NOTICE OF FILING

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Important Information

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Form 34
Rule 16.33

REPLY TO AMENDED DEFENCE

No. NSD673/2022

Federal Court of Australia
District Registry: New South Wales
Division: General

LACHLAN KEITH MURDOCH
Applicant

PRIVATE MEDIA PTY LTD & ORS
Respondents

In answer to the Amended Defence filed on 7 November 2022 (**Defence**), Murdoch adopts the same defined terms as appear in the Statement of Claim filed on 23 August 2022 (**SOC**) and relies upon the following facts and assertions:

1. Save and except in so far as it contains admissions (including deemed admissions), or as otherwise expressly pleaded in this Reply, Murdoch:

   1.1 joins issue with the matters pleaded in paragraphs 6-9 and 23-50 of the Defence; and

   1.2 relies upon the matters pleaded in the SOC.

2. In answer to paragraphs 1-15 of the Defence (Factual Background), Murdoch says that given the matters pleaded in paragraphs 5 and 6 below, he does not plead to those paragraphs which are now not relevant to any matter in issue.

3. In answer to paragraphs 16-22 of the Defence (Conduct of Keane and Fray) Murdoch does not know and cannot admit these matters.

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4. In answer to paragraph 37 of the Defence (Mitigation) Murdoch:

4.1 notes that sub-paragraph 37.1 has been deleted;

4.2 says that the pleas in sub-paragraphs 37.2, 37.4 and 37.5 are meaningless and unparticularised;

4.3 says that the plea in sub-paragraph 37.3 is embarrassing and bad in form in that it breaches the rule in *Scott v Sampson*, fails to identify any relevant sector of Murdoch's reputation, is ambiguous and discloses no reasonable ground of mitigation; and

4.4 otherwise denies the matters in paragraph 37 of the Defence.

5. In answer to paragraph 42 of the Defence (s29A), Murdoch:

5.1 admits that the Article concerned an issue or issues of public interest;

5.2 says that the subject matters of the Article is a matter for submission, upon consideration of the content of that Article;

5.3 denies that any of Private Media, Fray or Keane reasonably believed at the time of publication that the Article was in the public interest;

5.4 denies that any of Private Media, Fray or Keane reasonably believed at the time of publication that the Article, to the extent it carries defamatory matter about Murdoch, was in the public interest;

5.5 says that in publishing the Article, Private Media, Keane and Fray were instead, and inconsistently with any belief in public interest, actuated by malice in that they predominantly acted with the improper purpose or purposes of harming Murdoch and/or seeking to attract unwarranted attention to the Article by using Murdoch's name as evidenced by the matters set out in paragraph 7, below.

6. In answer to paragraph 43 of the Defence (*Lange*), Murdoch:

6.1 repeats the matters set out in paragraph 5, above;

6.2 admits that the Article related to American government and political matters including the November 2020 election, Donald Trump, the Republican Party, the events on 6 January 2021 and the United States House Select Committee public hearings into those matters taking place at the time of publication of the Article;

6.3 admits that the Article related to Murdoch;

6.4 admits that the Article related to Fox News' coverage of the results of the US November 2020 election and its coverage of the events of 6 January 2021;

6.5 says that no relevant relationship to Australia and the people of Australia has been pleaded or particularised;

6.6 denies that the matters at paragraphs 1-16 and 42.1 even if correct, "*affect or throw light on governmental and political matters in Australia*" for the purposes of a *Lange defence* or "*government and political matters that affect the people of Australia*" as alleged in the Defence;

6.7 denies that the Article "*affects or throws light on governmental and political matters in Australia*" for the purposes of the *Lange defence* or "*government and political matters that affect the people of Australia*" as alleged in the Defence;

6.8 denies that any of Private Media, Fray or Keane's publication of the Article was reasonable in the circumstances; and

6.9 otherwise denies the allegations in paragraph 43 of the Defence.

7. In further answer to paragraph 43 of the Defence (*Lange*), Murdoch says that in publishing the Article, Private Media, Keane and Fray were actuated by malice in that they predominantly acted with the improper purpose or purposes of harming Murdoch and/or seeking to attract unwarranted attention to the Article by using Murdoch's name as evidenced by the following:

Failure to adhere to journalists' standards

7.1 Private Media and/or Fray promote the Crikey website as a legitimate news source publishing articles that serve a public benefit or are in the public's interest.

