IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13721/2022

The application between:

H BESTER N.O.	First Applicant
AW VAN ROOYEN N.O.	Second Applicant
CJ ROOS N.O.	Third Applicant
JF BARNARD N.O.	Fourth Applicant
D BASSON N.O.	Fifth Applicant
CBS COOPER N.O.	Sixth Applicant

(cited in their capacities as the joint liquidators of Mirror Trading International (Pty) Ltd [in liquidation])

and

THE MASTER OF THE HIGH COURT, CAPE TOWN	Respondent

and

CH MARKS	First Intervening Party
PR BOTHA	Second Intervening Party
THE EDJ INVESTORS	Third Intervening Party
JA FISHER N.O.	Fourth Intervening Party
RN KHARIVHE N.O.	Fifth Intervening Party

[In their capacity as joint trustees of the insolvent estate of Cornelius Johannes Steynberg]

LIQUIDATORS' CONSOLIDATED ANSWERING AND REPLYING AFFIDAVIT

IN TERMS OF THE COURT ORDER DATED 31 OCTOBER 2022

I, the undersigned,

HERMAN BESTER N.O.

do hereby make an oath and say that:

1. I am an insolvency practitioner and liquidator of Tygerberg Trustees, First Floor, Cascade Terraces, Tyger Waterfront, Bellville, Western Cape and I depose to this application in my capacity as one of the duly appointed joint liquidators of Mirror Trading International (Pty) Ltd [registration number: 2019/205570/07] (in final liquidation) ("**MTI**").

2. The facts deposed to herein are within my personal knowledge and belief, save where the context indicates otherwise.

3. I am the principal deponent to the founding affidavit in this application. For purposes of consistency I incorporate all the abbreviations, definitions and references employed in the founding affidavit. As I already indicated in the founding affidavit, I am authorised on behalf of the applicants, to whom I shall refer herein as "**the liquidators**", to depose to the affidavits in this application, and, for completeness, I refer to the confirmatory affidavits deposed to by the remaining liquidators which will be delivered evenly with this affidavit.

4. Where I make submissions of a legal nature in this affidavit or where I refer to legal advice, such submissions and advice emanate from the legal advisors who assist the applicants in this matter, the reference to which is not and should not be construed as a waiver of any legal professional privilege that may apply.

5. To the extent that any party wishes to contend that any averment made in this affidavit constitutes hearsay evidence, and it be found as such by this court, the liquidators apply to this Court to notwithstanding admit such evidence in terms of section 3 of the Law of Evidence Amendment Act,

INTRODUCTION AND PURPOSE OF THIS AFFIDAVIT:

6. This application constitutes an approach this Court, by the MTI liquidators, for guidance in terms of of section 387(3) of the Companies Act, 61 of 1973 ("**the Companies Act**").

7. Section 387(3), to this end, permits the Court to give directions, or advice if it were, in relation to any matter arising under the winding-up of MTI. The matters upon which a Court may issue such guidance, or advice, to liquidators include any question of law and in cases of doubt the liquidators should, for their own protection, approach the Court.

8. Despite the factual and legal novelties and intricacies that arise in this application, the nature of the application is not complex at all. All that the MTI liquidators seek in terms of this application, is this Court's guidance on certain aspects emanating from the winding up proceedings of MTI.

9. This goal has always been, and remains, the purpose for which this application was prepared, brought and prosecuted.

10. This application served before this Court on 31 August 2022, upon which date a provisional order was granted by this Court in terms of this application, on an *ex parte* basis.

11. The guidance obtained from this Court is set out in paragraph 2 of the said order and that part of the order was granted in the form of a *rule nisi* ("**the *rule nisi***" or "**provisional order**").

12. Whereas, traditionally, a *rule nisi* is issued to operate with immediate effect, such an order was not granted in relation to this application. Because of the exceptional circumstances of this particular matter, and the numerous factors that distinguish MTI's liquidation proceedings from so many others, the liquidators particularly sought a different order.

13. A different type of order was applied for because the liquidators always intended to protect and preserve the rights of the many thousands of MTI investors in relation to this application. This the liquidators did not only by not pursuing substantive relief against any particular investor (only applying for guidance in terms of section 387) but also ensuring that all parties interested and affected by the guidance issued to the liquidators by this Court are given an opportunity to present submissions in relation thereto before this Court issues any guidance to the liquidators in terms of this application.

14. The Rule Nisi, to this end and in paragraph 3 thereof, expressly provides that:

"The provisional order shall be of no effect, until and unless confirmed by this Court, in whole, part or in an amended form, on the return date."

15. But, however, despite the liquidators' best intentions to not infringe upon the rights of any party, not only pursuant to the particular relief sought by them

but also in the manner in which they have gone about doing so, some have retaliated with misguided, or perhaps rather ill-intended, antagonism.

16. Whilst the liquidators are duty-bound to be and remain independent and to act in the interest of the entire body of MTI's creditors, without fear, favour or prejudice, some of the parties interested in and affected by the MTI liquidation proceedings do not share this admirable goal.

17. On the contrary, numerous parties, as expected and anticipated, pursue their own personal agendas that have those parties' own interests as their primary and principal priority. Some of those individuals will place, and indeed place, their own interests above all others, at the expense of the total body of MTI's creditors.

18. Whilst there is no undue financial benefit or other advantage to be gained by the liquidators personally pursuant to the guidance sought from and to be issued by this Court, it is obvious and inevitable that those who unduly benefitted from or plundered the MTI scheme, at the expense of others, will do whatever it takes – and say whatever needs to be said – in order to avoid the consequences of their conduct. This they will manifestly, and indeed demonstrably, do to protect themselves at the expense of all others.

19. In the circumstances, unfortunately so, conflict arises between the central considerations that guided and still guide this application from the liquidators' perspective (being the interests of the *concursus* constituents) and on the other hand, the interests of the individuals.

20. Whilst a certain degree of conflict and resistance could be expected, especially in the light of the major conflict of interest between those investors who lost money and those who handsomely profited from the scheme carried on by MTI, the reaction of some parties in response to this application is completely disproportionate and, to that end, unbecoming, unfortunate and regrettable.

21. This will be elaborated on in due course and against the proper context.

22. To this end, and for this replying affidavit to be placed in proper context, I will structure this affidavit to, in broad terms, topically and sequentially deal with the following:

    22.1. First, I formulate the reservations applicable to the contents of this replying affidavit and deal with certain misguided and unfounded common features of the oppositions to this application;

    22.2. Secondly I deal with the Marks' opposition;

    22.3. Thirdly I deal with the Botha opposition;

    22.4. Fourthly, I deal with the opposition of a number of unknown persons, purporting to be investors, to whom I shall collectively refer as the "**EDJ investors**";

    22.5. Fifthly, I deal with the stance adopted by the insolvency trustees of the insolvent estate of Mr Cornelius Johannes Steynberg ("**Mr Steynberg**"), to whom I shall refer as the "**Steynberg trustees**";

22.6. Lastly, I conclude by dealing with the specific relief sought as set out in the notice of motion.

CERTAIN RESERVATIONS AND CONFINES PLACED UPON THIS AFFIDAVIT:

23. The bulk of the intervention and answering affidavits filed to sustain participation by the intervening parties in these proceedings are not of an evidential nature and, to the extent that they are, the bulk of such evidence is irrelevant to these proceedings.

24. I interrupt the narrative to emphasise that the participation affidavits are over emotive and couched in disparaging language unbecoming of court papers that elevate this application beyond what it was always intended to be, in pursuance of a clear but inappropriate and impermissible attempt to unnecessarily personalise this application.

25. The liquidators will not unnecessarily burden this affidavit by dealing *ad seriatim* with each and every assertion contained in the said affidavits. A proper reading of the said affidavits reveals that it is not helpful to do so because the said affidavits are of little, if any, real value and do not substantively or substantially contribute much to the present enquiry under consideration. The intervening parties do not meaningfully engage with the bulk of the relief sought by the liquidators or the terms of the provisional order, already obtained, itself.

26. In this regard, the liquidators respond to the contents of these affidavits only to the extent that their contents require a response. By not responding to

any specific allegation set out in the said affidavits, the liquidators make no admission, concession or waiver of any nature. Any allegation not specifically responded to should, for present purposes, be considered as denied.

27. We also do not unnecessarily respond to assumptions, inferences, speculation or legal argument contained in the said affidavits. The said affidavits are, to this end, impermissibly replete with legal argument and non-factual submissions. These aspects will be addressed on behalf of the liquidators during legal argument – at the hearing of this matter - when and where it is appropriate to do so.

28. To avoid any form of confusion, the liquidators deny that all of the allegations made in the said affidavits are true or correct and I deny any allegation contrary to the contents of what I state herein.

29. Within these confines, the liquidators respond to the subject affidavits as set out hereunder.

COMMON FEATURES IN THE "OPPOSITION" TO THIS APPLICATION:

(i) The intervening parties request that this Court should dismiss the application

30. But for the Steynberg trustees, the other intervening parties purport to seek an order that this Court should dismiss this application with costs.

31. Whilst the liquidators deal hereunder with the nature of this application and the relief sought, which has manifestly been misconstrued, misunderstood

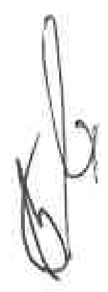
or just ignored, we point out at the outset that a request by a party that, or to the effect that, this Court should dismiss this application is in itself *mala fide*.

32. In terms of this application, the liquidators, as officers of the Court, approach this Court for guidance/advice on novel matters and issues arising in the liquidation proceedings of MTI. To this end, the liquidators do so in accordance with a statutory entitlement to approach this Court, in appropriate circumstances (such as the present) for such guidance and/or advice. The liquidation proceedings in respect of MTI are indeed liquidation proceedings initiated by this Court and the liquidators' approach to this Court, in these circumstances, is commensurately contextualised.

33. Those seeking a dismissal of this application in effect contend that this Court, despite having initiated the liquidation proceedings in respect of MTI, and in spite of the right statutorily bestowed upon the liquidators to approach this Court as they do in terms of this application, should refuse to come to the assistance of the liquidators at all. That is essentially what these parties contend.

34. It is wholly undesirable for the parties who pursue a dismissal of this application to do so and, as a matter of principle, it is neither competent nor appropriate for them to do so.

35. The marked distinction between the approach adopted by the Steynberg trustees on the one hand, and those seeking a dismissal of the application on the other hand, is clear and in of itself demonstrates the conceptual



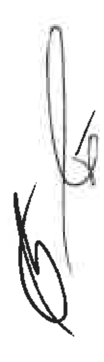
misunderstanding of the nature of the application and the relief sought pursuant thereto. This also informs the ill-conceived requests by the other intervening parties to have the application dismissed, as opposed to the provisional order being amended and/or revised in the respects that these parties contend it to be incorrect.

36. It is to this end that the liquidators also point out that the parties who seek a dismissal of this application have also failed to issueably engage with the terms of the provisional order in any proper manner with the view of challenging, in substance and/or form, the formulation of the direction and/or advice to be given to the liquidators by this Court in pursuance of this application.

37. In this respect, if these intervening parties who pursue a dismissal of the application were *bona fide*, one would have expected of them to address the issues that they raise directly and issuably within the context of the specific directions and/or advice as presently formulated in the provisional order and to pursue either an amendment or deletion of the contents thereof to which they object.

38. But this is not what they attempt to do – they want to procure a situation whereby this Court refuses to come to the assistance of its officers, the liquidators, in the present circumstances.

39. The approach so adopted is not in the interests of justice and it also does not serve the purpose and intention behind the enabling statutory provision.



40. The difference in the subject approaches to this matter is telling.

41. The liquidators persist in their application and approach to this Court and, to that end, request that this Court outright reject any contention, submission or proposition that the application ought to be dismissed.

(ii) The provisional order is alleged to have been inappropriately obtained

42. It seems to be a common theme throughout the oppositions mounted to the application that the intervening parties contend that liquidators were not entitled to have approached this Court on 31 August 2022 in the manner that they did.

43. This objection is ill-conceived and without basis.

44. First and foremost, the subject objection is fundamentally flawed on the level that those who are raising it failing to comprehend, or deliberately ignoring, the nature of the application and the relief sought in terms thereof by the liquidators.

45. The provisional order does not embody relief in favour of the liquidators against any person. The application, and indeed the provisional order, contemplates relief – in the form of guidance to the liquidators from the Court – and not relief against any party, nor does the application seek to enforce a debt against anyone.

46. These proceedings are concerned with nothing more, and nothing less, than obtaining directions from this Court as to how to go about certain aspects arising in the administration of the insolvent estate of MTI.

47. The application is not a pursuit mounted against any person by the liquidators. The liquidators do not seek relief against any individual in terms of the application and, to that end, the application does not seek to enforce a debt against anyone. The liquidators also never intended, and do not intend, for the application or the provisional order to operate as a judgment as against any person, nor do they for that matter intend for the application to finally determine or dispose of any rights as between the liquidators and any particular person.

48. With the aforesaid in mind, and despite having afforded the parties interested in and affected by the liquidation proceedings with an opportunity to participate in this application, the liquidators do not necessarily admit that those parties are indeed entitled to substantively do so. This is so because the matter is of a nature that in fact and law confine the proceedings as between the liquidators and this Court.

49. That being said, the liquidators, for purposes of full transparency and, to the extent that the interests of justice require that interested and affected parties need to voice their views in regard to the matters at hand, welcome the input and contribution by such parties.

50. But that does not mean that this application was always and should now be considered as a fully-fledged opposed motion in pursuance of which parties are entitled to participate as if they are the liquidators' opposing counter-parts in this application. They are not.

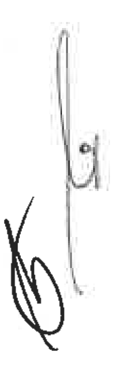
51. It is for this Court to decide how it is to direct the liquidators, not for other parties to arrogate upon themselves the authority of this Court or assume that they can in fact or law dictate these proceedings.

52. In this respect, we emphasise that, save for the Steynberg trustees, the other intervening parties pursue a dismissal of the application with costs. I have already dealt with this above but mention again that the stance is conceptually flawed because they in effect ask that this Court decline the request by its officers to be guided on novel matters to be administered by them in pursuance of the liquidation proceedings of MTI. Surely it cannot be contended, on any *bona fide* basis, that a Court should not, in these circumstances, come to the liquidators assistance to issue them with such guidance or advice as the circumstances may require, in whatever manner the Court deems appropriate.

53. It is simply not open to the intervening parties, especially those who profited from the scheme, to seek the dismissal of the application, and to do so, I submit, is entirely *mala fide*.

54. In any event, the provisional order clearly, unambiguously and in no uncertain terms states that *"[t]he provisional order shall be of no effect, until and unless confirmed by this Court, in whole, part or in an amended form, on the return date."*

55. Stripped to its core, what essentially occurred on 31 August 2022 is that this Court reduced the direction that it provisionally – not finally - saw fit to issue to the liquidators to writing and issued service directions which the Court



required to be attended to so that interested and affected parties could express their views in regard thereto on the return date.

56. Once again, nothing more and nothing less.

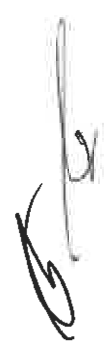
57. Not only is the liquidators' intention behind the application, the nature of the application itself and the relief sought in pursuance thereof of the kind and nature that they do not bring about a final determination of any rights as between the liquidators and any person, the provisional order itself expressly states that it has no force and effect, as aforesaid, until and unless confirmed by this Court, in whole, part or in an amended form, on the return date.

58. The objection is, with respect, as confused as it is confusing and simply without merit on every and any basis. Simply put, the fact that someone, on an ostensibly *bona fide* basis, contends that, or to the effect that, the liquidators stole a march or sneaked an order on 31 August 2022, absolutely boggles the mind.

59. The suggestion that the liquidators were not entitled to have approached this Court on 31 August 2022 in the manner that they did ignores the entire premise of the application, what it seeks to achieve and ignores the express wording of the provisional order itself. The subject objection is accordingly misplaced and should be rejected outright.

(ii) An ostensible dispute of fact as to where the relevant bitcoin reside

60. Another issue raised is a manifest and ostensible dispute of fact as to where the relevant bitcoin reside.



61. The ostensible dispute sought to be created is of absolutely no moment to this application.

62. First and foremost, the Court will note that the liquidators do not seek any relief declaring how many bitcoin befall MTI's insolvent estate.

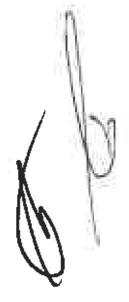
63. To this end:

    63.1. The relief sought by the liquidators, and indeed the provisional order granted and also, the confirmation or alteration thereof by this Court, does not depend on, nor is it in any way affected by, the precise amount of bitcoin that vests in the MTI estate; and

    63.2. The direction sought from this Court by the liquidators is direction in principle and same is concerned with the question as to how the liquidators should deal with any bitcoin in the MTI estate within the three scenarios postulated in the *rule nisi*.

64. In this respect, and because the direction sought is concerned with what approach should be adopted by the liquidators as a matter of principle, the direction that this Court is called upon to issue to the liquidators will be as applicable to ten bitcoin, as it would be to thousands of bitcoin, befalling the estate.

65. Any dispute as to where particular bitcoin presently resides, or where it should otherwise reside, is completely irrelevant and of no moment to these proceedings. Any such dispute, whether it was foreseen to be raised in opposition to this application or not, never militated against the prosecution



of this application nor does any such dispute militate against the determination of this application.

66. Simply put, this is not the correct forum, nor are these the correct proceedings, to resolve any disputes between the liquidators and any other party as to where particular bitcoin resides, or should reside. These proceedings, and in particular, the provisional order, does not concern itself with these disputes, nor do they even attempt to engage any such disputes, needless to say they also do not intend to resolve them.

67. That being said, this Court will note that this dispute primarily and predominantly emanates from the Steynberg's trustees. The bulk of the affidavits filed on behalf of the Steynberg trustees is indeed devoted to raising, and impermissibly advancing, this dispute in these proceedings.

