

NOTICE OF FILING

Details of Filing

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File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v MCPHERSON'S LIMITED (ACN 004 068 419) & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

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.

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Concise Statement

No. NSD of 2022

Federal Court of Australia

District Registry: New South Wales

Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

McPHERSON'S LIMITED (ACN 004 068 419) AND OTHERS

Respondents

A. THE IMPORTANT FACTS GIVING RISE TO THE CLAIM

Introduction

- During the period from 30 October 2020 to 1 December 2020, the first defendant (**McPherson's**) failed to promptly disclose to the Australian Securities Exchange (**ASX**) material information in contravention of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the ASX Listing Rules. During the same period it failed to correct misleading statements about profit guidance that it had previously published to the market, and then repeated those statements, including in circumstances where it issued a Cleansing Notice pursuant to s 708A(5) of the Corporations Act, in contravention of the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). As a result of these contraventions, the market was misled.
- The second defendant (**McAllister**), who was at all relevant times a director and the chief executive officer of McPherson's, in breach of the duty he owed pursuant to s 180 of the Corporations Act, caused or otherwise permitted the contraventions by McPherson's and authorised the giving of information to the ASX and shareholders that was false and misleading in a material particular, in contravention of s 1309(2) the Corporations Act.
- McPherson's is an Australian company, the issued shares of which are listed on the ASX. McPherson's provides health, wellness and beauty products in Australia and overseas and its business includes six core brands: Manicare, Lady Jayne, A'kin, Swisspers, Multix and Dr LeWinn (**DRL**).
- ABM Au Limited (Access Brand Management or **ABM**) is a distributor of DRL products in the People's Republic of China, including Hong Kong SAR and Macau SAR, and also in Taiwan. From 2017, McPherson's DRL product sales were almost exclusively high margin export sales to those markets to or through ABM. In November 2019, McPherson's signed a joint venture agreement with ABM to expand sales of DRL products in, and jointly develop new brands and products for, those markets.

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Plaintiff		
Prepared by (name of person/lawyer)	Rebecca Jaffe		
Law firm (if applicable)	HWL Ebsworth Lawyers		
Tel	03 8644 3530	Fax	N/A
Email	rjaffe@hwle.com.au		
Address for service	HWL Ebsworth Lawyers		
(include state and postcode)	Level 8, 447 Collins Street, MELBOURNE VIC 3000		

October Profit Forecast

5. On 20 October 2020, McPherson's released to the ASX its Q1 FY21 Trading Update (**October Profit Forecast**) in which it announced, among other things, projected forecast growth in first half FY21 underlying profit before tax (**PBT**) in the range of 20% to 30% above FY20 (which meant PBT for first half FY21 of approximately \$10.2 million to \$11.1 million) and forecast growth in full year FY21 PBT in the range of 5% to 10% above FY20 (which meant PBT for full year FY21 of approximately \$24.1 million to \$25.3 million). The October Profit Forecast was based on total forecast sales of \$223.8 million, of which sales to ABM of DRL branded products accounted for approximately \$48 million.
6. The October Profit Forecast was earnings guidance provided by McPherson's which created market expectations and gave rise to the need for ongoing, close attention from McPherson's and its directors to the attainability of the October Profit Forecast.

Announcement of the Institutional Placement and the Share Purchase Plan

7. On 27 October 2020, McPherson's announced the acquisition of the Global Therapeutics business from Global Therapeutics Pty Ltd and an associated equity raising of \$36.5 million by way of an institutional placement (**Placement**) to fund the acquisition. McPherson's also announced its intention to conduct a Share Purchase Plan (**SPP**) to raise up to \$10 million from existing shareholders. On 28 October 2020, McPherson's announced the completion of the Placement which raised \$36.5 million.

