

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 20/06/2019 3:59:08 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

|                  |   |
|------------------|---|
| Document Lodged: | Statement of Claim - Form 17 - Rule 8.06(1)(a)                          |
| File Number:     | VID682/2019   |
| File Title:      | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v<br>GARY HELOU & ANOR |
| Registry:        | VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA                          |



Dated: 24/06/2019 3:33:46 PM AEST

Registrar

A handwritten signature in blue ink, which appears to read "Warwick Soden".

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**

**Applicant**

**and**

**GARY HELOU and BRADLEY HINGLE**

**Respondents**

**STATEMENT OF CLAIM**

**A BACKGROUND**

1 Murray Goulburn Co-operative Co. Limited (**MG**), was at all material times between 29 May 2015 and 27 April 2016:

- (a) a public company registered under the provisions of the *Corporations Act 2001* (Cth) (**Act**);
- (b) able to be sued;
- (c) an unlisted disclosing entity within the meaning of section 111AL(2) of the Act;
- (d) pursuant to section 111AP, subject to the continuous disclosure requirements of section 675 of the Act.

2 At all material times between 29 May 2015 and 27 April 2016, the MG Unit Trust (Australian Registered Scheme No. 606 103 637), was a managed investment scheme registered under section 601EB of the Act.

3 MG Responsible Entity Limited (**MGRE**), at all material times between 3 July 2015 and 27 April 2016:

- (a) was a public company registered under the provisions of the Act;

|                             |   |
|-----------------------------|---|
| Filed on behalf of          | Australian Securities and Investments Commission, Applicant |
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- (b) was able to be sued;
- (c) was the trustee of the MG Unit Trust;
- (d) was the responsible entity for MG Unit Trust for the purposes of part 5C.2 of the Act;
- (e) was a listed disclosing entity within the meaning of section 111AL(1) of the Act;
- (f) was, pursuant to section 111AP, subject to the continuous disclosure requirements of section 674 of the Act;
- (g) was bound to comply with the Australian Stock Exchange (**ASX**) Listing Rules;
- (h) was a wholly owned subsidiary of MG;
- (i) had the same directors as MG;
- (j) had the same managing director as MG; and
- (k) had the same chief financial officer as MG.

## **B PARTIES**

4 The Applicant (**ASIC**) is a body corporate:

- (a) established by section 7 of the *Australian Securities and Investments Commission Act 1989* (Cth);
- (b) continuing in existence by section 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
- (c) able to sue in its corporate name by reason of section 8 of the ASIC Act.

5 The First Respondent, Gary Helou (**Helou**):

- (a) was first employed by MG and MGRE in October 2011;
- (b) was appointed managing director of both MG and MGRE in October 2011 and held those positions at all material times;
- (c) prior to joining MG and MGRE, had:

- (i) been chief executive officer of Ricegrowers Ltd t/a SunRice for 11 years;
- (ii) held senior leadership roles in Hong Kong, Singapore and Indonesia with Pacific Brands Group and Indofood;
- (d) had tertiary qualifications in chemical engineering and commerce;
- (e) received by way of remuneration for his services to MG and MGRE in the year ended 30 June 2016 (**FY16**) a base amount of \$1.5 million (excluding director's fees and bonuses);
- (f) during FY15 and FY16, was delegated responsibility by the board of directors of MG and MGRE (**Board**) for the day-to-day management of MG and MGRE's affairs and implementation of the corporate objectives, strategy and policy initiatives;

#### **PARTICULARS**

MG Annual Report dated 1 October 2015 (p36), and MG Annual Report dated 29 September 2016 (p29).

- (g) was at all material times a member of the MG executive leadership team (**ELT**); and
- (h) was, from 1 October 2015 to 26 April 2016, a member of the Disclosure Committee established under the Market Disclosure Policy defined in paragraph 8(g) below.

#### **6 The Second Respondent, Bradley Hingle (Hingle):**

- (a) was first employed by MG and MGRE in January 2014;
- (b) was appointed as chief financial officer of both MG and MGRE in January 2014 and held those positions at all material times;
- (c) in his role as chief financial officer of both MG and MGRE, reported to Helou;
- (d) prior to joining MG and MGRE, had been:
  - (i) employed by Ricegrowers Ltd t/a SunRice since 1999;
  - (ii) chief financial officer of Ricegrowers from 2009 to 2013;

- (e) received by way of remuneration for his services to MG and MGRE in the year ended 30 June 2016 a base amount of \$550,000 (excluding bonuses);
- (f) was at all material times a member of the ELT;
- (g) was from 1 October 2015 to 26 April 2016, a member of the Disclosure Committee established under the Market Disclosure Policy defined in paragraph 8(g) below;
- (h) made or participated in making decisions that affected the whole or a substantial part of the business of MG and MGRE; and
- (i) by reason of subparagraphs (b) and (f) to (h) above, was at all material times an officer of MG and MGRE within the meaning of section 9 of the Act.

## **C DIRECTORS' DUTIES – HELOU**

7 Between 1 July 2015 and 26 April 2016, Helou was under duties:

- (a) by virtue of section 180 of the Act, as a director of each of MG and MGRE to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they:
  - (i) were a director of the corporation in the corporation's circumstances; and
  - (ii) occupied the office held by him, and had the same responsibilities within the corporation as Helou;
- (b) by virtue of section 601FD of the Act, as an officer of MGRE:
  - (i) to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
  - (ii) to take all steps that a reasonable person would take, if they were in the officer's position, to ensure that MGRE complied with the Act.

8 Between 1 July 2015 and 26 April 2016, Helou's responsibilities within MG and MGRE relevantly included:

- (a) the day-to-day management of MG's affairs and implementation of the corporate objectives, strategy and policy initiatives;

- (b) providing regular reports to the Board and its Committees to enable them to discharge their obligations;
- (c) ensuring that adequate processes and controls were in place for the identification of material information and the release of disclosable information;
- (d) reviewing material information and determining whether it must be disclosed to the market;
- (e) overseeing compliance with relevant continuous and periodic disclosure obligations;
- (f) participating and working effectively as a member of the Board; and
- (g) complying with MG's Market Disclosure and Communications Policy dated 1 October 2015 (**Market Disclosure Policy**).

#### **PARTICULARS**

The duties in subparagraphs (a) and (f) arise from delegations from the Board. The duties in subparagraphs (c) to (e) arise by reason of Helou's membership of the Disclosure Committee. The remainder are express terms of Helou's written employment contract between Helou and MG which is undated but executed on or around October 2011, which included the requirement to perform duties as delegated by the Board.

- 9 A reasonable director of a corporation in the circumstances of MG and MGRE as described in this statement of claim who was a director with Helou's responsibilities within those companies would have taken care and exercised diligence so that he:
- (a) adequately monitored, assessed and gave due consideration to the effect of material developments and risks affecting the companies' financial position and performance;
  - (b) adequately monitored the companies' performance against forecasts disclosed to the market;
  - (c) considered whether forecasts should be adjusted in light of material developments and risks affecting the companies' financial position and performance;

- (d) recommended to the Board that it consider whether forecasts should be adjusted in light of material developments and risks affecting the companies' financial position and performance;
- (e) informed and did not withhold from the Board material information, especially relating to the February Earnings Guidance (as defined in paragraph 38 below);
- (f) considered whether further disclosure to the market was required in light of forecasts and material developments and risks affecting the companies' financial position and performance;
- (g) recommended to the Board that it consider whether further disclosure to the market was required in light of forecasts and material developments and risks affecting the companies' financial position and performance;
- (h) took all reasonable steps to ensure that material information concerning MG, MGRE and the February Earnings Guidance (as defined in paragraph 38 below) was disclosed, properly or at all, to:
  - (i) MG's Board;
  - (ii) MGRE's Board;
  - (iii) the ASX;
  - (iv) ASIC;
- (i) did not expose MG or MGRE to the risk of proceedings for contraventions of the Act, legal cost or penalties,

**(Helou Standard of Care).**

## **D DUTIES – HINGLE**

10 Between 1 July 2015 and 26 April 2016, Hingle was under duties:

- (a) by virtue of section 180 of the Act, as an officer of each of MG and MGRE to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they:

- (i) were an officer of the corporation in the corporation's circumstances; and
  - (ii) occupied the office held by him, and had the same responsibilities within the corporation as Hingle;
- (b) by virtue of section 601FD of the Act, as an officer of MGRE:
- (i) to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
  - (ii) to take all steps that a reasonable person would take, if they were in the officer's position, to ensure that MGRE complied with the Act.

11 From 1 July 2015 to 26 April 2016, Hingle's responsibilities within MG and MGRE relevantly included:

- (a) reporting financial results to the Board;
- (b) providing short term projections in budget and forecast;
- (c) providing financial analysis underpinning business case assumptions for decision support;
- (d) leading, managing and reporting financial results as required to the business and the Board;
- (e) driving rigour, discipline and efficiency in reporting, systems, processes and controls as well as corporate governance;
- (f) complying with MG's policies, including the Market Disclosure Policy;
- (g) instilling a culture of accountability, transparency and best practice;
- (h) ensuring that adequate processes and controls were in place for the identification of material information and the release of disclosable information;
- (i) reviewing material information and determining whether it must be disclosed to the market; and



- (j) overseeing compliance with relevant continuous and periodic disclosure obligations.

## **PARTICULARS**

The duties in subparagraphs (h) to (j) arise by reason of Hingle's membership of the Disclosure Committee. The remainder are express terms of Hingle's written employment contract dated 19 September 2013, which included the requirement to perform duties delegated by the Board.

- 12 A reasonable officer of a corporation in the circumstances of MG and MGRE as described in this statement of claim who was a chief financial officer with Hingle's responsibilities within those companies would have taken care and exercised diligence so that he:
- (a) Adequately monitored, assessed and gave due consideration to the effect of material developments and risks affecting the companies' financial position and performance;
  - (b) considered whether forecasts should be adjusted in light of material developments and risks affecting the companies' financial position and performance;
  - (c) recommended to the Board that it consider whether forecasts should be adjusted in light of material developments and risks affecting the companies' financial position and performance;
  - (d) informed and did not withhold from the Board material information, especially relating to the February Earnings Guidance (as defined in paragraph 38 below);
  - (e) recommended to the Board that it consider whether further disclosure to the market was required in light of forecasts and material developments and risks affecting the companies' financial position and performance;
  - (f) took all reasonable steps to ensure that material information concerning MG, MGRE and the February Earnings Guidance (as defined in paragraph 38 below) was disclosed, properly or at all, to:
    - (i) Helou;
    - (ii) MG's Board;

- (iii) MGRE's Board;
- (iv) the ASX;
- (v) ASIC;
- (g) did not expose MG or MGRE to the risk of proceedings for contraventions of the Act, legal cost or penalties,