68. The Steynberg trustees, in this regard, essentially contend that the bitcoin released to the MTI liquidators by FX Choice in truth and in fact reside with the insolvent estate of Steynberg and not with MTI. This is, in turn, disputed by the MTI liquidators, who contend that the stance adopted and the entitlement sought to be asserted by the Steynberg trustees are without merit in fact and law, on any and every conceivable basis.

69. It is obvious why the Steynberg trustees would want the aforesaid bitcoin to befall the insolvent estate of Mr Steynberg, as opposed to MTI, but the merits or demerits of their alleged entitlement to the subject bitcoin need not, cannot appropriately and should not be decided, or even ventilated, in these proceedings.

70. The Steynberg trustees have for months, if not for almost a year, adopted the stance that the subject bitcoin do not befall the insolvent estate of MTI but rather the insolvent estate of Mr Steynberg, but they have – in spite of having adopted this stance – not instituted a single process to assert their alleged stance or ostensible entitlement. Not one.

71. If the Steynberg trustees manifested the courage of their conviction they would have pursued their claims by now, which they are also duty-bound to do pursuant to the duties, responsibilities and obligations that they owe to the insolvent estate of Mr Steynberg and its creditors.

72. The fact that the Steynberg trustees have not done so to date is telling and, with respect, behoves no further debate as to their own convictions as to the merits of their alleged entitlement.

73. That being said, the direction sought from this Court by the liquidators will, as aforesaid, be as applicable to ten bitcoin in the MTI estate as it will be to thousands. The objection as to where any particular bitcoin resides, or ought to reside, is of no moment and it does not stand in the way of this application at all.

THE MARKS OPPOSITION:

74. Mr Marks also applies for leave to intervene in this application and he indeed pursues the dismissal hereof.

75. Whereas the other intervening parties were not in the proverbial "engine room" of MTI so to speak, Mr Marks was in fact at the centre of its operations. To this end, Mr Marks is a custodian of crucial and most relevant

primary facts surrounding the trade, dealings and affairs of MTI, but he has not taken this Court into his confidence to deal with the factual basis of the founding affidavit, despite having had two opportunities to do so.

76. The liquidators submit that this is telling, not only as a matter of arguable inference, but also as a matter of fact.

77. Mr Marks has, so it seems, deliberately elected not to issuably deal with either the facts in the founding affidavit, the legal contentions advanced therein or the terms of the provisional order.

78. The particular stance adopted by Mr Marks in pursuance of his attempt to participate in these proceedings requires specific context. The specific context required is to place Mr Marks' intervention and intended opposition to this application within the true facts of the matter as well as to show how Mr Marks' intended participation in this application is to be received by this Court.

79. It is for this reason that the liquidators, unlike the way in which we deal with the other intervening parties, will deal with Mr Marks' intended participation in and opposition to this application in greater detail.

80. Doing so, the liquidators will ultimately request this Court to reject Mr Marks' attempt to derail these proceedings and indeed his pursuit of an order dismissing this application.

81. In what follows, the liquidators will set out certain facts that we have established pursuant to our investigations into the trade, dealings and affairs of MTI, and particulary where Mr Marks fitted in. As liquidators, we

naturally do not have primary factual knowledge of what follows, but these facts are supported and indeed established by the books and records of MTI and through our ongoing investigation into the affairs of MTI, which include insolvency enquiries and digital forensic investigations conducted by suitably qualitified experts. One of these experts is Mr Vaughn Victor, who was primarily responsible for the investigation of the dealings of Mr Marks relating to the affairs of MTI. In this regard I refer to Mr Victor's confirmatory affidavit which will be filed simultaneously with this affidavit. To the extent necessary, we request that this court accepts into evidence those facts that may constitute hearsay, under and in terms of section 3 of the Law of Evidence Amendment Act, on the basis that the interest of justice requires the consideration of these facts in the determination of this application.

82. The facts that follow hereunder, insofar as they pertain to Mr Marks, in any event fall within his own personal knowledge and Mr Marks, being the primary custodian of such facts, is hereby called upon to engage with and issuably deal with same in his further responding affidavit, and take this court into his confidence.

83. As explained in my founding affidavit, the scheme operated within MTI constitutes a pyramid scheme. To this end, the pyramid of investors are built, and forms, as a necessary consequence, of the accumulation of new investors upon referral by existing investors into the scheme. To this end, once an existing investor refers an individual to the scheme and that individual invests into the scheme, then the new investor will resort under the individual who referred him/her to the scheme. In this manner new investors would then continue to refer individuals to the scheme and as

these new referrals materialise into individuals investing into the scheme, they ultimately form a leg under the primary investor.

84. Practically, for instance, if Mr Marks would refer A to the scheme and A invests in the scheme, then A would resort as investor in the scheme under Mr Marks. A then refers B, C and D to the scheme who would, in turn, once they invest in the scheme and become a member thereof, resort under A. Ultimately B, C and D, resort under A who in turn resorts under Mr Marks. This then creates a leg of investors, all resorting under Mr Marks. As this leg grows, pursuant to the accumulation of further investors in the scheme under primary referral of A by Mr Marks, Mr Marks' leg – i.e. the investors who directly or indirectly resort under him in the scheme – grows and Mr Marks accumulates referral bonuses and fractural bonuses pursuant to the growth of the relevant leg resorting under him in the scheme.

85. These legs of investors ultimately constitutes the pillars upon which the pyramid in the scheme is based and ultimately forms the mechanism in terms of which the investments made by individuals who most recently joined the scheme are eventually paid to the first investors, like Mr. Marks, in the form of referral bonuses and profits. When investments reach full circle – i.e. being paid into the scheme and ultimately paid out to the prior or earlier investors – it creates the circumstances that ultimately leads to a pyramid scheme imploding as set out in the founding affidavit.

86. As stated in the founding affidavit:

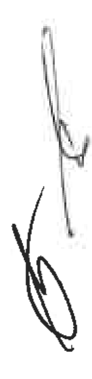
86.1. MTI was registered in 2019 as a private for-profit company with limited liability as contemplated by the Companies Act, 71 of 2008

("**the 2008 Companies** Act"), whereafter it formally commenced trading on or about 30 April 2019. The company, at all material times had two shareholders, being Mr Steynberg and Mr Clynton Marks ("**Mr Marks**"). Mr Steynberg and Mr Marks were also the principal protagonists of MTI and in primary control of the affairs of the entity, despite the fact that MTI had a board of directors and a management team.

86.2. MTI's board of directors, at the time, consisted of Mr Steynberg, Mr Marks, Mr Charles Ward (non-executive) and Mrs Monica Coetzee (non-executive). Its board of directors however later expanded to also include other individuals.

86.3. The MTI management team, in turn, appears to have been comprised of Mr Steynberg [Head of Technical and Research and Development Department], Mr Marks [Head of Referral Program and Members], Mr Charles Ward [Head of Strategy Implementation], Ms Monica Coetzee [Head of Corporate Services], Mr Romano Samuels [Head of Members Support], Mrs Cheri Marks [Head of Communications and Marketing and the wife of Marks], Mr Vincent Ward [Head of International Expansions] and Mr Leonard Gray [Head of Legal Department].

87. In the MTI-pyramid, in his own name and in the levels of investors in the investment scheme pyramid resorting below him, Mr Marks had no less than 189 138 investors in his so-called "left leg" [as a branch of the MTI Pyramid] and in his so-called "right leg", 71 631 investors [as another branch of the



MTI Pyramid]. This was despite the fact that Mr Marks himself had only referred, on what we could establish to date, 16 investors directly to the scheme.

88. How Mr Marks could have so many investors resorting under him in the MTI-pyramid, having only referred 16 investors to the scheme, is alarming to say the least.

89. Mr Marks is also well-versed in "motivating" group leaders and investors to invest, especially being supportive of the individuals who put in an effort to recruit new members to the scheme, in order to grow the scheme into a massive operation, but with the obvious and self-evident primary *modus operandi* of earning very lucrative returns, running into many millions of Rands for himself, in mind.

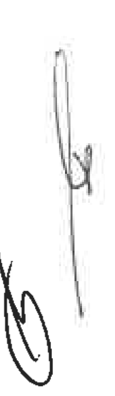
90. Just on his own investor profile, we could establish that Mr Marks:

    90.1. Invested approximately 22 bitcoin in MTI;

    90.2. In spite of the aforesaid, withdrew as against this investment, almost 220 bitcoin which, as at date of MTI's liquidation, represented a Rand value of approximately R74,9 million;

    90.3. Earned profit, on his invested bitcoin, to the amount of approximately 198 bitcoin; and

    90.4. Mr Marks was among the top three investors in the MTI investment scheme, and all of his so called profit and returns accrued to him



within the scheme from bitcoin subsequently invested by others, and his riches resulted to the detriment of the losers.

91. The aforesaid demonstrates the material conflict of interest between Mr Marks and the other investors, especially the innocent and those who lost in the scheme.

92. Mr Marks had continued to make these profits, and milk the MTI scheme, until the very last moment that MTI had existed, in spite of his own knowledge of the imminent collapse of the scheme. Even if one is to take only the value of bitcoin as at date of liquidation for purposes of comparison and multiply that value with the total amount of bitcoin invested by Mr Marks, his so-called "profit" to the detriment of MTI and the losers, was in excess of R65 million (I may add that the applicants, as again dealt with later on herein, are of the view that the correct time for determining the value of bitcoin for creditors' claims against MTI is not date of liquidation, but the date of each deposit of bitcoin, but I am simply referring to these values for ease of reference and to explain to the Honourable Court to what extent Mr Marks featured in MTI.).

93. I attach hereto as Annexure **"REP1"**, a full reconciliation of the bitcoin invested in MTI by Mr Marks and withdrawn out of MTI. Due to the number of transactions and the amount of detail contained in this schedule, it is unfortunately not possible to produce a more legible hard copy of this document on A4 or even A3 format. An electronic version will be made available to any party and to the Court upon request. I will refer to the expert's explanations regarding this statement herein below.

94. However, this is just the tip of the iceberg.

95. It appears from our investigations that Mr Marks also syphoned off bitcoin in other unlawful ways, unrelated to his own investments in the scheme.

96. As explained below, Mr Marks, assisted by others also in the "engine room" of the scheme, also simply misappropriated bitcoin deposited by individuals in the scheme in pursuance of making investments, in a form and manner that plainly constitutes theft. To this end Mr Marks caused bitcoin which investors deposited, or intended to deposit with MTI, to be transferred, through numerous wallets, to the benefit of an entity that was by design registered and utilised as a front for Mr Marks. He utilised this misappropriated bitcoin for the acquisition of two immovable properties, where he and his family reside.

97. To put it simple, Mr Marks misappropriated bitcoin deposited by investors with MTI, to which he had no entitlement and simply stole these bitcoin, converted it into fiat currency in Rand and used same to purchase immovable properties for Mr Marks and his family. I deal with this aspect in more detail below.

98. Our investigators have revealed that a company called Uprobuzz (Proprietary) Limited ("**Uprobuzz**") was utilised by Mr Marks, assisted by one Mr Don Nkomo ("**Mr Nkomo**"), to syphon off and misappropriate bitcoin deposited by investors with MTI, for their own advantage.

99. Uprobuzz was utilised by Mr Marks as a vehicle for the specific purpose of holding and accumulating assets as a conduit / front for Mr Marks and Mrs

Marks, to avoid same being registered in their personal names and in order to obfuscate and hide same from their creditors.

100. As set out above, it is important to note, for the purpose of this application that Mr Marks was at all relevant times the Head of MTI's Referral Program and Members and his wife/life partner, Mrs Cheri Marks ("**Mrs Marks**") was MTI's Head of Communications and Marketing.

101. Mr Nkomo is not only a family friend of Mr Marks, but he is also the sole director of Uprobuzz and was also intricately involved in the management of MTI. In addition to Mr Steynberg, Mr Nkomo and Mr Marks also had access and transactional authority in respect of certain of MTI's crypto wallets, which provided them with control over more than 5 000 bitcoin deposited by members/ investors into the scheme.

102. Mr Nkomo is a long-time friend and confidant of Mr Marks and was already involved with Mr Marks in previous similar schemes in which Mr Marks was involved, for example BTC Global. BTC Global was also a pyramid scheme, ran by *inter alia* Mr and Mrs Marks, Mr Andrew Caw [referred to herein below] ("**Mr Caw**") and a certain Mr Mark Twain, which resulted in a massive loss to investors in a manner comparable to the failed MTI scheme.

103. Mr Marks used Mr Nkomo and Uprobuzz to "cash out" bitcoin for or to the benefit of Mr Marks, the proceeds of which were ultimately utilised to make payment in exchange for immovable properties purchased by Mr Marks but registered in Uprobuzz's name. To achieve this, a specific destination wallet was used through which 2 843 bitcoin was transacted, all of which originated from deposits by investors into the scheme.

104. We have established that Mr Marks, through the assistance of Mr Caw and Mr Nkomo, withdrew and misappropriated bitcoin "invested" by other individuals with MTI, to the value of at least R19,450,000.00, which bitcoin were subsequently converted to fiat currency and utilised by Mr Marks to purchase the aforesaid two immovable properties for Mr Marks, to be nominally held on his behalf by Uprobuzz.

105. To this end, the purchase prices for the relevant immovable properties were paid for with bitcoin misappropriated from MTI that, in turn, emanated from deposits made by investors/members into the MTI scheme. The two properties purchased with the misappropriated bitcoin as aforesaid are the following:

    105.1. The first property is located in Durban North and is formally known as Unit 4, Monteith Estate 539 registered under title deed ST31929/2020 together with exclusive use area G3, Monteith Estate 539, registered under title deed number SK2059/2020S (*"**the Durban North property**"*); and

    105.2. The second property is located in Pietermaritzburg and is formally known as Portion 1726 of the Farm Cotton Lands 1575, Registration Division FU, Pietermaritzburg (*"**the Cotton Lands property**"*).

106. The syphoning off of bitcoin by Mr Marks, simplified to its core, occurred in a number of stages. I deal with the multi-stage process below.

107. First, as previously stated, numerous individuals would invest bitcoin by depositing same with MTI in its nominated receipt wallet. To that end, we have established that bitcoin of many thousands of investors deposited with MTI had been misappropriated from MTI by Mr Marks in order to purchase the aforeasaid properties.

108. Considering one of the two wallets utilised by Mr Marks, for instance the ZIM wallet – that wallet would record all the transactions transacted in respect of that wallet in the form comparable to a statement. This statement identifies transactions transacted on the particular wallet and references a unique transaction ID. I attach hereto a copy of the transaction history in respect of Mr. Marks's ZIM wallet as annexure **"REP2",** which shows that 669 transactions had been transacted on that wallet.

109. The said statement also sets out and identifies each of the 669 transactions with reference to the unique transaction ID that I have referred to above. When one accesses the transaction ID on the blockchain, it provides the information of the sending wallet as well as the receiving wallet. What this means is that the transaction ID essentially represents the data identifying the wallet from which the Bitcoin in a particular transaction was received into the ZIM wallet on a particular date and a particular time and providing the amount of Bitcoin or fraction thereof so received.

110. To explain the aforesaid, I attach hereto a screenshot from one of the transactions as annexure **"REP3"** that appears on the statement annexed as "REP2". This shows that the "sending wallet" to which I referred to hereinabove contains deposits from MTI investors as set out in annexure **"REP4"**. The receiving wallet is Mr. Marks's ZIM wallet into which 44,32760582 bitcoin was received in relation to this particular transaction.

111. Where I refer to a sending wallet above, it does not necessarily mean that only one wallet sent the bitcoin received in the ZIM wallet on the day in question. When I use that term it is a collective for anything between 1 and 772 wallets that may have potentially deposited fragments of or whole bitcoin to the ZIM wallet making up the total bitcoin of the transaction in question, as it appears from the said annexure.

112. Moreover, not all of the "sending wallets" that deposited bitcoin into the ZIM wallet and/or the CABF wallet are MTI owned/operated wallets. Some of the wallets take the form of a derivative emanating from MTI investors directly. The reason for this is of particular significance in this application.

113. Once an investor intended to deposit an investment with MTI, MTI would, through an automated system, generate a wallet for the particular investor who would then make his deposit into that wallet. From that wallet the fiat currency converted to bitcoin will be transferred to the MTI wallet. Mr Marks, however, managed to intercept bitcoin in the sense of manipulating

the system to generate his ZIM wallet or CABF wallet as the receiving wallet for investors who purported and intended to contract with MTI and who intended to deposit bitcoin with MTI.

114. In this manner, Mr Marks caused his wallets to be substituted for the MTI receiving wallet *vis-à-vis* the investor and accordingly intercepted the investors' bitcoin, by passing off his wallet as the wallet of MTI. What follows is particularly focussed on how Mr Marks unlawfully transferred bitcoin from MTI's receiving wallets to himself, misappropriating same as he had no entitlement thereto whatsoever.

115. Secondly, Mr Marks caused the misappropriated bitcoin to be withdrawn from MTI's nominated receipt wallet into two particular wallets held by and/or controlled by Mr Marks. The first wallet is a BTC trade wallet that Mr Marks held with MTI itself (to which reference is made as the ZIM wallet). The second wallet is a wallet held by Mr Marks and/or controlled by him, with Binance (to which reference is made as the CABF wallet). I deal with these wallets in more detail later in what follows.

116. I point out that it is already at this stage that the theft occurred, in the sense that Mr Marks misappropriated the bitcoin deposited into MTI by transferring same into his own personal wallets.

117. That being said, it is how Mr. Marks subsequently applied this bitcoin that is of further particular significance. This occurred in the third step.

118. Thirdly, from Mr Marks ZIM and CABF wallets, the misappropriated bitcoin is transferred by Mr Marks into what is known as a transit wallet. A transit wallet, for all intents and purposes, operates as a suspense account where bitcoin is temporarily housed for purposes of onward transfer and deposit into other wallets.

119. In this regard, as is common with the use of suspense accounts, those accounts by their very nature are susceptible to abuse by protagonists of schemes of the nature conducted within MTI, to conceal the transfer of funds as between the true transactors because these accounts can, and invariably are, used to obfuscate the identity of the transactors, in misrepresenting what purports to be an arm's length transaction where in truth and in fact it is not.

120. What in fact occurred, is that from Mr Marks's ZIM and CABF wallets, the misappropriated bitcoin is transferred into this "suspense account" type transit wallet where it is held for purposes of onward payment ultimately to Mr Caw, as I will explain hereunder.