Receipt by McPherson's of the Revised ABM Purchasing Forecast

8. On 26 October 2020, ABM provided McPherson's with a draft revised purchasing forecast for FY21, inclusive of year-to-date sales for the months of July to October 2020. It forecast ABM purchases from McPherson's of:
 - (a) \$26.9 million for the full year FY21 (compared to McPherson's forecast or budget of \$48 million on which the October Profit Forecast was based); and
 - (b) \$5.3 million for the first half FY21 (compared to McPherson's forecast or budget of \$18.6 million on which the October Profit Forecast was based),

(Revised ABM Purchasing Forecast).

9. On 30 October 2020, McAllister was informed of the Revised ABM Purchasing Forecast by employees of McPherson's. At the same time McPherson's and McAllister learnt that ABM held high levels of DRL stock compared to its sales.
10. During the period from 30 October 2020 to 1 December 2020, McPherson's did not disclose the Revised ABM Purchasing Forecast to the ASX, nor did it update or withdraw the October Profit Forecast.

Cleansing Notice

11. On 2 November 2020, McPherson's issued a Cleansing Notice for the SPP and the Placement (**Cleansing Notice**) pursuant to s 708A(5) of the Corporations Act. The Cleansing Notice relevantly stated that as at the date of the notice, McPherson's had complied with s 674 of the Corporations Act and there was no "excluded information" as defined in sections 708A(7) of the Act. McAllister approved the issuing of the Cleansing Notice on 1 November 2020.
12. Between 2 November 2020 and 20 November 2020, McPherson's undertook a SPP that was open to existing shareholders to subscribe for up to \$30,000 of new shares at a price per share being the lower of \$2.27 or a 2.5% discount to the volume weighted market price of McPherson's shares traded on the ASX during the five trading days up to and

including the closing date of the SPP. On 25 November 2020, McPherson's announced that all valid SPP applications were accepted, and the company was to issue 4.37 million shares at an issue price of \$2.15 per share on 27 November 2020, having raised \$9.4 million.

McPherson's Annual General Meeting on 4 November 2020

13. On 4 November 2020, McPherson's held its Annual General Meeting (**4 November AGM**). At that meeting, McPherson's informed shareholders of the rapid growth of export sales to ABM and re-affirmed the October Profit Forecast. McPherson's also advised that for FY21, McPherson's was targeting \$48.2 million in sales of DRL products to China, up 30% on FY20. Livia Wang (**Wang**) of ABM also presented at the 4 November AGM and forecasted sales of DRL products by ABM of 154M RMB (about \$31 million) for the key sales event known as "11/11" or "singles day" (**11/11 Event**).

11/11 Sales Results

14. On 12 November 2020, ABM informed McPherson's that ABM had achieved sales of 105.76M RMB (about \$21 million) for the 11/11 Event (**11/11 Sales Results**), down from ABM's forecasted sales of 154M RMB (about \$31 million). McAllister was provided with the 11/11 Sales Results on about 12 November 2020.
15. During the period from 12 November 2020 to 1 December 2020, McPherson's did not disclose the 11/11 Sales Results to the ASX, nor did it update or withdraw the October Profit Forecast.

1 December Announcement

16. On Tuesday 1 December 2020, following a meeting between Wang and McAllister (among others) on Friday 27 November 2020, McPherson's issued a Trading Update announcement to the ASX (**1 December Announcement**) which relevantly stated:
 - (a) on 27 November 2020, ABM had provided feedback that its 11/11 Event was below expectation; and
 - (b) after urgent and detailed consideration of the updated information, McPherson's had reduced its 1H FY21 underlying PBT forecast and 1H FY21 profit guidance downwards by 35% to a range of \$6.5 million to \$7.5 million and had withdrawn full year FY21 guidance.
17. By the 1 December Announcement, McPherson's represented to shareholders that the meeting on 27 November 2020 was the first time McPherson's became aware that the 11/11 Event had performed below expectation and that McPherson's decision to revise down its profit forecast was a result of feedback provided during that meeting. In fact, by 1 December 2020, McAllister, and consequently McPherson's, had been aware of the Revised ABM Purchasing Forecast for more than a month, and of the 11/11 Sales Results for almost 3 weeks.
18. McAllister was involved in drafting the 1 December Announcement and its release was approved by the Board, including McAllister, on 1 December 2020.
19. Following the release of the 1 December Announcement, McPherson's share price fell 34.5% to \$1.195, down from the previous day's closing price of \$1.825 and 44% lower than the SPP issue price.

