

## NOTICE OF FILING

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*Sia Lagos*

Registrar

### Important Information

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APPLICANT'S OUTLINE OF OPENING SUBMISSIONS

**A INTRODUCTION**

- 1 The Applicant<sup>1</sup> and the Respondents<sup>2</sup> are the main competitors in the building and construction information market in Australia. Customers who entered into subscription agreements were given access to the respective online platforms. The Applicant's platform is known as **LeadManager** and the Respondents' platform is known as **Cordell Connect**. The acquisition of customers, or potential customers, in such a market for services is known as "churn".
- 2 In late 2015, after the Second Respondent (**RP Data**) acquired the Third Respondent (**Cordell Information**) and the Cordell Connect business the Respondents' CEO, Ms Lisa Claes, observed that the business had [REDACTED] and considered initiatives to turn the business around, including by undertaking [REDACTED] and a [REDACTED] initiative led by her CFO Ms Lisa Jennings.<sup>3</sup> By March 2016, in pursuing the [REDACTED] initiative, the Respondents had resolved to [REDACTED]<sup>4</sup> into LeadManager, according to the Respondents' National Sales Manager, Mr David Hunt. Similar sentiments were expressed by the Respondents' Chief Data Officer, Kyle Evans, at the time (who approved processes to analyse the Applicant's data).<sup>5</sup> Neither Ms Claes nor Ms Jennings (still employees) nor Mr Hunt or Mr Evans (ex-employees) are witnesses called by the Respondents at the trial and no evidence is called from any witness to explain the initiative.
- 3 In order to gain access to LeadManager without detection, the Respondents used three front companies – Forum Group, SkillTech and Gingold – to act as 'dummy subscribers'. The front companies were selected based on their connection to the building and construction information market and personal affiliation with employees of the Respondents. The front companies entered into subscription agreements with the Applicant, pursuant to which they were allocated confidential User Details and Passwords enabling access to LeadManager and the Respondents reimbursed them for the cost of the subscriptions, and obtained the User Details and Passwords from them. It is uncontroversial that the Applicant would not have granted access rights to the Respondents or to these front companies if the Applicant had known the Respondents were involved, received the User Details or that they would access LeadManager.<sup>6</sup> This means all of the access gained by the Respondents and their agents through the use of the User Details and Passwords was clandestine and unauthorised.

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<sup>1</sup> "Hubexo", formerly "BCI Media Group".

<sup>2</sup> "Cotality", formerly "CoreLogic". FASOC [2]–[4], [6]; Particulars [2]–[6]; Defence [2]–[4], [6]. Reid 30.4.25 [17]–[20] (competition between LeadManager and Cordell); Krups 30.4.25 [43]–[47].

<sup>3</sup> Email from Claes 5.7.17(COR.003.121.1237; COR.003.121.2808; and COR.003.121.2809).

<sup>4</sup> Email from Mr Hunt to Michael Hooper and Richard Crnek on 16.3.16 (COR.001.015.0001)

<sup>5</sup> See emails on 6.12.16 (COR.003.905.2974) and 4.3.17 (COR.001.002.0153).

<sup>6</sup> Defence [55B], [82B] and [99B]: "BCI Media Group would never have granted RP Data any licence"; Reply [7].

- 4 The Respondents' covert access to LeadManager via the front companies' User Details continued for 4 years – from 2016 to 2020 (the **Access Period**). By mid-June 2019, Ms Jennings observed that [REDACTED] [REDACTED]<sup>7</sup> As late as August 2019, the Respondents still saw the need to continue accessing LeadManager to try and [REDACTED]<sup>8</sup> between their product offering and LeadManager. Numerous documents have been discovered by the Respondents, and will be tendered, which evidence their efforts to use their access to LeadManager to *close that gap*.
- 5 The scale of access to LeadManager and extent of information extracted by the Respondents in the Access Period is staggering. Records logged in the computer systems of the Applicant indicate that there were hundreds of thousands of instances of access. An Activity Report extracted from the Applicant's computers discloses the following access by the Subscriber IDs for the accounts of the relevant front companies:<sup>9</sup> first access on 12 July 2016, last access on 27 March 2020, a total of 1520 logins, a total time on LeadManager of 98,770 mins (equivalent to 1,650 hours), total clicks of 551,569 and exports of project reports of 159,578 (from 1 January 2018). Bearing in mind the limitations in the records discovered by the Respondents at least the following number of Project Reports were exported or copied: 35,397 (2017), 62,676 (2018), 75,574 (2019) and 21,328 (2020).<sup>10</sup> This is plainly activity on an industrial scale.
- 6 The nature and extent of the access by the Respondents, and their agents, and the use in the pursuit of their business objectives will be the subject of extensive documentary tender from the trove of documents they discovered (key parts of which are identified in the Applicants' summaries of background facts). In summary, the documents reveal that the Respondents: accessed LeadManager and extracted information in a high planned and systematic way; the volume of information taken was enormous; the principal actors were the Respondents' employees or agents (acting both with and without the assistance of robotic computer programs); and the Applicant's information was shared widely within the Respondents' business, including with research staff to improve the information in Cordell Connect and sales staff to use in their sales pitches to customers or potential customers.
- 7 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: the CEO (Ms Claes), the Chief Financial Officer of its US parent company and Director (Mr Jim Balas), the CFO's (Ms Jennings and Mr Scott McLachlan), the Chief Data Officer (Mr Kyle Evans), and other senior management such as the National Sales Manager (Mr Hunt), the Head of Research (Mr Simba Nikurawu), Senior Leader, Operations (Ms Sarah Edwards), the General Counsel (Ms Agrita Cliff), Chief Operating Officer (Ms Monisha Craig)) – none of whom will be giving evidence, other than (potentially) Mr Nikurawu. This has significance for issues of proof (see below).
- 8 The conduct was the result of senior management-level decisions, sophisticated planning, covert execution and ongoing concealment to prevent detection for 4 years. Manuals were

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<sup>7</sup> Email from Lisa Jennings to Jim Balas dated 4.6.19(COR.003.128.8988).

<sup>8</sup> Email from Simba Nikurawu to Loren Wakeley dated 1.8.19 (COR.001.002.0208).

<sup>9</sup> Roy 30.4.25 [91].

<sup>10</sup> Roy 30.4.35 [124].

created with step-by-step guidance for employees and agents to access LeadManager for maximum benefit to the Respondents. The individuals who accessed LeadManager were instructed to use surreptitious and deceptive means, such as using non-CoreLogic IP addresses, VPN's, proxy servers and other processes to minimise the chance of detection by the Applicant. Their efforts were successful until 2020, when they were discovered.

- 9 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 ██████████ by Mr Richard Crnck, the Respondents' General Manager, Commercial and Building Services and another non-witness in this proceeding). Collectively, this was, conscious wrongdoing for commercial improvement and gain. It is the kind of unlawful and commercially dishonest behaviour that the Court could not condone as acceptable business practice in Australia (the Respondents' attitude to the case appears to be that they were *entitled* to behave this way).
- 10 Numerous documents discovered by the Respondents contain candid admissions from employees about the nature of their conduct. As the Court recognised in *BCI Media Group Pty Ltd v CoreLogic Australia Pty Ltd (Amendment and Strikeout)* [2025] FCA 1030 at [17]: "Much of what the applicant knows about the respondents' alleged conduct has been gleaned through discovery – both pre-trial, and over the last few years." These documents include: (a) emails between employees documenting steps they took and the ██████████ they told to obtain and maintain access to LeadManager;<sup>11</sup> (b) spreadsheets containing tens of thousands of Project Reports exported from LeadManager;<sup>12</sup> (c) emails among researchers and third parties admitting to scraping LeadManager to update projects in Cordell Connect,<sup>13</sup> 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.<sup>14</sup> These employees are not the witnesses the Respondents have put forward to give evidence in answer.
- 11 Remarkably, none of the evidence in answer served by the Respondents directly engages with any of these documents that the Respondents discovered (even if it will be read, which is doubtful). Only two factual witnesses have been put forward by the Respondents – Ms Alexandra Bolles (sales) and Mr Nikurawu (research) – to give evidence on oath. Their written evidence makes little attempt to explain the conduct and is contradicted by contemporaneous records discovered by the Respondents. It is a precarious evidentiary position in which the Respondents enter the trial, when faced with the overwhelming body of evidence which arises on the Respondents' own discovered documents the effect of which is undeniable.
- 12 There is no expression or evidence of contrition, regret or acknowledgement of wrongdoing.<sup>15</sup> Nothing. How, then, do the Respondents meet such a case? *First*, by pleading bare denials and evasive non-admissions to put off having to confront the fact that they must have infringed the

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<sup>11</sup> E.g. COR.003.001.9666.

<sup>12</sup> E.g. COR.001.001.0047 to COR.001.001.0074..

<sup>13</sup> E.g. COR.003.010.7172, COR.003.393.5272, COR.003.076.8499, COR.003.004.5087.

<sup>14</sup> E.g. COR.003.123.0521, COR.001.008.6218, COR.003.385.5948.

<sup>15</sup> Despite some employees questioning whether the conduct was permitted.

rights of the Applicant when undertaking this conduct, as their own untutored discovered documents acknowledge. The Applicant's repeated complaints about this type of defence have been well ventilated, but unsuccessful in causing any change in behaviour. The Applicant has also attempted to compel the Respondents to specifically meet the pleaded allegations – they have refused and opposed each time, invoking permissive Court rules while taking numerous pleading points about the Applicant's case. This conduct is incompatible with the obligation to focus on the real issues in the case, given the objective facts arising from the documents.

- 13 *Secondly*, the Respondents have taken steps to actively conceal their conduct post filing. They objected to production of documents to identify who gained access to LeadManager and how many times. They produced no log files from their own computer network. They failed to produce documents ordered to be produced in the preliminary discovery until this case. They also egregiously failed to produce the UiPath software as they were ordered to do in the preliminary discovery case. More recently they have attempted to block the Applicant's reliance on the contemporaneous documentary evidence, even where it involves tender of documents the Respondents have discovered. The rationale for this unconventional objection has not yet emerged, but it is apparently pursued on the basis that such documents are *not relevant* to the issues (even though the documents answered specific discovery categories, which were ruled by the Registrar to be relevant to the issues). These tactics are a throw-back to litigation practices that were long ago banished from this Court. They have materially and unnecessarily expanded the issues in the case and greatly increased the costs to all parties.
- 14 *Thirdly*, the Respondents appear to be preparing to challenge the use by the Court of a sample mechanism to address evidence and making findings based on samples, with application to the broader volume of evidence. The issue of sampling is an issue for both parties, and the Court, given the scale of the Respondents' misconduct – involving mass infringement and breaches of confidential information which was of the Respondents' own making). Refusing to engage with a sampling process is obstructive and the respondents and their legal representatives will, again, run headlong into the requirements of ss 37M and 37N if they persist with this approach.
- 15 *Fourthly*, the Respondents advance no positive case of their own. They instead rely on attempting to erect difficulties of proof, often seeking to benefit from their own conduct in directing their employees not to create incriminating records or to destroy incriminating records to frustrate the later proof of wrongdoing. None of the Respondents' witness attempts to explain the discovered documents which have been long particularised in the FASOC – at the Respondents' insistence. There would be no up-side in the Respondents doing so, given the tension between their limited grounds of defence and the discovered documents to be tendered. The Court will hold the Respondents strictly to their forensic choices at the trial.
- 16 One example illustrates the unreality of the Respondents' approach. Despite denials that the Respondents "scraped" data from LeadManager,<sup>16</sup> the two witnesses of fact the Respondents' have served affidavits from, Ms Bolles (sales) and Mr Nikurawu (research), had the following

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<sup>16</sup> Defence [54].

instant message exchange on 8 May 2020 (which they do not address in their affidavits)<sup>17</sup> and which occurred after the Applicant had become aware of the Respondents' conduct:<sup>18</sup>

[REDACTED]

17 *Fifthly*, and in the light of such damning admissions, the Respondents' energy has been more focussed on the questions of causation and quantification of loss and damage. In this respect (1) they seek to establish that as a matter of causation, the Applicant could not have suffered *any* loss or damage, and that the Respondents ought not be required to disgorge *any* profit obtained from their conduct, and (2) seek to complicate the assessment of quantum.

