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Sia Lagos

Registrar

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APPLICANT'S OPENING REPLY SUBMISSIONS

A OVERVIEW

- 1 The following may be observed about the Respondents' submissions served 6 April 2026 (**RS**).
- 2 *First*, despite the hyperbole in RS [1] and [2], the Respondents have made important concessions regarding the claims against them which (although very late) limit the grounds of defence now relied on. For example, in the case of the **inducement claim**, the Respondents admit in RS [33]: *"There is no dispute that the other elements [other than loss and damage] of the tort [of inducement to breach contract by Forum Group, SkillTech and Artis] are made out on the evidence"*. That means the Respondents no longer maintain the denials and deemed denials in Defence [21], [23], [25]-[27], [33], [38]-[39] and [51]-[54]. Once the Court finds that *any* damage was suffered by the Applicant,¹ that claim necessarily succeeds.
- 3 This admission, coupled with formal admissions made in RS [18(a)-(f)] and [19(a)-(e)], have knock-on consequences for the denials that appear to be maintained in relation to at least some of the causes of action based on **misleading conduct**. For example, the admission of the inducement claim as pleaded must carry the consequence that the Respondents cannot dispute their knowledge of the terms of Hubexo's subscription agreements and that they would be breached by the front companies when they allowed the Respondents to access the accounts.
- 4 The admission of inducement also has consequences for claims of **breach of confidence**. The terms of the subscription agreements in FASOC [19] include a term that the subscriber agreed to only use their User Details as directed and to keep their User Details confidential (cl. 2.3). How the Respondents can continue to deny that the User Details are confidential is a mystery.
- 5 Another important concession in RS [20], [25] and [85] is that it is now admitted that Project Spreadsheets *were exported* from LeadManager by RP Data and its agents (Telus and Artis). This represents a dramatic shift from the previous position adopted by the Respondents, and their witnesses, that no exports occurred. The technical evidence and computer records (such as IT Activity Reports² and logs files³) adduced by the Applicant, and the Respondents' own discovered documents which refer to exporting activity, demonstrate that exports had occurred and in large numbers over many years. In RS [85] the Respondents seek to limit the admission to exports *"primarily occur[ing] from May 2019 but did occur on certain occasions earlier (November/December 2017, January 2018, March 2018 and October 2018)"*, but no basis for this limitation is identified such that the full extent of the access and exporting of information from LeadManager will have to emerge in the trial.
- 6 The scope of the admissions needs to be clarified because they materially change how the Respondents intend to defend the case at trial. The Applicant and the Court should not be left

¹ Eg. loss pleaded in FASOC [55A], or further or alternatively, [55B].

² Roy 30.4.35 [124].

³ Roy 17.7.25 [7] and [8](d).

to parse the vague language in the RS with the Defence to understand what is now admitted and how it relates to other denials and non-admissions. Procedural fairness requires that the Respondents file and serve a Further Amended Defence before the Applicant calls their first witness.

7 *Second*, the Respondents have raised new defences in the RS they have failed to plead and have made complaints about the FASOC not previously raised (despite the opportunities taken to make pleading complaints in the procedural history of the case). Examples include allegations that:

- (a) the misleading conduct has not been adequately pleaded (RS [3(b)(ii)]), despite the representations and conduct having been pleaded in detail in FASOC [100]-[126B] and the BCI Confidential Information has not been sufficiently specified (RS [71]-[73]), despite being pleaded in detail at FASOC [83]-[95] and the Respondents joining issue with these paragraphs in the Defence;
- (b) the copyright works do not include the authorship by Mr Matthias Krups and Mr Nikhil Roy who determined the fields of information in LeadManager (RS [3(d)(i)]), despite those fields being the Project Information and also critical components of the Project Reports pleaded in FASOC [56] and no issue previously being raised in the Defence;
- (c) there can be no liability for acts of copyright infringement by Telus because those acts were carried out in the Philippines at RS [3(d)(iii)(A)], despite no pleaded defence to that effect. In any event, it is admitted in Defence [6](ga)(iii), [42], [73](b)-(d), [73A](b)-(d), [73B](b)-(d) that copies of downloads made by Telus were stored in the Applicant's shared server, located in Australia; and
- (d) the Applicant cannot recover loss for copyright infringement of the BCI Works because the copyright in those works was assigned by BCI Asia to the Applicant on 8 May 2020 at RS [3(d)(iv)], despite that legal assignment giving effect to the practical reality that BCI Asia and its employees created the BCI Works for the benefit of the Applicant.

