



**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL COURT**

**No. S ECI 2020 03351** Case: S ECI 2020 03351

Filed on: 08/10/2021 07:46 PM

**B E T W E E N**

**BENJUMIN HILLMAN**

Plaintiff

**-and-**

**MAYNE PHARMA GROUP LTD (ACN 115 832 963)**

Defendant

**STATEMENT OF CLAIM**

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Date of Document: 8 October 2021  
Filed on behalf of: Plaintiff  
Prepared by: Phi Finney McDonald

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**A INTRODUCTION**

**A.1 The Plaintiff and the Group Members**

1. This proceeding is commenced as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) by the Plaintiff on his own behalf and on behalf of all persons who:

- (a) acquired an interest in:
  - (i) fully paid ordinary shares in the Defendant (**Mayne Shares**); and/or
  - (ii) American Depositary Receipts that represent Mayne Shares (**Mayne ADRs**),  
  
(together **Mayne Securities**) during the period between 24 November 2014 and 15 December 2016 (inclusive) (**Relevant Period**);
- (b) have suffered loss or damage by reason of the conduct of the Defendant (**Mayne**) pleaded in the General Indorsement and this Statement of Claim; and
- (c) were not during any part of the Relevant Period, and are not as at the date of this Writ, any of the following:

- (i) a related party (as defined by s 228 of the *Corporations Act 2001* (Cth) (**Corporations Act**) of Mayne;
- (ii) a related body corporate (as defined by s 50 of the *Corporations Act*) of Mayne;
- (iii) an associated entity (as defined by s 50AAA of the *Corporations Act*) of Mayne;
- (iv) an officer or associate (as defined by s 9 and s 11 of the *Corporations Act*) of Mayne; or
- (v) a Justice or the Chief Justice of the Supreme Court of Victoria, or a Justice or the Chief Justice of the High Court of Australia,

**(Group Members).**

2. The Plaintiff:

- (a) is and was at all material times a resident of the State of Victoria; and
- (b) acquired an interest in Mayne Shares during the Relevant Period.

**Particulars**

- i) *Details of the particular acquisitions of Mayne Shares by the Plaintiff are set out below:*

<b>Date</b>	<b>Transaction type</b>	<b>Number of Mayne Shares</b>	<b>Price</b>
20 June 2016	Buy	1,300	\$1.52
22 July 2016	Buy	999	\$1.28

- 3. Immediately prior to the commencement of this proceeding, there were more than seven Group Members.

**A.2 The Respondent**

- 4. Mayne is and at all material times was:

- (a) incorporated pursuant to the *Corporations Act* and capable of being sued;
- (b) a person within the meaning of s 1041H of the *Corporations Act*;

- (c) a person within the meaning of s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
- (d) a person within the meaning of s 18 of the Australian Consumer Law set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), as applicable pursuant to:
  - (i) s 12 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic);
  - (ii) s 28 of the *Fair Trading Act 1987* (NSW);
  - (iii) s 16 of the *Fair Trading Act 1989* (Qld);
  - (iv) s 6 of the *Australian Consumer Law (Tasmania) Act 2010* (Tas);
  - (v) s 19 of the *Fair Trading Act 2010* (WA);
  - (vi) s 14 of the *Fair Trading Act 1987* (SA);
  - (vii) s 7 of the *Fair Trading (Australian Consumer Law) Act 1992* (ACT); and/or
  - (viii) s 27 of the *Consumer Affairs and Fair Trading Act* (NT),
 (individually, or together, **ACL**).

## **B MAYNE'S BUSINESS**

### **B.1 Mayne's Business in the United States of America**

5. Mayne, at all material times:
  - (a) carried on business in Australia and the United States of America (**USA**) as a specialised pharmaceutical company focused on applying its delivery expertise to commercialise branded and generic pharmaceuticals;
  - (b) provided contract development and manufacturing services to more than 100 clients worldwide; and
  - (c) marketed and sold generic and branded pharmaceuticals in the USA through its wholly owned subsidiary, Mayne Pharma (USA) Inc (**Mayne USA**).
  
6. Mayne is, and at all material times from 1 July 2013 was, the consolidated reporting entity or parent for Mayne and its subsidiaries, and was required to present consolidated financial statements under Australian Accounting Standard AASB127 (Consolidated and Separate Financial Statements) and AASB10 (Consolidated Financial Statements) as applicable.

