

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No. S CI 2010 05318

BETWEEN

ERIN DOWNIE

Plaintiff

and

SPIRAL FOODS PTY LTD (ACN 006 292 780)
and others according to the Schedule

First Defendant

AMENDED STATEMENT OF CLAIM

(Amended pursuant to the orders of the Honourable Justice Beach made on 26 October 2012)

Date of Document:	21 December 2012
Filed on behalf of:	The Plaintiff
Prepared by:	
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Group Proceeding

1. This proceeding is brought by the plaintiff on her own behalf and on behalf of the group of persons described in paragraph 2 below, pursuant to Part 4A of the *Supreme Court of Victoria Act 1986* (Vic).

Group Members

2. The group members to whom this proceeding relates are all persons:
 - (a) who, during the period 1 July 2004 and 24 December 2009 (“**the period**”), consumed soy milk sold in Australia under the mark or brand “Bonsoy” (“**Bonsoy**”) and, as a result of consuming of Bonsoy, suffered thyroid dysfunction, exacerbation of pre-existing thyroid conditions or iodism; or
 - (b) infants who suffered thyroid dysfunction as a result of maternal consumption of Bonsoy during the period (‘the infants’).

3. At the time of the commencement of this proceeding there were seven or more group members.

The First Defendant

4. The first defendant (“**Spiral Foods**”):

- (a) is and was at all material times duly incorporated under the *Corporations Act 2001* (Cth);
- (b) is and was at all material times a trading corporation within the meaning of the *Trade Practices Act 1974* (Cth) (“**the Act**”);
- (c) carried on business at all material times under the name and using the brand “Spiral Foods”.

5. The second defendant (“**Muso**”):

- (a) is and was at all material times incorporated pursuant to the laws of Japan;
- (b) has since about 1986 conducted the business of, amongst other things, exporting soymilk from Japan to Australia.

6. The third defendant (“**Marusan**”), is and was at all material times:

- (a) incorporated pursuant to the laws of Japan;
- (b) in the business of, amongst other things, manufacturing food from soybeans, including soymilk.

Consumption of Bonsoy

7. During the period the plaintiff and each of the group members (other than the infants) consumed Bonsoy.

PLAINTIFF’S PARTICULARS

The plaintiff first consumed Bonsoy in or about June 2007. On and from about April 2008, and until about December 2009 the plaintiff consumed approximately 3-4 glasses of Bonsoy a day.

8. At all material times during the period:

- (a) Bonsoy contained kombu, a type of seaweed;
- (b) because it contained kombu, Bonsoy contained iodine;
- (c) because of the levels of iodine it contained:
 - (i) the consumption of Bonsoy materially increased the risk of those who consumed it suffering thyroid dysfunction, exacerbation of pre-existing thyroid conditions or iodism, and of infants who were exposed to increased levels of iodine as a result of maternal consumption suffering thyroid dysfunction; and
 - (ii) Bonsoy was unsafe for human consumption.

PARTICULARS

Consumption of high levels of iodine can and does cause thyroid dysfunction, exacerbation of a pre-existing thyroid conditions and iodism.

Tests conducted by the Royal Prince Alfred Hospital, NSW and Division of Analytical Laboratories, NSW, reported in December 2009 detected concentrations of iodine in Bonsoy of between 25,000 and 31,000 micrograms per litre.

Between 1991 and 2005 the upper safe daily intake for iodine (USL), published in the "Recommended Dietary Intakes for Use in Australia" by the Australian government, National Health and Medical Research Council (NHMRC), was 2000ug for adults and 1000 ug for children.

In 2002 the International Iodine Deficiency Disorders Committee found that daily intakes of 2,000ug of iodine should be regarded as excessive or potentially harmful.

In and after 2005 the Nutrient Reference Values for Australia (published by the NHMRC) provided a USL for iodine of 1,100ug for adults, 200ug for children aged 1-3, 300ug for children aged 4-8, 600ug for children aged 9-13 and 900ug for children aged 14-18. The Nutrient Reference Values provided that the "recommended daily intake" (RDI) of iodine was 150ug for adults, 90ug for children aged 1-8, 120ug for children aged 9-13 and 150ug for children aged 14-18.

The iodine content of Bonsoy was tested in July 2006 and found to contain 3mg of iodine per 100g (30mg/L). The composition of Bonsoy had not changed prior to that time, since 2003, and did not subsequently change, materially, throughout the period.

At all times throughout the period consumption of a single cup of Bonsoy would result in an iodine intake significantly exceeding the USL for iodine in Australia. During 2004-2005 consumption of one cup of Bonsoy would result in an iodine intake that was 3.7 times the USL for adults, in and after 2005 consumption of one cup of Bonsoy would result in an iodine intake

that was 7 times the USL for adults and 50 times the RDI for adults.

Food Standards Australia New Zealand (“FSANZ”) reported in December 2009 that consumption of 30ml of Bonsoy per day by adults, and 5ml a day by children, would likely exceed tolerable daily iodine intakes, and that daily consumption of a cup of Bonsoy could lead to a daily intake of more than 7,500 ugmicrograms of iodine.

Tests conducted by the Royal Prince Alfred Hospital, NSW and Division of Analytical Laboratories, NSW, reported in December 2009 detected concentrations of iodine in Bonsoy of between 25,000 and 31,000 micrograms per litre

Spiral Foods recalled Bonsoy from sale in Australia and internationally in December 2009 because it had been found to contain high levels of iodine, and subsequently re-formulated it to remove kombu from its ingredients.

~~The formula and composition of Bonsoy has not been reported as having changed in any material way during the period. Throughout the period a healthy daily iodine intake was approximately 80-150 micrograms and the safe upper limit per day was 1,100 micrograms for adults, 900 micrograms for 14 year olds and 200 micrograms per day for young children. Further particulars will be provided following discovery.~~

9. On or about 24 December 2009:
 - (a) Spiral Foods recalled Bonsoy from sale in Australia because it had been found to contain high levels of iodine;
 - (b) FSANZ commenced the co-ordination of a national recall of Bonsoy;
 - (c) FSANZ issued a media statement advising that people should not consume Bonsoy.
10. As a result of consumption of Bonsoy during the period, the plaintiff and each group member has suffered thyroid dysfunction, exacerbation of a pre-existing thyroid condition and/or iodism (“**the injuries**”).
11. As a result of suffering the injuries the plaintiff and each group member has experienced pain and suffering and suffered loss and damage

PLAINTIFF’S PARTICULARS

- (a) The plaintiff was born on 7 December 1980;
- (b) on and from about ~~July~~June 2008 she has suffered from thyroid dysfunction including hyperthyroidism and hypothyroidism, the consequences of which included anxiety, depression and psychiatric injury;

- (c) the plaintiff has incurred and will continue to incur medical and pharmaceutical and like expenses, particulars of which will be provided prior to trial;
- (d) the plaintiff has required domestic care, supervision and attention, particulars of which will be provided prior to trial;
- (e) the plaintiff suffered a loss of or reduction in capacity to provide gratuitous domestic services to her daughter and partner, particulars of which will be provided prior to trial;
- (f) since suffering the injuries particularised, the plaintiff has been unable to return to work as a musician and music teacher and suffered a loss of income, particulars of which will be provided prior to trial.

