

Applicants  
Velvel (Devin) Freedman  
First VDF1  
11 November 2019

Claim No.: [●]

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
COMMERCIAL COURT (QBD)

BETWEEN:

*IRA KLEIMAN, as the personal representative of the Estate of  
David Kleiman, and W&K Info Defense Research, LLC*

Applicants

-and-

Respondent

**ANDREW O'HAGAN**

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**FIRST WITNESS STATEMENT OF VELVEL (DEVIN) FREEDMAN**

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I, Velvel (Devin) Freedman, of Roche Freedman LLP, 200 South Biscayne Boulevard, Suite 5500, Miami, Florida 33131, United States of America **WILL SAY** as follows:

**1. INTRODUCTION**

- 1.1 I am a Partner of Roche Freedman LLP, which acts for Ira Kleiman, as the personal representative of the Estate of David Kleiman, and for W&K Info Defense Research, LLC (the "Applicants"), who are the plaintiffs in litigation in the United States District Court Southern District of Florida (the "SDF Court") against Dr Craig Wright (the "Defendant") as defendant (Case No.: 9:18-cv-80176-BB) (the "SDF Proceedings").
- 1.2 In the SDF Proceedings, the Applicants allege that the Defendant has unlawfully withheld Bitcoins and intellectual property assets rightfully belonging to the Applicants. I am the attorney with knowledge of the conduct of the SDF Proceedings on behalf of the Applicants and am duly authorised to make this witness statement on their behalf.
- 1.3 Save where otherwise stated, the facts and matters contained in this witness statement are based upon information provided to me by the Applicants and are true to the best of my knowledge and belief. Nothing in this witness statement is intended to constitute any waiver of privilege.
- 1.4 There is now shown to me marked "VDF1" a bundle of copy documents to which I refer in this statement by page numbers in square brackets.

2. APPLICATION

2.1 This Application (the "Application") is made pursuant to s.1 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "1975 Act") and Part 34 of the Civil Procedure Rules (the "CPR") in pursuance of a request issued by the SDF Court by way of a sealed Letter of Request dated 22 July 2019 (the "Letter of Request") [VDF1/1-16], for an order that Mr Andrew O'Hagan:

- (a) Be examined by way of deposition in a manner consistent with the US Federal Rules of Civil Procedure before an examiner of the Court to be appointed pursuant to CPR 34.18(1)(b), at the offices of Boies Schiller Flexner (UK) LLP, 5 New Street Square, London EC4A 3BF (the "O'Hagan Deposition"); and
- (b) Produce certain categories of documents (described more fully at paragraphs 4.13 below, pursuant to s. 2(2)(b) of the 1975 Act (the "O'Hagan Documents") (together, the "O'Hagan Evidence").

2.2 I believe that the Hon. Bruce E. Reinhart, United States Magistrate Judge has fully considered the matters in dispute and the requests as set out in the Letter of Request and considers the evidence sought to be relevant to the proceedings. As Judge Reinhart noted in the first page of the Letter of Request: "*The Court has presided over this matter since February 2018 and has carefully reviewed the categories of evidence listed below and considers the evidence sought is directly relevant to the issues in dispute and is not discovery within the meaning of Article 23 of the Hague Evidence Convention, that is, discovery 'for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.'*" [VDF1/1]

2.3 In this Witness Statement, I set out the following:

- (a) A short background to the SDF Proceedings for which the O'Hagan Evidence is required to be taken (paragraphs 3.1 to 3.4);
- (b) The expected contents and nature of the O'Hagan Evidence and how it will be relevant for trial in the SDF Proceedings (paragraphs 4.1 to 4.20);
- (c) Why an order to take the O'Hagan Evidence would be proportionate in respect of the Court's overriding objective (paragraphs 5.1 to 5.2); and
- (d) An explanation of the relevant US federal rules relating to evidence in federal civil actions, and why the O'Hagan Deposition would be permitted as evidence at trial under those rules (paragraphs 6.1 to 6.16).

3. BACKGROUND TO THE SDF PROCEEDINGS

- 3.1 By a Complaint in the SDF Proceedings dated 14 February 2018 (the "Complaint" [VDF1/17-54]), and by an amended Complaint dated 14 May 2018 (the "Amended Complaint" [VDF1/55-107]), and a second amended Complaint dated 14 January 2019 (the "Second Amended Complaint") [VDF1/108-156], the Applicants commenced an action for damages and other equitable relief in the SDF Court against Dr Wright.
- 3.2 The Applicants allege that Dr Wright has unlawfully taken bitcoins and intellectual property assets rightfully belonging to the Applicants, and claim that his actions amount to conversion,

unjust enrichment, breach of fiduciary duty, breach of partnership duties of loyalty and care, and fraud. As at the date of filing the Second Amended Complaint, the value of these assets exceeded \$11.4 billion; at their highest potential value, they could be worth more than \$27 billion (before punitive or treble damages, which may be available in the SDF Court).