18 The Respondents' approach lacks common sense and any connection to the reality of this case. Any successful implementation of the strategy by the Respondents to redress the churn of customers to the Applicant *must* have had the consequence that it caused loss and damage to the Applicant when customers or potential customers went to the Respondents instead. The concept of churn in a market such as this with two major participants in close competition means that when one succeeds in attracting customers it does so at the expense of the other. Once that basic principle is understood, much of the Respondents' attack on causation falls away.

19 The denials that the Respondents benefited from the conduct are as illogical. How could the Respondents seriously suggest that they obtained no benefit in the face of hundreds of documents they discovered which record the clear commercial purpose of their conduct and urgent need to use the information to compete with the Applicant, in a market in which they were losing ground? Why, it can be posed rhetorically, would the Respondents persist with the conduct *for 4 years*, reporting on it regularly, if it generated no commercial benefit for them?

20 Here the Court will not be left to wonder as there are numerous documents that provide the answers, which will be tendered in the course of the trial. For example, Mr Hunt (the National Sales Manager), and other senior members of his sales team (whom, like Mr Hunt, will not be giving evidence), candidly recorded in contemporaneous documents exactly why the Respondents pursued this strategy of gaining access to LeadManager:

<sup>17</sup> COR.003.194.6267.

<sup>18</sup> Bolles 12.9.25 [39], [52]. Nikurawu 17.10.25 [4], [8(b)], [11], [15]-[16].

- (a) [REDACTED]  
[REDACTED]  
[REDACTED]<sup>19</sup>
- (b) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>20</sup>
- (c) [REDACTED]  
[REDACTED]  
[REDACTED]<sup>21</sup>
- (d) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>22</sup>
- (e) [REDACTED]  
[REDACTED]<sup>23</sup>

21 With such statements, causation will be established, based on a common-sense approach to issues of proof which the Court is bound to apply. Causation is a question of fact to be determined by the application of common sense to the facts of each case: *March v Stramare*; *Bennett v Minister for Community Welfare* [1991] HCA 12; 171 CLR 506 at 515 (Mason CJ, Toohey and Gaudron JJ agreeing), at 522 (Deane J), at 530 (McHugh J). The Respondents had a systematic process in which sales staff used information from LeadManager to procure customers to cease subscribing to LeadManager and to subscribe to Cordell Connect. 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 contributing to the” relevant loss: *Gould v Vaggelas* (1985) 157 CLR 215 at 236 and 238 (Wilson J). Such an inference is to be more readily drawn where the business of the representor is to make such representations and where the representor’s business benefits from creating such an impression: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54 at [55] (French CJ, Crennan, Bell and Keane JJ). The Respondents cannot avoid these principles by demanding levels of proof that the authorities indicate are not required.

22 The proper approach to assessing a circumstantial or inferential case was articulated in *Transport Industries Co Ltd v Longmuir* [1997] 1 VR 125 by Winneke P at 128-129 and Tadgell JA at 141. The question of whether an inference is open and can be drawn as a matter of probability is to be determined by considering the combined weight of all the relevant

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<sup>19</sup> Email from David Hunt to other employees of the Respondents dated 10.4.16: COR.001.015.0009.

<sup>20</sup> Email from David Hunt to other employees of the Respondents dated 4.7.17: COR.003.018.9510.

<sup>21</sup> Email from Zarah Hammoud to other employees of the Respondents dated 27.10.17: see COR.003.192.1260, COR.001.009.0884 and COR.001.009.0885.

<sup>22</sup> Email from David Hunt to other employees of the Respondents dated 10.8.17: COR.003.002.0597.

<sup>23</sup> Email from David Hunt to other employees of the Respondents dated 1.2.18: COR.003.018.8132.

established facts, rather than by considering each fact sequentially and in isolation. This approach has been consistently cited with approval by the Full Court of the Federal Court: *Seven Network (Operations) Limited v Fairfax Media Publications Pty Ltd* [2023] FCAFC 185 at [40]; *Jadwan Pty Ltd v Rae & Partners (A Firm)* (2020) 278 FCR 1 at [445]-[446]; *Australian Broadcasting Corporation v Chau Chak Wing* (2019) 271 FCR 632 at [134]).

- 23 Relevantly in *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5, Dixon, Williams, Webb, Fullagar and Kitto JJ explained the requisite burden of proof in civil cases (emphasis added):

*Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence while [in] the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort where direct proof is not available it is enough [if] the circumstances appearing in the evidence give rise to a reasonable and definite inference ...*

- 24 This is also a case in which the principles in *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970 will play a significant role, given the forensic choices made by the Respondents. As Lord Mansfield observed, evidence “is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted”. In *Ho v Powell* [2001] NSWCA 168; (2001) 51 NSWLR 572 at [14]-[15], Hodgson JA (with whom Beazley JA agreed) explained how this principle would apply in practice:

*[I]n deciding facts according to the civil standard of proof, the court is dealing with two questions: not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision ...*

*In considering the second question, it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so ...*

- 25 In this context, the failure by a party to deny or explain facts which it is within that party’s power to explain or deny “gives a colour to the other evidence against him”: *Quintis Ltd (Subject to DOCA) v Certain Underwriters at Lloyd’s London* [2021] FCA 19 at [254] (Lee J), citing *Boyle v Wiseman* (1855) 156 ER 598 at 600 per Baron Alderson. This maxim also bears upon the appropriateness of deciding whether a fact has been proved when only limited evidence is available. Where material evidence is peculiarly within a party’s knowledge, it may be sufficient for the opposing party to adduce slight evidence of a matter in issue: *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2013] NSWCA 453; 87 NSWLR 284 at 292 [26] (Beazley P).

- 26 The rule in *Jones v Dunkel* (1959) 101 CLR 298 will also play a role in this case permitting the Court to: (1) infer that the evidence of the absent witness would not assist the case of that party; or (2) draw an inference unfavourable to that party with greater confidence: *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361 (Heydon, Crennan and Bell JJ) at [63]; *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; 247 CLR 345 at [232] (Heydon J). Given the limited evidence advanced by the Respondents, along with their unexplained failure to call any relevant witnesses whose state of knowledge is

in question, the Court is “entitled to be bold” in drawing such inferences: see *Chong v CC Containers Pty Ltd* [2015] VSCA 137; 49 VR 402 at [212] (Redlich, Santamaria and Kyrou JJA).

27 These principles were also conveniently summarised by Gleeson J in *BCI Finances Pty Ltd (in liq) v Binetter (No 4)* [2016] FCA 1351 at [122]-[124], and are relied on by the Applicant.

## **B OUTLINE OF FACTS**

### **B.1 The Parties**

28 The Applicant’s business was founded by Mr Matthias Krups in around 1998 in Singapore. It entered the Australian market in around 2002, as the Applicant.<sup>24</sup> It was part of a wider corporate group which provided building construction information in Australia as well as nine other countries in Asia, the US and New Zealand. Now Hubexo, as the corporate owner of BCI, has expanded to more than 20 countries and has a workforce over 2,500 employees worldwide.<sup>25</sup> Hubexo is the world’s leading provider of commercial construction data.<sup>26</sup>

29 The Respondents’ business has been operating in the Australian market for longer than LeadManager, having been founded in 1968. As mentioned, the Cordell Connect business was acquired by RP Data in around October 2015.<sup>27</sup> The Fourth Respondent (**CoreLogic Inc**) is the ultimate holding company of the First Respondent (**CoreLogic Australia Pty Ltd**).<sup>28</sup>

### **B.2 LeadManager**

30 LeadManager combines live construction project information and Customer Relationship Management (CRM) capabilities to allow subscribers to locate and manage new projects and sales opportunities, sort and distribute leads in relation to building projects, obtain verified contact details for key decision-makers on building projects, identify and submit quotes to multiple tendering parties for building projects and download data fields and building project related materials.<sup>29</sup> This allows subscribers to tender and quote for construction contracts.

31 The cornerstone information in LeadManager for each project is known as the Project Report.<sup>30</sup> It is gathered by BCI researchers from a combination of public and private sources.<sup>31</sup> Much of this information is not publicly available and has to be obtained from individual government organisations, private companies or individuals associated with projects.<sup>32</sup>

32 The Applicant’s research team, at the relevant time, consisted of around 120 employees (110 in the Philippines and 10 based in Australia). Each research team employee was employed either by the Applicant or its Asian associate company, referred to in the evidence as BCI Asia,

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<sup>24</sup> FASOC [11]–[12]; Particulars [11]–[12]; Defence [11]–[12]. *Krups* 30.4.25 [14], [26].

<sup>25</sup> *Krups* 30.4.25 [24]–[27].

<sup>26</sup> *Krups* 30.4.25 [25].

<sup>27</sup> FASOC [3]–[4]; Particulars [3]–[4]; Defence [3]–[4].

<sup>28</sup> FASOC [5], [10]; Particulars [5], [10]; Defence [5], [10].

<sup>29</sup> FASOC [15]–[17]; Particulars [15]–[17]; Defence [15]–[16]. *Krups* 30.4.25 [28]–[31]; *Aizenberg* 30.4.25 [20]–[24]; *Roy* 30.4.25 [19]–[23].

<sup>30</sup> FASOC [56]–[72].

<sup>31</sup> *Krups* 30.4.25 [42]–[47]; *Aizenberg* 30.4.25 [22], [39]–[52]; *Roy* 30.4.25 [21]–[23], [31]–[33].