8 The Respondents should not be allowed to run new unpleaded defences, or to seek to turn the trial into a rehash of pleading debates. In the case of the latter there were ample procedural opportunities to raise objection to the pleading. The Respondents joined issue with the relevant paragraphs of the FASOC and made forensic choices in their Defence (and evidence).

B CAUSES OF ACTION – WHAT REMAINS IN DISPUTE

9 The Applicant acknowledges that the Respondents dispute the Applicant's claim for loss, damage or entitlement to an account of profits in relation to each cause of action (repeated throughout RS). That appears to have always been the focus of the Respondents' case. The remaining issues in dispute on liability appear to now be as follows.

B.1 Inducement to breach contract and interference with contract

10 All elements (except for loss) of inducement to breach contract are now admitted: RS [32]-[33]. Interference with contractual relations is resisted *solely* on the basis that the reasoning of Beach J in *State Street* and *Directed Electronics* should not be followed by this Court: RS [34]-[37]. No reason is given as to why this Court would not follow that reasoning based on judicial comity.

B.2 Misleading or deceptive conduct

Subscription Representations – FASOC [100]-[124]

11 The defence to this claim is that the “*conduct of Forum Group, SkillTech and Gingold has not been proven*”: RS [41], [45]-[47]. The corresponding paragraphs of the Defence almost entirely consist of non-admissions regarding the conduct of those entities. There are two immediate problems with this position: (1) the representations pleaded in FASOC [100], [107], and [114] are supported by the contemporaneous records made in the discovered documents and those produced on subpoena;⁴ and (2) the RS ignores the misleading conduct by silence pleaded in FASOC [104]-[104B], [111]-[111B] and [118]-[118B] that the front companies failed to disclose to the Applicant that they were obtaining subscriptions for the Respondents, not themselves – a matter which should be beyond doubt given the Respondents’ admissions (eg. Defence [110]). No attempt is made to explain why these claims are not made out on the evidence.

Legitimate Subscriber Representations

12 The Respondents’ sole defence to FASOC [121]-[123] is in RS [50]: “*That claim is hopeless*”. That is a more appropriate description of the Defence, because there is no explanation for it. In any event it is not clear how this claim could now be seriously in dispute given that:

- (a) FASOC [121]-[123] pleads the Legitimate Subscriber Representations were that RP Data by its conduct represented to and induced the Applicant to believe that RP Data was the Forum Group, SkillTech and Gingold when it used the User Details to access LeadManager, in circumstances where in Defence [122] it is admitted that RP Data was not one of those entities, was not a subscriber and was not entitled to use the User Details issued to those entities; and
- (b) The Respondents now admit (see RS [18] and [31] all elements of inducement to breach contract other than loss), that: (i) they procured the front companies to obtain the User Details from the Applicant; (ii) the Applicant did not know the front companies were doing so in order to provide the Respondents access to LeadManager; (iii) the Applicant did not know that the Respondents were accessing LeadManager using the User Details provided to the front companies; and (iv) the Applicant *would not have provided the Respondents access* to LeadManager (see e.g. Defence [82B]).

⁴ E.g. FRM.001.001.0651; FRM.001.001.0652; COR.001.002.0607; COR.001.002.0321; COR.001.015.0035; COR.003.121.0844; COR.003.121.0787; COR.001.002.0128; COR.001.002.0129; Roy1 at 66, 68-69, 76-77.

- 13 Having admitted inducement to breach contract, the contravention of s 18 of the ACL in respect of the misleading Legitimate Subscriber Representations, which arise from the same facts, should not be in dispute. The only thing that should remain in dispute is whether an award should be made in respect of loss and damage under s 236 of the ACL. Whether or not such an award is made does not affect the finding of a contravention or non-monetary relief to which the Applicant would be entitled to as a consequence of the contravention being found.