3.3 The full details of the claims set forth in the SDF Proceedings are set out in the Second Amended Complaint. In brief:

- (a) The concept and technology behind Bitcoin was first published in October 2008 when its pseudonymous creator, Satoshi Nakamoto, sent a protocol to a mailing list of cryptography enthusiasts. The Defendant has alleged that he is Satoshi Nakamoto [VDF1/140-141].
  - (b) Mr David Kleiman and the Defendant were friends and business partners. Together, they developed the Bitcoin technology, and between 2009 and 2013 mined a large amount of Bitcoin for their joint benefit [VDF1/111, 120, 121-127, 252-261].
  - (c) Mr David Kleiman died on 26 April 2013 [VDF1/111]. At that point, the Bitcoin mined by the Defendant and Mr Kleiman was not worth as much as it is today.
  - (d) The Defendant then took possession and control of the Bitcoins and bitcoin-related intellectual property which rightfully belonged to the Applicants. [VDF1/111] He did so through various means, including by forging a series of contracts that purported to transfer all the bitcoins and intellectual property assets to the Defendant and/or companies controlled by him. [VDF1/111, 131]
  - (e) In May 2014, the Defendant disclosed to Mr Ira Kleiman that he had partnered with Mr David Kleiman to create Bitcoin, to mine Bitcoin, and to create valuable intellectual property, but claimed that Mr David Kleiman had signed all these property rights away in exchange for a non-controlling share of a non-operational Australian company [VDF1/111-112, 120, 262-265] The Second Amended Complaint alleges that the Defendant knew this to be untrue. [VDF1/112]
  - (f) In May 2016, the defendant publicly revealed himself and Mr David Kleiman as the creators of Bitcoin. [VDF1/118]
  - (g) To date, the Defendant has not returned any of the mined bitcoins or intellectual property rights belonging to the Applicants. [VDF1/112]
- 3.4 The pleadings in the SDF Proceedings have closed, and trial has been set for March 2020. The current deadline for disclosure (known as "discovery" in the United States) is set for 3 January 2020. The Applicants have not made this Application before now because until recently the parties were engaged in good faith settlement discussions and had reached a non-binding settlement in principle [VDF1/266-268, 269-270], for which reason the SDF Court had partially granted the parties' joint requests for extensions of time. [VDF1/271-273, 274-275]. On 30 October 2019, the Applicants were informed that the Defendant could not finance the settlement [VDF1/416], and the parties have returned to active litigation. The Applicants therefore request that this Application be granted as a matter of urgency.

#### 4. EXPECTED CONTENTS AND NATURE OF THE O'HAGAN EVIDENCE

- 4.1 Andrew O'Hagan is a reputable, thorough and highly regarded author. He has authored numerous fiction and non-fiction books and won numerous prestigious prizes for his work [VDF1/411-414]. Mr O'Hagan is the author of *The Satoshi Affair* [VDF1/157-251], a book-length article published in the *London Review of Books* in June 2016. *The Satoshi Affair* contains much information relevant to the SDF Proceedings.
- 4.2 In *The Satoshi Affair*, Mr O'Hagan writes in detail about Dr Wright's claims to have invented Bitcoin and his relationship with Mr David Kleiman.
- 4.3 The primary source of Mr O'Hagan's article was hours of conversation with the Defendant, much of which was recorded. [VDF1/181] Mr O'Hagan also interviewed and may have recorded numerous other individuals<sup>1</sup> with knowledge of the subject matter of the Second Amended Complaint, including the Defendant's relationship with Mr David Kleiman.
- 4.4 Mr O'Hagan was also sent written communications and provided with evidence relating to Dr Wright and Mr Kleiman from various parties. [VDF1/164, 167, 169, 170, 176, 250].
- 4.5 The article itself includes evidence relevant to the Applicants' claim, and has already been cited as evidence in the Second Amended Complaint. For example: "[The Defendant] has readily admitted [Mr David Kleiman] was intimately involved in the creation of Bitcoin. In numerous interviews with Andrew O'Hagan, documented in *The Satoshi Affair*, [the Defendant] told O'Hagan that '[the Defendant] did the coding and that Kleiman helped him to write the white paper'" [VDF1/140-141].
- 4.6 The raw material of the article – the Defendant's own words, those of others, and original documentation – will prove invaluable to the SDF Proceedings in two ways. First, it will enable the SDF Court to verify the accuracy of evidence derived from the article. Second, the raw material is likely to contain further relevant evidence that Mr O'Hagan chose not to include in the published version of *The Satoshi Affair*. Mr O'Hagan referred to such material in the article: "There were many things that were said to me by every party in this story that I would choose not to print. Not only things they said about one another, but business arrangements and unsubstantiated allegations about the past, and things I knew in the present. But I had been recording this as a documentary from the start, as I'd said I would when we met at Claridge's in December. Now I was being told that my material was too hot and my story posed a threat." [VDF1/245]. Mr O'Hagan also stated: "In fairness to Wright, Matthews might just have been running his mouth off, and I've left out the worst of what he said, now and later." [VDF1/204]
- 4.7 The Defendant has claimed in a deposition that *The Satoshi Affair* is a "work of fiction" and has made numerous statements at odds with statements he is reported in *The Satoshi Affair* as having made [VDF1/279, 285].