7. At all material times, the USA was Mayne's most important market, representing between 78% and 88% of group revenue.

#### **Particulars**

- i) Announcement entitled '2015 Full Year Results Investor Presentation' published and lodged to the ASX on 28 August 2015, p 7.*
- ii) Announcement entitled '2016 Half Year Investor Presentation' published and lodged to the ASX on 26 February 2016, p 5.*

#### **B.2 The regulatory environment in the United States applicable to Mayne**

8. Mayne USA is and was at all material times:

- (a) a corporation organised and existing under the laws of the State of Delaware; and
- (b) subject to federal United States antitrust laws, namely section 1 of the Sherman Antitrust Act of 1890, codified at 15 U.S.C. § 1 (the **Sherman Act**); and
- (c) subject to the antitrust law of States of the United States in which Mayne USA sold products, which were to similar effect as the Sherman Act (**State Antitrust Acts**),  
  
(the Sherman Act and State Antitrust Acts being part of **US competition law**).

#### **Particulars of (c)**

*The State Antitrust Acts included those set out in the Plaintiff States' Consolidated Amended Complaint filed against Mayne USA, and others, on 15 June 2018 in the United States District Court for the Eastern District of Pennsylvania, civil action 17-3768 (**Complaint**) at [606]-[889], and included the Connecticut Antitrust Act (Conn Gen Stat § 35-26 and 35-28).*

9. At all material times:

- (a) Section 1 of the Sherman Act provided that:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine

not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

- (b) violation of section 1 of the Sherman Act rendered a person liable to an action brought on the suit of the US Department of Justice, or Attorney-Generals of States on behalf of individuals within their States, including for injunctive relief, disgorgement of unlawful profits, treble damages, and court costs;
- (c) violation of section 1 of the Sherman Act also rendered a person liable to actions for treble damages brought by private parties pursuant to the Clayton Antitrust Act of 1914, codified at 15 U.S.C. § 11-27 (including calculated on revenues derived from the violation); and
- (d) violation of section 1 of State Antitrust Acts (to the same effect as the Sherman Act) rendered a person liable to an action brought on the suit of the Attorney-Generals of States on behalf of individuals within their States, including for injunctive relief, disgorgement of unlawful profits, treble damages, and court costs.

### **B.3 The Doxy DR market in the United States**

- 10. At all material times, USA based company, Heritage Pharmaceuticals, Inc. (**Heritage**):
  - (a) marketed and sold generic pharmaceuticals in the USA; and accordingly,
  - (b) was a competitor of Mayne USA.
- 11. At all material times, USA based company, Mylan Pharmaceuticals, Inc. (**Mylan**):
  - (a) marketed and sold generic pharmaceuticals in the USA; and accordingly,
  - (b) was a competitor of Mayne USA.
- 12. In 2012, Mayne USA acquired Metrics, Inc. and its division, Midlothian Laboratories (**Midlothian Acquisition**).
- 13. On and from the Midlothian Acquisition, Mayne USA has also operated under the name 'Midlothian'.
- 14. Prior to 2 July 2013, Mylan was the only manufacturer in the generic pharmaceuticals market in the USA of Doxycycline Hyclate Delayed Release (**Doxy DR**), being a tetracycline-class antimicrobial indicated as adjunctive therapy for severe acne.

15. On or about 2 July 2013, Heritage entered the USA market for Doxy DR.
16. Mayne USA entered the USA market for:
  - (a) Doxy DR in or around February 2014; and
  - (b) Doryx®, being the branded version of Doxy DR, in or around May 2015.
17. In the premises, on and from February 2014, Heritage, Mylan and Mayne USA were competitors in the generic pharmaceutical market for Doxy DR in the USA (**Doxy DR Market**).

#### **B.4 The market disclosure regime governing Mayne**

18. At all material times:
  - (a) Mayne was included in the official list of the financial market operated by the Australian Securities Exchange (**ASX**);
  - (b) Mayne Shares were:
    - (i) ED securities for the purpose of s 111AE of the Corporations Act, and quoted ED securities within the meaning of s 111AM of the Corporations Act; and
    - (ii) able to be purchased and sold by investors and potential investors in Mayne Shares (**Affected Market**) on the financial market operated by the ASX under the ticker “MYX”; and
  - (c) Mayne had an arrangement with the Bank of New York Mellon Corporation pursuant to which the latter institution issues Mayne ADRs (at a specified ratio of Mayne ADRs to Mayne Shares) which are traded on the OTC market in the United States of America under the ticker “MYPHY”.
19. Mayne is and was at all material times:
  - (a) a public company within the meaning of s 9 of the Corporations Act;
  - (b) a listed disclosing entity within the meaning of s 111AC(1) of the Corporations Act;
  - (c) a listed disclosing entity within the meaning of s 111AL(1) of the Corporations Act;
  - (d) subject to and bound by the Australian Stock Exchange Listing Rules (**ASX Listing Rules**); and