Third Party Representations

- 14 The Respondents, once again, suggest that the Third Party Representations are not sufficiently particularised (RS [54]-[56]), which is the foundation for the deemed denial in Defence [124]. This ignores that they are spelled out in detail in FASOC [124]-[124A] and the particulars thereto. The suggestion in RS [57]-[59] that the representations were mere “puffery” is not available because it is outside the Respondents’ pleaded case (which was confined to a non-admission). In any event, the Respondent’s National Sales Manager, David Hunt, emphasised to senior echelons of the Respondents that such representations were *critical* to his sales team retaining customers and winning new customers from the Applicant: see emails and quotes in AS [20]. The suggestion at RS [60]-[62], that the evidence of the misleading nature of the Third Party Representations given by Mr Matthias Krups “falls short”, ignores the fact that it is cogent evidence of the differences between the information in LeadManager compared to that in Cordell Connect which the Respondents were comparing by the Third Party Representations.

B.3 Breach of confidence and knowing involvement in breach of confidence

- 15 The Respondents suggest that the confidential information claims fail at a threshold level because: (a) the Respondents cannot have been under a duty of confidence because the Confidential BCI Information was not *imparted to them* in confidence by the Applicant, it having been provided to them by the front companies; and (b) being knowingly involved in a breach of confidence is “not recognised in equity”: see RS [77]-[79]. Neither proposition is correct.
- 16 Authority, even the cases cited in footnote 14 to RS [79], confirm that:
- (a) Information will have been received “in circumstances importing an obligation of confidence” where a reasonable person in the position of the recipient would have realised that the information was being provided in confidence: *Coco v AN Clark (Engineers) Ltd* (1968) 1A IPR 587 at 591.28-37 (per Megarry J). The Respondents, by admitting inducement to breach contract, knew that the information was provided in confidence to the front companies, under the terms of the subscription agreements the Respondents now admit were breached by the front companies.
 - (b) In *Countrywide Austral Pty Limited v Emergency Media Pty Ltd* [2018] VSC 540, Riordan J observed at [74] that the liability of a third party for knowing and dishonest assistance in a breach of confidence has been accepted by Besanko J in *Lifepan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at [334], in respect of which there was no appeal on the question of accessorial liability for breach of confidence,

and Einstein J in *City of Sydney v Streetscape Projects (Australia) Pty Ltd* (2011) 94 IPR 35 [483]–[491], with the finding that a claim may be maintained for accessorial liability for breach of confidence not disturbed on appeal.

- (c) In *New Aim Pty Ltd v Leung (No 4)* [2025] FCA 747, Neskovcin J identified at [206] that *although* Edelman J observed in *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537; [2022] HCA 23 at [238] that the *extent to which* an obligation is imposed upon persons who are not primarily liable is unsettled:

“Third parties who obtain confidential information may be restrained from using the information if they have actual or constructive knowledge that the information was obtained in breach of confidence: *Farm Transparency* at [162] (Gordon J); [238] (Edelman J); *ABC v Lenah Game Meats* (2001) 208 CLR 199; [2001] HCA 63 at 225 [39], 224 [34]–[35] (Gleeson CJ). Further, a third person who comes by information innocently may be restrained from making use of it once they learn that it was obtained in circumstances involving a breach of confidence: *Farm Transparency* at [162] (Gordon J); *Johns v Australian Securities Commission* (1993) 178 CLR 408; [1993] HCA 56 at 460 (Gaudron J); *Vestergaard Frandsen* at [25]–[26], [39] (Lord Neuberger).”

- (d) In *20 Trevis Court Pty Ltd v Emmapeel Holdings Pty Ltd* [2023] QSC 254, Applegarth J said at [31] (citing *Vestergaard* and supporting academic publications): “There seems no reason in principle why a form of accessorial liability that applies to breaches of trust or breaches of fiduciary duty should not apply to breaches of other equitable duties.”

User Details

- 17 The Respondents’ sole defence in respect of the User Details is that they were not confidential, the reasons for which are not clear: see RS [93]. The denial in Defence [85] and matters in [85](a) and (b) are contrary to the Respondents now admitting they knew the User Details were required to be kept confidential (in respect of the inducement to breach contract, under the terms of the Subscriber Agreement) and their own emails that they knew the User Details were confidential.⁵ It is not clear how there can be any genuine issue in relation to this claim.