**(Hingle Standard of Care).**

## **E RELATIONSHIP BETWEEN MG AND MGRE**

- 13 On 1 May 2015, the MG Unit Trust was established.
- 14 On 29 May 2015, MGRE issued a product disclosure statement (**PDS**) by which it offered fully paid units (**Units**) in the MG Unit Trust.
- 15 On and from 3 July 2015:
  - (a) the MG Unit Trust became admitted to the official list of the ASX;
  - (b) the MG Unit Trust issued Units to investors pursuant to the offer in the PDS;
  - (c) MG issued notes and convertible preference shares to a sub-trust of the MG Unit Trust;
  - (d) MGRE paid any distributions on notes and dividends on convertible preference shares that it received from the sub-trust to Unitholders.
- 16 The Units were at all material times between 3 July 2015 and 27 April 2016, intended to give Unitholders an economic exposure to MG and its business.
- 17 Pursuant to a Profit Sharing Mechanism Deed dated 26 May 2015 between MG and MGRE, MG and MGRE agreed that:
  - (a) the Board of MG would determine, amongst other things, the net profit after tax (**NPAT**) in each financial year in accordance with a "Profit Sharing Mechanism" set out in clause 2.1(a) of the Deed;
  - (b) the Profit Sharing Mechanism set out in clause 2.1(a) of the Deed required the Board to adjust the NPAT depending on a variable defined in the Deed as the "Actual Weighted Average Southern Milk Region Farmgate Milk Price";

- (c) following determination of NPAT under the Deed, the Board of MG would determine any dividend on MG shares, distribution on notes and dividend on convertible preference shares and each amount would be the same (clause 2.3).
- 18 In its PDS, MGRE referred to its Continuous Disclosure Policy at page 119 and said:
- (a) [MGRE] places a high priority on communication with Unitholders and is aware of the obligations it will have, once listed, under the Act and the ASX Listing Rules, to keep the market fully informed of any information [MGRE] becomes aware of concerning the MG Unit Trust which is not generally available and which a reasonable person would expect to have a material effect on the price or value of Units; and
  - (b) [MGRE] has entered into the Relationship Deed with [MG] in recognition that most of the information that will have a material effect on the price of the Units will relate to the performance and operations of [MG].
- 19 By a Relationship Deed dated 18 May 2015, MG and MGRE agreed that:
- (a) MG and MGRE must coordinate their continuous disclosure functions and ensure that a representative of MG is a member of the MGRE continuous disclosure committee and that a representative of MGRE is a member of the MG continuous disclosure committee (clause 2.3(a));
  - (b) the purpose of the arrangement referred to in clause 2.3(a) is to ensure that each of MG and MGRE are aware of matters that may cause the other to need to make a continuous disclosure announcement in accordance with the Act or the Listing Rules (clause 2.3(b));
  - (c) MG must notify MGRE immediately upon becoming aware of any information concerning MG that a reasonable person would expect to have a material effect on the price or value of the Units (clause 2.4(a));
  - (d) MGRE must notify MG immediately upon becoming aware of any information concerning MGRE that a reasonable person would expect to have a material effect on the price or value of the MG shares (clause 2.5(a)).
- 20 By a Continuous Disclosure Deed Poll dated 26 May 2015, MG undertook:

- (a) that once it is or becomes aware of any information concerning it or the MG Unit Trust that (i) is not generally available or (ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the shares in MG or the units in the MG Unit Trust, MG will immediately notify its shareholders and MGRE (clause 3.1(a));
- (b) to ensure that, while MGRE is a subsidiary of MG, MGRE complies with its continuous disclosure obligations under section 674 of the Act (clause 3.1(b)).

21 By reason of the matters referred to at paragraphs 3(h) to 3(k) and 17 to 20 above, at all material times between 1 July 2015 and 27 April 2016:

- (a) the directors and officers of MG had or ought reasonably to have come into possession of any information which MGRE was required to tell or give to the ASX under section 674 of the Act in the performance of their duties as directors or officers of MG;
- (b) the directors and officers of MGRE had or ought reasonably to have come into possession of any information which MG was required to tell or give to ASIC under section 675 of the Act in the performance of their duties as directors or officers of MGRE.

## **F MG'S BUSINESS AND PRODUCTS**

22 MG was at all material times Australia's largest dairy producer.

23 At all material times between 1 July 2015 and 27 April 2016, MG's business was broadly divided into two segments or divisions, namely Dairy Foods and Ingredients & Nutritionals.

24 The Ingredients & Nutritionals division sold bulk and customised dairy ingredients to markets in Australia, Asia, Sri Lanka and USA. This division was heavily exposed to fluctuating dairy commodity prices, which during the financial year ended 30 June 2015 had faced a rapidly deteriorating trading environment.

25 The Dairy Foods division comprised of two further divisions: the Dairy Foods Domestic/Australia division and the Dairy Foods International division.

26 The Dairy Foods division sold ready-to-consume dairy foods products including fresh milk, long-life UHT milk, cheese, cream, butter and instant milk powder.

- 27 At all material times between 1 July 2015 and 27 April 2016, MG produced and sold 1kg bags of adult milk powder, which was referred to by MG interchangeably as “sachets”, “sachet powder”, “adult milk powder”, “instant milk powder” and “consumer milk powder” (**Sachets**).
- 28 At all material times between 1 July 2015 and 27 April 2016, Sachets were sold only through the Dairy Foods division, and not the Ingredients & Nutritionals Division.
- 29 At all material times between 1 July 2015 and 27 April 2016, the majority of all Sachets sold by the Dairy Foods International division were sold to distributors who on-sold to customers in China.

**G MARKET DISCLOSURES BETWEEN 29 MAY 2015 AND 27 APRIL 2016**

- 30 In its PDS dated 29 May 2015 published to the ASX and ASIC and more widely to potential investors, MGRE gave financial forecasts for MG for the financial year ending 30 June 2016 (**FY16**) including the following:
- (a) NPAT attributable to shareholders and Unitholders would be \$86 million; and
  - (b) the Available Southern Milk Region Farmgate Milk Price (**FMP**) would be \$6.05 per kilogram of milk solids (**kgms**).
- 31 In the PDS, MG stated that it would update the market on potential increases or decreases in the FMP at its annual general meeting and otherwise in accordance with its continuous disclosure obligations.
- 32 On 31 August 2015, MG and MGRE released MG’s financial results for the full year ended 30 June 2015 to the ASX (**August Announcement**).
- 33 The August Announcement included the following statements:
- (a) the NPAT attributable to shareholders and Unitholders of \$86 million and FMP of \$6.05 can be achieved, provided dairy commodity prices strengthen during the balance of FY16;
  - (b) if assumptions relating to material strengthening of commodity prices during the balance of FY16, foreign exchange and other risk factors outlined in the PDS do not materialise, the FMP would be more likely to be in the range of \$5.60 - \$5.90 and NPAT would be between \$66 million to \$79 million;

- (c) MG will continue to monitor the situation closely and will update the market as soon as circumstances materially change. In the meantime, MG remains focused on executing its growth and value creation strategy to shift its product mix away from the volatility of commodity products to ready-to-consume dairy foods.
- 34 On 1 October 2015, MG and MGRE released MG's Annual Report for 2015 (**Annual Report**).
- 35 The Annual Report included MG's Corporate Governance Statement (**Corporate Governance Statement**), which included the following statements:
- (a) MG is committed to making timely and balanced disclosure of all material matters and effective communication with its key stakeholders so as to give them ready access to clear and relevant information to assist them in making informed decisions;
  - (b) As an unlisted public company and disclosing entity, MG has significant continuous disclosure obligations under the Act;
  - (c) Following the listing of the MG Unit Trust on the ASX on 3 July 2015, MGRE (a wholly owned subsidiary of MG) also has significant continuous disclosure obligations under the Act and the ASX Listing Rules;
  - (d) It is expected that most of the information that will have a material effect on the price of units in the MG Unit Trust will relate to the performance and operation of MG;
  - (e) Therefore, MG has entered into a Continuous Disclosure Deed Poll undertaking:
    - (i) that once it becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of units in the MG Unit Trust, MG will immediately notify its shareholders and MGRE;
    - (ii) to ensure that, while MGRE is a subsidiary of MG, MGRE complies with its continuous disclosure obligations.
- 36 On 26 October 2015, MGRE released the Managing Director's AGM Address to the ASX (**October Announcement**).

- 37 In the October Announcement, Helou confirmed the NPAT and FMP guidance given in the August Announcement.
- 38 On 29 February 2016, MG and MGRE released:
- (a) MG's Interim Financial Report for the half year ended 31 December 2015;
  - (b) MG's Half Year Financial Results Presentation; and
  - (c) MG's Half Year Financial Results News Release,
- (together the **February Announcement** which forecasted that MG would generate an NPAT of \$63 million and FMP of \$5.60 for FY16 (**February Earnings Guidance**),
- 39 On 22 April 2016, MGRE requested a trading halt.
- 40 On 27 April 2016, MGRE released a Trading and FY16 Outlook Update in relation to MG (**April Announcement**) which stated that it expected to achieve an NPAT of \$39 million to \$42 million and FMP of \$4.75 to \$5.00.

## H THE FORECASTING PROCESS

- 41 Throughout the period 1 July 2015 to 30 June 2016, MG prepared monthly "revised income forecasts" (**RIFs**) which provided a monthly update of the company's forecast NPAT and FMP for FY16.
- 42 Each RIF aggregated the actualised results for the preceding months together with an updated forecast for the remaining months of the financial year.
- 43 Preparation of the monthly RIFs typically involved the following steps:
- (a) by the 5<sup>th</sup> day of each month, each business unit provided to the finance team a submission containing their actualised results for the preceding months together with an updated forecast for the remaining months of the financial year;
  - (b) the finance team (headed by Daniel Egan) checked to ensure submissions had been received from all business units and then consolidated the submissions to produce a consolidated RIF for MG's forecast NPAT and FMP;

- (c) if necessary, the finance team sought explanations as to any major variances from the last RIF from the relevant business unit concerned;
- (d) by the 7<sup>th</sup> day of each month, Egan and Hingle met to discuss the business unit submissions and the consolidated RIF and from time to time, if necessary, Hingle required business units to review and resubmit their submissions;
- (e) the consolidated RIF was then finalised by Egan (with the assistance of members of his team including Joshua Pedersen) and sent to Hingle;
- (f) once finalised, the RIF was sent to the ELT for review and approval where, from time to time, additional "initiatives", "overlays" or "stretch targets", were added to the forecast;
- (g) once approved by the ELT, the RIF was presented at the next Board Meeting.

### **PARTICULARS**

The RIFs are in writing. At all material times prior to December 2015, each RIF typically contained three possible forecast "scenarios" or "cases" for the NPAT and FMP, referred to as the low case, mid case and high case. From December 2015, the RIFs contained only one forecasted NPAT and FMP which represented the mid case, but additionally contained a list of factors described as "risks and opportunities" or "upsides and downsides" which identified (and quantified) possible negative and positive variations to the forecasted NPAT and FMP.

## **I EVENTS BETWEEN AUGUST 2015 AND FEBRUARY 2016**

44 At a Board meeting on 27 and 28 August 2015:

- (a) the Board noted initiatives being undertaken to mitigate the impact of the weakened commodities prices, including maximising dairy foods production and sales (including production and sales of Sachets); and
- (b) a key optimisation initiative was to increase the budgeted sales volumes for Sachets from 27,000 tonnes to a forecast of 36,000 tonnes.

### **PARTICULARS**

Minutes of Board of Directors' meeting on 27 and 28 August 2015, page 13-14 [MGC.001.002.0003]. Presentation entitled "2016 Scenario's –for discussion" dated August 2015, Page 9 [MGC.001.001.2167].