<sup>32</sup> FASOC [13]–[17]; Particulars [13]–[17]; Defence [13]–[17]. *Krups* 30.4.25 [35]–[37]; *Aizenberg* 30.4.25 [43]–[47].

which invoiced the Applicant monthly for work undertaken by the researchers on its behalf. The rights in the intellectual property created by researchers employed by BCI Asia were assigned to the Applicant prior to the filing of the proceeding (along with the rights of action).<sup>33</sup> There are two other copyright works in suit: Project Information (a set of core information about each project in the Project Reports) and Project Spreadsheets (pre-defined sets of data exported for selected projects, capable of being exported from LeadManager).<sup>34</sup>

33 The data available to subscribers in LeadManager is securely stored on the Applicant's servers located in Australia and only made available to subscribers via IT systems with authentication safeguards.<sup>35</sup> That data is protected from unauthorised access by confidential usernames and passwords issued by the Applicant, as well as other technical features which were developed by the Applicant to prevent unauthorised access and use of LeadManager,<sup>36</sup> and contractual obligations in subscription agreements. Evidence of the security measures, including software to track user activity, is given by the Applicant's CTO, Mr Nikhil Roy. The Applicant claims confidentiality in the collection of information in LeadManager, which was created using the Applicant's skill and judgment, and protected by access controls on the system.<sup>37</sup>

34 Access to LeadManager is only permitted to organisations that have entered into subscription agreements with the Applicant and have been supplied with confidential usernames and passwords which enable a user to log into the LeadManager system.<sup>38</sup> Subscriptions range from single year to multi-year contracts, with varying degrees of fees depending on the scope of the information the subscriber seeks to access and the functionality that they choose to use.<sup>39</sup>

35 Relevant subscriber terms and conditions, as pleaded in the FASOC, include confidentiality restrictions on the use and disclosure of user details, passwords and information in LeadManager, and prohibitions on the use of computer programs that intercept or expropriate any information from LeadManager.<sup>40</sup> Tellingly, when it comes to assessing the plausibility of the Respondents' bare denials and non-admissions, the subscription agreement which the Respondents require customers to enter into for access to Cordell Connect contains equivalent restrictions and prohibitions.<sup>41</sup> That is highly relevant to the dispute over the confidentiality of the information in LeadManager. It is obvious why such restrictions are imposed – without them, the information would be accessible by anyone, undermining the business model.

36 The only dispute raised by the Respondents with respect to confidentiality and copyright subsistence is based on a contention that each individual piece of information recorded in project reports is originally sourced from material that a member of the public may be able to

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<sup>33</sup> FASOC [62]; [70]–[71]. Krups 30.4.25 [38]–[39]; Aizenberg 30.4.25 [25]–[31].

<sup>34</sup> FASOC [56]. Krups 30.4.25 [41]–[57]; Aizenberg 30.4.25 [22], [39]–[52]; Roy 30.4.25 [24]–[30]

<sup>35</sup> FASOC [14]–[20]. Roy 30.4.25 [34]–[40], [55]–[60]; Aizenberg 30.4.25 [20]–[24].

<sup>36</sup> FASOC [14]–[20]. Roy 30.4.25 [34]–[40], [55]–[60]; Aizenberg 30.4.25 [20]–[24].

<sup>37</sup> Roy 30.4.25 [34]–[40], [55]–[60].

<sup>38</sup> FASOC [18]–[21]. Krups 30.4.25 [32], [58]; Reid 25.6.25 [8]–[14]; Roy 30.4.25 [34]–[40].

<sup>39</sup> Reid 25.6.25 [8]–[14]; Krups 30.4.25 [58].

<sup>40</sup> FASOC [19]–[21], [51]–[53]; Particulars [19]–[21]; Defence [51]–[53]. Krups 30.4.25 [58]–[62]; Roy 30.4.25 [55]–[60].

<sup>41</sup> Krups 30.4.25 [75]; pages 138-149 of Ex MK-1.

obtain if they contact the right people such that the project reports cannot be confidential or copyright.<sup>42</sup> As set out below, that argument ignores the well-established principles of copyright in compilations and evidence regarding the specific effort in sourcing, compiling and presenting the information in Project Reports.<sup>43</sup> If that were not the case, there would be no value to customers paying BCI and CoreLogic for subscriptions to LeadManager and Cordell Connect.

### **B.3 The Respondents' conduct**

37 In February 2020, the Applicant became aware of anomalous activity on LeadManager and commenced investigations.<sup>44</sup> One employee became aware that there was a high volume of clicks being recorded against a subscriber account (Gingold) and the IP address for the computer accessing LeadManager during those sessions was registered to RP Data.<sup>45</sup>

38 The Applicant permanently suspended Gingold's access to LeadManager on 27 March 2020

39 Thereafter a request was sent by the Applicant's solicitors to the Respondents to produce documents that may be relevant to a decision whether the Applicant commence proceedings against them.<sup>46</sup> When documents were not produced, the Applicant filed for preliminary discovery.<sup>47</sup> The application was contested by the Respondents (although no evidence was led by them) and the Court ordered production.<sup>48</sup> It became necessary for two further production orders to be made against the Respondents, to ensure compliance.<sup>49</sup> The ensuing discovery exposed four years of industrial scale hacking and data scraping as outlined below.

40 The discovered documents show that between 2016 and 2020, RP Data and Cordell accessed LeadManager by reimbursing the aforementioned front companies, Forum Group, SkillTech and Gingold, for subscriptions they obtained to LeadManager in their own names.<sup>50</sup> The front companies then provided their login details to RP Data and Cordell, after which RP Data and Cordell accessed LeadManager and "scraped" content from it.<sup>51</sup> RP Data and Cordell also used Telus International (whose employees accessed and scraped information from LeadManager for them) and, later, Artis Pty Ltd (who programmed a "bot" using software called UiPath to login to scrape data) to undertake this conduct on their behalf.<sup>52</sup>

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<sup>42</sup> Defence [58(b)], [60(b)], [61], [86(b)], [88] and [95].

<sup>43</sup> Krups 30.4.25 [42]–[49]; Aizenberg 30.4.25 [39]–[52]; Roy 30.4.25 [24]–[30].

<sup>44</sup> Aizenberg 30.4.25 [3]; Roy 30.4.25 [1], [6]; McKemmish 15.5.25 [27], [30]; Krups 30.4.25 [66]; Reid 30.4.25 [53].

<sup>45</sup> Roy 30.4.25 [83]–[84]; McKemmish 15.5.25 [29(c)], [46(c)].

<sup>46</sup> Aizenberg 30.4.25 [3]; Roy 30.4.25 [1], [6].

<sup>47</sup> Krups 30.4.25 [2]; Aizenberg 30.4.25 [3].

<sup>48</sup> *BCI Media Group Pty Ltd v Corelogic Australia Pty Ltd* [2020] FCA 1556.

<sup>49</sup> *BCI Media Group Pty Ltd v Corelogic Australia Pty Ltd (No 2)* [2021] FCA 382; *BCI Media Group Pty Ltd v CoreLogic Australia Pty Ltd (No 3)* [2021] FCA 884; *BCI Media Group Pty Ltd v CoreLogic Australia Pty Ltd (No 4)* [2021] FCA 1285.

<sup>50</sup> FASOC [24]–[39], [41A]; Particulars [24]–[39], [41A]; Defence [24]–[39], [41A]. McKemmish 15.5.25 [27], [29(b)]–[29(e)], [46(c)]; Roy 30.4.25 [34]–[40].

<sup>51</sup> FASOC [24]–[41A], [41AA]; Particulars [24]–[41A]; Defence [24]–[41A], [41AA]. McKemmish 15.5.25 [27], [29(b)]–[29(e)], [42]–[45]; Roy 30.4.25 [34]–[40].

<sup>52</sup> FASOC [41B]–[41E]; Particulars [41B]–[41E]; Defence [41B], [41C], [41D], [41E]. McKemmish 15.5.25 [29(b)]–[29(e)], [42]–[45], [46(c)]; Roy 30.4.25 [41]–[47].

- 41 The documents which RP Data and Cordell created and caused to be created containing information scraped from LeadManager is defined in the FASOC as “Comparative Documents”.
- 42 The Comparative Documents came to be created in three ways.<sup>53</sup>
- 43 *First*, RP Data, Cordell, Telus and a bot created by Artis used an export function within LeadManager to create spreadsheets containing information from Project Reports in LeadManager (which were saved into shared folders on the CoreLogic Parties’ network, accessible to their employees, and emailed to employees).<sup>54</sup> *Second*, employees of RP Data searched for and copied specific information about projects within LeadManager into emails or other documents.<sup>55</sup> *Third*, the bot programmed by Artis, in addition to exporting information in Project Reports, ran searches across the platform and copied tallies of information in LeadManager (such as the number of projects) for use by RP Data and Cordell.<sup>56</sup>
- 44 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)<sup>57</sup> and to slow the churn of customers away from them by creating comparisons between the contents of LeadManager and the contents of Cordell Connect, which were communicated to the customers and potential customers.<sup>58</sup> The Respondents’ denial of this conduct cannot withstanding scrutiny when reference is made to their discovered documents.
- 45 The Respondents have made only very limited admissions as to the extent of their conduct, thereby refusing to disclose the true extent of the conduct. RP Data admits accessing LeadManager, but not the extent of access, and only admits to exporting one Project Report.<sup>59</sup> It is as untenable, as it is a factor aggravating the harm caused by the unlawful conduct, which will be reflected in the award of any additional damages in the case. As observed above, a combination of the exported spreadsheets discovered by the Respondents and BCI’s activity reports generated from its IT system record that there were at least 194,975 exports of data from the platform by CoreLogic and its employees over the Access Period.<sup>60</sup> This is not *one instance*.
- 46 Remarkably, in the face of this evidence, the Respondents call not a single witness who created or programmed the bot, or any evidence from anyone who operated it to explain how they used it to assist the business of Cordell Connect. Instead, they rely entirely on an outsider, Mr Whitbourn (independent IT expert), with no familiarity with their systems, or the software, to try

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<sup>53</sup> FASOC [42]–[42C]; Particulars [42]–[42C]; Defence [42]–[42C]. Roy 30.4.25 [41]–[47]; McKemmish 15.5.25 [42]–[45].

<sup>54</sup> FASOC [42(a)]–[42(c)], [42C]; Particulars [42]–[42C]; Defence [42(a)]–[42(c)], [42C]. Roy 30.4.25 [41]–[47]; McKemmish 15.5.25 [42]–[45].

<sup>55</sup> FASOC [42(a)]–[42(b)], [42C]; Particulars [42]–[42C]; Defence [42(a)]–[42(b)], [42C]. McKemmish 15.5.25 [29(e)], [42]–[45]; Roy 30.4.25 [41]–[47].

<sup>56</sup> FASOC [41D], [42(a)]–[42C]; Particulars [41D], [42]–[42C]; Defence [41D], [42]. McKemmish 15.5.25 [29(b)]–[29(e)], [42]–[45]; Roy 30.4.25 [41]–[47].

<sup>57</sup> FASOC [42C], [43], [43A]–[43D]; Particulars [42C], [43]–[43G]; Defence [42C], [43]. Reid 30.4.25 [43]–[47]; Krups 30.4.25 [43]–[47].

<sup>58</sup> FASOC [43A]–[43G]; Particulars [43A]–[43G]; Defence [43(iv)D], [43(v)E], [43(vi)E]. Reid 30.4.25 [43]–[47]; Krups 30.4.25 [43]–[47].

<sup>59</sup> Defence [42], [43].

<sup>60</sup> Roy 30.4.25 [61]–[62], [85]–[146]. McKemmish 15.5.25 [27], [46(b)].

and fill the evidential gap. There are numerous problems with his evidence, and, like Mr Ashby, he appears to have adopted an unreasonably defensive posture, on instructions.

