



IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL COURT

Case 8 FC 2020 61590  
SEP 2020 1990

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BETWEEN:

**BRETT STALLARD AS TRUSTEE FOR THE STALLARD SUPERANNUATION FUND**

First Plaintiff

**STEVEN NAPIER**

Second Plaintiff

- and -

**TREASURY WINE ESTATES LTD (ACN 004 373 862)**

Defendant

## DEFENCE

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In answer to the consolidated statement of claim dated 20 November 2020, the defendant (**Treasury**) says as follows:

**A. THE PARTIES AND GROUP MEMBERS**

**A.1 The Joint Plaintiffs and Group Members**

1. It does not plead to paragraph 1, as no allegations are made against it.
2. It does not know, and therefore cannot admit, paragraph 2.
3. As to paragraph 3, it:
  - (a) does not plead to sub-paragraphs 3(a) and 3(c), as no allegations are made against it;
  - (b) denies sub-paragraph 3(b).
4. It does not know, and therefore cannot admit, paragraph 4.

**A.2 Treasury**

5. Save that the reference to section 764(1)(a) of the *Corporations Act 2001* (Cth) (**Corporations Act**) in sub-paragraph 5(c)(iv) should be a reference to section 764A(1)(a), it:
  - (a) admits paragraph 5; and
  - (b) says that at trial, it will refer to the full terms and effect of the Australian Securities Exchange (**ASX**) Listing Rules and the statutory provisions referred to in paragraph 5.
6. It admits paragraph 6.

**B. TREASURY'S CONTINUOUS DISCLOSURE OBLIGATIONS**

7. As to paragraph 7, it:
  - (a) admits the contents of sections 111AP(1) and 674(2) of the *Corporations Act* and ASX Listing Rules 3.1 and 3.1A and that Treasury was bound by those sections and rules;
  - (b) says at trial, it will rely on the full content of those sections and rules, and sections 676 and 677 of the *Corporations Act*;
  - (c) otherwise denies that paragraph.

8. As to paragraph 8, it:
- (a) admits that ASX Listing Rule 19.12 provides that an entity becomes aware of information if, and as soon as, an officer of the entity has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity;
  - (b) admits that Treasury was bound by ASX Listing Rule 19.12;
  - (c) says at trial, it will rely on the full content of the ASX Listing Rules;
  - (d) says further that Treasury was not relevantly aware of every opinion held by an officer of Treasury;
  - (e) says further that Treasury was not constructively aware of any opinions, and its officers were not required to form opinions they did not hold; and
  - (f) otherwise denies that paragraph.

## C. **TREASURY'S WINE BUSINESS**

### C.1 **Treasury's US Wine Market**

9. As to paragraph 9, it:
- (a) admits that at all relevant times Treasury carried on a business that included the production, marketing, distribution and sale of wine;
  - (b) admits that it operated in different geographic regions, including the United States of America (**US**), Canada, Latin America, Australia, New Zealand, Asia, Europe, the Middle East and Africa;
  - (c) otherwise denies that paragraph.
10. As to paragraph 10, it:
- (a) says the allegation that there was a single market in the US for the production, sale and distribution of wine (defined in the consolidated statement of claim as the **US Wine Market**) is embarrassing and renders the consolidated statement of claim incomprehensible;
  - (b) says further that the allegation is so intertwined with the remainder of the consolidated statement of claim, that the entire consolidated statement of claim is liable to be struck out;

- (c) says further the matters alleged in sub-paragraphs 10(a) and (b) above mean it has not been possible for Treasury to properly plead to the consolidated statement of claim, and Treasury reserves its right to amend its pleading upon the provision of a pleading by the plaintiffs that complies with the pleading rules;
- (d) under cover of those objections, denies that paragraph.

11. As to paragraph 11, it:

- (a) refers to and repeats paragraph 10 above;
- (b) says the references to “*participated in the sale of wine*” and “*segments*” are embarrassing;
- (c) says the word “*segments*” appears to have a different meaning in paragraph 9 and paragraph 11 of the consolidated statement of claim;
- (d) under cover of those objections:
  - (i) admits that Treasury carried on a wine business which included the production, sale and / or distribution of wine in what it describes as the “*Americas*” (comprising the US, Canada, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bermuda, Bonaire, Brazil, British Virgin Islands, Cayman Islands, Colombia, Costa Rica, Curacao, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guayana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Puerto Rico, St Barthelemy, St Lucia, St Vincent and Grenadines, St. Kitts and Nevis, St. Maarten, Trinidad and Tobago, Turks and Caicos, Uruguay and the United States Virgin Islands);
  - (ii) admits that Treasury’s brand portfolio in the Americas included luxury, masstige and commercial wines, with luxury wine trading at a retail shelf price of A\$20+ per bottle, masstige wine trading at a retail shelf price of between A\$10 to A\$20 per bottle and commercial wine trading at a retail shelf price of between A\$5 to A\$10 per bottle, but for the avoidance of doubt denies that it sold wine from retail outlets in the US tracked by Nielsen scan data, and refers to and repeats paragraph 33(e) below;
  - (iii) admits that during the Relevant Period Treasury had a strategy of additional focus on its luxury and masstige portfolios while reducing focus on its lower margin commercial portfolio;

(iv) otherwise denies that paragraph.

12. As to paragraph 12, it:

- (a) says that the division described by Treasury as the “*Americas*” comprises the geographic regions alleged in paragraph 11(d)(i) above;
- (b) on the basis that the “*Americas*” division referred to in sub-paragraph (a) comprises the geographic regions alleged in paragraph 11(d)(i) above, admits that sub-paragraph;
- (c) says Treasury’s **EBITS** (as defined in the consolidated statement of claim) on a reported currency basis for the “*Americas*” division for the 2015 financial year was A\$83.2 million and for the 2017 financial year was A\$189 million;
- (d) otherwise denies that paragraph.

13. As to paragraph 13, it:

- (a) refers to and repeats paragraphs 10 and 11 above;
- (b) admits that in about January 2016, Treasury completed the acquisition of the majority of assets from Diageo Plc’s US and United Kingdom wine operations;
- (c) admits that those assets included wine brands known as “*Sterling Vineyards*”, “*Beaulieu Vineyard*”, and “*Acacia*”;
- (d) under cover of those objections, otherwise denies that paragraph.

14. As to paragraph 14, it:

- (a) refers to and repeats paragraph 10 above;
- (b) says the period of time to which the allegation relates is unclear;
- (c) says further the reference to “*consumer channels*” is embarrassing;
- (d) under cover of those objections:
  - (i) admits that prior to 31 January 2018, most of Treasury’s wine sales in the US were to licensed distributors;
  - (ii) admits that after acquiring wine from Treasury, licensed distributors in the US on-sold that wine to retail outlets (but not to end-consumers), and that the wine was ultimately on-sold to end-consumers;
  - (iii) otherwise denies that paragraph.

15. As to paragraph 15, it:

- (a) refers to and repeats paragraph 10 above;
- (b) under cover of those objections:
  - (i) admits that on 31 January 2018, Treasury announced (as was the fact) that:
    - (A) in California and Washington, States that allow producers to distribute directly to retailers, Treasury was implementing a direct sales and distribution model for all key national retail partners;
    - (B) in Florida, Treasury was implementing a new hybrid distribution model with its key retail partners (national and regional) and distributor partner; and
    - (C) in a number of other States, Treasury had appointed new full service distributor partners; and
  - (ii) admits that upon the adoption and completion of the implementation of the measures referred to in sub-paragraph (b)(i) above, Treasury's distribution channel in the US was converted from one where most of Treasury's wine was sold to licensed distributors to one in which some of Treasury's wine was sold through direct and hybrid distribution models and new distributor partners;
- (c) otherwise denies that paragraph.

16. As to paragraph 16, it:

- (a) says the reference to "*indirect wine sales*" is embarrassing;
- (b) under cover of that objection:
  - (i) says that Treasury recognised revenue in accordance with the Australian Accounting Standards adopted by the Australian Accounting Standards Board (AASB) and in a manner compliant with the International Financial Reporting Standards (IFRS) adopted by the International Accounting Standards Boards (IASB);

- (ii) admits that Treasury recognised revenue in accordance with AASB standards when the risk and rewards of ownership passed to the buyer, which was usually upon delivery of goods or upon their dispatch;
- (iii) admits that Treasury only recorded revenue:
  - (A) at the fair value of the consideration received or receivable, net of sales discounts and rebates, duties and taxes; and
  - (B) if it was probable that the economic benefits would flow to Treasury;
- (iv) otherwise denies that paragraph.

17. As to paragraph 17, it:

- (a) refers to and repeats paragraph 10 above;
- (b) says the period of time to which the allegation relates is unclear;
- (c) says further the reference to “*accounted for*” is embarrassing; and
- (d) under cover of those objections, denies that paragraph.

18. As to paragraph 18, it:

- (a) refers to and repeats paragraph 10 above;
- (b) says the reference to “*wine sourced from wine manufacturers*” is embarrassing;
- (c) says further that the plaintiffs’ definition of “*private label wine*” is embarrassing;
- (d) under cover of those objections:
  - (i) says that during the Relevant Period wine was sold, marketed and promoted by retailers under the individual retailer’s own private label; and
  - (ii) otherwise denies that paragraph.

19. As to paragraph 19, it:

- (a) refers to and repeats paragraph 10 above;
- (b) says the reference to wine being “*traded in the US Wine Market*”, and the acquisition of wine by “*wine companies*” is embarrassing;
- (c) under cover of those objections:



- (i) admits that during the Relevant Period wine traded in the US as a bulk commodity without being bottled, packaged or labelled for sale to end-consumers (**Bulk Wine**) was acquired by Treasury and other wine producers in the US for the production of commercial and masstige wine;
- (ii) otherwise denies that paragraph.

20. As to paragraph 20, it:

- (a) says that the division described by Treasury as the “*Americas*” comprises the geographic regions alleged in sub-paragraph 11(d)(i) above;
- (b) admits that in the 2014 financial year to the 2017 financial year, the division described by Treasury as the “*Americas*” contributed over 40% of Treasury’s net sales revenue (**NSR**) and over 30% of Treasury’s EBITs on a reported currency basis;
- (c) otherwise denies that paragraph.

21. As to paragraph 21, it:

- (a) refers to and repeats sub-paragraph 20(a) above;
- (b) admits that in the 2019 financial year, the division described by Treasury as the “*Americas*” contributed at least 40% of Treasury’s NSR on a reported currency basis;
- (c) admits that in the 2018 and 2019 financial years, the division described by Treasury as the “*Americas*” contributed over 30% of Treasury’s EBITs on a reported currency basis;
- (d) otherwise denies that paragraph.