CLAIMS AGAINST THE FIRST DEFENDANT

LIABILITY UNDER SECTION 74A(3) AND (4) OF THE ACT

12. During the period:

- (a) Spiral Foods supplied Bonsoy to retailers, supermarket proprietors, restaurant and cafe proprietors (**intermediate suppliers**) who acquired it for re-supply and supplied it the plaintiffs and group members;
- (b) The plaintiff and group members (other than the infants) acquired Bonsoy for the purpose of drinking or otherwise consuming it;
- (c) The purpose for which the plaintiff and group members acquired Bonsoy was, by implication, made known to Spiral Foods;

PARTICULARS

Bonsoy was marketed by Spiral Foods for drinking on its own, use in cereals, smoothies, tea and coffee or other personal consumption. The plaintiff refers to the Spiral Foods Website – <http://www.spiralfoods.com.au>. Bonsoy was acquired by intermediate suppliers from Spiral Foods so that they could supply it to consumers for drinking or other personal consumption.

- (d) Bonsoy was not reasonably fit for drinking or other human consumption;

PARTICULARS

The plaintiffs refers to and repeats the matters alleged at paragraph 68.

- (e) Spiral Foods caused its name or brand (“Spiral Foods”) to be applied to the packaging of Bonsoy supplied by it, or permitted it to be so applied;

- (f) Spiral Foods imported Bonsoy into Australia;
 - (g) Bonsoy was manufactured by ~~Muse Co Ltd~~ Marusan, which did not have a place of business in Australia.
13. By reason of the matters alleged at sub-paragraphs ~~10(a), 10(e), 10(f) and 10(g)~~ 12(a), (e), (f) and (g), Spiral Foods is deemed by sections 74A(3) and (4) of the Act to have manufactured Bonsoy.
 14. The conduct of Spiral Foods alleged at paragraph ~~10~~ 12 was conduct in trade or commerce.
 15. By reason of the fact that Bonsoy was not reasonably fit for human consumption the plaintiff and group members have suffered loss and damage.

PLAINTIFFS' PARTICULARS

The plaintiff refers to and repeats the matters set out at paragraphs ~~5, 8-7, 10 and 11~~ 9.

16. By reason of the matters alleged in paragraphs ~~10-12~~ to ~~13-15~~ 12 Spiral Foods is liable, pursuant to s74B of the Act, to compensate the plaintiff and each group member for their loss and damage.

LIABILITY UNDER SECTION 74D OF THE ACT

17. The plaintiff refers to and repeats the allegations made at sub-paragraph ~~10~~ 12(a) and at paragraphs ~~11-13~~ and ~~12~~ 14;
18. During the period, Bonsoy was not of merchantable quality, within the meaning of s74D of the Act;

PARTICULARS

The plaintiffs refers to and repeats the matters alleged at paragraph ~~6~~ 8.

19. By reason of the fact that Bonsoy was not of merchantable quality, the plaintiff and group members have suffered loss and damage.

PLAINTIFFS' PARTICULARS

The plaintiff refers to and repeats the matters alleged at paragraphs ~~5, 8-7, 10 and 9~~ 11.

20. By reason of the matters alleged in paragraphs ~~15-17~~ 17-19 Spiral Foods is liable, pursuant to

s74D of the Act, to compensate the plaintiff and each group member for their loss and damage.

LIABILITY UNDER SECTION 75ADB OF THE ACT

21. The plaintiff refers to and repeats the allegations made at sub-paragraph ~~12~~10(a) and at paragraphs ~~11~~13 and ~~12~~14;
22. During the period Bonsoy had a defect within the meaning of s75ACD of the Act;

PARTICULARS

By reason of the matters alleged at paragraph ~~8~~6, the safety of Bonsoy was not such as persons are generally entitled to expect.

Further or alternatively, by reason of the fact that the packaging in which Bonsoy was distributed did not contain any warning that:

- (i) disclosed the iodine levels in Bonsoy;
- (ii) disclosed the quantity of Bonsoy, the consumption of which would result in consumption of iodine above the USL and the RDI;
- (iii) disclosed the fact that consumption of excess iodine may have serious health consequences,

the safety of Bonsoy was not such as persons are generally entitled to expect.

23. By reason of the fact that Bonsoy had a defect, the plaintiff and each group member have suffered injuries.

PLAINTIFFS' PARTICULARS

The plaintiff refers to and repeats the matters alleged at paragraph ~~5~~, ~~8~~7, 10 and ~~11~~9.

Further or alternatively, had Bonsoy been distributed with a warning as alleged at paragraph 22 the plaintiff would not have consumed Bonsoy.

24. By reason of the matters alleged at paragraphs ~~19~~21-23 Spiral Foods is liable, pursuant to s75AD of the Act, to compensate the plaintiff and each group member for their loss and damage suffered as a result of their injuries.

LIABILITY IN NEGLIGENCE

25. During the period Spiral Foods:

- (a) distributed Bonsoy to intermediate suppliers for supply to consumers;
- (b) knew and intended that Bonsoy would be consumed by the consumers to whom it was supplied;
- (c) promoted Bonsoy as a safe and healthy product.

PARTICULARS

The plaintiff refers to and repeats the matters alleged at paragraph 1240(a)-(c).

Further, at all material times Bonsoy was distributed in 1 litre cartons. The text on the cartons stated, relevantly, "Begin your day with Bonsoy, hot or cold on cereals, or pour it on your favourite fruits and berries for a taste treat. Enjoy Bonsoy chilled, warm or straight from the pack. Bonsoy also makes smoothies taste terrific. Cooking with Bonsoy, make rich and moist pancakes, sauces and creamy soups as well as delicious breads, biscuits and cakes. Bonoy makes a great milk alternative; ideal for people with dairy allergies; perfect for cooking and baking. Bonsoy is a healthy, satisfying everyday food."

At all material times the Spiral Foods website stated:

"... Kombu (sea-veg), known for its mineral content, is also used when beans are consumed. Job's tears ... is held in high regard in Chinese medicine for its properties. These ingredients form the cornerstone of a 'traditional recipe' in that all these products work together not only for taste and texture but also for nutrition.

Q: My naturopath told me Bonsoy is the best soymilk and a good way for me to introduce soy into my diet. Please list some ways that I could include it in my diet. A: Bonsoy has a rounded taste and case be used imaginatively in all types of cuisines, goes great with cereals, smoothies, use it in cakes, sauces, with your tea or coffee, on its own."

26. In 2003 the composition of Bonsoy was re-formulated as a result of which, in and after August 2003:

- (a) Kombu extract CN (pure kombu) was substituted for the kombu powder previously used in Bonsoy;
- (b) the quantity of Kombu extract CN used in Bonsoy was approximately thirteen times greater than the amount of kombu powder used in Bonsoy prior to the re-formulation,

(the 2003 reformulation).