- (e) obliged by ss 111AP(1) and/or 674(1) of the Corporations Act and/or ASX Listing Rule 3.1 to, once it is, or becomes aware of, any information concerning Mayne that a reasonable person would expect to have a material effect on the price or value of Mayne Shares, tell the ASX that information immediately (unless the exceptions in ASX Listing Rule 3.1A apply) (**Continuous Disclosure Obligations**).

## **B.5 Mayne's exposure to reputational risk and criminal and civil penalties**

20. At all material times in the Relevant Period, Mayne was subject to:

- (a) reputational risk arising from negative perception on the part of customers, counterparties, shareholders, investors, debt holders, market analysts and regulators, with adverse reputational risk outcomes flowing from the failure to manage other types of risk (including compliance risk); and/or
- (b) the risk of loss of reputation if it, or its subsidiaries, engaged in conduct which failed to comply with, or contravened, the Sherman Act (or State Antitrust Acts) or which it was likely that shareholders, investors, debt holders, market analysts and regulators would, if they became aware of the conduct, consider to potentially involve such non-compliance or contravention,

(together and severally, the **Reputation Risk**).

21. Further, at all material times in the Relevant Period, Mayne, through its subsidiary, Mayne USA, and, in the alternative, Mayne USA, would be potentially liable to criminal and civil penalties in the USA if it contravened the Sherman Act (or State Antitrust Acts) including:

- (a) being deemed guilty of a felony;
- (b) being convicted of a felony;
- (c) punishment by fines of up to in the order of USD100,000,000; and
- (d) treble damages sought by reason of the violation,

(together and severally, the **Penalty Risk**).

### **Particulars**

- i) *The matters pleaded in paragraph 9 are repeated.*

## **B.6 Directors and officers of Mayne**

### ***B.6.1 Key personnel at Mayne USA***

22. Mr Chris Schneider (**Mr Schneider**) at all material times during the Relevant Period:
- (a) was the Executive Vice President of Generic Products and Vice President of Sales at Mayne USA;
  - (b) was a member of Mayne's Global Leadership Group;
  - (c) reported to:
    - (i) Mayne's Managing Director and Chief Executive Officer, Mr Scott Richards (**Mr Richards**); and
    - (ii) Mayne USA's President, Mr Stefan Cross (**Mr Cross**); and
  - (d) was an officer of Mayne within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
23. Mr Cross at all material times during the Relevant Period was:
- (a) the President of Mayne USA;
  - (b) a member of Mayne's Global Leadership Group; and
  - (c) an officer of Mayne within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
24. Ms Gloria Peluso-Schmid (**Ms Peluso-Schmid**):
- (a) at all material times during the Relevant Period, the Director of National Accounts of Mayne USA; and
  - (b) reported to:
    - (i) Mr Schneider; and
    - (ii) Mr Cross.

### ***B.6.2 Key personnel at Mayne***

25. Mr Richards was at all material times during the Relevant Period:
- (a) the Managing Director and Chief Executive Officer of Mayne;



- (b) a member of Mayne’s Global Leadership Group; and
  - (c) an officer of Mayne within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
26. Mr Roger Corbett (**Mr Corbett**) was at all material times during the Relevant Period:
- (a) the Chairman of Mayne; and
  - (b) an officer of Mayne within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
27. Mr Ron Best (**Mr Best**) was at all material times during the Relevant Period:
- (a) an independent non-executive director of Mayne;
  - (b) a member of Mayne’s Audit & Risk Committee; and
  - (c) an officer of Mayne within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
28. Mr William (Phil) Hodges (**Mr Hodges**) was at all material times during the Relevant Period:
- (a) an independent non-executive director of Mayne; and
  - (b) an officer of Mayne within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
29. Mr Bruce Mathieson (**Mr Mathieson**) was at all material times during the Relevant Period:
- (a) an independent non-executive director of Mayne;
  - (b) a member of Mayne’s Audit & Risk Committee; and
  - (c) an officer of Mayne within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
30. Mr Ian Scholes (**Mr Scholes**) was at all material times during the Relevant Period:
- (a) an independent non-executive director of Mayne;
  - (b) the Chairman of Mayne’s Audit & Risk Committee; and
  - (c) an officer of Mayne within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

