Applicant:
S.P.T. Rose
Third
SPTR3
24 October 2016

IN THE HIGH COURT OF JUSTICE **Claim No. CL-2008-000305 (Folio No. 267 of 2008)**
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

BETWEEN:

SOCIÉTÉ GÉNÉRALE

Claimant

and

(1) GOLDAS KUYUMCULUK SANAYI ITHALAT IHRACAT A.S.
(2) GOLDAS KIYMETLI MADENLER TICARETI A.S.
(3) MEYDAN DOVIZ VE KIYMETLI MADEN TICARET A.S.
(4) GOLDAS LLC

Defendants

AND BETWEEN:

SOCIÉTÉ GÉNÉRALE

Claimant

and

(1) GOLDAS KUYUMCULUK SANAYI ITHALAT IHRACAT A.S.
(2) GOLDART HOLDING A.S.

Defendants

THIRD WITNESS STATEMENT OF SIMON PAUL TIMOTHY ROSE

I, **Simon Paul Timothy Rose**, Director and Solicitor in the Firm of Morgan Rose Solicitors, 53-64 Chancery Lane, London, WC2A 1QU, will say as follows:

INTRODUCTION

1. I am a Director and Solicitor at Morgan Rose Solicitors, who are instructed by the Defendants in both proceedings. I am the fee earner with overall conduct of and responsibility for the proceedings for the Defendants. I confirm that I am authorised to make this witness statement on behalf of each of the Defendants.

2. I make this witness statement:-

   (1) in reply to the Claimant's response evidence filed opposing the Defendants' applications for an Order:

      (i) Discharging the freezing orders obtained by the Claimant against the Defendants on 15 March 2008, continued on 2 April 2008 (as against the Folio 267 Defendants ('the First Freezing Order') and on 2 April 2008 (as against the Folio 329 Defendants ('the Second Freezing Order'), and together referred to herein as 'the Freezing Orders';

      (ii) That there be an inquiry as to damages in respect of any losses caused to the Defendants by the Freezing Orders.

   (2) in response to the evidence filed in support of the Claimant's Summary Judgment Applications;

   (3) in response to the first witness statement of Stephen John Surgoner (the **'First Surgeoner Witness Statement'**) dated 12 May 2016 upon which the Claimant relies.

3. Save where I state otherwise, the facts and matters set out in this witness statement are within my own knowledge or arise from information or documents provided to me by the Defendants' authorised representatives. Where I refer to any additional information outside my own knowledge, I believe it to be true. I also refer to my first witness statement dated 9 February 2016 (the '**First Rose Witness Statement**') and its exhibit **SPTR1**, and my second witness statement dated 9 August 2016 (the '**Second Rose Witness Statement**') and its exhibit **SPTR2**. In this witness statement I will adopt the defined expressions and headings used in the First Surgeoner Witness Statement but without any admissions.

4. I refer in this witness statement to a paginated bundle of documents appended hereto and marked **SPTR3.** Page references herein are to SPTR3 unless stated otherwise.

5. Wherever possible I have not in this witness statement repeated matters which are contained in the First or Second Rose Witness Statements. As a result I have not sought to address points of conflict between those statements and the First Surgeoner Witness Statement unless it is necessary to add further information in relation to the relevant issue or conflict. The fact that I have not dealt with any point taken by Mr Surgeoner is not an indication that the Defendants accepts the accuracy or truth of the same, save where otherwise expressly stated.

THE PARTIES' COMMERCIAL RELATIONSHIP

Bullion Consignment Business

6. Whilst Mr Surgeoner explains the origins of the Claimant's consignment business, it is difficult to see the relevance of the same in relation to the very specific and unusual relationship which existed between the parties to these proceedings. For example, although Mr Surgeoner is keen to point out that the Claimant has used consignment agreements in relation to the depositing of gold in banks in India, the Defendants plainly are not banks or in a position similar to banks. It is the very fact that the commercial arrangements between the Claimant and the Defendants were very different to the arrangements between banks that means the traditional model of consignment upon which the Claimant focuses was not appropriate for use (and was not in fact used, as I have set out in the First Rose Witness Statement) by the parties.

7. I do not repeat in detail the matters set out in the First Rose Witness Statement in relation to Mr Surgeoner's summary of the use of BCAs between the parties. As I hope that statement makes clear, the Defendants' position is that although the parties executed copies of the BCAs, in reality and practice, the operation of the commercial arrangements between them was very different to what the Claimant now contends was the case (i.e. by strict reference to the ordinary workings of a consignment agreement). It is the Defendants' position that from the very outset this was not a commercial model which was followed, and that the Claimant was fully aware of and willingly assented to proceed on such a basis.

8. In addition to the general dispute between the parties as to the use, form and terms of the agreements, the Defendants do not agree with the conclusions reached at paragraphs 2.7 to 2.9 of the First Surgeoner Witness Statement. Whilst the Defendants cannot comment on what is contained in paragraphs 2.7 to 2.9 as to the bank's relationships with persons other than the Defendants, the portrayal of the loaning of gold to a jewellery company as an entirely negative process compared to a consignment is (i) not an accurate summary of the positive and negative sides to each of those transactions; and (ii) is in reality a matter for expert evidence which the Claimant has not sought to adduce.

9. For example, the Claimant does not say what impact a loan of gold (or the equivalent provision of credit for gold) had on the Claimant's internal and regulatory compliance requirements, which in the Defendants' view is a relevant factor particularly given that part of the Defendants' view of this matter is that the Claimant knew full well to what use the gold was put, that the parties were not in fact treating it as being on consignment, but yet the Claimant sought to rely on the advantages (both in terms of regulatory compliance and balance sheet effect) of apparently retaining title to the bullion.

10. Moreover, the conclusions ignore that only Kuyumculuk was a jewellery manufacturer and the other Goldas companies were traders. The use of the consignment model was therefore inappropriate for the Defendants as the use of the gold was consistent, and a credit model worked far better for the Defendants (as they maintain the Claimant was informed from the outset). Further, there was no need as Mr Surgeoner suggests for bullion to be kept on reserve in case of sudden fluctuations in demand or manufacture in circumstances where gold could be purchased by them from the Istanbul Gold Exchange ('IGE') virtually instantaneously or obtained from supplier such as the Claimant on a next day basis and when the amounts held on

consignment exceeded the annual production requirement. The Defendants do not accept that the consignment model fitted well with their business needs as was made clear to Mr Gratton-Brunt in the initial discussions between the parties and, the Defendants contend, to Mr Teboul. The Defendants contend that the Claimant was well aware of the purpose for which the Defendants obtained the gold, and that this was illustrated on yearly financial reports sent to the Claimant every year since 2003 as requested by the Claimant (SPTR3/A/I/1).

The credit approval process for the Commodities department

11. The Defendants cannot comment on the Claimant's description of the workings of its risk department save as is apparent from the information it has disclosed in support of the First Surgeoner Witness Statement. However, from analysis of the risk emails as supplied by Mr Surgeoner and set out below the Defendants make the following points:-

- The true driver of the relationship was the trading desk under Mr Topolanski and Mr Teboul;
- The use of the consignment agreement was an important means of reducing the risk from 100% to 2% and so allowing the shipment of far greater quantities of gold than would be possible under a 100% risk situation for example as with a loan;
- Mr Topolanski was responsible for the counterparty risk approval;
- Mr Teboul concluded the first deal ahead of the risk department decision;
- The deals proceeded ahead of risk approval.

12. At SJS1/A/Vol1/p198 (in French at SJS1/A/Vol1/p182), Ms Lydie Bellet who worked in the DEFI/CTY/MAR department wrote on 4 June 2003 to Mr Philippe Le-Huidoux on the subject of '*Turkish country risk*' explaining that she '*would like to request a line for a Turkish counterparty and asks whether there is a country risk on Turkey for CTY/MAR.*' Presumably there was some further communication between Mr Teboul and Ms Bellet because at SJS1/A/Vol1/p77 (in French at SJS1/A/Vol1/p75) is an email from Mr Teboul to Ms Bellet where he said:-

> *'Here is the rest.*
> *We hope to deal in person with them in the form of consignment (of RCM) 1 ton at 3 months which would seem to be enough for the moment.*
> *11.7 million US$ nominal*

0.3 million USD RCM at 3 months

Profitability 75% in lasting reality as we shall never exceed the year.)

Thank you

Florent'

13. Mr Le-Huidoux replied on 5 June 2003 on the subject of Turkish country risk at SJS1/A/Vol1/p197 (in French at SJS1/A/Vol1/p181) that:-

'A USD 3m limit is in place on Turkey for derivatives. On the other hand, utilization of this limit is conditional on approval by RISQ/EMG…The person to contact is Alain Audrey.'

14. Mr Teboul later that day wrote SJS1/A/Vol1/p77 (in French at SJS1/A/Vol1/p77) to Ms Bellet to clarify presumably referring to some other communication which has not been produced by the Claimant:-

'I am sorry that I was not clear.

11.7million USD of Principle risk for 3 months (in addition to the 0.3 ram for 3 months).

Thank you'

15. The last I have of these exchanges until September 2003 is Ms Bellet's response to Mr Teboul asking that he confirms that he does not require delivery risk, but there is no response available. As I understand from the Claimant's evidence, risk approval process was broken down into two parts: country risk and counterparty risk.

16. The next document in the sequence is a document entitled New Credit Application for counterparts Goldas Jewellery Kuyumculuk - Turkey dated 11 June 2003 (SJS1/A/Vol1/p79-85). Kuyumculuk is described as unrated by S&P and Moody's and that the country is rated (B-) (6- equivalent) thus the company cannot be rated higher than the country risk. The document appears to have been prepared by Mr David Zolynski, as is apparent from the note at the foot of each page of the document. The '*Request Summary*' section confirms that the requesting branch was the Front Office CTY/MAR for transactions derivatives sales on gold products. The Nominal amount is put at 11.7 MUSD which is in line with the email traffic above and there is reference to the profitability being '*Expected sales credit: 25,000 USD at GPO 75%*'. The Total Risk is '*12 MUSD/6 months in Principal Risk*' and '*300 k USD/6 months in RCM*'. The

document goes on to describe the history and background of Kuyumculuk and moves on at page SJS1/A/Vol1/p81 to DEFI/CY/MAR/NRJ requesting the line with the same Principal and RCM amounts, the purpose being '*to conduct GOLD purchase/sales and hedging operations.*' The recommendation of the report states that:-

> *'in light of the above CORI/CCG/CRF/MAR gives favourable opinion to the credit line request of CTY/MAR and asks for DEFI/CTY/DIR approval. The Raroc cannot be obtained as the model does not exist for Turkey, however the expected sales credit is USD 25,000 with RBO 75%.'*

17. I imagine that work was carried on in the background during the remainder of June, July and August but nothing substantive was heard from the Claimant by the Defendants until 1 September 2003. At page SJS1/A/Vol1/p89 there is an email from Mr Taboul to Mr Binatli appearing to be in mid conversation on the subject of '*bank for LCs*' (letters of credit). Mr Taboul by email at 5.07 pm on the 1 September 2003 suggests using Akbank TAS. Later that evening at 7.06 pm Elodie Fleury writes to Mr Binatli enclosing a Gold Consignment Agreement for perusal at page SJS1/A/Vol1/p86, and thereafter Mr Binatli enquires about the procedure for signing the agreement.

18. On 3 September 2003 at 07.58 Mr Binatli writes (at SJS1/A/Vol1/p88-89) to Mr Taboul on the subject of letters of credit stating that Akbank TAS will be problem but he will try his best to convince local banks to agree to provide a letter of credit; and he thinks that the banks are conflicted because Kuyumculuk will be competing directly with them in the importation of gold into Turkey.

19. There was clearly further communication from Mr Teboul prompting Mr Binatli's further email at 08.26 (SJS1/A/Vol1/p88) in which Mr Binatli explains the premium price Mr Binatli currently pays on anything above 100 kilos as roughly $0.80 per ounce. In the final paragraph, in regards to the leasing rate, he stated '*I assume you are asking me about the leasing rate? No we do not include the gold leasing rate on the premium and we pay on the average a rate between 2-3% p.a. separately.*'

20. At 11.50 am on 3 September 2003, Ms Bellet emailed Mr Alain Daudruy copying Mr Jean Reynaud, on the subject of Turkish country risk. She confirmed that she was handling credit line requests at DEFI/CTY/MAR (SJS1/A/Vol1/196-197):-

'We wish to deal in the physical (purchase of precious metals) with a new Turkish counterparts, Goldas.

Philippe Le-Huidaux (see the email below) asked me to review with you the possibility of obtaining a country risk on Turkey.'

21. The email referred to as *'the email below'* appears to refer to the email dated 5 June at paragraph 13 above. At this stage it is important to note that aside from the 'New Credit Application' prepared by Mr Zolynski on 11 June 2003 (above), no documents have been supplied by the Claimant on what happened next. However, it is possible to surmise that Mr Serge Topolanski was at some point given the file and agreed on 1 September 2003 (see below) to supply Kuyumculuk with half the amount requested in Mr Zolynski's credit application on condition that a letter of credit be supplied by a Turkish bank, hence Mr Teboul's email request for a letter of credit to Mr Binatli on the 1st as referred to in paragraph 17 above. This was the trigger for the flurry of activity immediately after the summer holidays. Ms Bellet then continues in the same email (of 3 September 2003):-

'Our requirements are as follows:

Principal risk = USD 6m with six month term

RCM = USD 0.15m with a 1 month term

Volume = 1 tonne every 3 months, for the time being

Profitability = 75%

For your information, we have received the approval of Serge Topolanski of DFI/CTY/DIR for this line, on the condition that a letter of guarantee be obtained from a Turkish bank,

I have therefore requested a 6 month RP line in the amount of USD 6m for Akbank TAS from Guillaume Ziegler at RISQ/CMC/ANA.

We should have an agreement during this month of September.'

22. Later the same day at 4.30 pm Ms Bellet sent a further email to Mr Alain Daudruy copying Mr Jean Reynaud at SJS1/A/Vol1/p184 (in French at SJS1/A/Vol1/p192):-

'Within the framework of its Country Risk limit of 3 M USD for derivatives on Turkey, we wish to obtain for now an agreement for a limit of risk of replacement of 0.15 MUSD at 1 month. This risk corresponds to the operations of "consignment" which CTY/MAR wishes to carry out with Goldas [...], file authorised by Serge Topolanski DEFI/CTY/MAR/DIR on 01.09.03.

I have a copy of this agreement which I can let you have by fax.'

Therefore at this point Ms Bellet was seeking country risk approval as she already had counterparty risk approval for dealing with Kuyumculuk from Mr Topolanski.

23. On 5 September 2003 at 4.06 pm Ms Barbara Hester-du-Granrut emailed Ms Bellet copying Mr Jean Reynaud on the subject of Turkish country risk SJS1/A/Vol1/p195 (in French at SJS1/A/Vol1/p191):-

> *'RISQ/EMG approval for assuming a one month Turkey risk of USD 0.15m in RCM representing "consignment" transactions with Goldas [...].*
> *We have noted that this transaction falls under the authority of DEFI/CTY/MAR/DIR [Debt Financing/Country/MAR/DIR] (which indicated its approval and does not require RISQ/CIB [Risk Division/Corporate and Investment Banking] approval of the counterparty risk.'*

24. Ms Barbara Hester-du-Granrut's email is ambiguous. The first paragraph appears to refer to approval for a one month country risk. The second notes that the transaction falls under the authority of Mr Topolanski's department DEFI/CTY/MAR/DIR, which she says has already indicated approval of the counterparty risk. Meanwhile the first 200 kg shipment transaction was agreed and completed that same afternoon and confirmed by email from Mr Binatli to Mr Teboul at 16.20 with delivery to take place in Istanbul on 10 September 2003. It is important to note that Mr Topolanski's approval was conditional on there being a letter of credit which was never obtained.

25. Finally, on 10 September 2003 at 5.28 pm Mr Jean Reynaud at SJS1/A/Vol1/p195 (in French at SJS1/A/Vol1/p191) sent an email to PAR-RISQ-CMC-RDCRequest&Renew@socgen; copied to Mr Teboul, Mr Lannegrace, Lydia Bellet and others but not it would seem to Mr Topolanski nor Ms Hester-du-Granrut with the subject '*Notification of permanent limits on Goldas [...], Turkey country risk*':-

> *'Please find attached our doc3 of notification of the approval by DEFI/CTY/DIR dated 9/01/03 on Goldas [...] no group in RDR for update of pilotage/iForce& Risk Desk (copy of this approval to follow by fax)*
> *Conditions of approval:*

OK for 500kg under a consignment contract

Country risk on Turkey approved as per below email of B. Hester-du-Granrut dated 9/05/03.