- 47 In the joint report date 13 March 2026 of the forensic IT experts, the experts agree that:
- (a) the Respondents have discovered code files (in text form) for two bots known as the Extract Program and the Comparison Program.<sup>61</sup>
  - (b) the core functions of the Extract Program were to:<sup>62</sup> log into LeadManager using credentials from the front companies; run a search for projects over the last 7 days; use the export to Microsoft excel function in LeadManager to export all of the search results (i.e. export the information in the Project Reports), and combine the exports into a single Microsoft Excel spreadsheet.
  - (c) the core functions of the Comparison Program were to:<sup>63</sup> check the day of the month and only run between the 25th and 31st of each month; log into both LeadManager and Cordell Connect; perform multiple searches by State/Territory, Category, and Project Stage (Planning, Tender, Construction), copy the Total Project count from both systems, and populate a Microsoft excel spreadsheet.
- 48 Mr Whitbourn’s disagreement with Mr McKemish in other respects is immaterial. There are irregularities in the way he conducted himself, which the Applicant will submit greatly diminishes the credibility of his evidence. His debating the meaning of the word “scraping” is curious, because it closely mimics the argumentative position taken by the Respondents’ solicitors despite the Respondents’ own witnesses describing their efforts to extract information from LeadManager as scraping (as highlighted in the example above of Ms Bolles and Mr Nikurawu acknowledging their “scraping” activities). Similarly, Mr Whitbourn’s attempt to challenge the evidentiary veracity of the log files extracted from the Applicant’s system by its Chief Information Officer is highly unsatisfactory and fails to account for the entries in the computer log files which refer to IP addresses of RP Data. The Court will be taken to the log files during the trial.
- 49 RP Data admits the creation of Comparative Documents (which compared information in LeadManager to information in Cordell Connect) and that it had a process whereby its employees could request documents for presentation to customers and that it provided its employees sales scripts as to what should be said to customers about the information in LeadManager to procure sales.<sup>64</sup> However, the admissions are limited to “the emails expressly particularised”,<sup>65</sup> being the only emails they discovered, despite documents demonstrating that they rolled out the comparative information to their sales force as the central message made in their sales pitches, and directed their sales force not to leave a record of the information.<sup>66</sup>

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<sup>61</sup> Joint Expert Report paras 2.1.1, 4.1.1, 6.1.1(a)(ii) and 6.1.5.

<sup>62</sup> Joint Expert Report para 3.1.1.

<sup>63</sup> Joint Expert Report para 5.1.1.

<sup>64</sup> Defence [43A]–[43C].

<sup>65</sup> Defence [43D].

<sup>66</sup> FASOC [43D]–[43E], [50]; Particulars [43D]–[43E], [50]. Reid 30.4.25 [43]–[47]; Krups 30.4.25 [44]–[47].

50 Clearly, it cannot be denied that the Comparative Documents were used systematically by Cordell Connect's salesforce to procure customers, as Cordell Connect's national leader of sales emphasised to his team the importance of using information from LeadManager to retain customers and win new customers.<sup>67</sup> The discovered communications are the limited instances in which the Respondents have retained documents identifying what was said to customers based on the Comparative Documents.<sup>68</sup> The lack of records of communications with customers referring to information in Comparative Documents is explained by the Respondents' own conduct: sales staff were instructed to present Comparative Documents to customers and prospective customers but that [REDACTED] and [REDACTED] with the stated reason being [REDACTED].<sup>69</sup>

51 The denial that the Respondents used information from LeadManager to improve Cordell Connect is contradicted by documents discovered showing their research staff routinely checking for information in LeadManager that needed to be added to Cordell Connect and the process of recalling their project reports to update them with information from LeadManager.<sup>70</sup>

52 The Court will find the attempt to quarantine the conduct, and responsibility, to RP Data unconvincing. The evidence will establish that the conduct was by both RP Data and Cordell, both of which issued invoices to customers, with the knowledge and involvement of CoreLogic Australia and CoreLogic Inc. All of the Australian companies had the same directors (two of whom are also officers of CoreLogic Inc.), used the same resources (such as IT infrastructure and offices) and held themselves out as being run by the same executives.

## C EVIDENCE

53 The Applicant has served the following affidavits from witnesses it will call to give evidence:

- (a) **Matthias Krups:** (i) Affidavit dated 30 April 2025 together with Exhibit MK-1 and Confidential Exhibit MK-2; (ii) Affidavit dated 10 October 2025 with Exhibit MK-3 and Confidential Exhibit MK-4.
- (b) **Paul George Reid:** (i) Affidavit dated 30 April 2025 together with Exhibit PGR-1 and Confidential Exhibit PGR-2; (ii) Affidavit dated 25 June 2025 with Confidential Exhibit PGR-3 and Confidential Exhibit PGR-4; (iii) Affidavit dated 10 October 2025; (iv) Affidavit dated 21 November 2025.

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<sup>67</sup> COR.003.018.9510. Reid 30.4.25 [43]–[47].

<sup>68</sup> FASOC [43D]. Reid 30.4.25 [43]–[47].

<sup>69</sup> COR.003.244.8453. FASOC [43D]–[43E], [50]. Reid 30.4.25 [43]–[47]; Krups 30.4.25 [44]–[47].

<sup>70</sup> FASOC [43], [43A]–[43D]; Particulars [43]–[43D]; Defence [43]. Reid 30.4.25 [43]–[47]; Krups 30.4.25 [43]–[47]. E.g. Emails between Ms Jones, Ms Anderson and Ms Bianco on 2-3 September 2019 (COR.003.004.5087) and corresponding entries in a recall report on 5 September 2019 (COR.003.411.0312, COR.003.005.3464).

- (c) **Michelle Aizenberg**: (i) Affidavit dated 30 April 2025 with Confidential Exhibit MA-1; (ii) Affidavit dated 10 October 2025; (iii) Affidavit dated 21 November 2025 together with Confidential Exhibit MA-2.
- (d) **Nikhil Roy**: (i) Affidavit of Nikhil Roy dated 30 April 2025 together with Exhibit NR-1, Confidential Exhibit NR-2 and Confidential Exhibit NR-3; (ii) Affidavit dated 17 July 2025 (Verification Affidavit); (iii) Affidavit dated 10 October 2025; (iv) Affidavit dated 27 November 2025.
- (e) **Ashleigh Porter**: (i) Affidavit dated 19 November 2025 together with Exhibit AP-1 and Confidential Exhibit AP-2; (ii) Affidavit dated 19 December 2025 with Confidential Exhibit AP-3 (Verification Affidavit).
- (f) **Robert Paul Krups** affidavit dated 17 July 2025 (Verification Affidavit).

54 The Applicant has served the following expert reports:

- (a) **Rodney David McKemmish (Forensic IT)**: (i) Affidavit dated 15 May 2025 together with Exhibit RDM-1, Confidential Exhibit RDM-2 and Confidential Exhibit RDM-3; (ii) Affidavit dated 27 November 2025 (in reply to Trent Whitbourn) with Exhibit RDM-4, Confidential Exhibit RDM-5 and Confidential Exhibit RDM-6.
- (b) **Andrew Ross (Forensic Accountant)**: (i) First Report of Andrew Ross (Account of Profits) dated 30 May 2025 with Exhibit AMR-1 to Exhibit AMR-3 and Appendix E.1 to Appendix G.2; (ii) Second Report of Andrew Ross (damages) dated 25 June 2025 with Exhibit 1 and Appendix D.1 to H.1; (iii) Third Report of Andrew Ross (account of profits in reply to Matthew Ashby) dated 19 December 2025 with Exhibit AR-1 to Exhibit AR-2 and Appendix D to Appendix G.4; (iv) Fourth Report of Andrew Ross (damages in reply to Mr Ashby) dated 19 December 2025 with Appendix E.1 to Appendix H.

## D LIABILITY

### D.1 Inducing Breach of Contract

#### (a) Forum Group, Skilltech and Gingold Subscription Agreements

55 As already observed, the front companies entered into LeadManager subscription agreements with the Applicant,<sup>71</sup> to facilitate access by the Respondents. The Forum Group Subscription Agreement, Skilltech Subscription Agreement and Gingold Subscription Agreements imposed express obligations by clauses 2.1, 2.3, 3.1, 3.3, 4.1, 5.1 (along with cl 2.1 of the Fair Usage Policy, imported by reference into the Skilltech Subscription Agreement and Gingold Subscription Agreements) as set out in the table at [2] of the Applicant's Reply pleading:<sup>72</sup>

- (a) to keep User Details confidential;<sup>73</sup>

<sup>71</sup> FASOC [19], [24]–[25], [30]–[31], [36]–[41].

<sup>72</sup> Conf Ex NR-2 pp 104-109, 128-133, 148-156 (CB Tab 109).

<sup>73</sup> Krups 30.4.25 [19(d)], [31]–[33].

- (b) not to permit any third party to use the User Details;<sup>74</sup>
- (c) not to use automated routines, bots or scraping tools;<sup>75</sup>
- (d) not to copy, reproduce or extract data except for limited internal purposes of the subscriber;<sup>76</sup> and
- (e) not to systematically retrieve data.<sup>77</sup>

56 The evidence establishes that these terms were well understood by subscribers and were consistently applied across all of the Applicant's subscription agreements.<sup>78</sup>

**(a) Breaches of Forum Group, SkillTech and Gingold Subscription Agreements**

57 The Applicant issued unique User Details to each subscriber: Forum Group in July 2016, SkillTech in Sept 2017, and Gingold in Sept 2018.<sup>79</sup> Those credentials were provided by Forum Group, SkillTech and Gingold to RP Data without the Applicant's knowledge or consent.<sup>80</sup>

58 Each of Forum Group, SkillTech and Gingold breached their respective agreements by providing their User Details to RP Data, permitting RP Data to use those credentials without the Applicant's consent, and enabling RP Data to access and copy information from LeadManager, including by automated means.<sup>81</sup>

59 RP Data used those credentials to access LeadManager 1,520 times over four years, logging 98,770 minutes (1,650 hours) of access,<sup>82</sup> and when it or its agents did so they exported over 150,000 Project Reports and other information from LeadManager.

**(b) Respondents' interference and inducement**

60 RP Data induced or procured those breaches, or alternatively interfered with the contractual relations between the Applicant and each of the front companies. The gravamen of the tort is the Respondents' intention to induce or procure the breach with knowledge that such a breach will interfere with the Applicant's contractual rights (although the Respondents need not know the precise terms of the contracts): *Daebo Shipping Co Ltd v The Ship Go Star* (2012) 207 FCR 220 at [89] (Keane CJ, Rares & Besanko JJ). The pleaded conduct includes:<sup>83</sup>

- (a) requesting each subscriber to obtain User Details from the Applicant and provide them to RP Data;
- (b) using those User Details to access and copy LeadManager content manually and via the Robotics Program;

<sup>74</sup> Krupps 30.4.25 [19(g)(i)], [58]-[62].

<sup>75</sup> Krupps 30.4.25 [19(e)], [19(g)(ii)].

<sup>76</sup> Krupps 30.4.25 [19(j)], [19(m)].

<sup>77</sup> Krupps 30.4.25 [19(k)].

<sup>78</sup> Krupps 30.4.25 [58]-[62]; Reid 30.4.25 [8]-[14].