<sup>1</sup> These include (a) Mr Stefan Matthews [VDF1/158, 160, 163, 165-169, 203-205, 208, 211, 218-220]; (b) Mr Allan Pederson [VDF1/159, 162, 195-200]; (c) Mr Robert MacGregor [VDF1/167-173, 185, 198-199, 205-206, 209-210, 218, 220-221, 239-240, 249]; and (d) (e) Mr Gavin Andresen [VDF1/216-221]. , Mr O'Hagan noted that he had "many hours of tape" and wrote, "But I had been recording this as a documentary from the start, as I'd said I would when we met at Claridge's in December." [VDF1/181, 245].

### Documentary Evidence

- 4.8 The Applicants seek the production of certain documents or limited categories of documents, all of which fall within the scope of the Letter of Request [VDF1/1-16]. The Applicants expect these documents to be used in trial, as they are likely to be highly probative of numerous elements of the Second Amended Complaint.
- 4.9 The Letter of Request seeks categories of documents rather than identifying individual documents. As a matter of US federal law, this is standard and permissible. By issuing the Letter of Request, the SDF Court has shown that it considers the categories in the Letter of Request to be relevant, appropriate and proportionate to the matter. I also understand that requests for documents from the English courts in aid of foreign proceedings, whether set out as single documents or categories, should be as specific as possible. In certain instances, therefore, the Applicants propose alternative, narrower categories than those articulated in the Letter of Request.
- 4.10 As a preliminary point, the requests are by definition narrowly tailored since they all relate solely to documents prepared or received in connection with a single article: *The Satoshi Affair*.
- 4.11 I set out here the categories described in the Letter of Request [VDF1/5], explain why each category of documents is relevant, and where appropriate propose alternative, narrower categories.
- 4.12 I understand that the English High Court case of *Atlantica Holdings, Inc et al v Sovereign Wealth Fund et al* [2019] EWHC 319 (QB) states at paragraph 80 that "*[i]f an examination of the terms of the [Letter of Request] and any other relevant material shows that the matter has been considered on the merits by the requesting court, and the topics found by it to be relevant, then the English Court should respect that determination because the requesting court is in the best position to judge relevance*". As noted above at paragraph 2.2, Judge Reinhart, who has extensive knowledge of the SDF Proceedings, considered the evidence requested and determined that the evidence sought is directly relevant to the issues in dispute.<sup>2</sup> Given that, I consider this Court should respect Judge Reinhart's determination and grant this Application. Nonetheless, in order to help the Court consider the Application, I set out in detail why the requested categories (and later, the subjects for questioning in deposition) are relevant.
- 4.13 The topics are as follows:
- (a) All video and/or audio recordings of interviews related to Mr O'Hagan's work in writing *The Satoshi Affair*. Specifically, including, but not limited to, the "many hours of tape" [VDF1/181] of the Defendant referenced in *The Satoshi Affair*.

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<sup>2</sup> Cf. *Atlantica Holdings, Inc et al v Sovereign Wealth Fund et al* [2019] EWHC 319 (QB) at paragraphs 99-100 ("These paragraphs are an explicit statement that Judge Furman considered the topics and found them to be relevant. I completely reject the suggestion that I should infer he merely rubber-stamped the Plaintiffs' application without applying his mind to the merits. Ms Fatima at one point in her submissions said that there was 'no evidence' that the judge had considered relevance. The short answer is that there did not need to be. The LORs are, as I have said, written by the judge in the first person and they contain his reasoning and conclusions that the topics are relevant. Nothing more is required, any more than it would be if this Court were to issue an LOR to Judge Furman setting out a list of topics said to be relevant to litigation here. In conclusion, I am entirely satisfied that the issue of relevance was considered on the merits by Judge Furman and the topics found by him to be relevant, and thus that as a matter of comity I must respect that determination because he was in the best position to judge relevance.")