## **C.2 Alleged Treasury Officers**

22. As to paragraph 22, it:

- (a) says Michael Clarke was appointed Managing Director and Chief Executive Officer on 31 March 2014, and ceased in those roles on 1 July 2020;
- (b) admits that Michael Clarke was an officer of Treasury at all times during the Relevant Period within the meaning of rule 19.12 of the ASX Listing Rules;
- (c) otherwise denies that paragraph.

23. It admits paragraph 23.
24. As to paragraph 24, it:
- (a) says from 9 May 2017 until 18 January 2019, Robert Foye was the Chief Operating Officer of Treasury;
  - (b) says from 1 January 2018 until 1 July 2018, Robert Foye, as part of his role as Chief Operating Officer, was also President, Americas;
  - (c) admits that Robert Foye was an officer of Treasury from the start of the Relevant Period until 18 January 2019, within the meaning of rule 19.12 of the ASX Listing Rules;
  - (d) otherwise denies that paragraph.
25. As to paragraph 25, it:
- (a) says that from 9 May 2017, Tim Ford was given the role of overseeing Europe, South East Asia, Middle East and Africa at Treasury (in addition to his other roles relating to Global Supply Chain and Industry Affairs);
  - (b) says further that Tim Ford was the Deputy Chief Operating Officer from 1 July 2018 to 18 January 2019;
  - (c) says further that Tim Ford was the Chief Operating Officer from 19 January 2019 until 30 June 2020;
  - (d) admits that Tim Ford was an officer of Treasury, within the meaning of rule 19.12 of the ASX Listing Rules, at all times during the Relevant Period;
  - (e) otherwise denies that paragraph.
26. As to paragraph 26, it:
- (a) admits sub-paragraph 26(a);
  - (b) admits that from 1 July 2018 until 14 February 2019, Angus McPherson was Managing Director ANZ and Europe of Treasury;
  - (c) says that between about 15 February 2019 and about 30 September 2019, Angus McPherson was Managing Director ANZ (Australia and New Zealand), Europe, South East Asia, Middle East and Africa at Treasury;
  - (d) says that from about 1 October 2019 until about 1 February 2020, Angus McPherson was President, Americas & Global Sales at Treasury;

- (e) says that from 6 November 2019 until 1 February 2020, Angus McPherson was on leave from his roles at Treasury;
  - (f) admits that Angus McPherson was an officer of Treasury, within the meaning of rule 19.12 of the ASX Listing Rules, from the start of the Relevant Period until 6 November 2019;
  - (g) otherwise denies that paragraph.
27. As to paragraph 27, it:
- (a) says that Victoria Snyder was Executive Vice President of the Americas at Treasury from 1 March 2018 until 1 July 2018;
  - (b) says that Victoria Snyder was President of the Americas at Treasury from 2 July 2018 until 23 August 2019;
  - (c) admits that Victoria Snyder was an officer of Treasury, within the meaning of rule 19.12 of the ASX Listing Rules, between 1 July 2019 and 23 August 2019;
  - (d) otherwise denies that paragraph.
28. As to paragraph 28, it:
- (a) says that from 1 May 2018 until 31 August 2018, Gunther Burghardt was the Executive Vice President, Operations – Americas at Treasury;
  - (b) says that from 1 September 2018 until 28 February 2019, Gunther Burghardt was the Executive Vice President, Supply – Americas at Treasury;
  - (c) says that from 21 September 2018 until 28 February 2019, Gunther Burghardt was on leave from his roles at Treasury;
  - (d) otherwise denies that paragraph.
29. It admits paragraph 29.
30. As to paragraph 30, it:
- (a) admits that Ed Chan, Warwick Every-Burns, Garry Hounsell, Colleen Jay and Lauri Shanahan were independent non-executive directors of Treasury during the Relevant Period, and were therefore officers of Treasury, within the meaning of rule 19.12 of the ASX Listing Rules, during the Relevant Period;
  - (b) says that Louisa Cheang was appointed an independent non-executive director of Treasury on 1 December 2018, and was therefore an officer of Treasury, within the

meaning of rule 19.12 of the ASX Listing Rules, from 1 December 2018 until the end of the Relevant Period;

(c) otherwise denies that paragraph.

31. As to paragraph 31, it:

(a) says that Michael Cheek was an independent non-executive director of Treasury from 1 September 2012 until 18 October 2018;

(b) admits that Michael Cheek was an officer of Treasury, within the meaning of rule 19.12 of the ASX Listing Rules, from the start of the Relevant Period until 18 October 2018;

(c) otherwise denies that paragraph.

32. As to paragraph 32, it:

(a) refers to paragraphs 8 and 22 to 31 above;

(b) otherwise denies that paragraph.

### **C.3 Treasury Monitoring Systems**

33. As to paragraph 33, it refers to and repeats paragraph 10 above, and under cover of those objections:

(a) admits sub-paragraph 33(a) (except to the extent that sub-paragraph makes allegations with respect to the “*US Wine Market*”, as there is no such wine market as defined by the plaintiffs), and further admits that Treasury’s dedicated consumer insights and innovation team tracked consumer trends in the US;

(b) admits sub-paragraph 33(b) (except to the extent that sub-paragraph makes allegations with respect to the “*US Wine Market*”, as there is no such wine market as defined by the plaintiffs), and further admits that Treasury had global business planning processes, including portfolio reviews and global volume alignment processes, with respect to the US;

(c) admits sub-paragraph 33(c) (except to the extent that sub-paragraph makes allegations with respect to the “*US Wine Market*”, as there is no such wine market as defined by the plaintiffs), and further admits that Treasury had a system for inventory management which entailed a discipline of close monitoring of stock levels across its wholesale and retail partners in the US;

- (d) admits sub-paragraph 33(d) (except to the extent that sub-paragraph makes allegations with respect to the “*US Wine Market*”, as there is no such wine market as defined by the plaintiffs), and further admits that Treasury received detailed inventory and depletion data from most of its distributor partners in the US on a monthly basis;
- (e) as to sub-paragraph 33(e), says that:
  - (i) Nielsen scan data records sales of wine to retail consumers (that is, consumers who purchase wine from retailers) at a limited selection of retail outlets in the US;
  - (ii) TWE does not (and did not at any material time) have access to, or use, Nielsen sales data in respect of the US;
  - (iii) the coverage of Nielsen data is limited within the US;
  - (iv) there is no data source that comprehensively records either the sale of wine to retail consumers at retail outlets in the US or other sales of wine to retail consumers in the US;
  - (v) otherwise denies that sub-paragraph;
- (f) admits sub-paragraph 33(f);
- (g) admits sub-paragraph 33(g).

## **D. ALLEGED JUNE 2018 CONTRAVENTIONS**

### **D.1 Alleged June 2018 Misleading or Deceptive Conduct**

34. As to paragraph 34, it:

- (a) admits that it made the statements contained in the announcement titled “*Treasury Wine Estates Interim 2018 financial results*” dated 31 January 2018 (**31 January 2018 Announcement**);

#### **Particulars**

*The 31 January 2018 Announcement is in writing.*

- (b) admits the announcement said Treasury was “*confident that the business model changes we are making this year, along with an increased availability of high-end wine, will set [Treasury] up for accelerated growth in F19, F20 and beyond*” and that “*‘Fixed’ regions, Asia, Europe and ANZ, are outperforming expectations, and*

*we are now taking some exciting steps to really transform our route-to-market in the United States, and further strengthen the long-term outlook for the Americas region”;*

- (c) says that the announcement noted, on several occasions, there was execution risk associated with implementing the route-to-market changes;
  - (d) says further it will rely on the full content of the announcement at trial; and
  - (e) otherwise denies that paragraph.
35. As to paragraph 35, it:
- (a) refers to and repeats paragraph 34 above;
  - (b) admits the statements that Treasury would be set up for “*accelerated growth in F19, F20 and beyond*” and that “*the long term outlook for the Americas region*” would “*further strengthen*” were statements as to future matters;
  - (c) otherwise denies that paragraph.
36. As to paragraph 36, it:
- (a) refers to and repeats paragraphs 5 and 34 above;
  - (b) admits that the statements contained in the 31 January 2018 Announcement were made:
    - (i) in trade or commerce;
    - (ii) in relation to a financial product (as that term is defined in Chapter 7 of the Corporations Act and in Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)*);
  - (c) otherwise denies that paragraph.
37. As to paragraph 37, it:
- (a) refers to and repeats paragraph 34 above;
  - (b) says that if Treasury made the representation as alleged (which is denied), it did not repeat that representation at any time and it was not a continuing representation;
  - (c) says further that it was not during the Relevant Period under any obligation to withdraw or qualify a statement it made; and
  - (d) otherwise denies the paragraph.

38. As to paragraph 38, it:

- (a) refers to and repeats paragraph 10 above;
- (b) says further that the references to “*US wine*”, “*US wineries’ tanks and barrels*”, “*the US Wine Market*”, “*the bulk wine market*” and “*the global wine market*” are embarrassing;
- (c) says further the allegation in sub-paragraph 38(e) that “*there was generally a lead time from wine grape harvest to sale of wine products in the global wine market of more than six months*” is also embarrassing, by reason of the allegation depending on an alleged “*global wine market*”, which does not exist and also because it fails to specify what sales and what wine products are being referred to;
- (d) says further that:
  - (i) Ciatti describes itself as the world’s largest broker of “*bulk wine and grapes*” (which, whatever its meaning, does not mean all wine produced, sold and distributed in the US);

#### **Particulars**

*The description is contained on its website ([www.ciatti.com](http://www.ciatti.com)).*

- (ii) Ciatti produces reports for its customers, that are properly described as a form of marketing, for the supply of what is described as bulk wine and grapes;
  - (iii) the document referred to in particular (ii) post-dates 30 June 2018, such that the plaintiffs’ reliance on those reports and documents in support of the allegations in paragraph 38 is embarrassing;
  - (iv) in the premises, the consolidated statement of claim’s reliance on reports prepared by Ciatti is embarrassing;
- (e) under cover of those objections:
- (i) as to sub-paragraph 38(a), admits that as at 30 June 2018 the 2018 grape crop in California was predicted to be average to above average;
  - (ii) denies sub-paragraph 38(b);
  - (iii) denies sub-paragraph 38(c);
  - (iv) denies sub-paragraph 38(d);

- (v) denies sub-paragraph 38(e) and further says that the lead time from grape wine harvest to the sale of wine sourced from that grape wine harvest varies significantly depending on the type of wine;
- (vi) denies sub-paragraph 38(f).