Confidential Project Information

- 18 The new defence in RS [71]–[73] that the Confidential Project Information is not sufficiently specified travels beyond the Respondents’ pleaded case, which largely consisted of denials: eg. Defence [86], [87], [88]. In any event, AS [75]–[77] identify the reasons and evidence why this should be rejected and these have not been answered in RS.
- 19 Further, the suggestion in RS [74]–[75] that the Confidential Project Information was not confidential is contrary to: (1) the submission in RS [74] that information may be confidential having regard to “the amount of effort or money expended in developing it and the ease or difficulty involved in acquiring or duplicating it” and the evidence of the effort and expense

⁵ E.g. COR.003.001.9153; COR.001.002.0607; COR.001.015.0026; COR.003.001.9666; COR.001.002.0783; COR.003.043.1457; COR.003.193.7245.

incurred by the Applicant and the Respondents in collating such information for their competing products; and (2) the Respondents' subscription agreement requiring such information to be kept confidential (see AS [35]⁶). The submission in RS [76] does not make sense: subscribers were restricted to using information from LeadManager for their own information needs (cl.4.1).

20 At RS [82]-85], the Respondents suggest that Confidential Project Information was not used to create the Comparative Documents. That ignores the admission made in RS [20], [25] and [85] that thousands of Project Reports were exported by Telus and the Robotics Program, and the documents that will be tendered demonstrating that the Respondents used exported information when creating and using Comparative Documents.⁷ The Respondents fail to address the fact the Comparative Documents were only able to be created because of the access gained to LeadManager using the confidential User Details, to access and export data.

21 In response to the suggestion in RS [87]-[91] that there was no "gap filling" using information from LeadManager, the Applicants have identified a large number of instances of such conduct: see "Part C – Applicant's Background Facts (Identification and Filling of Gaps)". That evidence establishes that access to LeadManager provided the Respondents with critical intelligence to enable them to identify gaps and differences, and how to fill and address them. Up until that point, the Respondents were aware of customer feedback about the shortcomings in Cordell Connect, but they could only address them effectively with access to LeadManager to figure out what needed to be added or updated in Cordell Connect, or in their research processes. The critical role which access to LeadManager played in allowing the Respondents to improve Cordell Connect and win customers is demonstrated by the prominence it played in their strategy documents: e.g. COR.001.002.0113 and COR.001.002.0539. This was not one-off instances of "pinching data" as the Respondents have previously said; it was 'baked' into the Respondents' strategy and conduct of their business, and is central to the profits claim.

21.1 Copyright Infringement

22 The Respondents raise "four main issues" with the Applicant's copyright case: RS [94].

23 No human author: RS [98] repeat the plea in Defence [57](b) that the Project Reports "generated in a final and expressed form using a computer process or process" as an answer to authorship. This misses the point. The use of a computer to publish a work does not deny it human authorship. The critical issue is whether the compilations represented by each Project Report were "brought into the form in which they were published primarily by an **automated** computerised process": *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 194 FCR at [72]. There was no automated process in the case of the Project Reports. They were clearly works created in every sense of s 32 of the Copyright Act by the BCI Researchers.

24 RS [100] raises a "timing" issue, without identifying any authority for it. The evidence discloses that the BCI Researchers created each of the Project Reports and they went through review

⁶ Krupps 30.4.25 [75]; pages 138-149 of Ex MK-1.

⁷ E.g. COR.003.390.3024; COR.001.002.0499; COR.001.002.0784; COR.001.011.0042; COR.001.002.0612.

and editing before being published, saved as a discrete file relating to the particular project. Contrary to RS [101], the fact that the content was inputted into an internal RMS does not change the character of the compilation created by the BCI Researchers. Although it is not clear what is being suggested by the assertion that the RMS is “a different document”, there is no relevant “further process” which would change the authorship or originality of Project Reports.