<sup>79</sup> Krupps 30.4.25 [26], [32], [37A].

<sup>80</sup> McKemmish 15.5.25 [46(b)]-[46(d)].

<sup>81</sup> FASOC [51]-[53].

<sup>82</sup> McKemmish 15.5.25 [46(c)], [119]-[121].

<sup>83</sup> FASOC [54].

(c) knowing that such conduct would breach the subscription agreements; and

(d) reimbursing the subscribers for their subscription fees.

61 RP Data requested the User Details from the subscribers and directed them to provide the credentials.<sup>84</sup> RP Data then: (a) used the credentials internally;<sup>85</sup> (b) provided them to Telus and Artis;<sup>86</sup> (c) engaged Telus in 2017 to extract data from LeadManager and, from 2019, replaced Telus by deploying UiPath automation created by Artis to systematically extract data from LeadManager;<sup>87</sup> (d) used AWS servers to conceal the origin of the access;<sup>88</sup> (e) orchestrated scraping and exports on a scale impossible for a human user.<sup>89</sup> The deliberate, systematic nature of the access demonstrates procurement, not passive receipt.<sup>90</sup>

**(c) Respondents' knowledge of the contractual relations**

62 RP Data knew that LeadManager access was restricted to authorised subscribers. Mr Roy explains that the system architecture made this obvious: only the Applicant-issued confidential credentials issued to subscribers could be used to authenticate access.<sup>91</sup> As the documents discovered by the Respondents show, that is why they procured the front companies to obtain subscriptions for RP Data to use. In the course of doing so, RP Data obtained the quotation and other contractual documents, with the terms applying to the subscription agreements, that the Applicant provided to the front companies. RP Data therefore knew the specific terms of the Forum Group, Skilltech and Gingold Subscription Agreements. RP Data's steps to conceal its conduct (including using front companies and automation) demonstrates the Respondents knew that the access was unauthorised.<sup>92</sup> The use of UiPath bots to mimic human behaviour at irregular intervals is consistent with an intention to deliberately evade detection.<sup>93</sup>

**(d) Loss caused by induced breaches**

63 But for the induced breaches, RP Data would not have been given access to LeadManager. The Respondents admit this elsewhere in their Defence.<sup>94</sup> It must follow, as a matter of commonsense and logic, that, absent the inducement to breach contract, RP Data would not have been able to access or copy any of the information from LeadManager or use it.

64 The only substantive issue that appears to be in dispute is whether RP Data used that information to *improve* Cordell Connect and to form part of its sales pitch to customers and prospective customers, with the result that RP Data was enriched and the Applicant suffered

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<sup>84</sup> McKemmish 15.5.25 [46(b)]–[46(d)].

<sup>85</sup> McKemmish 15.5.25 [46(c)(ii)].

<sup>86</sup> McKemmish 15.5.25 [27], [46(c)(i)].

<sup>87</sup> McKemmish 15.5.25 [114]–[117].

<sup>88</sup> McKemmish 15.5.25 [119]–[121].

<sup>89</sup> McKemmish 15.5.25 [46(e)], [114]–[117].

<sup>90</sup> McKemmish 15.5.25 [46], [114]–[121].

<sup>91</sup> Roy 30.4.25 [44]–[60].

<sup>92</sup> McKemmish 15.5.25 [119]–[121].

<sup>93</sup> McKemmish 15.5.25 [114]–[117].

<sup>94</sup> Defence paragraphs 55B, 82B and 99B state that “BCI Media Group would never have granted RP Data any licence”; Reply at [7].

loss.<sup>95</sup> The Applicant has pleaded the facts which support this.<sup>96</sup> The relevant finding is inescapable.

65 RP Data used the extracted data to: (i) identify gaps in Cordell Connect<sup>97</sup> and fill those gaps using information from LeadManager;<sup>98</sup> and (ii) create Comparative Documents<sup>99</sup> which RP Data sales employees presented to customers and prospective customers to induce them to leave LeadManager or taking up a Cordell Connect subscription.<sup>100</sup> Correspondingly, from 2016 the Applicant experienced: (i) sudden declines in renewal rates;<sup>101</sup> (ii) customer demands for discounts;<sup>102</sup> (iii) customer queries driven by Cordell's claims of superior project numbers;<sup>103</sup> and (iv) loss of customers to Cordell.<sup>104</sup> At the time, Cordell Connect enjoyed a reduction in churn of customers and greater revenue from mid-2016 onwards than it would otherwise have achieved.<sup>105</sup> This coincides precisely with the period of RP Data's unauthorised access.<sup>106</sup>

66 Documents discovered by the Respondents which support those pleaded facts are identified in the Applicant's chronology, in addition to the expert opinions of Mr Ross, summarised below.

## **D.2 Misleading or Deceptive Conduct**

### **(a) Subscription representations**

67 Each of Forum Group, SkillTech and Gingold made representations to the Applicant to the effect that they sought to access and use LeadManager for their own business purposes.<sup>107</sup> Those representations induced the Applicant to enter into or renew the subscription agreements and to provide User Details to each of them,<sup>108</sup> evidenced by the fact that the Applicant entered into the subscription agreements with them and the Respondents admit, consistent with the Applicant's evidence, that the Applicant would not have granted the Respondents subscriptions or access to LeadManager.<sup>109</sup> The representations were false because the front companies obtained User Details not for themselves, but for the purpose of providing them to directly to RP Data for used by the Respondents.<sup>110</sup> It is plain, therefore, that the Forum Group, SkillTech and Gingold thereby engaged in misleading or deceptive conduct contrary to s 18 of the ACL.<sup>111</sup>

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<sup>95</sup> FASOC [55]-[55B].

<sup>96</sup> FASOC [43]-[43J].

<sup>97</sup> Krupps 30.4.25 [43]-[50].

<sup>98</sup> Krupps 30.4.25 [43]-[50].

<sup>99</sup> McKemmish 15.5.25 [46(f)].

<sup>100</sup> Reid 30.4.25 [44]-[47].

<sup>101</sup> Reid 30.4.25 [43].

<sup>102</sup> Reid 30.4.25 [44]-[47].

<sup>103</sup> Reid 30.4.25 [44]-[47].

<sup>104</sup> Reid 30.4.25 [41]-[47].

<sup>105</sup> Ross4 identified the increased revenue trend enjoyed by RP Data from mid-2016 onwards.

<sup>106</sup> Reid 30.4.25 [43]-[47].

<sup>107</sup> FASOC [100], [107], [114]. Eg. SKT.001.001.0002, COR.001.015.0043, COR.001.012.0025, COR.001.012.0008, COR.001.001.0112, COR.001.001.0114, COR.001.001.0117, COR.001.001.0080, COR.001.001.0101.

<sup>108</sup> FASOC [102], [109], [116].

<sup>109</sup> Defence paragraphs 55B, 82B and 99B state that "BCI Media Group would never have granted RP Data any licence"; Reply at [7].

<sup>110</sup> FASOC [103], [110], [117].

<sup>111</sup> FASOC [103A], [110A], [117A].

68 As identified in respect of the other causes of action, RP Data:<sup>112</sup> (a) requested Forum Group, SkillTech and Gingold to obtain User Details; (b) requested that the User Details be provided to RP Data; (c) reimbursed Forum Group, SkillTech and Gingold for the subscription fees they paid the Applicant; and (c) requested Forum Group, SkillTech and Gingold to conceal from the Applicant the provision and use of User Details by the Respondents. RP Data thereby aided, abetted, counselled or procured Forum Group, SkillTech and Gingold's misleading conduct, or was knowingly concerned in it, within the meaning of s 2 of the ACL.<sup>113</sup>

**(b) Legitimate Subscriber Representations**

69 By accessing LeadManager using third-party User Details, RP Data represented to the Applicant that it was the subscriber to whom those User Details had been issued (i.e. Forum Group, SkillTech or Gingold). These representations were clearly false and misleading, contrary to ss 18 and 29(b) of the ACL,<sup>114</sup> as evidenced by the steps which RP Data took to conceal its conduct from the Applicant pleaded in particularised in FASOC [50]. Cordell and CoreLogic, Inc were thereby involved in RP Data's contraventions by reason of their participation in the conduct and knowledge of the use of third-party User Details.<sup>115</sup>

**(c) Third Party Representations**

70 Finally, RP Data and Cordell made representations to customers and prospective customers that Cordell Connect contained significantly more project information than LeadManager, and that the Applicant overstated its project numbers.<sup>116</sup> The specific Third Party Representations made in emails from RP Data and Cordell are particularised in FASOC [124]-[124A] and defined there as: (a) Cordell Connect had 70% more projects in the planning stage and 65% more projects in the tender stage, or alternatively significantly more projects in the planning and tender stages, than LeadManager; (b) Cordell Connect had 70% more, or alternatively significantly more, residential projects than LeadManager; (c) Cordell Connect had 70% more, or alternatively, significantly more, construction projects than LeadManager; (d) the Applicant significantly overstates the number of projects in its database by double categorising projects; and (e) Cordell Connect has 50% more, or alternatively significantly more, projects in its database than LeadManager. These representations were false and misleading.<sup>117</sup>

**(d) Causation and loss**

71 But for the misleading conduct, the Applicant would not have entered into the subscription agreements with Forum Group, Skilltech or Gingold, provided them User Details, or permitted them access to LeadManager. Again, that appears to be beyond doubt given the Respondents admit that the Applicant would not have granted them subscriptions or access to LeadManager.<sup>118</sup> As with the other causes of action, the misleading conduct caused customers

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<sup>112</sup> FASOC [104C], [111C], [118C].

<sup>113</sup> FASOC [104D]-[105A], [112]-[112B], [119]-[119B].

<sup>114</sup> FASOC [121]-[123].

<sup>115</sup> FASOC [126]-[126B]; McKemmish 15.5.25 [109]-[112], [123]-[124].

<sup>116</sup> FASOC [124]-[124A].

<sup>117</sup> FASOC [125]. Confidential Annexure A to Krupps 30.4.25 [71(g)].

<sup>118</sup> Defence paragraphs 55B, 82B and 99B state that "BCI Media Group would never have granted RP Data any licence"; Reply at [7].

to cease subscribing, demand discounts, or not subscribe to LeadManager because RP Data used its access to improve Cordell Connect and procure customers to leave or not take up subscriptions to the Applicant.<sup>119</sup>

### **D.3 Breach of Confidence**

#### **(a) Duties of confidence**

72 The front companies (Forum Group, SkillTech and Gingold) and the Respondents came under duties of confidence in respect of the BCI Confidential Information (their User Details and information in LeadManager).<sup>120</sup> Subscribers were bound to maintain confidentiality of both.<sup>121</sup> The confidential nature of that information is reinforced by the fact that subscribers to Cordell Connect were required to keep user details in order to access information on that platform.<sup>122</sup>

73 Factors relevant to a determination whether information is of a confidential nature include:<sup>123</sup> (a) the fact that skill and effort was expended to acquire the information; (b) the fact that the information is jealously guarded by the applicant; (c) the fact that it was plainly made known to persons who received the information that it was regarded as confidential; (d) the fact that the usages and practices of the industry support the assertion of confidentiality; and (e) the fact that the recipient of the information in question has been permitted to use the information only by reason of the applicant's consent to do so.