121. Mr Marks caused the misappropriated bitcoin held in the transit wallet to be deposited into exchange wallets held by or under the control of Mr Caw and ultimately to enable Mr Caw to cash in the misappropriated bitcoin for Mr Marks and for it to ultimately be applied towards payment of the

purchase consideration in exchange for Uprobuzz's acquisition of the two subject properties.

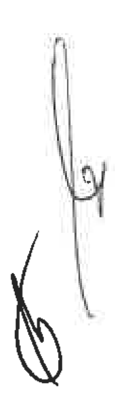
122. Mr Marks then caused the misappropriated bitcoin to be transferred from the aforesaid transit wallet into two particular exchange wallets held by or under the control of Mr Caw. Those two wallets of Mr Caw were held with Valr and Altcoin respectively and, as our investigations presently confirm, were either held in his personal capacity or in the name of a private profit company with limited liability called Coin Buyers Club (Pty) Limited ("**Coin Buyers Club**"), of which Mr Caw is the sole director.

123. That brings me to the fifth stage of the misappropriation process.

124. On the instructions of Mr Marks and after having received the misappropriated bitcoin from Mr Marks' transit wallet into his two exchange wallets, Mr Caw converted the misappropriated bitcoin to fiat currency in Rand, which were paid into two bank accounts.

125. Again, our investigations show that these funds were paid into the bank account of Coin Buyers Club held at Standard Bank and to Mr Caw's personal bank account also held at Standard Bank.

126. That then brings me to the sixth step in the *modus operandi*.



127. From Mr Caw's bank accounts, the proceeds of the liquidated misappropriated bitcoin were then paid to the bank accounts/trust

accounts of Messrs Vetter Attorneys and Tatum Wilks Attorneys. These two firms attended to the transfer of the subject properties from their erstwhile owners to Uprobuzz and, to that end, also payment of the purchase consideration to the sellers of those properties in respect of the two respective transactions.

128. For purposes of doing so Mr Caw made payment from the Standard Bank accounts to these accounts from the proceeds of the misappropriated bitcoin as detailed hereunder, whereafter the transfer attorneys released same to the sellers of the two respective properties in payment, purportedly and ostensibly so, on behalf of Uprobuzz, in respect of the purchase consideration of the two properties.

129. In this manner, Mr Marks effectively misappropriated millions of Rands worth of bitcoin of MTI and, through Mr Caw, caused same to be liquidated to fiat currency, the proceeds of which were then applied in payment to the benefit of Mr Marks' alter ego Uprobuzz, enabling it to acquire the aforesaid two immovable properties for Mr Marks and his family.

130. I respectfully submit that it is important to consider Mr Marks' opposition to this application in the context of his criminal involvement in the affairs of MTI, as explained above.

131. This is, *inter alia*, where Mr Marks fits into the picture.

THE LIQUIDATORS' PENDING LEGAL ACTION AGAINST MR MARKS

132. Against the backdrop of what we have uncovered in relation to MTI's affairs and the central role played by Mr Marks and indeed Mrs Marks, the liquidators instituted an action against Mr Marks and Mrs Marks.

133. The aforesaid action, to which I refer herein as the "**section 424 action**", is pending. A complete copy of the liquidators' summons and particulars of claim, without the annexures thereto, is attached to the Steynberg trustees' application to intervene as annexure "JF6".

134. The Court will note that the liquidators, in pursuance of this action, seek an order declaring Mr and Mrs Marks, together with a number of others, liable for the debts of MTI to the tune of billions of Rand and for having conducted the affairs of MTI and guiding it on a route that is, to put it mildly, reckless and/or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose.

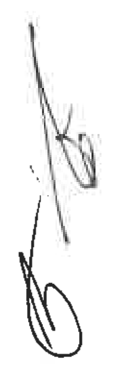
The paragraph by paragraph responses to the Marks affidavit:

135. **<u>Ad paragraph 1 thereof:</u>**

This is noted.

136. **<u>Ad paragraph 2 thereof:</u>**

Each and every allegation herein is denied. In amplification of this denial, and without in any respect derogating therefrom, it is denied that the contents of the affidavit are true and correct.



137. **Ad paragraph 3 thereof:**

Suffice to state that the legal advice premised upon which the legal submissions are made in Mr Marks' affidavit is incorrect, this is noted.

138. **Ad paragraph 12 thereof:**

The liquidators do not oppose Mr Marks' application for leave to intervene in the application. To this end, the fact that the liquidators do not oppose the said application does not mean that they do not dispute the contents of Mr Marks' affidavit filed in support of his intervention and the liquidators' decision not to oppose his intervention is made without otherwise making any admission, concession or waiver of any nature.

139. **Ad paragraph 13.2 thereof:**

139.1. As is the case with numerous other paragraphs in Mr Marks' affidavit, these allegations are introduced merely to create atmosphere and to somehow paint in the liquidators in a bad light.

139.2. The liquidators have not litigated "on the grand scale" as alleged or at all. The liquidators are acting in accordance with their duties and are performing their obligations owed towards the insolvent estate of MTI and its creditors and have taken such steps as the

circumstances ensuing upon MTI's liquidation proceedings demand.

139.3. Save as aforesaid, each and every allegation is denied.

140. **Ad paragraph 13.3 thereof:**

The liquidators again emphasise the context within which Mr Marks' participation in the litigation instituted by the liquidators should be received. Mr Marks is one of the individuals who unduly and unlawfully benefitted from the illegalities of MTI and the scheme that Mr Marks and others conducted in MTI. It is demonstrably for this reason that Mr Marks has opposed the liquidators' attempts to attend to the administration and winding-up of MTI's insolvent estate in the best manner possible under the circumstances premised upon its affairs. Save as aforesaid, each and every allegation is denied.

141. **Ad paragraphs 13.4 and 13.5 thereof:**

141.1. Not only do these allegations merely seek to create atmosphere in this application, they are irrelevant for purposes of determining this application. I pause to emphasise that Mr Marks essentially contends that this application is unnecessary – which is denied.

141.2. The liquidators have formulated this motivation for having brought this application and their reasoning behind it to the fullest extent.

141.3. Mr Marks' criticism of the liquidators should be seen in the context of Mr Marks' participation not only in this application but also the other processes prosecuted by the liquidators and the liquidators point out that if the advice/directions sought from the Court in terms of this application and provisionally granted in terms of the rule *nisi* is to be confirmed, then the legal consequences ensuing therefrom would be adverse to Mr Marks' interests. It is manifestly for this reason that a desire exists on the part of Mr Marks to oppose the liquidation process because he wants to retain the proceeds that he derived from MTI's fraudulent scheme and the ill-gotten gains that he received pursuant thereto.

141.4. Save as aforesaid, each and every allegation herein is denied.

142. **Ad paragraphs 13.6 and 13.7 thereof:**

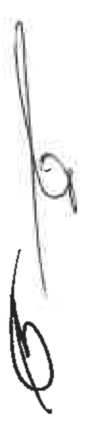
This application does not constitute an abuse, as alleged or at all. Other litigants did in fact apply for leave to intervene in this application, as is clear from the record. Mr Marks' purported reasons for applying for leave to intervene in this application late are spurious and without proper basis. Nonetheless, the liquidators do not object to his intervention, as set out hereinabove.

143. **Ad paragraph 16 thereof:**

This corresponds with the records of MTI that we have been provided with to date. Save as aforesaid, the liquidators cannot presently admit or deny the truth, authenticity and correctness of this allegation but for present purposes do not dispute same. To this end, the liquidators make no admission, concession or waiver of their present position or any other position that they may, in future, assert, as to the status of the shareholding of MTI. Save as aforesaid, each and every allegation is denied.

144. **Ad paragraph 18 thereof:**

Mr Marks was intricately involved in the day-to-day affairs of MTI and at all material times was in truth and in fact a *de facto* director of MTI. What is more, Mr Marks was at the very least a prescribed officer of MTI within the contemplation of Regulation 38 of the Regulations promulgated under and in terms of the 2008 Companies Act. Mr Marks was not forced to assume a putative or derivative role as *de facto* director of MTI in order to answer the allegations made in the liquidation application under case number 19201/2020, he was in fact vested with the primary factual knowledge of the affairs of MTI as a competent witness to testify on its behalf as to the contents of that application. The question is, with respect, not whether Mr Marks was a competent deponent to an opposing affidavit to the liquidation application on behalf of MTI, because he was a "putative or derivative" *de facto* director of MTI, but his competency to have done so is informed by



the fact that he was and remains possessed of a primary factual knowledge of the trade, dealings and affairs of MTI. Save as aforesaid, each and every allegation herein is denied.

145. **Ad paragraph 19 thereof:**

Each and every allegation herein is denied. In any event, what the contents of this paragraph show is that Mr Marks has primary factual knowledge of the internal workings, dealings and affairs of MTI and that he has intricate knowledge of its business and how it was conducted. Mr Marks was after all part of the central management structure within MTI. Save as aforesaid, these allegations are not relevant in the determination of this application and, to the extent that they are, they are denied.

146. **Ad paragraphs 20 to 23 thereof:**

As aforesaid, this accords with the records of MTI presently in our possession. For purposes of this application the liquidators do not oppose Mr Marks' intervention and in doing so, as aforesaid, the liquidators make no admission, concession or waiver of any right to in future contest any of these allegations. Save as aforesaid, the contents of this paragraph do not fall within the primary personal knowledge of the liquidators and the reverting to respond thereto is commensurately confined.

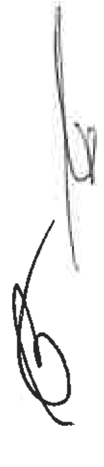
147. **Ad paragraphs 24 thereof:**

147.1. I have already recorded the liquidators' stance as to Mr Marks' assertion that he was and remains a 50% shareholder of MTI.

147.2. To this end, I reiterate that the liquidators do not have personal primary knowledge of Mr Marks' status as a shareholder of MTI and we placed reliance on the records of the company to direct our conduct in regard to Mr Marks and where he fits in to the MTI saga. In this respect I confirm that the records of MTI do suggest that Mr Marks is a 50% shareholder in MTI and we have assumed that this is in fact the position.

147.3. That being said, our investigations into MTI as well as its trade, dealings and affairs, have shown that – with respect – Mr Marks cannot be trusted nor can he be relied upon to provide proper and *bona fide* cooperation with the liquidators of MTI in the administration and the winding-up of MTI's insolvent estate.

147.4. Within the aforesaid confines and with express reservation of our rights to revisit this issue in future if other evidence comes to hand, we have approached the matter on the basis that Mr Marks is such a shareholder but without thereby waiving, forfeiting or abandoning any right to challenge this position in future should evidence to the contrary come to hand and we accordingly do not unreservedly or unconditionally acquiesce to this position.



147.5. Save as aforesaid, each and every allegation is denied.

148. **Ad paragraph 25 thereof:**

148.1. The relief claimed by the liquidators in this application is not dependent upon determination of substantially the same question of law or fact pending in case number 15426/2021, as alleged or at all.

148.2. For the reasons set out hereinabove, Mr Marks has indeed also, as is the case with the other participants in these proceedings, misdiagnosed this application. His participation should be seen in the context of his ill-conceived understanding of what the application is, in contrast to what this application truly is. The liquidators will urge this Court to consider this application for its true purpose and not for what the misguided understanding of Mr Marks suggests it is.

148.3. Save as aforesaid, each and every allegation is denied.

149. **Ad paragraphs 26 to 29 thereof:**

As aforesaid, the liquidators do not contest Mr Marks' intervention in these proceedings. The remainder of the allegations do not contribute to the effective disposal of the pending litigation and they are consequently irrelevant to consideration thereof. Save as aforesaid, each and every allegation is denied.

150. **Ad paragraph 30, read with 30.1 and 30.2 thereof:**

The only real interest that Mr Marks intends to protect in pursuance of his intended participation of this application is that of his own. Mr Marks does not participate in these proceedings in the interests of the thousands of other investors who have, for instance, lost many millions of Rands by investing in the scheme that Mr Marks and others operated within MTI. Save as aforesaid, each and every allegation is denied.

151. **Ad paragraph 30, read with 30.3 thereof:**

The issues dealt with in this application do not materially overlap with nor are they substantially the same issues raised in the opposed application under case number 15426/2021, and it is not so that the rights of Mr Marks, and indeed those of other litigants in the latter case, will be prejudicially affected by a final decision by this Court in respect of this application. I have already dealt with the nature and purpose of this application hereinabove and if proper regard is had to what has been stated to this end, and in fact the real purpose and intention behind this application, the

fallacy in the submissions of Mr Marks are exposed. They have no merit. Save as aforesaid, each and every allegation is denied.

152. **<u>Ad paragraph 31 thereof:</u>**

I have already dealt with the substance of these allegations elsewhere in this affidavit. Save as aforesaid, each and every allegation is denied.

153. **<u>Ad paragraph 32 thereof:</u>**

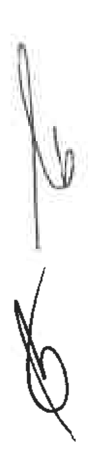
It is admitted that Mr Marks is engaged with the liquidators in various processes relating to and concerning the winding-up of MTI. In addition to the processes mentioned by Mr Marks, I reiterate that the liquidators are also pursuing Mr Marks for payment in respect of billions of Rands under and in terms of section 424 of the Companies Act, on the basis as set out in the liquidators' particulars of claim referred to above.

154. **<u>Ad paragraphs 33 to 36 thereof:</u>**

154.1. This application only seeks guidance from this Court in relation to matters arising from and pursuant to the liquidation proceedings of MTI. Whilst the classification and status of crypto assets within South African law forms an integral part of this application, and indeed featured in passing in the so-called Ponzi application, the point achieves no more. Whilst in the Ponzi application, and only

during argument, as appears from annexure "CHM3" to Mr Marks' affidavit, it arose that the question as to whether bitcoin constitutes property within the contemplation of the Insolvency Act became relevant, it is not only that classification that features in this application, but also the type of property that bitcoin ought to be classified as. This is relevant particularly for purposes as to formulate guidance to the liquidators in relation to how they are to go about dealing with such property – depending naturally on what type of property – bitcoin is to be regarded as within the context of the insolvency proceedings. The distinction between the classification of bitcoin as property on the one hand, and the classification of bitcoin as a particular type of property, is manifestly ignored and not properly grasped by Mr Marks in pursuance of his opposition to this application. Further legal argument will be made on this issue at the hearing of this application. Save as aforesaid, each and every allegation is denied.

154.2. As Mr Marks himself points out, paragraph 2.1 of the rule *nisi* advises and provides direction to the liquidators that they should treat bitcoin in the estate of MTI as intangible assets that constitute property as defined in Section 2 of the Insolvency Act.



154.3. What the advice and directions presently contemplate is not that bitcoin constitutes property, but that it constitutes property in the

sense of it assuming the status of intangible assets that befall the estate.

154.4. On 8 November 2022 full argument was addressed to the Honourable Court hearing the Ponzi application and, to the extent that an order may be made by that Court with regard to the classification of bitcoin, paragraph 2.1 of the provisional order may fall away *in toto* or partially. If no order is made by that Court, and to the extent that it is not made the liquidators will seek confirmation of paragraph 2.1 of the provisional order.

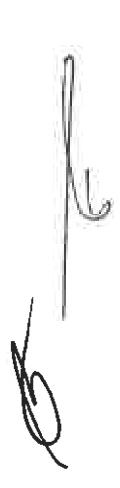
155. **Ad paragraph 37 thereof:**

Each and every allegation is denied.

156. **Ad paragraphs 38 and 39 thereof:**

156.1. It is noted that Mr Marks' legal representative filed the written note referred to.

156.2. Whether what is stated in the said note is correct in law requires debate. The note is not evidence of anything but what Mr Marks contends. The liquidators have considered what is contended for on behalf of Mr Marks and persist that the position that they have adopted represents the better view and ought to be upheld.



156.3. Save as aforesaid, each and every allegation herein is denied.

157. **Ad paragraph 40 thereof:**

157.1. The issue in this application is not whether bitcoin only constitutes property, but in fact whether it constitutes intangible movable assets as a species of property. Save as aforesaid, I have already dealt with these issues and the liquidators will furthermore deal with these allegations during argument of the matter.

157.2. Suffice it to state that the contentious issue in this application is not at all concerned with a definition of property as a confined concept, which is what Mr Marks seems to suggest.

158. **Ad paragraph 41 thereof:**

The effect of the rule *nisi* granted in these proceedings is not that Mr Marks is prejudiced in the Ponzi application at all. Mr Marks can take issue with this Court's jurisdiction, as he did in the Ponzi application, also in pursuance of his participation in this application and opposition to the relief sought. Mr Marks is, in this respect, welcome to advance the argument that this Court is not empowered to pronounce upon this application, at the hearing of this application. He, however, does so at his own peril and an

appropriate cost order would be sought if that argument is to be raised and persisted with by Mr Marks. The fact of the matter is that there is no merit in the contention that this Court does not have jurisdiction to pronounce upon issues emanating from the winding-up proceedings of MTI. This Court obviously does, it is after all the Court who placed MTI into liquidation in the first place. Save as aforesaid, each and every allegation is denied.

159. **Ad paragraph 42 thereof:**

The rule *nisi* granted in terms of this application does not prejudge any dispute concerning the status of crypto assets as alleged or at all. Not only does the express wording of the order divest any such contention of any merit whatsoever, it is also not the intention behind this application to do so. Save as aforesaid, each and every allegation is denied.

160. **Ad paragraph 42, read with 42.2 thereof:**

The rule *nisi* does not subvert nor does it deny a fair outcome of the Ponzi application. For the very same reasons as already dealt within hereinabove, there is no merit in this contention in fact or at all. Save as aforesaid, each and every allegation is denied.

161. **Ad paragraph 42, read with 42.3 thereof:**

The rule *nisi* does not resolve or finally determine any issue that is presently pending before another Judge in this Division as alleged or at all. I have also dealt with the substance of these allegations elsewhere in this affidavit. Save as aforesaid, each and every allegation is denied.