B. THE RELIEF SOUGHT FROM THE COURT (AND AGAINST WHOM)

20. ASIC seeks declarations, pecuniary penalties and costs against McPherson's and McAllister, and a disqualification order against McAllister, as set out in its Originating Process.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

Continuous disclosure contraventions by McPherson's

21. During the period from 30 October 2020 to 1 December 2020 (or alternatively, following the issuing of the Cleansing Notice during the period 2 November 2020 to 1 December 2020):
- (a) McPherson's was aware of the Revised ABM Purchasing Forecast;
 - (b) ASX Listing Rule 3.1 required immediate disclosure of the Revised ABM Purchasing Forecast;
 - (c) the Revised ABM Purchasing Forecast was not generally available; and
 - (d) McPherson's was negligent with respect to whether the Revised ABM Purchasing Forecast would, if it were generally available, have had a material effect on the price or value of McPherson's shares.
22. Alternatively, during the period from about 12 November 2020 to 1 December 2020:
- (a) McPherson's was aware of the Revised ABM Purchasing Forecast and the 11/11 Sales Results;
 - (b) upon becoming aware of the 11/11 Sales Results, ASX Listing Rule 3.1 required immediate disclosure of both the Revised ABM Purchasing Forecast and the 11/11 Sales Results;
 - (c) the Revised ABM Purchasing Forecast and the 11/11 Sales Results were not generally available; and
 - (d) McPherson's was negligent with respect to whether the Revised ABM Purchasing Forecast and the 11/11 Sales Results would, if they were generally available, in light of October Profit Forecast provided to the market and information about the 11/11 Sales, have had a material effect on the price or value of McPherson's shares.
23. McPherson's contravened s 674(2) of the Corporations Act by failing to:
- (a) inform the ASX of the Revised ABM Purchasing Forecast; and
 - (b) withdraw or update the October Profit Forecast,
- in the period from about 30 October 2020 to 1 December 2020.
24. Alternatively, McPherson's contravened s 674(2) of the Corporations Act by failing to:
- (a) inform the ASX of the Revised ABM Purchasing Forecast; and
 - (b) withdraw or update the October Profit Forecast,
- in the period from about 2 November 2020 to 1 December 2020.
25. Alternatively, McPherson's contravened s 674(2) of the Corporations by failing to:

- (a) inform the ASX of the Revised ABM Purchasing Forecast and the 11/11 Sales Results; and
 - (b) withdraw or update the October Profit Forecast,
- in the period from about 12 November 2020 to 1 December 2020.

Misleading or deceptive conduct by McPherson's

Cleansing Notice Representations

26. By issuing the Cleansing Notice on 2 November 2020, McPherson's represented that as at the date of the notice:
- (a) it had complied with s 674(2) of the Corporations Act (**First Cleansing Notice Representation**); and
 - (b) there was no "excluded information" as defined in s 708A(7) of the Corporations Act (**Second Cleansing Notice Representation**).
27. The First Cleansing Notice Representation was misleading or deceptive in that McPherson's had not complied with s 674(2) of the Corporations Act, for the reasons set out in paragraphs 21 to 24 above. Further or alternatively, the Second Cleansing Notice Representation was misleading or deceptive in that, as at the date of the Cleansing Notice, McPherson's had received the Revised ABM Purchasing Forecast on or about 30 October 2020 which, if it was not required to be announced pursuant to the ASX Listing Rules that was because it was "excluded information" as defined in s 708A(7) of the Corporations Act.

AGM Representations

28. Further, at the 4 November AGM, McPherson's represented that (**AGM Representations**):
- (a) McPherson's forecast growth in full year FY21 profit was in the range of 5-10%; and
 - (b) ABM sales of \$48 million were forecast for FY21.
29. The AGM Representations were misleading or deceptive in that, having received the Revised ABM Purchasing Forecast on or about 30 October 2020, McPhersons did not have reasonable grounds for making the AGM Representations on 4 November 2020.
30. The AGM Representations are taken to be misleading by s 769C of the Corporations Act and s 12BB of the ASIC Act.

