequence of TTL's strikeout application, the Enyo Defendants will be preparing responsive evidence on two occasions. If TTL fails on its strikeout application, I would expect that its reply evidence will seek to deal with the factual allegations of fraud made against TTL and Dr Wright and I anticipate having to investigate and to respond to that evidence in short order. 120 hours of total solicitor time (most of which is at the junior level) is entirely reasonable given the matters in issue and the serious allegations made.

35.5. TTL's points on PIT phases:

35.5.1. Disclosure. TTL says that £121,250 (which is made up of 343 hours of solicitor time) is excessive for the disclosure phase of proceedings given what I have said about what this phase is likely to require. At this stage, the volume of disclosure that TTL will give is unclear. It appears, based on the evidence that TTL has filed in these proceedings to date, that disclosure might be very limited. I hope that is the case. However, even if only a handful of documents are disclosed, that will not limit the work that will need to be done by my team to analyse and investigate the documents and their content. This will include detailed analysis of other documents already in public domain. Dr Wright's propensity for forgery and fabrication mean that the Enyo Defendants will not be able to take anything disclosed by TTL at face value.

35.5.2. Evidence. TTL says that my statement that "there is similarly likely to be limited

factual evidence required" for the PIT is inconsistent with my estimate of up to 10 witnesses. The estimates I have given are conservative and intended to ensure that, if Dr Wright does call a number of witnesses, or a number of witnesses are required to disprove his case on ownership, then sufficient time is available for those witnesses to be heard. The only witness likely to be called to address the issues of substance is Dr Wright. TTL has not indicated that it intends to call any other witnesses but has also not said it will not. It is not expected that the Enyo Defendants will call many witnesses at all, but it may be necessary to call witnesses on very discrete points such as: (i) when the purchase order template was created, or (ii) when WMIRK started dealing in Bitcoin. Again, whilst the ultimate scope of the evidence for trial is likely to be small, there is likely to be a reasonable amount of work necessary to properly investigate and respond to Dr Wright's case on ownership.

35.5.3. Experts. TTL says that it is not clear why the limited exercise involved in the forensic analysis of documents I have described in Elliss 1 would cost £205,000, involve 217 hours of solicitor time and expert fees in the amount of £100k. Until TTL has given disclosure it is unclear exactly how many documents will need to be examined forensically. However, even a limited number of documents will require a significant amount of time to review properly. This is because detailed contextual work is often required to investigate source documents, fonts and other imbedded metadata and cross check that with other documents in the disclosure set and available from publicly available sources. It may be that TTL confirms the only documents it relies upon are those that it has already disclosed (which will limit the task significantly), however unless it is prepared to do so then I consider that the existing estimate to be reasonable and proportionate.

35.5.4. Pre-trial review. TTL states that it is not clear that a PTR will be required. The Chancery Guide directs that there should be a PTR for all trials with estimates of five days or more (including judicial pre-reading). It is therefore necessary to budget for a PTR.

36. Finally, it is notable that no complaint is made about my firm's rates for this matter. This is not surprising given that my firm has agreed to do this matter at a significant discount. I expect that the Travers Smith team instructed for TTL are charging TTL rates at or in excess of my firm's standard rates and, in any event, at rates materially higher than those charged by my firm to the Enyo Defendants.

37. Ultimately, whilst it is useful to look at each phase of the security requested, it is also necessary to take a step back and consider whether the sums sought are reasonable and proportionate as a whole. In this case, TTL's entire claim is based on a small number of documents that have prima facie indications of forgery. Moreover, Dr Wright has a long and documented history of fabricating documents, giving false evidence and otherwise advancing a deliberately false case. This necessitates a significant amount of extra work checking and testing the evidence of TTL against publicly available sources (including the large amounts of information in the public domain by reason of the other proceedings in which Dr Wright is a party). Looking at the sums sought from that perspective, it is my respectful opinion, that the sums sought are reasonable and proportionate and should be ordered in the full amount sought by the Enyo Defendants' application.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of Court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

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Timothy William Elliss

15 September 2023