162. **Ad paragraph 43 thereof:**

162.1. It is admitted that there are pending litigation matters involving MTI.

162.2. It is denied that the pending litigation matters, being those referred to in paragraphs 43.1 to 43.5 or otherwise, have material bearing on this application. This application, by its very nature, is *sui generis* and clearly distinguishable as to purpose, nature and effect when compared to the other matters involving MTI identified by Mr Marks. Save as aforesaid, each and every allegation is denied.

163. **Ad paragraph 44 thereof:**

163.1. I reiterate that the liquidators do not object to Mr Marks intervening and participating in this application. The basis upon which he seeks to do so is however denied.

163.2. As regards to the allegations made in paragraph 44.1 of the affidavit, I confirm that this application was properly served and notice thereof was properly given to thousands of investors in compliance with the provisions of the provisional order. To that end, participation in this application by the Steynberg trustees is received in a particular context. Indeed the intervention of Mr Botha and the EDJ Investors, are also received in a particular context. Mr Marks' context is something completely different.

163.3. It is telling in this respect that the thousands of investors who have notice of this application do not intend to oppose this application because they are manifestly interested in bringing the MTI liquidation proceedings to finality in such a cost effective and expeditious manner as possible. Mr Marks, however, is clearly not interested in this goal. Mr Marks is interested only in protecting himself. This will be expanded upon during argument on the matter.

163.4. In relation to the allegations made in paragraph 44.2, it is denied that the rule *nisi* usurps the authority of another court in this Division which is already seized with the dispute. Again, this contention is incorrectly premised on the fatally flawed misconception having been formed by Mr Marks as to what this application is about. I have also already dealt with the subject

matter and substantive contents of the paragraph under reply. Save as aforesaid, each and every allegation is denied.

163.5. In relation to the allegations made in paragraph 44.3 of Mr Marks' affidavit, each and every allegation is denied. These contentions are not contentions of a factual nature, but rather legal argument which will be addressed at the hearing of this matter. I have also already dealt with the substance of the allegations under reply. Save as aforesaid, the liquidators admit that a copy of Government Gazette Notice Number 1350, dated 19 October 2022 is annexed to Mr Marks' affidavit.

163.6. The contents of these paragraphs will be dealt with at the hearing of this matter during argument. Save as aforesaid, each and every allegation is denied.

164. **Ad paragraph 45 thereof:**

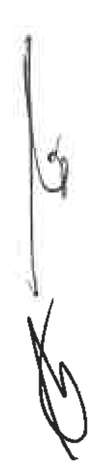
164.1. Receipt of the letter dated 20 September 2022 is admitted. The remaining allegations are only admitted insofar as they expressly correspond with the precise contents of the said letter. The liquidators will submit argument in relation to this application with reference to the actual contents of the letter and not only those portions emphasised and/or represented to Court by Mr Marks.

164.2. I reiterate that the issue in this application is not whether bitcoin falls within the definition of property within South African law and as intended by section 2 of the Insolvency Act. The issue in this application is wider than the narrow issue considered in the Ponzi scheme application. The minute overlap is of no consequence. It is admitted that judgment in respect of the Ponzi scheme application has not been handed down.

164.3. It is admitted that Mr Marks challenged the jurisdiction of the South African Courts to deal with issues pertaining to bitcoin, but as I have said hereinabove, his contentions have no merit and it can particularly not be contended in these proceedings that this Court is not vested with jurisdiction to determine and/or pronounce upon issues emanating from the liquidation proceedings of MTI, which proceedings were initiated by this very Court.

164.4. Mr Marks' contentions that crypto assets cannot be brought within the definitions of South African legislation or be regulated are devoid of any merit. This a matter for legal argument which will be addressed on this issue at the hearing of this application.

164.5. The fact that Mr Marks raised these issues in the Ponzi scheme litigation is of no moment and is irrelevant to the determination of this application within the context and for the purpose for which it has been brought. If regard is had, by way of comparative analysis



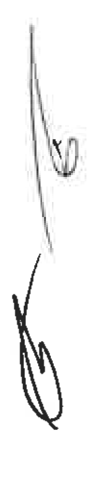
between the relief sought in the Ponzi shceme application and the relief sought in this application, it is evident that the relief sought is in substance and form not the same.

164.6. In any event, even if it were, the Court has the discretion to still entertain this application notwithstanding. This is a matter for legal argument and will be addressed accordingly at the hearing of this application. Save as aforesaid, each and every allegation is denied.

165. **Ad paragraphs 45.9 to 45.14 thereof:**

165.1. I have already dealt with the substance of the allegations on the reply. On a proper consideration of these allegations, it is clear that they have no bearing or relevance to this application and they do not militate against this Court proceeding to determine this application and come to the assistance of the liquidators by issuing directives and advice required by them in order to enable them to properly, responsibly and prudently perform their duties as liquidators of MTI.

165.2. Save as aforesaid, each and every allegation is denied.



166. **Ad paragraph 46 thereof:**

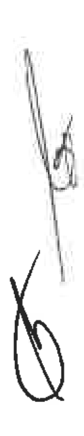
It is admitted that on 7 November 2022 our attorneys responded to Mr Marks' letter of 20 October 2022. The letter addressed in response to Mr Marks' letter speaks for itself and the liquidators stand by what is stated therein on their behalf.

167. **Ad paragraph 47 thereof:**

I point out that the disclosure referred to in paragraph 47 of Mr Marks' affidavit, in turn referring to paragraph 98 of the founding affidavit in this application, advises and indeed advised the Court who granted the rule *nisi*, of the nature and purport of the declaratory application. If annexure "FA10" is considered in conjunction with the relief sought in terms of this application, the Court was fully appraised of the true distinct and individually contextualised forms of the relief sought by the liquidators in pursuance of the respective, and indeed distinct, processes. Save as aforesaid, each and every allegation is denied.

168. **Ad paragraphs 48 to 54 thereof:**

All of these allegations constitute repetitive legal argument impermissibly advanced under cover of Mr Marks' affidavit and which ought to have never been included therein in the first place. Mr Marks is welcome to present these arguments to the Court at the hearing of this application but it is unbecoming and unfitting of these allegations to be contained in affidavits, which serve the purpose of evidence. To the extent that Mr Marks suggests



that the liquidators acted in any untoward manner, any such allegation is denied. It is clear that the primary motive behind Mr Marks' opposition to this application is indeed to sweep facts under the rug. Save as aforesaid, these allegations will be dealt with at the hearing of this application, when and where it is appropriate to do so, and subject to this reservation, each and every allegation is denied.

169. **Ad paragraph 55 thereof:**

The advice and directions sought from the Court by the liquidators in pursuance of this application, are sought as a matter of principle and not on a fact-specific basis that would directly and finally impact upon the rights and interests of "the litigants who opposed the relief in case number 15426/2021", nor would it deprive those parties of having their day in Court. Save as aforesaid, each and every allegation is denied.

170. **Ad paragraph 56 thereof:**

170.1. The liquidators are not grappling with the dilemma of attempting to find a legal basis to enforce the recovery of bitcoin for MTI members as alleged or at all.

170.2. To this end, the liquidators have obtained the necessary advice from their legal advisors and have decided, prudently and responsibly so, to also approach this Court with this application so

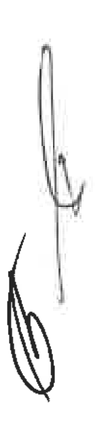
as to obtain legal certainty about whether their intended approach is sound. That is what this application is about.

170.3. Whilst the liquidators' pursuit of Mr Marks is clearly and clinically sustained in fact and in law, on the basis as set out in the liquidators' particulars of claim in the section 424 action, there are still certain uncertainties that arise on other aspects of the MTI liquidation proceedings that need clarification.

170.4. The remainder of these allegations are again a regurgitation of Mr Marks' primary contentions to which I have already substantively responded to elsewhere in this affidavit. I will not necessarily respond to all the repeated allegations in Mr Marks' affidavit since doing so will not be helpful in the circumstances of this matter. Save as aforesaid, each and every allegation is denied.

171. **Ad paragraph 57 thereof:**

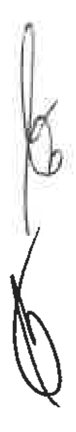
The applicants have not misled the Court as alleged or at all. I confirm that the same version of the MTI agreement was attached to the Applicants' founding affidavit in the Ponzi Application as annexure "AVR2" (from page 149 of the record in the Ponzi Application) as was annexed as annexure "FA5" to my founding affidavit in this application. The applicants provided full disclosure to the Court and still provide full disclosure to the Court of all and any documents that the Court may wish to take into account in



pursuance of adjudicating upon this application and extending the required guidance to the liquidators – which is what is sought in terms of this application. Even if the incorrect version of the MTI agreement or terms and conditions were attached to the founding affidavit (which is denied), that is of no moment to the determination of this application as it is an application intended to deal with matters arising from the MTI liquidation proceedings in principle and to provide guidance in principle to the liquidators in relation thereto. Save as aforesaid, each and every allegation is denied.

172. **Ad paragraph 58 thereof:**

These allegations are immaterial to the determination of this application. To the extent that there is a discrepancy between the two sets of documents, both sets are before this Court and this Court is able to have regard to both sets of the documents to consider this application. Again, I emphasise that there is no winner or loser in this application. This is an application that seeks guidance from this Court in order to guide the liquidators as to how they should prospectively go about dealing with the administration of the insolvent estate of MTI. The purpose of this application is not to finally resolve the competing rights and interests and entitlements of the different parties interested and affected by the liquidation proceedings of MTI, which needs to be done on a fact specific and case-by-case basis. Save as aforesaid, each and every allegation is denied.



173. **Ad paragraph 59 thereof:**

Mr Marks has had an opportunity to respond in detail to the submissions made in our founding affidavit and to deal with the annexures put up by the liquidators in terms thereof. That opportunity, despite having been afforded to him in terms of a Court order, he did not utilise. Whilst Mr Marks has had that opportunity, he has not used it and his failure to do so in and of itself evidences that his intended participation in this application is but another step in his over-arching *stratagem* to obstruct and delay. Save as aforesaid, each and every allegation is denied.

174. **Ad paragraph 60 thereof:**

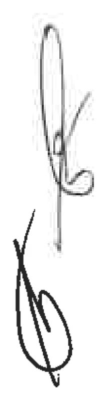
Each and every allegation is denied.

175. **Ad paragraph 61 thereof:**

Each and every allegation is denied.

176. **Ad paragraph 62 thereof:**

176.1. The inclusion of these allegations in Mr Marks' affidavit all serve as evidence of a complete misunderstanding as to what this application is about.



176.2. The relief sought by the liquidators in terms of this application, and indeed the rule *nisi*, is couched on two hypothesis, one assuming that the MTI agreements are void *ab initio* and the other assuming that they are in fact extant. A proper reading of the application, together with a proper reading of Mr Marks' intervention application, evidences that Mr Marks has not properly read this application at all.

176.3. Save as aforesaid, each and every allegation is denied.

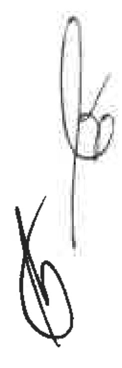
177. **Ad paragraph 63 thereof:**

Each and every allegation is denied.

178. **Ad paragraph 64 thereof:**

The liquidators do not oppose Mr Marks' intervention. Mr Marks has had the opportunity to deal with the founding affidavit issuably and he has not utilised that opportunity to do so. Save as aforesaid, each and every allegation is denied.

179. **Ad paragraph 65 thereof:**



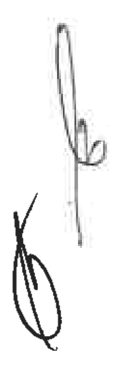
I have already stated that the liquidators do not oppose Mr Marks' intervention and participation in this application, albeit within the aforesaid confines.

180. **Ad paragraph 66 thereof:**

180.1. The liquidators do not oppose the grant of an order in terms of prayer 1 of Mr Marks' notice of motion.

180.2. Insofar as the relief sought in paragraph 2 of the notice of motion is concerned, Mr Marks was already afforded this opportunity and did not make use of it. In the circumstances, Mr Marks has had the opportunity to respond issuably to the founding affidavit filed in support of this application but he has not utilised the opportunity to do so and to this end has manifestly acquiesced in the matter proceeding in the absence of a supplementary affidavit to be filed on his part.

180.3. As regards to the relief sought in prayer 4 of Mr Marks' notice of motion, the liquidators dispute that Mr Marks is entitled to any costs in relation to his intervention application and full legal argument will be addressed on this issue and the hearing of this application.



180.4. The liquidators persist in their application and pursue confirmation of the rule *nisi* in its present terms, or as amended in accordance with the discretion of this Honourable Court.

180.5. Save as aforesaid, each and every allegation is denied.

THE BOTHA INTERVENTION AND THE CASE MOUNTED IN PURSUANCE THEREOF:

181. I refer the Honourable Court to what I stated before concerning the basis of opposition by Mr Botha. For the reasons dealt with before, Mr Botha's opposition is ill-conceived and stands to be dismissed.

182. I mention that Mr Botha's opposition to this application must be considered in its appropriate context. As appears from the pending action against Mr Botha which he annexed to his opposing affidavit, Mr Botha is not an ordinary investor who invested bitcoin in MTI and received a Return, such as those investors envisaged in Class 1 and Class 2 of the provisional order. On the information available to the liquidators, Mr Botha profited handsomely from his investment in the MTI scheme, and he did so by manipulating the MTI referral bonus structure by creating several ghost accounts under different pseudonyms, as I explained in paragraph 76 of my founding affidavit. He thus devised his own scheme within the MTI scheme in which he improperly secured referral bonuses through misrepresenting to MTI that he had secured "new investors" who, in truth and in fact, were none other than himself. Mr Botha, I submit, does not

approach this Court with clean hands and his opposition should, I submit further, be considered bearing this in mind.

183. That said, I deal *ad seriatim* with Mr Botha's affidavit below.

184. **Ad paragraph 1 to 3 thereof:**

Save to dispute the correctness of the facts and the correctness of the legal advice received by Mr Botha, the remainder of the contents in these paragraphs are noted.

185. **Ad paragraph 4 thereof:**

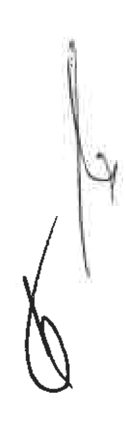
185.1. I dispute that Mr Botha has demonstrated that the provisional order should be discharged. I repeat what I stated before concerning why it is inappropriate for any of the intervening parties to seek a dismissal of this application.

185.2. Save as aforesaid, the remainder of the contents in this paragraph are admitted.

186. **Ad paragraph 6 thereof:**

The liquidators have no objection to Mr Botha intervening in this application and being joined as a respondent.

187. **Ad paragraph 7 to 8 thereof:**



I take note of the costs order sought by Mr Botha. I deny that such an order, let alone any order for costs against the liquidators, is warranted. This will further be informed by what is contained later in this affidavit.

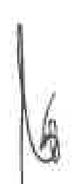
188. **<u>Ad paragraph 9 thereof:</u>**

188.1. The allegations contained in this paragraph are denied. In particular, it is denied that the liquidators withheld material facts from this Honourable Court.

188.2. The contentions by Mr Botha herein demonstrates his misunderstanding of the relief sought by the liquidators in this application.

188.3. I do not dispute that there is a pending action between the liquidators and Mr Botha under case number 3741/2022. In fact, many similar actions have already been instituted by the liquidators against several other investors in MTI like Mr Botha.

188.4. The existence of these pending actions have no bearing on the relief sought in this application. The existence of such actions are irrelevant to the present application and therefore did not warrant disclosure by the liquidators in the application papers.



188.5. The relief sought by the liquidators in this application, as framed in the notice of motion, neither seeks to secure a finding that the bitcoin invested in MTI by any investors constitute the "property" of

MTI, nor does it seek to establish the validity and enforceability of a claim against any investors for the return of bitcoin disposed of by MTI to any of them in terms of the provisions of the Insolvency Act.

188.6. The relief sought simply seeks an order from this Honourable Court which stands to assist the liquidators in the appropriate and correct administration of the insolvent estate of MTI, dealing both with the manner in which the liquidators ought to treat claims against the estate and the manner in which they should seek to recover property believed to belong to the estate, subject to the requirements for such recovery in terms of the relevant provisions in the Insolvency Act being fulfilled in respect of each claim.

188.7. As at the date on which this affidavit is deposed to, in excess of 6,0000 claims have been received from investors against MTI which, in value, exceed R2 billion. The necessity for the liquidators to obtain the guidance we seek from this Court concerning the correct treatment of investors' claims can therefore not be overstated. Insofar as claims against investors are concerned, many actions have already been instituted by the liquidators against investors who received Returns from MTI and many more such actions stand to be instituted. The guidance sought by the liquidators in this application concerning these causes of action – which I repeat, in no way purport to stand as a finding in respect of any of the jurisidictional requirements which the liquidators must

establish in any of those actions to obtain judgment – is equally necessary.

188.8. The relief sought is therefore not specific to any particular investor and cannot, on any possible construction, be construed to constitute a finding by this Honourable Court against any investor.

189. **Ad paragraph 10 to 11 thereof:**

The allegations in this paragraph are denied for the reasons already advanced before.

190. **Ad paragraph 12 thereof:**

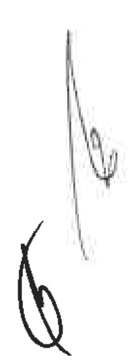
Save to repeat that the liquidators have no objection to Mr Botha being permitted to intervene as a further respondent in this application, the remainder of the relief sought by Mr Botha, as summarised in this paragraph, should not be granted.

191. **Ad paragraph 13 thereof:**

I admit the contents in this paragraph.

192. **Ad paragraph 14 thereof:**

The legal and factual issues which exist between the liquidators and Mr Botha are set out and are contained in the pleadings of the pending action against him. The relief sought in this application, as explained before, does not seek to have these issues determined or dealt with in this application.



193. **Ad paragraph 15 thereof:**

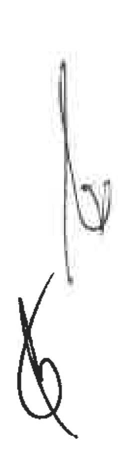
I admit the contents in this paragraph.