27. Spiral Foods approved the 2003 reformulation.

PARTICULARS

As at May 2000 Bonsoy relevantly included 0.54kg of kombu extract powder and 1.5kg of wet salt per 1000L of Bonsoy. The kombu extract powder contained kombu, alcohol, dextrin and dietary salt. In about December 2002 James Wilson of Spiral Foods met with representatives of Muso and Marusan who informed him that dietary salt was added to Bonsoy but that it was not disclosed as an ingredient on Bonsoy's packaging. The minutes of that meeting (which are Marusan's discovered document 9) record that Mr Wilson "would like, if possible, to avoid representing sea salt as a raw material overseas. Presently Westerners are extremely sensitive about the amount of salt intake, and the representation of salt as a raw ingredient will not be advantageous in sales. We will have Sato Foods increase the amount of dietary salt contained in kombu extract as a raw material so that dietary salt will not be added by Marusan. If this is possible representation of kombu extract will do, and there will be no need to represent dietary salt." In February 2003 Marusan ascertained that it would be possible change the composition of Bonsoy to one that did not require the addition of salt as an ingredient, by changing the kombu extract then used, to a new kombu extract. On or about 16 May 2003 Muso wrote to James Wilson of Spiral Foods asking for permission to change the composition of Bonsoy. Wilson gave the approval requested. A copy of Muso's letter which is endorsed with Wilson's approval, is Muso's discovered document 45.

28. The composition of Bonsoy did not change in any material respect after that time, until it was again reformulated after December 2009 to remove kombu.

29. At all material times during the period;

(i) -the consumption of Bonsoy materially increased the risk of those consuming it suffering thyroid dysfunction, exacerbation of a pre-existing thyroid condition or iodism, and of the infants exposed to increased levels of iodine as a result of maternal consumption suffering thyroid dysfunction; and

(ii) was unsafe for human consumption.

PARTICULARS

The plaintiff refers to and repeats the matters alleged at paragraph 68.

26-30. By reason of the following, at all material times during the period Spiral Foods had reason to know that there was a real risk that Bonsoy could contain levels of iodine that were harmful to human health and that accordingly, the consumption of Bonsoy could pose a real risk of harm to human health:

(a) Spiral Foods was, during the period and for many years prior to the period, in the

business of promoting and distributing food that it identified and described to the public as healthy and safe;

- (b) Spiral Foods had and professed to have expertise in assessing the health benefits of the foods it promoted and distributed;
- (c) Spiral Foods promoted Bonsoy to the public, intermediate suppliers, dieticians, nutritionists and naturopaths as healthy and safe;
- (d) Spiral Foods knew that Bonsoy contained kombu and promoted that fact;
- (e) the fact that seaweed products commonly and naturally contain high levels of iodine had been well documented for many years prior to the period and was readily ascertainable by any person in the business of distributing food products, acting reasonably;
- (f) Kombu was recognised as one of the richest sources of bioavailable iodine, and therefore, the seaweed species with the greatest propensity to contribute to iodine excess in the human diet if not correctly apportioned and monitored;
- (g) the potential for seaweed ingestion to cause adverse health consequences was well documented from at least the 1970's with most cases occurring in Japan, and was readily ascertainable by any person in the business of distributing food products, acting reasonably;
- (~~e~~)(h) the association between the consumption of high levels of iodine and thyroid dysfunction and iodism (including in infants) had been well documented for many years prior to the period commencing, and was readily ascertainable by any person in the business of distributing food products, acting reasonably;
- (~~e~~)(i) On 26 April 2004 the New Zealand Food Safety Authority ("NZFSA") published the findings of a study that found that a soy milk product distributed in New Zealand that used seaweed as a flavouring, contained high levels of iodine. The NZFSA stated, in its publication, that the results of the study had caused it concern, and that the manufacturer of the soy milk had immediately ceased production and re-formulated its product. The study was readily accessible by Spiral Foods, which distributed food products in New Zealand at the time at which the study was published;
- (j) In September 2005 the Australian and New Zealand Journal of Public Health published the results of a case-control study by O'Connell and others in which it was found that a

New Zealand cluster thyrotoxicosis was associated with the consumption of soy milk that contained a high level of iodine as a result of the addition of kombu. The study was readily accessible to Spiral Foods.

31. In June 2006:

- (a) Spiral Foods was contacted by a consumer who told Spiral Foods that she was being treated for an ongoing medical condition and that her endocrinologist needed to know the iodine levels of the kombu used in Bonsoy, the amount of kombu used in Bonsoy and the iodine levels in Bonsoy overall;
- (b) Spiral Foods referred the query to Muso, telling Muso that, "this lady needs some information for her doctor about Bonsoy as she is being treated for a serious problem";
- (c) Muso referred the query to Marusan.

PARTICULARS

The communications alleged are evidenced in Marusan's discovered document 26.

32. In July 2006:

- (a) At Spiral Foods' request Marusan obtained an iodine analysis of Bonsoy;
- (b) The analysis, which was performed by Japan Food Research Laboratories and reported on 7 July 2006, showed that Bonsoy contained 3mg of iodine per 100g (30mg per litre);
- (c) The results of the analysis were circulated to Spiral Foods and Muso.

PARTICULARS

Spiral Food's request for the analysis is evidenced in Spiral Food's discovered document 294 and Marusan's discovered document 26. A report of the analysis is Marusan's discovered document 27. Spiral's receipt of the analysis is evidenced in Spiral's discovered document 9. Muso says, at paragraph 18(c)(ii)(H) of its defence to the statement of claim indorsed on the third party notice served on it by Spiral Foods (**defence to third party notice**), that in or about mid July 2006 Muso provided Spiral Foods with information about the iodine level in Bonsoy, namely that Bonsoy contained 3mg per 100g of iodine.

33. In or about October 2007:

- (a) Spiral Foods received an inquiry from a consumer about the level of iodine in Bonsoy;

(b) Spiral Foods referred the inquiry to Muso;

(c) Muso responded to Spiral Foods, saying,

“we have no test data on iodine. However the composition of kombu extract in Bonsoy is only 0.67%, and it would not affect so much. P.S. Only toxic activity iodine is often called into question, but it is an essential trace mineral. Iodine lacking causes disorder of the thyroid gland. So, iodine is added to salt in some landlocked countries like Switzerland, inland of China etc. Taking a trace mineral from kombu, a natural food, is much better than taking from an additive for salt.”

PARTICULARS

The communications alleged are evidenced in the Muso’s discovered document 47.