39. As to paragraph 39, it:

- (a) refers to and repeats paragraph 10 above;
- (b) says that the allegation of “*a decline in sales*” in sub-paragraph 39(a) is embarrassing as the comparative (earlier) period from which the alleged decline in sales occurred is not identified;
- (c) further says that the allegation of “*reduced sales growth in respect of sales*” in sub-paragraph 39(b) is embarrassing as the comparative (earlier) period from which the alleged reduced sales growth occurred is not identified;
- (d) under cover of those objections:
  - (i) refers to and repeats paragraphs 16 and 33(e) above;
  - (ii) says Treasury does not sell to end-consumers via any retail channel which is captured by Nielsen data;
  - (iii) as to sub-paragraph 39(a):
    - (A) says the allegation that “*Treasury had experienced a decline in sales in the US of the Key Diageo Brands*” must, by reason of the particulars thereto, be a reference to a decline in sales (by volume) by retail outlets to end-consumers (which sales were not made by Treasury);
    - (B) denies sub-paragraph 39(a);
    - (C) further refers to and repeats the allegations made in sub-paragraph 33(e) above regarding the limited coverage of sales data such as Nielsen sales data;
    - (D) admits the Nielsen sales data records (in respect of such of the sales to end-consumers that are tracked by Nielsen) a decline in the volume of sales to end-consumers of “*Sterling Vineyards*”, “*Beaulieu Vineyard*”, and “*Acacia*” brand products in the 2017 financial year and says further that the Nielsen sales data records



- sales of certain sub-brands of “*Sterling Vineyards*” and “*Beaulieu Vineyard*” increased in the 2017 financial year;
- (E) admits the Nielsen sales data records (in respect of such of the sales to end-consumers that are tracked by Nielsen) a decline in the volume of sales to end-consumers of “*Beaulieu Vineyard*” and “*Acacia*” brand products in the 2018 financial year and says further that the Nielsen sales data records sales of certain sub-brands of “*Beaulieu Vineyard*” increased in the 2018 financial year;
  - (F) says that the particulars record that according to Nielsen sales data, the volume of sales to end-consumers of all “*Sterling Vineyards*” brand products tracked by Nielsen increased by 1.8% in the 2018 financial year and is thus inconsistent with the material fact alleged;
  - (G) further says that the document relied on by the plaintiffs in support of particular (iii) to sub-paragraph 39(a) (the Credit Suisse report dated 16 August 2018) [NAP.999.002.0002] noted the lack of comprehensive available data;
  - (H) further says that particular (iii) to sub-paragraph 39(a) refers to declines as recorded in Nielsen data, which data has not been provided to Treasury by the plaintiffs;
- (iv) as to sub-paragraph 39(b):
- (A) says that the allegation that “*Treasury had experienced reduced sales growth in respect of sales of its wines ... in the US in 4Q18*” must, by reason of the particulars thereto, be a reference to a decline in sales (by value) by retail outlets to end-consumers (which sales were not made by Treasury);
  - (B) denies sub-paragraph 39(b);
  - (C) further refers to and repeats the allegations made in sub-paragraph 33(e) above regarding the limited coverage of sales data such as Nielsen sales data;

- (D) says that the particulars refer to declines as recorded in Nielsen data, which data has not been provided to Treasury by the plaintiffs; and
  - (E) further says that the second paragraph of the particulars to sub-paragraph 39(b) does not support the material fact alleged;
- (v) as to sub-paragraph 39(c):
- (A) says that the impact databank depletion data relied on by the plaintiffs purports to show that between the calendar years of 2015 and 2018, Treasury had not experienced an ongoing (i.e. continuous) decline in depletions in respect of at least the following brands or groups of brands:
    - (1) “*Founders’ Estate*”;
    - (2) “*Other Beringer*”;
    - (3) “*19 Crimes*”;
    - (4) “*Matua*”;
    - (5) “*Coastal Estates*”;
    - (6) “*Gabbiano*”;
    - (7) “*Other Acacia*”;
    - (8) “*The Last Wine Co*”;
    - (9) “*Lyric by Etude*”;
    - (10) “*Other Etude*”;
    - (11) “*Penfolds Total Top 15*”;
  - (B) further says that it does not know the source and provenance of the impact databank depletion data, and does not use that data in its business, and accordingly does not know and therefore cannot admit whether that data is accurate; and
  - (C) otherwise denies that sub-paragraph.
- (vi) denies sub-paragraph 39(d).

40. As to paragraph 40, it:

- (a) refers to and repeats paragraphs 10, 38 and 39 above;
- (b) says the particulars to paragraph 40 do not support the allegations contained therein and the inference sought to be drawn from particular iii to paragraph 40 is embarrassing, and accordingly there is no proper basis for the allegations made in paragraph 40;
- (c) under cover of those objections:
  - (i) denies sub-paragraph 40(a) and in further answer to that sub-paragraph refers to and repeats paragraph 58(g) below;
  - (ii) denies sub-paragraph 40(b), and in further answer to that sub-paragraph says that the consolidated statement of claim does not disclose a proper basis for the allegation in sub-paragraph 40(b), as Treasury's ability to achieve accelerated EBITs growth in future financial periods depended on the future performance of its global operations (and not merely the future performance of its "*Americas*" division).
- (d) under cover of those objections, denies that paragraph.

41. As to paragraph 41 it:

- (a) says the paragraph is embarrassing insofar as it alleges that "*one or more of the Treasury Officers knew or ought to have known*" certain information;
- (b) says that pursuant to rule 13.10(3)(b) of the Supreme Court (General Civil Procedure) Rules 2015 (Vic), the plaintiffs are required to make clear:
  - (i) which alleged officer is alleged to have known and / or is alleged ought to have known (or became aware of) which piece of information (including any opinions, which must actually have been held by an officer); and
  - (ii) when such knowledge (or awareness) is alleged to have been acquired, and until that occurs the pleading is embarrassing;
- (c) says further that the particulars are embarrassing as they assert the alleged Treasury Officers had "*knowledge of Treasury's business and sensitivities, the Treasury Monitoring Systems and information which would have come into the possession of one or more of the Treasury Officers in the proper performance of their duties*", but provide no particulars of the "*sensitivities*" and "*information which would have*

*come into the possession*” of the alleged Treasury Officers, which alleged Treasury Officers had or ought to have had that knowledge, and when each such alleged Treasury Officer had or ought to have had such knowledge;

- (d) says further that the particulars are embarrassing, as they assert that knowledge (actual or constructive) of the alleged Treasury Officers can be inferred from the fact that at a future time (28 January 2020) Treasury became aware of information;
- (e) refers to and repeats paragraph 10 above;
- (f) under cover of those objections, denies that paragraph.

42. As to paragraph 42, it:

- (a) says the allegation that Treasury failed to adequately take into account certain information is embarrassing, as no particulars are provided as to how Treasury took into account that information, and why that (unspecified) conduct was inadequate;
- (b) says further that the particulars are embarrassing insofar as they seek to draw an inference by reference to matters arising at a future time (28 January 2020);
- (c) refers to and repeats paragraph 10 above;
- (d) under cover of those objections denies that paragraph, and in further answer to that paragraph refers to and repeats paragraphs 37, 38, 39 and 40 above.

43. It denies paragraph 43 and in further answer to that paragraph refers to and repeats paragraphs 37 to 42 above.

44. As to paragraph 44, it:

- (a) says that insofar as the plaintiffs rely on the allegation that the January 2018 Representation was a continuing representation in the consolidated statement of claim, they must identify how it became known to Treasury that the alleged representation (which is denied) was false (including particulars of who had that knowledge / formed the opinion, when that person(s) acquired the knowledge / formed the opinion, and how those matters are attributable to Treasury) and, absent such allegations, the said reliance is embarrassing; and
- (b) under cover of that objection, denies that paragraph and refers to and repeats paragraphs 34 to 40 and 43 above.

**D.2 Alleged June 2018 Continuous Disclosure Contravention**

45. As to paragraph 45, it:

- (a) says the paragraph is embarrassing insofar as it alleges that “*one or more of the Treasury Officers were aware*” of certain information;
- (b) refers to and repeats paragraphs 10 and 41 above;
- (c) under cover of those objections, denies that paragraph.

46. As to paragraph 46, it:

- (a) refers to and repeats paragraph 10 above;
- (b) says that the particulars are embarrassing insofar as they say that the alleged information included “*Treasury’s own information relating to its business, projections and sensitivities*”, but provide no particulars of the “*business, projections and sensitivities*” and which alleged Treasury Officers had or ought to have had that knowledge, and when each such alleged officer had or ought to have had such knowledge;
- (c) under cover of those objections:
  - (i) refers to and repeats paragraph 40 above;
  - (ii) denies the alleged June 2018 US Market Conditions Impact Information was information that existed at any time during the Relevant Period;
  - (iii) denies that information comprising the alleged June 2018 US Market Conditions and the alleged June 2018 Treasury US Market Conditions (to the extent such information in fact existed) was not generally available within the meaning of s 676 of the Corporations Act;
  - (iv) otherwise denies that paragraph.

47. As to paragraph 47, it:

- (a) refers to and repeats paragraphs 45 and 46 above; and
- (b) otherwise denies that paragraph.

48. As to paragraph 48, it:

- (a) admits that on 28 January 2020 it published an announcement on the ASX titled “*1H20 Profit Report (subject to audit review), Revised F20 Guidance, Investor*

*Presentation and Interim Dividend Announcement*” (**28 January 2020 Announcement**);

- (b) admits that prior to 28 January 2020 it did not inform the ASX of the alleged June 2018 US Market Conditions Impact Information (the existence of which information during the Relevant Period is denied);
- (c) says further it was under no obligation to make any announcement regarding the alleged June 2018 US Market Conditions Impact Information during the Relevant Period; and
- (d) otherwise denies that paragraph.

49. It denies paragraph 49.

## **E. ALLEGED FEBRUARY 2019 CONTRAVENTIONS**

### **E.1 Alleged February 2019 Misleading or Deceptive Conduct Contravention**

50. As to paragraph 50, it:

- (a) admits that it made the statements contained in the announcement titled “*Treasury Wine Estates Interim 2019 Results*” (**1H19 Presentation**), and the announcement titled “*Treasury Wine Estates Interim 2019 financial results*” (**1H19 Results Announcement**), both dated 14 February 2019 (collectively, the **14 February 2019 Announcements**);

#### **Particulars**

*The 14 February 2019 Announcements are in writing.*

- (b) admits Treasury said in the:
  - (i) 1H19 Results Announcement that it “*expects growth in F20 reported EBITs in the range of approximately 15% to 20%*” and “*expects reported EBITs growth in F20 in the range of approximately 15% to 20%*”; and
  - (ii) 1H19 Presentation that “*EBITs growth rate of approximately 15% to 20% expected for F20*”;
- (c) says the 1H19 Presentation, and the 1H19 Results Announcement, both stated that EBITs growth assumed “*no material changes due to vintage or foreign exchange movements, and does not include impacts from the application of AASB16 Leases in F20*”;

- (d) says further the 1H19 Presentation stated:

*... No representation is made as to the accuracy, completeness or reliability of this presentation...*

*This presentation contains forward looking statements ... Such forward looking statements are not guarantees of future performance and involve known and unknown risks, uncertainties and other factors, many of which are beyond the control of TWE, which may cause actual results to differ materially from those expressed or implied in such statements. Readers are cautioned not to place undue reliance on forward looking statements.*

*Except as required by applicable regulations or by law, TWE does not undertake any obligation to publicly update or review any forward looking statements, whether as a result of new information or future events...*

*Past performance information included in this presentation is for illustrative purposes only and cannot be relied on as a guide to future performance.*

- (e) says further it will rely on the full content of the 14 February 2019 Announcements at trial;
- (f) otherwise denies that paragraph.