7.2 Fray and Keane promote themselves as journalists who write articles for the Crikey website that serve a public benefit or are in the public's interest.

7.3 Eric Beecher, Chairman and major shareholder of Private Media, has claimed that the Article was public interest journalism.

7.4 Private Media, Beecher, Fray and Keane, on the Crikey website, claim to adhere to a code of conduct in their reporting, said to reflect the standard of conduct required by the Media Entertainment & Arts Alliance, including by:

(a) seeking truth and providing a fair and comprehensive account;

(b) thorough and honest reporting;

(c) acting with professional integrity;

(d) striving for accuracy, fairness and disclosure of all essential facts;

(e) not giving distorting emphasis;

(f) giving a fair opportunity to reply;

(g) not allowing personal interest, belief, payment, gift or benefit to undermine accuracy, fairness or independence;

(h) not improperly using a journalistic position for personal gain;

(i) not allowing commercial considerations to undermine accuracy, fairness or independence;

(j) fairly correcting errors.

7.5 In publishing the Article, in the circumstances described further in the sub-paragraphs below, each of Private Media, Keane and Fray failed to adhere to each of the standards set out in the preceding sub-paragraph.

7.6 Private Media is a member of the Australian Press Council.

7.7 In publishing the Article, the circumstances described further in the sub-paragraphs

below, each of Private Media, Keane and Fray failed to adhere to the Australian Press Council's Statement of Principles.

7.8 Public interest journalism requires, at least, that:

(a) it concerns a topic of public interest;

(b) includes original investigation such as primary documents, interviews and original material;

(c) claims are factual, transparent and verifiable;

(d) it is presented in a fair and balanced manner;

(e) minimizes harm; and

(f) allows right of reply.

7.9 By reason of the matters described further in the sub-paragraphs below, to the extent the Article referred to Murdoch, it was not in the public interest or published for the public benefit.

7.10 In promoting the Article as set out in the SOC and which continued after the SOC was filed, as set out in the sub-paragraphs below, each of Private Media, Keane and Fray failed to adhere to each of the standards or principles set out above.

7.11 In promoting the Article as set out in the SOC and which continued after the SOC was filed, as set out in the sub-paragraphs below, each of Private Media, Keane and Fray were not acting for the public benefit or in order to protect public interest journalism.

7.12 The conduct of each of Private Media, Fray and Keane in relation to the Article, the Reposted Article and these proceedings as set out in the SOC and in this Reply was part of a hypocritical and cynical scheme to harm Murdoch, boost subscriptions, gain publicity and/or engender sympathy.

Circumstances of publication

7.13 The conduct of each of Private Media, Fray and Keane in relation to the Article, the Reposted Article, the matters alleged in the SOC and in this Reply was part of a pre-meditated marketing campaign to publish articles for the pre-dominant purpose of encouraging and soliciting subscriptions.

7.14 The Article purported to concern evidence given by Cassidy Hutchinson on 28 June 2022 about the conduct and knowledge of Donald Trump on 6 January 2021 and the days preceding it.

7.15 To the knowledge of Private Media, Keane and Fray, the Hutchinson evidence made no reference to Murdoch or any person in Murdoch's family or with that surname.

7.16 To the knowledge of Private Media, Keane and Fray, the Hutchinson evidence did not concern any allegations about Fox News conspiring with or supporting Trump.

7.17 To the knowledge of Private Media, Keane and Fray, the only references to Fox News on the days Hutchison gave evidence, were made by Liz Cheney, who mentioned two Fox News personalities that sent texts and other entreaties to Mark Meadows to ask Mr Trump to tell the people in the Capitol to go home.

7.18 To the knowledge of Private Media, Keane and Fray, the Hutchinson evidence aired on Fox News.

7.19 The Article falsely implied that Murdoch had been named in the Hutchison evidence.

7.20 The Article falsely implied that Murdoch had been named in the Hutchison evidence or other evidence before the Senate Select Committee as a co-conspirator of Trump.

7.21 Private Media, Fray and Keane each intended that Murdoch be identified as one of the subjects of the Article.

7.22 Private Media, Fray and Keane each intended that readers of the Article understand that Murdoch was named in the Hutchison evidence or other evidence before the Senate Select Committee as a co-conspirator of Trump.