74 Even if the Respondents did not owe a duty themselves, they were knowingly involved in or provided knowing assistance to the breach of confidence by Forum Group, SkillTech and Gingold, RP Data knew that access was restricted to authorised subscribers who were required to keep their User Details confidential and not share LeadManager information outside their organisation.<sup>124</sup>

#### **(b) Confidential information**

75 The applicant pleads that three categories of information constitute the BCI Confidential Information: **User Details**, which were confidential, not publicly available, and provided solely to enable subscriber access to LeadManager;<sup>125</sup> **Confidential Project Information**, being detailed project-specific data compiled by the Applicant and not publicly available;<sup>126</sup> and **Confidential Featured Information**, including "Most active companies", "Trending projects", "Latest projects" and "Subscription Reports", also compiled by the Applicant and not publicly available.<sup>127</sup>

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<sup>119</sup> FASOC [127]–[128B].

<sup>120</sup> FASOC [96].

<sup>121</sup> *Krupps* 30.4.25 [19], [58]–[62]. *Roy* 30.4.25 [51]–[82].

<sup>122</sup> *Krupps* 30.4.25 [75]; p 138–149 Ex MK-1.

<sup>123</sup> *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317 at 334; 20 IPR 481 at 498–499; cited with approval in e.g. *Leica Geosystems Pty Ltd v Koudstaal* (No 3) (2014) 109 IPR.

<sup>124</sup> *Roy* 30.4.25 [55]–[60].

<sup>125</sup> FASOC [83]–[85].

<sup>126</sup> FASOC [86]–[88].

<sup>127</sup> FASOC [89]–[91].

- 76 Each category had the necessary quality of confidence and commercial value, and that access was restricted to the Applicant employees and authorised subscribers.<sup>128</sup> The User Details were confidential, not publicly available, and protected by authentication systems.<sup>129</sup> With regards to Confidential Project Information and Confidential Featured Information, it is well established that “it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process”: *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413 at 415 (Lord Greene MR).<sup>130</sup>
- 77 The Confidential Project Information and Confidential Featured Information was (as identified in more detail below in respect of copyright infringement): (a) not publicly available; (b) the product of extensive research, skill, labour and investment that is commercially valuable to the Applicant; (c) actively protected by the Applicant through contractual, technical and organisational measures; and (d) would cause serious commercial harm to the Applicant if disclosed<sup>131</sup> particularly because if competitors obtained it, they could: (i) shortcut years of research and investment; (ii) replicate the Applicant’s project intelligence; (iii) target the Applicant’s customers; and (iv) undermine the Applicant’s competitive advantage. As Mr Krups and Ms Aizenberg state, disclosure of the confidential materials would seriously and adversely affect the commercial position of the Applicant.<sup>132</sup> This accords with common sense and logic.

**(c) Breaches**

- 78 The front companies breached their duties of confidence by providing their User Details to RP Data and allowing RP Data to access and copy BCI Confidential Information.<sup>133</sup> RP Data breached, or knowingly assisted or was knowingly involved in those breaches by:<sup>134</sup> (1) inducing the subscribers to obtain User Details and provide their User Details to RP Data; (2) reimbursing them for the subscription fees they paid (because in truth the subscriptions were taken out by the Respondents); (3) using the User Details to access and copy BCI Confidential Information; and (4) using BCI Confidential Information to improve Cordell Connect, create Comparative Documents and induce customer switching from LeadManager to Cordell Connect. The evidence in respect of those elements is set out below in relation to the claims of inducing breach of contract and copyright infringement.

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<sup>128</sup> FASOC [92]–[95].

<sup>129</sup> *Krups* 30.4.25 [31]–[33].

<sup>130</sup> Quoted/cited with approval and applied by Campbell JA in *Del Casale v Artedomus (Aust) Pty Ltd* [2007] NSWCA 172 at [116], Beach J in *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd (No 8)* [2022] FCA 1404 at [260] (appeal dismissed [2023] FCAFC 149), Priestley JA Meagher JA Giles JA in *Industrial Rollformers Pty Ltd & Anor v Ingersoll-Rand (Australia) Ltd* [2001] NSWCA 11 at [97]–[98] and Emmett J in *Bluescope Steel Limited (ACN 000 011 058) v Kelly* [2007] FCA 517 at [141] and [159]. See also *Coco v A N Clark* [1969] RPC 41, Megarry J at 590, *Lopez v Gold Titan Pty Ltd* [2022] FCAFC 117 and *Robb v Green* [1895] 2 QB 1 p 18-19.

<sup>131</sup> *Aizenberg* 30.4.25 [32]–[26].

<sup>132</sup> *Krups* 30.4.25 [9]; *Aizenberg* 30.4.25 [8].

<sup>133</sup> FASOC [97]. *McKemmish* 15.5.25 [46(b)]–[46(e)].

<sup>134</sup> FASOC [98]–[98A]. See *McKemmish* 15.5.25 [46(b)]–[46(d)] and [119]–[121].

**(d) Loss and profits**

79 But for the breaches of confidence (as with inducing breach of contract and copyright infringement), RP Data would not have obtained or used the BCI Confidential Information, improved Cordell Connect, or induced customers to leave LeadManager or subscribe to Cordell Connect, thereby causing the Applicant loss of subscription revenue.<sup>135</sup> The Applicant alternatively seeks an account of profits.<sup>136</sup>

**D.4 Copyright Infringement**

**(a) Copyrights works in suit**

80 The Applicant pleads three categories of works – Project Reports, Project Information and Project Spreadsheets (together, the **BCI Works**) – as original literary works within the meaning of the **Copyright Act 1968** (Cth).<sup>137</sup> The BCI Works are created by employees of BCI Media Group or BCI Asia with copyright vesting in the Applicant by their employment or by assignment.<sup>138</sup>

81 Section 10 of the *Copyright Act* non-exhaustively defines a literary work as including a table, or compilation, expressed in words, figures or symbols. Compilations are protectable as long as they satisfy the requirement of originality: *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at [28]. Compilations found to be protectable after *IceTV* include compatibility charts for printer and computer consumables<sup>139</sup> and material data safety sheets.<sup>140</sup>

82 The affidavits of Matthias Krups, Michelle Aizenberg, and Nikhil Roy of 30 April 2025 are more than sufficient to establish that each BCI Work is the product of: (a) substantial human skill and labour; (b) creative selection, arrangement and compilation; (c) structured research methodologies; and (d) authorship by BCI employees or contractors whose rights are owned or have been assigned to the Applicant. Their evidence also establishes that they are not mere aggregations of public information, as the Respondents would have the Court believe.

Project Reports

83 The fields, categories and subcategories of building information in the Project Reports were designed and chosen by Mr Krups and Mr Roy for the Applicant through extensive deliberation. Mr Krups devised the schema “after consulting... and revising them multiple times until I felt that I had the right set of fields.”<sup>141</sup> Mr Roy confirms that he “designed the templates for the Project Reports... selecting from a range of potential fields... identifying categories and subcategories... arranging the information... and presenting it in a way that allowed easy and

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<sup>135</sup> FASOC [99]–[99C].

<sup>136</sup> FASOC [99D].

<sup>137</sup> FASOC [56]–[61].

<sup>138</sup> FASOC [62]–[72].

<sup>139</sup> *Tonnex International Pty Ltd v Dynamic Supplies Pty Ltd* (2012) 99 IPR 31.

<sup>140</sup> *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173.

<sup>141</sup> Krups 30.4.25 [46]–[47].

efficient identification.”<sup>142</sup> These design choices constitute acts of authorship. The Project Reports embody these creative selections and arrangements.

84 Separate to the schema, the creation of each Project Report involves a manual, multi stage research process requiring significant human judgement. This process involved the following (1) The process of gathering information was always a manual, not automated, process carried out by the Applicant’s researchers.<sup>143</sup> (2) Publicly available information is incomplete, inconsistent and unreliable such that researchers must therefore supplement it through direct inquiries, stakeholder engagement and verification.<sup>144</sup> (3) As Ms Aizenberg explains, public information “frequently omitted information... or lacked details... [and] additional information was needed... direct follow up enquiries... were invariably necessary.”<sup>145</sup> (4) Researchers exercise judgement in determining which stakeholders to contact, what questions to ask, and how to assess the reliability and usefulness of information.<sup>146</sup> They also use their “industry knowledge and experience... to verify and enhance the information... including making direct inquiries of people involved in the project.”<sup>147</sup> (5) The process includes contacting a wide range of stakeholders—developers, architects, engineers, planners, contractors and others—to obtain non-public information.<sup>148</sup> This requires skill, relationship building and targeted questioning.<sup>149</sup> (6) The researchers then compile the information into structured fields and narrative text, making decisions about selection, relevance and presentation.<sup>150</sup> (7) Mr Krups confirms that researchers “retain significant discretion in creating each Project Report as to the information that is included.”<sup>151</sup> (8) Researchers are “the primary author of the record kept of the information they gathered.”<sup>152</sup> Accordingly, their names appear on each Project Report.<sup>153</sup> (9) Each Project Report undergoes a rigorous editorial process with editors checking accuracy, ensure compliance with guidelines, and adding or refining information.<sup>154</sup> Their contributions are recorded in the Project Report.<sup>155</sup>

85 That evidence establishes the Project Reports are not mechanical reproductions of facts, but original compilations involving substantial intellectual effort. They each are a curated, edited and refined literary work authored by Mr Krups, Mr Roy, researchers and editors who were employees or contractors of the Applicant or BCI Asia.<sup>156</sup> Researchers created the works in the

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<sup>142</sup> Roy 30.4.25 [23]-[27].

<sup>143</sup> Aizenberg 30.4.25 [41].

<sup>144</sup> Aizenberg 30.4.25 [43]-[44].

<sup>145</sup> Aizenberg 30.4.25 [44].

<sup>146</sup> Aizenberg 30.4.25 [50]-[52].

<sup>147</sup> Aizenberg 30.4.25 [47].

<sup>148</sup> Aizenberg 30.4.25 [49].

<sup>149</sup> Aizenberg 30.4.25 [50]-[52].

<sup>150</sup> Aizenberg 30.4.25 [56]-[57].

<sup>151</sup> Krups 30.4.25 [45].

<sup>152</sup> Aizenberg 30.4.25 [27]

<sup>153</sup> Aizenberg 30.4.25 [62]; Krups 30.4.25 [44].

<sup>154</sup> Aizenberg 30.4.25 [67]; Krups 30.4.25 [49].

<sup>155</sup> Aizenberg 30.4.25 [67]

<sup>156</sup> Aizenberg 30.4.25 [30]-[31].

course of employment by the Applicant or BCI Asia.<sup>157</sup> Under s 35(6) of the *Copyright Act*, the Applicant owns the copyright. For contractors, standard contracts assigned copyright to it.<sup>158</sup> All copyright authored by BCI Asia authors was intended to be owned by the Applicant, and a confirmatory deed of assignment has been executed to reflect that.<sup>159</sup>

#### Project Information

86 The Project Information is a defined set of fields selected by Mr Krups, after consultation with sales teams, “to be the default fields for the Project Reports”<sup>160</sup> which he considered to be “some of the most valuable information to customers.”<sup>161</sup> It is therefore not raw data but a curated compilation reflecting selection, arrangement and judgement. The evidence as to originality and authorship of the Project Reports applies equally to the Project Information. The Applicant’s researchers identify, compile and record the Project Information,<sup>162</sup> and that process requires verification, stakeholder contact and cross referencing, and the Applicant’s editors review and verify that information.<sup>163</sup> These activities satisfy the originality threshold.