194. **Ad paragraph 16 to 21 thereof:**

194.1. I admit that the cause of action in the pending action against Mr Botha is based on the provisions of the Insolvency Act. I also admit that the declaratory relief sought in this application pertains to the same provisions contained in the Insolvency Act.

194.2. I mention again, *ex abundanti cautela*, that the relief sought in this application concerning these provisions does not have any bearing on the pending action against Mr Botha since, in respect of all the provisions in the Insolvency Act, it will remain incumbent upon the liquidators to establish the jurisdictional requirements for relief under all these sections, irrespective of the outcome of this application.

194.3. I further mention that, similar to what I say later in response to the opposition by the Steynberg trustees, the liquidators have no objection that the provisional order, on confirmation of the terms therein, be qualified by this Court to say that the terms therein do not constitute a finding of any fact or law as against any investor or any other person in any pending action instituted by the liquidators to the extent which this is not already made clear from the wording both in the notice of motion and in the provisional order.



194.4. Save as aforesaid, the remainder of the allegations contained in this paragraph are admitted.

195. **Ad paragraph 22 thereof:**

The allegations contained in this paragraph are denied.

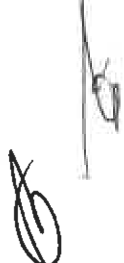
196. **Ad paragraph 23 thereof:**

As I already indicated, many similar actions against various investors have already been instituted. I maintain that the existence of those actions have no bearing on the relief sought in this application, nor does the relief sought in this application have any bearing on those actions. There is therefore no reason or need for the liquidators to disclose the existence of such pending actions to the Honourable Court.

197. **Ad paragraph 24 to 27 thereof:**

197.1. In the application, the liquidators sought directions from this Honourable Court for the substituted service of the application. Such relief was obtained, as appears from paragraph 4 to 6 of the provisional order.

197.2. The manner in which these directions were complied with by the attorneys of record for the liquidator appear from the affidavit of service already filed.



197.3. I cannot comment on whether notice of the provisional order reached Mr Botha. The provisional order was, to my knowledge, sent to the known addresses of Mr Botha and his wife, and if it is indeed so that it did not reach them by way of e-mail, this had to either be due to a technical error or a *bona fide* oversight.

198. **Ad paragraph 28 thereof:**

The basis of Mr Botha's opposition is noted. I dispute that any of these bases entitle him to the relief he seeks, let alone to repeat that the relief he seeks is in any event inappropriate.

199. **Ad paragraph 30 thereof:**

199.1. I deny the correctness of the contentions by Mr Botha in this paragraph.

199.2. The liquidators seek directions from this Court concerning the classification of bitcoin, whether as an intangible asset or otherwise, and a further direction that it would constitute "property" as defined in section 2 of the Insolvency Act. The relief sought in this regard does not, at all, seek a determination by this Court that such bitcoin is either the property of MTI or otherwise, that MTI had some other interest in such bitcoin.

199.3. The question concerning ownership of invested bitcoin and in the interests therein by either MTI or any investors, are matters which

stand to be determined on a case-by-case basis in the various actions instituted by the liquidators against investors.

199.4. The directive sought in paragraph 3.1 of the notice of motion and in paragraph 2.1 of the provisional order may, to avoid any confusion, be restated in general terms to make it clear that the order is not intended to be dispositive of any disputes relating to the ownership of bitcoin. This will be achieved by the insertion of the words "*adminsitration of*" before the words "*the estate...*" in paragraph 2.1 of the provisional order.

200. **Ad paragaph 31 to 32 thereof:**

200.1. I do not dispute that, in the pending action against Mr Botha, ownership of the bitcoin he invested and which was transferred to him by MTI is an issue which is in dispute.

200.2. I also do not dispute that the aforesaid dispute cannot be determined in application proceedings, and is an issue which stands to be determined when the action against Mr Botha proceeds to trial.

200.3. However, as I pointed out before, Mr Botha misunderstands the relief sought in this application since the relief herein does neither seek to resolve the aforesaid dispute, nor does it seek to determine it. I respectfully refer the Honourable Court to what I stated before in this regard.

201. **Ad paragaph 33 to 38 and paragraph 40 thereof:**

The allegations contained in these paragraphs are noted. These allegations pertain to the dispute which form the subject of the pending action against Mr Botha and are, I respectfully submit, entirely irrelevant to the present application. I therefore do not deem it necessary to specifically deal with these allegations herein, suffice to state that by me not doing so should not, in future proceedings, be construed to be an admission of the correctness of the contents thereof. The liquidators will deal with these allegations in the appropriate forum when necessary.

202. **Ad paragaph 39 thereof:**

Again, Mr Botha's contention in this paragraph is noted. As appears from the pending action, the liquidators hold a different view. This dispute is something which will be determined in the pending action against him and is therefore irrelevant to this application, as pointed out before.

203. **Ad paragaph 41 to 42 thereof:**

I respectfully refer the Honourable Court to what I already stated before. This application does not seek to determine any dispute between MTI and any investors concerning the ownership of bitcoin invested in MTI and paid out by MTI. I deny that any order obtained from this Honourable Court would have the effect as suggested by Mr Botha.

204. **Ad paragaph 43 to 44 thereof:**

204.1. I deny that we withheld any facts which are material or relevant to the present application.

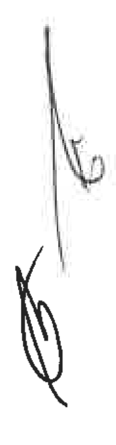
204.2. I do not dispute that Mr Botha denied that the bitcoin to which the claims of the liquidators against him pertain was not property of MTI as contemplated in the Insolvency Act. I repeat that the dispute relating to ownership of bitcoin has no bearing on the present application and is irrelevant hereto. It was therefore not necessary for the liquidators to refer to such disputes in the present application.

204.3. It is noted that Mr Botha does not dispute that bitcoin constitutes "property" as contended by the liquidators.

205. **Ad paragaph 45 to 47 thereof:**

205.1. I deny that there is a *lis* between the liquidators and Mr Botha in this application and therefore, the opposition based on the defence of *lis alibi pendens* is misplaced.

205.2. Briefly, the relief sought in the present application differ vastly from the pending action against Mr Botha, it involves the determination of different questions of law and no findings in the present application would be determinative of any issues in the pending action against him.



205.3. I dispute the remainder of the allegations contained in this paragraph.

206. **Ad paragaph 48 to 50 thereof:**

For the reasons already dealt with before, the allegations are denied.

207. **Ad paragaph 51 to 52 thereof:**

The allegations herein pertain to the pending action between the liquidators and Mr Botha. Since these allegations are irrelevant for the determination of the present application, I refrain from dealing with them herein and repeat that my election not to do so at this time should not be construed, in any other proceedings, to be an admission of the correctness of these allegations.

208. **Ad paragaph 53 thereof:**

208.1. I deny that the provisional order, if granted, would have the effect as contended for by Mr Botha.

208.2. Mr Botha need not concede to any claim by the liquidators since the finalisation of the pending action will determine the position concerning the claims made against him.

208.3. Moreover, the relief sought herein does not postulate that an investor with a legitimate claim against the insolvent estate can only

submit such claim once that investor has returned the bitcoin he or she received from MTI.

209. **Ad paragaph 54 thereof:**

The allegations herein are noted. I do not dispute that Mr Botha may take such steps as he may be advised to protect his interests, and the liquidators certainly do not seek to preclude him from doing so.

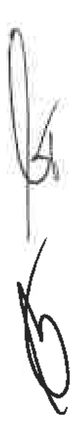
210. **Ad paragaph 55 to 58 thereof:**

The difference between the wording in the notice of motion and the wording in the provisional order granted by this Honourable Court is, I respectfully submit, semantics. There is no doubt that on either wording, the *onus* on the liquidators to prove their case and the existence of the jurisdictional requirements for relief against each investor in the actions instituted against such investors, including Mr Botha, remain intact. The relief sought herein does not, and could never, be construed to discharge the *onus* the liquidators have in those actions.

211. **Ad paragaph 59 thereof:**

211.1. I refer the Honourable Court to what I already stated before.

211.2. For the avoidance of any doubt, I maintain that the relief sought in the present application does not, and could not, have the effect of "sanctioning" the liquidators claims against any investor.



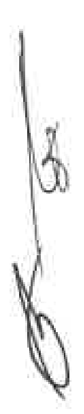
211.3. Insofar as the claims of investors are concerned, the allegation by Mr Botha that the relief sought is somehow an attempt by the liquidators to take a shortcut in the discharge of their duties concerning claims made against the estate is entirely misplaced and is spurious. As I carefully explained in the founding affidavit, the MTI estate, due to the nature of the assets dealt with and the manner in which it did business, the manner of valuation of crypto assets and for many more reasons, is novel, complex and brings about various uncertainties. The relief sought in the notice of motion is directed thereat to ensure that the liquidators, from the outset, administer the estate correctly, and this Honourable Court has therefore been approached to assist to eliminate at least some of these uncertainties.

212. **Ad paragaph 60 thereof:**

This application is indeed made in terms of the provisions of section 387(3) of the Companies Act. Mr Botha's contrary view is incorrect. I respectfully refer the Honourable Court to what I stated already concerning the remainder of the allegations contained in this paragraph.

213. **Ad paragaph 61 to 63 thereof:**

The interest which Mr Botha has in this application, on account of him being an investor in MTI who also benefited from the scheme conducted by the insolvent company, is not disputed. Save as aforesaid, the remainder of the allegations contained in these paragraphs are denied.



214. **Ad paragraph 64 thereof:**

I admit that many investors have given evidence at enquiries held across the country before different Commissioners, all of whom were appointed by this Honourable Court in the order obtained as part of the liquidation application. Only the honourable retired Judge Fabricius has issued reports since these enquiries commenced in which useful and material information relevant to the adjudication of this application is set out. It is for this reason that only the enquiry before him was referred to, and not also the enquiry held before any of the other Commissioners.

215. **Ad paragraph 65 to 67 thereof:**

215.1. It is indeed so that the liquidators obtained advice that the quantification of investors' claims should take place on date of *concursus*. But it is also so that the liquidators obtained further advice which express a contrary view that the quantification of claims should take place on the date when an investor invested bitcoin in MTI.

215.2. It is due to the different views and opinions obtained by the liquidators that clarity in respect of this issue is sought from this Honourable Court.

215.3. As explained in the founding affidavit, the liquidators align themselves with the advice received that investors' claims based on enrichment should be quantified on the date of investment, and

not on the date of *concursus* only. I explain, more fully and with reference to the relevant principles underlying the law on enrichment, as we understand it, why the liquidators contend so below where I deal with the same objection and debate raised by the EDJ investors.

215.4. Save as aforesaid, the remainder of the allegations and the argument in these paragraphs are noted. I maintain that the quantification date of claims for invested bitcoin should be the date of investment, contrary to the views expressed by Mr Botha in these paragraphs.

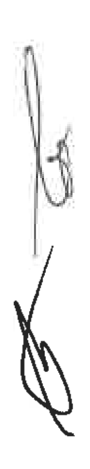
216. **Ad paragraph 68 to 71 thereof:**

216.1. I deny the frivolous contention that we sought to obtain relief which affects the rights of any investors behind their backs.

216.2. I again refer the Honourable Court to what I stated before and again dispute that we failed to disclose all material facts relevant to this application.

216.3. The request for a costs order against the liquidators is noted but I dispute that Mr Botha is entitled to an order for costs, let alone any such order on a punitive scale.

THE EDJ INVESTORS' INTERVENTION AND PARTICIPATION:



217. I turn now to deal with the opposition to the relief sought by the investors represented by Ms Elna De Jager, the so-called "EDJ investors". I point out that the EDJ investors initially delivered an opposing affidavit deposed to by their attorney, Ms De Jager, on 28 October 2022, and after the rule *nisi* was extended by this Honourable Court, a further affidavit titled "*Supplementary Opposing Affidavit of the Intervening Party known as "the EDJ Investors*" was delivered on 29 November 2022.

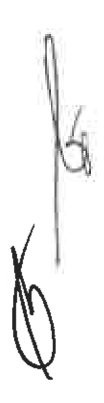
218. Whilst the supplementary opposing affidavit supersedes the initial opposing affidavit, out of caution, I deal with both below, commencing with the affidavit initially delivered. Before I do, the liquidators raise an objection to the *locus standi* of the unknown and unidentified EDJ investors.

219. **IN LIMINE: *LOCUS STANDI***

219.1. Ms De Jager purports to act on behalf of 2151 investors in MTI but has, to date, been unable to identify who these investors are, or on which of these investors' behalf the application is being opposed.

219.2. In paragraph 1 to 8 of the opposing affidavit, Ms De Jager explains that she represents Mr Cecil John Jacob Rowe and several further unidentified investors, yet it is entirely uncertain who these investors are. The same appears from the supplementary opposing affidavit of Ms De Jager at paragraphs 10 to 20 thereof.

219.3. In the absence of Ms De Jager adequately identifying these purported investors, it is impossible for the liquidators or this



Honourable Court to assess whether these persons have the requisite standing to oppose this application.

219.4. Moreover, should this Honourable Court reject the opposition of the EDJ investors and order that they contribute towards the cost of this application, there will be great uncertainty whether Mr Rowe, Mr Charl Coetzee, the few unidentified investors Ms De Jager purportedly represents or which of the total of 2151 investors she alleges she represents (of whom, it appears, she only holds a mandate of 877 of them) will be liable to contribute to such costs.

219.5. The liquidators are therefore not in a position to either admit or deny Ms De Jager's representation of any of the persons she purports to represent, nor are we in a position to admit the *locus standi* of the purported EDJ investors. Consequently, Ms De Jager is put to the proof of who she represents and she is called upon to clarify which of those investors participate in this application. Should she fail to do so, she will expose herself to a costs order *de bonis propriis*.

219.6. As appears from paragraph 8 of Ms De Jagers further affidavit, she purports to represent over 2000 investors who include both Class 1 and Class 2 investors. It is self-evident that Ms De Jager is faced with a major conflict of interest between the two classes of investors she purports to represent. There is a major conflict between those investors who lost money in the scheme and those who received Returns from the scheme. In addition, the interests of multiple

investors, such as Mr Botha, would be quite distinct from those of a once only investor. Ms De Jager is invited to consider the aforesaid concern carefully.

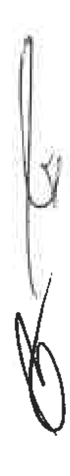
220. Conditional upon Ms De Jager satisfying this Honourable Court of the identity of her clients on whose behalf she opposes this application and further, provided that it is found that her said clients have the requisite *locus standi* to oppose this application as they purport to do in the affidavit filed by Ms De Jager on behalf of the EDJ investors, I proceed below to deal with the allegations contained in the respective affidavits filed of record.

AD ELNA DE JAGER'S "OPPOSING AFFIDAVIT" OF 28 OCTOBER 2022

221. The opposing affidavit of Ms De Jager is incomplete in 2 respects:

221.1. First, in paragraph 19 to 23 therein, several blank spaces were left in this part of the affidavit. These paragraphs of the opposing affdavit therefor warrant no response; and

221.2. Second, page 11 of the affidavit appears never to have been part of the papers served by Ms De Jager on the liquidators' attorneys of record. In the course of preparing this affidavit, a request was directed to Ms De Jager's offices that the missing page be provided to them, but the said page was not received by the time when this affidavit became due for filing. I was therefore unable to address



the allegations which may appear on page 11 of the complete opposing affidavit.

222. **Ad paragraph 1 to 2 thereof:**

Save that I dispute the correctness of the allegations contained in this affidavit, I take note of the remainder of the allegations herein.

223. **Ad paragraph 3 to 8 thereof:**

223.1. I admit the allegations in paragraph 4, 5 and 7 of the opposing affidavit.

223.2. Whilst the present application pertains to the insolvent estate of MTI, the relief sought herein is unrelated to the issues raised in the pending application under case number 15426/2021.

223.3. It may well be so that there may be a degree of overlap between the pending application and the present application, depending on the judgment which the Court delivers in that application. This possible overlap is not, however, of such a degree that any issue which serves before this Court is *lis pendens* or otherwise, that any finding by the Court in that application would necessarily result in such issue in this application becoming *res judicata*.

223.4. Save as aforesaid, I respectfully refer the Honourable Court to what I stated concerning the remainder of these allegations and the *locus*

standi of the unidentified EDJ investors. Consequently, Ms De Jager is put to the proof of the remainder of these allegations.

224. **Ad paragraph 9 thereof:**

The contents are noted.

225. **Ad paragraph 10 thereof:**

For the reasons advanced before, I can neither admit nor deny the allegations and consequently, Ms De Jager is put to the proof thereof.

226. **Ad paragraph 11 thereof:**

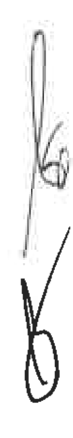
Suffice to mention that further argument in that application was made to the Court on 7 November 2022 and that judgment was reserved, I take note of the remainder of the allegations herein. Notably, the so-called "Rowe-members" took no issue in that application that bitcoin constituted "property" with which they parted when investing such bitcoin in MTI.

227. **Ad paragraph 12 thereof:**

This is admitted.

228. **Ad paragraph 13 to 14 thereof:**

I take note of the allegations herein.



229. **Ad paragraph 15 thereof:**

Save to reiterate what I stated concerning the *locus standi* of the EDJ investors, I take note of the allegations herein.

230. **Ad paragraph 16 to 18 thereof:**

Whilst the allegations are noted, it is submitted that it does not address the objection raised concerning the *locus standi* of the EDJ investors.

231. **Ad paragraph 19 to 23 thereof:**

These paragraphs warrant no response from the liquidators.

232. **Ad paragraph 24 to 27 thereof:**

To the extent which the quoted excerpts from the provisional order conforms with the express wording of the order, the contents herein are admitted.

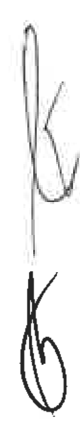
233. **Ad paragraph 28 thereof:**

I dispute that the relief as set out in paragraph 2.4.2.7 to 2.4.2.10 of the provisional order should not be confirmed by this Honourable Court.

234. **Ad paragraph 29 to 31 thereof:**

This is admitted.