45 From about November 2015 and at all material times thereafter:

- (a) the Dairy Foods division was forecasted by MG to produce the greatest gross profit contribution to MG's consolidated forecast and RIFs;
- (b) Sachets was the product that was forecasted by MG to produce the greatest gross profit contribution to each of the Dairy Foods Domestic/Australia and the Dairy Foods International divisions; and
- (c) month on month improved performance in Sachet sales and revenues was critical to MG meeting its forecasted NPAT and FMP,

**(Sachet Assumptions).**

#### **PARTICULARS**

The forecasts from November 2015 onwards are contained in RIFs prepared by MG between November 2015 to April 2016. The RIFs are written and may be inspected by appointment.

46 At all material times from November 2015, Helou knew that the financial forecasts of MG relied on the Sachet Assumptions.

#### **PARTICULARS**

The RIFs were approved by the ELT (including Helou). From time to time, Hingle provided the RIFs to Helou prior to them being sent to the ELT for approval. The RIFs are written and may be inspected by prior appointment.

47 At all material times from November 2015, Hingle knew that the financial forecasts of MG relied on the Sachet Assumptions.

#### **PARTICULARS**

The RIFs were provided to Hingle prior to them being sent to Helou and the ELT for approval. The RIFs were approved by the ELT (including Hingle). The RIFs are written and may be inspected by prior appointment. From 11 January 2016, Hingle requested that Sachet sales be reported to him on a weekly basis as Sachets was a "major contributor" to MG's FY16 financial results. No other product was being reported to Hingle on a weekly basis.

#### **J EVENTS IN FEBRUARY 2016**

48 At a meeting held on about 24 February 2016, the ELT (including Helou and Hingle) approved the February RIF, which forecasted:

- (a) the FY16 NPAT was likely to be \$63.7 million;

- (b) the FY16 FMP was likely to be \$5.62;
  - (c) MG would sell 37,192 tonnes of Sachets from February to June 2016;
  - (d) 22,209 tonnes of Sachets would be sold by Dairy Foods International between February to June 2016 at an average unit price of \$8.30 per unit;
  - (e) 87.4% of the entire FY16 forecasted Sachet sales volume for Dairy Foods International would be sold between February to June 2016,
- (together, the **February Assumptions**).

#### **PARTICULARS**

The February RIF contains a "Sachet Volume" table (at page 7) that recorded actual sales figures for the months of July 2015 to January 2016 (inclusive) and forecast figures for the months of February 2016 to June 2016 (inclusive).

49 By 26 February 2016, the following material or significant risks existed, which were likely to adversely affect MG and MGRE's ability to achieve the forecast NPAT and FMP contained in the February RIF:

- (a) actual Sachet sales for February 2016 were below forecast in that:
  - (i) 90% of the month had passed;
  - (ii) total actual Sachet sales in Dairy Foods were 1,646 tonnes (materially below the 4,483 tonnes forecast for February in the February RIF and below the monthly figures that had been achieved in the previous 5 months);
  - (iii) total actual Sachet sales in Dairy Foods International were 464 tonnes (materially below the 1,658 tonnes forecast for February);
  - (iv) total actual Sachet sales in Dairy Foods Domestic/Australia were 782 tonnes (materially below the forecast of 2,018 tonnes for February);

#### **PARTICULARS**

Spreadsheet titled "Sachet Sales Update 25-2-2016.xlsx" attached to email from Becker to Moncau and Ceddia [MGC.016.001.0657, MGC.016.001.0658].

- (b) of the 37,192 tonnes Sachet sales forecast for February to June 2016:

- (i) MG did not have in place contracts or firm commitments from customers for the entirety of the 37,192 tonnes forecast Sachet sales;
- (ii) approximately half had not been allocated for sales to existing customers;
- (iii) the unallocated amounts were forecast to be taken up by new distributors in the period from March to June 2016, who had not previously purchased from MG and had no distribution agreements in place with MG;

#### **PARTICULARS**

Spreadsheet titled "RIF 7+5 Q3\_Q4 Analysis.xlsx" attached to email from Carbone to Hingle dated 23 February 2016 [MGC.015.001.5835] and [MGC.015.001.5837].

- (iv) there were no significant forward orders for sales allocated to existing customers for March or April to June 2016;

#### **PARTICULARS**

Spreadsheet titled "Sachet Sales Update 25-2-2016.xlsx" attached to email from Becker to Moncau and Ceddia [MGC.016.001.0657, MGC.016.001.0658].

- (v) the Sachet sales forecast was based on production capacity, not sales capacity;

#### **PARTICULARS**

Email from Moncau to David Mallinson dated 19 March 2016 [MGC.015.001.0792].

- (c) save for a minor exception, MG did not have physical distribution channels in China to enable MG to achieve the forecast sales in the February RIF:

- (i) MG had, to February 2016, sold its Sachets predominantly through online, e-commerce distributors and achieving the February Earnings Guidance required MG to develop MG's physical ("offline") distribution channels into stores in China;

#### **PARTICULARS**

Email from Moncau to Helou dated 8 March 2016 [MGC.015.001.1153]. Email chain between Moncau and Helou dated 8 March 2016 [MGC.015.001.1140]. Email from Helou to Moncau dated

18 February 2016 [MGC.015.005.0186]. March Sachet Risk Profile [MGC.015.001.1142, MGC.015.001.1143]. Email chain between Moncau and Zhang dated 17 and 18 February 2016 [MGC.015.002.8773].

- (ii) MG's only existing physical, "offline" distributor for China, Foodgears, had historically purchased Sachets volumes of less than 100 tonnes per month representing less than 1.5% of the forecast Sachet volume in the February RIF;

#### **PARTICULARS**

Spreadsheet titled 'Sachet Sales Update 29-2-2016.xlsx' emailed from Becker to Moncau and Scott on 29 February 2016 [MGC.016.001.0655];

- (iii) no distribution agreements had been signed with offline distributors in China during FY16 (save for Foodgears);

#### **PARTICULARS**

Email chain between Moncau and Helou dated 8 March 2016 [MGC.015.001.1140]. Email from Moncau to Helou dated 18 February 2016 [MGC.015.001.1477] Email from Moncau to Scott dated 21 February 2016 [MGC.015.006.4843] Email from Moncau to Helou dated 23 February 2016 [MGC.015.001.1389]. Email from Helou to Moncau dated 23 February 2016 [MGC.015.005.0171].

- (iv) Foodgears had advised that there was an oversupply of Sachets in the market;

#### **PARTICULARS**

Email from Lily Ku of Foodgears to Jeff Zhang dated 23 February 2016 [MGC.051.015.4940]. Email from Moncau to the ELT dated 15 February 2016 [MGC.015.001.1517]. Email from Moncau to Helou dated 23 February 2016 [MGC.015.001.1389].

- (d) there were no valuable supply agreements with major retailers in Asia;
- (e) there were no documented joint business plans with global eCommerce platforms such as JD.com and Tmall.com, or any other global eCommerce platform;
- (f) demand for Sachets in China was not well understood by MG and no research or analysis had been undertaken to determine the likely long-term demand or ceiling for the demand for Sachets in China;

### PARTICULARS

Draft Nov RIF emailed by Hingle to Egan on 22 November 2015  
[MGC.051.004.3987, MGC.051.004.3988 page 4002].

- (g) Foodgears had told MG that the market for milk powder had slowed down as there was an oversupply of milk powder and competitive prices from other channels and origins;

### PARTICULARS

Email from Lily Ku of Foodgears to Zhang on 23 February 2016  
[MGC.051.015.4940].

- (h) as for customers of MG in the domestic market:
  - (i) Costco was not taking all of its allocated Sachet volumes;

### PARTICULARS

Email from Moncau to Helou, Hingle and Mallinson dated 15 February 2016 [MGC.015.001.1517].

- (ii) Woolworths had indicated that some stores were overstocked with Sachets;

### PARTICULARS

Email from Moncau to Helou, Hingle and Mallinson dated 15 February 2016 [MGC.015.001.1517].

- (iii) Senior staff reported that there were high stocks of Sachets held by the biggest distributors;

### PARTICULARS

Email from Moncau to Helou dated 23 February 2016  
[MGC.015.001.1389].

- (i) the Head of Commercial Finance, Chris Carbone (**Carbone**) had advised Hingle on 23 February 2016 that the forecasted gross profit for FY16 was likely to decrease from approximately \$136.4 million to approximately \$91 million (a decrease of approximately \$45 million);

### PARTICULARS

Email from Carbone to Hingle dated 23 February 2016  
[MGC.015.001.5835].

- (j) by reason of the matters in subparagraphs (a) to (i) above (individually or collectively), there was a material risk that the forecast Sachet sales in the February RIF would not be achieved,

(individually or collectively, the **February Risks**).

50 The February RIF also identified a number of risks and opportunities to the FMP, with the greatest risk identified as "Sachet volume" which:

- (a) was forecasted to have an impact to gross profit of -\$23.6 million;
- (b) was forecasted to have an impact to FMP of -10 cents; and
- (c) if it eventuated to the exclusion of all other risks and opportunities identified in the February RIF, would have resulted in an FMP materially below the February Earnings Guidance,

(**Sachet Volume Risk**).

51 By 26 February 2016, Helou knew of the February Risks and the Sachet Volume Risk.

#### **PARTICULARS**

Email from Moncau to Helou (amongst others) dated 15 February 2016 [MGC.015.001.1517]. Email from Moncau to Helou dated 23 February 2016 [MGC.015.001.1389]. Email from Helou to Moncau dated 23 February 2016 [MGC.015.005.0175]. Email from Helou to Moncau dated 23 February 2016 [MGC.015.005.0171].

52 By 26 February 2016, Hingle knew of the February Risks and the Sachet Volume Risk.

#### **PARTICULARS**

Email from Moncau to Hingle (amongst others) dated 15 February 2016 [MGC.015.001.1517]. Email from Egan to Hingle and Pedersen dated 17 February 2016 [MGC.015.001.6054, MGC.015.001.6055, MGC.015.001.6058]. Email from Carbone to Hingle (amongst others) [MGC.015.001.6049, MGC.015.001.6050]. Email from Moncau to Hingle dated 18 February 2016 attaching document entitled "Markets Questions.docx" [MGC.015.001.1478, MGC.015.001.1479]. Email from Pedersen to Hingle dated 22 February 2016 [MGC.015.001.5876]. Email from Chris Carbone to Hingle dated 23 February 2016 [MGC.015.001.5835].

- 53 At the Board meeting on 26 February 2016 Hingle presented the February RIF to the Board.

**K THE FEBRUARY ANNOUNCEMENT**

- 54 On 26 February 2016, both Hingle and Helou approved a draft of the February Announcement before it was submitted to the Board.

**PARTICULARS**

On 26 February 2016, Helou sent to Smith a revised draft of the February Announcement, the content of which was included in the final February Announcement. On 28 February 2016 Smith sent to the Board, Helou and Hingle an email attaching the final documents for the half year results, including drafts of the announcement and asking for any comments.

- 55 On 29 February 2016, the sub-committee approved the February Announcement for immediate release to the market.

**PARTICULARS**

At the Board Meeting on 26 February, the Board delegated authority to a sub-committee comprising the Chairman, Helou, the Finance, Risk and Audit Committee Chairman and the Compliance Committee Chairman to approve the draft February Announcement.