7.23 None of Private Media, Fray or Keane held any belief or opinion at the time of publication of the Article that either Murdoch or any person related to him or with his surname, collaborated with, conspired with or in any way encouraged, counselled or procured Donald Trump to engage in any conduct (whether criminal or otherwise) on 6 January 2021 or the days leading up to it.

7.24 Private Media, Fray and Keane knew and deliberately chose to use the term "unindicted co-conspirator" in conjunction with the name Murdoch combined with the allegation that he had committed indictable crimes in connection with the events of 6 January 2021 consistent with the marketing campaign adopted to attract subscribers.

7.25 Each of Private Media, Keane and Fray had knowledge of the falsity of the imputations carried by the Article about Murdoch, as admitted on their behalf by their solicitor Michael Bradley in a letter dated 27 July 2022 in which they accepted that "there is no evidence" that Murdoch engaged in any of the conduct the subject of the imputations.

7.26 No attempt was made by any of Private Media, Fray or Keane to contact Murdoch (or any person in his family, or with that surname) prior to publication to give him an opportunity to respond to the allegations in the Article.

7.27 Upon complaint, Private Media, Fray and Keane removed the Article from the Crikey website within 20 minutes, knowing that it was untrue, baseless and indefensible, further that it could not be justified as a publication that met any standard applicable to a journalist or press agency.

7.28 On 7 July 2022 Private Media, Fray and Keane through their then solicitor implicitly accepted that Murdoch was identified by the Article (but not by the social media posts).

7.29 On 27 July 2022 Private Media, Fray and Keane, through their solicitor Michael Bradley, admitted that the Article mentions Murdoch.

7.30 Neither on 2 or 9 August 2022 did Private Media, Fray or Keane, through their solicitor Michael Bradley, make any claim that Murdoch was not the subject of the Article.

7.31 On 14 August 2022 when speaking for a quote in the SMH Article, Fray made no claim that the Article was not about Murdoch.

7.32 On 15 August 2022 in publishing the Reposted Article, Private Media, Fray and Keane did not claim that the Article was not about Murdoch.

7.33 On or after 22 August 2022 Private Media, Fray and Keane have each now disingenuously suggested that the Article was not about Murdoch or that they did not intend to identify him.

7.34 Despite the matters set out above, each of Private Media, Fray and Keane have stated that they "*stand by*" the Article and their "*reporting*".

Harming Murdoch in order to boost subscriptions/attract "clicks"

7.35 Including Murdoch's name in the Article was, to the knowledge of Private Media, Keane and Fray, irrelevant and unnecessary for the reasons set out above and was in order to increase the readership of the Article and to harm Murdoch.

7.36 The promotion of the Article on 29 and 30 June 2022, as alleged in the SOC at paragraphs 5.1 to 5.12, including the use of Murdoch's name in the captions on social media, was in order to increase the readership of the Article and to harm Murdoch.

7.37 The respondents' participation in the SMH Article and the publication of the Reposted Article on the Crikey website on 15 August 2022 as alleged in the SOC at paragraphs 5.14 and 5.29 was in order to draw attention to a dispute that had ended some 10 days earlier, to falsely claim that they had been intimidated and to attract subscriptions to the Crikey website.

7.38 Shortly after the reposting of the Article, Private Media advertised via its newsletter, website and on social media a half price subscription offer, referring in that advertising to its "*dispute*" with Murdoch.

7.39 On 22 August 2022 Private Media paid up to $100,000 to place the NY Times ad demanding that it and Fray and Eric Beecher be sued by Murdoch for their publication of the Article.

7.40 On 22 August 2022 Private Media paid further thousands of dollars to place the Canberra Times ad demanding that it and Fray and Eric Beecher be sued by Murdoch for their publication of the Article.

7.41 From about 22 August 2022 and thereafter, Private Media paid tens of thousands of dollars to promote its social media posts on Facebook, Twitter and Instagram about Murdoch and the Article.

7.42 On 23 August 2022, in an article on the Crikey website entitled "*Crikey's Murdoch move ripples around the nation – and the world*", Private Media applauded itself for the publicity attracted by the NY Times ad and criticised Australian media organisations for not reporting on Private Media's conduct.