34. In or about August 2009:

(a) Spiral Foods received an inquiry from a consumer who was seeking information about the iodine levels in Bonsoy;

(b) Spiral Foods referred the inquiry to Muso, stating that the customer had an aversion to iodine;

(c) Muso responded to Spiral, saying that, “kombu is known as seaweed containing iodine at high levels and that’s why she is asking this I guess. Since the percentage of kombu extract is very low, I don’t think it would be great concern for her but let us see what information Marusan may have”;

(d) Muso referred the inquiry to Marusan, stating that iodine “is known as an element in kombu and tends to be disliked in products overseas.” Muso attached a link to a Japanese Ministry of Health website concerning iodine. The website contained information concerning the risks of excess iodine, the upper daily limits for the Japanese population (at that time, 3mg/day) and indicated iodine levels for various foods including kombu.

(e) Muso responded to Spiral Foods, stating iodine in Bonsoy had not been analysed before, but on the basis of similar products, it estimated the iodine content of Bonsoy at 8.71ppm.

PARTICULARS

The communications alleged are evidenced in Muso's discovered document 52 and Marusan's discovered document 28.

~~27.35.~~ By reason of the matters alleged at paragraphs ~~23 to 25~~ 25 to 30 Spiral Foods owed a duty to the plaintiff and each of the injured group members to take reasonable care to:

- ~~(a) inquire of the manufacturer as to the levels of iodine in Bonsoy;~~
 - ~~(b) ensure that Bonsoy it distributed had been tested for iodine content;~~
 - ~~(c) ascertain by doing (a) and (b) that the iodine content of Bonsoy that it was to distribute was not such as to pose a real risk of harm to human health;~~
 - ~~(d) if at any time it could not or did not ascertain that the iodine content of Bonsoy that it was to distribute was not such as to pose a real risk of harm to human health, to cease distributing Bonsoy, until it did so.~~
- (a) ensure that Bonsoy it distributed was not unfit for human consumption;
 - (b) ensure that Bonsoy it distributed did not pose a material risk to human health when consumed;
 - (c) refrain from distributing Bonsoy unless and until it had taken reasonable steps to ascertain that the Bonsoy was not unfit for human consumption and did not pose a material risk to human health when consumed;
 - (d) further and alternatively to (a)-(c), to provide a warning on the packaging in which Bonsoy was distributed that:
 - (i) disclosed the iodine levels in Bonsoy;
 - (ii) disclosed the quantity of Bonsoy, the consumption of which would result in consumption of iodine above the USL and the RDI
 - (iii) disclosed the fact that consumption of excess iodine may have serious health consequences.

~~28.36.~~ In breach of its duty alleged in the preceding paragraph Spiral Foods:

- ~~(a) did not inquire of the manufacturer as to the levels of iodine in Bonsoy;~~

- ~~(b) — did not ensure that the product it distributed had been tested for iodine content;~~
- ~~(e) — did not ascertain that the iodine content of Bonsoy that it was to distribute was not such as to pose a real risk of harm to human health;~~
- ~~(d) — despite not doing (a),(b) or (e), continued to distribute Bonsoy for supply to consumers.~~
- (a) failed to have regard to the available scientific literature which would have informed it of the matters alleged at sub-paragraphs 30(e)-(h), when:
 - (i) approving the 2003 re-formulation of Bonsoy;
 - (ii) distributing Bonsoy throughout the period;
- (b) approved the 2003 reformulation of Bonsoy without ascertaining the consequences of the reformulation for the risks to human health by consuming Bonsoy;
- (c) failed to determine that the change in the composition of Bonsoy in 2003 may amount to “novelty” within the meaning of the standard 1.5.1 of the Australia and New Zealand Food Standards Code (which applied to Spiral Foods by virtue of the *Food Act 1984* (Vic)), and failed to submit the reformulation to FSANZ for evaluation;
- (d) before June 2006, failed to ascertain the levels of iodine in Bonsoy;
- (e) after receiving the inquires alleged above in 2006, 2007 and 2009, failed to ascertain for itself whether the levels of iodine in Bonsoy, of which it was then aware, constituted a risk to human health;
- (f) distributed Bonsoy at all material times throughout the period, having failed to take reasonable steps to ascertain that the Bonsoy was not unfit for human consumption and did not pose a material risk to human health when consumed;
- (g) at all material times throughout the period, failed to give the warning alleged at sub-paragraph 35(d).

29-37. By reason of Spiral Foods’ breach of duty as alleged, the plaintiff and each group member have suffered injury, loss and damage.

PLAINTIFFS’ PARTICULARS

The plaintiff repeats the matters alleged at paragraphs 7, 10 and 11. Further or alternatively, if Bonsoy had been distributed with a warning as alleged at paragraph 35(d) the plaintiff would not have consumed Bonsoy.

CLAIMS AGAINST THE SECOND DEFENDANT

LIABILITY IN NEGLIGENCE

38. Since 1986 (and at all relevant times during the period):
- (a) Muso has been in the business of exporting soymilk to Western countries including Australia;
 - (b) Muso has supplied Bonsoy to Spiral Foods for importation into Australia.
39. Muso supplied to Spiral Foods the Bonsoy that it resupplied to intermediate suppliers from whom the plaintiffs and group members acquired it (as alleged at paragraph 12).
40. The Bonsoy that Muso supplied to Spiral Foods was manufactured and packaged specifically for export to Australia.
41. At all material times Muso knew that the purpose for which Spiral Foods acquired Bonsoy from it was for resale to intermediate suppliers who intended to sell to consumers in Australia for human consumption.

PARTICULARS

The plaintiff refers to paragraph 17 of Muso's defence to third party notice.

42. Muso professes to have expertise in the use of sea vegetables (of which kombu is one), and their health effects.
43. In 2003 the composition of Bonsoy was re-formulated as a result of which, in and after August 2003:
- (a) Kombu extract CN (pure kombu) was substituted for the kombu powder previously used in Bonsoy;
 - (b) the quantity of Kombu extract CN used in Bonsoy was approximately thirteen times greater than the amount of kombu powder used in Bonsoy prior to the re-formulation, (the 2003 reformulation).

44. Muso assisted Spiral Foods with the 2003 reformulation.

PARTICULARS

As at May 2000 Bonsoy relevantly included 0.54kg of kombu extract powder and 1.5kg of wet salt per 1000L of Bonsoy. The kombu extract powder contained kombu, alcohol, dextrin and dietary salt. In about December 2002 representatives of Muso met with representatives of Marusan and with James Wilson of Spiral Foods. At that meeting Muso, Marusan and Spiral Foods discussed changing the composition of Bonsoy in order to avoid the need to mention the addition of salt on the packaging of Bonsoy.

In February 2003 Marusan ascertained that it would be possible change the composition of Bonsoy to one that did not require the addition of salt as an ingredient, by changing the kombu extract then used, to a new kombu extract.

On or about 1 May 2003 Muso wrote to Marusan stating, "we are at present working with Spiral towards a change in ingredients for Bonsoy." A copy of Muso's letter is Muso's discovered document 44.

On or about 16 May 2003 Muso wrote to James Wilson of Spiral Foods asking for permission to change the composition of Bonsoy. Wilson gave the approval requested. A copy of Muso's letter which is endorsed with Wilson's approval, is Muso's discovered document 45.