Other representations

31. Further, McPherson's contravened s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act by:
- (a) failing to disclose the Revised ABM Purchasing Forecast, and its likely effect on the October Profit Forecast, in the period from about 30 October 2020 to 1 December 2020;
 - (b) failing to disclose the 11/11 Sales Results in the period from about 12 November 2020 to 1 December 2020; and

- (c) failing to withdraw or update the October Profit Forecast in the period from about 30 October 2020 (or alternatively 12 November 2020) to 1 December 2020.

Contravention of s 180(1) of the Corporations Act by McAllister

32. During the period from 30 October 2020 to 1 December 2020, McAllister failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in failing to take adequate steps to prevent McPherson's conduct constituting contraventions of s 674(2) of the Corporations Act referred to in paragraphs 21 to 25 above, and of s 1041H(1) of the Corporations Act and s12DA(1) of the ASIC Act, referred to in paragraphs 26 to 2730 above.

Contravention of s 1309(2) of the Corporations Act by McAllister

33. The Cleansing Notice contained information that was false or misleading in material particulars, for the reasons described in paragraphs 26 to 27 above and by operation of s1309(5) of the Corporations Act. McAllister contravened s 1309(2) of the Corporations Act by making available or giving, or alternatively authorising or permitting the making available or giving of, the Cleansing Notice to the ASX and shareholders of McPherson's, without having taken reasonable steps to ensure the information was not false or misleading in a material particular.
34. Further, the 1 December Announcement contained information that was false or misleading in material particulars, for the reasons described in paragraph 17 above. McAllister contravened s 1309(2) of the Corporations Act by making available or giving, or alternatively authorising or permitting the making available or giving of, the 1 December Announcement to the ASX and shareholders of McPherson's, without having taken reasonable steps to ensure the information was not false or misleading in a material particular.

D. HARM SUFFERED

35. The obligation of continuous disclosure, imposed on an ASX listed company by s 674 of the Act and ASX Listing Rule 3, is imposed to enhance confident and informed participation by investors in the secondary securities markets, an object effected by achieving a well-informed market. The object is to enhance the integrity and efficiency of capital markets by requiring timely disclosure of price and market sensitive information, with the consequence that the market price of securities reflect their underlying economic value. While having a wider field of operation, in its application to the present circumstances, the prohibition on misleading or deceptive conduct has similar objects of market integrity and investor protection. The conduct of McPherson's and McAllister prevented the attainment of those objects in relation to the listed shares in McPherson's, and affected market integrity and confidence in the market more broadly.
36. In the period of the contraventions, the market traded on a materially uninformed or misinformed basis with respect to McPherson's, inflicting losses and fortuitous gains, including at a time when shareholders were subscribing for further shares pursuant to the SPP. Had the market traded on an informed basis during the SPP offer period, investors in the SPP may have acquired shares at a lower price or may not have taken up the offer at all.
37. An important feature of Australia's capital raising regime is the ability of listed companies to raise capital without the need for a full prospectus. Central to this "low doc" capital raising regime is the ability of investors to confidently rely on cleansing notices issued by companies raising capital. The interests of listed companies in raising capital and all investors and participants in the Australian market for securities was potentially harmed

by the conduct of McPherson's through damage to market or investor confidence in the capital raising regime.

38. Further, the duty imposed on directors by s 180 of the Corporations Act is protective of the interests of the corporation. The actions of McAllister have exposed McPherson's to harm through the exposure of the company to penalty, action by its shareholders and reputational harm which in turn affects its business and future capital raisings.

This Concise Statement has been prepared by Jeremy Giles SC and Louise Hulmes

Certificate of lawyer

I, Rebecca Jaffe 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: 8 December 2022



Signed by Rebecca Jaffe

Solicitor for the Australian Securities and
Investments Commission