- 25 The key question when computers are involved is the one posed by Perram J in *Telstra Corporation* at [113]: “Who were the people who reduced these directories to their material form?” The answer is clearly, the BCI Researchers (and, if necessary, Mr Krups and Mr Roy). Perram J observed in that case that “I have no doubt if the galley file (or some physical analogue of it) had been generated by humans this would have meant that the directories were original works”: *Telstra Corporation* at [113]. That is the case here. It is entirely unlike the “galley file” which lacked authorship in *Telstra Corporation* whose production was “almost entirely automated”: *Telstra Corporation* at [114].
- 26 Identity of authors: This is a false issue. Contrary to RS [102], it is not necessary for the applicant to “identify the identity of each BCI Researcher said to have authorised each Project Report”. In *Telstra Corporation* Keane CJ observed at [57] “One may accept that identification by name of each and every author is not necessary in order to make out a claim that copyright subsists”. Perram J also observed, at [61] that: “I would not accept that it is necessary to identify each author. All the Act requires in the case of s 32(2) is that there be an original work first published in Australia. The necessity for there to be an original work carries with it the necessity for there to be an author or authors but all that needs to be demonstrated is that such persons exist. Their identification is not legally required by the concept of an original work.”
- 27 Originality of expression: To the extent that RS [103] relies on the issue of human authorship, the “further point”, about the degree of intellectual effort, is comprehensively dealt with in the evidence and AS [82]. The Applicant does not rely on the “mere collection or collation of data” (cf RS [104]), or “industrious collection” (cf RS [106]) by the BCI Researchers. They decided what would be included in each compilation, after having undertaken their research activities.
- 28 Versions: The updating of Project Reports is a non-issue: cf RS [107]. It was not pleaded in the Defence. Whether or not each further Project Report has been amended substantially enough as to represent a separate work (in the sense identified in *JR Consulting & Drafting Pty Ltd v Cummings* (2016) 116 IPR 440; [2016] FCAFC 20 at [275]) makes no difference to the subsistence of copyright in the original Project Report.
- 29 Joint authorship: The Applicants rely on the principles of joint authorship to the extent that the Court has any concerns about the identification of the authors of the Project Reports. Its primary position is that the authors of each Project Report are the BCI Researchers who created each of them. If there is any issue arising, it will be addressed further at the trial.
- 30 Project Information and Project Spreadsheets: RS [109] misstates the Applicant’s case. The compilation reflected in the Project Information cannot sensibly be described as “unprotectable raw data” (RS [110]) – copyright protected compilations by their nature are collections of data.

The Applicant is not seeking to protect a database. The expression of the compilation is determined by the BCI Researchers (alternatively, with the contribution of Mr Krups and Mr Roy). Mr Roys' evidence is an answer to the issue raised around the originality of the Project Spreadsheets (cf RS [111]). RS [112] reflects a misunderstanding of the relationship between the Project Reports and the Project Spreadsheets (particularly the last sentence), which is clear on the evidence.

31 Infringement (by RP Data, Telus and Artis): There is evidence of each of the acts of infringement being committed by RP Data or its agents (cf RS [113] and [114]). RS [115] concedes, as it must, that even on the Respondents' case, infringement by reproduction has been established. Submissions based on the "project counting" theory (eg. RS [116] and RS [117]) fails because evidence indicates that the conduct was not confined to counting – it included export of the BCI Works, which the Respondents now concede occurred, in substantial numbers (and the discovered documents show they were used to create Comparison Documents and fill gaps in Cordell Connect: see Background Facts Parts B, C and D). So too is the submission at RS [120], which depends on facts contrary to the evidence. As to RS [118]-[119], infringement is pleaded in respect of the download of those documents.⁸ That is sufficient to result in a finding of infringement. The submission at RS [120] bears no relationship to the conduct engaged in by the Respondents and their agents.

32 Infringement by Telus: RS [121]-[124] are misdirected. The evidence discloses that Telus downloaded BCI Works and then copied them into the Respondents' shared drive, which its common ground was located in Australia. Examples of exports by Telus copied into the shared drive were discovered by RP Data. The maker of the reproduction on the share drive in such circumstances is Telus (or Telus and RP Data based on the reasoning of *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 at [79]).

33 Loss and damage: The new unpleaded defence regarding assignment of copyright at RS [125]-[130] should be rejected. In any event, the assignment of copyright and all causes of action, carries with it a right to sue for the loss and damage suffered prior to the assignment. None of the cases cited in RS [128] address the assignment or both the asset and the cause of action.

C THE NON-RP DATA RESPONDENTS

34 RS [131]-[132] largely avoids engaging with the contemporaneous documents that the Applicant relies upon — the emails, the internal communications, the instructions to conceal, the scale of the access and the admissions of "scraping". Those documents establish a group-wide strategy endorsed at all levels of the organisation in Australia — by the CEO (Ms Claes), the CFO (Ms Jennings and Mr McLachlan), the Chief Data Officer (Mr Evans), the National Sales Manager (Mr Hunt), and other senior management – and was approved, promoted and funded by the parent company, CoreLogic Inc. Assertions in affidavits to the contrary, such as from Mr Balas, do not address discovered documents: cf RS [131]-[132].