- (i) These recordings will enable the SDF Court to assess the accuracy and veracity of the contents of *The Satoshi Affair*, which is already evidence in the SDF Proceedings, as well as the reliability of the Defendant's evidence. This is especially important since the Defendant has claimed the article is a work of fiction (see above, paragraph 4.7).
  - (ii) The recordings are also expected to include further relevant information relating to the following topics, each of which was part of the final published version of *The Satoshi Affair*:
    - (A) the creation of Bitcoin and Dave Kleiman's participation therein [VDF1/164, 180-181, 186, 192-193];
    - (B) the personal and business relationship between the Defendant and Mr David Kleiman, including W&K Info Defense Research, and how they all conducted their Bitcoin mining activities and intellectual property research and development [VDF1/121, 181, 185-187, 192];
    - (C) the Bitcoin allegedly mined by the Defendant and Mr David Kleiman [VDF1/191];
    - (D) the Tulip Trusts and any other trusts into which the Defendant purportedly placed Bitcoin mined by him and Mr David Kleiman (the "Trusts") [VDF1/190]; and
    - (E) the intellectual property alleged to have been created by the Defendant and Mr David Kleiman. [VDF1/186-187]
  - (iii) **Alternatively**, the Court may require that Mr O'Hagan produce only those parts of the recordings that relate to the above topics. However, such an order may be more burdensome on Mr O'Hagan, as he will be required to conduct an extensive search, which the Applicants would be better placed to conduct.
- (b) All documents relied on or reviewed in preparing for, and drafting, *The Satoshi Affair*. This includes contemporaneous notes taken by Mr O'Hagan or others, and any documents or communications reviewed or relied upon when preparing the story.
- (i) The request for "contemporaneous notes" should be read as "contemporaneous notes of interviews".
  - (ii) These documents would be useful at trial for the same reasons set out above.
  - (iii) **Alternatively**, the Court may require that Mr O'Hagan produce only those parts of the documents that relate to the topics set out in paragraph 4.13(ii). However, such an order may be more burdensome on Mr O'Hagan, as he will be required to conduct an extensive search, which the Applicants would be better placed to conduct.

- (iv) Further, in respect of the request for contemporaneous notes, the Court may alternatively require that Mr O'Hagan produce only notes of interviews for which recordings do not exist.
- (c) *All emails between Mr O'Hagan, and each of the Defendant, Ms. Ramona Watts, Mr Robert MacGregor, Mr Stefan Matthews or Mr Calvin Ayre.*
- (i) The relevance of e-mails with the Defendant is clear. As one example, the Defendant sent Mr O'Hagan copies of numerous emails between him and Mr David Kleiman [VDF1/187, 190, 191].
- (ii) The Respondent may consider that he does not need to produce certain communications with the Defendant because the Defendant has disclosure obligations in the SDF Proceedings which would include producing relevant emails between himself and the Respondent (and he has in fact produced some emails). Nonetheless, we do not consider this request will duplicate what the Applicants already have received in discovery, for the following reasons.
- (A) *First, the Defendant has not always conducted himself honestly in the SDF Proceedings, including in regard to documents. The Applicants therefore consider it likely that he has not honestly and diligently observed his disclosure obligations. I understand this is a serious allegation to make, but it is supported by the evidence, including findings of both a US Magistrate Judge and a District Judge.*
- (B) In March 2019, after the Defendant moved to dismiss the case<sup>3</sup> based on new allegations as to who the members of the W&K Applicant were,<sup>4</sup> United States District Judge Beth Bloom denied the Defendant's motion, stating the following: "*Indeed, the Court notes that the defendant has made several conflicting statements regarding even his own ownership of W&K.... Unfortunately, the record is replete with instances in which the defendant has proffered conflicting sworn testimony before this Court. In weighing the evidence, the Court simply does not find the defendant's testimony to be credible.*" (emphasis in the original) [VDF1/300-301, 306]

There was credible evidence that the Defendant attempted to use at least two forged documents in support of his allegations.<sup>5</sup>

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<sup>3</sup> In US terms, he moved for judgment on the pleadings.

<sup>4</sup> If it could be shown that there were non-American members of the W&K Applicant, that would have shown there was not complete "diversity of citizenship" and would have defeated the subject matter jurisdiction of the US federal court.

<sup>5</sup> The first document (referred to in the relevant papers as "Exhibit A") purported to be an email between Mr David Kleiman and Uyen Nguyen sent on 20 December 2012. A computer science expert retained by the Applicants found the following, which he testified in two sworn affidavits to the SDF Court: "*This email [Exhibit A] includes a digital signature allegedly belonging to Dave Kleiman as an attempt to prove its authenticity. Based on my analysis of this document and the signature on it, this document was digitally signed in early 2014, almost a year after Dave Kleiman died.... I have also conducted a forensic analysis of Exhibit F to Defendant's Motion for Judgment on the Pleadings (ECF No. [144-6], hereafter referred to as "Exhibit F") and determined that it was created by further modifying Exhibit A to make it appear as if Exhibit F is actually a separate email sent from Dave Kleiman*