Thank you

Jean Reynaud

DEFI/EMO'

26. From this it can be seen that Mr Reynaud has taken Ms Hester-du-Granrut's 5 September email as approval of the country risk. He has made specific reference to the earlier approval by Mr Topolanski. I have not seen Mr Topolanski's approval save for the reference to it in Ms Bellet's email referred to above. Likewise I am not aware of any decision to remove the requirement for a letter of credit. It is clear that the first trade was proceeding at speed in parallel with the risk department's work, the consignment agreement sent out and signed and returned and the first deal concluded all by 5 September 2003. Mr Binatli wrote to confirm that day's agreement to ship 200 kilos of gold 14 minutes after Ms Hester-du-Granrut's supposed approval. There is clearly information missing, however there was no urgency from the Defendants; this was entirely generated by the Claimant. Mr Binatli said that the commencement of trading with the Claimant came suddenly. He had made an approach in November 2002, had a couple of meetings followed up with an email, supplied some accounts and then heard nothing ostensibly until 1 September 2003. Mr Binatli says that he was assured by Mr Teboul that the consignment agreement was just a formality and would allow the Defendant to use the gold immediately. Indeed this is the clear implication of the way in which the first consignment agreement came into existence.

27. Crucially the first trade was commenced under a signed agreement with counterparty risk approved at one ton by Mr Topolanski conditional on there being a letter of credit and that the transaction was a consignment agreement. The country risk was approved at half a ton on condition that there be a consignment agreement. The significance of there being a consignment agreement is now clear, namely that on a loan the security required would be equal to the amount sent out i.e. 100%, but on a consignment agreement it would be 2% of the amount shipped. This point is further developed at paragraphs 44 and 45 below. The importance of this is for the balance sheet effect for the Claimant as gold sent on consignment would remain part of the Claimant's assets and properly form part of its reserve. The cavalier attitude of the Claimant in completing the transaction before obtaining risk approval, contracting without a letter of credit, trading with scant or no regard to the terms of the

consignment agreement, agreeing to oral variations and sending the goods invoiced as opposed to with a proforma invoice maintaining the retention of title clause. These issues are bad enough from a contract law point of view, but it is astonishing when the true importance of the consignment agreement is taken into account reducing as it does the risk quotient to 2% of the principal, that extreme care was not taken with regard to each and every aspect of the transactions so as to ensure that there could have been no issue with its enforceability.

Start of SocGen's bullion supply and trading relationship with the Goldas companies

28. Paragraphs 2.24, 2.29, 2.30 and 2.31 of the First Surgeoner Witness Statement refer to Mr Binatli's knowledge of the significance of consignment agreement. It is clear from the use of 'consign/lease' by Mr Binatli (at SJS1/A/Vol1/189) that he was not referring specifically to any agreements between the parties but he was making general comments on how the banks operated in Turkey in providing a letter of credit. It is not accepted that the use of word '*consign*' by Mr Binatli in this email would necessarily correspond to the subsequent agreement between the parties especially when the agreements sent by the Claimant to be signed by Goldas were standard form agreements which Goldas accepted without amendments owing to the assurances as to how the relationship would operate given by the Claimant. In addition, as set out in paragraph 42 of the First Rose Witness Statement, Mr Binatli was aware of what a consignment agreement was but that this was not what was intended by either party and not how the parties operated in practice.

29. Furthermore, Mr Surgeoner's contentions that Mr Binatli gave dishonest evidence and lied to the Bakirkoy Chief Prosecutor's Office at paragraphs 1.9 (e) and 2.43 of the First Surgeoner Witness Statement are inaccurate. Mr Binatli had been interrogated by the police and the deposition reflects Mr Binatli's answers to the questions he was being asked albeit those questions are not set out in the deposition document so that there is an absence of context against which the answers can be fully understood. It is clear from the statement that Mr Binatli was not denying the existence of the bullion agreements; indeed he refers to them at the beginning of his deposition. I have spoken to Mr Binatli about this and he has explained to me that by saying '*I have not been informed of the agreement executed*' he meant that he was not aware of reliance on the BCAs and the reality of the parties' dealings was a sale and purchase agreement which had never been executed. He added that it was a nerve wrecking experience given the gravity of the allegations and that he had never been questioned by a prosecutor. The

prosecutor asked him questions for about an hour and then dictated the statement and gave it to him to sign and the issue of what was agreed and executed became conflated.

30. Mr Binatli has also confirmed that he had hundreds of telephone conversations with the Claimant's representatives and was confident that there was no misunderstanding between the parties as to what the Defendants did or would do with the gold. I also understand that the Claimant has or had recordings of all the telephone conversations (of which Mr Surgeoner has referred to a very few in evidence which suits the Claimant's purposes) which, given that the Claimant commenced proceedings against the Defendants, ought to have been retained by them. This is apparent from the transcripts of hearings in the proceedings between the Claimant and its insurers which I refer to below. Mr Binatli is confident that a thorough analysis of what passed between the parties will reveal the truth of his and the Defendants' position.

31. The Claimant refers to legal opinions which were obtained by the Defendants prior to entering into the gold or bullion consignment agreements (see e.g. paragraph 2.28 of the First Surgeoner Witness Statement). What Mr Surgeoner has not said is that the legal opinion provided was one supplied by the Claimant in standard form for execution and which the Claimant required the Defendants to return. Much like the BCAs themselves, the Defendants considered that they already had a successful partnership in place based upon the parties' mutual trust and the reality of the on-going commercial relationship (irrespective of the strict terms of the BCAs) as is apparent by the fact that the Defendants were not required to provide security. I attach at SPTR3/A/I/32 an email with its attachment from an officer of the Claimant, Ms Fleury, to Cetin Binatli with Florent Teboul copied in, dated 2 September 2003, responding to Mr Binatli's query as to whether the Claimant required an opinion from the company lawyer:-

> *'We usually require that the legal opinion be delivered by a local law firm rather than by company counsel. We will however be satistied with a letter from an in-house lawyer, substantially in the form of letter herein attached, together with a certified copy of Statutes/Articles of Association of your company: (See attached file: Standard Legal Opinion (In-house).doc)*
> *Before printing out the 2 execution copies of the Gold Consignment Agreement, please insert today's date and your company's legal designation and address details on the heading of the contract and specify at page 9 the location(s) of the branch office(s) in Turkey where you will have gold delivered by SG under this agreement.'*

It is clear from the comparison of the draft standard legal opinion template provided by the Claimant and the legal opinion signed by Mr Atim (which is produced in the exhibits to the First Surgeoner Witness Statement at SJS1/A/Vol1/p187) that it was signed with the exact same terms as provided by the Claimant save for the dotted lines filled in by the lawyer providing information on the signatory Defendant.

32. Irrespective of the above, the key point here is, notwithstanding the legal opinions, which were executed on request in the Claimant's standard form, that the parties by mutual acquiescence conducted their commercial relationship wholly outside the strict terms set out by the agreements. It is not irrelevant to this that the terms of the bullion agreements themselves were not individually negotiated; they were drafted by the Claimant as confirmed by Mr Surgeoner at paragraph 2.12 (h) (i) of the First Surgeoner Witness Statement before being (on the face of it) approved by the Defendants without any detailed review of their terms. Those agreements were very seldom (if ever) referred to in the course of the parties business relationship and there is a significant body of evidence which supports the Defendants' contention that the true contractual relationship between the parties was, from the outset (but even if it was not, clearly became), different to that upon which the Claimant now seeks to rely and moreover that the Claimant was fully aware of the circumstances of which it later sought to complain.

Development of SocGen's bullion supply and trading relationship with the Goldas companies

Consignment lines for other Goldas entities

33. I note that in paragraph 2.41 of the First Surgoner Witness Statement, Mr Surgeoner refers to advice received from Pekin & Pekin ('Pekin'). This paragraph merely demonstrates such advice was received; the Defendants do not accept the advice is or was necessarily accurate, and of course this advice cannot be adduced as expert evidence on Turkish Law by reference. Further, the accuracy of Pekin's advice generally is somewhat undermined by the fact that the Claimant's own expert on Turkish Law has concluded (in his report dated 5 August 2016) for the purposes of these proceedings that the claim forms have not been validly served on the Turkish Defendants. This conclusion runs directly contrary to the advice which the Claimant

says it received from Pekin in 2008, and upon which it has so heavily relied in the present applications.

34. The Claimant avers at paragraph 2.42(a) of the First Surgeoner Witness Statement that the emails referred to in the First Rose Witness Statement between Mr Binatli and the Claimant do not show that Mr Binatli made it clear to the Claimant that Goldas would be using the bullion before it was priced and paid for. I have dealt with this further below.

35. Mr Surgeoner refers at paragraph 2.42(b) of the First Surgeoner Witness Statement to Mr Deshpande's knowledge of the BCAs and seeks to confirm that the BCAs were followed (even though it is accepted that Mr Deshpande did not consider them actively when dealing with the Defendant by phone or email). Tied to this point is the general assertion made by Mr Surgeoner that the Claimant had no knowledge of the use in the Defendants' business activities of the bullion before it was paid for. It is this contention which the Defendants strenuously contest.

36. One significant issue here is that there has been no disclosure for the purposes of this application. This is significant in the present case because so much of the interaction and discussion of trades between the parties occurred during telephone calls. Although the Defendants anticipate that the Claimant will maintain no such calls took place, it is possible to establish from other sources that it is extremely likely that records of the same do or should exist. In particular, I refer to documents obtained in relation to litigation between the Claimant and its insurers concerning claims in respect of the bullion. The pleadings in this action (some of which I have been able to obtain) refer to specific conversations or documents which suggests their existence. For example, the Amended Defence and Counterclaim of the 7th defendant (Cooper Gay & Co) to the Re-Re-Re-Amended Particulars of Claim of 27 May 2011 in the abovementioned insurance case asserts that the Claimant had always had knowledge of the use by the Defendants of the bullion (SPTR3/A/I/36). The underwriter relies on page 7 paragraph 14 subparagraph A of the Particulars, on specific facts including conversations and documents which provides a strong and clear basis for concluding that such events were recorded, or that relevant documents exist. These include:

'(i) the telephone conversation between Mr Binatli and Mr Deshpande on 17 October 2007 in which the converting of gold into jewellery before the relevant Goldas companies had paid for the gold supplied by SG was discussed.

(ii) SG's knowledge that each of the Goldas companies was accounting for the gold on consignment as assets within its inventories; and was accounting for a mere financial liability to SG in respect of such gold within trade creditors. In this regard, CG relies upon the email from Ms Luet to Mr Merlin dated 12 November 2007; the email from Mr Merlin to Ms Luet dated 27 November 2007; the email from Ms Luet to Mr Teboul dated 6 December 2007; the telephone conversation between Mr Binatli and Mr Teboul on 14 December 2007; the email from Ms Luet to Mr Richard dated 9 January 2008; and the email from Ms Luet to Mr Francois Garbado and Mr Jean-Louis Faure dated 18 January 2008.

(iii) The credit assessment by Ms Luet dated 15 January 2008 which stated that the gold on consignment was used by Goldas as of its delivery to make jewellery before it had been purchased from SG by Goldas.'

37. I also understand from documents obtained in relation to the aforementioned action that the Court made substantial provision for disclosure which enabled the specificity of references in the amended pleadings I set above. In this respect I also refer to page 18 of the transcript of the hearing on the 8th of October 2010 in the insurance litigation when Mr Moger QC (for Societe Generale, with Mr Gunning who appears in these proceedings) confirmed the existence of 3,111 audio recordings (amounting to 114 hours) amongst thousands of other documents. Mr Moger QC stated as follows (SPTR3/A/I/78):-

'We listed 25,259 electronic documents, 3,111 audio recordings, and 33 hard copy categories of documents, 21 of which are files, and I am indebted to Mr. Schaff for setting out at para.9 of his skeleton that that consists of 108,612 pages of documents and 114 hours of audio files. Can I hand to your Lordship, just by way of a specimen, I have not brought the document as a whole to court, a specimen of the various sections of the list. The top page is the list, a specimen page, the documents, as you see in the left hand column, beginning with document 23,845 of the electronic documents disclosed.'

From this it is apparent that there is a substantial volume of material to consider given that what is referred to above has been achieved following a 35 key word search as we know from page 7 of the same transcript.

38. In the Re-Re-Amended Defence and Counterclaim in the same case, a copy of which was exhibited at SPTR1/B/1, the underwriters also relied on various evidence including records of telephone conversations between Mr Binatli, Mr Teboul and Mr Deshpande (SPTR1/B/28 and SPTR1/B/34). Although I was not able to obtain a signed copy of this document, I was able to obtain a signed copy of the Re-Re-Re-Re-Amended Particulars of Claim (SPTR3/A/I/130) which refers to the Re-Re-Amended Defence and Counterclaim (for example at paragraph 34 referring to paragraph 18(c) of the Re-Re-Amended Defence and Counterclaim) thereby confirming that this document was filed with the court. Although Mr Surgeoner mentions that a signed copy has not been exhibited, he appears to have neither suggested the document exhibited is materially incorrect compared to the version filed, nor indeed supplied a signed copy (which of course the Claimant could do). The Re-Re-Amended Defence and Counterclaim stated at paragraph 21 (d):-

> *'The Claimants, as parties who sold large quantities of gold into Turkey over several years must have known that Turkish law and practice requires delivery of all imported gold into the IGE vaults. The importer was required to be an IGE member and that member was required to offer and trade the gold on the IGE (either buying the gold itself or selling it to another member). Further, the Claimants were actually aware, from as early as January 2005 (and, in any event, by March 2007), that the gold that they shipped to Goldas companies was being sold by those companies prior to payment being made to the Claimants. In support of the foregoing allegation, the Underwriter Defendants will rely upon the following facts and matters (in particular):*
>
> *(i) the emails dated 3 January 2005 from Mr Binatli to Mr Fernandez-Valdes (which were forwarded by Mr Fernandez-Valdes to Mr Deshpande and Mr Teboul) [10000011];*
>
> *(ii) the exchange of emails between Mr Deshpande and Mr Binatli on 21 and 22 March 2005 [10001084 & 10001091] and the exchange of emails between Mr Deshpande and Mr Binatli on 4 October 2006 (concerning the sale by Meydan of the gold which was the subject-matter of transaction no. 1505 with the Claimants for which the agreed payment date with the Claimants was 10 October 2006) [10011736 & 10011737];*

(iii) the telephone conversations between Mr Teboul and Mr Binatli on 20 March 2007 [1500287 & 1500289];

(iv) the telephone conversations between Mr. Deshpande and Mr. Binatli on 2 March 2007, 6 March 2007 [1500179 & 1500181]. 9 March 2007 [1500219], 14 March 2007 [1500239], 22 March 2007 [1500308], 28 March 2007 [1500353], 1 May 2007 [1500420], 13 June 2007 [1500828], 15 June 2007 [1500872], 7 September 2007 [1501688], 13 November 2007 [1502273] and 5 December 2007 [1502484];

(v) the meeting which took place in Paris on 17 January 2008 between Mr Binatli and Mr Teboul, Mr Lannegrace, Mr Varenne and Mr Neviaski;

(vi) the telephone conversations between Mr Deshpande and Mr Binatli on 30 January 2008 [1502870], 8 February 2008 [1502997] and 12 February 2008 [1503027].'

39. I understand the references in square brackets to this section of pleading were references to document disclosure numbers. Of course, the Defendants have no access to this disclosure and unlike the Claimant could not produce these documents. Again, however, the content of the above statements strongly suggest documents supporting the above contentions exist. It is notable that the Claimants have not produced any of the above documents.

40. Paragraph 2.45 of the First Surgeoner Witness Statement refers to Appendix 1 which is purely an internal document of the Claimant. I can see that the Claimant's risk department was periodically involved in increasing the authorised amounts of maximum consignment quantities. I have been informed by the Defendants' representatives that these were not brought to the attention of the Defendants in the form of an amended consignment agreement or at all. The risk correspondence is brief and is absent briefings supplied as to the nature and trading relationship between the Claimant and the Defendants. It was not be possible to verify it's the contents of Appendix 1 against the documents provided by the Claimant on this subject in SJS1/F/Vol1, many of which were illegible and it was certainly not possible to assess even whether the risk department gave knowing consent to the increases which were agreed. I note that numerous of the risk emails were entitled as *'urgent'* such as at SJS1/F/Vol1/p17, 26 and 73. This is again indicative of the front office needing to get approval to increase limits quickly. I suggest that the driver for this requirement should have been fundamental changes

(improvements) in the financial status of the counterparty and the country because as stated above the counterparty risk cannot exceed the country risk. The requests merely seek an increase in the trading limit. The risk department, from the information available, was focused solely on factors such as the accounts of Kuyumculuk and on the Claimant having no more than 25% of the market share on debtor risk (SJS1/F/Vol1/p80). With this in mind it is significant that I can find no enquiry made of the Defendants by the Claimant at the relevant time. I further refer to my comments on this subject at paragraph 11 onwards above. The documents which seem to recommend the authorisation (for example SJS1/F/Vol1/p80) do not relate to the date referred to in Appendix 1 and the '*notification of approval*' documents are illegible. Finally the increases fell short of the actual amounts transacted and the last increase was in June 2007, at that point the approval was for 11.3 metric tons as the combined amount for all the Defendant counterparties. The figure subject of this Claim is or about 15 tons, clearly the approved figure was exceeded.