#### Project Spreadsheets

87 The spreadsheets exported from LeadManager contain fields and information from the Project Reports. They are: (a) selection of default fields chosen by Mr Roy and Mr Krups; (b) arrangement of columns; (c) layout design; and (d) technical constraints imposed to prevent system abuse. Mr Roy “designed the template for the Project Report export functionality,” including the “default set of fields” and “the order in which they were presented.”<sup>164</sup> The selection of fields was based on what Mr Roy and Mr Krups “considered were the most valuable fields of information to customers.”<sup>165</sup> It was designed to be “easy to comprehend and easy to navigate,” including separating contact details from other fields.<sup>166</sup> These design choices are acts of authorship and satisfy the test of originality.

#### Conclusion

88 The BCI Works are not mere compilations of public information. As Mr Krups explains, “There is no public repository of information about all construction projects in Australia.”<sup>167</sup> The BCI Works “cannot be traced to public information from a single source... not a ‘cut and paste’ job... not simply ‘raw information or data’.”<sup>168</sup> Public information on its own is incomplete, unreliable

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<sup>157</sup> Aizenberg 30.4.25 [30]-[31].

<sup>158</sup> Aizenberg 30.4.25 [31].

<sup>159</sup> Krups 30.4.25 [39].

<sup>160</sup> Krups 30.4.25 [53]-[54].

<sup>161</sup> Krups 30.4.25 [55].

<sup>162</sup> Krups 30.4.25 [54].

<sup>163</sup> Aizenberg 30.4.25 [44]-[52].

<sup>164</sup> Roy 30.4.25 [28]-[29].

<sup>165</sup> Roy 30.4.25 [30].

<sup>166</sup> Roy 30.4.25 [30].

<sup>167</sup> Roy 30.4.25 [45]-[47].

<sup>168</sup> Krups 30.4.25 [37]

and requires verification.<sup>169</sup> Significant information is obtained from private stakeholders to supplement, distil and verify other pieces of information.<sup>170</sup>

**(b) Acts of infringement**

89 RP Data, Telus International and Artis Group reproduced, copied, adapted and communicated substantial parts of the BCI Works by:<sup>171</sup> (1) copying Project Reports, Project Information and Project Spreadsheets; (2) incorporating those works into the Cordell Connect database; (3) creating Comparative Documents; and (4) publishing Comparative Documents to customers and prospective customers. No witness from either entity will give evidence.

90 As observed, RP Data exported at least 159,578 Project Spreadsheets via the Microsoft Excel export function in LeadManager.<sup>172</sup> RP Data scraped further data using UiPath bots, including project lists, project details and search results.<sup>173</sup> The scraping included copying HTML, screen content and structured data.<sup>174</sup> Separately, RP Data copied the whole or substantial parts of the BCI Works by taking or causing its agents to take, screenshots of Project Reports and prepare Comparative Reports and other documents containing extracted information.<sup>175</sup>

91 RP Data also: (a) ingested BCI data into Cordell Connect to improve its coverage;<sup>176</sup> and (b) presented information from LeadManager in Comparative Documents to customers and prospective customers.<sup>177</sup> These acts were done without licence or authority of the Applicant.<sup>178</sup> That is not factually in dispute: the Respondents admit that the Applicant would not have granted them access to LeadManager.<sup>179</sup>

**(c) Authorisation and involvement in infringement**

92 The Applicant alleges that RP Data and Cordell acted in a common design to obtain and use the BCI Works for improvement of Cordell Connect and creation and dissemination of Comparative Documents, by their salesforce.<sup>180</sup> RP Data authorised the infringing acts of Telus and Artis by having the power to prevent the acts (but not doing so), maintaining a relationship with the actors, and failing to take reasonable steps to prevent the infringements.<sup>181</sup>

93 The evidence establishes that: (a) there is no discernible difference between the activities of RP Data and Cordell – Telus and Artis acted in concert with RP Data employees working for both of them for the benefit of the Cordell Connect business; (b) RP Data directed Telus and

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<sup>169</sup> Aizenberg 30.4.25 [44].

<sup>170</sup> Aizenberg 30.4.25 [45], [49].

<sup>171</sup> FASOC [73]-[75B].

<sup>172</sup> McKemmish 15.5.25 [46(e)].

<sup>173</sup> McKemmish 15.5.25 [114]-[117].

<sup>174</sup> McKemmish 15.5.25 [114]-[117].

<sup>175</sup> FASOC [75]-[75B]; Consolidated Particulars [6]-[6B];. McKemmish 15.5.25 [46(f)].

<sup>176</sup> Krups 30.4.25 [43]-[50].

<sup>177</sup> Reid 30.4.25 [44]-[47].

<sup>178</sup> FASOC [76]-[77B].

<sup>179</sup> Defence [82D].

<sup>180</sup> FASOC [77B].

<sup>181</sup> FASOC [78].

Artis, including to use User Details and to copy data;<sup>182</sup> (c) RP Data controlled the UiPath automation and AWS infrastructure used to conduct scraping;<sup>183</sup> and (d) RP Data's executives received reports and approved the data scraping program.<sup>184</sup> CoreLogic Australia and CoreLogic, Inc authorised RP Data's infringements by virtue of their control, knowledge and failure to prevent the conduct.<sup>185</sup>

**(d) Loss or account of profits**

94 As with inducement to breach contract, but for the infringements RP Data would not have improved Cordell Connect or copied information from LeadManager into Comparative Documents used to gain customers and prospective customers causing the Applicant loss of subscription revenue.<sup>186</sup> The Applicant alternatively seeks an account.<sup>187</sup>

**E RELIEF AND EXPERT EVIDENCE**

95 Extensive expert accounting evidence has been filed but there are still outstanding steps, such as the further reply by Mr Ashby to Ross3 and Ross4, which means that the true extent of the disagreement between the expert accountants on quantum has not yet crystallised. These submissions address the material currently filed but the Applicant reserves the right to supplement the submissions when the extent of the disagreement is revealed in the expert conclave.

**E.1 Account of Profits**

96 An account of profits is available for infringement of copyright<sup>188</sup> and breach of confidence.<sup>189</sup>

97 With respect to account of profits, equity requires a wrongdoer to account for the "full value of the enhancement" wrongly obtained and they cannot avoid liability to disgorge profits dishonestly made by showing that those profits might have been made honestly, or by claiming that only limited profits were caused by particular acts when the consequences of those acts were inseparable from the consequences of the general scheme of breach of duty: **Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd** [2018] HCA 43; 265 CLR 1 at [2] and [9] (Kiefel CJ, Keane and Edelman JJ); see also *Lopez v Gold Titan Pty Ltd* [2022] FCAFC 117 at [34], [35] and [42] (Rares J). The disgorgement is not reduced by revenue that would have been received by a lawful alternative: *Ancient Order* at [9].

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<sup>182</sup> *McKemmish* 15.5.25 [27], [46(c)(i)].

<sup>183</sup> *McKemmish* 15.5.25 [119]-[121].

<sup>184</sup> *McKemmish* 15.5.25 [46(f)].

<sup>185</sup> FASOC [79]-[79A]; E.g COR.002.045.8482, COR.002.101.4579, COR.002.101.4580, COR.002.142.1639, COR.002.013.7788, COR.002.013.7789.

<sup>186</sup> FASOC [82]-[82C].

<sup>187</sup> FASOC [82D]-[82E].

<sup>188</sup> See, eg, *Dart Industries Inc v Décor Corporation Pty Ltd* (1993) 179 CLR 101 at 111, 114, 125; *Rowe v National Australia Bank Ltd* (2019) 56 WAR 1 at [64]; *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at [85]; *Xiao v BCEG International (Australia) Pty Ltd* (2023) 111 NSWLR 132 at [43]; see also (in the context of dishonest infringement of trademark) *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 34-35, 43 (Windeyer J); *Ancient Order* at [9].

<sup>189</sup> *Attorney-General v Observer Ltd* [1990] 1 AC 109 at 262.

- 98 A sufficient causal connection exists if the dishonest or fraudulent breach can be concluded to have played a material part in contributing to the benefit or gain of the fiduciary or knowing participant, even where it cannot be concluded that the benefit or gain would not have been obtained but for the breach: *Ancient Order* at [88].
- 99 In *Ancient Order*, the plurality held that Foresters could **not** limit its liability to disgorge profits by claiming that only limited profits were caused by particular acts of knowing assistance when the consequences of those acts were inseparable from the consequences of the general scheme of breach of fiduciary duty. That is, focusing on each act of knowing assistance and its direct consequences, rather than the overall effect of Foresters' wrongful conduct, would be to ignore the obvious reality that the particular interactions resulted, as they were always apt to do, in the wholesale acquisition by Foresters of the business connections that Lifeplan and FPM had with funeral directors: *Ancient Order* at [4]-[5].
- 100 Where causation is established, the onus shifts to the wrongdoer to show that they should not account for the full value of the advantage: *Ancient Order* at [18], [19] and [21]. The burden on the defendant is not just evidentiary; fundamentally, it is persuasive – it is to justify the private advantage that has been obtained: *Ancient Order* at [91]. Here, the onus is on the Respondents to prove that there was a reason to expect an increase in the profitability of its business apart from the success of its wrongful conduct: *Ancient Order* at [18]; also [19], [21], [15] and [16].

## **E.2 Expert evidence on account of profits**

### **Trading profit**

- 101 In his first report, Ross1, Mr Ross seeks to quantify the benefit obtained by CoreLogic by:
- (a) Identifying the revenue CoreLogic recorded as coming from subscriptions for Cordell Connect during the period which CoreLogic accessed LeadManager and for a period after (on the assumption that some the subscriptions for some of the customers who were induced to subscribe to Cordell Connect during the access period would not end until after the access period) – Mr Ross refers to this as the “Relevant Revenue”.
  - (b) Identifying the costs (direct costs and overheads) associated with obtaining that revenue – Mr Ross identifies this as the “Attributable Costs”.
  - (c) Arriving at the “Relevant Profit” by subtracting the Attributable Costs from the Relevant Revenue.
- 102 Mr Ross justifies such an approach because it is not possible to identify which of CoreLogic's potential or existing customers were induced to subscribe to Cordell Connect using information from LeadManager: see [2.3.6] of his first report. This is an unremarkable observation, given the state of the records of the Respondents, in which their employees were directed not to create incriminating information tied to the use of information extracted from LeadManager.
- 103 The Respondents' accounting expert, Mr Matthew Ashby, criticises Mr Ross's methodology at [11.3.2] of his first report. Specifically, Mr Ashby says that attributing revenue from all

customers in Confidential Annexures is inappropriate because it does not consider “factors likely to affect the probability that customers in each category were influenced by the Alleged Wrongful Conduct to enter into, renew or not renew a Cordell Connect subscription”.