7.43 Falsely representing what these proceedings are about in order to attract subscribers including on 24 August 2022 in an article written by Keane published on the Crikey website entitled "*The events of January 6, and the role of Fox and the Murdochs, must be scrutinised*".

Engendering sympathy in order to harm Murdoch

7.44 Prior to the publication of the Article Private Media received a revenue of approximately $3 million from subscriptions to the Crikey website.

7.45 Shareholders of Private Media include wealthy individuals, some with assets over tens of millions of dollars.

7.46 At all relevant times Private Media is and was insured for defamation claims which indemnify it for its own costs, Murdoch's costs and any damages awarded to Murdoch in these proceedings (**insurance policy**).

7.47 None of Private Media, Fray or Keane have disclosed the insurance policy to the public in connection with the Article, or at any relevant time.

7.48 Since about 14 August 2022 and continuing thereafter, Private Media, Fray and/or Keane have made social media posts, given interviews, made statements in Crikey newsletters and on the Crikey website, on the Go Fund Me Page, or otherwise made false public statements to the effect that:

(a) the Article merely "*mentioned the word Murdoch*";

(b) the allegations made about Murdoch and January 6 in the Article "*were tame*" compared to what had been published widely overseas by other media organisations;

(c) calling Murdoch an unindicted co-conspirator in relation to January 6 insurrection is commonplace in the U.S.;

(d) the Article merely alleged that the Murdoch family, via Fox News, helped create the conditions for the January 6 insurrection;

(e) the Article was independent public interest journalism;

(f) Murdoch could not sue in the U.S because he is a public figure;

(g) Murdoch has sought to intimidate them;

(h) Murdoch sought to bully them using his media companies;

(i) the pre-litigation correspondence was out of the ordinary for a defamation claim and amounted to intimidation and bullying;

(j) Murdoch's resources in the proceedings far outweigh theirs;

(k) they are "*David*" or "*David's weaker younger sibling*" in a battle against "*Goliath*";

(l) Murdoch has "*unleashed*" his resources against them;

(m) they require financial assistance from members of the public to defend the proceedings that they demanded be brought against them;

(n) their purpose in demanding that Murdoch sue them and in defending the proceedings (and thus seeking money from the public) is to protect public interest journalism;

(o) they require more subscriptions to defend the proceedings and to promote their

causes against Murdoch.

7.49 On 23 August 2022 Will Hayward, CEO of Private Media falsely claimed in an article published on the Crikey website "*A huge bet, for sure, but we believe a free press is worth fighting for*" that Murdoch brought the claim so that "*Crikey should suffer" and "it is our subscribers versus Murdoch's billions*".

7.50 Falsely representing what these proceedings are about in order to engender sympathy to Private Media, Fray and Keane and incite hatred towards Murdoch including on 24 August 2022 in an article written by Keane published on the Crikey website entitled "*The events of January 6, and the role of Fox and the Murdochs, must be scrutinised*".

7.51 On 26 August 2022 Private Media commenced a Go Fund Me campaign seeking $3 million, which included a representation that the cost to the respondents could be millions in damages and legal costs, when in fact they were insured in relation to the proceedings, including as to payment of Murdoch's damages and costs, a matter that they did not disclose.

7.52 By reason of Private Media's resources, including the insurance policy, the representations made to the public in order to generate new subscriptions and donations were false.

8. In answer to paragraphs 44-49 of the Defence (s18), Murdoch says that:

8.1 the letter of 27 July 2022 did not constitute an Offer to Make Amends for the purposes of s15 of the *Defamation Act* 2005 (**Offer**);

8.2 the Offer was not made as soon as reasonably practicable after the provision of the Concerns Notice (on 30 June) that had been issued 4 weeks earlier, in circumstances where the respondents:

(a) removed the Article from the Crikey website at 4:30pm on 30 June, being 20 minutes after receiving the Concerns Notice; and

(b) by their lawyers in fact responding to the Concerns Notice in detail on 7 July 2022 (20 days before the Offer).

8.3 The Offer was not reasonable in the circumstances including because:

(a) of the reasons set out in the letter from Murdoch's solicitor dated 29 July 2022;

(b) it did not include an offer to publish a reasonable correction or clarification;

(c) the "*Statement*" repeated verbatim the offensive and defamatory content from the Article, which had been taken down from the Crikey website 4 weeks earlier;

(d) the "*Statement*" set out the defamatory imputations of concern to Murdoch;

(e) it did not include an offer to take reasonable steps to tell third parties that the matter is or may be defamatory of Murdoch;

(f) it did not include an apology;

(g) it included further allegations about Murdoch.