51. As to paragraph 51, it:

- (a) refers to and repeats paragraph 50 above;
- (b) admits the statements referred to in sub-paragraph 50(b) were statements as to a future matter; and
- (c) otherwise denies that paragraph.

52. As to paragraph 52, it:

- (a) refers to and repeats paragraphs 5 and 50 above;
- (b) says the statements contained in the 1H19 Presentation, and the 1H19 Results Announcement were made:
- (i) in trade or commerce;
- (ii) in relation to a financial product (as that term is defined in Chapter 7 of the Corporations Act and in Part 2, Division 2 of the ASIC Act);

- (iii) in relation to financial services for the purposes of Part 2, Division 2 of the ASIC Act;
  - (c) otherwise denies that paragraph.
53. As to paragraph 53, it:
- (a) refers to and repeats sub-paragraph 33(e) and paragraph 38 above;
  - (b) says the references to “*the US wine industry*”, “*the US Wine Market*” and “*private label wine*” are embarrassing;
  - (c) says further that the allegations in sub-paragraphs 53(b) and (c) as to what was “*expected*” are embarrassing, as they do not identify who is alleged to have had those expectations;
  - (d) says further the documents particularised do not support the allegations made in paragraph 53 of the consolidated statement of claim, and that:
    - (i) the document titled “*State of the Wine Industry Report 2019*” [SAG.001.001.0299] represents the opinion of one person (Rob McMillan), and in it Mr McMillan expressly states his prior predictions have been wrong, that the information he relied on was sourced from third parties, was unverified, and may not be accurate or complete;
    - (ii) the document titled “*Ciatti California Report*” dated November 2018 [NAP.999.004.0004] relates to “*bulk wine*” in California;
    - (iii) several allegations are unparticularised;
  - (e) says further the particulars in support of sub-paragraph 53(f) refer to increases as recorded in Nielsen data, which data has not been provided to Treasury by the plaintiffs;
  - (f) says further that the document relied on by the plaintiffs [NAP.999.002.0006] in support of the allegations made in sub-paragraph 53(f) says the following:
 

*No representation or warranty ... is provided in relation to the accuracy, completeness or reliability of the information contained in any materials to which this document relates (the "Information") ... The Information is not intended to be a complete statement or summary of the securities, markets or developments referred to in the document. UBS does not undertake to update or keep current the Information ... Any statements*



*contained in this report attributed to a third party represent UBS's interpretation of the data, information and/or opinions provided by that third party either publicly or through a subscription service, and such use and interpretation have not been reviewed by the third party;*

- (g) says further particular ii to sub-paragraph 53(g) of the consolidated statement of claim is irrelevant to the allegations contained therein;
- (h) under cover of those objections:
  - (i) denies sub-paragraph 53(a);
  - (ii) as to sub-paragraph 53(b), does not know and therefore cannot admit whether as at 14 February 2019 the 2018 grape harvest in the North West was expected to set records, and otherwise denies that sub-paragraph;
  - (iii) denies sub-paragraph 53(c);
  - (iv) denies sub-paragraph 53(d);
  - (v) denies sub-paragraph 53(e) and further refers to and repeats sub-paragraph 38(e)(v) above;
  - (vi) as to sub-paragraph 53(f), admits that if Bulk Wine prices decrease, this may lead to increased sales of wine that is sold, marketed and promoted by retailers under the individual retailer's own private label, but otherwise denies sub-paragraph 53(f);
  - (vii) denies sub-paragraph 53(g).

54. As to paragraph 54, it:

- (a) refers to and repeats paragraph 39 above;
- (b) as to sub-paragraph 54(a)(i), refers to and repeats sub-paragraphs 39(a), 39(b) and 39(d)(i), (ii) and (iii) above;
- (c) as to sub-paragraph 54(a)(ii):
  - (i) says that the allegation of "*a further decline in sales*" is embarrassing as the comparative (earlier) period from which the alleged decline in sales occurred is not identified;

- (ii) further says that particular (ii) in support of the sub-paragraph is embarrassing as it seeks to rely on data as at 29 June 2019 in support of the position as at 14 February 2019;
- (iii) further says that particular (iii) in support of the sub-paragraph is embarrassing as it is speculation;
- (iv) under cover of those objections:
  - (A) says that the allegation that Treasury was experiencing a “*further decline in sales in the US of the Key Diageo Brands*” must, by reason of the particulars thereto, be a reference to a decline in sales (by volume) to end-consumers by retail outlets in the US of all “*Sterling Vineyards*”, “*Beaulieu Vineyard*”, and “*Acacia*” brand products (which sales were not made by Treasury);
  - (B) denies sub-paragraph 54(a)(ii);
  - (C) further refers to and repeats the allegations made in sub-paragraph 33(e) above regarding the limited coverage of sales data such as Nielsen sales data;
- (d) as to sub-paragraph 54(b)(i), refers to and repeats sub-paragraphs 39(a), 39(c) and 39(d)(i), (ii) and (iv) above;
- (e) as to sub-paragraph 54(b)(ii):
  - (i) says that the allegation of “*reduced sales growth in respect of sales*” is embarrassing as the comparative (earlier) period from which the alleged reduced sales growth occurred is not identified;
  - (ii) under cover of that objection:
    - (A) says that the allegation that “*Treasury had experienced reduced sales growth in respect of sales of its wines ... in the US in FY19 to date*” must, by reason of the particulars thereto, be a reference to a decline in sales (by value) by retail outlets to end-consumers (which sales were not made by Treasury);
    - (B) denies sub-paragraph 54(b)(ii);

- (C) further refers to and repeats the allegations made in sub-paragraph 33(e) above regarding the limited coverage of sales data such as Nielsen sales data;
  - (D) further says the particulars refer to declines as recorded in Nielsen data, which data has not been provided to Treasury by the plaintiffs;
- (f) as to sub-paragraph 54(c), refers to and repeats sub-paragraphs 39(a) and 39(d)(i), (ii) and (v) above, and otherwise denies that sub-paragraph;
- (g) as to sub-paragraph 54(d):
- (i) says that the allegation that “*Treasury’s market share in the US was falling*” is embarrassing, as it is not possible to make an allegation about market share without first defining the market;
  - (ii) says further that the particulars refer to declines as recorded in Nielsen data, which data has not been provided to Treasury by the plaintiffs;
  - (iii) says further that the document relied on by the plaintiffs [NAP.999.002.0006] in support of the allegations made in sub-paragraph 54(d) says the following:

*No representation or warranty ... is provided in relation to the accuracy, completeness or reliability of the information contained in any materials to which this document relates (the "Information") ... The Information is not intended to be a complete statement or summary of the securities, markets or developments referred to in the document. UBS does not undertake to update or keep current the Information ... Any statements contained in this report attributed to a third party represent UBS's interpretation of the data, information and/or opinions provided by that third party either publicly or through a subscription service, and such use and interpretation have not been reviewed by the third party;*
  - (iv) otherwise denies that sub-paragraph.
- (h) denies sub-paragraph 54(e).

55. As to paragraph 55, it:
- (a) refers to and repeats paragraphs 10, 53 and 54 above;
  - (b) says the particulars to paragraph 55 do not support the allegations contained therein and the inference sought to be drawn from particular iii to paragraph 55 is embarrassing, and accordingly there is no proper basis for the allegations made in paragraph 55;
  - (c) under cover of those objections, denies that paragraph.
56. As to paragraph 56, it:
- (a) refers to and repeats paragraph 24 above;
  - (b) says Robert Foye had not been a member of Treasury's Americas Leadership Team on and from 2 July 2018;
  - (c) otherwise denies that paragraph.
57. As to paragraph 57, it:
- (a) refers to and repeats paragraph 10 above;
  - (b) says that the 28 January 2020 Announcement is not a proper basis for the allegations made by the plaintiffs;
  - (c) under cover of those objections, denies that paragraph.
58. It denies paragraph 58, and in further answer to that paragraph:
- (a) refers to and repeats paragraphs 55 and 57 above;
  - (b) says further that the consolidated statement of claim does not disclose a proper basis for the allegation in paragraph 58, as Treasury's ability to achieve growth in EBITs on a reported currency basis at a rate of 15% to 20% in the 2020 financial year depended on the future performance of its global operations (and not merely the future performance of its "*Americas*" division);
  - (c) says further that:
    - (i) at all material times, Treasury had a robust budgeting process which underpinned the guidance it gave, including in respect of the 2020 financial year;

- (ii) Treasury's budgeting process for the 2018, 2019 and 2020 financial years was substantially the same;
- (iii) Treasury's EBITs guidance for the 2018 financial year was reasonable and substantially in line with its budget for that financial year, and was exceeded by its results for the 2018 financial year;
- (iv) Treasury's EBITs guidance for the 2019 financial year was reasonable and substantially in line with its budget for that financial year, and was met or substantially met in its results for the 2019 financial year;
- (v) during the first half of the 2020 financial year Treasury was tracking to its budget for the 2020 financial year, and accordingly was on track to achieve Treasury's EBITs guidance for the 2020 financial year, which was underpinned by its budget;
- (vi) in the premises, at all relevant times, the guidance given by Treasury in respect of the 2020 financial year had reasonable grounds, and Treasury's reliance on its budget and budgeting process was reasonable;

#### **Particulars**

*For the 2018 financial year, EBITs guidance was A\$524 million and the result was A\$530.2 million on a reported currency basis.*

*For the 2019 financial year, EBITs guidance ranged between A\$665 million and A\$662.7 million and the result was A\$662.7 million on a reported currency basis.*

*For the first half of the 2020 financial year, Treasury's budget was between A\$363.5 million and A\$390.3 million and the result was A\$366.7 million on a reported currency basis.*

*Treasury's budgets for the 2020 financial year were based on detailed volume plans prepared on individual product line levels. They were thorough, detailed and reasonable.*

- (d) says further that the size and quality of each vintage grown in the US is not generally known until October of each year;
- (e) says further thereafter some time is required to assess the impact of that information, and refers to and repeats sub-paragraph 50(c) above and sub-paragraph 69(c) below;
- (f) further relies on the matters alleged in sub-paragraph 110(d)(ii) below;
- (g) says further that the inference the plaintiffs seek to draw in particular ii is not open in circumstances where:

- (i) according to paragraph 9 of the consolidated statement of claim, the “Americas” includes the US and Canada (and it in fact includes all the geographic regions alleged in sub-paragraph 11(d)(i) above);
- (ii) the consolidated statement of claim does not make any allegations as to what percentage of NSR and EBITs derived from what Treasury described as the “Americas” is attributable to Treasury’s operations in Canada (or any of the other geographic regions alleged in sub-paragraph 11(d)(i) above) as distinct from Treasury’s operations in the US;
- (iii) there are no allegations relating to Treasury’s operations in Canada (or any of the other geographic regions alleged in sub-paragraph 11(d)(i) above, other than the US) in the consolidated statement of claim.