41. At paragraph 2.47 of the First Surgeoner Witness Statement, the Claimant explains how an issue was raised by the Claimant as to why the 'consigned' bullion sent to Goldas was being recorded under its inventories. Mr Binatli explained by email (to which Mr Surgeoner refers to) that this was how it had to be recorded under Turkish legislation and the fact that it was being so recorded is consistent with the Defendants' overall position in relation to the terms on which the bullion was delivered. The Defendants' position is clearly set out at paragraph 151 and 152 of the First Rose Witness Statement.

42. It is worth adding here that Mr Surgeoner refers to a database system named 'Gophy' in his witness statement at paragraphs 2.74(c) and (h), 2.82, 2.87, 2.102, 2.107 and 2.108 of the First Surgeoner Witness Statement. This was, apparently, an internal physical gold database maintained by the Claimant. What is not mentioned is whether these records were the official figures which were shared with the Claimant's financial authorities or how the records were overseen. Without any independent auditing of the figures kept on Gophy, the evidential value of the entries into this system is very limited. The Claimant has not exhibited any documents from its official books and records to evidence that the figures on the Gophy database were the ones communicated to their financial authorities.

Transactions on back-to-back terms

43. Paragraph 2.58 and Appendix 2 of the First Surgeoner Witness Statement refer to and exhibit to a chart allegedly showing monthly gold shipped to the Defendants and monthly amounts invoiced to and paid by them. The Claimant's chart is difficult to understand and the Defendants, whislt aware that they have transacted large quantities of gold do not have figures which correspond to this chart as it did not keep a monthly book but rather a record of each transaction given that the quantities delivered would not be paid for at the time of delivery but some days or months later. For this reason without sight of the Claimant's records it will not be possible to check the accuracy of the chart.

SocGen's charging structure: the economics of the consignment business

44. The Defendants are unable to provide any substantive comments to paragraphs 2.61 to 2.70 as the Defendants were never aware of the hedging procedure described by Mr Surgeoner. As I understand the position, hedging only protects against gold price fluctuation. There is no need for the Claimant to protect against a rising price as it benefits from that, it is only if the price of gold were to drop during the consignment period then the Claimant by having a hedging transaction would be able to offset any loss. The Claimant would only need to maintain its hedging in circumstances where the market dipped. The price of gold hardly ever fell during the Defendants' dealings with the Claimant during the period 2003 to 2008. I has spoken to the Defendants' representatives and they cannot find an example of a falling price during any of the transactions but they believe that there will have been some occasions where the price fell. I understand from the First Surgeoner Witness Statement at paragraph 2.22 that Mr Topolanski explained that:

> *'the risk associated with a loan transaction was the risk of non-payment by the counterparty- known as a "principal" risk. This risk was treated by SocGen as 100% of the nominal value of the loan. The credit lines for such principal risks (including for any US$ loans that SocGen might make to the Goldas companies) were known within SocGen as principal (or debtor) lines.'*

45. I know from the risk emails at the commencement of the trading relationship from June and September 2003 referred to above, that there be a consignment agreement and a $6m letter of

credit for a $6m gold shipment. I understand this was required to ensure that there was 100% security for the risk. I am also aware of banks being required to maintain a minimum captalisation and that sending gold out of the country beyond the control of the Claimant would have affected the Claimant's minimum capital requirement, certainly if the transaction were not as a consignment.

46. The Claimant clearly needed to obtain from the Defendants security for the risk equivalent to 100% of the bullion value as directed by Mr Topolanski, and/or needed to ensure it had sufficient reserves equal to what was delivered, or similar, and I believe it did not. One effect of the use of the BCAs was that it meant that the Claimant was not required to comply with the same risk requirements which would have been imposed in circumstances where the bullion was known to be being used. Certainly I understand from the Claimant's chief finance officer Mr Herve Kerdrel in his letter dated 18 March 2008 (referred to in paragraph 52 below) that the Claimant treated all gold sent to the Defendants as the Claimant's asset on its balance sheet until it was paid for.

The charges made by SocGen to Goldas and the individual transactions conducted under the BCAs

47. The Defendants' position in relation to the charges paid to the Claimant is set out at paragraph 73 and 137 of the First Rose Witness Statement. Whilst Mr Surgeoner has described how the Claimant says it set the price of the gold, as I note above the Defendants did not know about the hedging and any effect this had on the position of the Claimant. What is notable is Mr Surgeoner's reference to Mr Teboul and Mr Binatli apparently agreeing that the Defendants should pay interest on gold delivered to the Defendants. The Defendants' position on interest has been dealt with in the First Rose Witness Statement, but even on Mr Surgeoner's case this is yet another example of the parties proceeding on a different commercial basis to that contained in the BCAs. There was no obvious reason for interest to be paid if the gold was on consignment only; had there been one would have expected this to be provided for in the BCAs. Further, in the same vein whilst at paragraph 2.99 of the First Surgeoner Witness Statement it is suggested the Claimant charged an additional 10 cents per ounce margin per additional day for extending the payment date, I am told by the Defendants' representatives that no such charges were made.

48. In relation to the purchase of the gold, the Defendants would effect payment after delivery on the date ('value date') which was agreed upon by both parties in the initial request to fix the

spot price. In regards to paragraphs 2.74 to 2.76, 2.103 and 9.15(d) of the First Surgeoner Witness Statement, the First Rose Witness Statement at paragraphs 73 and 137 provide a complete breakdown of the transactions but they would benefit from further clarity. The course of a typical transaction in a chronological order would be as follows:-

(i) The Defendant company would make a request for shipment of a specific amount of gold. The request would almost always be by telephone by Mr Binatli to Mr Teboul or Mr Deshpande;

(ii) Goldas and the Claimant would agree on the quantity, date of shipment, premium and payment term (be it 1 month or 3 month or back to back). The Claimant would include a 'value date' or 'settlement date', usually based on the payment term). Despite the inclusion of a settlement date this was a matter of form and not substance, the parties would not agree on the pricing date in advance, this would be left to Mr Binatli's discretion.

(iii) The Claimant would send an email setting out the parties' agreement on quantity to be shipped, date of shipment, premium, payment term. This email would also usually make reference to 'pricing' but this would be in regards to a previous transaction, not the one which was being confirmed in this email;

(iv) Mr Binalti would then confirm the terms by a brief email;

(v) The Claimant would prepare the shipment documents and send them to the Defendant company in the next day or so by email and by DHL. These would be the invoice, shipment confirmation notice, airway bill, packing list. The invoice would state a price which would be the price of the gold on the date the gold is to be shipped plus the premium agreed in the confirmation email sent by the Claimant under (iii) above. The premium would cover the insurance and transport costs;

(vi) The Claimant would then ship the gold and have it passed through Turkish customs and effect delivery to the IGE at which point the title would pass and the interest would start running. The payment of such interest was not provided at all in the BCAs but was how the parties' agreements operated in practice. The Claimant appears to accept as much at paragraph 2.73 of the Surgeoner Witness Statement as mentioned above. Clearly, Mr Teboul had the authority to amend the BCAs through his conduct and the Claimant intended to be bound by such variation requesting and accepting payment of this interest from the Defendants. I have spoken to Mr Binatli on this subject and he states that this agreement with Mr Teboul was one of many examples of agreed commercial conduct outside the scope of the BCA documents;

(vii) After receipt of delivery Goldas would trade the gold or retain it for its production needs, as the Claimant was aware. Goldas always treated the gold as its property following delivery and receipt of the Claimant's invoice.

(viii) At some point after receipt of delivery at the IGE, the Defendant company would request to fix the price of the gold delivered by telephone. The Claimant would then send an email entitled *'Pricing confirmation'* to confirm their agreement on the price fixing. The price agreed would include the price of the gold shipped as indicated on the invoice under point (v) above, augmented by the price of the gold on the date of the price fixing, the premium and the interest both as indicated on the invoice. In all cases, the Defendant company would be expected to, and would in fact pay the price contained in the invoice delivered in step (v), above, and then make any balancing payment necessary as per step (ix), below.

(ix) The Claimant would then send a document called *'Final Invoice'* which incorporated the contents of the email in (viii). This would only be sent by email on the same day or the day after the email fixing the price. Despite being entitled *'Final Invoice'*, this was not treated as a formal invoice by the Defendant company, and it was never sent as an original document. I have spoken to Sedat Yalinkaya who has informed me that that the *'Final Invoice'* was not an official invoice as no original document was ever sent. That the original invoice was never credit-noted and so

unless the Claimant contends that both invoices should have been paid (which is not their claim) then the '*Final Invoice*' was a document which effectively provided confirmation of the balance to be paid. The Defendant company accounted in its books for the original invoice and treated the balancing payment and interest as a cost of purchase which is recorded as an '*unexpected expenses*' as there was no designated category to record the same. There should have been a further invoice for the difference or a credit note. The original invoice supplied by the Claimant is signed and stamped by the Claimant's 'company finance manager'. The '*Final Invoice*', however, whilst signed is not stamped but was for the same sum plus or minus an amount to account for any relevant price movement. In these circumstances it is easy to see the logic of the Defendants in paying the one true invoice and paying the interest and balancing payment on pricing separately as set out in the First Rose Witness Statement at paragraph 73. Not only that but the original invoice was the basis upon which the gold was imported into Turkey and Dubai and had to be paid.

(x) Goldas would then effect payment in three stages as set out in paragraph 73 of the First Rose Witness Statement: (a) payment of the price as indicated on the original invoice under (v) above; (b) the difference between of gold price as agreed on price fixing date and (c) the interest. The payment under (b) would not be invoiced separately; it would only be documented on the '*Final Invoice*' document sent by the Claimant. The Claimant also never sent an invoice in relation to payment of the interest. Therefore pricing of the gold would be agreed between the parties *after* shipment and transfer of title. The parties would in effect reserve their agreement on the price of the gold for after delivery to take into account the fluctuation in gold prices.

49. On the first transaction and on every transaction since, the gold was shipped on a sale and purchase basis. The amount sent, the lack of collateral, the invoices and the sale and purchase nature of the transactions could not have been unknown to wider officers or staff of the Claimant. For example, the person creating, signing and stamping the invoices must have been aware that it would create an accounting ledger impact and that it must be recorded in the accounts of the Claimant. If the person were to be keeping the transaction off book as a

'Proforma Invoice' then it would have required some reference on the face of the invoice. In addition, according to Mr Surgeoner *'Customs Invoices'* were created, but were not sent to the Defendants that I am aware of; nor to customs or the shippers based on the emails sent by the Claimant to the Defendants at SPTR3/A/I/164-262 which were stated to be copies of the enclosures which the Claimant were sending by DHL for importation. The *'Customs Invoices'* must have had some purpose and one might infer that they were stored and filed for the purpose of being audited and reviewed by the banks regulators and risk department. These documents are being held out as evidence of a conditional shipment having been made but in fact the evidence points to them being used to create a misleading impression within the Claimant. As is apparent from paragraph 2.85 onwards of the First Surgeoner Witness Statement, he has produced *'Customs Invoices'* but does not produce evidence that they were relied on or that they were sent.

50. The *'Final Invoices'* were never sent to the Defendants as stamped signed originals. There is no reference to them being sent by DHL but had these documents been of any accounting importance originals would have been a prerequisite. In addition, upon the creation of the *'Final Invoice'* there would need to have been some kind of double entry dealing with the original invoice such as a credit note or cancellation. Otherwise the accounts would show double the amount of transactions.

51. The Claimant sent the original invoice on headed paper with a signature and stamp plus customs documentation to enable the import of the gold into Turkey. These documents were shown to Turkish customs and indeed the gold could not have been imported without them. If what the Claimant contends is correct, then arguably what it seeks to say is that the invoice which enabled importation was not a genuine invoice and was only produced for that purpose to circumvent the requirements of Turkish Law.

52. On 18 March 2008 the chief financial officer for the Claimant, Mr Herve Kerdrel, sent a letter to Turkish police stating that all the gold sent by the Claimant belonged to the Claimant until such time as it was paid for and all of that gold remained on the Claimant's balance sheet until such time (SPTR3/A/III/578). When contrasted what appears to be the content of the November 2007 email exchanges between Mr Binatli and Mr Teboul (referred to below at paragraph 81), the inescapable conclusion is that as at November 2007, at least, the Claimant's wider risk department knew (as is further apparent from the insurance litigation pleadings

referred to above at paragraph 36) that both it and the Defendants were simultaneously recording the same gold as an asset on both entities balance sheets and yet rather than dealing with the issue the Claimant shipped on its case approximately a further $US2bn worth of gold and would have presumably continued to do so had it not been for the entirely separate impact of the Kerviel case (as referred to below at paragraph 149 onwards) and the cash flow issue brought about by the spike in gold prices in 2008.

Release instructions, shipping instructions and air waybill

53. The Defendants cannot comment on paragraphs 2.78, 2.79, 2.83 and 2.84 of the First Surgeoner Witness Statement insofar as these concern the Claimant's dealings with its refineries and shippers. However, I draw attention to paragraph 2.83(b) of the First Surgeoner Witness Statement and the fact that the Claimant was solely responsible for the delivery of the gold and instructed their shippers for this purpose. Mr Surgeoner states that the delivery location for bullion delivered to Turkey was the 'vaults at Goldas' premises'. Whilst Goldas premises may have been the recorded addresses, it was well known to the Claimant that in fact the gold would be delivered to the IGE and it is inconceivable that the Claimant did not know delivery of the gold was not being made to the addresses indicated in the shipping instructions in circumstances where it was using its own shippers to effect delivery.

54. That the Claimant was well aware of the true delivery location is evidenced by Mr Teboul's affidavit in the freezing injunction applications at paragraphs 12.4.4 and 12.4.7 exhibited at SJS1/B/Vol1/Tab7/p54 that '*[f]or shipments in Turkey, I understood from the shipper that Turkish regulations required the bullion be first shipped to the Istanbul Gold Exchange before being transported elsewhere*' and that in respect of the 'Receipt of Shipment', '*[f]or the First to Third Respondents the delivery address on these documents was the Istanbul Gold Exchange*'. No complaint was raised by the Defendants relating to delivery throughout the course of their business relation and the Claimant certainly did not complain as they were getting paid for the gold shipped.

55. Additionally, all the shipment confirmation emails sent by the Claimant state that the delivery will be made '*at Istanbul*' or '*at Dubai*', not specifically at the head offices of the Defendants in Turkey or Dubai. This is another one of the terms of the BCAs which the parties did not adopt in practice. The 'receipt of Shipment' documents from Erk Trans referred to in Mr Teboul's affidavit clearly indicate IGE being the place of shipment (SJS1/B/Vol1/p234-250). Erk Trans

was a subcontractor to G4S shippers used by the Claimant. Again, it is inconceivable that the Claimant would not have received these documents from its own shippers immediately after delivery given the value of the gold being transported. If they did not, or if their shippers were not providing them with the information, then that is an issue between the Claimant and its shipper. However, it is plain (as is evidenced by the conversation recorded between Mr Deshpande and Mr Watson at SJS1/A/Vol3/p645) that the Claimant could have obtained this information at any time by making the appropriate checks. In any event, Mr Surgeoner's own evidence is that Mr Deshpande knew that gold had to be registered at the IGE upon arrival in Turkey (see paragraph 2.88(a) of the First Surgeoner Witness Statement).

56. An email exchange from 2005 relating to the delivery of silver bullion to Kuyumculuk also confirms that the Claimant knew it was being made to the IGE. Mr Deshpande in his email of 5 October 2005 states to Mr Binatli (SPTR3/A/III/571):-

> *'We have been advised by our shipping agents that the Customs Clearance procedure for the subjects Silver Grains has been completed. They have also advised that the delivery of the same is going to take place today at the IGE.'*

57. The Claimant therefore knew (or at the very least ought to have known) that the gold was not being delivered to the Defendants' head offices from the outset. This is despite Mr Surgeoner's contention at paragraphs 2.91 to 2.98 of the First Surgeoner Witness Statement that the second sentence of paragraph 12.4.7 of Mr Teboul's affidavit being incorrect. This contention is not accepted. There is no reason for Mr Teboul to have stated as much in an affidavit which the Claimant will no doubt say was carefully prepared if it was incorrect.