104 As the principles identified above make clear, that problem lies at the feet of the Respondents particularly given the evidence establishes they incorporated LeadManager information into their product, Cordell Connect, leveraged it as part of their standard sales pitch to all customers and have created difficulties of proof by concealing their conduct and not calling any relevant witnesses to explain what they did. The onus lies on the Respondents to establish that any revenue should be excluded from the disgorgement. It is not enough to criticise the Applicant’s quantification of the profit; the Respondents have failed to prove what should be excluded.

105 In any event, in Ross3 Mr Ross addresses the methodological criticisms made by Mr Ashby, including by performing the calculations which Mr Ashby said should be performed (but Mr Ashby did not perform because he was instructed not to). One of those methods Mr Ross performs in his third report compares the revenue trends for Cordell Connect prior to the period they accessed LeadManager, during the access period and after the access period. That revenue trend analysis is depicted in Figure 2-2 and paragraphs 2.5.16-2.5.18 of Ross3.

### **Capital Profit**

106 Mr Ross seeks to identify the capital profit obtained by CoreLogic from its conduct in [2.4.6] and section 5 of his first report. He calculates that increase in capital profits based on the value obtained from the sale of the shares in CoreLogic Inc in June 2021. CoreLogic’s expert, Mr Ashby, criticises this as requiring disgorgement of profits obtained by the shareholders of CoreLogic Inc rather than CoreLogic Inc or its subsidiaries, however, this misses the point that what Mr Ross is identifying is the increase in capital value enjoyed by the CoreLogic business as a consequence of the conduct, the value of which is identified in the capital profit part of the share sale price (section 6 of Ross3).

## **F RELIEF: LOSS OR DAMAGE**

### **F.1 Assessing loss**

107 The inferences as to the movement of customers from LeadManager to Cordell Connect are supported by discovered documents which demonstrate that customers left LeadManager or subscribed to Cordell Connect after the Respondents’ salespeople presented misleading information to them about LeadManager. The Respondents’ conduct created difficulties in proving the loss precisely: they instructed their sales staff not to leave a record of what they said to customers such that there are key gaps in the CRM records which have been discovered and they have not called sales staff to give evidence about what they said to customers.

108 Such difficulties trigger what the High Court described as the “facilitation principle”, which facilitates the shift of an evidential onus “in circumstances where the defendant’s wrongdoing has resulted in uncertainty regarding the quantum of loss”: *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17; 98 ALJR 719 at [127]-[129] (Edelman, Steward, Gleeson and Beech-Jones JJ). The greater the difficulty in proof that results from the wrongdoing, the

stronger the inference the court will be prepared to draw against the wrongdoer: *Cessnock City Council* at [132]; see also *Armory v Delamirie* (1722) 1 Str 505; *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 59.

- 109 The Full Court recently confirmed that “the Court is to adopt a ‘robust’ approach to assessing loss and should not deprive a plaintiff of a monetary award due to the difficulty of assessing loss”: *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited* [2025] FCAFC 63 at [614], citing *Fink v Fink* [1946] HCA 54; 74 CLR 127 at 143 (Dixon and McTiernan JJ); *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83 (Mason CJ and Dawson J) and 125 (Deane J); and *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10; 196 ALR 257 at [38] (Hayne J, with Gleeson CJ, McHugh and Kirby JJ agreeing). Where damages cannot be assessed with certainty, an applicant is “entitled to have the court do the best it can” to quantify the loss suffered: *Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd* [2019] VSCA 136 at [70] (Maxwell ACJ, Niall JA and Macaulay AJA).
- 110 There are various ways in which a wrongdoer might discharge its onus and reduce the extent of the liability to disgorge profits. Relevantly, the *first* way is by proving entitlement to an allowance for costs incurred, and labour and skill employed: *Ancient Order* at [14]; cf *Colbeam* at 43. The Applicant’s expert, Mr Ross, has already accommodated this in his account of profits analysis by reducing the “Relevant Revenue” by “Attributable Costs”. The *second* way is by demonstrating that the benefit or advantage is beyond the scope of the liability for which the wrongdoer should account for profits – i.e., proving that the profit or benefit has no reasonable connection with the wrongdoing: *Ancient Order* at [15].
- 111 The Respondents have not served any evidence to satisfy that burden. Instead, they instructed their expert, Mr Matthew Ashby, to not perform any quantification of loss and profit, with the consequence that he limited his reports to criticising Mr Ross’s methodologies, including with respect to customers who should be included in the quantification. It puts the Respondents in a precarious position on quantum and no amount of disputation over the attempts by the Applicant to calculate their loss can overcome this evidentiary lacuna.
- 112 In any event, Mr Ross has responded (in Ross3 and Ross4) by addressing the methodological issues raised by Mr Ashby. Their reports are summarised at the end of these submissions. Even if the criticisms of Mr Ashby are taken into account, the quantum of loss caused to the Applicant and profit gained by the Respondent is many millions of dollars and reflects the scale and extent of the conduct engaged in by the Respondents over a 4-year period.

## **F.2 Quantum**

- 113 In Ross2, Mr Ross quantifies loss by calculating the amount of revenue which the Applicant would have obtained from customers if they had not left the Applicant (the Applicant’s Confidential Annexure A list of customers), if they had not been provided a discount to stay with the Applicant (Confidential Annexure B) and if they had taken up a subscription with the Applicant (Confidential Annexure C). He summarises that loss up to 2025 in Figure 1, paragraph 2.2.3. He also opines that the lost future revenue from those customers would be, as summarised in Figure 2, paragraph 2.2.7.

- 114 As with his account of profits report, Mr Ashby in his second report criticises Mr Ross' methodologies for calculating loss (particularly with respect to identification of customers in respect of whom subscription fees were lost). Those criticisms are premised on a misunderstanding of the relevant principles concerning loss. In addition to those identified in the introduction above (particularly concerning the Respondents' conduct having created difficulties of proof), the following principles emerge from cases with similar fact patterns:<sup>190</sup>
- (a) The Applicant is not required to call each and every customer to prove its loss.
  - (b) The Applicant does not need to identify, with precision, exactly who or how many customers were affected by the infringing conduct.
  - (c) Having regard to the serious nature of the infringing conduct, the Court can be satisfied that there is a likelihood that customers (i.e., persons to whom the conduct was directed) were influenced by that conduct.
  - (d) Damages may be awarded even if the Applicant has not experienced a drop or downturn in profits or sales – for example, by adopting as a proxy the Applicant's diminished rate of increase in demand
  - (e) Changes in the profit, revenue, or sales of the Respondents may be relevant to, or a proxy for, proving and quantifying the Applicant's loss.
- 115 Mr Ross has acknowledged that, in paragraphs 11.5.3 and 11.6.5 of Mr Ashby's second report (on damages), Mr Ashby identifies some confidential annexure A and C customers who should be excluded from the loss calculation based on the timing of their subscriptions, and in Ross4 Mr Ross has met those issues by excluding such customers from his loss analysis.
- 116 Mr Ross has updated those figures in Ross4, particularly by reference to further data that has become available from the Applicant's accounting system.
- 117 The Applicant is not in a position to address all issues arising from the accounting evidence, given that the Applicant will not be served with Mr Ashby's responses to Ross3 and Ross4 until 2 April 2026. Whether he performs a quantification of loss and profit in his reports remains to be seen. The Applicant reserves its rights to supplement these submissions on the issue of quantification of loss once it has received Mr Ashby's responses ahead of the later hearing days scheduled in July 2026 for the accounting experts to give their evidence concurrently.

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<sup>190</sup> *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).

### F.3 Aggravated damages

- 118 Claims are made for both additional damages (for copyright infringement pursuant to s 115(4) of the *Copyright Act*) and exemplary damages (for inducement). This is a paradigm case for awards of such damages to be made; to express its disapproval of this type of conduct revealed in the evidence and in the Respondents' own documents.
- 119 The award of additional damages for copyright infringement need not be proportionate to any award of compensatory damages.<sup>191</sup> An award of additional damages involves an element of penalty.<sup>192</sup> The damages awarded must operate as sufficient deterrent to ensure the conduct will not occur again.<sup>193</sup> This includes specific deterrence and general deterrence.<sup>194</sup> Conduct which may be seen as flagrant includes conduct which involves a deliberate and calculated infringement, a calculated disregard of the applicant's rights, or a cynical pursuit of benefit (all of which apply here).<sup>195</sup> Consciousness of wrongdoing can be sufficient to found flagrancy.<sup>196</sup>
- 120 Tortious conduct, including inducement of breach of contract and interference in contractual relations, can sound in exemplary damages when the respondent's conduct amounts to a conscious wrongdoing in disregard for the applicant's rights.<sup>197</sup> Exemplary damages awards are punitive, rather than compensatory, and are intended to "punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again".<sup>198</sup> If "exemplary damages are to fulfil their threefold purpose, they must not merely irritate, they must sting".<sup>199</sup> The necessity for exemplary damages is increased where the wrongdoing is motivated by profit.<sup>200</sup> It is the "gravity and character of the Defendants' conduct which guides the Court's discretion as to the proper amount to award".<sup>201</sup>

### Conclusion

- 121 The Court will find that the applicant succeeds on its causes of action and that it is entitled to be awarded substantial compensation, as calculated by its accounting expert, Mr Ross, on the basis of an account of profits or damages. Awards of additional and exemplary damages should also be made. The Applicant seeks the opportunity to be heard on the question of costs.

27 March 2026

JM Hennessy

C. D. McMeniman

Gilbert + Tobin

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<sup>191</sup> *Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd (No 2)* (2008) 76 IPR 763 at [17]; *Truong Giang Corp v Quach* (2015) 114 IPR 498 at [133]; *Universal Music Publishing Pty Ltd v Palmer (No 2)* (2021) 158 IPR 421 at [483], [524].

<sup>192</sup> *Facton Ltd v Rifai Fashions Pty Ltd* (2012) 199 FCR 569 at [33], [89]; *Truong* at [134]; *Geneva Laboratories Limited v Prestige Premium Deals Pty Ltd (No 5)* (2017) 122 IPR 279 at [80].

<sup>193</sup> *Halal Certification Authority Pty Ltd v Scadilone Pty Ltd* (2014) 107 IPR 23 at [111].

<sup>194</sup> *Truong* at [138]; *Geneva* at [80], [83]; *Henley Arch Pty Ltd v Del Monaco* [2019] FCCA 3848 at [104].

<sup>195</sup> *Futuretronics* at [19]; *Facton* at [92].

<sup>196</sup> *Henley Arch* at [244].

<sup>197</sup> *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 (Knox CJ), 81 (Isaacs J); *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd (No 10)* [2023] FCA 1656 at [121]-[126] (Beach J); *Multinail Australia Pty Ltd v Pryda (Aust) Pty Ltd* [2002] QSC 105 at [156]-[157], [160]-[161] (Chesterman J).

<sup>198</sup> *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471 (Brennan J); see also *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at [110] and [117] (Gordon J); *Directed Electronics* at [121].

<sup>199</sup> *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at [253] (Heydon JA); also *Directed Electronics* at [126].

<sup>200</sup> *Harris* at [254].

<sup>201</sup> *Lewis* at [113]; *Harris* at [254].