9. Murdoch repeats and relies on the matters set out in the preceding paragraphs 6, 7 and 8 as matters within his knowledge that have aggravated the hurt and harm occasioned to him by the publication of the Article.

10. Murdoch relies on his knowledge of the conduct of Private Media, Fray and Keane in the proceedings as matters aggravating his hurt and harm that have arisen since the SOC was filed including:

10.1 Publishing articles and other material on the Crikey website, in newsletters, on social media on the accounts of Private Media, Fray, Keane, Will Hayward, and Marque Lawyers and in interviews about the proceedings which have attracted comments about Murdoch and his lawyers.

10.2 Complaining about Murdoch's commencement of the proceedings, having demanded that he sue them in relation to the Article.

10.3 The hypocritical failure of Private Media to upload the SOC onto the Crikey website, having claimed it sought to be transparent in uploading the pre-litigation correspondence and having claimed that it welcomed "*honest, open and public*

debate" about its dispute with Murdoch and these proceedings.

10.4 Falsely representing what these proceedings are about including on 24 August 2022 in an article written by Keane published on the Crikey website entitled "*The events of January 6, and the role of Fox and the Murdochs, must be scrutinised*".

10.5 Alleging on 24 August 2022 in an article written by Michael Bradley published on the Crikey website entitled *"Australia's defamation laws favour the reputations of the rich and powerful. Why?"* that Murdoch and other public figures who commenced defamation proceedings in Australia could not have done so in the United States of America because of the requirement of malice in circumstances where:

(a) Murdoch did, in fact, allege malice against Private Media and Fray in the SOC;

(b) the other applicants referred to in the article either proved malice (Hockey), proved conduct amounting to malice where a malice finding was not in issue (Barilaro) or otherwise alleged malice;

(c) the article failed to refer the reader to the SOC or excerpt those parts of it which alleged malice;

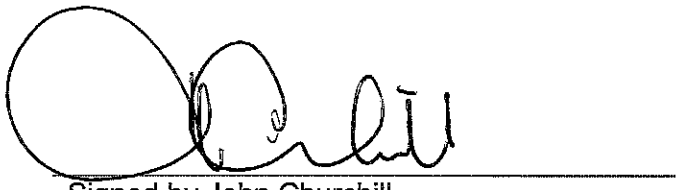
(d) the article advocated for a change in Australia's defamation law to provide a defence for impugned publication concerning government or politics, only to concede that such a defence should still have an exception for malice.

10.6 Making offensive and inappropriate comments about Murdoch's solicitor.

10.7 The commencement of a Go Fund Me campaign on 26 August 2022 seeking $3 million, which included a representation that the cost to the respondents could be millions in damages and legal costs, when in fact they were insured in relation to the proceedings, including as to payment of Murdoch's damages and costs, a matter that they did not disclose.

10.8 Alleging on 6 September 2022 in an article published on the Crikey website titled "*Why do billionaires SLAPP journalists? Because they can*" that Murdoch's claim is an abuse of process (SLAPP suit) and so were other proceedings in which his senior counsel was briefed.

Date: 8 November 2022



Signed by John Churchill
Lawyer for the applicant

This pleading was prepared by Sue Chrysanthou SC and John Churchill, solicitor.

Certificate of lawyer

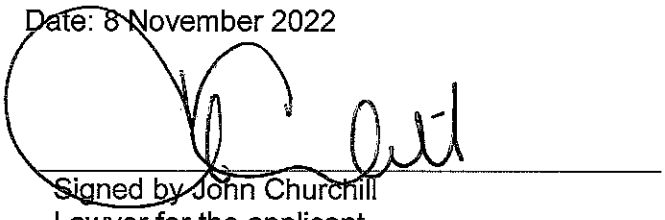
I, John Churchill, certify to the Court that, in relation to the reply filed on behalf of the Murdoch, the factual and legal material available to me at present provides a proper basis for:

(a) each allegation in the pleading; and

(b) each denial in the pleading; and

(c) each non admission in the pleading.

Date: 8 November 2022



Signed by John Churchill
Lawyer for the applicant