Documentation prepared and sent out by the back office

58. The Defendants do not accept that the '*Shipment Confirmation Notice*' was issued in accordance with the terms of the BCAs as suggested by Mr Surgeoner at paragraphs 2.85(a) and 2.86 of the First Surgeoner Witness Statement, although as the point is made at paragraphs 55 and 137(3) of the First Rose Witness Statement I do not repeat the explanation here. It is also not accepted that the Claimant erroneously used the template from other agreements with three different customers; rather the document identifies the true characterisation of the transaction as seen by the parties. This document was used by the parties from the outset and at no point did the

Claimant challenge the adequacy of the document over the course of five years despite transacting billions of dollars' worth of gold.

59. The Defendants do not accept that the Claimant provided the Defendants with a '*Customs Invoice*' and an invoice which is erroneously defined by Mr Surgeoner as a '*Provisional Invoice*' in his statement (paragraphs 2.85(b), 2.85(c), 2.87, 2.88 and 2.89 of the First Surgeoner Witness Statement). The Defendants' position is clearly set out at paragraphs 48 to 54 and 131 to 137 of the First Rose Witness Statement. For instance, in relation to shipment 1919, and contrary to Mr Surgeoner's evidence, a '*Customs Invoice*' or a '*Provisional Invoice*' was never sent save for those first few instances for '*Proforma Invoices*' in September and October 2003. The Defendants object to Mr Surgeoner's attempts to use the defined term '*Provisional Invoice*' in an attempt to make it appear that invoices sent to the Defendants were something other than actual invoices.

60. The '*Customs Invoice*' produced at SJS1/F/Vol1/Tab2/p124 and referred to at 2.85(b) of the First Surgeoner Witness Statement, is not a document stamped by the Claimant (and as referred to above in paragraph 49 and they were not sent out). The invoice and shipment confirmation notice provided to the relevant Goldas entity would always be stamped and signed by the Claimant. Also, Mr Surgeoner refers at paragraph 2.86(c) to a '*Provisional Invoice*' for shipment 1919 dated 12 December 2007 and refers to exhibit SJS1/F/Vol1/Tab2/p125. However, the document exhibited there is an invoice with no mention of it being provisional. It is an accounting document of record.

61. In addition, the exhibit attached to Mr Surgeoner's Witness Statement at SJS1/F/Vol1/Tab2/p124 is not the document which was sent to Kuyumculuk. I attach at SPTR3/A/I/158 the email dated 12 December 2007 by Sandrine Rignault, an officer of the Claimant, who sent Mr Binatli the documents in relation to shipment 1919. Only the shipment notice confirmation, the invoice, the airway bill and the packing list were sent to the Defendants. I have attached copies of all the emails sent by the Claimant enclosing the documents for each of the transaction which are the subject of this dispute (SPTR3/A/I/164-262). The '*Customs Invoice*' Mr Surgeoner exhibits is therefore not what the Claimant sent to the Defendants or Turkish Customs whereas I exhibit the actual emails the Claimant sent to Mr Binatli with attachments. Mr Surgeoner has apparently exhibited documents which are not the documents which were sent to the Defendants and there is no evidence they were ever sent to Turkish Customs.

62. Consequently, the Claimant's contention at paragraph 2.89 of the First Surgeoner Witness Statement is inaccurate to the extent that Defendants never received a '*Provisional Invoice*' nor a '*Customs Invoice*' as so defined or marked. However, this raises the question as to why the Claimant created documents marked for '*customs use only*' in circumstances in which they were not used for that purpose; and why did the Claimant keep them in relation to many thousands of transactions. Of course, the Defendants cannot answer this question, although the obvious inference given that those documents were not used for external purposes is that they were created for some other internal purpose.

63. Furthermore, at paragraph 2.88(c) of the First Surgeoner Witness Statement, Mr Surgeoner states that '*[n]either Florent Teboul nor Aneesh Deshpande was a party to the relevant emails in the chain, or any other request by Mr Binatli to change the heading of the proforma invoices, [...]. [...] Mr Deshpande has informed my team and me that he thinks that Mr Jedusadan would have raised such a matter with him or Mr Teboul, and that they would have made the change in the wording of the Provisional Invoice at that time.*' Contrary to what Mr Surgeoner states, Mr Teboul and Mr Deshpande were aware of the position, both having been blind-copied into each of the emails referred to. The email I exhibited to SPTR1 (at SPTR1/C/I/221-225) was the incoming email to Mr Binatli and the string of emails below his email did not show the blind copied persons. I therefore now exhibit the chain of emails referred to at paragraph 2.88(c) of the First Surgeoner Witness Statement showing the same string where the last email is from Mr Binatli and therefore shows his blind copies, including Mr Deshpande and Mr Teboul (SPTR3/A/II/263).

64. Paragraph 2.88(c) of the First Surgeoner Witness Statement suggests that Mr Surgeoner has discussed this very issue with Mr Desphande. Whilst Mr Desphande is apparently emphatic in his position, he is also clearly mistaken. I have exhibited at (SPTR3/A/II/265-430) a series of emails taken from dealings between Mr Binatli and the Claimant's precious metals team illustrating times when the requirement for an original invoice was raised and in particular involving Mr Desphande and Mr Teboul. In these emails Mr Binalti repeatedly makes it clear that an original signed invoice is required to import the gold and nothing else will do. Mr Teboul and Mr Desphande agree (although a series of back office errors meant that on occasion '*Proforma Invoices*' had still been sent). Following this email correspondence the problem was not repeated and original invoices were sent out thereafter.

65. The Defendants' representatives have also informed me that the shippers would have to have been provided with a proper stamped signed invoice, rather than an invoice purporting to be conditional such as a '*Customs Invoice*', to effect shipment and to import the gold into Turkey. However Mr Teboul in his affidavit at paragraph 12.2.3 (a) exhibited at SJS1/B/Vol1/Tab7/p52 and Mr Surgeoner at paragraph 2.85 (b) of the First Surgeoner Witness Statement both refer to the '*Customs Invoice*' being provided to the shipper and do not explain the emails referred to in paragraph 64 above. The Claimant has not exhibited any evidence that such a document was actually provided to the shipper or anyone else. However, I refer to an email in the exhibit SJS1/A/Vol3/p660 to the First Surgeoner Witness Statement from Mr Richard Watson from G4S (shipper used by the Claimant) to Mr Deshpande which suggests that the Claimant sent the shipper an original invoice:-

> *'Please see attached confirming deposit into our vault. As discussed DNATA are the airport handlers in the freezone area who collect all val shipments from aircraft. They confirm all original documentation (AWB, invoice) is in order prior to customs clearance. Once cleared, customs inspection usually involves a count of boxes. I am awaiting feedback to confirm if any record of bar numbers etc are recorded and held on record by either DNATA or customs.'*

Monthly stock confirmations

66. Paragraphs 2.107 to 2.110 (and 3.23) of the First Surgeoner Witness Statement deal with the Claimant's monthly stock confirmations sent to the Defendants. It is correct that the Defendants received these documents and that these were returned to the Claimant by the Defendants. However, the wording of them is as follows: '*for the purpose of our internal audit, we would like to confirm the outstanding transaction balances as of the date mentioned above with ourselves*' and '*stock of gold quantity not priced and not paid*' (SJS1/A/Vol2/p388). In light of the information which Mr Surgeoner says was entered on to the Claimant's Gophy system, it appears the only information the Claimant had relating to the bar serial numbers was the packing lists when the gold was originally dispatched. The stock confirmations therefore did not seek to identify in which gold bars the Claimant apparently retained title but was a method by which the Claimant sought to confirm how much of its transacted gold remained unpriced and unpaid for. The '*monthly stock confirmation*' requested by the Claimant was in reality an exercise in credit control ('*outstanding transaction balances*') and nothing to do with stock control or identifying gold in respect of which the Claimant claimed to retain title.

67. Mr Binatli has explained to me that in 2007-2008 he became aware of a shift in the attitudes of the Claimant's personnel and in particular Mr Deshpande and Mr Teboul. Mr Binatli has informed me that they complained to him that there were auditors scrutinising the Claimant's books and that they had never had this before. They were anxious that the auditors would want to look into the Goldas account because it was so big with such a large open balance. This was shortly prior to the announcement of the Kerviel scandal and the banking crisis. Mr Binalti tells me he recalls pointed remarks to the effect that the Claimant and the Defendants would not be able to continue business the way they had been and they would have to move back to the limits referred to in the BCAs.

68. It also appears from the insurance action pleadings that the Claimant never sought to confirm the stock location or any other information on the stock nor did it ask to inspect the gold at any time during the parties' business relationship. Besides, the Claimant did not have any contractual right to inspect the gold. On page 10 paragraph 2F (k) of the Re-Re-Amended Defence and Counterclaim, a copy of which is exhibited at SPTR1/B/1, the underwriters averred that:-

> *'The Claimants took no steps to inspect or audit the gold bullion which was on consignment physically in situ (whether at the Goldas companies' premises, at the Istanbul or Dubai Gold Exchange or elsewhere). Instead, they relied upon "stock confirmation notices" which merely confirmed "outstanding transaction balances" (in respect of shipped bullion), stating the quantity (by weight) of gold which was on consignment but had not yet been priced or the quantity of gold on consignment which had been priced but not yet paid for. These were merely contractual balances, not reports on physical gold bars, each of which had a unique serial number. The Claimants never sought to identify the whereabouts of any specific bar and never made any inspection of (or researched) any storage location to appraise its security.'*

69. At paragraph 6.14 (a) of its Re-Re-Amended Reply and Defence to Counterclaim of 1 April 2011, a signed copy of which is produced at SPTR3/A/II/431, the Claimant admits that the bullion was never inspected:

> *'It is admitted that the Claimant did not carry out audits or inspections of the gold bullion which was on consignment physically in situ. Consignment agreements for gold do not as a matter of routine*

contain provisions for the audit or inspection of the gold on consignment and in practice banks rarely conduct inspections pursuant to such clauses, as it risks alienating the customer.'

70. The Claimant claims throughout the First Surgeoner Witness Statement (paragraphs 2.109, 3.20, 3.23, 6.7, 6.22, 9.17 and its Appendices 5 and 6) that it did not discover (at least) details of the alleged misappropriation until 2012 and neither did it learn that Goldas had sold the gold onto third parties until then. This is plainly not true. The Claimant knew that the gold shipped to Goldas was sold onto third parties as evidenced by the fact that (at the latest) the IGE letter of 19 March 2008 (SJS1/B/Vol2/Tab14-15/p616) clearly shows the sale by Goldas of gold to third parties on the IGE between 1 October 2007 and 18 March 2008. This letter was exhibited as GM13 to Gemma Muggoch's affidavit dated 31 March 2008. Paragraphs 15 and 16 of the Second Rose Witness Statement deal with this point and so I will not expand on it any further save that there was a further IGE letter dated 24 March 2008 which succinctly states to whom the gold was sold (SPTR3/A/III/903). Additionally, the Claimant itself admitted in its Re-Re-Amended Reply and Defence to Counterclaim of 1 July 2011 in the insurance case at paragraph 28(b) that '*the information from the IGE set out at Appendix 3 to the Particulars of Claim shows that the Goldas companies had sold that gold on the IGE before it had even been priced by the Claimant.*'

SOCGEN'S DISCOVERY OF THE MISAPPROPRIATION OF ITS GOLD; AND SOCGEN'S CLAIM AGAINST GOLDAS

The initial discovery of wrongdoing

71. Mr Surgeoner's account of the apparent '*discovery of wrongdoing*' by the Claimant and the whole tenor of the position put forward by the Claimant is entirely disputed by the Defendants for reasons I have already raised several times. I n essence it can be summarised as (i) the fact that the Claimant was well-aware not only of how the gold delivered to the Defendants traded or used, but that this formed the true basis of the parties entire relationship (irrespective of the strict wording of the BCAs); and (ii) the fact that the dispute arose suddenly (and in the Defendants' view for reasons outside the parties' relationship) during the course of normal commercial discussions in which the Claimant improperly accused the Defendant of misappropriating gold.

72. In relation to the initial meeting referred to by Mr Surgeoner in paragraph 3.2 and 3.5 of the First Surgeoner Witness Statement, there are a number of points to be made additional to what I have already stated elsewhere:

(1) Mr Surgeoner's explanation of the context of the conversations is not correct. I refer to an email exhibited at SPTR3/A/II/462-463 (with English translations) sent by Mr Binatli to Mr Sedat Yalinkaya on 4 February 2008 in which Mr Binatli informs Mr Yalinkaya that Mr Teboul had confided in him that he was going to resign from the Claimant and move to a competitor bank. Mr Binatli informs me that Mr Teboul was unhappy at the increased amount of oversight and inspection which Mr Binatli understood after the breaking news of the Kerviel fraud. Mr Binatli in his email described this as a big problem.

(2) On Friday 8 February 2008, Mr Binatli sent a further email to the Yalinkaya brothers informing them of a deeply worrying conversation he had just had with the Claimant who stated that in light of the instruction from their credit department because of the delays in payments and of limits which were exceeded that they had stopped all supply of the gold above contractual limits (exhibited at SPTR3/A/II/464-465 English translation). He said that they should have an internal meeting on Monday which would have been the 11 February 2008.

(3) Immediately after meeting with the Yalinkaya brothers on 11 February 2008, Mr Binatli sent the email referred to at paragraph 3.1 of the First Surgeoner Witness Statement to Mr Teboul on the same day and booked a flight to Paris for the next day. There was a terrible snow storm in Istanbul and Mr Binatli's flight was cancelled. He wasn't able to fly to Paris until the 18 February 2008.

(4) From this, it is clear that Mr Binatli was not doing anything behind the backs of the board as is suggested by Mr Teboul. It was not unusual for Mr Binatli to go to Paris. He would often visit and meet Mr Teboul. Nor was it unusual that Mr Binatli or Mr Teboul would ask that they meet outside. Contrary to what Mr Surgeoner claims at paragraph 3.3 of the First Surgeoner Witness Statement, the representatives of the Defendants were fully aware that Mr Binatli was meeting Mr Teboul, the meeting was therefore not 'secret'.

(5) There is important background to this discourse and Mr Teboul has been selective in his recollection and/or evidence. It is clear that something was afoot at the Claimant and the suggestion at paragraph 3.1 of the First Surgeoner Witness Statement that the email of 11 February 2008 was the first likely sign of trouble is incorrect for the reasons set out below at subparagraph 7.

(6) Paragraph 35 of Mr Teboul's affidavit (SJS1/B/Vol1/p65) refers to a telephone call he made to Mr Binatli on 18 February 2008 approximately at 11.15 pm. He uses the words *'it was decided that if Mr Binatli were aware I was calling from SG's offices he might be alarmed.'* Taking the telephone call of the 18 February 2008 in the context of the huge amount of activity which Mr Teboul had been involved in during January 2008 regarding the obtaining of insurance cover against theft and fraud by Goldas as described below in subparagraph 7, and the discussions of the Defendants using the gold before it was paid for as referred to in the same insurance pleadings below, suggests that the telephone call of the 18 February 2008 and the subsequent affidavit were part of the Claimant's careful preparation for its potential claims both against the Defendants and under its insurers newly amended insurance cover.

(7) I believe from the existence of reference to disclosure from the insurance litigation that the Claimant and its officers were aware that the Defendants used the gold prior to purchase, in particular paragraph 21 (e) of the Re-Re-Amended Defence and Counterclaim (SPTR1/B/31) where the Defendants assert from their review of the disclosure provided by the Claimant that a wide body of its officers knew that the Defendants were using the gold prior to payment, for example:-

Paragraph 21(e)

(iv) *'the Credit Assessment which was produced by the Claimants' RISQ department on or about 15 January 2008, which stated (amongst other things): 'The gold on consignment, although not at that stage purchased by Goldas, is used as of its delivery to manufacture jewellery.' [1002296];*

(v) the meeting which took place in Paris on 17 January 2008 between Mr Binatli and Mr Teboul, Mr Lannegrace and Mr Neviaski;

(vi) the discussion of the insurance protecting the Claimants , which took place in the Claimants' organization (and with Cap Marin) from about 9 January 2008; in particular the discussion as to whether (1) it protected the Claimant in respect of the loss of gold which was being used (by Goldas Kuyumculuk) and/or (2) it covered the Claimant in respect of "misappropriation" of the gold by Goldas including:

(a) [...] the exchange of emails between Ms Luet and Mr Teboul on 14 and 15 January 2008 [10022513; 1002252]; 10022557]; [...] the email from Mr Teboul to Mr Neviaski dated 20 January 2008 (stating among other things that the risk of misappropriation by the client was not covered by the Claimants' insurance and the premium for such cover would be 2 to 3 times more than their existing premium) [10023015];'

(8) These communications culminated in the Claimant on 29 January 2008 instructing Cap Marine, its insurance broker, to secure agreement from the underwriter to a misappropriation clause to be added to the policy of insurance to cover theft and fraud (SPTR1/B/33).