235. **Ad paragraph 32 to 33 thereof:**



235.1. I repeat that, at least the entire paragraph 33 of the opposing affidavit, did not form part of the papers the liquidators were served with as page 11 thereof was omitted. I deal with this paragraph only to the extent which it appears on page 10 of the opposing affidavit and reserve my right to amplify this response, should it be necessary, once the missing page 11 is furnished to the liquidators.

235.2. The allegations herein demonstrate Ms De Jager and the EDJ investors' misunderstanding of the relief sought and the operation of the provisions of the Insolvency Act.

235.3. Our insistence that any Returns must be returnable to the estate in terms of section 29 or 30 of the Insolvency Act cannot, with respect, be faulted:

235.3.1. Accepting, for the purposes of illustration, that we demonstrate to the trial Court in any of these claims that the bitcoin claimed by an investor constitutes "property" of MTI of which it "disposed" of to an investor, and provided further that the jurisdictional requirements of section 29 or 30 are established, it follows by operation of the provisions of section 32(3) of the Insolvency Act, that either the Returned bitcoin or the value thereof is recoverable by the estate.

235.3.2. The fact that an investor may have invested more bitcoin than the Return he receives does not absolve such

investor from the obligation to return such bitcoin or its value to the MTI estate – to do so would result in set-off being applied post-liquidation which, apart from not being permissible, would result in such an investor being preferred over other investors who received no Returns, and who will only stand to recover a dividend from the MTI estate in due course.

235.3.3. For example, if Investor A invested 3 bitcoin and was paid a Return of 2 bitcoin by MTI which is held to be impeachable in terms of the Insolvency Act:

235.3.3.1. Investor A would, on his claim for enrichment against MTI and before the setting aside of the Return, have a claim for 1 bitcoin against the estate;

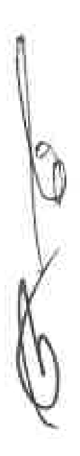
235.3.3.2. In terms of section 32(3) of the Insolvency Act, once set aside, Investor A is liable to return the 2 bitcoin he received as a Return to MTI.

235.3.3.3. In terms of the provisional order, Investor A will then have an opportunity of submitting a claim for 2 bitcoin to ensure that his entire claim against the estate is equal to his impoverishment, being the 3 bitcoin he initially deposited.

235.3.3.4. In time, if a liquidation dividend equivalent to say, 30%, is distributed in respect of proven claims, Investor A will receive 0.9 bitcoin from MTI. If he was allowed to apply set-off between the claim by the liquidators against him, he would have only claimed 1 bitcoin against MTI. He would then, in effect, have received the 2 bitcoin he was permitted to retain, plus 0.3 bitcoin, being the 30% return on the 1 bitcoin claim he had against the estate. In other words, Investor A would then have received 2.3 bitcoin in the liquidation of MTI in respect of his 3 bitcoin investment.

235.3.4. Then, take for example, Investor B who invested 3 bitcoin but received no return. Investor B would have a claim against the estate for 3 bitcoin, but will only recover, as a liquidation dividend, 30% thereof, i.e., 0.9 bitcoin.

235.3.5. Comparing the positions of respectively Investor A and Investor B, it is obvious that, should bitcoin Returned to an investor not be returned to the estate of MTI subsequent to being set aside as an impeachable transaction and rather, be permitted to be set-off against the investor's claim against MTI, investors will be treated unequally and will not receive the same dividends in liquidation, despite



them being on no different footing to one another. This, it is submitted, is not permissible in a *concursus*.

235.3.6. Further, the relief in paragraph 2.4.2.10 of the provisional order remedies any shortfall in the amount claimed by an investor by permitting such investor to submit an additional claim to ensure that his or her entire claim corresponds with the total amount of bitcoin that investor invested in MTI.

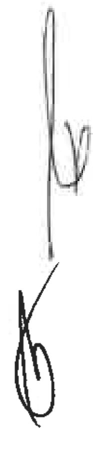
235.4. Simply put, there is no duplication or *"duplicated burden"* as alleged, as demonstrated by the aforegoing example.

236. **<u>Ad paragraph 34 thereof:</u>**

The allegations in paragraph 34 is contained on the missing page 11 of the opposing affidavit. I can therefore not respond thereto herein.

237. **<u>Ad paragraph 35 to 37 thereof:</u>**

237.1. As already demonstrated, the manner in dealing with these claims and the necessity for the dispositions of bitcoin to be set aside against any investor in terms of the provisions of the Insolvency Act and to be repaid to the MTI estate, are evident. It is not only practical and prudent to do so, but it is, in fact, what the law requires.



237.2. I deny that the provision in the provisional order contained in paragraph 2.4.2.10 is illogical or that it will result in an absurdity. It is, in fact, a quintessential provision to cater for the difference between the impoverishment of an investor before being ordered to return any bitcoin to MTI and the impoverishment of the investor after a Return was set aside and repaid to the MTI estate.

237.3. Save as aforesaid, the remainer of the allegations contained herein are denied.

238. **Ad paragraph 38 to 39 thereof:**

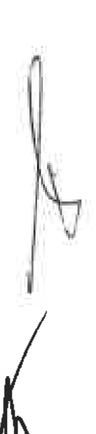
238.1. For the reasons advanced before, I deny that the EDJ investors are entitled to the order sought by them. I repeat what I already stated concerning the request that any of the relief sought by the liquidators be dismissed. The request is inappropriate.

238.2. I also deny the entitlement by the EDJ investors to any order for costs as prayed for.

AD ELNA DE JAGER'S SUPPLEMENTARY OPPOSING AFFIDAVIT

239. **Ad paragraph 1 to 2 thereof:**

Save to deny that the contents of Ms De Jager's affidavit are true and correct, I take note of the remainder of the allegations herein.



240. **Ad paragraph 3 to 6 thereof:**

This is admitted.

241. **Ad paragraph 7 to 10 thereof:**

241.1. I dispute that Ms De Jager's unidentified clients, for the reasons dealt with before, are simply permitted to intervene in the application and I dispute that this was accepted by the liquidators. I refer the Honourable Court to what I stated earlier in this regard.

241.2. Save as aforesaid, I take note of the remainder of the allegations contained in these paragraphs.

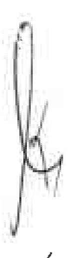
242. **Ad paragraph 10 to 20 thereof:**

242.1. I respectfully refer the Honourable Court to what I stated before pertaining to the allegations contained in these paragraphs.

242.2. I reiterate that, for the reasons dealt with already, the liquidators can neither admit nor deny these allegations and consequently, Ms De Jager is put to the proof thereof.

243. **Ad paragraph 21 thereof:**

I take note of the respective objections which the EDJ investors seek to raise in opposition to this application. I will deal with each objection further below, suffice it to mention that none of the objections has any merit.



244. **Ad paragraph 22 to 25 thereof:**

I repeat that the contents in these affidavits fall far short of addressing the objection of *locus standi* raised by the liquidators *in limine*. It is impossible to discern from what is contained in these paragraphs and elsewhere in the affidavits filed by Ms De Jager who her clients are, who she represents in these proceedings, which of her clients oppose the relief sought in this application and which of them may incur liability for costs should their opposition be unsuccessful and such an order be made.

245. **Ad paragraph 26 to 30 thereof:**

245.1. I deny that this application seeks to limit claims of investors in MTI in any way. What the relief sought in this application seeks to do, as already explained, is to give guidance to the liquidators on how to treat whatever claims investors may make against MTI.

245.2. Since both scenarios, i.e., either the lawfulness or unlawfulness of the MTI scheme, are dealt with and provided for in the provisional order and also in the relief sought in the notice of motion, I fail to see how this application can be premature. Should this Honourable Court in the pending application under case number 15426/2021 find that the MTI scheme is unlawful, those provisions in the provisional order dealing with the scenario where the scheme is held to be lawful would become inapplicable and *vice versa*.

245.3. The administration of the insolvent estate carries on day by day and is not suspended pending the outcome of the aforesaid application. This is demonstrated by the vast amount of claims already recevied

in the estate, as referred to already. Nothing precludes the liquidators from obtaining directives from this Honourable Court, irrespective of what the judgment in case number 15426/2021 may say, to assist them in the proper discharge of their duties in the estate.

245.4. The contention that the application is premature and that it should be held in abeyance pending the outcome of the application under case number 15426/2021 is therefore misplaced and meritless.

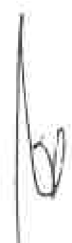
246. **Ad paragraph 31 to 38 thereof:**

246.1. Ms De Jager, with respect, misconstrues the provisions of section 387(1), (2) and (3) of the Companies Act.

246.2. Section 387(3) provides as follows:

"*(3) Where the Master has refused to give directions as aforesaid* ***or*** *in regard to any other particular matter arising under the winding-up, the liquidator may apply to the Court for directions.*" (own emphasis)

246.3. The present application resorts under the scenario following the word "*or*" in section 387(3), which clearly contemplates a scenario which is different from the position where the Master has refused to give directions in terms of section 387(2). In this scenario, a refusal by the Master under section 387(2) is not a prerequisite before



application can be made by liquidators to the Court in respect of questions of law and in cases of doubt concerning the winding-up of the company in liquidation.

246.4. I therefore deny that Ms De Jager's interpretation of the relevant provisions is correct, and I deny that this Honourable Court does not have the authority or jurisdiction to grant the relief sought.

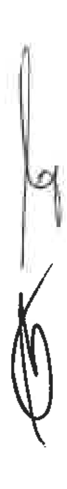
246.5. I further deny that the directives sought in this application interferes with the discretion afforded to an officer presiding at a meeting of creditors in relation to the proof of claims. The relief sought relating to the submission of claims pertains only to the manner in which a claim must be formulated – whether proof of that claim satisfies the presiding officer or not is not something which arises in this application.

246.6. The relief sought also does not seek to limit whatever causes of action a creditor may rely on in seeking to prove a claim against the MTI estate.

246.7. The allegations contained in these paragraphs are therefore denied.

247. **<u>Ad paragraph 39 to 43 thereof:</u>**

I take note of the contents herein.



248. **<u>Ad paragraph 44 to 45 thereof:</u>**

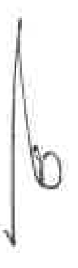
248.1. The relief sought in the present application pertains to the manner in which bitcoin invested in MTI and paid out by MTI should be dealt with by the liquidators. This is both in respect of claims already submitted and to be submitted in terms of section 44 of the Insolvency Act against the insolvent estate, and in relation to claims for recovery of bitcoin paid out by MTI to investors.

248.2. The fact that relief is not sought in relation to potential delictual liability by the insolvent estate does not and should not be construed to mean that the liquidators hold the view that investors would only have liquidated claims in respect of investments of bitcoin made by them. Should any investor seek to establish a claim against MTI based on delict, by instituting action against MTI, the liquidators will appropriately deal with such a claim when it arises.

248.3. It bears to mention that to date, the liquidators have not received any such claims or received notice in terms of section 359(2) of the Companies Act of any investor's intention to make such a claim against the insolvent estate.

249. **Ad paragraph 46 thereof:**

This is not disputed.



250. **Ad paragraph 47 thereof:**

I take note of the allegations in this paragraph. I refrain from expressing a view whether an innocent investor will have a claim for unliquidated damages based on delict in the event that it is found that the MTI scheme was unlawful. Should any such claims ever be made by any of the investors, each such claim will be considered on a case-by-case basis and be dealt with by the liquidators in the appropriate forum.

251. **Ad paragraph 48 to 49 thereof:**

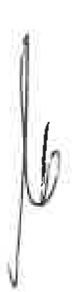
This is not disputed.

252. **Ad paragraph 50 to 52 thereof:**

I take note of the allegations contained in these paragraphs but, for the reasons already advanced, I again refrain from expressing a view on these contentions. Should a claim along the lines contended for in these paragraphs be made by any investor, the liquidators will deal therewith in the appropriate forum.

253. **Ad paragraph 53 to 56 thereof:**

253.1. For the reasons already advanced, I deny that the effect of the relief sought in this application, if granted, would be to limit the types of claims which investors may have against MTI.



253.2. The liquidators simply sought directions from this Honourable Court pertaining to, in the context of claims against the estate, enrichment claims arising from the investment of bitcoin by an investor in MTI.

253.3. It is indeed so that an enrichment claim would be limited, at most, to the amount of bitcoin deposited by an investor or its value. This is the position in accordance with the law and not a special limitation sought by the liquidators specific to this estate.

253.4. Save as aforesaid, the remainder of the allegations contained in these paragraphs are denied.

254. **Ad paragraph 57 to 58 thereof:**

The allegations herein are not disputed.

255. **Ad paragraph 59 to 90 thereof:**

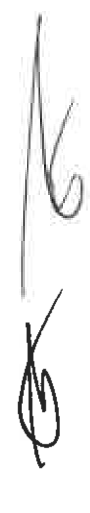
255.1. As I indicated earlier, Mr Botha, in his opposition to this application, also objects to the proposition we make that a claim of an investor for bitcoin invested in MTI should be calculated or quantified, in Rand, as at the date on which the investment was made and not on some other, later date, such as at *concursus* or otherwise.

255.2. Whilst we welcome the debate concerning the question when bitcoin must be valued in Rand for the purposes of the claims of investors against the estate based on enrichment, we contend, with respect, that the necessity to do so on the date of investment is an incidence of the law on enrichment. Notwithstanding the arguments to the contrary – both from some of our own legal representatives, Mr Botha and also the EDJ investors – for the reasons and

arguments we deal with below, and upon which will be expanded, if necessary, in argument when this application is heard, we maintain that the relief in this regard, as framed in the notice of motion, is correct.

255.3. As a point of departure, albeit at the risk of over-simplifying the requirements for a claim on enrichment, we are advised that it is a trite principle of the law of enrichment that a claim premised thereon is for the amount by which a claimant is impoverished or by which a defendant is enriched, whichever is the lesser. It is an incidence of this principle that notwithstanding the amount of the impoverishment of a claimant, if the enrichment of the defendant has somehow been reduced or eradicated, a claim for enrichment would, as a general proposition, similarly reduce or no longer lie against that defendant.

255.4. We accept that the judgment in the **Fluxmans**-case does not determine, expressly, when an enrichment claim must be quantified, but the judgment is instructive since it provides when an enrichment claim arises. So too does **Fourie N.O. v Edeling**, [2005] 4 ALL SA 393 (SCA) where it provides, in paragraph 13, that –

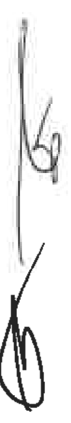


> *"...Upon receipt of a payment the scheme was liable promptly to repay it to the investor who had a claim for it under the condictio ob iniustam causam."* (own underlining)[1]

255.5. Bearing in mind the timing upon which such an enrichment claim arises in accordance with these judgments, the requirements for such a claim for enrichment to come into existence, at all, includes, *inter alia*, the impoverishment of the claimant. It follows, we submit, that for the claim to come into existence, the claimant had to, at that time, be impoverished, and further that since any such claim is limited to the lesser of the claimant's impoverishment or the defendant's enrichment, the claimant's impoverishment is determined at the time when the claim arises.

255.6. In further support of this proposition, the discussion of the general requirements for liability for enrichment in paragraph 208 of **LAWSA**, Volume 17, 3rd Edition, are also instructive. The author states, in discussing the requirement that the defendant be enriched, that -

> *"...Not included under 'enrichment' is an 'incidental benefit' (eg when a property's value increases due to a desirable development on the neighbouring property, or where a flatowner saves electricity due to the neighbour's flat being so efficiently heated that it renders independent heating of her flat redundant) – not because it does*



---

1 See also **ST v CT**, 2018 (5) SA 479 and **Kudu Granite Operations (Pty) Ltd v Caterna Ltd**, 2003 (5) SA 193.

not constitute a financial benefit, but rather because the provider of the incidental benefit will not have been impoverished...".

255.7. With these principles in mind, the liquidators' contention concerning the timing of quantification of an investor's claim is that the extent of that investor's impoverishment is established the moment that investor acquired a claim, which occurs at the time of making the bitcoin investment. The fact that the value of bitcoin may have, subsequent to the investment, increased, constitutes an incidental benefit which is not included in the impoverishment of a claimant or the enrichment of a defendant.

255.8. Whilst I take note of the arguments in these paragraphs by the EDJ investors and also, with due regard to the argument put up by Mr Botha in this regard, I do not specifically deal with all the contentions and averments contained in these paragraphs. Whilst I disagree that the argument contained herein is sound and the liquidators maintain that the position proposed in the notice of motion and the provisional order accords with the legal principles touched on above, it is in respect of these uncertainties and in light of the contrary arguments made by the parties why this Honourable Court's guidance is sought.

256. **Ad paragraph 91 thereof:**

256.1. I take note that those EDJ investors who form part of the Class 2 investors objected to the relief presently contained in paragraph 2.4.2.7 to 2.4.2.10 of the provisional order.

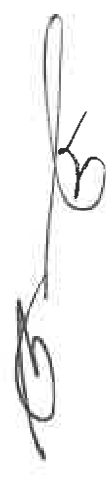
256.2. I have already dealt with this objection earlier and I respectfully refer the Honourable Court to what I stated in regard thereto. The objection by these investors, I submit with respect, is based on a misunderstanding of the relevant provisions contained in the Insolvency Act and the provisions in the provisional order, and I submit further that the objection should therefore not be sustained by this Honourable Court.

256.3. I point again to the fact that the relief in these paragraphs in the provisional order are conditional upon the circumstances permitting that such claims are justified, in other words, it remains incumbent upon the liquidators, in each action against each investor, to establish that the jurisdictional requirements for relief under the provisions contained in section 29 and 30 of the Insolvency Act have been satisfied.

257. **Ad paragraph 92 thereof:**

This is not disputed.

258. **Ad paragraph 93 thereof:**



To the extent which the averments herein accord with the relief as framed in the notice of motion, the averments are not disputed.

259. **Ad paragraph 94 to 99 thereof:**

259.1. The allegations herein are identical to those made by Ms De Jager in paragraph 25 to 27 and paragraph 29 to 30 in her opposing affidavit, with which I have already dealt with before. I respectfully refer the Honourable Court to what I have already stated in response to these allegations.