59. As to paragraph 59, it:

- (a) refers to and repeats paragraph 41 above (which applies *mutatis mutandis* to the information the subject of paragraph 59 of the consolidated statement of claim);
- (b) says that the particulars are circular and embarrassing insofar as they assert the alleged Treasury Officers were aware of information because Treasury was aware of information;
- (c) says further that the particulars are embarrassing as they say that the alleged Treasury Officers had “*knowledge of Treasury’s business and sensitivities to leadership changes, the Treasury Monitoring Systems and information that one or more of the Treasury Officers would come across in the proper performance of their duties*”, but provide no particulars of the “*sensitivities to leadership changes*” and “*information that one or more of the Treasury Officers would come across in the proper performance of their duties*”, which alleged Treasury Officers had or ought to have had that knowledge, and when each such alleged Treasury Officer had or ought to have had such knowledge;
- (d) under cover of those objections:
  - (i) says that the directors of Treasury knew when Robert Foye ceased to work at Treasury;
  - (ii) otherwise denies that paragraph.

60. As to paragraph 60, it:

- (a) refers to and repeats paragraphs 42 (which applies *mutatis mutandis* to the information the subject of paragraph 60 of the consolidated statement of claim), 53 to 59 above;
- (b) under cover of those objections:
  - (i) denies that paragraph;
  - (ii) says further that in the 1H19 Results Announcement, Treasury:
    - (A) said “*US wine market volume (excl. bag in box) continues to be flat*” with some decline;
    - (B) referred to high quality and high volume 2018 vintages from California;

**Particulars**

*The 1H19 Results Announcement is in writing.*

- (iii) says further it will rely on the full content of the 1H19 Results Announcement at trial.
61. It denies paragraph 61 and refers to and repeats paragraphs 53 to 60 above.
62. As to paragraph 62, it:
- (a) refers to and repeats paragraph 50 above;
  - (b) says that if Treasury made the representation as alleged (which is denied), it did not repeat that representation at any time and it was not a continuing representation;
  - (c) says further that it was not during the Relevant Period under any obligation to withdraw or qualify a statement it made; and
  - (d) otherwise denies that paragraph.
63. As to paragraph 63, it:
- (a) says that insofar as the plaintiffs rely on the allegation that the February 2019 Representation was a continuing representation in the consolidated statement of claim, they must identify how it became known to Treasury that the alleged representation (which is denied) was false (including particulars of who had that knowledge / formed the opinion, when that person(s) acquired the knowledge / formed the opinion, and how those matters are attributable to Treasury) and, absent such allegations, the said reliance is embarrassing; and

- (b) under cover of that objection, denies that paragraph and refers to and repeats paragraphs 50 to 58, 61 and 62 above.

## **E.2 Alleged February 2019 Continuous Disclosure Contravention**

64. As to paragraph 64, it:

- (a) refers to and repeats paragraphs 45 (which applies *mutatis mutandis* to the information the subject of paragraph 64 of the consolidated statement of claim) and 59 above;
- (b) says the inference sought to be drawn in particular ii is embarrassing;
- (c) under cover of those objections, denies that paragraph.

65. As to paragraph 65, it:

- (a) refers to and repeats paragraph 10 above;
- (b) says that the particulars are embarrassing insofar as they say that the alleged information included “*Treasury’s own information relating to its business, projections and sensitivities*”, but provide no particulars of the “*business, projections and sensitivities*” and which alleged Treasury Officers had or ought to have had that knowledge, and when each such alleged officer had or ought to have had such knowledge;
- (c) under cover of those objections:
  - (i) refers to and repeats paragraphs 55, 57 and 58 above;
  - (ii) denies the alleged February 2019 US Market Conditions Impact Information, the alleged February 2019 Leadership Impact Information and the alleged February 2019 Combined US Impact Information was information that existed at any time during the Relevant Period;
  - (iii) denies that information comprising the alleged February 2019 US Market Conditions, the alleged February 2019 Treasury US Market Conditions, and the alleged February 2019 Leadership Changes (to the extent such information in fact existed) was not generally available within the meaning of s 676 of the Corporations Act;
  - (iv) otherwise denies that paragraph.

66. As to paragraph 66, it:



- (a) refers to and repeats paragraphs 64 and 65 above; and
- (b) otherwise denies that paragraph.

67. As to paragraph 67, it:

- (a) admits that it published the 28 January 2020 Announcement;
- (b) admits that prior to 28 January 2020 it did not inform the ASX of the alleged February 2019 US Market Conditions Impact Information, the alleged February 2019 Leadership Impact Information or the alleged February 2019 Combined US Impact Information (the existence of which information during the Relevant Period is denied);
- (c) says further it was under no obligation to make any announcement regarding the alleged February 2019 US Market Conditions Impact Information, the alleged February 2019 Leadership Impact Information or the alleged February 2019 Combined US Impact Information during the Relevant Period; and
- (d) otherwise denies that paragraph.

68. It denies paragraph 68.

## **F. ALLEGED AUGUST 2019 CONTRAVENTIONS**

### **F.1 Alleged August 2019 Misleading or Deceptive Conduct Contravention**

69. As to paragraph 69, it:

- (a) admits that it made the statements contained in the announcement titled “*Treasury Wine Estates Annual 2019 Results*” (**FY19 Results Presentation**), and in the announcement titled “*Treasury Wine Estates Annual 2019 financial results*” (**FY19 Results Announcement**), both dated 15 August 2019;

#### **Particulars**

*The FY19 Results Presentation, and FY19 Results Announcement are in writing.*

- (b) admits Treasury said in the:
  - (i) FY19 Results Presentation that “[r]eported EBITs growth rate of approximately 15% to 20% re-iterated for F20”;
  - (ii) FY19 Results Announcement that Treasury “reiterates F20 guidance of reported EBITs growth of approximately 15% to 20%”, “reiterates

*guidance of approximately 15% to 20% reported EBITs growth for F20, which will be delivered by growth in all markets” and “reiterates guidance for F20 reported EBITs growth of approximately 15% to 20%”;*

(c) says that the FY19 Results Presentation and FY19 Results Announcement both stated that EBITs growth assumed “*no material changes due to vintage or foreign exchange movements [and] [d]oes not include impacts from the application of AASB16 Leases or one-off*” costs or charges;

(d) says further the FY19 Results Presentation stated:

*... No representation is made as to the accuracy, completeness or reliability of this presentation.*

*This presentation contains forward looking statements... These forward looking statements are not guarantees of future performance and involve known and unknown risks, uncertainties and other factors, many of which are beyond the control of TWE, and which may cause actual results to differ materially from those expressed or implied in such statements. Readers are cautioned not to place undue reliance on forward looking statements.*

*Except as required by applicable regulations or by law, TWE does not undertake any obligation to publicly update or review any forward looking statements, whether as a result of new information or future events...*

*Past performance information included in this presentation is for illustrative purposes only and cannot be relied on as a guide to future performance.*

(e) says further it will rely on the full content of the FY19 Results Presentation and FY19 Results Announcement at trial;

(f) otherwise denies that paragraph.

70. As to paragraph 70, it:

(a) refers to and repeats paragraph 69 above;

(b) admits the statements referred to in sub-paragraph 69(b) above were statements as to a future matter;

(c) otherwise denies that paragraph.

71. As to paragraph 71, it:

- (a) refers to and repeats paragraphs 5 and 69 above;
- (b) says the statements contained in the FY19 Results Presentation and FY19 Results Announcement were made:
  - (i) in trade or commerce;
  - (ii) in relation to a financial product (as that term is defined in Chapter 7 of the Corporations Act and in Part 2, Division 2 of the ASIC Act);
  - (iii) in relation to financial services for the purposes of Part 2, Division 2 of the ASIC Act;
- (c) otherwise denies that paragraph.

72. As to paragraph 72, it:

- (a) refers to and repeats paragraph 53 above;
- (b) says the allegations in sub-paragraphs 72(a) and (b) are inconsistent;
- (c) says further the references to “*the US Wine Market*”, and “*normal or average to above normal or average*” are embarrassing;
- (d) says further the documents particularised do not support the allegations made in paragraph 72 of the consolidated statement of claim, and that the particulars in support of the allegations made in sub-paragraphs 72(c), (d) and (e) of the consolidated statement of claim relate only to California;
- (e) says further that the allegation in sub-paragraph 72(c) as to what was “*expected*” is embarrassing, as it does not identify who is alleged to have had that expectation;
- (f) says further the particulars in support of sub-paragraph 72(a) of the consolidated statement of claim refer to declines as recorded in Nielsen data, which data has not been provided to Treasury by the plaintiffs;
- (g) says further the document relied on by the plaintiffs [NAP.999.002.0006] in support of the allegations made in sub-paragraph 72(a) says the following:

*No representation or warranty ... is provided in relation to the accuracy, completeness or reliability of the information contained in any materials to which this document relates (the "Information") ... The Information is not intended to be a complete statement or summary of the securities, markets or developments referred to in the document. UBS does not*

*undertake to update or keep current the Information ... Any statements contained in this report attributed to a third party represent UBS's interpretation of the data, information and/or opinions provided by that third party either publicly or through a subscription service, and such use and interpretation have not been reviewed by the third party;*

(h) says further that the reports prepared by Ciatti referred to in particulars ii and iii to sub-paragraph 72(c) and particulars i and ii to sub-paragraphs 72(d) and (f) [SAG.001.001.0412 and SAG.001.001.0433]:

(i) relevantly relate to “*bulk wine*” in California; and

(ii) contain the following disclaimer:

*Whilst we have tried to ensure the accuracy and completeness of the contents of the ... Report, Ciatti cannot offer any undertaking, warranty or guarantee, either expressly or implicitly ... regarding how correct, complete or up to date the contents of the ... Report is...*

(i) under cover of those objections:

(i) denies sub-paragraph 72(a) and refers to and repeats paragraph 53;

(ii) admits sub-paragraph 72(b);

(iii) denies sub-paragraph 72(c) and says further that as at 15 August 2019 the 2019 grape harvest in the US was expected to be average;

(iv) as to sub-paragraph 72(d), says that as at 15 August 2019 surplus stock of Bulk Wine from the 2018 harvest in the US remained available, but otherwise denies that sub-paragraph;

(v) denies sub-paragraph 72(e);

(vi) denies sub-paragraph 72(f);

(vii) denies sub-paragraph 72(g).