45. The composition of Bonsoy did not change in any material respect after that time, until it was again reformulated after December 2009 to remove kombu.

46. Muso designed the packaging for the reformulated Bonsoy and provided it to Marusan and advised Marusan about the representation of ingredients on the packaging.

47. At all material times during the period:

(i) the consumption of Bonsoy materially increased the risk of those consuming it suffering thyroid dysfunction, exacerbation of a pre-existing thyroid condition or iodism, and of the infants exposed to increased levels of iodine as a result of maternal consumption suffering thyroid dysfunction; and

(ii) was unsafe for human consumption.

PARTICULARS

The plaintiff refers to and repeats the matters alleged at paragraph 8.

48. By reason of the following, at all material times during the period Muso had reason to know that there was a real risk that Bonsoy could contain levels of iodine that were harmful to

human health and that accordingly, the consumption of Bonsoy could pose a real risk of harm to human health:

- (a) Muso was, during the period and for many years prior to the period, in the business of exporting food including soymilk to Western countries including to Australia;
- (b) Muso professed to have expertise in the health benefits of sea vegetables;
- (c) Muso knew that Bonsoy contained kombu;
- (d) the fact that seaweed products commonly and naturally contain high levels of iodine had been well documented for many years prior to the period and was readily ascertainable by any person in the business of distributing food products, acting reasonably;
- (e) Kombu was recognised as one of the richest sources of bioavailable iodine, and therefore, the seaweed species with the greatest propensity to contribute to iodine excess in the human diet if not correctly apportioned and monitored;
- (f) the potential for seaweed ingestion to cause adverse health consequences was well documented from at least the 1970's with most cases occurring in Japan, and was readily ascertainable by any person in the business of distributing food products, acting reasonably;
- (g) the association between the consumption of high levels of iodine and thyroid dysfunction and iodism (including in infants) had been well documented for many years prior to the period commencing, and was readily ascertainable by any person in the business of distributing food products, acting reasonably;
- (h) On 26 April 2004 the New Zealand Food Safety Authority ("NZFSA") published the findings of a study that found that a soy milk product distributed in New Zealand that used seaweed as a flavouring, contained high levels of iodine. The NZFSA stated, in its publication, that the results of the study had caused it concern, and that the manufacturer of the soy milk had immediately ceased production and re-formulated its product. The study was readily accessible by Muso.
- (i) In September 2005 the Australian and New Zealand Journal of Public Health published the results of a case-control study by O'Connell and others in which it was found that a New Zealand cluster thyrotoxicosis was associated with the consumption of soy milk that contained a high level of iodine as a result of the addition of kombu. The study was

readily accessible to Muso.

49. In June 2006:

- (a) Spiral Foods was contacted by a consumer who told Spiral Foods that she was being treated for an ongoing medical condition and that her endocrinologist needed to know the iodine levels of the kombu used in Bonsoy, the amount of kombu used in Bonsoy and the iodine levels in Bonsoy overall;
- (b) Spiral Foods referred the query to Muso, telling Muso that, "this lady needs some information for her doctor about Bonsoy as she is being treated for a serious problem";
- (c) Muso referred the query to Marusan.

PARTICULARS

The communications alleged are evidenced in Marusan's discovered document 26.

50. In July 2006:

- (a) At Spiral Foods' request Marusan obtained an iodine analysis of Bonsoy;
- (b) The analysis, which was performed by Japan Food Research Laboratories and reported on 7 July 2006, showed that Bonsoy contained 3mg of iodine per 100g (30mg per litre);
- (c) The results of the analysis were circulated to Spiral Foods and Muso.

PARTICULARS

A report of the analysis is Marusan's discovered document 27. Muso says, at paragraph 18(c)(ii)(H) of its defence to third party notice, that in or about mid July 2006 Muso provided Spiral Foods with information about the iodine levels in Bonsoy, namely that Bonsoy contained 3mg per 100g of iodine.

51. In or about October 2007:

- (a) Spiral Foods received an inquiry from a consumer about the level of iodine in Bonsoy;
- (b) Spiral Foods referred the inquiry to Muso;
- (c) Muso responded to Spiral Foods, saying,

"We have no test data on iodine. However the composition of kombu

extract in Bonsoy is only 0.67%, and it would not affect so much. P.S. Only toxic activity iodine is often called into question, but it is an essential trace mineral. Iodine lacking causes disorder of the thyroid gland. So, iodine is added to salt in some landlocked countries like Switzerland, inland of China etc. Taking a trace mineral from kombu, a natural food, is much better than taking from an additive for salt."

PARTICULARS

The communications alleged are evidenced in the Muso's discovered document 47

52. In or about August 2009:

- (a) Spiral Foods received an inquiry from a consumer who was seeking information about the iodine levels in Bonsoy;
- (b) Spiral Foods referred the inquiry to Muso, stating that the customer had an aversion to iodine;
- (c) Muso responded to Spiral, saying that, "kombu is known as seaweed containing iodine at high levels and that's why she is asking this I guess. Since the percentage of kombu extract is very low, I don't think it would be great concern for her but let us see what information Marusan may have."
- (d) Muso referred the inquiry to Marusa, stating that iodine 'is known as an element in kombu and tends to be disliked in products overseas.'" Muso attached a link to a Japanese Ministry of Health website concerning iodine. The website contained information concerning the risks of excess iodine, the upper daily limits for the Japanese population (at that time, 3mg/day) and indicated iodine levels for various foods including kombu.
- (e) Muso responded to Spiral Foods, stating that iodine in Bonsoy had not been analysed before, but on the basis of similar products, it estimated the iodine content of Bonsoy at 8.71ppm.

PARTICULARS

The communications alleged are evidenced in Muso's discovered document 52 and Marusan's discovered document 28.

53. By reason of the matters alleged at paragraphs 38-48 Muso owed a duty to the plaintiff and each of the injured group members to take reasonable care to:

- (a) ensure that Bonsoy it supplied to Spiral Foods was not unfit for human consumption;
- (b) ensure that Bonsoy it supplied to Spiral Foods did not pose a material risk to human health when consumed;
- (c) refrain from supplying Bonsoy to Spiral Foods unless and until it had taken reasonable steps to ascertain that the Bonsoy was not unfit for human consumption and did not pose a material risk to human health when consumed;
- (d) further and alternatively to (a)-(c), to provide a warning on the packaging in which Bonsoy was distributed that:
 - (i) disclosed the iodine levels in Bonsoy;
 - (ii) disclosed the quantity of Bonsoy, the consumption of which would result in consumption of iodine above the USL and the RDI;
 - (iii) disclosed the fact that consumption of excess iodine may have serious health consequences.