(9) This came a matter of days after the Kerviel news broke publically on 24 January 2008. Mr Teboul's concern to find new employment, having been heavily involved in discussions with the Claimant's risk department and Cap Marine to procure insurance against an act he knew and his employer knew was already taking place and was being acquiesced to, followed shortly afterwards. It is not surprising that Mr Binatli wanted a private meeting as the threatened removal of gold supplies at short notice was not something he wanted to discuss in the Claimant's offices. Mr Binatli interpreted the words of Mr Teboul in his email of the 11th February 2008 '*shall I say anything to anyone or you want me to stay quiet about it?*' (SJS1/A/Vol3/p600) as being a reference to Mr Teboul's news. This was also highly sensitive issue for the Defendants and could have affected the Kuyumculuk share price. It is clear that the fragmentary information supplied by Mr Teboul in his affidavit is misleading.

(10) As has been demonstrated above at paragraphs 36 and subparagraph 9, the evidence relied on by the Claimant in paragraphs 3.7 and 3.8 of the First Surgeoner Witness Statement is a mere fragment of the much wider and continuing discourse carried on by officers of the Claimant such as Mr Teboul, Mr Deshpande and the Defendants. Taking this conversation between Mr Binatli, Mr Varenne and Mr Teboul is meaningless without seeing it in context or everything else that passed between them all.

(11) Mr Surgeoner has referred to selectively produced telephone conversations in a particular and interesting timeframe, but it is apparent that records of hundreds of hours of conversations recorded by the Claimant are available, many of which are likely to disclose the Claimant's knowledge of the activities of the Defendants.

73. I am informed that between 12 February 2008, the first scheduled date for a meeting between Mr Teboul and Mr Binatli and 18 February 2008, the date on which they were able to meet, the Defendants made a payment of US$88,352,061.35 to the Claimant on outstanding invoices. This was in addition to the sum of US$658,428,523.35 paid during January 2008 and until the 11 February 2008 for bullion received all of which demonstrates that the Defendants were committed to the business relationship and did not resile from making substantial payments to the Claimant.

74. Whilst news of the Kerviel scandal was breaking, the Claimant had sought to reassure Goldas that it was taking the necessary steps to recover from this. The Claimant's Global Heads of Commodities Market, Mr Edouard Neviaski and Francois-Xavier Saint-Macary, sent an email to the Defendants (this was presumably for wider circulation) dated 24 January 2008, enclosing a letter signed by the Chairman of the Claimant, Mr Daniel Bouton, confirming that they were committed to their partnership SPTR3/A/II/466. Mr Desphande sent a further email enclosing a comfort letter (this was again presumably for wider circulation) dated 12 February 2008 by Mr Mustier, head of Claimant's Corporate and Investment Banking Activities SPTR3/A/II/467. The Claimant represented to Goldas that they intended to proceed with their business relationship:-

'Unconditionally guaranteed by a banking syndicate, this capital increase will strengthen our balance sheet and enable us to continue to accompany you in your business development. [...] We would like to

sincerely thank you for the confidence that you have placed in Société Générale these past few weeks. All the teams within SG CIB all over the world are determined, more than ever, to providing the best possible service to meet your needs and to build the future together.'

75. The second document enclosed by Mr Desphande in his email of 12 February 2008 referring to the Claimant's capital increase of €5,5bn has a heading marked 'immediate measures. This is particularly interesting because the Claimant was in a potentially distressed position but was able to recapitalise in order to stabilize its position, a route denied to the Defendant by the Claimant's precipitous action in obtaining an injunction, damaging market confidence and destroying the Defendants' ability to do the same. In the aforementioned email the Claimant mentioned, *inter alia*:-

'Enhanced operational controls:

- *Stricter controls of operations and reporting of nominal positions:*
  - *Improved security regarding transaction confirmation procedures*
  - *Further strengthening of management alert processes*
  - *Stricter compliance with mandatory holiday procedures*
- *Tighter IT security and access controls to Information Systems*
- *Temporary decrease of limits applicable to stress test and arbitrage volume'*

76. In light of the change of stance of the Claimant denying the reality of five years of course of dealings and all of the above information, paragraph 3.10 of the First Surgeoner Witness Statement, that at the meeting in Paris on 28 February 2008 between the parties' representatives the Claimant did not know what had happened to the gold, is plainly subject to a substantial dispute. The Claimant knew the gold was sold to third parties or was being used in the manufacturing process of gold jewellery by the Defendants, the Claimant having assured the Defendants that it was a formality as referred to above at paragraph 26 and was now relying on the strict terms. The purpose of the meeting as the Defendants saw it was to agree commercial terms for the payment of invoices in light of the sudden and precipitous action taken by the Claimant and the cash flow difficulty experienced by the Defendants given the unusual increases in the price of gold at the time. As can be seen from the graph at SPTR3/A/III/862 that the price of gold rapidly increased between beginning of January and 28 February 2008 by approximately US$100 per ounce which caused extreme cash flow difficulties. The Defendants were in a position to pay US$128m but in the interest of smooth running of the business

required time to pay. The background to this was that the Defendants had been requesting and expecting an increase in the amount of gold to be supplied, which was a regular feature of the business relationship. Against this the Defendants had been told on 8 February 2008 that all supply of the gold above contractual limits had been stopped (as explained above at paragraph 68(2)). The Defendants had options to raise capital on the market with a rights issue as the Claimant had just done and it was essential for the Defendants that they maintained a stable position for the market and so to gain time to pay and put in place strategies was crucial to protect its market credibility. I understand that Sedat Yalinkaya explained in the meeting that the Defendants had sufficient credit lines to make payment but that they needed time arrange to use them with the Turkish banks and that if the Claimants were to take any dramatic action then this might mean they would lose their credit lines and it would impact on their ability to go to the market. I refer to the email dated 27 February 2004 of Mr Zolynski, commodity analyst of the Claimant, where he states *'[...] there is no long term debt (too expensive in Turkish lira). That could only lead to liquidity problems if one of those banks decides to terminate the relationship. On the other hand, they are listed on the stock exchange and can access capital in that manner.'* (SJS1/F/Vol1/p15), it is clear from this that the Claimant knew full well the liquidity issues which would be triggered for the Defendants by any precipitous action and that the Defendants had access to capital funding from the stock exchange as well as from other banks. The Defendants were surprised by the response of the Claimant's representatives which was aggressive and appeared to give the impression that the past five years of business dealings had not happened and that all transactions were as a strict consignment. It was agreed that the Defendants would meet with representatives of the Claimant to provide details of assets which could be used to provide security.

77. As to paragraphs 3.11 and 9.15(d)(ii) of the First Surgeoner Witness Statement, Mr Yalinkaya requested that the gold the Defendants had purchased be priced in the usual way as the gold prices at that time had started to rapidly increase, but this had nothing to do with a stratagem to disguise any position nor was it dishonest. It merely followed the usual procedure employed by the parties. It should also be noted in this respect that, despite the Claimant apparently seeking to rely on a clear distinction (it says) between a *'Provisional Invoice'* and *'Final Invoice'*, in proceedings in Turkey in which the Claimant sought the insolvency of the Defendant companies, the Claimant appears to have been happy to rely on either type of invoice. For example, when applying for orders from the Turkish Insolvency Office the first step in the insolvency claims in Turkey for the gold which had already been priced, the Claimant relied on

the import documents and the '*Final Invoice*' as evidence of a debt owed. I exhibit the order against Kiymetli and Kuyumculuk where the Claimant referred to an 'invoice' as evidence [SPTR3/A/II/472 for Kiymetli; SPTR3/A/II/480 for Kuymculuk] but relied on a '*Final Invoice*' [SPTR3/II/A/474 for Kiymetli; SPTR3/II/A/482 for Kuyumculuk]. However, for the gold which was not yet priced, the Claimant relied on the import documents and the original invoice. I exhibit the order against Meydan and Goldart where the Claimant referred to 'proforma invoice' as evidence [SPTR3/II/A/487 for Meydan; SPTR3/II/A/494 for Goldart] but relied on an original invoice (not a '*Final Invoice*' as none had been issued) [SPTR3/II/A/489 for Meydan; SPTR3/II/A/496 for Goldart]. In addition, for the 11.3MT unpriced gold, the Claimant applied a pricing based on 19 February 2008 gold price [SPTR3/II/A/488 for Meydan; SPTR3/II/A/495 for Goldart]. By applying a pricing based on 19 February 2008, the Claimant had fixed the priced without first receiving a request from the Defendants. It is not surprising that the Claimant then refused to comply with the request to fix the price by Mr Yalinkaya the following week.

The gold bullion which was misappropriated and/or not paid for by Goldas

The deliveries of gold made by SocGen to the Goldas companies

78. At paragraphs 3.13 to 3.15 of the First Surgeoner Witness Statement, the Claimant sets out the numbers of shipment which were sent to Goldas between 7 December 2007 and 18 February 2008. The Claimant refers to 1200 kg of gold having been paid for by Goldas but does not mention that the Defendants paid a total of US$1,049,902,897.90 to the Claimant during this period, which I am informed was a sum paid. The Defendants continued transacting with the Claimant as fully committed to the partnership and entered into negotiations with the Claimant in good faith seeking a resolution of the cash flow difficulties created by the spike in gold prices. The Defendants and their major shareholder the Yalinkaya brothers offered security over all business and personal in relation to outstanding sums but the Claimant rejected this.

The fate of delivered gold

79. It is correct that the insurance policies were cancelled by the Defendants as of 19 November 2007 as stated at paragraph 3.19 of the First Surgeoner Witness Statement. Mr Binatli has

explained to me that this occurred as a result of the Claimant having told the Defendants at the beginning of November 2007 that it wanted to adopt a global insurance policy. As a result the Claimant said that there was no need for the Defendants to maintain their policies. It is therefore incorrect for Mr Surgeoner to claim (as he does at paragraph 1.9 (g) of the First Surgeoner Witness Statement) that this cancellation was without the Claimant's knowledge.

80. Furthermore, the judgment of Mr Justice Christopher Clarke dated 5 April 2012 in the insurance case appears to suggest that the Claimant obtained insurance cover for storage of gold in November 2007 having previously only insured for shipping or transportation:-

> *'On 12 March 2008, a meeting took place at Soc Gen at which Mr Richard and Miss Engelhard were present, as well as Mr Jugé and two others from Cap Marine. According to the Cap Marine minutes, it was pointed out that at the time of subscription of the risk, Turkey was only included in the table for shipping and not for storage of precious metals. It was also recorded that Soc Gen had indicated to Mr Jugé that it worked in the same way with Goldas since 2002, with transportation only being insured originally and storage beginning in November 2007. The minute recorded the need to verify this, because there could have been a misdescription of the risk. The minute also refers to the fact that there was equally a misdescription of the risk for the declarations of transit for non-precious metals.'*

81. The timing of the change in relation to the insurance policy by the Claimant is notable, correlating as it does to what Mr Binatli has told me regarding the Claimant's indication that it wished to have its own global insurance policy. These steps taken by the Claimant are difficult to reconcile with other events such as the November 2007 correspondence (SPTR1/C/III/606) mentioned at paragraph 151 of the First Rose Witness Statement identifying the fact that the Defendants were treating the gold as their own property. In addition, on or about 29th of January 2008, the Claimant sought to extend the scope of the insurance policy to include '*misappropriation*' of gold by Goldas. This is referred to in the Re-Re-Amended Defence and Counterclaim paragraph 21(vii) page 33 (SPTR1/B/33):

> *'Misappropriation clause*
> *This contract covers the risks of misappropriation of the subject matter insured. The following risks are covered among others: fraud of any party, fraudulent transfer of ownership from the insured interest*

and/or embezzlement and/or dispossession of the goods except solely by State intervention. … [10023090]'

82. Against this background it is striking that the Claimant maintains in the First Surgeoner Witness Statement that it only discovered the alleged misappropriation on 18 February 2008.

TURKISH LAW PRINCIPLES

83. The Defendants' position is set out at paragraphs 45-47, 72(2), 138-139 and 142 of the First Rose Witness Statement. At paragraphs 4.2 and 4.3 of the First Surgeoner Witness Statement, the Claimant relies on advice apparently obtained from a Professor Ocal to set out their case relating to the passage of title of gold bullion. The Claimant has not sought or obtained permission to rely on expert evidence on this issue, and if it did so the parties would have to obtain separate expert evidence before what Mr Surgeoner says would be admissible to prove the legal position in Turkey.

84. In addition, the Claimant has not actually produced the advice given by Ms Ocal directly, but instead relied upon a document prepared by Clifford Chance which appears to be a memorandum of what they say the advice received was. Morgan Rose requested by letter of 19 July 2016 that Clifford Chance provides Ms Ocal's advice as they have plainly waived privileged in it (SPTR3/II/A/501). Clifford Chance has refused to do so by letter of 15 August 2016 asserting no waiver of privilege (a position which must be untenable) (SPTR3/II/A/505).

85. I also note that the Claimant has made somewhat contradictory submissions in regards to the passage of title of gold. At paragraph 4.3(f)(ii) of the First Surgeoner Witness Statement, the Claimant argues in relation to gold which was priced that '*As a matter of Turkish law, ownership of this gold passed to the Goldas counterparty on the pricing date (confirmed in the pricing confirmation e-mails)*'; and in respect of the unpriced gold, '*since no request was ever made by the relevant Goldas entity to purchase the gold in question at a price quoted by SocGen, ownership of the gold did not pass to the Goldas counterparty but, rather, remained with SocGen.*' The Claimant claims in the Re-Re-Amended Reply and Defence to Counterclaim dated 1 July 2011 (SPTR3/A/II/431) from the insurance proceedings at paragraph 15 that '*The Claimant and the Goldas Companies intended that title to a consignment of gold bullion delivered under the terms of the BCAs would only pass to the Goldas Companies only once payment for it had been received by the Claimant.*' During Mr Brock's submissions to Judge

Kitchin on 15 March 2008, the Judge was told that under Turkish law title passed with the invoice (SJS1/B/Vol1/Tab10/p321).

86. Regardless of any advice given by any expert instructed by the Claimant, it must be noted that a Turkish Supreme Court ruling and the IGE itself have both previously indicated that the gold cannot be imported unless it is owned by the importer. For example, I refer to the witness statement of Mr Cem Ulucay, the head of Legal Department at the IGE in 2008, at SPTR1/C/II/602. He states on the second page of his statement that *'[i]t is not possible for companies exporting from abroad to Turkey to perform transaction via member broker companies as to have reserve ownership on deposit. Regarding this issue, the imported good is assumed to belong to the importer member. After all, all documents (importation information form and Customs Declaration) should be issued to the name of the imported company. It is not possible to enforce any restriction.'* He adds, *'all gold been transacted pursuant to the applicable legislation are accepted as belonging to the importer company. The financial value obtained after sales is transferred to the account of the seller member. [...] The ownership of the gold sold passes to the buyer member.'* Even if this is disputed by the Claimant, that dispute can only be resolved at trial with the benefit of properly obtained expert evidence.

87. I exhibited at SPTR1/C/I/199 the decision of Chief Prosecutor's Office in Istanbul not to prosecute the Defendants' officers. In making that decision, the prosecutor relied on expert opinions from legal experts. Professor Dr Eris stated that the bullion consignment agreement between the Claimant and Goldas should be considered to be a conditional sales agreement, and because it was an import under Turkish law 1567, the Claimant was not entitled to make the transfer of ownership subject to any conditions. In addition he said that the import was made as an open balance/cash on delivery and that it should be accepted that the ownership of imported gold passes to the buyer. Professor Dr Eris, in relation to cash on delivery said: *'in this kind of importations, the buyer pays the amount of the goods to the seller after delivery. In this kind of payments, after the goods which are the subject matter of the sales are delivered, the related sales amount is paid on due dates set by the parties and the dates stated on the submitted invoices. Regarding the basis of the conflict, as an agreement has been concluded between SG, the seller and Goldas, the buyer, however when the imperative regulations of the law numbered 1567 are taken into consideration, since the importation was performed as cash on delivery where no reserve ownership may be applied, it should be accepted that not only possession, but also the ownership passes to the buyer'* (SPTR1/C/I/202-203).