- (C) Further, in an order dated 27 August 2019 sanctioning the Defendant for failing to comply with an earlier court order, US Magistrate Judge Reinhart found: "*There was substantial credible evidence that documents produced by Dr. Wright to support his position in this litigation are fraudulent. There was credible and compelling evidence that documents had been altered... [T]here is a strong, and unrebutted, circumstantial inference that Dr. Wright willfully created the fraudulent documents.*" [VDF1/351-352]. Further, "*the evidence establishes that he has engaged in a willful and bad faith pattern of obstructive behavior, including submitting incomplete or deceptive pleadings, filing a false declaration, knowingly producing a fraudulent trust document, and giving perjurious testimony at the evidentiary hearing . . . I have found that Dr. Wright intentionally submitted fraudulent documents to the Court, obstructed a judicial proceeding, and gave perjurious testimony.*" [VDF1/358-359]
- (D) If the Defendant is willing to submit fraudulent documents in order to help his defence, there is a good chance that he will conceal documents that do exist in order to avoid harming his defence. Therefore, the Court should require the Respondent to produce the requested emails.
- (E) *Second, in the ordinary course of things, emails are sometimes deleted, mislaid, or not found when looked for (perhaps because of being poorly located or not including expected keywords).* Therefore, it is to be expected that the sets of responsive emails held by the Respondent and the Defendant would not be identical.
- (iii) The Applicants no longer seek emails between Mr O'Hagan and Mr Ayre.
- (iv) The other individuals named above would have relevant knowledge, which can be expected to be revealed in the emails, as follows:
- (A) Ms Watts is the Defendant's wife and has been involved in his companies since approximately 2011 [VDF1/286, 363]. She shared information with Mr O'Hagan relating to issues in the SDF Proceedings, including the creation of Bitcoin and the Trusts, and

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*to Uyen Nguyen, when, in my opinion, it is simply another revision to the PDF created from an email the Defendant sent to himself on or about April 16, 2014. In sum, Exhibit A and Exhibit F, which appear to be emails sent from Dave Kleiman to Uyen Nguyen on December 20, 2012, are manipulations of a PDF created from an email the Defendant sent from himself to himself on or about April 16, 2014." (footnote omitted) [VDF1/ 321, 310]. The Court was not required to determine whether the expert was correct, because the Defendant, after including both documents as exhibits to his motion to dismiss the case, then withdrew both documents, one at the hearing to decide the motion. [VDF1/302]. But the Court nonetheless indicated its concerns about the Defendant's behaviour thus: "The Court also notes that the emails in question were produced by the defendant during discovery. The defendant, however, is not the sender, recipient, nor copied to the emails. At the Hearing, given that the Defendant claims he has not been in contact with Nguyen "in years," the Court questioned how the defendant came into possession of the emails. The Defendant claimed he received them as "records" from companies when he left Australia." [VDF1/302-303]*

communicated with Mr O'Hagan, *inter alia*, by email [VDF1/173, 245, 250].<sup>6</sup>

- (B) Mr MacGregor was the Defendant's business partner and was made privy to details about the creation and mining of Bitcoin by the Defendant and Mr David Kleiman, and intellectual property developed by them [VDF1/167, 289]. He was a "generous source of information" to Mr O'Hagan, and shared information with Mr O'Hagan relating to issues in the SDF Proceedings, including the creation of Bitcoin, Satoshi Nakamoto, the Trusts, and the intellectual property created by the Defendant and Mr David Kleiman, and communicated with Mr O'Hagan, *inter alia*, by email [VDF1/167, 172-173, 199, 249].
- (C) Mr Matthews is an IT expert and a long-time friend of the Defendant [VDF1/163] who cooperated with Mr O'Hagan in the process of compiling information for the authoring of *The Satoshi Affair*, including by giving him evidence [VDF1/167]. He shared information with Mr O'Hagan relating to issues in the SDF Proceedings, including the creation of Bitcoin, Mr David Kleiman, and the Trusts [VDF1/166, 205, 207, 249].
- (v) Alternatively, the Court may require that Mr O'Hagan produce only those parts of the emails that relate to the topics set out in paragraph 4.13(ii). However, such an order may be more burdensome on Mr O'Hagan, as he will be required to conduct an extensive search, which the Applicants would be better placed to conduct.
- (d) All drafts of *The Satoshi Affair*, any edits received, and comments thereto.
- (i) The Applicants no longer seek this category of documents.

4.14 I consider that these documents are in Mr O'Hagan's possession based on the following averments he made in *The Satoshi Affair*:

- (a) For all stories written under his name, including *The Satoshi Affair*, Mr O'Hagan takes notes and makes recordings; he made "many hours of tape" in preparing for the article [VDF1/169, 181];
- (b) Mr O'Hagan sent and received emails to and from Dr Wright [VDF1/184-187];
- (c) Mr O'Hagan sent and received emails to and from Mr MacGregor [VDF1/167, 198-199, 209].
- (d) Mr O'Hagan sent emails to and received evidence from Mr Matthews [VDF1/167, 205].
- (e) Mr O'Hagan received emails from Ms Watts [VSF1/250].

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<sup>6</sup> The Applicants are seeking a separate order from the Court under CPR 34 to acquire evidence from Ms Watts.