54. In breach of its duty alleged in the preceding paragraph Muso:

- (a) before June 2006, failed to ascertain the levels of iodine in Bonsoy;
- (b) after receiving the inquires alleged above in 2006, 2007 and 2009, failed to ascertain for itself whether the levels of iodine in Bonsoy, of which it was then aware, constituted a risk to human health;
- (c) supplied Bonsoy to Spiral Foods at all material times throughout the period, having failed to take reasonable steps to ascertain that the Bonsoy was not unfit for human consumption and did not pose a material risk to human health when consumed;
- (d) at all material times throughout the period, failed to give the warning alleged at sub-paragraph 53(d).

55. By reason of Muso's breach of duty as alleged, the plaintiff each group member have suffered injury, loss and damage.

PLAINTIFFS' PARTICULARS

The plaintiff repeats the matters alleged at paragraphs 7, 10 and 11. Further or alternatively, if Bonsoy had been distributed with a warning as alleged at paragraph 53(d) the plaintiff would not have consumed Bonsoy.

ALTERNATIVE CLAIMS – LIABILITY UNDER JAPANESE LAW

56. In the alternative to paragraphs 38-55 Japanese law applies to the claims of the plaintiff and group members against Muso.

Claim under the Product Liability Act

57. Article 3 of the Product Liability Act (Japan) (the PL Act) has at all material times provided that:

“The manufacturer, etc. shall be liable for damages arising from the infringement of life, body or property of others which is caused by a defect in the delivered product which was manufactured, processed, imported or provided with the representation of name, etc. described in item 2 or item 3 of paragraph 3 of the preceding article, provided, however that the manufacturer, etc. shall not be liable when the damages occur only with respect to such product.”

58. Article 2 of the PL Act has at all material times provided (relevantly) that:

- “(1) The term “product” as used in this Act shall mean moveable which is manufactured or processed;
- (2) The term “defect” as used in the Act shall mean a lack of safety that the product should ordinarily provide, taking into account the nature of the product, the ordinarily foreseeable manner of use of the product, the time when the manufacturer, etc delivered the product, and other circumstances concerning the product.
- (3) The term “manufacturer, etc.” as used in this Act shall mean the following:
 - (i) any person who manufactured, processed, or imported the product in the course of trade (hereinafter referred to as ‘manufacturer’).…”

59. Bonsoy was at all material times a product within the meaning of Article 2 of the PL Act.

60. Muso was at all material times a manufacturer of Bonsoy within the meaning of Article 2 of the PL Act.

PARTICULARS

The plaintiff refers to and repeats the allegations at paragraphs 38-41, 44 and 46.

61. At all material times Bonsoy was defective within the meaning of Article 3 of the PL Act.

PARTICULARS

It was ordinarily foreseeable that the Bonsoy that Muso supplied to Spiral Foods would be consumed by persons in Australia, including as a milk substitute.

At all material times during the period, the consumption of Bonsoy materially increased the risk of those consuming it suffering thyroid dysfunction, exacerbation of a pre-existing thyroid condition or iodism, and of the infants exposed to increased levels of iodine as a result of maternal consumption suffering thyroid dysfunction, and was unsafe for human consumption. The plaintiff refers to and repeats the matters alleged at paragraph 8.

Further at no time during the period did the packaging in which Bonsoy was distributed contain any warning that:

- (i) disclosed the iodine levels in Bonsoy;
- (ii) disclosed the quantity of Bonsoy, the consumption of which would result in consumption of iodine above the USL and the RDI
- (iii) disclosed the fact that consumption of excess iodine may have serious health consequences.

62. As a result of the matters alleged in paragraph 61, the plaintiff and group members have suffered personal injury, loss and damage.

PLAINTIFF'S PARTICULARS

The plaintiff repeats the matters alleged at paragraphs 7, 10 and 11. Further or alternatively, if Bonsoy had been distributed with a warning as alleged at paragraph 53(d) the plaintiff would not have consumed Bonsoy.

Claim under the Civil Code

63. Article 709 of the Civil Code (Japan) (the Civil Code) has at all material times provided that:

“A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence”.

64. Article 710 of the Civil Code has at all material times provided that:

“Persons liable for damages under the provisions of the preceding Article must also compensate for damages other than those to property, regardless of whether the body, liberty or reputation of others have been infringed, or property rights of others have been infringed.”

65. Muso negligently infringed the rights of the plaintiff and group members within the meaning of article 709 of the Civil Code, by reason of the matters alleged at paragraphs 38-55.

66. By reason of the matters alleged in paragraph 62 the plaintiff and group members have suffered loss and damage, and they are entitled to claim that loss and damage from Muso pursuant to Articles 709 and 710 of the Civil Code.

PLAINTIFF'S PARTICULARS

The plaintiff refers to and repeats the particulars given under paragraphs 7, 10 and 11.

CLAIMS AGAINST THE THIRD DEFENDANT

LIABILITY IN NEGLIGENCE

67. At all relevant times during the period Marsusan has been in the business of, amongst other things, manufacturing food from soybeans, including soymilk.

68. Marusan manufactured the Bonsoy that Muso supplied to Spiral Foods.

69. The Bonsoy that Marusan manufactured for supply to Muso was manufactured and packaged specifically for export to Australia.

70. At all material times Marusan knew that the purpose for which Muso acquired Bonsoy from it was to supply it to Spiral Foods, who would re-sell it, ultimately for consumption by Australian consumers.

PARTICULARS

Marusan's knowledge can be inferred from Marusan's discovered documents 9, 10 and 15.

71. Marusan professes to have expertise in the manufacture of food products from soybeans.

72. In 2003 Marusan reformulated the composition of Bonsoy as a result of which, in and after August 2003:

(a) Kombu extract CN (pure kombu) was substituted for the kombu powder previously used in Bonsoy;

(b) the quantity of Kombu extract CN used in Bonsoy was approximately thirteen times greater than the amount of kombu powder used in Bonsoy prior to the re-formulation,

(the 2003 reformulation).

PARTICULARS

As at May 2000 Bonsoy relevantly included 0.54kg of kombu extract powder and 1.5kg of wet salt per 1000L of Bonsoy. The kombu extract powder contained kombu, alcohol, dextrin and dietary salt. In about December 2002 Representatives of Muso met with representatives of Marusan and with James Wilson of Spiral Foods. At that meeting Muso, Marusan and Spiral Foods discussed changing the composition of Bonsoy in order to avoid the need to mention the addition of salt on the packaging of Bonsoy.

In February 2003 Marusan ascertained that it would be possible change the composition of Bonsoy to one that did not require the addition of salt as an ingredient, by changing the kombu extract then used, to a new kombu extract.

In about August 2003 Marusan reformulated Bonsoy as alleged at paragraph 72.

73. The composition of Bonsoy did not change in any material respect after that time, until it was again reformulated after December 2009 to remove kombu.

74. At all material times during the period:

- (i) the consumption of Bonsoy materially increased the risk of those consuming it suffering thyroid dysfunction, exacerbation of a pre-existing thyroid condition or iodism, and of the infants exposed to increased levels of iodine as a result of maternal consumption suffering thyroid dysfunction; and
- (ii) was unsafe for human consumption.