31. Mr Bruce Robinson (**Mr Robinson**) was at all material times during the Relevant Period:
- (a) an independent non-executive director of Mayne; and
  - (b) an officer of Mayne within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
32. Ms Nancy Dolan (**Ms Dolan**) was at all material times during the Relevant Period from 21 September 2016:
- (a) an independent non-executive director of Mayne; and
  - (b) an officer of Mayne within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
33. Mr Mark Cansdale (**Mr Cansdale**) was at all material times during the Relevant Period:
- (a) the Group Chief Financial Officer of Mayne;
  - (b) the Company Secretary of Mayne;
  - (c) a member of Mayne's Global Leadership Group; and
  - (d) an officer of Mayne within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

***B.6.3 The knowledge of the officers of Mayne is the knowledge of Mayne***

34. By reason of the matters pleaded in paragraphs 25 to 32 above, any information of which any or all of:
- (a) Mr Richards;
  - (b) Mr Corbett;
  - (c) Mr Best;
  - (d) Mr Hodges;
  - (e) Mr Mathieson;
  - (f) Mr Scholes;
  - (g) Mr Robinson; and/or
  - (h) Ms Dolan,

(together, **Mayne Board**) became aware, or which ought reasonably to have come into his or her possession in the course of the performance of his or her respective duties as an officer of Mayne, was information of which Mayne was aware (as awareness is defined in ASX Listing Rule 19.12).

35. By reason of the matters pleaded in paragraphs 22, 23, 25 and 33 any information of which any or all of:

- (a) Mr Schneider;
- (b) Mr Cross;
- (c) Mr Richards; and/or
- (d) Mr Cansdale,

(together, **Mayne Officers**) became aware, or which ought reasonably to have come into his or her possession in the course of the performance of his or her respective duties as an officer of Mayne, was information of which Mayne was aware (as awareness is defined in ASX Listing Rule 19.12).

## **C CONTINUOUS DISCLOSURE CONTRAVENTIONS**

### **C.1 The information Mayne had**

#### ***C.1.1 Heritage Anti-competitive Information***

36. Beginning from a date in or after July 2013, Mayne USA entered into, and continued, discussions with Heritage concerning:

- (a) the respective share of Mayne USA and Heritage in the Doxy DR Market including allocating customers; and/or
- (b) the prices of Doxy DR,

(the **Heritage Discussions**).

#### **Particulars**

- i) *The Plaintiff relies upon the Plaintiff States' Consolidated Amended Complaint filed against Mayne USA, and others, on 15 June 2018 in the United States District Court for the Eastern District of Pennsylvania, civil action 17-3768 (**Complaint**) at [94], [95] and [218]-[242]*

37. As part of the Heritage Discussions, by no later than on or about 24 November 2014, Mayne USA entered into an agreement or arrangement or understanding with Heritage which was to the effect (and, or alternatively, which it was likely that shareholders, investors, debt holders, market analysts and US regulators would, if they became aware of them, consider to have the effect) that:

- (a) Mayne USA would not pursue McKesson (one of Heritage's customers or purchasers in the Doxy DR Market) and Heritage would 'walk away' from Econdisc (one of its customers or purchasers in the Doxy DR Market) and, or alternatively,
- (b) that Mayne USA and Heritage would in the Doxy DR Market maintain share; avoid market erosion; not compete with one another; would share customers or purchasers; and/or would share with one another commercially sensitive information,

(the **Heritage Agreement**).

#### **Particulars**

- i) *The Plaintiff relies upon the Complaint, at [218]-[242], and, in particular, the following facts:*
  - A) *on 7 January 2014, Ms Peluso-Schmid, Mayne's Director of National Accounts, approached her counterpart at Heritage to discuss Mayne's plans for launching Doxy DR;*
  - B) *on 21 February 2014, Mr Schneider, Mayne's Executive Vice President of Generic Products, exchanged emails with Ms Peluso-Schmid in relation to targeting Heritage's market share in the Doxy DR Market;*
  - C) *on 13 and 17 March 2014, Ms Peluso-Schmid communicated with her counterpart at Heritage by telephone in relation to Doxy DR;*
  - D) *on 1 and 2 April 2014, Ms Peluso-Schmid communicated with her counterpart at Heritage by telephone in relation to Doxy DR;*
  - E) *on 9 and 10 April 2014, Ms Peluso-Schmid communicated with her counterpart at Heritage by telephone and text*