⁸ FASOC [73](b)-(d), [73A](b)-(d), [73B](b)-(d).

35 Similarly, the suggestion in RS [28]-[30] and [139] that the principles in *Blatch v Archer* have no role to play other than *Jones v Dunkel* inferences fails to grapple with the documents evidencing conduct and knowledge at senior levels which has been left unexplained – much of which has been detailed in the Applicant’s Background Facts documents and referred to in summary form in the AS (e.g. AS [20] regarding Mr Hunt) which the RS has conveniently ignored. The point at RS [29] goes nowhere: both Ms Claes and Ms Cliff were senior executive and legal officers of the Respondents at all relevant time (Ms Claes being the Managing Director from September 2016 and then CEO from 2017 and Ms Cliff the Head of Legal Australia 2014-2016, Associate General Counsel (International) from 2016 to January 2020 and General Counsel thereafter).

D CAUSATION, LOSS AND ACCOUNT OF PROFITS

Causation

36 The Respondents seek to set up a “straw man” in RS [134]-[135] and [138] by asserting that the Applicant’s causation case is “pleaded with surgical precision” but founded on inferences “stacked” on inferences that are “little more than speculation, guesswork and assumption”. Pages are devoted to such arguments by the Respondents, with little real engagement as to what is actually pleaded and no engagement with the documents that demonstrate the scope of their conduct and the reasons why they engaged in that conduct.

37 With respect to the pleading, the Respondents ignore:

- (a) The material facts pleaded in FASOC [43A]-[43C] are proved by the discovered documents themselves – they are not inferences.
- (b) The fact pleaded in FASOC [43D], that the information in Comparative Documents was presented to customers, is one which as a matter of common sense flows from the facts which the Respondents admit in the preceding paragraphs – that the Respondents created Comparative Documents for sales employees to present to customers and even had a process by which bespoke comparisons would be prepared and provided to sales employees (in respect of which they admit at least 21 instances of requests) – and discovered documents of instances of such presentations in emails.
- (c) The facts pleaded in FASOC [43E]-[43G], that customers were induced by information presented to them in Comparative Documents, also arises as a matter of common sense when regard is had to the documents discovered by the Respondents and their failure to explain them in their evidence or in the RS.

38 The discovered documents demonstrate that the purpose for which they engaged in data scraping of LeadManager was to increase the amount of customer revenue they received and damage the Applicant’s customer revenue. In that regard, the Respondents ignore the following in the AS:

- (a) The discovered documents show that RP Data and Cordell used the Comparative Documents to improve Cordell Connect (in particular by filling gaps or updating

information within Cordell Connect)⁹ and to slow the churn of customers away from them by creating comparisons between the contents of LeadManager and Cordell Connect, which were communicated to the customers and potential customers¹⁰: AS [18] and [44]. That strategy is reinforced by the many emails from Mr Hunt, the National Sales Manager, who consistently identified the information from LeadManager was essential for his sales team to win new business and retain existing customers: AS [20].

- (b) This was not conduct of one, or even a few, rogue employees; it was the conduct of the whole business. It was endorsed at all levels of the organisation: AS [7]. The scale of access identified at AS [5] identifies that it involved significant investment by the Respondents over 4 years, reflecting the commercial benefit they gained from it: 1,520 logins, 98,770 minutes (1,650 hours), 551,569 clicks, and 159,578 exports of Project Reports (from 1 January 2018), with at least 194,975 exports of data.
- (c) The Respondents' sales staff who used the information extracted from LeadManager were specifically instructed not to leave any evidence of the extraction of information with customers or prospective customers of the Respondents (described as "company policy" by Mr Richard Crnek, the Respondents' General Manager, Commercial and Building Services and another non-witness in this proceeding): AS [9] and [50]¹¹.
- (d) As identified in AS [10], numerous documents discovered by the Respondents contain candid admissions from employees about the nature of their conduct, including: (a) emails between employees documenting steps they took and the "significant lies" they told to obtain and maintain access to LeadManager;¹² (b) spreadsheets containing tens of thousands of Project Reports exported from LeadManager;¹³ (c) emails among researchers and third parties admitting to scraping LeadManager to update projects in Cordell Connect,¹⁴ and (d) emails to sales staff informing them of what they can say to customers about information they had taken from LeadManager and how that compared to information in Cordell Connect.¹⁵