PARTICULARS

The plaintiff refers to and repeats the matters alleged at paragraph 8.

75. By reason of the following, at all material times during the period Marusan had reason to know that there was a real risk that Bonsoy could contain levels of iodine that were harmful to human health and that accordingly, the consumption of Bonsoy could pose a real risk of harm to human health:

- (a) Marusan was, during the period and for many years prior to the period, in the business of food manufacture;
- (b) Marusan knew that Bonsoy contained kombu;
- (c) the fact that seaweed products commonly and naturally contain high levels of iodine had been well documented for many years prior to the period and was readily ascertainable

by any person in the business of manufacturing food products, acting reasonably;

- (d) Kombu was recognised as one of the richest sources of bioavailable iodine, and therefore, the seaweed species with the greatest propensity to contribute to iodine excess in the human diet if not correctly apportioned and monitored.
- (e) the potential for seaweed ingestion to cause adverse health consequences was well documented from at least the 1970's with most cases occurring in Japan, and was readily ascertainable by any person in the business of manufacturing food products, acting reasonably;
- (f) the association between the consumption of high levels of iodine and thyroid dysfunction and iodism (including in infants) had been well documented for many years prior to the period commencing, and was readily ascertainable by any person in the business of manufacturing food products, acting reasonably;
- (g) On 26 April 2004 the New Zealand Food Safety Authority ("NZFSA") published the findings of a study that found that a soy milk product distributed in New Zealand that used seaweed as a flavouring, contained high levels of iodine. The NZFSA stated, in its publication, that the results of the study had caused it concern, and that the manufacturer of the soy milk had immediately ceased production and re-formulated its product. The study was readily accessible by Marusan.
- (h) In September 2005 the Australian and New Zealand Journal of Public Health published the results of a case-control study by O'Connell and others in which it was found that a New Zealand cluster thyrotoxicosis was associated with the consumption of soy milk that contained a high level of iodine as a result of the addition of kombu. The study was readily accessible to Marusan.

76. In June 2006:

- (a) Spiral Foods was contacted by a consumer who told Spiral Foods that she was being treated for an ongoing medical condition and that her endocrinologist needed to know the iodine levels of the kombu used in Bonsoy, the amount of kombu used in Bonsoy and the iodine levels in Bonsoy overall;
- (b) Spiral Foods referred the query to Muso, telling Muso that, "this lady needs some information for her doctor about Bonsoy as she is being treated for a serious problem."

- (c) Muso referred the query to Marusan.

PARTICULARS

The communications alleged are evidenced in Marusan's discovered document 26.

77. In July 2006:

- (a) Marusan obtained an iodine analysis of Bonsoy;
- (b) The analysis, which was performed by Japan Food Research Laboratories and reported on 7 July 2006, showed that Bonsoy contained 3mg of iodine per 100g (30mg per litre).

PARTICULARS

A report of the analysis is Marusan's discovered document 27.

78. In or about August 2009:

- (a) Spiral Foods received an inquiry from a consumer who was seeking information about the iodine levels in Bonsoy;
- (b) Spiral Foods referred the inquiry to Muso, stating that the customer had an aversion to iodine;
- (c) Muso responded to Spiral, saying that, "kombu is known as seaweed containing iodine at high levels and that's why she is asking this I guess. Since the percentage of kombu extract is very low, I don't think it would be great concern for her but let us see what information Marusan may have."
- (d) Muso referred the inquiry to Marusan, stating that iodine "is known as an element in kombu and tends to be disliked in products overseas." Muso attached a link to a Japanese Ministry of Health website concerning iodine. The website contained information concerning the risks of excess iodine, the upper daily limits for the Japanese population (at that time, 3mg/day) and indicated iodine levels for various foods including kombu.
- (e) Muso responded to Spiral Foods, stating that iodine in Bonsoy has not been analysed before, but on the basis of similar products, it estimated the iodine content of Bonsoy at 8.71ppm.

PARTICULARS

The communications alleged are evidenced in Muso's discovered document 52 and Marusan's discovered document 28.

79. By reason of the matters alleged at paragraphs 67-75 Marusan owed a duty to the plaintiff and each of the injured group members to take reasonable care to:

- (a) ensure that Bonsoy that it manufactured for supply to Muso for re-supply to Spiral Foods was not unfit for human consumption;
- (b) ensure that Bonsoy manufactured for supply to Muso for re-supply to Spiral Foods did not pose a material risk to human health when consumed;
- (c) refrain from supplying Bonsoy to Muso for re-supply to Spiral Foods unless and until it had taken reasonable steps to ascertain that the Bonsoy was not unfit for human consumption and did not pose a material risk to human health when consumed;

80. In breach of its duty alleged in the preceding paragraph Marusan:

- (a) before June 2006, failed to ascertain the levels of iodine in Bonsoy;
- (b) after receiving the inquires alleged above in 2006 and 2009, failed to ascertain for itself whether the levels of iodine in Bonsoy, of which it was then aware, constituted a risk to human health;
- (c) supplied Bonsoy to Muso at all material times throughout the period, having failed to take reasonable steps to ascertain that the Bonsoy was not unfit for human consumption and did not pose a material risk to human health when consumed.

81. By reason of Marusan's breach of duty as alleged, the plaintiff each group member have suffered injury, loss and damage.

PLAINTIFFS' PARTICULARS

The plaintiff repeats the matters alleged at paragraphs 7, 10 and 11.

ALTERNATIVE CLAIMS – LIABILITY UNDER JAPANESE LAW

82. In the alternative to paragraphs 67-81 Japanese law applies to the claims of the plaintiffs and group members against Marusan.

Claim under the Product Liability Act

83. Articles 2 and 3 of the Product Liability Act (Japan) (the PL Act) has at all material times provided as set out in paragraphs 57 and 58.

84. Bonsoy was at all material times a product within the meaning of Article 2 of the PL Act.

85. Marusan was at all material times a manufacturer of Bonsoy within the meaning of Article 2 of the PL Act.

86. At all material times Bonsoy was defective within the meaning of Article 3 of the PL Act.

PARTICULARS

It was ordinarily foreseeable that the Bonsoy that Marusan supplied to Muso would be consumed by persons in Australia, including as a milk substitute. The plaintiff refers to and repeats the particulars given under paragraph 70.

At all material times during the period, the consumption of Bonsoy materially increased the risk of those consuming it suffering thyroid dysfunction, exacerbation of a pre-existing thyroid condition or iodism, and of the infants exposed to increased levels of iodine as a result of maternal consumption suffering thyroid dysfunction, and was unsafe for human consumption. The plaintiff refers to and repeats the matters alleged at paragraph 8.

87. As a result of the matters alleged in paragraph 86, the plaintiff and group members have suffered personal injury, loss and damage.

PLAINTIFF'S PARTICULARS

The plaintiff repeats the matters alleged at paragraphs 7, 10 and 11.