- 56 The February Announcement included the following statements:
- (a) since issuing the PDS in May 2015, and again since MG's Annual General Meeting in October 2015, dairy commodity prices had continued to decline;
  - (b) the weakness in dairy commodity prices was now expected to result in the Ingredients and Nutritionals segment materially underperforming against the PDS forecasts in FY16;
  - (c) International Dairy Foods revenue continues to experience significant growth;
  - (d) the underperformance of the Ingredients and Nutritionals segment was expected to be partially offset by the growth in [the] Dairy Foods segment ... and the expected strong performance of domestic and international ready-to-consume dairy foods product sales;

- (e) internationally, Dairy Foods sales revenue growth was up strongly by 21.4 percent (compared to the half year ended 31 December 2014) and was supported by:
  - (i) a broadened distribution network that extended MG's reach to tier two and tier three cities across China; and
  - (ii) very strong demand for Devondale branded consumer milk powders;
- (f) [in the context of Dairy Foods International division]...MG advanced its Asian distribution strategy in this period by securing:
  - (i) valuable supply agreements with major retailers; and
  - (ii) entering into joint business plans with global eCommerce platforms including JD.com and Tmall.com;
- (g) Dairy Foods International performance was driven by growing demand for Consumer Milk Powder and that the joint business plans referred to in subparagraph 56(f)(ii) added to MG's access to this growing demand;
- (h) MG expected to maintain [an FMP] of \$5.60 per kgms in FY16, however this was subject to there being no further material deterioration in dairy commodity prices or unfavourable changes to the current AUD:USD exchange rate;
- (i) under the Profit Sharing Mechanism, a \$5.60 per kgms milk price would be expected to generate for the full year FY16 NPAT attributable to shareholders and unitholders of approximately \$63 million.

57 As at 29 February 2016:

- (a) the February Risks existed; and
  - (b) the Sachet Volume Risk existed,
- (together, the **February Circumstances**).

58 The statements in paragraph 56(c) to (g) above were false because of the February Circumstances.

59 The February Announcement did not disclose any of the February Circumstances.



60 As at 29 February 2016, MG and MGRE were aware of the February Circumstances.

#### PARTICULARS

MG and MGRE's knowledge is to be imputed to it by reason of the knowledge of its officers, Helou and Hingle. The knowledge of Helou and Hingle is to be inferred from their preparation of, or receipt of, the documents referred to in the particulars subjoined to paragraphs 51 and 52 above.

#### L EVENTS IN EARLY MARCH 2016

61 By 8 March 2016, the following material or significant risks existed which were likely to adversely affect MG and MGRE's ability to achieve the February Earnings Guidance:

- (a) the February Risks had not been mitigated and in fact, had increased;

#### PARTICULARS

Email exchange between Helou and Moncau dated 8 March 2016 [MGC.015.001.1153]. Email from Helou to Moncau dated 8 March 2016 [MGC.015.001.1140].

- (b) on 8 March 2016, the Executive General Manager of Dairy Foods at MG, Albert Moncau (**Moncau**) provided Helou and Hingle with an analysis of the risk profile for Sachet sales (**March Sachet Risk Profile**) which forecasted as the mid-case or "more realistic" scenario:

- (i) 47,800 tonnes of Sachets would be sold during FY16 which was likely to result in a FY16 NPAT of approximately \$54.2 million and FMP of approximately \$5.37;
- (ii) MG would sell 26,829 tonnes of Sachets from March to June 2016;
- (iii) 18,934 tonnes of Sachets would be sold by Dairy Foods International between March to June 2016 at an average unit price of \$8.00 per unit;

#### PARTICULARS

Email from Moncau to members of the ELT, including Helou and Hingle attaching a document titled "Sachet Risk Profile" [MGC.015.001.1142, MGC.015.001.1143].

- (c) actual sales for February 2016 were materially below forecast, in that 1645 tonnes of Sachets had been sold as against a forecast of 4560 tonnes in the February RIF;

- (d) actual sales for March 2016 were materially below forecast, in that:
- (i) 25% of the month had passed;
  - (ii) the month to date sales volume for Sachets was 295.9 tonnes (materially below the 8,366.4 tonnes forecast for March);
  - (iii) the month to date gross sales revenue for Sachets was \$2.143 million (materially below the \$67.97 million forecast for March);

#### **PARTICULARS**

Email from Carbone to Moncau and Hingle dated 8 March 2016 [MGC.015.001.4941, MGC.015.001.4942].

- (e) the March Sachet Risk Profile also forecasted:
- (i) that if the volume in the February RIF was to be maintained for the period 1 February to 30 June 2016, the estimated price for the higher volumes would need to be in line with domestic pricing, namely \$6.70 per kg;
  - (ii) 47,800 tonnes of Sachets would be sold during FY16 instead of the 56,500 tonnes which had been forecast in the February RIF for Sachets for FY16;
  - (iii) gross profit from Sachet sales of \$81.1 million instead of \$110.4 million (the latter of which had been forecasted for Sachet sales in the February RIF) representing a gross profit downgrade of -\$29.3 million, (individually or collectively, the **Early March Risks**).

62 By 8 March 2016, Helou knew of the Early March Risks.

#### **PARTICULARS**

The knowledge of Helou is to be inferred from his preparation of, or receipt of, the documents referred to in the particulars subjoined to paragraphs 51 and 61 above.

63 By 8 March 2016, Hingle knew of the Early March Risks.

#### **PARTICULARS**

The knowledge of Hingle is to be inferred from his preparation of, or receipt of, the documents referred to in the particulars subjoined to

paragraphs 52 and 61 above. Further, from 4 March 2016, daily Sachet sales reports were provided to Hingle on a daily basis.

- 64 As at 8 March 2016, MG and MGRE were aware of the Early March Risks.

#### **PARTICULARS**

MG and MGRE's knowledge is to be imputed to it by reason of the knowledge of its officers, Helou and Hingle. The Plaintiff refers to and repeats the particulars sub-joined to paragraphs 62 and 63 above.

#### **M EVENTS IN LATE MARCH 2016**

- 65 By 22 March 2016, the following material or significant risks existed which were likely to adversely affect MG and MGRE's ability to achieve the February Earnings Guidance:

- (a) the February Risks and the Early March Risks continued, had not been mitigated and in fact, had increased;
- (b) the March RIF forecasted that:
  - (i) the FY16 NPAT was likely to be \$52.4 million;
  - (ii) the FY16 FMP was likely to be \$5.32;
  - (iii) MG would sell 26,675 tonnes of Sachets from March to June 2016;

#### **PARTICULARS**

Email from Pedersen to Hingle dated 22 March 2016 attaching the March RIF [MGC.015.001.4696 and MGC.015.001.4697].

- (c) actual Sachet sales for March 2016 were materially below forecast, in that:
  - (i) 65% of the month had passed;
  - (ii) the month to date sales volume for Sachets was 1,138.8 tonnes (materially below the 8,366.4 tonnes forecast for March);
  - (iii) the month to date gross sales revenue for Sachets was \$8.268 million (materially below the \$67.974 million forecast for March); and

#### **PARTICULARS**

Email from Carbone to Hingle and Helou (amongst others) attaching document titled "Daily Sales 21st March.pdf". [MGC.015.001.4694 and MGC.015.001.4695]

- (d) Moncau had advised Helou and Hingle that:
- (i) March sales of sachet powder were looking better than January and February but were not good enough to achieve the forecast for the month of March set out in the March Sachet Risk Profile;
  - (ii) customers had surplus stock and did not need to place new orders with MG to meet their existing demand; and
  - (iii) MG had very limited offline distribution;

#### **PARTICULARS**

Email from Moncau to Helou dated 19 March 2016.  
[MGC.015.004.0570]

Email from Moncau to Hingle and Helou dated 19 March 2016  
[MGC.015.001.0804, MGC.015.001.0806]

- (e) Head of Group Finance of MG, Daniel Egan had prepared an analysis which showed that:
- (i) even if the maximum number of Sachets that were able to be produced by MG for FY16 were sold by 30 June 2016 (ie 60,000 tonnes), the resulting NPAT and FMP would fall below the February Earnings Guidance, namely to \$60.1 million and \$5.52 respectively;
  - (ii) if a total of 35,000 tonnes of Sachets for FY16 were sold by 30 June 2016, the resulting NPAT and FMP were likely to be \$48.5 million and \$5.21 respectively;
  - (iii) if a total of 47,635 tonnes of Sachets for FY16 were sold by 30 June 2016 consistent with the "mid-case" of the March Sachet Risk Profile (as referred to in paragraph 61(b) above), the resulting NPAT and FMP were likely to be \$54.2 million and \$5.37 respectively,

#### **PARTICULARS**

Email from Egan to Hingle dated 21 March 2016 attaching document titled "NPAT Scenarios.xlsx" [MGC.015.001.4730, MGC.015.001.4731]

(individually or collectively, the **Late March Risks**).

66 By 22 March 2016, Helou knew of the Late March Risks.

#### **PARTICULARS**

The knowledge of Helou is to be inferred from his receipt of, the documents referred to in the particulars subjoined to paragraphs 65 above and his day to day conversations with Hingle in relation to NPAT and FMP on or around 21 March 2016. Further, from 9 March 2016, daily Sachet sales reports were provided to Helou on a daily basis.

67 By 22 March 2016, Hingle knew of the Late March Risks.

#### **PARTICULARS**

The knowledge of Hingle is to be inferred from his preparation of, or receipt of, the documents referred to in the particulars subjoined to paragraphs 65 above. Further, from 4 March 2016, daily sachet sales reports were provided to Helou on a daily basis.

68 As at 22 March 2016, MG and MGRE were aware of the Late March Risks.

#### **PARTICULARS**

MG and MGRE's knowledge is to be imputed to it by reason of the knowledge of its officers, Helou and Hingle. The Plaintiff refers to and repeats the particulars sub-joined to paragraphs 66 and 67 above.

#### **N EVENTS IN APRIL 2016**

69 By 13 April 2016, the following material or significant risks existed which were likely to adversely affect MG and MGRE's ability to achieve the February Earnings Guidance:

(a) the February Risks, Early March Risks, Late March Risks had not been mitigated and, in fact, had increased;

(b) the April RIF forecasted:

(i) the FY16 NPAT was likely to be \$52.4 million;

(ii) the FY16 FMP was likely to be \$5.33;

(iii) MG would sell 27,900 tonnes of Sachets from April to June 2016;

#### **PARTICULARS**

Email from Hingle to Helou dated 13 April 2016 and attached April RIF. [MGC.003.002.0087 and MGC.003.002.0088]

(c) actual Sachet sales for April 2016 were materially below forecast, in that:

- (i) 45% of the month had passed;
- (ii) the month to date sales volume for Sachets was 738.8 tonnes (materially below the 8,176 tonnes forecast for April); and
- (iii) the month to date gross sales revenue for Sachets was \$5.468 million (materially below the \$66.939 million forecast for April);

#### **PARTICULARS**

Email from Carbone to Hingle and Helou (amongst others) attaching document titled "Daily Sales 13<sup>th</sup> April.pdf" [MGC.003.001.4913 and MGC.003.001.4914].

- (d) MG's finance team had reported that recent and forecast performance suggests an FMP of \$5.60 for FY16 is untenable;

#### **PARTICULARS**

Email from Matthew Adams to Hingle dated 7 April 2016 attaching draft KPI & MD Overview [MGC.003.001.6516 and MGC.003.001.6517].