88. Other legal experts, Professor Dr Aslan Kaya and Assistant Professor Dr Halit Akkanat stated that *'consignment means delivering for sales and that the actual dominance on the commodity should be transferred to itself in order to fulfil the secondary optional debt as paying the sales amount through seizing the commodity, which has been left for sales in the conferment agreement for sales, at the end of the stated time or for selling to a third party'*. They also submitted that *'[t]he transfer of the possession is realised for the purpose of transferring the ownership on the commodity in the future, so it should not be forgotten that the party letting the commodity for sales accepts in advance that the party receiving the commodity may transfer the ownership of the commodity to third parties. [...] In customs declaration codes, [...] the cash on delivery means that the amount of the good purchase by the imported is paid after such good comes to the arrival as stated in the sales agreement and is delivered'* (SPTR1/C/I/203).

THE CLAIMANT'S APPLICATIONS AND CLAIMS AGAINST GOLDAS MADE IN MARCH AND APRIL 2008

Events leading up to the making of the freezing order on 15 March 2008

89. The Defendants contend that the picture which Mr Surgeoner seeks to paint in relation to the events leading up to the obtaining of the first freezing injunction is misleading. For example, the Claimant did not make *'many'* denied requests for payment or for the return of bullion by 11 March 2008 as Mr Pinnell stated in his affidavit and as suggested at paragraph 5.3 of the First Surgeoner Witness Statement. By this time, the Defendants had only received notices on 4th March 2008 (in person at the meeting in Istanbul with the representatives of the parties and later by fax) and on 10th March 2008 (through notary public), the latter of which expressly sought to give a period of seven days for compliance until 18 March 2008. That notice appears to have been given cynically by the Claimant, it having apparently already decided by 10 March 2008 that it would be applying for ex parte interim relief without notice to the Defendants. Whilst Mr Surgeoner says (despite not having been involved in the case at the time) that the final decision to proceed was taken on 14 March 2008, the documents suggest otherwise. The Commercial Court was notified of the application on 10 March 2008; the affidavit and application documents were prepared and signed by 11 March 2008 and the skeleton argument for the hearing was dated 13 March 2008 and plainly anticipated the hearing being heard that day.

90. At the same time, of course, the Defendants were led to believe by the Claimant that dialogue would be ongoing in relation to the proposals for payment in light of the sudden change of position and (in the Defendants' view, unfounded and improper) demands by the Claimant. Indeed, as I set out at paragraph 96 of my First Rose Witness Statement, a meeting had been scheduled for 17 March 2008 (I wrongly refer to the year as 2015 at paragraph 96 of my first witness statement) by the Claimant for a continuation of such discussions despite it plainly having no intention of attending in good faith. Similarly, on 5 March 2008 the Claimant informed the Defendants that it had instructed PricewaterhouseCoopers ('PwC') as financial advisers '*to continue to assess the potential realisable value of the assets proposed as supporting your future proposals to us. To this end PwC will required the full and ongoing co-operation of you, your staff and your advisers and full access to all necessary information (under the terms of the confidentiality agreement between you). PwC will be in direct contact with you and your advisers on this matter.*' (SPTR3/A/II/507). This, of course, suggested to the Defendants that the Claimant was intending to continue discussions. However, the Claimant proceeded to apply for an injunction only ten days later whilst continuing the façade of carrying on the negotiations with the Defendants through PwC even after the injunction was obtained.

91. Whilst Mr Surgeoner appears to try and rely on advice given by Pekin, that advice is irrelevant as a justification for making the application. In any event, unless the Claimant discloses the advice in full it is a reference without weight. Morgan Rose invited the Claimant to disclose copies of advice received which are referred to in the First Surgeoner Wintess Statement by letter dated 19 July 2016. The Claimant has refused by letter of 15 August 2016 (SPTR3/II/A/505), rendering references to such advice almost entirely useless, particularly as the fact of receiving such advice provides no real explanation for the decision in question being taken.

The making of the freezing order on 15 March 2008 and notification of the freezing order to the Goldas companies

92. Notwithstanding what Ms Muggoch said in her affidavit of 31 March 2008, the Defendants do not accept that the hearing bundles were delivered to each of the Defendants. It is also incorrect that an authorities bundle was delivered within the hearing bundle as stated by Ms Muggoch at paragraph 5.2 of her affidavit dated 31 March 2008 (SJS1/B/Vol2/Tab14/p351).

This has still not been provided to the Defendants. The Defendants' position is otherwise as set out at paragraph 100 of the First Rose Witness Statement.

93. As to Mr Surgeoner's complaint at 5.11 of the First Surgeoner Witness Statement that the Defendants have failed to provide information concerning their assets:

(1) That complaint is predicated on the obligation in question having arisen. As Mr Surgeoner notes, such obligation only arose upon service of the order. However, as is clear from these proceedings, the Defendants contend they have never been served with the orders nor the claim forms. At least in relation to the Turkish Defendants, the Claimant's expert agrees with that conclusion;

(2) It is in any event somewhat hollow for this complaint to be raised some eight and a half years after the order was obtained in circumstances where the Claimant has taken no steps not only in relation to the proceedings generally, but in relation to the freezing orders or their enforcement.

Hearing on 2 April 2008 and orders made by Burton J.

94. Of course, the Defendants cannot give first-hand evidence in relation to the hearing of 2 April 2008. However, the Claimant has produced a note of the hearing of 2 April 2008 upon which the Defendants will make submissions in due course (SJS1/D/Vol1/p111). One particular point of note, however, is that it is plain that Burton J was expressly told that service had been effected in accordance with the relevant provisions of local law (notwithstanding that the judge's attention was drawn to the Defendants' letters rejecting service of 25 March 2008 and 27 March 2008), and that the Claimant had complied with its undertakings in this respect. It is completely clear, at least in relation to Turkey (and to be determined in relation to the UAE) that this fundamental assertion of good service was wrong.

STEPS TAKEN BY THE PARTIES IN TURKEY AND DUBAI

Turkey

Decision to pursue bankruptcy proceedings in Turkey

95. In seeking to explain why the Claimant decided to take no steps at all in the English proceedings, Mr Surgeoner has had to fall back on a reference to advice from Pekin. In doing so, Mr Surgeoner plainly refers to the substance of that advice. However, and as I note above, the Claimant has refused to disclose that advice in full so that its content can be properly analysed. Given this stance, very little weight, if any, can be attached to what is said.

96. Notwithstanding this general point, the fact remains that the Claimant took an active and tactical decision not to take any steps in the English proceedings and instead to pursue the Defendants by various methods in their local jurisdictions whilst maintaining the existence of the freezing orders and the English proceedings.

97. The Defendants do not in any event accept the accuracy of the contents of the advice apparently received from Pekin in at least the following respects:

(1) It is not accepted without more, and certainly not without expert evidence properly adduced (and given Pekin's previous advice on Turkish law has been found fundamentally wanting, no weight can be given to its own advice) that an English judgment obtained in default would not be enforceable in Turkey;

(2) Mr Surgeoner suggests at paragraph 6.13 (b) of the First Surgeoner Witness Statement that the evidence available was that Goldas did not have sufficient assets to meet the sums owed and that Pekin carried out investigations with the Financial Police which revealed that Goldas had no significant sums deposited in their bank accounts. It is unimaginable that Pekin would have had access to such information without a court order directing that such information be revealed. In any event, the Defendants contend this information is simply wrong. The Defendants would have been in a position to pay the sums claimed outright before the freezing orders were obtained. For example as set out in paragraphs 177 to 183 of the First Rose Witness Statement, the Defendants had significant lines of credit available to them and stock in Kuyumculuk was valuable and a rights issue could have raised appropriate finance if requires, a tactic employed by the Claimant (SPTR3/II/A/467).

98. Despite having been advised by Pekin in April 2008 (paragraph 6.13 of the First Surgeoner Witness Statement), the Claimant did not bring the insolvency proceedings until January 2009 and yet still took no steps in the English proceedings. When the Claimant brought these proceedings in January 2009, it claimed only about US$15m from each of the Turkish Defendants (the cumulative total of the sums claimed being US$57,994,498.75). The Claimant then decided in December 2012, almost four years after the first set of proceedings to bring second insolvency proceedings against Kuyumculuk for an amount of about US$104,703,270.00 plus interest. In 2013, the Claimant made applications to the 'insolvency desk'[1] in charge of administering the insolvency claiming the total sum of $462,374,065.14 (including interest) on the notices of default of 10 March 2008 against Kiymetli ($264,109,376.27), Meydan ($68,955,245.65) and Kuyumculuk ($129,309,443.22) separately. The demand against Kuyumculuk included the sums claimed as guarantor to Kiymetli. I exhibit the declarations of receivables submitted by Pekin against Kiymetli and Kuyumculuk together with their English translations (SPTR3/II/A/508 for Kuyumculuk; SPTR3/II/A/538 for Kiymetli). However, the Defendants cannot locate a copy for Meydan but I exhibit the document in Turkish listing the Claimant as a creditor and its receivables which was signed by the Claimant's representative Mr Ahmed Bagci from Pekin and presented to the 'insolvency desk' in Turkey at SPTR3/II/A/561-562. There is further confusion as the Claimant in its claims and its proceedings in Turkey claimed in the region of $US462m in 2012/2013 yet in its annual report of 2011 the Claimant (SPTR1/C/III/643) refers to €466.6m, I am not certain where the figure from the annual report comes from as it is larger than both the Turkish and the English claims. The Claimant is clearly pursuing the same sums in both the Turkish and English jurisdictions and must withdraw one or the other.

Claims made by Goldas against SocGen in Turkey

99. It is disputed that the Defendants brought proceedings against the Claimant in Turkey as a litigation tactic to put pressure on the Claimant as alleged by the Claimant at paragraph 6.26 of the First Surgeoner Witness Statement. That allegation has no basis and appears itself only to be one of many attempts by Mr Surgeoner on behalf of the Claimant to seek to divert attention from its own conduct. In taking steps in Turkey the Defendants merely sought to assert what they considered were their legitimate rights to claim compensation and enforce their rights against the Claimant in light of the allegations made against the Defendants and their officers

[1] Creditors' Committee would be the nearest equivalent.

of criminal conduct (all of which were denied, and all of which were dismissed by the Turkish authorities).

100. All of the Defendants' claims against the Claimant in Turkey were brought in February or March 2010 and no new proceedings were brought after these. It is also worth noting that the number of proceedings against the Defendants brought by the Claimant and third parties as a direct result of the Claimant's actions and the proceedings brought by third parties against the Defendants dwarfed the number of proceedings brought against the Claimant by the Defendants. Whilst proceedings against the Claimant took different forms, I am told by the Defendants that there were a number of complaints being made and different legal avenues open to the Goldas Defendants to seek recovery and/redress against the Claimant in respect of the aggressive (and what they perceived to be as unjustified) action it had taken, hence proceedings of a different nature were utilised.

101. Whilst it is accepted that all of the civil and some of the criminal complaints were dismissed, this is certainly not the case with all of them as has been suggested. Further, Mr Surgeoner seeks to portray the Defendants or their officers as vexatious. There is no basis on which he is able to do so, and in any event that is plainly not a matter for this Court to determine. However, the very fact that, by Mr Surgeoner's own evidence, certain of the complaints were not decided until December 2015 and remain subject to appeal plainly suggests that the proceedings have not been considered vexatious by the Turkish Courts.

102. Whilst I set out a brief response to the general assertions made by Mr Surgeoner in his evidence below in relation to the Turkish proceedings of which he complains, it is difficult to see precisely what relevance these points have to the matters in dispute. The Claimant appears intent on raising a smokescreen in this respect to deflect attention from its own improper conduct in relation to the English proceedings.

Civil compensation claims

103. Mr Surgeoner suggests at paragraphs 6.2 and 6.28 of the First Surgeoner Witness Statement that all of the civil claims made by the Defendants against the Claimant in Turkey have been rejected by the Turkish courts, and later that such proceedings were tactical in nature. The latter point is inaccurate and I have dealt with it above. In any event the civil claims were brought by

Goldas group companies and board members on advice from their Turkish lawyers because they all suffered losses as a direct result of the action taken by the Claimant. The causal link between the losses suffered and the Claimant's action is properly the freezing injunctions issued in London.

Criminal complaints

104. Again, in relation to the criminal proceedings (which effectively, as I understand it, relate loosely to what would amount to a complaint of defamation) the Defendants contend that they were perfectly within their rights to issue claim against the executives of the Claimant in light of the conduct in seeking the prosecution of the Defendants' executives (such prosecutions being rejected). Again, whilst it is accepted these claims have been refused, three suits have been consolidated into one for the purposes of a combined appeal which is ongoing. All of these actions have been taken on legal advice from Turkish lawyers.

Dubai

Civil proceedings

105. The Dubai Court of Appeal found in favour of Goldas LLC and the Claimant's application for preliminary attachment was rejected with findings as to the substance of the case (see below). The Court of Appeal in Dubai ruled on this matter on 26 November 2008 (at SJS 1/E/Vol4/p901). The Court decided that the Claimant ('*Appellant*') failed to get its preliminary attachment order under Dubai Law of the Civil Procedures as amended for the following reasons. The Court said that:-

> *'it is further acknowledged that a summary cases judge maintains the right to examine the case facts to fathom the existing relationship between both litigants, a thing that does not affect the original right. Consequently, whereas the request for precautionary seizure is based on the allegation that the Respondent was entrusted with the gold, subject of seizure, and it was confirmed that the Respondent disposed of the same, received its price and refrained from settling it to the Appellant; however, upon perusal of case papers it becomes obvious that a selling of the gold shipment received according to contract 1944 was concluded between the parties of the appeal as the copy of the invoices issued by the petitioner (Appellant) on 18/1/2008 indicates that the latter confirms the following conditions*

referring to itself as the seller and to the Respondent as the purchaser and specifying the time and place of delivery, in addition to the total value [...] Therefore the Respondent was not - according to the documents - entrusted with the gold. Furthermore, the Respondent's account statement attached to the same docket proves that an amount of USD14,132,085.44 was withdrawn and the name of the Appellant was mentioned in detail. However even if it is acknowledged for the sake of argument that the price was not settled the requisites for a precautionary seizure are still not met, since it is verified that the Respondent is a limited liability company existing in the Emirate of Dubai; nevertheless, case papers do not reflect any proof that the company's manager fled outside the country or the funds of the company have been smuggled. Whereas the appealed judgment supported this viewpoint, it is considered legal and may not be affected by the reasons of the present appeal which the court rejects as it is based on reasons that do not comply with the facts and law; the Court further obligates the Appellant to pay the costs [...].'

106. The Goldas LLC's lawyers in their submissions at paragraph 4 to the Dubai Court of Appeal (SJS1/E/Vol4/p887) acknowledged that it was immaterial whether or not the amounts paid as referred to in the bank statement covering the 23 January 2008 payment to the Claimant were made in relation to the 1944 invoice or some other. Their central point was that this was an invoice transaction referring to a seller and purchaser and the goods have been shipped on the basis of CIF terms and so Goldas LLC became legally entitled to dispose of the goods upon shipment. This demonstrates that the Dubai Court of Appeal treated the invoice as transferring title and that the contractual relationship between the parties was a sale and purchase agreement. Whilst Mr Surgeoner explains that the Claimant was awaiting final conclusion of the Turkish proceedings before it came back to the court in London to pursue these claims there can be no excuse for not returning to the Commercial Court with regard to the claim against Goldas LLC in Dubai after the Claimant failed to appeal the above decision any further in Dubai.

BACKGROUND TO THE DEFENDANTS' CURRENT APPLICATIONS

107. Mr Surgeoner's complaints as to how this application was issued are entirely hollow in light of the Claimant's response to the same (paragraphs 7.2 to 7.8 of the First Surgeoner Witness Statement). It is quite clear from the reaction the application has received that the Claimant has and would never have had any intention of taking any position other than vociferous opposition to the Defendants' applications. Unless the Claimant's position is that it would have

been willing to agree (without an application being required) the discharge of the freezing injunctions and dismissal or strike out of the claim forms then there is no true ground for complaint. Of course, such a suggestion is entirely implausible and is borne out by the Claimant's response, which has been unreservedly aggressive (perhaps unsurprisingly in light of the position it took in the proceedings which has led to its present predicament).

108. As to the timing of this application, the Defendants' position is set out at paragraphs 167, 168 and 196 to 203 of the First Rose Witness Statement. The Claimant's suggestion that its timing was tactical and designed to coincide with a decision in Turkey is entirely speculative and utterly wrong. I can confirm expressly that the applications of the Defendants in February 2016 did not depend on the outcome of the insolvency case against Meydan, but were simply issued once prepared. Further, there is no obvious sense in taking action upon receipt of the Meydan judgment when claims in relation to other Defendant companies are much larger.

109. The remainder of what Mr Surgeoner says in this section is at largely a matter of submission. Needless to say, however, the submissions Mr Surgeoner makes there are not necessarily accepted.