4.15 I am aware that English law generally protects a journalist from disclosing his sources unless such disclosure is deemed to be in the interests of justice. For the avoidance of doubt, and without making any admission that *The Satoshi Affair* is a work of journalism, the Applicants do not seek, either through the O'Hagan Documents or the O'Hagan Deposition, the disclosure by Mr O'Hagan of any hitherto-undisclosed source. If, which is unexpected, it later emerges that the identity of such a source becomes relevant to any of the issues in the SDF Proceedings, the Applicants will seek agreement with Mr O'Hagan in that regard, or will return to the Court for a further order.

#### Deposition

- 4.16 The Applicants seek to take a deposition of Mr O'Hagan, over a period of one day not to exceed seven hours, at the offices of Boies Schiller Flexner (UK) LLP in London, or another venue convenient for Mr O'Hagan and suitable for the taking of a deposition.
- 4.17 The Applicants expect to use the O'Hagan Deposition as evidence at trial. As explained at paragraph 6.10, the relevant United States federal laws of evidence would allow the Applicants to use portions of the O'Hagan Deposition as part of their evidence if Mr O'Hagan is unavailable to testify at trial.
- 4.18 The deposition of Mr O'Hagan will be limited to the issues set out in the Letter of Request. Although, as noted, Judge Reinhart has already determined relevance, I explain why each issue is relevant below:
- (a) *Mr O'Hagan's educational background, employment history, professional qualifications, personal preparation for the deposition (to include any contact he may have had with the parties, their lawyers, insurers or representatives, but excluding any privileged content of such communications).*
    - (i) This evidence will be useful for the SDF Court in determining the reliability and trustworthiness of Mr O'Hagan and the contents of *The Satoshi Affair*.
  - (b) *The accuracy of the quotes and factual assertions contained within his article *The Satoshi Affair*.*
    - (i) As noted, *The Satoshi Affair* has already been proffered in evidence in the SDF Proceedings. This evidence will assist the SDF Court in assessing its reliability, veracity and weight as evidence, and the reliability of the Defendant's evidence, especially in light of his characterisation of the article as a work of fiction (see above, paragraph 4.7).
  - (c) *Statements made, or documents provided, by Mr Wright (and his agents), Ms Lynn Wright [VDF1/188-189], or Ms Watts [VDF1/171-174, 180, 244-247] that relate to Satoshi Nakamoto, the creation of Bitcoin, Mr David Kleiman, W&K Info Defense Research, the Tulip Trusts, the Bitcoin allegedly mined by Mr Wright and/or Mr David Kleiman, and the intellectual property alleged to have been created by Mr Wright and/or Mr David Kleiman.*
  - (d) *Statements made, or documents provided, by anyone interviewed in connection with the drafting of *The Satoshi Affair* that relate to Satoshi Nakamoto, the creation of Bitcoin, Mr David Kleiman, W&K Info Defense Research, the Tulip Trusts, the Bitcoin*

*allegedly mined by Mr Wright and/or Mr David Kleiman, and the intellectual property alleged to have been created by Mr Wright and/or Mr David Kleiman.*

- (i) These two issues can be considered together. Each of the topics noted is highly specific, was written about by Mr O'Hagan in *The Satoshi Affair*,<sup>7</sup> and is clearly relevant to the Applicants' allegations regarding the partnership between the Defendant and Mr David Kleiman, the Bitcoins and intellectual property generated as a result thereof, and the actions taken by the Defendant in respect of the Bitcoins.
  - (ii) Ms Wright is the Defendant's former wife. She shared information with Mr O'Hagan relating to issues in the SDF Proceedings, including the relationship between the Defendant and Mr David Kleiman [VDF1/188-189].
- 4.19 In accordance with the English case cited previously, *Atlantica Holdings, Inc et al v Sovereign Wealth Fund et al* [2019] EWHC 319 (QB), I believe that the issues are sufficiently specific and certain.
- 4.20 I also consider that all these issues are within Mr O'Hagan's personal knowledge since they relate to his personal background and dealings, and to an article that he prepared and wrote.

## 5. PROPORTIONALITY

### Previous Steps Taken By the Applicants to Obtain the O'Hagan Evidence

- 5.1 Matthew Getz, a partner at Boies Schiller Flexner (UK) LLP in London, previously made attempts to contact Mr O'Hagan through his literary agent, Peter Straus of Rogers, Coleridge & White. Mr Getz sent emails to Mr Straus on 23 and 31 July 2018 [VDF1/366-367]. The emails were not answered.

### Cost and Proportionality

- 5.2 I understand that the courts in England and Wales look, under CPR 1.1, to the overriding objective of ensuring that cases are dealt with justly and at proportionate cost. Granting the Applicants' Application would, in my view, meet this objective for the following reasons:
- (a) **Equal footing:**
    - (i) Mr O'Hagan is a well-known and well-respected author whose work appears in prestigious publications around the world. He will not be at a disadvantage vis-à-vis the Applicants.
    - (ii) Mr O'Hagan is the only person able to provide the recordings that he created as part of the process of writing *The Satoshi Affair*, verify under oath that the statements attributed to Craig Wright therein are accurate, and provide relevant documents and emails he received in connection with the drafting of *The Satoshi Affair*.