- (e) Carbone had informed Helou and Hingle that:
  - (i) historically the forecast for Sachets had only ever been achieved in December 2015 when significant stock was sold for Chinese New Year;
  - (ii) no other historical forecast had been met to date in FY16;
  - (iii) supply was exceeding demand;
  - (iv) sales orders from the major Australian customers like Costco, Woolworths and Coles had decreased; and
  - (v) MG had reduced prices to international customers,

#### **PARTICULARS**

Email from Carbone to Helou and Hingle dated 29 March 2016 [MGC.003.001.8480],

(individually or collectively, the **April Risks**).

70 By 13 April 2016, Helou knew of the April Risks.

### **PARTICULARS**

The knowledge of Helou is to be inferred from his receipt of, the documents referred to in the particulars subjoined to paragraph 69 above. Further, from 9 March 2016, daily Sachet sales reports were provided to Helou on a daily basis.

- 71 By 13 April 2016, Hingle knew of the April Risks.

### **PARTICULARS**

The knowledge of Hingle is to be inferred from his preparation of, or receipt of, the documents referred to in the particulars subjoined to paragraph 69 above. Further, from 4 March 2016, daily sachet sales reports were provided to Hingle on a daily basis.

- 72 As at 13 April 2016, MG and MGRE were aware of the April Risks.

### **PARTICULARS**

MG and MGRE's knowledge is to be imputed to it by reason of the knowledge of its officers, Helou and Hingle. The Plaintiff refers to and repeats the particulars sub-joined to paragraphs 71 and 72 above.

- 73 On 19 April 2016, Hingle:

- (a) informed the Board that Sachet sales were lower than forecast in February and March 2016 with trends in April weaker than expected;

### **PARTICULARS**

Minutes of Board of Directors' meeting on 19 April 2016  
[MGC.001.002.0049].

- (b) presented a discussion paper setting out management's analysis for potential options under the Profit Sharing Mechanism on the assumption that the forecast NPAT and FMP in the February Guidance was not achieved; and

### **PARTICULARS**

Memo from Hingle to the Board dated 14 April 2016  
[MGC.001.001.1179]

- (c) presented the April RIF to the Board, which did not forecast the NPAT and FMP for FY16.

### **PARTICULARS**

Document titled "2016 Scenario Update April 2016"  
[MGC.001.001.1160]

74 Subsequently, the Board caused MGRE:

- (a) on 22 April 2016, to request a trading halt as set out in paragraph 39 above; and
- (b) on 27 April 2016, to release the April Announcement which disclosed that:
  - (i) the NPAT and FMP were expected to be between \$39 million and \$42 million and \$4.75 and \$5.00, respectively;
  - (ii) a primary driver of MG's revised FY16 NPAT and FMP was lower than expected adult milk powder sales in China; and
  - (iii) the lower than expected adult milk powder sales in China was the largest primary driver of MG's revised FY16 NPAT and FMP, by value.

## **O THE FEBRUARY CONTRAVENTIONS**

### **O.1. Misleading or Deceptive Conduct**

75 MG and MGRE made the statements referred to in paragraph 56 above:

- (a) in trade or commerce within the meaning of section 12BA of the ASIC Act;
- (b) in relation to a financial service within the meaning of:
  - (i) section 12BAB(1) of the ASIC Act; further or alternatively,
  - (ii) section 766A(1)(a) of the Act;
- (c) in relation to a financial product, being the shares and the Units, within the meaning of section 764A of the Act.

76 By reason of the matters set out in paragraphs 56 to 58 and 75 above, MG and MGRE engaged in conduct that was misleading or deceptive, or likely to mislead or deceive in contravention of section 1041H of the Act and/or section 12DA of the ASIC Act.

77 By reason of the matters set out in paragraphs 51, 54 to 58 and 75 above, Helou engaged in conduct that was misleading or deceptive, or likely to mislead or deceive in contravention of section 1041H of the Act and/or section 12DA of the ASIC Act.



- 78 Further, the February Circumstances was information that the market, unitholders and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances including because:
- (a) the February Circumstances were materially different from, and inconsistent with, the statements referred to in paragraph 56 above; and
  - (b) of the statements made by MG in relation to its intended approach to continuous disclosure as set out in the PDS, the Relationship Deed, the Continuous Disclosure Deed Poll and the Corporate Governance Statement as referred to in paragraphs 18, 19, 20 and 35 above, respectively.
- 79 By reason of the matters set out in paragraphs 56, 57, 59 and 78 above, MG and MGRE engaged in conduct that was misleading or deceptive, or likely to mislead or deceive in contravention of section 1041H of the Act and/or section 12DA of the ASIC Act.
- 80 By reason of the matters set out in paragraphs 51, 54 to 57, 59 and 78 above, Helou engaged in conduct that was misleading or deceptive, or likely to mislead or deceive in contravention of section 1041H of the Act and/or section 12DA of the ASIC Act.
- 81 Further:
- (a) the statement in paragraph 56(d) above contained representations as to a future matter, namely:
    - (i) MG's expectation of the future growth of the Dairy Foods segment and its ability to "partially offset" the underperformance of the Ingredients and Nutritionals segment;
    - (ii) MG's expected strong performance of domestic and international ready-to-consume dairy foods product sales;
  - (b) the statements in paragraphs 56(h) and (i) above were representations as to future matters, namely the forecast NPAT and FMP of MG and MGRE for FY16;
  - (c) MG and MGRE did not have reasonable grounds for making the representations referred to in subparagraphs (a) and (b) above; and

- (d) each of the representations is taken to be misleading pursuant to section 12BB(1) of the ASIC Act and/or section 769C of the Act.
- 82 By reason of the matters set out in paragraph 81 above, MG and MGRE engaged in conduct that was misleading or deceptive, or likely to mislead or deceive in contravention of section 1041H of the Act and/or section 12DA of the ASIC Act.
- 83 By engaging in the conduct referred to in paragraphs 54 and 55, Helou:
- (a) made the statements referred to in paragraphs 81(a) and 81(b) above which were representations as to future matters for the reasons set out in paragraphs 81(a) and 81(b) above;
  - (b) did not have reasonable grounds for making the representations referred to in paragraph 81(a) and 81(b) above.
- 84 Helou made the statements referred to in paragraphs 81(a) and 81(b) above:
- (a) in trade or commerce within the meaning of section 12BA of the ASIC Act;
  - (b) in relation to a financial service within the meaning of:
    - (i) section 12BAB(1) of the ASIC Act; further or alternatively,
    - (ii) section 766A(1)(a) of the Act;
  - (c) in relation to a financial product, being the shares and the Units, within the meaning of section 764A of the Act.
- 85 By reason of the matters set out in paragraphs 83 and 84 above, each of the representations referred to in paragraph 83 is taken to be misleading pursuant to section 12BB(1) of the ASIC Act, and/or section 769C of the Act.
- 86 By reason of the matters set out in paragraphs 83 to 85 above, Helou engaged in conduct that was misleading or deceptive, or likely to mislead or deceive in contravention of section 1041H of the Act and/or section 12DA of the ASIC Act.

## O.2. Continuous Disclosure

- 87 By reason of the February Circumstances, as at 29 February 2016:

- (a) there was likely to be a material decrease in the February Earnings Guidance;  
and
- (b) the February Earnings Guidance was unlikely to be achieved,

(the matters in subparagraphs (a) and (b) above are hereafter referred to as the **February Material Information**).

88 By reason of paragraph 60, as at 29 February 2016, MG and MGRE knew or ought to have known the February Material Information.

### **PARTICULARS**

MG and MGRE's knowledge is to be imputed to it by reason of the knowledge of its officers, Helou and Hingle. Particulars of Helou's knowledge are at paragraph 91 below and Hingle's knowledge is at paragraph 93 below.

89 Further, the February Material Information was information:

- (a) of which MG and MGRE was aware within the meaning of ASX Listing Rule 19.12;
- (b) that was required to be disclosed by the ASX Listing Rule 3.1;
- (c) that was not generally available; and
- (d) that a reasonable person would have expected, if it had been generally available, to have had a material effect:
  - (i) on the price or value of MG's shares, within the meaning of section 675(2) of the Act; and
  - (ii) on the price or value of the Units, within the meaning of section 674(2)(c)(ii) and section 677 of the Act.

90 By failing to disclose the February Material Information, on and from 29 February 2016:

- (a) MG contravened section 675(2) of the Act; and
- (b) MGRE contravened section 674(2) of the Act.

- 91 By reason of paragraph 51, as at 29 February 2016, Helou knew the February Material Information and the matters referred to in paragraph 89 above.

#### **PARTICULARS**

His knowledge of the matters in paragraph 89(a) is set out in the particulars to paragraph 60 above. His knowledge of the remainder of the matters is to be inferred by reason of the position held by him, his role as Disclosure Committee member and his previous experience in working for listed entities.

- 92 By reason of paragraph 91 above, Helou was directly or indirectly, knowingly concerned, within the meaning of section 79 of the Act, in the contravention by:
- (a) MG of section 675(2) on and from 29 February 2016 and thereby himself contravened section 675(2A) of the Act; and
  - (b) MGRE of section 674(2) on and from 29 February 2016 and thereby himself contravened section 674(2A) of the Act.

- 93 As at 29 February 2016, Hingle knew the February Material Information and the matters referred to in paragraph 89 above.

#### **PARTICULARS**

His knowledge of the matters in paragraph 89(a) is set out in the particulars to paragraph 60 above. His knowledge of the remainder of the matters is to be inferred by reason of the position held by him, his role as Disclosure Committee member and his previous experience in working for listed entities.

- 94 By reason of paragraph 93 above, Hingle was directly or indirectly, knowingly concerned, within the meaning of section 79 of the Act, in the contravention by:
- (a) MG of section 675(2) on and from 29 February 2016 and thereby himself contravened section 675(2A) of the Act; and
  - (b) MGRE of section 674(2) on and from 29 February 2016 and thereby himself contravened section 674(2A) of the Act.

#### **O.3. Directors' and officers' duties - Helou**

- 95 Wrongfully and in breach of the Helou Standard of Care, between 26 February and 29 February 2016, Helou failed to:

- (a) adequately assess and give due consideration to the effect of the February Circumstances on the financial position and performance of MG and MGRE;
- (b) inform the Board on 26 February 2016, or at a reasonable time thereafter of the February Risks;
- (c) inform the Board of the February Material Information;
- (d) consider whether the forecast NPAT and FMP in the February RIF should be downgraded, to account for the February Risks;
- (e) recommend to the Board on 26 February 2016, or at a reasonable time thereafter that the Board should consider whether the forecast NPAT and FMP in the February RIF should be downgraded, to account for the February Risks;
- (f) consider whether the forecast NPAT and FMP in the February RIF should be downgraded, to account for the Sachet Volume Risk;
- (g) recommend to the Board on 26 February 2016, or at a reasonable time thereafter that the Board should consider whether the forecast NPAT and FMP in the February RIF should be downgraded, to account for the Sachet Volume Risk; and
- (h) recommend to the Board on 26 February 2016, or at a reasonable time thereafter that the Board should consider whether the February Material Information required disclosure to the market.