73. As to paragraph 73, it:

(a) refers to and repeats paragraph 54 above;

(b) as to sub-paragraph 73(a), refers to and repeats sub-paragraphs 39(a), 39(b), 39(d)(i)-(iii) and 54(a)-(c) above;

(c) as to sub-paragraph 73(b), refers to and repeats sub-paragraphs 54(a), 54(d) and 54(e) above;

- (d) as to sub-paragraph 73(c), refers to and repeats sub-paragraph 54(a) and 54(f) above;
- (e) as to sub-paragraph 73(d):
  - (i) says the allegation made in that sub-paragraph that “*Treasury’s market share in the US was falling*” is embarrassing, as it is not possible to make an allegation about market share without first defining the market;
  - (ii) says further the particulars in support of sub-paragraph 73(d) of the consolidated statement of claim refer to declines as recorded in Nielsen data, which data has not been provided to Treasury by the plaintiffs;
  - (iii) says further the document relied on by the plaintiffs [NAP.999.002.0006] in support of the allegations made in sub-paragraph 73(d) says the following:
 

*No representation or warranty ... is provided in relation to the accuracy, completeness or reliability of the information contained in any materials to which this document relates (the "Information") ... The Information is not intended to be a complete statement or summary of the securities, markets or developments referred to in the document. UBS does not undertake to update or keep current the Information ... Any statements contained in this report attributed to a third party represent UBS's interpretation of the data, information and/or opinions provided by that third party either publicly or through a subscription service, and such use and interpretation have not been reviewed by the third party;*
  - (iv) otherwise denies that sub-paragraph.
- (f) denies sub-paragraph 73(e).

74. As to paragraph 74, it:

- (a) refers to and repeats paragraphs 10, 72 and 73 above;
- (b) says the particulars to paragraph 74 do not support the allegations contained therein and the inference sought to be drawn from particular ii to paragraph 74 is embarrassing, and accordingly there is no proper basis for the allegations made in paragraph 74;
- (c) under cover of those objections, denies that paragraph.

75. As to paragraph 75, it:
- (a) refers to and repeats paragraphs 26 to 28 and 56 above;
  - (b) admits that the Americas Leadership Team included the President, Americas, Executive Vice President of Operations, and Chief Marketing Officer;
  - (c) says that Michelle Terry ceased her employment as Chief Marketing Officer on 31 July 2019;
  - (d) refers to and repeats paragraph 28 above and says that Gunther Burghardt ceased his employment as Executive Vice President of Supply on 28 February 2019;
  - (e) otherwise denies that paragraph.
76. As to paragraph 76, it:
- (a) refers to and repeats paragraph 10 above;
  - (b) says that the 28 January 2020 Announcement is not a proper basis for the allegations made by the plaintiffs;
  - (c) under cover of those objections, denies that paragraph.
77. It denies paragraph 77 and in further answer to that paragraph:
- (a) refers to and repeats paragraphs 73, 74 and 76 above;
  - (b) says further that the consolidated statement of claim does not disclose a proper basis for the allegation in paragraph 77, as Treasury's ability to achieve growth in EBITs on a reported currency basis at a rate of 15% to 20% in the 2020 financial year depended on the future performance of its global operations (and not merely the future performance of its "*Americas*" division);
  - (c) refers to and repeats sub-paragraphs 58(c), (d), (e) and (f) above;
  - (d) says further that the inference the plaintiffs seek to draw in particular ii is not open in the circumstances alleged in sub-paragraph 58(g) above.
78. As to paragraph 78, it:
- (a) refers to and repeats paragraphs 41 and 59 above (which apply *mutatis mutandis* to the information the subject of paragraph 78 of the consolidated statement of claim);
  - (b) under cover of those objections:

- (i) says that the directors of Treasury knew when Michelle Terry, Victoria Snyder and Gunther Burghardt ceased their employment with Treasury, and when Angus McPherson was appointed President, Americas; and
- (ii) otherwise denies that paragraph.

79. As to paragraph 79, it:

- (a) refers to and repeats paragraphs 42 and 60 (which apply *mutatis mutandis* to the information the subject of paragraph 79 of the consolidated statement of claim), 72 to 78 above;
- (b) under cover of those objections:
  - (i) denies that paragraph;
  - (ii) says further that the FY19 Results Announcement said on several occasions that there had been “*competitor discounting*”;

#### **Particulars**

*The FY19 Results Announcement is in writing.*

- (iii) says further it will rely on the full content of the FY19 Results Announcement at trial.

80. It denies paragraph 80 and refers to and repeats paragraphs 72 to 79 above.

81. As to paragraph 81, it:

- (a) refers to and repeats paragraph 69 above;
- (b) says that if Treasury made the representation as alleged (which is denied), it did not repeat that representation at any time and it was not a continuing representation;
- (c) says further that it was not during the Relevant Period under any obligation to withdraw or qualify a statement it made; and
- (d) otherwise denies that paragraph.

82. As to paragraph 82, it:

- (a) says that insofar as the plaintiffs rely on the allegation that the August 2019 Representation was a continuing representation in the consolidated statement of claim, they must identify how it became known to Treasury that the alleged representation (which is denied) was false (including particulars of who had that knowledge / formed the opinion, when that person(s) acquired the knowledge /

formed the opinion, and how those matters are attributable to Treasury) and, absent such allegations, the said reliance is embarrassing; and

- (b) under cover of that objection, denies the paragraph and refers to and repeats paragraphs 69 to 77 and 80 to 81 above.

## **F.2 Alleged August 2019 Continuous Disclosure Contravention**

83. As to paragraph 83, it:

- (a) refers to and repeats paragraphs 45 (which applies *mutatis mutandis* to the information the subject of paragraph 83 of the consolidated statement of claim) and 78 above;
- (b) says the inference sought to be drawn in particular ii is embarrassing;
- (c) otherwise, denies that paragraph.

84. As to paragraph 84, it:

- (a) refers to and repeats paragraph 10 above;
- (b) says that the particulars are embarrassing insofar as they say that the alleged information included “*Treasury’s own information relating to its business, projections and sensitivities*”, but provide no particulars of the “*business, projections and sensitivities*” and which alleged Treasury Officers had or ought to have had that knowledge, and when each such alleged officer had or ought to have had such knowledge;
- (c) under cover of those objections:
  - (i) refers to and repeats paragraphs 74, 76 and 77 above;
  - (ii) denies the alleged August 2019 US Market Conditions Impact Information, the alleged August 2019 Leadership Impact Information, the alleged August 2019 Combined US Impact Information was information that existed at any time during the Relevant Period;
  - (iii) denies that information comprising the alleged August 2019 US Market Conditions, the alleged August 2019 Treasury US Market Conditions, and the alleged August 2019 Leadership Changes (to the extent such information in fact existed) was not generally available within the meaning of s 676 of the Corporations Act;



(iv) otherwise denies that paragraph.

85. As to paragraph 85, it:

- (a) refers to and repeats paragraphs 83 and 84 above; and
- (b) otherwise denies that paragraph.

86. As to paragraph 86, it:

- (a) admits that it published the 28 January 2020 Announcement;
- (b) admits that prior to 28 January 2020 it did not inform the ASX of the alleged August 2019 US Market Conditions Impact Information, the alleged August 2019 Leadership Impact Information or the alleged August 2019 Combined US Impact Information (the existence of which information during the Relevant Period is denied);
- (c) says further it was under no obligation to make any announcement regarding the alleged August 2019 US Market Conditions Impact Information, the alleged August 2019 Leadership Impact Information or the alleged August 2019 Combined US Impact Information during the Relevant Period; and
- (d) otherwise denies that paragraph.

87. It denies paragraph 87.

## **G. ALLEGED OCTOBER 2019 CONTRAVENTIONS**

### **G.1 Alleged October 2019 Misleading or Deceptive Conduct Contravention**

88. As to paragraph 88, it:

- (a) admits that on 16 October 2019, in the announcement titled “*2019 AGM Chairman and CEO Address*” dated 16 October 2019 (**October 2019 Announcement**) Treasury said “[i]n closing, I’d like to report that we are pleased with our first quarter and we re-affirm our guidance of 15% to 20% reported EBITs growth in fiscal 20”;

#### **Particulars**

*The October 2019 Announcement is in writing.*

- (b) refers to and repeats paragraphs 34, 50 and 69 above;
- (c) says further it will rely on the full content of the October 2019 Announcement at trial; and

- (d) otherwise denies that paragraph.
89. As to paragraph 89, it:
- (a) refers to and repeats paragraph 88 above;
- (b) admits the statement “*we re-affirm our guidance of 15% to 20% reported EBITs growth in fiscal 20*”, which is contained in the October 2019 Announcement, was a statement as to a future matter;
- (c) otherwise denies that paragraph.
90. As to paragraph 90, it:
- (a) refers to and repeats paragraphs 5 and 88 above;
- (b) says the statements contained in the October 2019 Announcement were made:
- (i) in trade or commerce;
- (ii) in relation to a financial product (as that term is defined in Chapter 7 of the Corporations Act and in Part 2, Division 2 of the ASIC Act);
- (iii) in relation to financial services for the purposes of Part 2, Division 2 of the ASIC Act;
- (c) otherwise denies that paragraph.
91. As to paragraph 91, it:
- (a) refers to and repeats paragraph 72 above;
- (b) says the references to “*the US Wine Market*”, and “*casegood sales*” are embarrassing;
- (c) says further the document relied on by the plaintiffs [NAP.999.002.0006] in support of the allegations made in sub-paragraph 91(a) says the following:

*No representation or warranty ... is provided in relation to the accuracy, completeness or reliability of the information contained in any materials to which this document relates (the "Information") ... The Information is not intended to be a complete statement or summary of the securities, markets or developments referred to in the document. UBS does not undertake to update or keep current the Information ... Any statements contained in this report attributed to a third party represent UBS's interpretation of the data, information and/or opinions provided by that*

*third party either publicly or through a subscription service, and such use and interpretation have not been reviewed by the third party;*