THE DEFENDANTS' APPLICATION TO STRIKE OUT THE CLAIM FORMS, AND SOCGEN'S CROSS APPLICATION ON SERVICE

110. Paragraphs 8.1 to 8.14 of the First Surgeoner Witness Statement relate to service of the proceedings and is dealt with by way of expert reports served and filed on the 9 August 2016. As can be seen from the expert reports of Mr Atali and Mr Yavuz, the Turkish law experts agree that service of the claim forms was not effected to the Defendants in Turkey contrary to what the Claimant maintains. Further, the Defendants do not accept that there are any circumstance which justify the relief sought eight years after the event as Claimant seek; rather the situation is one of Claimant's own making and in any event what is said at paragraph 7.8 of the First Surgeoner Witness Statement (which is not even accepted as being correct in principle) is not exceptional.

Want of prosecution

111. Similarly to the position regarding service, paragraphs 8.15 to 8.18 of the First Surgeoner Witness Statement primarily amount to submissions made in light of the Claimant's attempts to

provide some sort of explanation for having taken no steps in the English proceedings since April 2008, albeit that it is plainly accepted (or at least plainly true) that not only have no steps been taken, but instead steps have been taken in alternative proceedings in different jurisdictions.

112. Again, submissions will be made in relation to the relevant legal principles, but it suffices to say that it is not accepted that what the Claimant says provides any satisfactory answer on the point. The Claimant's adopted position was anything but reasonable or understandable as Mr Surgeoner seeks to suggest.

113. Further, the Court will note once again that the only way the Claimant tries to justify its position is to rely on evidence received from Pekin. Notwithstanding the insufficiency of this attempted justification, the Claimant has refused to disclose that advice or any documents by which it was relayed to the Claimant, meaning it is impossible to see the full nature or extent of the advice received.

THE DEFENDANTS' APPLICATIONS TO DISCHARGE THE FREEZING ORDERS AND FOR AN INQUIRY AS TO DAMAGES

114. As to paragraphs 9.2 to 9.3 of the First Surgeoner Witness Statement, which are again submissions, the short point is that it is not accepted that a '*substantial trial*' is required to determine the question of whether the freezing orders were properly granted. The test for the granting of a freezing order is not simply aligned to the perceived merits of the underlying action. The Defendants accept that in principle, all other things being equal, that the hurdle of whether there was a serious issue to be tried would have been satisfied in this case. However, that does not mean that the Court would have granted the freezing injunctions had it been given a complete picture of the parties' relationship, including the Claimant's knowledge of and actions taken during that relationship, and particularly matters which go to the use of the gold and when the Claimant knew this was the case.

115. It is obvious that the Court would need to give directions for any inquiry as to damages. If and when this stage is reached the Defendants will address the Court as to the content of any such directions.

Delay

116. As to the issue of delay, the Defendants have already set out their position at paragraphs 168 and 193 of the First Rose Witness Statement. Further submissions on delay will be made in due course. Once again, however, the Claimant's complaint about delay is in reality a diversion from its own failings in circumstances where it retained a clear obligation to act in a certain manner. It is noted Mr Surgeoner does not attempt (no doubt because he could not do so properly) to suggest that the delay of which he accuses the Defendants could in any way be said to have impacted upon the Claimant's own conduct.

The freezing orders were properly obtained by SocGen

Failure to exhibit and explain complete invoices (First Rose Witness Statement paragraphs 131-144)

117. As Mr Surgeoner notes, the Defendants' position is set out at paragraphs 131 to 144 of the First Rose witness Statement. I do not repeat the matters stated there, and also refer to paragraphs 48 above. Whilst Mr Surgeoner accepts that Mr Teboul did not exhibit the full suite of documents to his affidavit, he seeks to underplay their importance on the basis that they were administrative in nature. This is not accepted. As explained in the First Rose Witness Statement, the documents were crucial to understand how the parties' agreements operated in practice and that the terms of the BCAs were not being followed at all.

118. Of course, I do not accept the criticisms made by Mr Surgeoner in paragraph 9.15 of the First Surgeoner Witness Statement. Mr Surgeoner seems to take the view that because his client does not accept a point made that means the evidence I have given is misleading (rather than simply not accepted) which of course is incorrect. The fact remains that the parties take different positions on the true nature of the commercial agreements which existed and were carried out in practice between them. Much of what Mr Surgeoner says in paragraph 9.15 amounts to a submission and does not warrant any factual evidence in response. Other criticisms are unfounded. For example, Mr Surgeoner appears to suggest that the suite of documents I referred to was incomplete as it failed to include 'back-office' documents and '*Customs Invoices*'. I have expanded on this at paragraph 54 onwards above. In addition, Mr Surgeoner's position is in part predicated on the fact that the Claimant does not accept the Defendants' position in

relation to the invoicing and purchase arrangements of the gold. This, however, is a dispute of fact to be determined in due course. It does not mean the evidence supplied on behalf of the Defendants is necessarily wrong or misleading and is merely an example of the Claimant's approach to this application.

119. It should be noted in relation to paragraph 9.15(g) of the First Surgeoner Witness Statement that the Claimant was responsible for shipment and carriage of the goods to the IGE. The allegation that the '*Turkish Customs declarations*' were documents produced by Goldas or its shippers is without foundation as is the suggestion that the Goldas companies might have controlled such entities. The fact that the Claimant's shippers knew exactly where the gold was being delivered is plain from the Claimant's own evidence. Leaving aside the inherent improbability that the Claimant did not once get told by its shippers where the gold had been delivered in the ordinary course of their relations, it remains that the Claimant (apparently) did not ever seek to confirm with its shippers over a five year period the delivery destinations. Whether this is true or not, what is obvious is that the Defendants plainly did not in any sense make attempts to conceal the destination of the gold deliveries (as the Claimant would no doubt suggest). This in itself goes directly against the Claimant's arguments that (i) gold was misappropriated; and (ii) it did not know how the gold was being used. The relevance of Professor Ocal's view on the present dispute is explained at paragraphs 83-88 above.

120. Although the Claimant's Istanbul office had no involvement in dealings with the Defendants as stated by Mr Surgeoner at paragraph 2.13 and 9.16 of the First Surgeoner Witness Statement, they were nevertheless active in this dispute as is apparent from correspondence attached at SPTR3/A/III/563 which is a reply in Turkish by the Claimant's Istanbul office to a letter from the Turkish Capital Markets Board. A translation can be provided if need be.

121. Mr Surgeroner's argument at paragraph 9.17 of the First Surgeoner Witness Statement is again predicated on the Claimant's argument about the invoices and the relationship between the parties being correct. For obvious reasons this is not accepted. I have stated on several occasions the Defendants' position in this respect. Even on Mr Surgeoner's evidence it appears accepted that title would pass on the delivery of an invoice, albeit that the Claimant maintains this needed to be a second invoice not a first invoice. It is also apparent that a first invoice (which contained a price) was in fact issued by the Claimant (albeit they dispute the nature and

effect of that invoice). It is therefore plainly wrong for the conclusion to be drawn that there can be 'no suggestion' that title passed with this invoice as the Defendants contend.

Failure to disclose variations to the contractual arrangements (First Rose Witness Statement paragraphs 145-148)

122. It is wrong to suggest as Mr Surgeoner does at paragraphs 9.18 and 9.19 of the First Surgeoner Witness Statement, that variations to the Maximum Consignment Quantity and the Maximum Consignment Period in the BCAs were not fundamental variations. Further, this approach fails to recognise the importance of the fact that the Claimant and the Defendants were plainly prepared to work on the basis of commercial arrangements made informally which were not reflected in the paperwork. Failure to respect the Maximum Consignment Period agreed in each case between the parties would have financial consequences for the Defendants by way of payment of interest to the Claimant. Also, the Claimant set out at great length in paragraphs 2.14 to 2.23 and 9.24 of the First Surgeoner Witness Statement that a risk analysis would be carried out for each type of transaction and this would presumably affect the amount of capital that the Claimant required to keep in reserve. It is inconceivable that the risk for the Claimant would have been evaluated in the same way for transactions surpassing the Maximum Consignment Quantity initially approved by the Claimant's risk department; which is another indicator that these terms were fundamental variations to the BCAs.

123. It goes without saying that the Defendants' position is that not only was there (on one view) a variation to the written terms of the BCAs relating to the use of the gold but that this was the very basis upon which the relationship between the parties was established namely the assurance to Mr Binatli of the mere formality of the agreement, the exceeding of the Maximum Consignment Quantity and the trading of silver for without a consignment agreement for a considerable period being examples of this. The Defendants continue to maintain that in reality the Claimant knew from its introduction to the Defendants that the supply of bullion was intended to be used by the Defendants in the manufacture of jewellery and in trading on gold exchanges. Such a position is dealt with in paragraphs 66, 67, 72 and 145-8 of the First Rose Witness Statement.

Claimant's knowledge of the use of bullion (First Rose Witness Statement paragraphs 149-154)

124. Paragraph 9.22 of the First Surgeoner Witness Statement amounts to a submission on the law of agency. Be that as it may, even if it is true (and it is not accepted without more that it is) that Mr Teboul and Mr Deshpande had no authority fundamentally to vary the terms of the BCAs without obtaining such credit approval, this was not known to the Defendants (and nor is as much suggested). Mr Teboul and Mr Deshpande were plainly willing and able to deal day-in and day-out with Mr Binatli from the outset of the relationship between the parties, who had no reason to suspect their authority to carry out and give effect to the transactions between the parties (which they did). This is particularly true of Mr Teboul who was the point of contact following Mr Gratton-Brunt's absence and stayed heavily involved in dealings with Goldas as the Head of Precious Metals Department. Both individuals certainly gave the impression that they could bind the Claimant through their actions.

125. In addition, the acts of Mr Deshpande and Mr Teboul suggest that they were willing and able to bind the Claimant in relation to such transactions. For example, they occasionally asked the Defendants whether they required any additional gold to be shipped beyond that requested. I attach a sample email from Mr Deshpande to Mr Binatli dated 8 April 2005 asking whether he wants an extra 500kg gold to be shipped (SPTR3/A/III/568). It was clear that the Claimant did not consider itself bound by the strict terms of the BCAs. The Claimant itself would go beyond the Maximum Consignment Quantities provided in the BCAs by asking to ship extra gold (SPTR3/A/III/569). Occasionally, the Claimant would also ask to ship silver despite not having any kind of written agreement in place with the Defendants at all (SPTR3/A/III/570). The only document signed in place at the time would be the gold consignment agreements which were entered into before the BCAs with Kuyumculuk in 2003 and Meydan Doviz in 2004 which did not make any provisions for shipment of silver (SPTR1/E/1-28). I have made mention of the debacle surrounding the Meydan shipments with no agreement in place and no risk approval.

126. In addition, I have referred previously to Mr Teboul's apparent willingness and ability to extend significant sums of credit to the Defendants on the basis of a simple email request with a one-line agreement. The fact that such agreement was forthcoming in a matter of minutes strongly suggests that Mr Teboul was perfectly able and willing to bind the Claimant in relation to its commercial and credit relationships with the Defendant (and at the very least gave that impression to the Defendants).

127. At paragraph 9.23 of the First Surgeoner Witness Statement, the Claimant claims that the confidentiality order was obtained because Mr Hasan Yalinkaya had indicated in a letter dated 22 February 2008 (SJS1/B/Vol1/Tab8.15/p272) that Goldas might seek to take some advantage from publicly embarrassing the Claimant. The Claimant takes the words citied in the witness statement out of context. The letter does not carry any threats. The Defendants were trying to avoid any disruptions to the parties negotiations and were reassuring the Claimant that they wished to continue working together but that it would be prejudicial to both their interests if they organised a public visit to the Defendants' premises. Instead the Defendants proposed to meet in Paris. It is clear from the wording of the letter that the Defendants were trying to find a middle ground and did not have any intention of *'publicly embarrassing SocGen'* which clearly would have been prejudicial to the Defendants' own interest. The Defendants' position is set out at paragraph 152 of the First Rose Witness Statement, but in any event is now irrelevant in light of the parties agreement that the confidentiality order no longer applies.

The freezing orders would have been granted in any event

128. Again, although much of what is said in relation to this issue is a question of submission, what Mr Surgeoner says second hand from Mr Teboul is not accepted. In particular, the Claimant knew about both the fact of the use of the gold, and it was told about the cash position of the Defendants as well as reassured about the Defendants' ongoing commitment to the business relationship, a relationship which in the eight weeks prior to these events had resulted in the Claimant receiving over US$1bn in payments from the Defendants in relation to bullion delivered. The Defendants' position remains that in light of all the factors which ought to have been brought to the Court's attention, including the true nature of the relationship between the parties, the Claimant's knowledge of the use of the gold, the making of significant payments in the weeks immediately prior to the injunction being sought and other matters previously raised, the Court would not have granted the freezing injunctions.

CLAIMANT'S COMPLAINT TO TURKISH CAPITAL MARKETS BOARD

129. The First Surgeoner Witness Statement's exhibit SJS1/B/Vol2/p704 contains the second affidavit of Gemma Muggoch dated 1 April 2008 which is not mentioned anywhere in the First Surgeoner Witness Statement and does not seem (although this is not clear) to have been provided to the court, nevertheless it was exhibited in SJS1. It exhibits the preliminary

attachment decision against Kuyumculuk and a legal opinion from Pekin in which Pekin advises that criminal and civil proceedings can be brought against Goldas and its board members for failure to make public disclosures of the freezing injunctions and the decision against Kuyumculuk. However the news of the freezing injunction was front page news in Turkey on as early as 21 March 2008 (SPTR3/A/III/572) and Goldas made public announcement through the Istanbul Stock Exchange on 21 March 2008 (SPTR3/A/III/575-577). The Claimant eventually made a detailed complaint to the Capital Market Board in Turkey on 8 February 2013 in the wake of a raft of decisions from the Turkish Supreme Court rejecting the insolvency cases brought by the Claimant against the Defendants.

130. However, because of the insolvency orders and collapse of Goldas the Capital Markets Board were obliged to investigate. This initially required financial details of each of 23 Goldas companies to be provided to the relevant authorities and regulators even though only Kuyumculuk and Kiymetli were stock exchange companies and so governed directly by Capital Markets Board regulations. The upshot was that all of the directors and board members of each of the Goldas companies had to sign each page of each document. Logistically alone this was a crippling exercise in futility. First the documents had to be compiled and checked and then each board member located so that his/her signature could be obtained for each page. Mr Sedat Yalinkaya told me that the first tranche of documents eventually compiled were transported in a large van; that the signature process was commenced but that it proved impossible to complete; they calculated that for one board member alone he would have to sign documents continuously for two months; that this process stopped First to Third Defendants from operating; and the Capital Markets Board after many requests agreed to accept digital documents instead. It cannot be overstated that the impact of this as it was carried out in a hostile atmosphere in which numerous extensions of time were required to complete the task. The irony of it is that the allegations could not be properly investigated until the preliminary documentation was supplied. At the heart of the matter the Pekin allegation of failure to notify the shareholders and Capital Markets Board proved to be unfounded.

ADDITIONAL MATTERS RELEVANT TO THE CLAIMANT'S APPLICATIONS

131. In the course of the First and Second Rose Witness Statements and in this witness statement I have set out at some length the Defendants' position in relation to the claims made against the Defendants, including the fact that the Claimant knew of and agree to the bullion being used by

the Defendants, and therefore that title must have passed in relation to the same. I have also set out the Defendants' position concerning the absence of service of the claim forms, the abuse of process and want of prosecution arguments and the effect for which the Defendants' contend on the claims.

132. I have also set out at length how the Claimant, contrary to the parties' agreement in this respect, wrongfully demanded immediate payment in respect of all bullion and/or demanded its return (to which it was not entitled). I have also explained how the Claimant's wrongful and precipitous action which followed (which the Defendants contend amount to an abuse of the civil process) caused significant financial damage to the Defendants. I have also explained how the Defendants contend they are entitled to redress from the Claimant in respect of that damage whether by way of inquiry or counterclaim.

133. In addition to these matters, I set out in this section further matters which have been brought to my attention which go to the Claimant's conduct, both specifically in relation to the Defendants and further redress which may be available to them and more generally, and which corroborate the Defendants' concerns about the behavior of the Claimant at the material times. Needless to say, in light of all these points, the Defendants do not accept the Claimant is entitled to judgment or that there are no compelling reasons for these complicated and closely connected matters to be litigated.

GOLD PRICE RIGGING

134. The Defendants will rely on and refer to the complaint (amended) in the gold price fix group litigation issued in the Southern District Court of New York ('the Complaint') (SPTR3/A/III/600). I understand that similar proceedings were issued in Canada against the Claimant (SPTR3/A/IV/915). The Claimant was a board member of the London Gold Market Fixing Limited, a company of which the Claimant is a member, together with Barclays Bank Plc, HSBC Bank USA, The Bank of Nova Scotia and (until 14 May 2014) Deutsche Bank AG. I exhibit at (SPTR3/A/III/844) a copy of the Directors' Report and Financial Statements for the year ended 31 March 2015 (which are the most recent available at Companies House). The Claimant was one of the five banks who as board members were responsible for setting the gold price twice daily at 10 am and 3 pm.