96 Further, or alternatively, between 26 February and 29 February 2016, wrongfully and in breach of the Helou Standard of Care Helou:

- (a) caused or permitted MG to contravene section 1041H of the Act, further alternatively section 12DA of the ASIC Act, as alleged in paragraphs 76, 79 and 82 above;
- (b) caused or permitted MGRE to contravene section 1041H, further or alternatively section 12DA of the ASIC Act, of the Act as alleged in paragraphs 76, 79 and 82 above;
- (c) caused or permitted MG to contravene section 675(2) of the Act as alleged in paragraph 90 above;

- (d) caused or permitted MGRE to contravene section 674(2) of the Act as alleged in paragraph 90 above;
- (e) thereby exposed MG and MGRE to the risk of proceedings for contraventions of the Act, legal costs and penalties.

97 By reason of the matters set out in paragraph 95, further or alternatively paragraph 96 above, Helou:

- (a) failed to exercise his powers and discharge his duties as a director of MG and MGRE and thereby contravened section 180(1) of the Act; and
- (b) further or alternatively, insofar as the conduct relates to the MG Unit Trust, thereby failed to take all steps that a reasonable person would take if they were in his position to ensure that MGRE complied with the Act and thereby contravened sections 601FD(1)(b) and 601FD(1)(f) of the Act.

#### O.4. Directors' and officers' duties - Hingle

98 Wrongfully and in breach of the Hingle Standard of Care, between 26 February and 29 February 2016, Hingle failed to:

- (a) adequately assess and give due consideration to the effect of the February Circumstances on the financial position and performance of MG and MGRE;
- (b) inform the Board on 26 February 2016, or at a reasonable time thereafter of the February Risks;
- (c) inform the Board of the February Material Information;
- (d) consider whether the forecast NPAT and FMP in the February RIF should be downgraded, to account for the February Risks;
- (e) recommend to the Board that the Board should consider whether the forecast NPAT and FMP in the February RIF should be downgraded, to account for the February Risks;
- (f) consider whether the forecast NPAT and FMP in the February RIF should be downgraded, to account for the Sachet Volume Risk;

- (g) recommend to the Board that the Board should consider whether the forecast NPAT and FMP in the February RIF should be downgraded, to account for the Sachet Volume Risk; and
  - (h) recommend to the Board on 26 February 2016, or at a reasonable time thereafter that the Board should consider whether the February Material Information required disclosure to the market.
- 99 Further or alternatively, between 26 February and 29 February 2016, wrongfully and in breach of the Hingle Standard of Care, Hingle:
- (a) caused or permitted MG to contravene section 1041H of the Act, further or alternatively section 12DA of the ASIC Act, as alleged in paragraphs 76, 79 and 82 above;
  - (b) caused or permitted MGRE to contravene section 1041H of the Act, further or alternatively section 12DA of the ASIC Act, as alleged in paragraphs 76, 79 and 82 above;
  - (c) caused or permitted MG to contravene section 675(2) of the Act as alleged in paragraph 90 above;
  - (d) caused or permitted MGRE to contravene section 671(2) of the Act as alleged in paragraph 90 above;
  - (e) thereby exposed MG and MGRE to the risk of proceedings for contraventions of the Act, legal costs and penalties.
- 100 By reason of the matters set out in paragraph 98 above, further or alternatively paragraph 99 above, Hingle:
- (a) failed to exercise his powers and discharge his duties as an officer and chief financial officer of MG and MGRE and thereby contravened section 180(1) of the Act; and
  - (b) further or alternatively, insofar as the conduct relates to the MG Unit Trust, thereby failed to take all steps that a reasonable person would take if they were in his position to ensure that MGRE complied with the Act and thereby contravened sections 601FD(1)(b) and 601FD(1)(f) of the Act.

## **P MARCH CONTRAVENTIONS**

### **P.1. Misleading or deceptive conduct**

- 101 The statements made by MG and MGRE as referred to in paragraph 56 above were continuing representations.
- 102 Between 1 March 2016 and 31 March 2016, MG and MGRE did not correct the statements referred to in paragraph 56 above, by disclosure to the ASX or at all.
- 103 Between 1 March 2016 and 31 March 2016, MG and MGRE did not disclose to the ASX or ASIC, the February Circumstances.
- 104 Between 8 March 2016 and 31 March 2016, MG and MGRE did not disclose to the ASX or ASIC, the Early March Risks.
- 105 Between 22 March 2016 and 31 March 2016, MG and MGRE did not disclose to the ASX or ASIC, the Late March Risks.
- 106 The February Circumstances, the Early March Risks and the Late March Risks was information which the market, unitholders and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances including because:
- (a) it was materially different from, and inconsistent with, the statements referred to in paragraph 56 above; and
  - (b) of the statements made by MG and MGRE in relation to its intended approach to continuous disclosure as set out in the PDS, the Relationship Deed, the Continuous Disclosure Deed Poll and the Corporate Governance Statement as referred to in paragraphs 18, 19, 20 and 35 above, respectively.
- 107 By reason of the matters set out in paragraphs 101 to 106 above, between 1 March 2016 and 31 March 2016 MG and MGRE engaged in conduct that was misleading or deceptive, or likely to mislead or deceive in contravention of section 1041H of the Act and/or section 12DA of the ASIC Act.
- 108 Between 1 March 2016 and 31 March 2016, Helou did not correct the statements referred to in paragraph 56 above, by disclosure to the ASX, or at all.



- 109 Between 1 March 2016 and 31 March 2016, Helou did not disclose to the ASX or ASIC, the February Circumstances.
- 110 Between 8 March 2016 and 31 March 2016, Helou did not disclose to the ASX or ASIC, the Early March Risks.
- 111 Between 22 March 2016 and 31 March 2016, Helou did not disclose to the ASX or ASIC, the Late March Risks.
- 112 By reason of the matters set out in paragraphs 51, 54, 55, 56, 62, 66, 101 and 106 and 108 to 111 above, between 1 March 2016 and 31 March 2016, Helou engaged in conduct that was misleading or deceptive, or likely to mislead or deceive in contravention of section 1041H of the Act, and/or section 12DA of the ASIC Act.

P.2. Continuous disclosure

- 113 By reason of the Early March Risks, as at 8 March 2016:
- (a) there was likely to be a material decrease in the February Earnings Guidance; and
  - (b) the February Earnings Guidance was unlikely to be achieved,
- (the **Early March Material Information**).
- 114 By reason of paragraph 64 above, as at 8 March 2016, MG and MGRE knew or ought to have been aware of the Early March Material Information.

**PARTICULARS**

MG and MGRE's knowledge is to be imputed to it by reason of the knowledge of its officers, Helou and Hingle. Particulars of Helou's knowledge are at paragraph 117 below and Hingle's knowledge is at paragraph 119 below.

- 115 The Early March Material Information was information:
- (a) of which MG and MGRE was aware within the meaning of ASX Listing Rule 19.12;
  - (b) that was required to be disclosed by the ASX Listing Rule 3.1;
  - (c) that was not generally available; and

- (d) that a reasonable person would have expected, if it had been generally available, to have had a material effect:
  - (i) on the price or value of MG's shares, within the meaning of section 675(2) of the Act; and
  - (ii) on the price or value of the Units, within the meaning of section 674(2)(c)(ii) and section 677 of the Act.

116 By failing to disclose the Early March Material Information, on and from 8 March 2016:

- (a) MG contravened section 675(2) of the Act; and
- (b) MGRE contravened section 674(2) of the Act.

117 As at 8 March 2016, Helou knew the Early March Material Information and each of the matters referred to in paragraph 115 above.

#### **PARTICULARS**

His knowledge of the matters in paragraph 115(a) above is set out in paragraph 62 above. His knowledge of the remainder of the matters is to be inferred by reason of the position held by him, his role as Disclosure Committee member and his previous experience in working for listed entities.

118 By reason of paragraph 117 above, Helou was directly or indirectly, knowingly concerned, within the meaning of section 79 of the Act, in the contravention by:

- (a) MG of section 675(2) on and from 8 March 2016 and thereby himself contravened section 675(2A) of the Act; and
- (b) MGRE of section 674(2) on and from 8 March 2016 and thereby himself contravened section 674(2A) of the Act.

119 As at 8 March 2016, Hingle knew the Early March Material Information and each of the matters referred to in paragraph 115 above.

#### **PARTICULARS**

His knowledge of the matters set out in paragraph 115(a) above is set out in paragraph 63 above. His knowledge of the remainder of the matters is to be inferred by reason of the position held by him, his role as Disclosure Committee member and his previous experience in working for listed entities.

- 120 By reason of paragraph 119 above, Hingle was directly or indirectly, knowingly concerned, within the meaning of section 79 of the Act, in the contravention by:
- (a) MG of section 675(2) on and from 8 March 2016 and thereby himself contravened section 675(2A) of the Act; and
  - (b) MGRE of section 674(2) on and from 8 March 2016 and thereby himself contravened section 674(2A) of the Act.
- 121 By reason of the Late March Risks, as at 22 March 2016:
- (a) there was likely to be a material decrease in the February Earnings Guidance; and
  - (b) the February Earnings Guidance was unlikely to be achieved,
- (the **Late March Material Information**).
- 122 By reason of the matters referred to in paragraph 68 above, as at 22 March 2016, MG and MGRE knew or ought to have been aware the Late March Material Information.

### **PARTICULARS**

MG and MGRE's knowledge is to be imputed to it by reason of the knowledge of its officers, Helou and Hingle. Particulars of Helou's knowledge are at paragraph 125 below and Hingle's knowledge is at paragraph 127 below.

- 123 The Late March Material Information was information:
- (a) of which MG and MGRE was aware within the meaning of ASX Listing Rule 19.12;
  - (b) that was required to be disclosed by the ASX Listing Rule 3.1;
  - (c) that was not generally available; and
  - (d) that a reasonable person would have expected, if it had been generally available, to have had a material effect:
    - (i) on the price or value of MG's shares, within the meaning of section 675(2) of the Act; and

- (ii) on the price or value of the Units, within the meaning of section 674(2)(c)(ii) and section 677 of the Act.

124 By failing to disclose the Late March Material Information, on and from 22 March 2016:

- (a) MG contravened section 675(2) of the Act; and
- (b) MGRE contravened section 674(2) of the Act.

125 As at 22 March 2016, Helou knew the Late March Material Information and each of the matters referred to in paragraph 123 above.

#### **PARTICULARS**

His knowledge of the matters set out in paragraph 123(a) above is set out in paragraph 66 above. His knowledge of the remainder of the matters is to be inferred by reason of the position held by him, his role as Disclosure Committee member and his previous experience in working for listed entities.

126 By reason of paragraph 125 above, Helou was directly or indirectly, knowingly concerned, within the meaning of section 79 of the Act, in the contravention by:

- (a) MG of section 675(2) on and from 22 March 2016 and thereby himself contravened section 675(2A) of the Act; and
- (b) MGRE of section 674(2) on and from 22 March 2016 and thereby himself contravened section 674(2A) of the Act.

127 As at 22 March 2016, Hingle knew the Late March Material Information and each of the matters referred to in paragraph 123 above.

#### **PARTICULARS**

His knowledge of the matters set out in paragraph 123(a) above is set out in paragraph 67 above. His knowledge of the remainder of the matters is to be inferred by reason of the position held by him, his role as Disclosure Committee member and his previous experience in working for listed entities.