- (d) says further the particulars to sub-paragraph 91(a) refer to declines as recorded in Nielsen data, which data has not been provided to Treasury by the plaintiffs;
- (e) says further that the allegations in sub-paragraph 91(b) as to what was “*expected*” is embarrassing, as it does not identify who is alleged to have had that expectation;
- (f) says further the documents particularised do not support the allegations made in paragraph 91 of the consolidated statement of claim, and that the particulars in support of the allegations made in sub-paragraphs 91(b) to 91(e) of the consolidated statement of claim relate only to California;
- (g) says further that the reports prepared by Ciatti referred to in the particulars to sub-paragraphs 91(b) to 91(e) [SAG.001.001.0468 and SAG.001.001.0489]:
  - (i) relevantly relate to “*bulk wine*” in California; and
  - (ii) contain the following disclaimer:
 

*Whilst we have tried to ensure the accuracy and completeness of the contents of the ... Report, Ciatti cannot offer any undertaking, warranty or guarantee, either expressly or implicitly ... regarding how correct, complete or up to date the contents of the ... Report is...*
- (h) says further the allegation in sub-paragraph 91(e) is irrelevant and thus embarrassing and/or is embarrassing because it is not supported by the particulars under that sub-paragraph;
- (i) under cover of those objections:
  - (i) denies sub-paragraph 91(a) and refers to and repeats sub-paragraph 72(i) above;
  - (ii) denies sub-paragraph 91(b) and says further that as at 16 October 2019 the 2019 grape harvest in the US was expected to be average;
  - (iii) as to sub-paragraph 91(c), says that as at 16 October 2019 surplus stock of Bulk Wine from the 2018 harvest in the US remained available but otherwise denies that sub-paragraph;
  - (iv) denies sub-paragraph 91(d);
  - (v) as to sub-paragraph 91(e):

- (A) admits the Ciatti September 2019 report said “[t]here is an awareness among bulk wine sellers ... that the slowness of the market domestically is not a short-term phenomenon”;
  - (B) otherwise denies that sub-paragraph;
    - (vi) denies sub-paragraph 91(f);
    - (vii) denies sub-paragraph 91(g).
92. As to paragraph 92, it:
- (a) refers to and repeats paragraph 73 above;
  - (b) as to sub-paragraph 92(a), refers to and repeats sub-paragraphs 54(a)-(c) and 73(a)-(c) above;
  - (c) as to sub-paragraph 92(b):
    - (i) as to sub-paragraph 92(b)(i), refers to and repeats sub-paragraphs 73(a) and (c) above;
    - (ii) as to sub-paragraph 92(b)(ii):
      - (A) says that the allegation of “*reduced sales growth in respect of sales*” is embarrassing as the comparative (earlier) period from which the alleged reduced sales growth occurred is not identified;
      - (B) under cover of that objection:
        - (1) says that the allegation that “*Treasury had experienced reduced sales growth in respect of sales of its wines ... in the US in FY20 to date*” must, by reason of the particulars thereto, be a reference to a decline in sales by retail outlets to end-consumers (which sales were not made by Treasury);
        - (2) denies sub-paragraph 92(b)(ii);
        - (3) further refers to and repeats the allegations made in sub-paragraph 33(b) above regarding the limited coverage of sales data such as Nielsen sales data;
        - (4) says further that particulars (ii) and (iii) in support of that sub-paragraph are embarrassing as they seek to rely on

data that post-dated 16 October 2019 in support of the position as at 16 October 2019;

- (5) says further that the particulars thereto refer to declines as recorded in Nielsen data, which data has not been provided to Treasury by the plaintiffs;
- (6) says further that the documents relied on by the plaintiffs in support of the allegations [NAP.999.002.0005 and NAP.999.002.0006] say the following:

*No representation or warranty ... is provided in relation to the accuracy, completeness or reliability of the information contained in any materials to which this document relates (the "Information") ... The Information is not intended to be a complete statement or summary of the securities, markets or developments referred to in the document. UBS does not undertake to update or keep current the Information ... Any statements contained in this report attributed to a third party represent UBS's interpretation of the data, information and/or opinions provided by that third party either publicly or through a subscription service, and such use and interpretation have not been reviewed by the third party;*

- (d) as to sub-paragraph 92(c), refers to and repeats sub-paragraphs 73(a) and 73(d) above;
- (e) as to sub-paragraph 92(d):
  - (i) says the allegation made in that sub-paragraph that “*Treasury’s market share in the US was falling*” is embarrassing, as it is not possible to make an allegation about market share without first defining the market;
  - (ii) says further that the particulars thereto refer to declines as recorded in Nielsen data, which data has not been provided to Treasury by the plaintiffs;
  - (iii) says further that the document relied on by the plaintiffs in support of the allegations [NAP.999.002.0006] say the following:

*No representation or warranty ... is provided in relation to the accuracy, completeness or reliability of the information contained in any materials to which this document relates (the "Information") ... The Information is not intended to be a complete statement or summary of the securities, markets or developments referred to in the document. UBS does not undertake to update or keep current the Information ... Any statements contained in this report attributed to a third party represent UBS's interpretation of the data, information and/or opinions provided by that third party either publicly or through a subscription service, and such use and interpretation have not been reviewed by the third party;*

- (iv) refers to and repeats sub-paragraphs 54(a) and 54(g) above;
  - (v) otherwise denies that sub-paragraph;
  - (f) denies sub-paragraph 92(e).
93. As to paragraph 93, it:
- (a) refers to and repeats paragraphs 10, 91, and 92 above;
  - (b) says the particulars to paragraph 93 do not support the allegations contained therein and the inference sought to be drawn from particular iii to paragraph 93 is embarrassing, and accordingly there is no proper basis for the allegations made in paragraph 93;
  - (c) under cover of those objections, denies that paragraph.
94. As to paragraph 94, it:
- (a) refers to and repeats paragraphs 56 and 75 above;
  - (b) says that during the second quarter of the 2020 financial year, Angus McPherson had been unable to relocate to the US as planned, and Ben Dollard was subsequently appointed to the role as President, Americas;
  - (c) otherwise denies that paragraph.
95. As to paragraph 95, it:
- (a) refers to and repeats paragraph 10 and above;
  - (b) says that the 28 January 2020 Announcement is not a proper basis for the allegations made by the plaintiffs;

- (c) otherwise denies that paragraph.
96. It denies paragraph 96, and in further answer to that paragraph:
- (a) refers to and repeats paragraphs 91, 93 and 95 above;
  - (b) says further that the consolidated statement of claim does not disclose a proper basis for the allegation in paragraph 96, as Treasury's ability to achieve growth in EBITs on a reported currency basis at a rate of 15% to 20% in the 2020 financial year depended on the future performance of its global operations (and not merely the future performance of its "*Americas*" division).
  - (c) refers to and repeats sub-paragraphs 58(c), (d), (e) and (f) above;
  - (d) says further that the inference the plaintiffs seek to draw in particular ii is not open in the circumstances set out in sub-paragraph 58(g) above.
97. As to paragraph 97, it:
- (a) refers to and repeats paragraphs 41, 59 and 78 above (which apply *mutatis mutandis* to the information the subject of paragraph 97 of the consolidated statement of claim);
  - (b) under cover of those objections:
    - (i) says that the directors of Treasury knew of the matters referred to in paragraph 94(b) above; and
    - (ii) otherwise denies that paragraph.
98. As to paragraph 98, it:
- (a) refers to and repeats paragraphs 42, 60 and 79 (which apply *mutatis mutandis* to the information the subject of paragraph 98 of the consolidated statement of claim), 91 to 97 above;
  - (b) under cover of those objections:
    - (i) denies that paragraph;
    - (ii) says further it will rely on the full content of the October 2019 Announcement at trial.
99. It denies paragraph 99 and refers to and repeats paragraphs 91 to 98 above.
100. As to paragraph 100, it:

- (a) refers to and repeats paragraph 88 above;
- (b) says that if Treasury made the representation as alleged (which is denied), it did not repeat that representation at any time and it was not a continuing representation;
- (c) says further that it was not during the Relevant Period under any obligation to withdraw or qualify a statement it made; and
- (d) otherwise denies that paragraph.

101. As to paragraph 101, it:

- (a) says that insofar as the plaintiffs rely on the allegation that the October 2019 Representation was a continuing representation in the consolidated statement of claim, they must identify how it became known to Treasury that the alleged representation (which is denied) was false (including particulars of who had that knowledge / formed the opinion, when that person(s) acquired the knowledge / formed the opinion, and how those matters are attributable to Treasury) and, absent such allegations, the said reliance is embarrassing; and
- (b) under cover of that objection, denies that paragraph and further refers to and repeats paragraphs 88 to 96, 99 and 100 above.

## **G.2 Alleged October 2019 Continuous Disclosure Contravention**

102. As to paragraph 102, it:

- (a) refers to and repeats paragraphs 45 and 83 (which apply *mutatis mutandis* to the information the subject of paragraph 102 of the consolidated statement of claim) and 97 above;
- (b) says the inference sought to be drawn in particular iv is embarrassing;
- (c) otherwise, denies that paragraph.

103. As to paragraph 103, it:

- (a) refers to and repeats paragraph 10 above;
- (b) says that particulars are embarrassing insofar as they say that the alleged information included “*Treasury’s own information relating to its business, projections and sensitivities*”, but provide no particulars of the “*business, projections and sensitivities*” and which alleged Treasury Officers had or ought to



have had that knowledge, and when each such alleged officer had or ought to have had such knowledge;

- (c) under cover of those objections:
- (i) refers to and repeats paragraphs 93, 95 and 96 above;
  - (ii) denies the alleged October 2019 US Market Conditions Impact Information, the alleged October 2019 Leadership Impact Information and the alleged October 2019 Combined US Impact Information was information that existed at any time during the Relevant Period;
  - (iii) denies that information comprising the alleged October 2019 US Market Conditions, the alleged October 2019 Treasury US Market Conditions, and the alleged October 2019 Leadership Changes (to the extent such information in fact existed) was not generally available within the meaning of s 676 of the Corporations Act;
  - (iv) otherwise denies that paragraph.

104. As to paragraph 104, it:

- (a) refers to and repeats paragraphs 102 and 103 above; and
- (b) otherwise denies that paragraph.

105. As to paragraph 105, it:

- (a) admits that it published the 28 January 2020 Announcement;
- (b) admits that prior to 28 January 2020 it did not inform the ASX of the alleged October 2019 US Market Conditions Impact Information, the alleged October 2019 Leadership Impact Information or the alleged October 2019 Combined US Impact Information (the existence of which information during the Relevant Period is denied);
- (c) says further it was under no obligation to make any announcement regarding the alleged October 2019 US Market Conditions Impact Information, the alleged October 2019 Leadership Impact Information or the alleged October 2019 Combined US Impact Information during the Relevant Period; and
- (d) otherwise denies that paragraph.