*messages in relation to Mayne's bids to McKesson and Econdisc;*

- F) *in May 2014 Heritage "walks away" from a Doxy DR account upon learning of an unsolicited bid from Mayne;*
- G) *on 21, 24 and 25 November 2014, Ms Peluso-Schmid communicated with her counterpart at Heritage in relation to further bids by Mayne to McKesson and Econdisc and agreed that if Mayne retracts its bid to McKesson Heritage will "give up" Econdisc;*
- H) *in December 2014, Ms Peluso-Schmid continued to communicate with her counterpart at Heritage by text message and in person at the American Society of Health-System Pharmacists conference on 9 December;*
- I) *in January 2015, Econdisc put its Doxy DR business out to bid and Heritage made sure it bid a higher price than Mayne (thus ensuring that Mayne would have the more attractive offer); and*
- J) *in September 2015, Ms Peluso-Schmid communicated with her counterpart at Heritage in relation to Mayne's client (a large pharmacy chain) approaching Heritage for a bid on Doxy DR; Heritage confirmed it would not bid.*

38. The Heritage Discussions and/or Heritage Agreement had (and, or alternatively, it was likely that shareholders, investors, debt holders, market analysts and US regulators would, if they became aware of them, consider them to have had) the purpose of:

- (a) fixing, maintaining, and/or artificially maintaining the price of Doxy DR; and/or
- (b) allocating or dividing market share between Mayne USA and Heritage; and/or
- (c) allocating or dividing customers or purchasers; and/or
- (d) restraining trade,

in the Doxy DR Market (the **Heritage Anti-competitive Purpose**).

39. By reason of the Heritage Discussions and/or Heritage Agreement it was the case (and, or alternatively, it was likely that shareholders, investors, debt holders, market analysts and US regulators would, if they became aware of them, consider) that:
- (a) the price for Doxy DR had not or may not have been set in a competitive Doxy DR Market; and/or
  - (b) trade in the Doxy DR Market was or may have been unreasonably restrained,
- (the **Heritage Anti-competitive Effect**).

**Particulars**

- i) *The Plaintiff relies upon the Complaint, at [110], [241], [514] and [516].*

40. By no later than 24 November 2014, alternatively 12 March 2015, alternatively 4 December 2015, Mayne was aware (within the meaning of ASX Listing Rule 19.12) of:
- (a) the Heritage Discussions;
  - (b) the Heritage Agreement;
  - (c) the Heritage Anti-competitive Purpose; and/or
  - (d) the Heritage Anti-competitive Effect,
- (together and severally, the **Heritage Anti-competitive Information**).

**Particulars**

- i) *Mr Schneider and Mr Cross ought reasonably to have been, or become, aware of the Heritage Anti-competitive Information in the performance of their duties, as persons to whom Ms Peluso-Schmid reported or who had responsibility or oversight of or were involved in the management or strategy of the prices, bids, requests for proposals or contracts or sale of Doxy DR.*
- ii) *Further, or alternatively to (i), each of Mr Schneider and Mr Cross, ought reasonably to have been aware of the Heritage Anti-competitive Information because Mayne's systems the subject of the Code of Conduct Compliance Representations ought to have resulted*

*in Ms Peluso-Schmid's conduct and activities being drawn to Mr Schneider's attention or Mr Cross' attention.*

iii) *Further, or alternatively to (i) and (ii), each of Mr Schneider and Mr Cross and members of the Mayne Board ought reasonably to have been aware of the Heritage Anti-competitive Information because they each ought to have taken steps, including as a matter of reasonable care and diligence in the performance of their roles to institute investigations of their systems and procedures to ensure that there was no conduct being engaged in of the kind the subject of the the Heritage Anti-competitive Information, given that from late 2014, it was announced that various US regulators were investigating generic pharmaceutical companies in connexion with possible violations of the Sherman Act, or other violations of US competition law (and they ought to have been aware of such announcements concerning investigations into their industry, and competitors):*

A) *On 15 July 2014, Impax Laboratories LLC, a pharmaceutical company, disclosed to the US Securities Exchange Commission (SEC) that it had received interrogatories and subpoena from the State of Connecticut Attorney General concerning its investigation into pricing of digoxin.*