39 There are other matters the Respondents overlook that are centrally relevant to causation.

40 *First*, causation is a question of fact (*March v Stramare*), reliance is not a substitute for causation (see, e.g., *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [143]) and, as identified in AS [21], where representations are intended to induce customers to act in that way, the court will infer that customer were induced to so act; the representation "need not be the sole inducement", it is "sufficient so long as it plays some part even if only a minor part in

⁹ FASOC [42C], [43], [43A]–[43D]; Particulars [42C], [43]–[43G]; Defence [42C], [43]. *Reid* 30.4.25 [43]–[47]; *Krupps* 30.4.25 [43]–[47].

¹⁰ FASOC [43A]–[43G]; Particulars [43A]–[43G]; Defence [43(iv)D], [43(v)E], [43(vi)E]. *Reid* 30.4.25 [43]–[47]; *Krupps* 30.4.25 [43]–[47].

¹¹ COR.003.244.8453. FASOC [43D]–[43E], [50]. *Reid* 30.4.25 [43]–[47]; *Krupps* 30.4.25 [44]–[47].

¹² E.g. COR.003.001.9666.

¹³ E.g. COR.001.001.0047 to COR.001.001.0074.

¹⁴ E.g. COR.003.010.7172, COR.003.393.5272, COR.003.076.8499, COR.003.004.5087.

¹⁵ E.g. COR.003.123.0521, COR.001.008.6218, COR.003.385.5948.

contributing to the” relevant loss: *Gould v Vaggelas* (1985) 157 CLR 215 at 236 and 238 (Wilson J). Causation is commonly established by inference – as identified in *Campbell v Backoffice at* [143]; see also *Hanave Pty Limited v LFOT Pty Limited* [1999] FCA 357 per Keifel J, referred to with approval in *Burke v LFOT Pty Ltd* [2002] HCA 17; 209 CLR 282 at [75] and *Lin v Zheng* [2023] NSWCA 174 at [52] (Payne JA, Bell CJ and White JA agreeing), and *Como Investments Pty Ltd (In Liq) v Yenald Nominees Pty Ltd* [1997] FCA 12.

- 41 *Second*, the Respondents say nothing about the principles set out at AS [114], by reference to cases concerning similar fact patterns,¹⁶ that the Applicant is not required to identify with precision exactly how many customers were affected by the conduct or call each and every customer to prove its loss; changes in the profit, revenue, or sales of the Respondents may be relevant to, or a proxy for, proving causation (as a matter of fact) and quantifying the Applicant’s loss. Mr Ross’ revenue trend analysis (Figure 2-2 and paragraphs 2.5.16-2.5.18 of Ross3), which establishes the Respondents increased the revenue they were otherwise trending to achieve in the period they had access to LeadManager, provides a cogent basis for finding causation to be established.
- 42 Having ignored those (inconvenient) matters, the Respondents focus on trying to pick apart the Confidential Annexures at RS [140]-[149]. Those confidential particulars are of the cohorts of customers who, as the Registrar ordered, were to the best of the Applicant’s knowledge induced by the Respondents to cease subscribing or not subscribe to LeadManager. They are, necessarily, cohorts of customers. This is not a case amenable to proof by direct evidence from any or every customer. Not only is the number of customers in the cohort too large, the Respondents are the only party with the specific knowledge as to what was said to them and what they did in response to it. That is their own making, having engaged in their conduct surreptitiously and instructing their sales employees not to keep a record of it.
- 43 It is readily apparent that the CRM records that have been left behind by the Respondents do not record what was said to customers, even in instances where it is clear from internal communications between employees of the Respondents that they were communicating with those customers about LeadManager.¹⁷ Nor is what customers were telling the Applicant reliable: Reid3 at [13]. Yet the Respondents seek to make a virtue of the CRM’s in RS [146] by saying they indicate there may potentially have been other reasons why customers acted in the way they did, which also ignores the authorities concerning causation identified above.