135. In the New York Complaint it is alleged that that the defendant members of the London Gold Market Fixing Limited illegally conspired to rig the market price of gold bullion. The Complaint relies on academic research into the gold price statistics and the volumes of trade at different times during the day. The central theme of the allegation is that the PM fixing was deliberately manipulated so that it spike down and that the downward price spikes at the PM fixing were statistically significant. The result was that an artificially low price was produced and that it would bounce back in later trading. The importance of the PM fixing is that a number of important gold derivative products are sold according to the PM fixing.

136. The price fixing worked by the five board members would meet in secret either face to face or in a telephone conference and set the rate using a form of auction based on the demand for gold that they had. This was a system over which there was no regulation or external supervision. It was born out of a decision in 1919 to provide a market price for gold and the London Gold Market Fixing Limited was originally populated by major London gold trading organisations including Rothchilds. It was essentially run by gentlemen and like much of the city at that time the standards of conduct and integrity were beyond reproach. The Complaint states that after Rothchilds sold their seat as the last remaining founder member the foxes were left in charge of the hen coup. The allegation is that Barclays, HSBC, Societe Generale, Bank of Nova Scotia and Deutsche Bank were cavalier in their approach to rules of good conduct and leaving them totally unsupervised and/or regulated was a terrible mistake. The Complaint cites other instances where the same banks have been criticised over LIBOR fixing and to a number of government investigations into the member banks activities relating to the London gold fix.

137. The Complaint therefore is that there was a massive conflict of interest as banks trading in gold and gold derivatives had an unfair advantage in knowing in advance of the market what the price was going to be fixed ahead of time. This meant that the banks could take advantage on behalf of themselves and their clients because they knew what the price was going to be and could manipulate it.

138. On 14 April 2016, the lead advocates on behalf of the class action, Daniel L. Brockett of Quinn Emanuel Urquhart and Sullivan LLP and Merrill G. Davidoff of Berger and Montague wrote to Valerie E. Caproni who was the Judge in the matter in terms that they were writing on behalf of the plaintiffs and Deutsche Bank AG to inform the court that they had subject to court approval agreed terms to settle all of the claims between the plaintiffs and Deutsche Bank in

this matter and that Deutsche Bank had agree to pay valuable monetary consideration into a settlement fund and that there were provisions requiring Deutsche Bank cooperation in pursuing claims against the remaining defendants (SPTR3/A/III/861).

139. I have spoken to Professor Rosa Abrantes-Metz whose research triggered the investigations into the gold fixing and her paper is quoted in the Complaint. She explained the statistical analysis she had undertaken. I asked her whether she had considered the wider impact on the gold price of the fixing and whether it had impacted on the general spot price for gold in the gold market. She said that it did and referred to me to the amended Complaint. I then discussed the case with Mr Davidoff, one of the lead counsel referred to above, and he explained that they were waiting the outcome of an application issued by the defendants. I then spoke again to Professor Abrantes-Metz after studying the analysis in the Complaint and asked her whether and to what extent there is empirical evidence to show that because the banks knew of the 3 PM fixing and that it was therefore an assured win whether this had driven demand for gold creating a bull market such that although the immediate impact of the conspiracy was to spike the price of gold down the overall effect on the market was to drive the price up because of the increase demand by defendant member banks drawn into the market to bet on a sure thing. She said that she had not been instructed to conduct that analysis. I asked whether given the fact that following the introduction of independent regulation post 2013 and the disappearance of the downward spike at the PM fixing whether the upward only driver had been removed. She was not able to answer this. From my review of the gold price movement following the introduction of independent regulation and oversight the market appears less volatile.

140. I have considered the allegations in the Complaint and there appears to be strong evidence to support the contention that the market was rigged the startling factor being the disappearance of the downward price spike in the PM fixing (SPTR3/A/III/659 at paragraph 143 of the amended Complaint).

141. Deutsche Bank's election to pay considerable compensation and provide assistance to the plaintiffs in their action against the other board members would certainly indicate that Deutsche Bank, at least, believes that its membership of the board of London Gold Market Fixing Limited has generated a good reason to pay a considerable sum to members of the wider public not necessarily being their clients in settlement of the litigation brought.

142. If the London Gold Market Fixing Limited member defendants including the Claimant did as is alleged, conspire or turn a blind eye to the rigging of the gold market, in a particular manner by producing a dip on the PM fixing, then there is every possibility that there were wider and possibly unanticipated impacts on the workings of the gold market beyond the immediate time if the PM fixing. So as has been referred to above, there is every possibility that the defendant member banks, knowing that they have a sure bet because they know the future price, then this might draw in greater amounts of investment by those banks and so with this increased demand increase the price of gold generally.

143. The effect of the rigging of the gold market on the Goldas Defendants is not yet known, however if Goldas had known that there was a downward spike at 3 PM then they might have structured their purchases for this time, but they did not. In addition, if the gold price was pushed up as a result of the rigging and we know that the complainant refers to banks, including the defendant banks, being responsible for 40% of the short positions on gold then it can be seen that the banks were a significant driver of demand of gold and gold derivatives (paragraph 213 of the Complaint). The Complaint at paragraph 215 describes a short position on the COMEX or a defendant bank's hedge book as an undertaking to deliver gold to a buyer for deferred, or, less commonly, immediate delivery. If a defendant bank is 'short' in its hedge book or COMEX position, it will profit (or lose less) if the gold bullion price declines.

144. The Defendants' position was effectively that it was taking a 'long' position. The Complaint at its paragraph 100 describes a 'long' position on gold, meaning it agrees to pay for a specified amount of gold and take delivery at the expiry of the contract, clearly a person taking a long position benefits if the price decreases. Goldas were taking the gold on payment terms whereby the price would be fixed when payment was due. If the price of gold dropped, Goldas would have made a profit on the trade; however if the price of gold rose, then Goldas would have made a loss. Given that Goldas' terms were ten days, one month or three months, the short term downward spikes did not benefit them. This is because from 2004 to 2008, that is the commencement period for the Complaint, there were small fluctuations but generally the price went up.

145. Prior to the Complaint period, the price of gold from or about 1980 to 2003 was relatively stable (SPTR3/A/III/862), certainly by comparison with the next four years when the gold

price tripled. It would be fair to say no great increase was envisaged; there have been a number of international incidents such as the Balkan war, 9/11 bombing, invasions of Iraq, sanctions etc. However after the start of the Complaint period the price of gold increased and kept increasing. There was no particular explanation for this. Indeed the British government under Gordon Brown's chancellorship sold 58% (395 tonnes) of the UK's total gold reserves of 715 tonnes between July 1999 and March 2002. I have enclosed a copy of the summary of the HM Treasury Review of the sale of part of the UK gold reserves October 2002 (SPTR3/A/III/863). This had little or no impact on the market price of gold. The figures are also of interest because the Defendants purchased in the region of 500 tonnes of gold form the Claimant over a similar period of time. However Goldas' purchases were during the Complaint period and the price of gold rose threefold between September 2003 and March 2008. If the price increases are a deliberate or an accidental side effect of the banks rigging the PM fixing then Goldas will have lost out on practically each and every transaction with the size of the loss dwarfing the claim in this case. I have asked Mr Binatli whether the price paid in the '*Final Invoice*' was ever lower than the invoice price of shipped goods. He believed that on one or two occasions the price was lower on the '*Final Invoice*' but could not point me to a specific example.

146. The price rigging allegations are very serious. The market price may have been deliberately manipulated causing downward spikes at the PM fixing. This may have had or there may have been a second deliberate or accidental effect to increase the market price because of the increase demand for gold by the participating banks and their customers. What cannot be ignored is the fact that, on the Cliamant's on case, the Defendants case represented 99% of the Claimant's gold shipments. The numbers are significant, 500 tonnes is not far short of the UK's national reserve before the sell off. It must be the case tha thte Claimant was aware of the Defendants' purchases in terms of their impact on the market price. For example on 10 Decmeber 2007 there is an email from Mr Deshpande to Mr Binatli which states in relation to an order '*just to keep you inofmred that none of the overnight orders got filled. We came very vclose to fill the first one during New York hours on Friday but the market was very thin and the market took our order as a support and bought above it.*' (SPTR3/A/III/913). Certainly Mr Desphande was aware of the impact on the gold market of its actions. If the price of gold has been manipulated and driven up the market price for gold in the process then the quantification of the Defendants' losses would be significant. When the Claimant issued its claims against the Defendants, gold price peaked the day before and for the rest of that year went into a series of jolting falls throughout the year. This issue will bear further investigation.

THE ROLE OF MR TOPOLANSKI

147. Mr Serge Topolanski was a director of the London Gold Fixing Limited for the Claimant for the period 2002 to 2005 and Mr Xavier Lannegrace has been since 19 December 2013. I have enclosed copies of forms 288a and 288b (SPTR3/A/III/865-870). I cannot comment on the role of Mr Topolanski in relation to the New York Complaint as there is no information currently available, but he was the board member for part of the period of the Complaint. Mr Topolanski was also the person who signed the BCAs with the Defendants on behalf of the Claimant and he was also the person who appears to have approved the counterparty risk on behalf of the Claimant in September 2003 when the decision was first made to ship gold to Goldas as is evidenced by the Claimant's officers internal email exchange sent by Ms Bellet to Mr Daudruy on 3 September 2003 at 11.50 am (SJS1/A/Vol1/p197, SJS1/A/Vol1/p180). In 2004, it was Serge Topolanski who approved Meydan as a new customer without opening a file, doing a risk assessment or even basic KYC let alone having maximum consignment quantities, country limits or even the fig leaf of a contractual agreement. It was a hand-shake agreement which terms were based on trust without the need for security (SJS1/F/Vol1/p17-20). By the time this matter was addressed by the Claimant, shipment of 500 kilos of gold had been agreed on 19 May 2004 and was delivered on 24 May 2004 to Meydan with a further 500 kilos agreed to be sent on 26 May 2004 and was to be delivered to Meydan on 31 May 2004.

148. I do not know what the job specification of Mr Topolanski was but it must have been complex. Certainly in the period 2002 to 2005 he was Deputy Head of Commodities Trading and Markets. In addition, as set out above he was the director of London Gold Market Fixing Limited on behalf of the Claimant. On or about 19 May 2004, he had given his risk approval for Meydan (a gold and currency trader) to be shipped gold in large quantities assuming that all KYC, BDR and legal etc. had been complied with (as can be seen from the email he sent on 26 May 2004 at 05.06 pm to Mr Deshpande at SJS1/F/Vol1/p17). Presumably, he had to attend the AM and PM fixing meetings for London Gold Fixing Limited where he used the information of his bullion trades with Meydan, likewise on 26 May 2004 when a further 500 kilos was agreed to be sent to Meydan. In addition, there were other trades with the Defendants during this short period of time. I am not aware from the documentation available to me that any employee of the Claimant was reprimanded for the failures to properly register Meydan and trade a ton of gold without a formally executed agreement. I refer at

SPTR3/A/III/871 to an email exchange on 13 May 2004 between Mr Binatli and Mr Teboul where Mr Teboul confirms they can start trading prior to executing the agreement. A cover letter sent by the Claimant dated 17 June 2004 attaching the executing copy of the agreement is exhibited at SPTR3/A/III/873 which clearly shows that the Claimant had not sent an executed copy of the consignment agreement prior to this date.

JEROME KERVIEL APPEAL

149. The Claimant has come under substantial criticism for its back office procedures and profit over compliance approach. In the Jerome Kerviel appeal to the Court of Appeal Versailles 390 9th Chamber case number RG14/01570 of 23 September 2016, the French Court of Appeal made stinging criticisms of the Claimant when reducing Mr Kervial's fine from €4.9bn to €1m. I attach a copy of the judgment at SPTR3/A/III/874 in French. A translation can be provided in due course if need be. The Kerviel case was described one of a rogue trader employed by the Claimant. Whilst it is not suggested that Mr Kerviel traded in or was linked to the trading of bullion, there are systemic issues raised by the Court of Appeal by reference to an internal report (the 'Green report') exhibiting a report from the bank's auditors PwC, and to the report of the Bank Commission of the Bank of France prepared for the purposes of an investigation which resulted in 2008 in a €4m fine for the Claimant. The Defendants do not have access to either of these reports and only know of their existence from reference to the appeal judgment.

150. Throughout the judgment there are frequent references to defective systems which should have picked up the Kerviel trading problem as early as 2005. The Court stated that the Kerviel case highlighted deficiencies, which were already identified sometimes many years before by the periodical reviews/audits by the Claimant but that the necessary correctional actions were not always taken sometimes due to management's decided actions, and moreover, there was reference to a failure to sufficiently take into account the recommendations of the periodical reviews. According to the Bank Commission's report, the weaknesses of security were largely identified by the periodical reviews especially after incidences which occurred in other sectors of the bank, but the necessary corrective actions were not taken, either because of managerial choices and budgetary considerations in favour of an implicit acceptance of the risk, or because of an underestimation of the of the operational risks undertaken. (page 24 of the judgment).

151. In relation to the back office, the Bank Commission's report found that the Claimant's back office was exclusively oriented towards production to the detriment of preventing operational

risks, and that there was an absence of sufficient separation between entities engaged within operations in the front office and those responsible for their approval within the back office (page 24 of the judgment).

152. The Court highlighted that the control of the trading limits imposed by the Claimant on Mr Kerviel was particularly irregular, that the activities of the Delta Desk One (which was Mr Kerviel's department) gave way to frequent and substantial instances where the limits were exceeded. The Court stated that in 2006/7 the limit was exceeded over 22% of the open days i.e. more than one day per week and that the limit of the stress test of the Desk was exceeded in 15 % of the cases i.e. more than one day per week. The Court found that the managerial choice favored risk taking to increase profitability and allowed a bad intentioned employee like Mr Kerviel an environment where he was able to develop his fraudulent purposes (page 27 of the judgment).

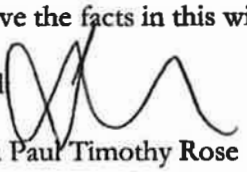
153. In the circumstances, the Claimant has been criticized for serious lapses in its back office, risk and regulatory departments by the French Court of Appeal, this corresponds with the above analysis of the risk department emails at paragraph 11 onwards above, and circumstances surrounding the commencement of trade with Meydan (referred to above at paragraphs 147-148). The failings of the Claimant's back office and risk departments may or may not have contributed to the circumstances in which the Claimant chose to take the action it did, certainly if it transpires from disclosure by the Claimant (to date the Claimant has not disclosed the documents referred to in the insurance pleadings) that the references referred to in paragraph 21 of the Re-Re-Amended Defence and Counterclaim from the insurance proceedings are correct, then it would appear that the Claimant would have serious questions to answer. The matters referred to above regarding the gold price rigging and the criticisms of the back office are serious and will require full and careful exploration.

154. The lax behaviour of the Claimant's officers demonstrated above is a familiar theme. For example, it is not apparent how the Claimant could have issued invoices stamped and signed and sent to Defendants and the Turkish Customs for the purpose of importing the gold into Turkey and yet to be claiming that the invoice was provisional. An invoice is an accounting document of record and the Claimant would have had many people involved in its being processed into its accounts. Yet the Claimant sent out a '*Final Invoice*' not an original document, which was delivered electronically only and not in a signed original and stamped original format

as would be required for accounting purposes and as was done with the original invoice sent . Both of these documents have to be created by accounting personnel who are responsible for maintaining the accounts of the business. The two invoices are for the same amount and cannot coexist.

Statement of Truth

I believe the facts in this witness statement are true.

Signed: 

Simon Paul Timothy Rose

Dated: 24/10/2016

Applicant: S.P.T. Rose
Third
SPTR3
24 October 2016

IN THE HIGH COURT OF JUSTICE **Claim No. CL-2008-000305 (Folio No. 267 of 2008)**
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

BETWEEN:

SOCIÉTÉ GÉNÉRALE
Claimant

and

GOLDAS KUYUMCULUK SANAYI ITHALAT IHRACAT A.S.
GOLDAS KIYMETLI MADENLER TICARETI A.S.
MEYDAN DOVIZ VE KIYMETLI MADEN TICARET A.S.
GOLDAS LLC
Defendants

AND BETWEEN:

SOCIÉTÉ GÉNÉRALE
Claimant

and

GOLDAS KUYUMCULUK SANAYI ITHALAT IHRACAT A.S.
GOLDART HOLDING A.S.
Defendants

THIRD WITNESS STATEMENT OF
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