B) *On 16 July 2014, Lannett Company Inc, a generic pharmaceutical company, disclosed to the SEC that it had received interrogatories and subpoena from the State of Connecticut Office of the Attorney General concerning its investigation into pricing of digoxin, and its investigation into the generic pharmaceutical industry into possible violations of the Sherman Act, and issued a press release titled 'Lannett Receives Inquiry from Connecticut Attorney General' announcing that it has received those interrogatories and subpoena.*

C) *On 10 November 2014, an article entitled 'Justice Department Probes Generic Companies After Price Hike Reports' published by The Wall Street Journal reported that a probe into the recent price hikes for some generic drugs appeared to be widening, and that the US Department of*

*Justice (DOJ) issued subpoenas to two generic drug makers (Lannett and Impax) seeking information about their interactions with competitors.*

- D) On 20 November 2014, an article entitled ‘Justice Department, Senate investigating generic drug price hikes’ published by the Philadelphia Inquirer reported that a federal grand jury in Philadelphia and the Connecticut attorney general are looking into possible violations of US competition law by generic drugmakers, and that the US Senate Subcommittee on Primary Care and Aging will hold a hearing Thursday in Washington in the hope of getting some answers.*
- E) On 8 December 2014, Lannett disclosed to the SEC that it had been served with a grand jury subpoena related to the continuing federal investigation of the generic pharmaceutical industry seeking corporate documents from the Company relating to corporate, financial, and employee information, communications or correspondence with competitors regarding the sale of generic prescription medications, and the marketing, sale, or pricing of certain products.*
- F) On 12 March 2015, Par Pharmaceutical Companies, Inc, a pharmaceutical company, disclosed to the SEC that it had received a subpoena from the Antitrust Division of the DOJ requesting documents related to communications with competitors regarding its authorized generic version of Covis’s Lanoxin (digoxin) oral tablets and its generic doxycycline products.*
- G) On 26 June 2015, an article entitled ‘DOJ believes collusion over generic drug prices widespread – source’ published by Policy and Regulatory Report stated that the DOJ’s investigation is wide-ranging: ‘A PaRR source says prosecutors see the case much like its antitrust probe of the auto parts industry, which has gone on for years and morphed into the department’s largest criminal antitrust*



*probe ever. Like in that case, prosecutors expect to “move from one drug to another in a similar cascading fashion.”*

- H) *On 6 August 2015, Allergan plc, a pharmaceutical company, disclosed to the SEC that it had received a subpoena from the DOJ seeking information relating to the marketing and pricing of certain of the Company's generic products and communications with competitors about such products.*
- I) *On 20 August 2015, an article entitled *The Government’s Generic Price-Fixing Investigation Targets Allergan’s Actavis Unit* published by Mondaq reported on the DOJ’s ‘expanding investigation into possible price fixing by generic drug manufacturers’.*
- J) *On 4 December 2015, Mylan N.V., a general and specific pharmaceutical company, disclosed to the SEC that it had received a subpoena from the DOJ’s antitrust division related to the marketing, pricing and sale of its generic antibiotic Doxycycline, and any communications with competitors about the drug.*
- K) *On 7 December 2015, an article entitled ‘DOJ Subpoenas Mylan Over Pricing of Antibiotic Doxycycline’ published by Drug Industry Daily reported that Valeant Pharmaceuticals had recently received subpoenas from federal prosecutors in Massachusetts and New York regarding its drug pricing decisions.*
- L) *On 28 May 2016, an article entitled ‘India’s Sun Pharma gets U.S. subpoena over generic drugs pricing’ published by Reuters News reported that the DOJ had subpoenaed India's largest drugmaker Sun Pharmaceutical Industries Ltd seeking information about the pricing and marketing of the generic drugs it sells in the United States, and asked for documents related to employee and corporate records and communications with competitors.*