Claim under the Civil Code

88. Articles 709 and 710 have of the Civil Code (Japan) (the Civil Code) has at all material times provided as set out in paragraphs 63 and 64 above.

89. Marusan negligently infringed the rights of the plaintiff and group members within the meaning of article 709 of the Civil Code, by reason of the matters alleged at paragraphs 67-81.

90. By reason of the matters alleged in paragraph 89 the plaintiffs and group members have suffered loss and damage, and they are entitled to claim that loss and damage from Marsuan pursuant to Articles 709 and 710 of the Civil Code.

PLAINTIFF'S PARTICULARS

The plaintiff refers to and repeats the particulars given under paragraphs 7, 10 and 11.

Common questions of fact and law

91. The questions of fact or law common to the claims of the plaintiff and all group members, as against all defendants, are:

- (a) whether, at all material times during the period, the consumption of Bonsoy materially increased the risk of those consuming it suffering thyroid dysfunction as alleged at paragraph 8, 29, 47 and 74;
- (b) whether, at all material times during the period, Bonsoy was unsafe for human consumption as alleged at paragraph 8, 29, 47 and 74;
- (c) whether Bonsoy was reformulated as alleged at paragraphs 26, 43 and 72.

88-92. The questions of fact or law common to the claims of the plaintiff and all group members, as against the first defendant, are:

- (a) Whether, at all material times during the period Bonsoy contained kombu as alleged at paragraph 6
- (b) whether, at all material times during the period, the consumption of Bonsoy materially increased the risk of those consuming it suffering thyroid dysfunction as alleged at paragraph 8 and 296;
- (c) whether, at all material times during the period, Bonsoy was unsafe for human consumption as alleged at paragraph 8 and 296;
- (d) whether, at all material times during the period, Bonsoy was not reasonably fit for the purpose of human consumption, as alleged at paragraph 1240;
- (e) whether Spiral Foods is deemed by sections 74A(3) and (4) of the Act to have manufactured Bonsoy, as alleged at paragraph 11
- (e) whether, at all material times during the period, Bonsoy was not of merchantable quality as alleged at paragraph 1846;

- (f) whether, at all material times during the period, Bonsoy had a defect within the meaning of s75ACD of the Act as alleged at paragraph 2224;
- (g) whether Spiral Foods had the knowledge alleged at paragraph 30;
- (h) whether Spiral Foods owed a duty of care to the plaintiff and injured group members as alleged at paragraph 2635.
- (i) whether Spiral Foods breached its duty of care as alleged at paragraph 2736.

93. The questions of fact or law common to the claims of the plaintiff and all group members, as against the second defendant, are:

- (a) whether, at all material times during the period, the consumption of Bonsoy materially increased the risk of those consuming it suffering thyroid dysfunction as alleged at paragraph 47.
- (b) whether, at all material times during the period, Bonsoy was unsafe for human consumption as alleged at paragraph 47;
- (c) whether Bonsoy was reformulated as alleged at paragraph 43;
- (d) whether Muso had the knowledge alleged at paragraph 48;
- (e) whether Muso owed a duty of care to the plaintiff and group members, as alleged at paragraph 53;
- (f) whether Muso breached its duty of care as alleged at paragraph 54;
- (g) whether, at all material time during the period Muso was a manufacturer within the meaning of Article 2 of the PL Act, as alleged at paragraph 60;
- (h) whether at all material times during the period Bonsoy was defective within the meaning of Article 3 of the PL Act, as alleged at paragraph 61;
- (i) whether Muso negligently infringed the rights of the plaintiff and group members as alleged at paragraph 65.

94. The questions of fact or law common to the claims of the plaintiff and all group members, as against the third defendant, are:

- (a) whether, at all material times during the period, the consumption of Bonsoy materially increased the risk of those consuming it suffering thyroid dysfunction as alleged at paragraph 74,
- (b) whether, at all material times during the period, Bonsoy was unsafe for human consumption as alleged at paragraph 74;
- (c) whether Bonsoy was reformulated as alleged at paragraph 72;
- (d) whether Marusan had the knowledge alleged at paragraph 75;
- (e) whether Marusan owed a duty of care to the plaintiff and group members, as alleged at paragraph 79;
- (f) whether Marusan breached its duty of care as alleged at paragraph 80;
- (g) whether at all material times during the period Bonsoy was defective within the meaning of Article 3 of the PL Act, as alleged at paragraph 86;
- (h) whether Marusan negligently infringed the rights of the plaintiff and group members as alleged at paragraph 89.

AND THE PLAINTIFF CLAIMS AGAINST THE FIRST DEFENDANT:

- A. Declarations concerning the questions set out at paragraph 2991 and 92.
- B. Damages;
- C. Compensation pursuant to paragraphs 74B, 74D and 75AD of the Act;
- D. Interest pursuant to statute;
- E. Costs.

AND THE PLAINTIFF CLAIMS AGAINST THE SECOND DEFENDANT:

A. Declarations concerning the questions set out at paragraph 91 and 93.

B. Damages;

C. Interest pursuant to statute;

D. Costs.

AND THE PLAINTIFF CLAIMS AGAINST THE THIRD DEFENDANT:

A. Declarations concerning the questions set out at paragraph 91 and 94.

B. Damages;

C. Interest pursuant to statute;

D. Costs.

David Curtain QC

Lisa Nichols

DATED: ~~13 December 2010~~ 21 December 2012

Schedule of Parties

ERIN DOWNIE

Plaintiff

and

SPIRAL FOODS PTY LTD (ACN 006 292 780)

First Defendant

MUSO CO LTD

Second Defendant

MARUSAN-AI CO LTD

Third Defendant

Rule 4.10

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION**

S CI 2010 05318

BETWEEN

ERIN DOWNIE

Plaintiff

and

**SPIRAL FOODS PTY LTD (ACN 006 292 780)
& Ors (according to the Schedule)**

Defendants

PROPER BASIS CERTIFICATION

Date of Document:

21 December 2012

Filed on behalf of:

The Plaintiff

Prepared by:

Maurice Blackburn, Lawyers
Level 10, 456 Lonsdale Street
Melbourne Vic 3000

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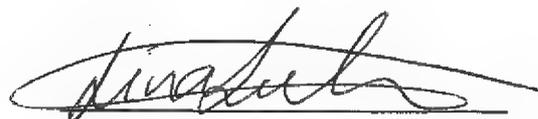
Ref: IL/3019700

DX: 466 (Melbourne)

In accordance with section 42 of the Civil Procedure Act 2010, I Irina Lubomirska certify to the Court that, in relation to the Amended Statement of Claim dated 21 December 2012 filed on behalf of the plaintiff, on the factual and legal material available to me at present:

- (a) Each allegation of fact in the document has a proper basis

Date: 21 December 2012


Signed

Schedule of Parties

ERIN DOWNIE

Plaintiff

and

SPIRAL FOODS PTY LTD (ACN 006 292 780)

First Defendant

MUSO CO LTD

Second Defendant

MARUSAN-AI CO LTD

Third Defendant