106. It denies paragraph 106.

## H. ALLEGED SUSTAINABLE GROWTH MISLEADING OR DECEPTIVE CONDUCT

107. As to paragraph 107, it:

- (a) admits it made the statements recorded in the announcements it released to the ASX, and particularised by the plaintiffs, before and during the Relevant Period, and that it will rely on the full contents of those announcements at trial;

### Particulars

*The announcements are in writing.*

- (b) otherwise denies that paragraph.

108. As to paragraph 108, it:

- (a) refers to and repeats paragraph 5 above;
- (b) says the statements contained in the announcements made by Treasury to the ASX were made:
  - (i) in trade or commerce;
  - (ii) in relation to a financial product (as that term is defined in Chapter 7 of the Corporations Act and in Part, 2 Division 2 of the ASIC Act);
  - (iii) in relation to financial services for the purposes of the ASIC Act from 26 October 2018;
  - (iv) otherwise denies that paragraph.

109. As to paragraph 109, it:

- (a) says that if Treasury made the representation as alleged (which is denied), it:
  - (i) says the alleged representation is alleged to have arisen by reason of a combination of express and implied statements;
  - (ii) says further it did not repeat that representation at any time and it was not a continuing representation;
- (b) says further that it was not during the Relevant Period under any obligation to withdraw or qualify a statement it made; and
- (c) otherwise denies that paragraph.

110. As to paragraph 110, it:

- (a) says the particulars do not support the allegations made in paragraph 110 of the consolidated statement of claim, which are embarrassing;
- (b) says further that the allegation that Treasury's alleged strategy for its global business was underpinned by the performance of two brands of wine is embarrassing;
- (c) says further that the material facts pleaded in paragraph 110 do not disclose a cause of action, and that the paragraph is liable to be struck out on that basis;
- (d) under cover of those objections:
  - (i) refers to and repeats paragraphs 16, 38, 39, 53, 54, 72, 73, 91, and 92 above;
  - (ii) says further that:
    - (A) at all times from 14 February 2019 (when Treasury gave guidance for the 2020 financial year in the 14 February 2019 Announcements (**Initial FY20 Guidance**)) until the Board of Treasury resolved on 28 January 2020 to give the revised guidance for the 2020 financial year, which was given later that day in Treasury's 28 January 2020 Announcement, Treasury was in a position to meet its Initial FY20 Guidance; and
    - (B) rather than focusing on the short-term goal of meeting the Initial FY20 Guidance, Treasury elected to maintain its strategy of sustainable growth in preference to short term profits;
  - (iii) otherwise denies that paragraph.

111. It denies paragraph 111.

## **I. ALLEGED DIAGEO BRANDS MISLEADING OR DECEPTIVE CONDUCT**

112. As to paragraph 112, it:

- (a) admits it made the statements recorded in the announcements it released to the ASX, and particularised by the plaintiffs, before and during the Relevant Period, and that it will rely on the full contents of those announcements at trial;

### **Particulars**

*The announcements are in writing.*

- (b) otherwise denies that paragraph.
113. As to paragraph 113, it:
- (a) refers to and repeats paragraph 5 above;
  - (b) says the statements contained in the announcements made by Treasury to the ASX were made:
    - (i) in trade or commerce;
    - (ii) in relation to a financial product (as that term is defined in Chapter 7 of the Corporations Act and in Part 2, Division 2 of the ASIC Act);
    - (iii) otherwise denies that paragraph.
114. As to paragraph 114, it:
- (a) says that if Treasury made the representation as alleged (which is denied), it:
    - (i) says the alleged representation is alleged to have arisen by reason of a combination of express and implied statements;
    - (ii) says further it did not repeat that representation at any time and it was not a continuing representation;
  - (b) says further that it was not during the Relevant Period under any obligation to withdraw or qualify a statement it made; and
  - (c) otherwise denies that paragraph.
115. As to paragraph 115, it:
- (a) refers to and repeats paragraphs 38, 39, 53, 54, 72, 73, 91 and 92 above;
  - (b) otherwise denies that paragraph.
116. It denies paragraph 116.

## **J. INFORMATION DISCLOSURE AND ALLEGED SHARE PRICE IMPACT**

117. As to paragraph 117, it:
- (a) refers to and repeats paragraph 10 above;
  - (b) says that in the 28 January 2020 Announcement, it said:
    - (i) “*we slightly missed our 1H20 EBITs versus our own expectations*”;

- (ii) “[a]s a result of challenging conditions in the US wine market, TWE now expects F20 reported EBITs growth of approximately 5% to 10%”;
- (iii) the downgrade had been “driven primarily by underperformance in our US results in the first half and is expected to continue through the second half, due to:
  - 1. Unexpected changes in our Americas leadership, resulting in a loss of execution momentum through the first half that will carry into the second half.
  - 2. US wine market dynamics where suppliers are trying to move surplus wine across the market at lower prices, resulting in an accelerated growth of private label, which is up approximately 15% in a market that is flat to down. This is a significant market shift in a very short period, especially after the recent US vintage in October and towards the end of the half.
  - 3. As a result of these market dynamics, we were unable to recover or offset higher US Luxury COGS and higher Australian Commercial COGS, with higher levels of discounting required to try to maintain share across all price points. We also walked away from just under half a million cases of Commercial volume in the US due to private label growth, aggressive market pricing and our higher COGS.
- (iv) “Americas reported a 17% decline in EBITs to \$98.3m and an EBITs margin of 16.1% (down 3.6ppts)”;

### **Particulars**

*The announcement is in writing.*

- (c) otherwise denies that paragraph.
118. As to paragraph 118, it:
- (a) admits that Treasury’s share price declined from A\$16.68 per share at the close of trading on 28 January 2020 to A\$12.35 per share at the close of trading on 29 January 2020;
  - (b) otherwise denies that paragraph.
119. As to paragraph 119, it:

- (a) admits sub-paragraph 119(a); and
- (b) otherwise denies that paragraph.

**K. ALLEGED CONTRAVENTIONS CAUSED ALLEGED LOSS OR DAMAGE**

120. As to paragraph 120, it:

- (a) admits sub-paragraph 120(a); and
- (b) does not know, and therefore cannot admit, sub-paragraph 120(b).

121. It denies paragraph 121.

122. It denies paragraph 122.

123. It denies paragraph 123.

124. As to paragraph 124, it:

- (a) says the allegation that the second plaintiff and some group members relied on “*the Representations, or one or more of them*” is embarrassing; and
- (b) otherwise denies that paragraph.

125. It denies paragraph 125.

126. As to paragraph 126, it:

- (a) refers to and repeats paragraph 125 above; and
- (b) otherwise denies the paragraph.

126A In further answer to paragraphs 120 to 123 and 125 to 126, it:

- (a) denies that the doctrine of market-based causation is part of Australian law;
- (b) alternatively, says that if the doctrine of market-based causation is part of Australian law (which is denied), then:
  - (i) the plaintiffs and the group members are not entitled to invoke or rely on that doctrine and/or that doctrine can have no application, unless they plead and prove that, had Treasury not engaged in the alleged contravening conduct - but rather informed the ASX of the alleged material information at the time(s) the plaintiffs allege Treasury was required to do so, and not made the alleged representations the plaintiffs allege were misleading or deceptive, with the consequence (as alleged by the plaintiffs) that the “inflation” in the price of Treasury Shares alleged at paragraphs 121 and

122 of the consolidated statement of claim would not have been in the Treasury Share price at the time they acquired their Treasury Shares – they nevertheless would have proceeded to acquire those Treasury Shares on that counterfactual; and

- (ii) any group member who engaged in short selling of Treasury Shares at any material time cannot invoke or rely on that doctrine in order to establish that any of the alleged contraventions (all of which are denied) caused that group member any loss or damage (which loss and damage is also denied).

126B In further answer to the whole of the consolidated statement of claim, insofar as the plaintiffs and group members make claims for compensation pursuant to section 1317HA(1) of the Corporations Act for damage resulting from one or more of Treasury's alleged contraventions of section 674(2) of the Corporations Act (which are denied), and it appears to the Court that Treasury has, or may have, contravened section 674(2) of the Corporations Act (which is denied), Treasury:

- (a) says that it has acted honestly;
- (b) says further that having regard to all the circumstances of the case, Treasury ought fairly be excused for any contravention of section 674(2) of the Corporations Act;
- (c) in the premises, the Court should relieve Treasury wholly or partly from the liability to which it would otherwise be subject, or which might otherwise be imposed of it, because of any contravention of section 674(2) of the Corporations Act.

### **Particulars**

*Treasury relies on the Corporations Act, s 1317S.*

126C In further answer to the whole of the consolidated statement of claim, insofar as the plaintiffs and group members make claims for compensation pursuant to:

- (a) section 1041I(1) of the Corporations Act in relation to economic loss caused by conduct of Treasury that was allegedly done in contravention of section 1041H of the Corporations Act (which is denied); and/or
- (b) section 12GF(1) of the ASIC Act in relation to economic loss caused by conduct of Treasury that was allegedly done in contravention of section 12DA of the ASIC Act (which is denied); and/or

- (c) section 236(1) of the Australian Consumer Law in relation to economic loss caused by conduct of Treasury that was allegedly done in contravention of section 18 of the Australian Consumer Law (which is denied),

Treasury says that:

- (d) if the plaintiffs or any group member suffered the loss claimed or any loss at all (which is denied) it was as a result wholly or partly of the plaintiffs' or any group member's failure to take reasonable care, by failing to have adequate regard to the full terms of any or all of Treasury's announcements (including disclaimers and warnings), insofar as:
- (i) the plaintiffs or any group members allege that they directly relied on any or all of the announcements made by Treasury in their decision to acquire shares in Treasury;
  - (ii) further or alternatively, the plaintiffs or any group members made the decision to purchase shares in Treasury without reading those announcements;
- (e) Treasury did not intend to cause the loss claimed by the plaintiffs or any group member, or any loss at all; and
- (f) in the premises, if the plaintiffs or any group member suffered the loss claimed or any loss at all (which is denied), the damages which the plaintiffs or any group member may recover in relation to any losses are to be reduced to the extent to which the Court thinks just and equitable having regard to the plaintiffs' or group member's share in the responsibility for the loss.

### **Particulars**

*Treasury relies on the Corporations Act, s 1041I(1B), the ASIC Act, s 12GF(1B) and the Competition and Consumer Act 2010 (Cth), s 137B.*

#### **L. ALLEGED ENTITLEMENT TO RELIEF**

127. It denies paragraph 127.
128. It denies paragraph 128.

#### **M. COMMON QUESTIONS OF FACT OR LAW**

129. It does not plead to paragraph 129, as it contains no allegations against Treasury.



Dated 25 February 2021

**M GARNER**

**G KOZMINSKY**

A handwritten signature in blue ink, reading "Herbert Smith Freehills". The signature is written in a cursive style and is positioned above a horizontal dotted line.

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Herbert Smith Freehills  
Solicitors for the defendant