- iv) *Further, Mr Cross (to the extent he was not aware, or did not become aware, of the information by reason of the matters set out in particulars i), ii) and iii) above), Mr Richards and Mr Cansdale ought reasonably to have been, or become, aware of the Heritage Anti-competitive Information in the performance of their duties, because Mr Schneider ought to have advised Mr Cross, and either Mr Schneider or Mr Cross ought to have advised Mr Richards and Mr Cansdale of the Heritage Anti-competitive Information as members of Mayne's Global Leadership Group, in circumstances where Mr Schneider and/or Mr Cross ought to have been aware of that information by reason of what is set out in particulars (i), (ii) or (iii) above. Further, Mayne USA's systems ought to have resulted in information of that character in the possession of Mr Schneider and/or Mr Cross being communicated to Mr Richards and Mr Cansdale.*
- v) *Further, the Mayne Board was aware or ought reasonably to have been, or become, aware of the Heritage Anti-competitive Information in the performance of their duties, because Mr Cross, Mr Richards and/or Mr Cansdale ought to have advised the Mayne Board of the Heritage Anti-competitive Information once they had that information (which they ought to have been aware of by reason of what is set out in particular (iv) above). Further, Mayne's systems ought to have resulted in information of that character in the possession of Mr Cross, Mr Richards or Mr Cansdale being communicated to the Mayne Board.*

### **C.1.2 The Investigation Information**

41. On or around 17 March 2016, Mayne USA received a subpoena from the DOJ which required Mayne USA and Mayne to produce documents dated or used in the period from 1 January 2013 which targeted information concerning:
- (a) each person who had authority to recommend, negotiate, formulate, establish or approve Mayne USA's prices, bids or sales contracts with respect to generic prescription medications;
  - (b) each person who managed or supervised Mayne USA's pricing, bids, or requests for proposals for generic drugs;

- (c) the reporting lines, prior employment, travel and entertainment expense information, pay information, diary and calendar information, outgoing and internal correspondence, telephone records, and request for proposal or quotation files of the person referred to in subparagraphs (a) and (b);
- (d) customer information, sales information, pricing information, and the terms and conditions of sale for generic drugs;
- (e) requests for proposal or contract solicitation for generic drugs on which Mayne USA bid or was invited to bid;
- (f) pricing, bidding proposals, competitive market share, plans, forecasts, strategies, production decisions or changes thereof from any person engaged in the management, pricing, sale or manufacture of generic drugs, the source of such documents and how they came into the possession of Mayne USA or its representatives;
- (g) the recommendation, negotiation, formulation, establishment, approval or denial of any changes in prices, rebates or discounts for generic drugs;
- (h) any decision by Mayne USA to begin or cease manufacturing generic drugs;
- (i) communications in any form with competitors;
- (j) any actual or proposed meeting, conversation, communication, coordinations, understanding, or agreement (whether or not an agreement was reached) between any competitors relating to generic drugs;
- (k) any business ventures, contractual relationships, joint ventures, or space-swapping or sharing arrangements between Mayne USA and any other person that sells or provides generic drugs;
- (l) any telephone records between or among in any competitors in the business of selling generic drugs;
- (m) Mayne USA's policy or procedure regarding compliance with antitrust or competition laws of the United States or any other country;
- (n) any investigation, prosecution or legal proceedings arising from any actual or alleged violation of the antitrust or competition laws of the United States or any other country;
- (o) Mayne USA's policies, plans procedures or practices concerning the retention, destruction, secrecy or confidentiality of documents, including any instructions or

suggestions that documents be destroyed or removed from Mayne USA's files, or that information should not be committed to writing or should not be retained in Mayne USA's files,

(the **DOJ Subpoena**).

42. Further and alternatively, on or around 18 June 2016, Mayne USA received a subpoena and interrogatories from the Attorney General for the State of Connecticut which:

(a) stated that the Attorney General for the State of Connecticut had reason to believe that a person has engaged in a contract, combination or conspiracy which is in restraint of trade or commerce and, more particularly, which is for the purpose of, or has the effect of: (a) fixing, controlling or maintaining prices, rates, quotations, or fees; (b) allocating or dividing customers or territories; (c) bid rigging; or (d) refusing to deal, or coercing, persuading, or inducing third parties to refuse to deal with other parties relating to the sale of pharmaceutical drugs in violation of sections 35-26 and 35-28 of the Connecticut General Statutes, and Mayne USA had information relevant thereto;

(b) required Mayne USA to:

(i) answer written interrogatories for the period from 1 January 2008 concerning, among other things:

(A) Mayne USA's document retention policies and the steps taken to preserve documents and electronically stored information;

(B) Mayne USA's filing system and applications, databases, spreadsheets, macros, queries, reports and devices used to record, store, compute, analyse, report or query on, or retrieve any information relating to the pricing or sale of pharmaceutical drugs;