<sup>7</sup>

See paragraph 4.5 above.

- (iii) Mr O'Hagan will not need to fear widespread disclosure of his working papers. A protective order has been entered in this case by the SDF Court allowing any party to designate testimony or documents as confidential, if appropriate, in order to protect confidentiality and privacy [VDF1/368-385]. To the extent necessary, the Applicants are willing to work with Mr O'Hagan to see if any such material requires such designation.<sup>8</sup>
  - (iv) By contrast, the Applicants would be seriously disadvantaged in their pursuit of justice in the SDF Proceedings if they were unable to obtain the O'Hagan Documents and testimonial evidence.
- (b) **Saving expense:**
- (i) Ordering production of the O'Hagan Documents will not create disproportionate expense for Mr O'Hagan (or any party) as these are documents already in his possession, and relating to a single article. The Applicants seek to depose Mr O'Hagan for a maximum of seven hours, on a mutually convenient date. The Applicants propose that the Deposition take place at the offices of their solicitors in London, the city in which Mr. O'Hagan lives and works.
  - (ii) The Applicants, on the other hand, have already incurred substantial expense in the SDF Proceedings, in obtaining the Letter of Request and in bringing this present application, in order to recover the assets which the Defendant has unlawfully taken. It would also be more expensive for the Applicants to seek to procure the information from each named source, especially as many of the sources will not have taken notes or recorded the conversation.
- (c) **Proportionality:** An order from this Court to obtain the O'Hagan Documents is proportionate for the following reasons:
- (i) **Amount of money involved:** the Applicants allege that the Defendant has unlawfully taken assets worth at least \$11 billion.
  - (ii) **Importance of the case:** this case is plainly a significant case, involving very large sums of money and the genesis of one of the most important financial and technological innovations of our time. The case has generated significant media attention.
  - (iii) **Financial position of each party:** We are not aware of Mr O'Hagan's financial position. However, complying with an order from the Court should not significantly affect him, as the Applicants would pay for the reasonable costs of copying and transmitting the O'Hagan Documents (and will pay Mr O'Hagan's costs of attending the deposition, as per CPR 34.8(6)). Mr Ira Kleiman is not wealthy [VDF1/387], and W&K Info Defense Research, LLC has no assets available to it.

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The materials will of course not be confidential as to the Defendant or the SDF Court.

- (d) **Ensuring the application is dealt with expeditiously and fairly:** The Applicants are willing to provide all necessary assistance to Mr O'Hagan in order to facilitate the production of the O'Hagan Documents and the taking of the O'Hagan Deposition.

## 6. RELEVANT US FEDERAL EVIDENCE RULES

### Federal Rules of Civil Procedure

- 6.1 The Applicants seek an order that Mr O'Hagan's evidence should be taken as a deposition in accordance with the US Federal Rules of Civil Procedure. CPR 34.18(2)(a) permits the Court to order a deposition under rules other than the CPR. It is my understanding that the English courts will usually allow foreign rules for evidence-taking so long as they do not conflict with basic English principles. It may therefore assist the Court if I explain the nature of US depositions briefly, albeit that I anticipate the Court will already enjoy considerable familiarity therewith.
- 6.2 I emphasise that in this section, and in the section of my statement below addressing the differences between the English and US procedural rules, I am seeking to provide an overview only; this does not purport to be an exhaustive analysis, which would of course run to many pages.
- 6.3 In civil litigation in the United States, depositions are routinely employed as a way to procure admissible evidence to be used at trial and obtain relevant information related to the case. In the federal court system, both parties have an automatic right and power to subpoena 10 witnesses each, and to take their deposition.
- 6.4 Specifically, for litigation in the federal courts, Rule 30(a)(1) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") states:

*"A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45."*

[VDF1/394]

- 6.5 Rule 30(a)(2), Fed. R. Civ. P. states:

*"A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2): (A) if the parties have not stipulated to the deposition and: (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; (ii) the deponent has already been deposed in the case; or (iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or (B) if the deponent is in prison."*

[VDF1/394]

- 6.6 Under Rule 45(a)(3) subpoenas are issued from the court where the action is pending. Alternatively, "[a]n attorney also may issue and sign a subpoena if the attorney is authorized

*to practice in the issuing court.*" Accordingly, attorneys for each party can issue subpoenas under the relevant court's authority to take the deposition of up to 10 people without leave of court [VDF1/407].