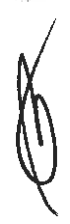
259.2. I reiterate that there is no duplication of recoveries for the MTI estate in the manner in which it is proposed that Class 2 investor claims be dealt with, especially since specific relief is also sought from this Court which would enable an investor to claim the difference between bitcoin claimed on the basis of enrichment and the total amount of bitcoin invested in MTI.

259.3. I therefore deny that the conclusion which Ms De Jager seeks to draw in paragraph 99 of her affidavit is correct.

260. **Ad paragraph 100 thereof:**

260.1. I admit that the value of bitcoin increased in 2020.

260.2. I deny the allegation that the insolvent estate of MTI will somehow unduly benefit due to the increase in the value of bitcoin from when investments of bitcoin were made in it by investors to when it made



dispositions of Returns which may be impeachable in terms of the relevant provisions of the Insolvency Act.

260.3. The value of the bitcoin which may be claimed by the liquidators as part of any recovery proceedings in terms of the Insolvency Act is determined by section 32(3) of the Insolvency Act, which provides that –

> *"(3) When the Court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property <u>the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher</u>."* (own underlining)

260.4. The fact that the value of the bitcoin which may be reclaimed by the liquidators increases from date of investment by an investor to the date of disposition – or, if the value is even higher on date of judgment if such a claim succeeds, that value – is an incidence of the law of insolvency and not an undue benefit which the liquidators seek to attain through the relief sought in this application.

260.5. The fact, further, that the date for the determination of the value of the claims for investors based on their impoverishment may be different to the valuation date determined by the specific provision in section 32(3) of the Insolvency Act is also an incidence of the law

and not something sought to be designed or engineered specific to this estate.

260.6. These legal principles remain the same, irrespective of whether, in the context of this estate, the value of bitcoin increases or decreases.

260.7. The remainder of the allegations in this paragraph are denied.

261. **Ad paragraph 101 to 103 thereof:**

261.1. I dispute the allegations in these paragraphs.

261.2. I again refer the Honourable Court to the example I used before pertaining to two similar investors (Investor 1 and Investor 2), where one received a Return and the other nothing. If the approach suggested by Ms De Jager is sanctioned by this Honourable Court (i.e., that set-off be allowed between claims and Returns), the effect will be that the dividend which investors will ultimately derive from the estate will differ depending on whether such an investor was lucky enough to receive a Return before the demise of MTI or not. Those lucky investors who received Returns will recover much more of their invested bitcoin than those who were unfortunate not to be able to withdraw their bitcoin in MTI before it collapsed.

261.3. Such a differential treatment of investor-creditors, who are no different to one another and of whom no single one enjoys a

preference above the other, is legally untenable and directly contrary to the trite principles which underscore the *concursus.*

262. **Ad paragraph 104 to 107 thereof:**

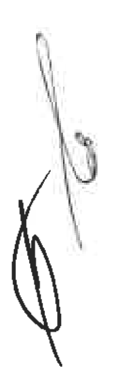
262.1. I do not dispute that there may be valid and legal defences against any claims premised on section 29 and 30 of the Insolvency Act.

262.2. However, such defences are specific to the facts of each action instituted by the liquidators against an investor and stand to be determined as part of those actions. Since this application does not seek to establish liability on the part of any of the investors in respect of any action or claim against them by the liquidators, the general proposition made in these paragraphs of possible available defences are irrelevant.

262.3. I therefore do not respond to each and every allegation in these paragraphs in full, suffice to mention that, as and when such defences are raised by individual investors in the pending actions against them, or in actions to be instituted against such investors, such defences will be dealt with in the appropriate forum by the liquidators.

263. **Ad paragraph 108 thereof:**

The objection of the EDJ Class 2 investors is noted, but I respectfully submit that it is devoid of merit and falls to be rejected by this Honourable



Court. As pointed out above, the approach contended for by the EDJ investors in Class 2 will be detrimental to the Class 1 investors. It also demonstrates the need for appropriate directions to be issued by this Honourable Court.

264. **<u>Ad paragraph 110 thereof:</u>**

The contents herein are noted.

265. **<u>Ad paragraph 111 thereof:</u>**

I repeat that, until such time as the EDJ investors who seek to oppose this application are properly identified by Ms De Jager, the liquidators cannot agree to any such persons being permitted to intervene in this application and, it is respectfully submitted, nor should this Honourable Court. Save as aforesaid, I take note of the admissions contained in this paragraph.

266. **<u>Ad paragraph 112 thereof:</u>**

This is noted.

267. **<u>Ad paragraph 113 thereof:</u>**

267.1. The objection of the EDJ investors premised on the relevant provisions contained in section 387 of the Companies Act is noted, but I refer the Honourable Court what I stated in respect thereof before. I deny that this application is not properly made in terms of

the relevant provisions contained in section 387(3) of the Companies Act.

267.2. The EDJ investors in fact previously, in their intervention application, conceded the relief sought by the liquidators with only a few minor qualifications thereto. They still do not dispute the bulk of the relief sought by the liquidators.

268. **Ad paragraph 114 thereof:**

I dispute that this application is premature and refer the Honourable Court to what I stated in this regard before. Save as aforesaid, I take note of the remainder of the allegations in this paragraph.

269. **Ad paragraph 115 thereof:**

The contents are noted.

270. **Ad paragraph 116 to 117 thereof:**

I have dealt with the contentions of Ms De Jager in this paragaph hereinbefore. I refer the Honourable Court to what I have already stated.

271. **Ad paragraph 118 thereof:**

The contents are noted.

272. **Ad paragraph 119 thereof:**

I admit that this application does not seek to limit the causes of action which investors may have against MTI.

273. **Ad paragraph 120 to 128 thereof:**

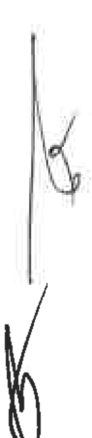
Save that I take note of the admissions contained in these paragraphs, the remainder of the allegations herein are denied

274. **Ad paragraph 129 thereof:**

I deny the allegations herein. The Court which dealt with the application when the provisional order was granted was satisfied that it was urgent enough to warrant its attention. Ms De Jager's view on the urgency of the application is therefore irrelevant. I already dealt with the contention that the application is premature and I again refer the Honourable Court what I stated in that regard.

275. **Ad paragraph 130 thereof:**

The EDJ investors delayed in delivering their opposing affidavit until Friday 28 October 2022, whilst the application was set down for that Monday, on 31 October 2022. In other words, there were not a single business day between the belated delivery of the opposing affidavit and the return date. To contend, in these circumstances, that the estate of MTI should somehow be liable for alleged wasted costs incurred by the EDJ investors is, I submit with respect, opportunistic. The contention stands to be rejected out of hand. If this request is, despite what I state herein, persisted



with by the EDJ investors, further argument will be advanced at the hearing of this application to demonstrate why, in fact, the EDJ investors should be held liable for the costs wasted consequent upon the postponement of the matter resulting from their belated delivery of their opposing affidavit.

276. **Ad paragraph 131 thereof:**

I take note of the relief sought by the EDJ investors and their request that they be awarded costs, but I dispute that they are entitled to such relief for the reasons already dealt with herein.

THE STEYNBERG TRUSTEES' INTERVENTION AND PARTICIPATION:

277. I deal next with the application for intervention by the trustees of the insolvent estate of Mr Steynberg and with their further answering affidavit. As in the case of the EDJ investors, the intervention application has been superseded by what is set out in the further answering affidavit. Out of caution, I nevertheless proceed to deal first with intervention application and thereafter with the further answering affidavit.

278. **Ad paragraph 1 thereof:**

The contents herein are noted.

279. **Ad paragraph 2 thereof:**

I dispute that the contents of the affidavit deposed to by Mr Fisher are true and correct and that it falls within his own personal knowledge.

280. **Ad paragraph 3 to 10 thereof:**

The contents of these paragraphs are admitted.

281. **Ad paragraph 11 to 13 thereof:**

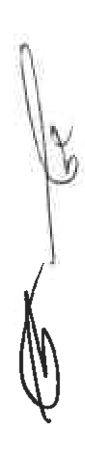
It is not disputed that the insolvent estate of Mr Steynberg has an interest in the application and in the provisional order already obtained. The liquidators therefore do not dispute their entitlement to intervene in this application. The remainder of the contents of these paragraphs are not disputed.

282. **Ad paragraph 14 to 20 thereof:**

282.1. Mr Fisher misreads paragraph 30.1.3 in the particulars of claim to the summons issued against, amongst others, Mr Steynberg's insolvent estate.

282.2. The liquidators do not allege in the said paragraph in the particulars of claim that the bitcoin frozen in the FX Choice account was not part of MTI investors' bitcoin but that it belonged to Mr Steynberg. What is pleaded in the said paragraph is the following:

"After the Financial Sector Conduct Authority ("FSCA") had started an investigation into the affairs of MTI during July 2020, and interviewed Mr Steynberg on 20 July 2020, Mr Steynberg and the main promoter of MTI, the eighth defendant, represented to the



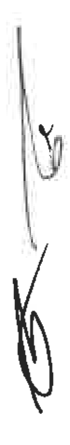
FSCA, and all of MTI's investors, widely by way of circulars, website notices, YouTube clips and public social media forums, that:

30.1.3 The bitcoin frozen at that stage in the FX Choice account, amounting to approximately 1,282 bitcoin, were not part of MTI investors' bitcoin, but belonged to Mr Steynberg..."

282.3. In paragraph 30.2 of the particulars of claim, it is further pleaded by the liquidators that the aforesaid representation was false. It is specifically pleaded, in paragraph 30.2.3 of the particulars of claim that "*...[t]he bitcoin frozen by FX Choice was not the property of Mr Steynberg but belonged to MTI and formed part of the so-called trading pool of bitcoin invested by the members of MTI.*"

282.4. I submit that it is clear that it was pleaded in the particulars of claim by the liquidators that Mr Steynberg and the eighth defendant in that action, Mrs Marks, misrepresented to the MTI investors and the public that the 1,282 bitcoin in the FX Choice account belonged to Mr Steynberg, whilst it in fact, according to the liquidators, it belonged to MTI. It is not pleaded that the said bitcoin belonged to Mr Steynberg.

282.5. Save as aforesaid, the remainder of the allegations contained in this paragraph, to the extent which it accords with what is expressly pleaded in the particulars of claim in the aforesaid action, are not disputed.



283. **Ad paragraph 21 thereof:**

This is admitted.

284. **Ad paragraph 22 to 23 thereof:**

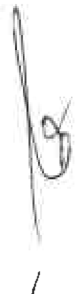
To the extent which the allegations herein accord with what is expressly pleaded in the particulars of claim in the pending section 424 action, the averments in these paragraphs are not disputed .

285. **Ad paragraph 24 thereof:**

285.1. To the extent which the allegations herein accord with what is expressly pleaded in the particulars of claim in the pending section 424 action, such averments are not disputed.

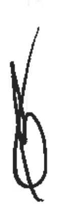
285.2. It is admitted that the liquidators submitted a claim against Mr Steynberg's insolvent estate in an amount in excess of R10 billion, and that the claim, which was duly proved, is now the subject matter of an application for expungement.

285.3. I have been advised that this application does not concern the quantification of the claims and that it would be improper to burden this Court therewith.



286. **Ad paragraph 25 thereof:**

The contents herein are noted.



287. **Ad paragraph 26 to 27 thereof:**

287.1. The contents contained in paragraph 26 are admitted.

287.2. The Ponzi application has since been further argued and judgment is awaited.

287.3. The contentions contained in paragraph 27 concerning the attainment of various different legal opinions are admitted and that, as a result of the divergent views, the complex nature of the estate and novelty of various questions arising in the administration of the estate, the liquidators made this application to seek guidance from this Court in terms of section 387 of the Companies Act.

287.4. I take note that the insolvent estate of Mr Steynberg lays claim to ownership of the 1,282 bitcoin which was held at FX Choice, which have since been transferred to the MTI estate by FX Choice and which was subsequently realised.

287.5. As I pointed out earlier in this affidavit, the ownership in and to the FX Choice bitcoin is not an issue in this application, and no relief is sought by the liquidators which would have the effect of making any determination as to where the ownership in that bitcoin lies. Whilst I acknowledge that there is a dispute between the liquidators and the insolvency trustees of Mr Steynberg's insolvent estate concerning ownership of the FX Choice bitcoin, that dispute stands

to be ventilated in different proceedings and are irrelevant for the purposes of the determination of this application.

287.6. I will therefore refrain, in these proceedings, from engaging with Mr Fisher and his co-trustees' contentions concerning the ownership in and to the FX Choice bitcoin. Whilst I say this, I mention that the evidence and arguments set out by Mr Fisher pertaining to Mr Steynberg's alleged ownership in and to the FX Choice bitcoin in the intervention application and in the further affidavit are noted, but state that the liquidators are also in possession of forensic evidence which demonstrate, conclusively in our view, that the FX Choice bitcoin belong to MTI. This Honourable Court should not however be burdened with this factual dispute and with such divergent evidentiary matters on affidavit, which further demonstrates the irrelevance of the ownership in and to the FX Choice bitcoin in this application.

288. **<u>Ad paragraph 28 to 29 thereof:</u>**

288.1. The reference to the MTI backoffice in the founding papers is admitted.

288.2. The contentions by Mr Fisher that the said backoffice is not reliable is noted. It is notable that Mr Fisher does not disclose from who or from where this information and advice was purportedly obtained and the absence of any particularity as to why it is contended that the said backoffice is not reliable is notable.

288.3. That being said, I fail to understand the relevance of the accuracy of the information retrieved from the MTI backoffice for the purposes of the present application. The Steynberg trustees are free to raise the accuracy of such information in the pending action against Mr Steynberg's estate should they so wish. Such contentions fall to be dealt with in proceedings in which they are relevant, which is not the case in this application.

288.4. For these reasons, I refrain from further dealing with these contentions by Mr Fisher.

289. **<u>Ad paragraph 30 to 32 thereof:</u>**

The report of the FSCA speaks for itself. The liquidators do not only rely on the FSCA report to contend that MTI's business was unlawful, as appears from what is stated in the founding affidavit and further, what is pleaded in the section 424 action and the contentions made in the pending Ponzi application. The FSCA did not find that the bitcoin frozen by FX Choice belonged to Steynberg, but rather referred to the fact that, contrary to what one would have expected, the relevant accounts at FX Choice, into which investors' bitcoin were pooled, were in the name of Steynberg. In any event, the findings by the FSCA concerning the ownership of the FX Choice bitcoin are of no moment and are, in any way, irrelevant for the purposes of the present application.

290. **<u>Ad paragraph 33 thereof:</u>**

Whilst I admit that MTI recovered the FX Choice bitcoin, I refer the Court to what I have already said concerning this dispute about the ownership in and to such bitcoin before. The dispute is irrelevant to the present application and therefore warrants no further comment.

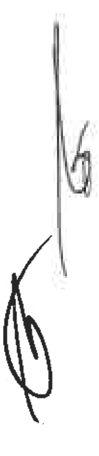
291. **Ad paragraph 34 thereof:**

The contents herein are noted.

292. **Ad paragraph 35 thereof:**

292.1. I take note that the Steynberg trustees seek a declarator concerning ownership of the FX Choice bitcoin. This is, however, not sought as part of the relief in the notice of motion by way of some or other form of counter application.

292.2. I further dispute that the insolvency trustees can appropriately seek such a declarator in these proceedings by reason, *inter alia*, of the obvious factual dispute concerning ownership in and to FX Choice bitcoin. Moreover, even if they could, they ought to be precluded from attaining any such relief since the fact that neither FX Choice, nor any of the investors which have claims in the MTI estate and who would have an interest in any such relief sought, are parties to any such application by the Steynberg trustees. Their absence would constitute a material non-joinder which would preclude them from attaining such an order herein if it could have been competently sought (which remains disputed).



292.3. As already mentioned before, the ownership in and to such bitcoin is not an issue in the application made by the liquidators. Should Mr Steynberg's trustees seek such relief, they should issue appropriate proceedings in which that question can be determined.

293. **Ad paragraph 36 thereof:**

As indicated before, argument in the Ponzi application was finalised in November 2022 and judgment is awaited. I deny, however, that the judgment in that matter is required before this application can proceed. The determination of this application is not dependent on the outcome of the Ponzi application. The effect of the judgment in the Ponzi application, once given, will simply be that one of the alternative scenarios provided for in the provisional order, concerning either the lawfulness or not of the scheme, will become inapplicable. Similarly, should the Court in the Ponzi application make any order which disposes of, or partially disposes of, any part of the relief sought in this application, such relief will not be sought again from this Honourable Court.

294. **Ad paragraph 37 thereof:**

The investigation into the affairs of MTI is ongoing and remains a work-in-process. Mr Pedersen's affidavit, at the time when it was deposed to, reflected his knowledge, known at that time, premised on the stage which the investigation had reached by then. Additional information becomes available and is unearthed by the liquidators and their consultants as the investigation continues. The explanation why this occurs should not be

difficult to comprehend – due to the magnitude of the fraud committed in MTI, the wrongdoers clearly made a concerted effort to conceal their conduct. Investigations into the affairs of MTI remain ongoing and is far from finalised. This does not, however, compromise the integrity of all information obtained to date as Mr Fisher appears to suggest. The inference he seeks to have drawn from what is contained in this paragraph is disputed.

295. **Ad paragraph 38 thereof:**

The opinion of Louw SC is noted. For the reasons already explained, since the conclusions reached in that opinion pertain to the ownership in and to the FX Choice bitcoin, there is no need for me to deal with the contents of the opinion herein, suffice to mention that the liquidators do not agree with what is contained therein. To the extent necessary, argument with regard thereto will be addressed to the Honourable Court.

296. **Ad paragraph 39 thereof:**

The liquidators do not object to this Honourable Court granting leave to the Steynberg trustees to intervene in the application.

297. I turn now to deal with the further answering affidavit of Mr Fisher.

AD INSOLVENT ESTATE STEYNBERG'S FURTHER ANSWERING AFFIDAVIT

298. **Ad paragraph 1 to 2 thereof:**

Save to dispute that the contentions in Mr Fisher's affidavit are true and correct, I take note of the remainder of the contents in these paragraphs.