128 By reason of paragraph 127 above, Hingle was directly or indirectly, knowingly concerned, within the meaning of section 79 of the Act, in the contravention by:

- (a) MG of section 675(2) on and from 22 March 2016 and thereby himself contravened section 675(2A) of the Act; and

- (b) MGRE of section 674(2) on and from 22 March 2016 and thereby himself contravened section 674(2A) of the Act.

P.3. Directors' and officers' duties – Helou

129 Between 29 February and 8 March 2016, wrongfully and in breach of the Helou Standard of Care, Helou failed to:

- (a) adequately monitor the financial position and performance of MG and MGRE against forecasts and against the February Earnings Guidance;
- (b) adequately assess and give due consideration to the effect of the Early March Risks on the financial position and performance of MG and MGRE;
- (c) inform the Board on 8 March 2016 or a reasonable time thereafter of the Early March Risks;
- (d) inform the Board of the Early March Material Information;
- (e) consider whether the February Earnings Guidance should be downgraded, to take account of the Early March Risks;
- (f) recommend to the Board on 8 March 2016 or a reasonable time thereafter that the Board should consider whether the February Earnings Guidance should be downgraded, to account for the Early March Risks; and
- (g) recommend to the Board on 8 March 2016, or at a reasonable time thereafter that the Board should consider whether the Early March Material Information required disclosure to the market.

130 Between 8 March 2016 and 22 March 2016, wrongfully and in breach of the Helou Standard of Care, Helou failed to:

- (a) adequately monitor the financial position and performance of MG and MGRE against forecasts and against the February Earnings Guidance;
- (b) adequately assess and give due consideration to the effect of Late March Risks on the financial position and performance of MG and MGRE;
- (c) inform the Board on 22 March 2016 or a reasonable time thereafter of the Late March Risks;

- (d) inform the Board of the Late March Material Information;
- (e) consider whether the February Earnings Guidance should be downgraded, to take account of the Late March Risks;
- (f) recommend to the Board on 22 March 2016 or a reasonable time thereafter that the Board should consider whether the February Earnings Guidance should be downgraded, to account for the Late March Risks; and
- (g) recommend to the Board on 22 March 2016, or at a reasonable time thereafter that the Board should consider whether the Late March Material Information required disclosure to the market.

131 Further or alternatively, between 29 February 2016 and 22 March 2016, wrongfully and in breach of the Helou Standard of Care, Helou:

- (a) caused or permitted MG to contravene section 1041H of the Act, further or alternatively section 12DA of the ASIC Act, as alleged in paragraph 107 above;
- (b) caused or permitted MGRE to contravene section 1041H of the Act, further or alternatively section 12DA of the ASIC Act, as alleged in paragraphs 107 above;
- (c) caused or permitted MG to contravene section 675(2) of the Act as alleged in paragraphs 116 and 124 above;
- (d) caused or permitted MGRE to contravene section 674(2) of the Act as alleged in paragraphs 116 and 124 above;
- (e) thereby exposed MG and MGRE to the risk of proceedings for contraventions of the Act, legal costs and penalties.

132 By reason of the matters set out in paragraphs 129 to 131 above, Helou:

- (a) failed to exercise his powers and discharge his duties as a director and of MG and MGRE and thereby contravened section 180(1) of the Act; and
- (b) further or alternatively, insofar as the conduct relates to the MG Unit Trust, thereby failed to take all steps that a reasonable person would take if they

were in his position to ensure that MGRE complied with the Act and thereby contravened sections 601FD(1)(b) and 601FD(1)(f) of the Act.

P.3. Directors' and officers' duties – Hingle

133 Between 29 February and 8 March 2016, wrongfully and in breach of the Hingle Standard of Care, Hingle failed to:

- (a) adequately monitor the financial position and performance of MG and MGRE against forecasts and against the February Earnings Guidance;
- (b) adequately assess and give due consideration to the effect of the Early March Risks on the financial position and performance of MG and MGRE;
- (c) inform the Board on 8 March 2016 or a reasonable time thereafter of the Early March Risks;
- (d) inform the Board of the Early March Material Information;
- (e) consider whether the February Earnings Guidance should be downgraded, to account for the Early March Risks;
- (f) recommend to the Board on 8 March 2016 or a reasonable time thereafter that the Board should consider whether the February Earnings Guidance should be downgraded, to account for the Early March Risks; and
- (g) recommend to the Board on 8 March 2016, or at a reasonable time thereafter that the Board should consider whether the Early March Material Information required disclosure to the market.

134 Between 8 March 2016 and 22 March 2016, wrongfully and in breach of the Hingle Standard of Care, Hingle failed to:

- (a) adequately monitor the financial position and performance of MG and MGRE against forecasts and against the February Earnings Guidance;
- (b) adequately assess and give due consideration to the effect of Late March Risks on the financial position and performance of MG and MGRE;
- (c) inform the Board on 22 March 2016 or a reasonable time thereafter of the Late March Risks;

- (d) inform the Board of the Late March Material Information;
- (e) consider whether the February Earnings Guidance should be downgraded, to account for the Late March Risks;
- (f) recommend to the Board on 22 March 2016 or a reasonable time thereafter that the Board should consider whether the February Earnings Guidance should be downgraded, to account for the Late March Risks; and
- (g) recommend to the Board on 22 March 2016, or at a reasonable time thereafter that the Board should consider whether the Late March Material Information required disclosure to the market.

135 Further or alternatively, between 29 February 2016 and 22 March 2016, wrongfully and in breach of the Hingle Standard of Care, Hingle:

- (a) caused or permitted MG to contravene section 1041H of the Act, further or alternatively section 12DA of the ASIC Act, as alleged in paragraph 107 above;
- (b) caused or permitted MGRE to contravene section 1041H of the Act, further or alternatively section 12DA of the ASIC Act, as alleged in paragraphs 107 above;
- (c) caused or permitted MG to contravene section 675(2) of the Act as alleged in paragraphs 116 and 124 above;
- (d) caused or permitted MGRE to contravene section 674(2) of the Act as alleged in paragraphs 116 and 124 above;
- (e) thereby exposed MG and MGRE to the risk of proceedings for contraventions of the Act, legal costs and penalties.

136 By reason of the matters set out in paragraphs 133 to 135 above, Hingle:

- (a) failed to exercise his powers and discharge his duties as an officer and chief financial officer of MG and MGRE and thereby contravened section 180(1) of the Act; and
- (b) further or alternatively, insofar as the conduct relates to the MG Unit Trust, thereby failed to take all steps that a reasonable person would take if they



were in his position to ensure that MGRE complied with the Act and thereby contravened sections 601FD(1)(b) and 601FD(1)(f) of the Act.

## **Q APRIL CONTRAVENTIONS**

### **Q.1. Misleading or deceptive conduct**

- 137 Between 1 April and 26 April 2016, MG and MGRE did not correct the statements referred to in paragraph 56.
- 138 Between 1 April 2016 and 26 April 2016, MG and MGRE did not disclose:
- (a) the February Circumstances;
  - (b) the Early March Risks; or
  - (c) the Late March Risks.
- 139 Between 13 April 2016 and 26 April 2016, MG and MGRE did not disclose the April Risks.
- 140 The February Circumstances, the Early March Risks, the Late March Risks and the April Risks was information which the market, unitholders and potential investors expected or were reasonably entitled to expect to be released to them in all the circumstances including because:
- (a) it was materially different from, and inconsistent with, the statements referred to in paragraph 56 above; and
  - (b) of the statements made by MG and MGRE in relation to its intended approach to continuous disclosure as set out in the PDS, Relationship Deed, the Continuous Disclosure Deed Poll and the Corporate Governance Statement as referred to in paragraphs 18, 19, 20 and 35 above, respectively.
- 141 By reason of paragraphs 101 and 137 to 140 above, between 1 April and 26 April 2016, MG and MGRE engaged in conduct that was misleading or deceptive, or likely to mislead or deceive in contravention of section 1041H of the Act and/or section 12DA of the ASIC Act.
- 142 Between 1 April 2016 and 26 April 2016, Helou did not correct the statements referred to in paragraph 56 above, by disclosure to the ASX, or at all.

- 143 Between 1 April 2016 and 26 April 2016, Helou did not disclose to the ASX or ASIC, the February Circumstances, Early March Risks and Late March Risks.
- 144 Between 13 April 2016 and 26 April 2016, Helou did not disclose to the ASX or ASIC, the April Risks.
- 145 By reason of the matters set out in paragraphs 51, 54, 55, 56, 62, 66, 70, 101, 140 and 142 to 144 above, between 1 April 2016 and 26 April 2016, Helou engaged in conduct that was misleading or deceptive, or likely to mislead or deceive in contravention of section 1041H of the Act, and/or section 12DA of the ASIC Act.

Q.2. Continuous disclosure

- 146 By reason of the April Risks, as at 13 April 2016:
- (a) there was likely to be a material decrease in the February Earnings Guidance; and
  - (b) the February Earnings Guidance was unlikely to be achieved,
- (the **April Material Information**).
- 147 By reason of paragraph 69 above, as at 13 April 2016, MG and MGRE knew or ought to have known the April Material Information.

**PARTICULARS**

MG and MGRE's knowledge is to be imputed to it by reason of the knowledge of its officers, Helou and Hingle. Particulars of Helou's knowledge are at paragraph 150 below and Hingle's knowledge is at paragraph 152 below.

- 148 The April Material Information was information:
- (a) of which MG and MGRE was aware within the meaning of ASX Listing Rule 19.12;
  - (b) that was required to be disclosed by the ASX Listing Rule 3.1;
  - (c) that was not generally available; and
  - (d) that a reasonable person would have expected, if it had been generally available, to have had a material effect:

- (i) on the price or value of MG's shares, within the meaning of section 675(2) of the Act;
- (ii) on the price or value of the Units, within the meaning of section 674(2)(c)(ii) and section 677 of the Act.

149 By failing to disclose the April Material Information, on and from 13 April 2016:

- (a) MG contravened section 675(2) of the Act; and
- (b) MGRE contravened section 674(2) of the Act.

150 As at 13 April 2016, Helou knew the April Material Information and each of the matters referred to in paragraph 148 above.

#### **PARTICULARS**

His knowledge of the matters in paragraph 148(a) above is to be inferred from the fact that he received the email and attachment referred to therein. His knowledge of the matters in paragraph 148 above is to be inferred by reason of the position held by him, his role as a Disclosure Committee member and his previous experience in working for listed entities.

151 By reason of paragraph 150 above, Helou was directly or indirectly, knowingly concerned, within the meaning of section 79 of the Act, in the contravention by:

- (a) MG of section 675(2) on and from 13 April 2016 and thereby himself contravened section 675(2A) of the Act; and
- (b) MGRE of section 674(2) on and from 13 April 2016 and thereby himself contravened section 674(2A) of the Act.

152 As at 13 April 2016, Hingle knew the April Material Information and each of the matters referred to in paragraph 148 above.

#### **PARTICULARS**

His knowledge of the matters in paragraph 148(a) above is to be inferred from the fact that he received the email and attachment referred to therein. His knowledge of the matters in paragraph 148 above is to be inferred by reason of the position held by him, his role as Disclosure Committee member and his previous experience in working for listed entities.