¹⁶ *Wilson v Smith* (1902) 2 SR (NSW) 174; *Prince Manufacturing Inc v ABAC Corporation Australia Pty Ltd* (1984) 4 FCR 288; *Typing Centre of NSW Pty Ltd v Northern Business College Ltd* [1989] FCA 148; *FAI General Insurance Co Ltd v RAI A Insurance Brokers Ltd* (1992) 108 ALR 479 (upheld on appeal: *RAIA Insurance Brokers Ltd v FAI General Insurance Co Ltd* (1993) 41 FCR 164); *Star Micronics Pty Ltd v Five Star Computers Pty Ltd (trading as Computerfair)* (1991) 22 IPR 473 at [48]; *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526; *Ductline Pty Ltd v Arcric Investments Pty Ltd* (1995) 32 IPR 419; *Acohs Pty Ltd v RA Bashford Consulting Pty Ltd* (1997) 37 IPR 542; *Yanmar Diesel Engine Co Ltd v Kama Diesel Australia Pty Ltd* [2002] FCA 1330 at [27]-[31]; *Madden v Seafolly Pty Ltd* (2014) 313 ALR 1 at [101]-[117] (Rares and Robertson JJ); *Harmonious Blend Building Corporation v Keene (No 2)* [2015] VSC 276 at [20]-[22]. See also *PSN Recruitments Ltd (t/a Cosmopolitan Recruitment) v Ludley* [2023] EWHC 3153; *Lopez v Gold Titan Pty Ltd* [2022] FCAFC 117; and *Central Innovation Pty Ltd (No 4) v Garner (No 4)* [2020] FCA 1796 (upheld on appeal: *Garner v Central Innovation Pty Ltd* [2022] FCAFC 64).

¹⁷ E.g. COR.003.328.3410; COR.003.041.9858; COR.003.041.7442; COR.003.041.7442; COR.003.257.4046; COR.003.497.240

44 RS [147] supports the Applicant's causation case: the evidence served by the Respondents, such as from Mr Murton, that they engaged in comparisons before they had access to LeadManager reinforces the role of comparisons in inducing customers. The only difference is that once the Respondents had access to LeadManager they were able to scale it up.

45 Finally, it is relevant to note that the Respondents' own expert acknowledges there are hundreds of customers in Confidential Annexure A who in the relevant period left the Applicant and thereafter took up a subscription with the Respondents (e.g. Asby 2 at [11.5.3(d)(iii)]) and hundreds of customers in Confidential Annexure C who were prospective customers of the Applicant but took up subscriptions with the Respondents (e.g. Ashby 2 at [11.6.5(d)(iii)]). Those customers generated millions of dollars in revenue for the Respondents.

Damages

46 RS [151]-[155] merely repeat the Respondents' submissions on causation. They do not engage with the principles regarding quantification of loss, particularly where their conduct has created difficulties of proving such loss precisely. Nor do the Respondents suggest that the expert evidence of Mr Ross cannot be relied on for that purpose. The particulars of customers in the Confidential Annexures A, B and C were sought by the Respondents and ordered by the Court. The Applicant was ordered to provide the best particulars it could. It did so. It never conceded, however, that this could be done precisely based on the conduct or that it would preclude the Court from assessing damages according to the authorities, doing the best it could.

Account of Profits

47 The Respondents seek to distance themselves from *Ancient Order* in RS [158]-[160]. *First*, they say it does not apply to breach of copyright or misuse of confidential information. That is wrong. *Ancient Order* was a breach of confidence case (as the first instance judgment demonstrates) and the plurality of the High Court identified at [9] that the relevant principles referred to in RS [159] arise from intellectual property cases. *Second*, the Respondents say this case, unlike *Ancient Order*, does not involve "wholesale acquisition of the business connections". It is worse. It concerns a group-wide strategy implemented over a four-year period to covertly access LeadManager for the purpose of improving Cordell Connect revenue through the use of information from LeadManager and presentation to customers. That is why the scope of the Respondents' conduct is of particular relevance to causation and loss. The same observations about the customer particulars made above apply equally here.

Exemplary damages

48 The Applicant seeks exemplary damages and additional damages for inducing breach of contract and copyright infringement in its Originating Application; the conduct which has been pleaded particularised in detail going to those claims, including concealment in FASOC [50], go directly to that relief: cf RS [165]-[166].