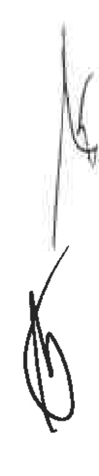
299. **Ad paragraph 3 to 7 thereof:**

The contents herein are not disputed.

300. **Ad paragraph 8 thereof:**

This is noted. I have dealt with the Steynberg trustees' claim to ownership of the FX Choice bitcoin already before, and I respectfully refer the Honourable Court to what I stated. I repeat that, throughout my response to follow to Mr Fisher's further answering affidavit, I will again refrain from engaging with Mr Fisher on evidentiary matters, argument and contentions concerning the ownership of the FX Choice bitcoin. I do so since the determination of that dispute is not something with which this Court is tasked with in this application. I reiterate that the relief sought in this application does not, and cannot be construed, to have the effect that this Honourable Court determines the question of ownership of bitcoin in the MTI estate, including ownership in and to the FX Choice bitcoin, and the dispute raised by Mr Fisher concerning such ownership is therefore entirely irrelevant hereto.

301. **Ad paragraph 9 to 10 thereof:**



I have dealt with these contentions already above. I refer the Honourable Court to what I stated before. I specfically deny the allegation in the last sentence of paragraph 10.

302. **Ad paragraph 11 to 13 thereof:**

302.1. It is admitted that the reliability of the information in the MTI backoffice is an issue in dispute in the pending section 424 action.

302.2. That issue, I submit, stands to be appropriately determined as part of those proceedings. The dispute concerning the reliability of the MTI backoffice is, for the purposes of this application, irrelevant.

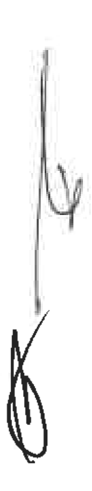
302.3. To the extent which the remaining allegations herein accord with what is contained in the so-called "Selzer plea", which I repeat is irrelevant to this application, the allegations are admitted.

303. **Ad paragraph 14 to 17 thereof:**

I have replied to the affidavit deposed to by Mr Botha above. I respectfully refer the Honourable Court to what I stated in respect of Mr Botha's contentions contained in his affidavit.

304. **Ad paragraph 18 thereof:**

I admit that the liquidators were aware that the Steynberg trustees laid claim to ownership of the FX Choice bitcoin. However, as I have repeatedly pointed out before, we seek no specific relief in this application concerning



the FX Choice bitcoin, or any other investors' bitcoin for that matter, other than that this Court clarify how bitcoin be classified. For the same reasons why the contentions made by Mr Botha are irrelevant to this application, as dealt with before, the Stenyberg trustees' dispute concerning ownership in and to the FX Choice bitcoin is also irrelevant.

305. **Ad paragraph 19 thereof:**

I have dealt with Mr Marks' affidavit already. I refer the Honourable Court to what I have already stated in response thereto.

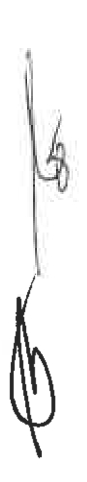
306. **Ad paragraph 20 thereof:**

For the reasons already explained before, the determination of the ownership in respect of the FX Choice bitcoin, or any other bitcoin for that matter, is not an issue before this Honourable Court and accordingly, any factual dispute which exists in relation thereto, is entirely irrelevant to the adjudication of this application. The Steynberg trustees should, if so advised, institute action for any relief they want to seek against the MTI estate.

307. **Ad paragraph 21 to 22 thereof:**

307.1. Paragraph 2.1 of the provisional order provides as follows:

> *"The liquidators of Mirror Trading International (Pty) Ltd ("the Company" and "the liquidators" respectively) should treat Bitcoin ("BTC") in the estate of the Company as intangible assets that*



constitute "property" as defined in section 2 of the Insolvency Act, 24 of 1936 ("the Insolvency Act")."

307.2. On no possible construction, I respectfully submit, can this wording be regarded as conferring a right on MTI with regard to the FX Choice bitcoin or its proceeds as its property. That is simply not what the order contemplates.

307.3. I reiterate that, according to the liquidators, the FX Choice bitcoin was indeed the property of MTI, contrary to the claims of the trustees of Mr Steynberg's estate. Should they seek to pursue this dispute further, they should take whatever steps may be available to them to have the question of ownership determined in appropriate proceedings, other than these proceedings.

307.4. For the avoidance of any doubt, and in line with the request by Mr Fisher in paragraph 22 of his affidavit, we have no objection thereto that any final order obtained from this Honourable Court, concerning the relief sought in paragraph 3.1 of the notice of motion, expressly state that no finding is made in respect of ownership of any bitcoin.

308. **Ad paragraph 23 thereof:**

This is accepted, however, we do not seek determination of the ownership in and to any bitcoin in this application.

309. **Ad paragraph 24 to 32 thereof:**

309.1. In my founding affidavit, I set out the history of MTI in some detail.

309.2. Also, the history of MTI was extensively pleaded in the particulars of claim in the section 424 action, a copy of which appears at paragraph "JF6" to Mr Fisher's affidavit in the estate Steynberg intervention application.

309.3. To the extent which the allegations herein accord with the history set out in the founding affidavit and in the particulars of claim, I admit the allegations.

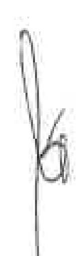
309.4. Save as aforesaid, the remainder of the allegations are denied.

310. **Ad paragraph 33 thereof:**

I deny the allegations contained in this paragraph. MTI indeed had bitcoin wallets and kept a record of investors' bitcoin investments in the MTI backoffice.

311. **Ad paragraph 34 to 44 thereof:**

311.1. To the extent which allegations herein accord with the history set out in the founding affidavit and in the particulars of claim in the section 424 action, I admit the allegations.



311.2. Save as aforesaid, the remainder of the allegations are denied.

312. **Ad paragraph 46 to 135 thereof:**

312.1. The allegations contained in these paragraphs pertain to the dispute of the ownership of the FX Choice bitcoin, which, as I indicated before, is not relevant for the purposes of the present application. In any event, the contents herein constitute, for the greater part thereof, argumentative matter.

312.2. As I already stated, I am not going to engage with Mr Fisher in these proceedings on these issues since they are not relevant to the relief sought in this application. The evidence, arguments and contentions raised herein will be dealt with, if necessary, when proceedings are instituted by the Steynberg trustees regarding the ownership of the FX Choice bitcoin. It may well be that such a claim would exist only between the insolvency trustees and FX Choice and that the MTI estate will not be party thereto.

312.3. I admit the allegation in paragraph 112 that FX Choice transferred the bitcoin to the liquidators. This has never been in dispute. I deny the further allegations in paragraph 112.

312.4. I specifically deny the allegations in paragraphs 115, 123 and 124.

312.5. With regard to paragraphs 126 to 135, I admit that the report of Mr Pederson has not been given to the Steynberg trustees. The report is privileged and is, in any event, a work-in-progress, as I explained already. I decline to engage with the Steynberg trustees with regard

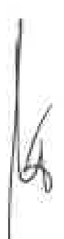
to the other allegations in the aforesaid paragraphs which allegations are, I submit, clearly, irrelevant to the issues before this Honourable Court.

312.6. Out of caution, I therefore do not admit the correctness of any of the remaining allegations contained in these paragraphs at this time.

312.7. I mention, however, that I take note of the correspondence attached to Mr Fisher's affidavit and as referred to in this paragraph. I do not dispute the engagements referred to in these paragraphs between Mr Fisher and his co-trustee with the MTI liquidators and their consultants. Again, I refrain from further commenting thereon herein.

312.8. As I mentioned already, FX Choice is not a party to these proceedings, neither are the thousands of investors who may have an interest in the claim made by the Steynberg trustees to the FX Choice bitcoin. The improper attempt by the Steynberg trustees to ventilate these issues should, with respect, not be tolerated by the Court.

312.9. It is important to bear in mind that the Steynberg trustees are not claiming any substantive relief against MTI. Their claim, if they indeed have a claim, would likely lie only against FX Choice, and not also against MTI. It is, accordingly, idle for the Steynberg trustees to unnecessarily burden this Honourable Court with a



plethora of irrelevant allegations and submissions which do not contribute to the determination of the issues which are before this Court in this application.

313. **Ad paragraph 136 thereof:**

I repeat that the provisional order, at paragraph 2.1 thereof, does not have the effect and cannot be construed to establish ownership in any bitcoin in the estate of MTI. It is noted that, save for this difference in interpretation, there is no dispute between the liquidators and the insolvency trustees of Mr Steynberg's estate that bitcoin should be dealt with as assets in an insolvent estate and therefore, that it would also constitute "property" of an estate, should that estate be able to establish that it has ownership in and to such bitcoin.

314. **Ad paragraph 137 thereof:**

314.1. It is correct that the order, in paragraph 2.1 of the provisional order, does not identify any particular bitcoin as belonging to MTI in ownership. This is because no such order was ever sought, nor is the effect of the order the such a determination is made.

314.2. I deny that we sought to circumvent any factual dispute concerning ownership and entitlement in respect of any bitcoin in the estate of MTI, including the FX Choice bitcoin. All such disputes stand to be determined in the relevant action proceedings instituted by the

liquidators and in proccedings to be instituted by or against MTI's estate.

314.3. The relief sought in paragraph 2.1 of the notice of motion is premised on the view held by the liquidators – which is informed by the advice they received as dealt with in my founding affidavit – that bitcoin is "property", as envisaged in section 2 of the Insolvency Act, in the form of intangible assets. In seeking this Court's guidance in this respect, it must be born in mind that the only property ever dealt with by MTI, and which is relevant to the administration of its estate in liquidation, was and remains bitcoin. The liquidators accordingly seek guidance from this Honourable Court on this issue, primarily to assist them on how to deal with claims by investors and how to deal with claims against investors who recevied bitcoin from MTI. The FX Choice bitcoin, and the dispute concerning the ownership of that bitcoin as repeatedly raised by the Steynberg trustees, are wholly irrelevant to the guidance sought by the liquidators in this application.

314.4. The aforegoing having been said, I have to make it clear beyond doubt, if it is not already, that the liquidators have always been of the view, and still is, that the bitcoin transferred from FX Choice was, and has always been the property of MTI and that the said bitcoin, or its realised proceeds, fall to be dealt with by the liquidators in the course of the administration of the insolvent estate of MTI. This, whilst being irrelevant to the present proceedings, will

be demonstrated by the liquidators in the appropriate forum, should the need for us to do so ever arise.

315. **Ad paragraph 138 thereof:**

I do not deny that a factual dispute concerning the ownership in and to bitcoin, including the FX Choice bitcoin, exists and I also do not dispute that such a factual dispute cannot be ventilated and determined in application proceedings. However, I reiterate that this application does not seek a determination of such a dispute, and these factual disputes are therefore, for the purpose of this application, entirely irrelevant.

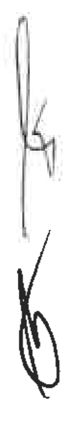
316. **Ad paragraph 139 thereof:**

As I already indicated, the liquidators will have no difficulty agreeing to an order, concerning the present paragraph 2.1 of the provisional order, expressly stating that no finding is made in relation to the ownership of any bitcoin in the estate of MTI.

317. **Ad paragraph 140 thereof:**

317.1. I dispute that an order as proposed in this paragraph can be made.

317.2. The order proposed by Mr Fisher in this paragraph is interdictory in nature, whilst no application for an interdict has been made by the insolvency trustees, nor has the requirements for an interdict been established. Moreover, several parties which would have a direct and substantial interest in any application for such an interdict, such



as FX Choice and investors who submitted claims against MTI, are not before Court.

317.3. The FX Choice bitcoin was paid to MTI, and is regarded by the liquidators to be the property of MTI. This, I repeat, is not an issue before this Honourable Court in this application. There is no obligation on the liquidators to commence proceedings to confirm their ownership of the bitcoin in its possession or the proceeds thereof.

317.4. It is the prerogative of the Steynberg trustees to initiate proceedings to ventilate this dispute and to have it resolved, should they so wish, irrespective whether such proceedings are instituted against the MTI estate, FX Choice or both.

318. **Ad paragraph 142 thereof:**

For the reasons dealt with before, I dispute there was any obligation on us to deal with any disputes concerning ownership in and to the FX Choice bitcoin.

319. **Ad paragraph 143 thereof:**

I take note that Mr Fisher disputes the insolvency of MTI. This is something that stands to be determined in the pending action against, amongst others, Mr Steynberg's insolvent estate. It is also in issue in the Ponzi application.

320. **Ad paragraph 144.1 to 144.2 thereof:**

This is admitted.

321. **Ad paragraph 144.3 thereof:**

This is denied. As I stated earlier, the liquidators are in possession of forensic evidence which supports the liquidators contention that the FX Choice bitcoin, at all relevant times, belonged to the MTI estate.

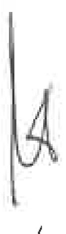
322. **Ad paragraph 144.4 thereof:**

The contents herein are noted. I respectfully submit that, once it is clarified that this application and any relief given pursuant thereto does not result in a finding of ownership in respect of bitcoin being made, it appears that the Steynberg trustees do not oppose the relief sought.

323. **Ad paragraph 144.5 thereof:**

I have dealt with this contention several times before. I respectfully refer the Honourable Court to what I already stated. I again deny the contents herein and reiterate that the claim by the Steynberg trustees is not only misconceived but it is also irrelevant to this application.

324. **Ad paragraph 144.6 thereof:**



This is irrelevant. However, I admit that the liquidators did nto agree to the suggestion made by the Steynberg trustees. I deny the further allegations in this paragraph.

325. **Ad paragraph 144.7 thereof:**

This allegation is so vague that I cannot meaningfully respond thereto. It is also irrelevant.

326. **Ad paragraph 144.8 thereof:**

This is noted.

327. **Ad paragraph 144.9 thereof:**

I respectfully dispute that a finding, as suggested by Mr Fisher in this paragraph, can be made by the Honourable Court in these proceedings. This issue, as I have repeatedly pointed out before, is not an issue upon which this Honourable Court is called to pronounce and in any event, due to the obvious and material factual disputes concerning the determination of this issue, it would not be appropriate that it be determined in application proceedings.

328. **Ad paragraph 144.10 to 145 thereof:**

This is noted.

329. **Ad paragraph 146 thereof:**

329.1. Save that the admissions herein are noted, I dispute the remainder of the allegations herein and repeat what I have stated hereinabove.

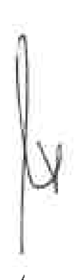
329.2. I agree that it would not be desirable nor appropriate, with respect, for this Honourable Court to determine the issue of ownership of any bitcoin in these proceedings. I deny, however, that such relief was ever sought in this application and that the factual dispute which exists in respect thereof have any bearing on the further adjudication of this application.

330. **Ad paragraph 147 thereof:**

330.1. I take note that the Steynberg trustees dispute the insolvency of MTI. As I intimated before, this will be determined in the pending Ponzi application or in the pending section 424 action, or in any of the actions instituted against investors for the return of bitcoin paid by them from MTI.

330.2. The outcome of the Ponzi application may have limited effect on this application which we maintain is immaterial to this application. The outcome of that applicaiton does not preclude the adjudication of this application before judgment is given therein.

330.3. The directions sought from this Honourable Court remain urgent. As pointed out above, thousand of claims have already been received and proved against the estate and many more claims are expected. The liquidators urgently require guidance from this Honourable Court to enable them to perform their statutory obligations with regard to the examination of the proven claims and



the further steps to be taken with regard thereto in terms of the Insolvency Act.

330.4. Save as aforesaid, the remainder of the allegations contained in this paragraph, unless otherwise specifically dealt with before, are denied.

331. **Ad paragraph 148 thereof:**

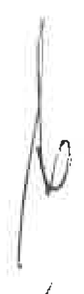
The contents herein are noted.

332. **Ad paragraph 149 thereof:**

332.1. I dispute that this application warrants a referral for oral evidence or to trial.

332.2. The only real material dispute of fact pertains to ownership of bitcoin, which is not an issue before this Honourable Court, and which is not something which will be affected by any order granted in this application as prayed for by the liquidators.

332.3. The proposed costs order in respect of the Steynberg trustees' opposition to this application is noted. Whilst I deal below with my proposal how costs in this application be dealt with, the issue of costs will have to be argued and debated when this application is heard.



CONCLUSION:

333. It is submitted that a proper case is made out for the relief in the provisional order to be made final, subject to such amendments thereto which this Honourable Court may wish to make in light of that which has been raised by the intervening parties and in light of that which is contained herein.

COSTS:

334. The liquidators accept that all the intervening parties, save for what I stated concerning the unknown EDJ investors and their *locus standi*, have the right to make submissions with regard to the relief sought by the liquidators in this application.

335. Each of the intervening parties have, however, abused the occasion to a certain degree by raising wholly irrelevant issues and, in some instances, by launching a scurrilous personal attack on the liquidators.

336. It is evident from the affidavits delivered by the intervening parties that they have all misconceived the nature and effect of the relief sought by the liquidators. Their misconceptions should have been clarified by what I have stated herein.

337. The liquidators do not wish to unnecessarily burden this Honourable Court with issues relating to costs and, to this end, the intervening parties are invited to reconsider their positions and agree to the confirmation of the provisional order, with such amendments as the Court may deem fit. In such event, the liquidators propose that the costs of the intervening parties be costs in the MTI estate.

338. However, in the event that the intervening parties, or any of them, persist with their unwarranted attacks on the liquidators and persist with their opposition to the relief sought which would, if granted, be in the interest of the whole *concursus*, appropriate costs orders will be sought against such intervening parties, for which argument will be presented to this Court at the hearing of this application.

WHEREFORE the liquidators persist with the relief sought by them in the notice of motion and pray that the provisional order, subject to such amendments as the Court may deem fit, be confirmed.

DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at **BELLVILLE** on this the **31st** day of **JANUARY 2023**, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Ex Officio COMMISSIONER OF OATHS (RSA)
CHARL THOMAS HAMBRIDGE
(Member) Chartered Management Accountant
Business Consultant
CTH Consulting
25 Dolfyn Street, Yzerfontein
Western Cape, 7351