153 By reason of paragraph 152 above, Hingle was directly or indirectly, knowingly concerned, within the meaning of section 79 of the Act, in the contravention by:

- (a) MG of section 675(2) on and from 13 April 2016 and thereby himself contravened section 675(2A) of the Act; and
- (b) MGRE of section 674(2) on and from 13 April 2016 and thereby himself contravened section 674(2A) of the Act.

Q.3. Directors' and officers' duties – Helou

154 Between 22 March 2016 and 26 April 2016, wrongfully and in breach of the Helou Standard of Care, Helou failed to:

- (a) adequately monitor the financial position and performance of MG and MGRE against forecasts and against the February Earnings Guidance;
- (b) adequately assess and give due consideration to the effect of the April Risks on the financial position and performance of MG and MGRE;
- (c) inform the Board on 13 April 2016 or a reasonable time thereafter of the April Risks;
- (d) inform the Board of the April Material Information;
- (e) consider whether the February Earnings Guidance should be downgraded, to take account of the April Risks;
- (f) recommend to the Board on 13 April 2016 or a reasonable time thereafter that the Board should consider whether the February Earnings Guidance should be downgraded, to account for the April Risks; and
- (g) recommend to the Board on 13 April 2016, or at a reasonable time thereafter that the Board should consider whether the April Material Information required disclosure to the market.

155 Further or alternatively, between 22 March 2016 and 26 April 2016, wrongfully and in breach of the Helou Standard of Care, Helou:

- (a) caused or permitted MG to contravene section 1041H of the Act, further or alternatively section 12DA of the ASIC Act, as alleged in paragraph 141 above;

- (b) caused or permitted MGRE to contravene section 1041H of the Act, further or alternatively section 12DA of the ASIC Act, as alleged in paragraph 141 above;
- (c) caused or permitted MG to contravene section 675(2) of the Act as alleged in paragraph 149 above;
- (d) caused or permitted MGRE to contravene section 674(2) of the Act as alleged in paragraph 149 above;
- (e) thereby exposed MG and MGRE to the risk of proceedings for contraventions of the Act, legal costs and penalties.

156 By reason of the matters set out in paragraphs 154 and 155 above, Helou:

- (a) failed to exercise his powers and discharge his duties as a director and of MG and MGRE and thereby contravened section 180(1) of the Act; and
- (b) further or alternatively, insofar as the conduct relates to the MG Unit Trust, thereby failed to take all steps that a reasonable person would take if they were in his position to ensure that MGRE complied with the Act and thereby contravened sections 601FD(1)(b) and 601FD(1)(f) of the Act.

### Q.3. Directors' and officers' duties – Hingle

157 Between 22 March 2016 and 26 April 2016, wrongfully and in breach of the Hingle Standard of Care, Hingle failed to:

- (a) adequately monitor the financial position and performance of MG and MGRE against forecasts and against the February Earnings Guidance;
- (b) adequately assess and give due consideration to the effect of the April Risks on the financial position and performance of MG and MGRE;
- (c) inform the Board on 13 April 2016 or a reasonable time thereafter of the April Risks;
- (d) inform the Board of the April Material Information;
- (e) consider whether the February Earnings Guidance should be downgraded, to account for the April Risks;

- (f) recommend to the Board on 13 April 2016 or a reasonable time thereafter that the Board should consider whether the February Earnings Guidance should be downgraded, to account for the April Risks; and
- (g) recommend to the Board on 13 April 2016, or at a reasonable time thereafter that the Board should consider whether the April Material Information required disclosure to the market.

158 Further or alternatively, between 22 March 2016 and 26 April 2016, wrongfully and in breach of the Hingle Standard of Care, Hingle:

- (a) caused or permitted MG to contravene section 1041H of the Act, further or alternatively section 12DA of the ASIC Act, as alleged in paragraph 141 above;
- (b) caused or permitted MGRE to contravene section 1041H of the Act, further or alternatively section 12DA of the ASIC Act, as alleged in paragraph 141 above;
- (c) caused or permitted MG to contravene section 675(2) of the Act as alleged in paragraph 149 above;
- (d) caused or permitted MGRE to contravene section 674(2) of the Act as alleged in paragraph 149 above;
- (e) thereby exposed MG and MGRE to the risk of proceedings for contraventions of the Act, legal costs and penalties.

159 By reason of the matters set out in paragraphs 157 and 158 above, as at 13 April 2016, Hingle:

- (a) failed to exercise his powers and discharge his duties as an officer and chief financial officer of MG and MGRE and thereby contravened section 180(1) of the Act; and
- (b) further or alternatively, insofar as the conduct relates to the MG Unit Trust, thereby failed to take all steps that a reasonable person would take if they were in his position to ensure that MGRE complied with the Act and thereby contravened sections 601FD(1)(b) and 601FD(1)(f) of the Act.

## R      **TRADING AND EVENTS FOLLOWING 27 APRIL 2016**

- 160      At 8:48am on 27 April 2016, MG released the April Announcement to the ASX which disclosed MG's expected FY16 NPAT of \$39 million to \$42 million and FY16 FMP of \$4.75 to \$5.00 respectively.
- 161      The Unit price of the MG Unit Trust immediately prior to the trading halt on 22 April 2016 was \$2.14.
- 162      Following the April Announcement on 27 April 2016, Units opened at \$1.50 (29.91% lower than the closing price prior to the trading halt) and closed that day at \$1.24 (42.06% lower than the closing price prior to the trading halt).
- 163      The volume of Units traded on 27 April 2016 was approximately 21,203,529, significantly above the 30 day moving average of 818,500 Units.
- 164      During the 37 trading days in the period from 29 February 2016 to 26 April 2016 (inclusive), 33.45 million Units in the MG Unit Trust were traded with a total value of \$71 million at an average price per Unit of \$2.12.
- 165      On 16 May 2016, John Webster commenced a representative proceeding, on behalf of unit holders of the MG Unit Trust, in the Supreme Court of Victoria against MG, MGRE and its former directors (**Class Action**).
- 166      On 27 April 2017, the Australian Competition and Consumer Commission commenced proceedings in the Federal Court of Australia against MG, MGRE, Helou and Hingle (**ACCC Proceeding**).
- 167      On 9 May 2017, the Class Action was cross-vested to the Federal Court of Australia.
- 168      On 16 November 2017, the Plaintiff commenced proceedings in the Federal Court of Australia against MGRE (**ASIC Proceeding**).
- 169      On 15 December 2017, in the ASIC Proceeding, the Federal Court of Australia:
- (a)      made a declaration of contravention in respect of MGRE that MGRE contravened section 674(2) of the Act on and from 22 March 2016 continuing until 8.48am on 27 April 2016 by failing to notify the ASX that circumstances had arisen a consequence of which was that Murry Goulburn Co-operative Co. Limited was unlikely to achieve the forecast Available Weighted Average Southern Region Farmgate Milk Price for the financial year ending 30 June

2016 of \$5.60 per kilogram of milk solids and full-year net profit after tax for FY16 of appropriately \$63 million as stated by MG and MGRE in their ASX announcement dated 29 February 2016 title “Murray Goulburn – Half Year Financial Results News Release” and “Murray Goulburn – Half Year Financial Results Presentation.”; and

(b) ordered MGRE to pay a penalty to the Commonwealth of \$650,000.

170 On 16 August 2018, Endeavour River Pty Ltd commenced a representative proceeding, on behalf of unit holders of the MG Unit Trust, in the Federal Court of Australia against MG and MGRE.

171 On 6 December 2018, in the ACCC Proceeding, the Federal Court of Australia:

(a) declared that MG engaged in misleading or deceptive conduct and made representations with respect to the price of goods, in connection with the supply or possible supply of goods (being milk), which were false or misleading, in contravention of ss 18 and 29(1)(i) of the Australian Consumer Law, by making representations to Farmers between 29 February 2016 and 27 April 2016; and

(b) ordered MG to pay a contribution to the ACCC’s costs in the sum of \$200,000.

172 In all of the circumstances, including those matters referred to in paragraphs 160 to 171 above, each of the contraventions by each of Helou and Hingle was serious, within the meaning of section 1317G(1A)(c)(iii) of the Act.

## **S DISQUALIFICATION - HELOU**

173 Helou was a director of MG and MGRE when each of them, on at least two occasions, contravened:

(a) section 1041H of the Act as alleged in paragraphs 76, 79, 82, 107 and 141 above; and

(b) sections 675(2) and 674(2) of the Act, respectively, as alleged in paragraphs 90, 116, 124 and 149 above.



174 On each of the occasions when MG and MGRE contravened sections 675(2) and 674(2) of the Act, respectively, and section 1041H, Helou failed to take reasonable steps to prevent the contravention.

175 By reason of:

- (a) the contraventions of the Act committed by MG and MGRE while he was a director of those companies; and
- (b) his failure to take reasonable steps to prevent the contraventions,

Helou should be disqualified pursuant to section 206E of the Act from managing a corporation for a period that the Court considers appropriate.

176 Alternatively, by reason of his contraventions of:

- (a) section 1041H of the Act as alleged in paragraphs 77, 80, 86, 112 and 145 above;
- (b) section 675(2A) and 674(2A) of the Act, respectively, as alleged in paragraphs 92, 118, 126 and 151 above; and
- (c) section 180(1) of the Act as alleged in paragraphs 97, 132 and 156 above,

Helou should be disqualified from managing a corporation for a period that the Court considers appropriate pursuant to section 206E of the Act.

177 Alternatively, by reason of his contraventions of section 180(1) of the Act as alleged in paragraphs 97, 132 and 156 above, Helou should be disqualified from managing a corporation for a period that the Court considers appropriate pursuant to section 206C of the Act.

## **T DISQUALIFICATION - HINGLE**

178 Hingle was an officer of MG and MGRE when each of them, on at least two occasions, contravened:

- (a) section 1041H of the Act as alleged in paragraphs 76, 79, 82, 107 and 141 above; and
- (b) sections 675(2) and 674(2) of the Act, respectively, as alleged in paragraphs 90, 116, 124 and 149 above.

179 On each of the occasions when MG and MGRE contravened sections 675(2) and 674(2) of the Act, respectively, and section 1041H, Hingle failed to take reasonable steps to prevent the contravention.

180 By reason of:

- (a) the contraventions of the Act committed by MG and MGRE while he was an officer of the companies; and
- (b) his failure to take reasonable steps to prevent the contraventions,

Hingle should be disqualified pursuant to section 206E of the Act from managing a corporation for a period that the Court considers appropriate.

181 Alternatively, by reason of his contraventions of:

- (a) section 675(2A) and 674(2A) of the Act, respectively, as alleged in paragraphs 94, 120, 128 and 153 above; and
- (b) section 180(1) of the Act as alleged in paragraphs 100, 136 and 159 above,

Hingle should be disqualified from managing a corporation for a period that the Court considers appropriate pursuant to section 206E of the Act.

182 Alternatively, by reason of his contraventions of section 180(1) of the Act as alleged in paragraphs 100, 136 and 159 above, Hingle should be disqualified from managing a corporation for a period that the Court considers appropriate pursuant to section 206C of the Act.

**And the Plaintiff claims** the relief specified in the Originating Application dated 20 June 2019.

**J PETERS**

**N MONCRIEF**

**J FINDLAY**

### **Certificate of lawyer**

I, Tim Honey, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 20 June 2019



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Signed by Tim Honey  
Lawyer for the Applicant