- 6.7 A subpoena must "command each person to whom it is directed to the following a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control; or permit the inspection of premises" (Rule 45(a)(1)(A)(iii)) [VDF1/406]).
- 6.8 Subpoenas may be served not only on parties to the proceedings, but also non-parties, thereby allowing for depositions of, and discovery of documents from, non-parties such as Mr O'Hagan (Rule 30(a)(1)) [VDF1/394]).
- 6.9 Under Rule 32(a)(1), a deposition may be used at trial against a party if: (a) the party was represented at or had reasonable notice of the deposition; (b) the deposition is used to the extent it would be admissible if the deponent were testifying; and (c) the use is allowed by one of the provisions of Rule 32(a)(2)-(8) [VDF1/399-401].
- 6.10 In this case, either of two provisions of Rule 32(a)(2)-(8) will apply. If Mr O'Hagan testifies, under Rule 32(a)(2) the deposition may be used "*to contradict or impeach*" his testimony. If Mr O'Hagan does not testify, under Rule 32(4)(B) the deposition may be used "*for any purpose...if the court finds...that the witness...is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition.*" [VDF1/399].

#### Distinction Between English and US Procedural Rules

- 6.11 The English and US procedural rules for the taking of evidence by way of deposition are similar in most respects. In both instances, the deposition must be conducted on oath, before an officer appointed by the court,<sup>9</sup> as if the deponent were giving evidence at trial (CPR 34.9(1); Fed. R. Civ. P., Rule 30(c)(1) [VDF1/396]). The deponent may be required to produce documents (CPR 34.8(4); Fed. R. Civ. P., Rule 30(b)(2) [VDF1/395]). The deposition must be recorded in full and the recording provided to the deponent (CPR 34.9(4)&(6); Fed. R. Cv. P., Rules 30(c)(1), 30(e)(1) [VDF1/394-398]).
- 6.12 Under both English and US rules, a deponent may not be required to answer any question (or produce any document) which is subject to privilege (CPR 34.20; Fed. R. Civ. P., Rule 30(c)(2) [VDF1/396]). As the deposition will be taken in England, I understand English as well as Florida privilege laws will apply (Evidence (Proceedings in Other Jurisdictions) Act 1975, s. 3).
- 6.13 The primary distinction between the English and US rules is the manner in which the rules deal with objections. In England, if there is an objection to a deponent answering a question, the party requiring the deposition may apply to the Court for an order requiring the deponent to answer (CPR 34.10(1); see also *R v Rathbone ex parte Dikko* [1985] QB 630). Under the US Federal Rules, where there is an objection, the objection will be noted in the record but the deponent must answer anyway, unless the objection is: (a) to preserve a privilege; (b) to enforce a limitation ordered by the court; or (c) based upon an allegation of bad faith,

<sup>9</sup>

Under CPR 34.18, a deposition taken in England for use in foreign proceedings may also be taken before "*any fit and proper person*" nominated by the applicant. In the present case, however, the Applicants ask the Court to order deposition before an examiner of the Court under CPR 34.18(1)(b).

unreasonably annoying or embarrassing questioning, or oppression (Fed. R. Civ. P., Rule 30(c)(2) [VDF1/396]).

- 6.14 This difference is more formal than real. The carve-out under the US Federal Rules for oppressive or unreasonably annoying or embarrassing questions protects the deponent from irrelevant or vexatious lines of questioning. So too does the carve-out for any limitations imposed by the court. In the present case, the Applicants are seeking an order to question Mr O'Hagan only on limited categories of questions, so that under either the English or US rules, the Applicants could not require answers on wholly irrelevant questions. Moreover, under the Federal Rules, deposition testimony may only be used at trial to the extent that the testimony would otherwise be admissible under the Federal Rules of Evidence. (Fed. R. Civ. P., Rule 32(a)(1)(B) [VDF1/399]). Finally, under both the English and US rules, the court has the power to hold a deponent in contempt of court where he or she refuses to answer a question without any valid ground for refusal (CPR 34.10(2), 81(4); Fed. R. Civ. P., Rule 37(b)(1) [VDF1/403]).

#### Depositions in the SDF Proceedings

- 6.15 The case has already had numerous depositions. To date, the Applicants have taken the deposition of Dr Wright (twice), Mr Jonathan Warren, Mr James Wilson, and the Defendant has taken the deposition of Mr Ira Kleiman. The Defendant has also set the depositions of other witnesses in this case to take place at a later date. It is therefore understood by all parties that depositions, including those of non-parties, are necessary in this case.
- 6.16 In view of the above, the Applicants make the present Application to this Court so that the Evidence may be obtained for use at trial. As noted, the trial is currently scheduled for March 2020 and the discovery period is due to close on 3 January 2020 (though extensions can be applied for) [VDF1/271-273]. The Applicants therefore seek to obtain the Evidence as soon as possible. For that reason, time is of the essence in respect of this Application.

#### **STATEMENT OF TRUTH**

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

*Devin Freedman*

Name: Devin Freedman  
Dated: 11/11/2019