(C) all persons with supervisory, executive or other significant non-ministerial responsibility related to the pricing or sale of pharmaceutical drugs, including specifically, but not limited to, doxycycline products. Such responsibility shall include, but not be limited to, responding, or deciding whether to respond, to requests for proposals from pharmaceutical wholesalers, preparing, authorising, proposing, suggesting, establishing, recommending, or approving prices, prices increases or decreases, price levels, price quotations,

discounts, special discounts, credits, rebates or other terms or conditions of sale for pharmaceutical drugs;

- (D) each meeting or communication between one or more of Mayne USA's employees and one or more employees of any competitor with respect to (a) any actual, proposed, suggested, or recommended prices, price increases or decreases, price levels, discounts, special discounts, credits, rebates, or other terms or conditions of sale for pharmaceutical drugs, or (b) any actual, proposed, suggested, or recommended allocation or division of any territory, customers, or any customer's purchases between or among Mayne USA and any of Mayne USA's competitors, including any agreements not to bid or to rescind a bid;
- (E) any agreements between or among Mayne USA and any competitor or competitors with respect to (a) any actual, proposed, suggested, or recommended prices, price increases or decreases, price levels, discounts, special discounts, credits, rebates, or other terms or conditions of sale for pharmaceutical drugs, or (b) any actual, proposed, suggested, or recommended allocation or division of any territory, customers, or any customer's purchases between or among Mayne USA and any of Mayne USA's competitors, including any agreements not to bid or to rescind a bid;
- (F) in relation to Gloria Schmid, all telephone numbers used, salary and compensation paid, stock options paid or granted, and requests for travel or other expense reimbursed and paid by Mayne USA;
- (G) whether Mayne USA had ever been investigated or prosecuted (criminally or civilly) by any federal or state law enforcement agency or regulator related to any possible violation of the Sherman Act, or any similar state antitrust law or competition-related law (ie the Connecticut Unfair Trade Practices Act, C.G.S. § 42-110a, et seq) that related to meetings with competitors, exchanging pricing or price-related information with competitors, agreements with competitors not to bid or to withdraw a bid, or entering into any contract, arrangement, understanding, agreement, plan or scheme, with any competitor or any of its employees;

- (H) whether Mayne USA has any written compliance policy directed to the antitrust laws;
- (I) each document that was sent to, or received from, or exchanged between or among Mayne USA and any competitor related to list prices, transaction prices, bids, negotiations with actual or potential customers, terms and conditions of sale, or allocation of business or actual or potential customers of Mayne USA;
- (J) whether Mayne USA has been, or is now, a recipient of any subpoena, civil investigative demand, or other written process served as part of an investigation by a federal or state governmental entity into a potential violation of federal or state antitrust or competition-related laws that relates to the price, bids, terms and conditions of sale, or other competitive conditions relating to the sale of pharmaceutical drugs;

(ii) produce documents concerning the interrogatories identified in (i) above,

(the **AG Subpoena**).

43. Mayne was aware (within the meaning of ASX Listing Rule 19.12) of:

- (a) the DOJ Subpoena by 17 March 2016; and/or
- (b) the AG Subpoena by 18 June 2016,

(together and severally, the **Investigation Information**).

#### **Particulars**

- i) *Mr Cross ought reasonably to have been aware of the Investigation Information by reason of his position and responsibilities as President of Mayne USA.*
- ii) *Further and alternatively, Mr Schneider and Ms. Peluso-Schmid ought reasonably to have been aware of the Investigation Information by reason of their documents falling within the terms of the DOJ Subpoena and AG Subpoena.*
- iii) *Further, Mr Richards and Mr Cansdale ought reasonably to have been aware of the Investigation Information, because Mr Cross and Mr Schneider ought to have advised Mr Richards and Mr Cansdale*

*of the Investigation Information as members of Mayne's Global Leadership Group.*

- iv) *Further, the General Counsel of Mayne received the DOJ Subpoena on or around 18 March 2016, and a copy of the AG Subpoena on or around 21 June 2016 and by reason of the position and responsibilities as Counsel of Mayne, ought reasonably to have advised the Mayne Board and, in particular, the Audit & Risk Committee, of the Investigation Information, alternatively, ought reasonably to have advised Mr Cross, Mr Richards, and Mr Schneider of the Investigation Information who ought to have advised the Mayne Board, and, in particular, the Audit & Risk Committee, of the Investigation Information The significance of the Heritage Anti-Competitive Information, and the Investigation Information*

44. By reason of:

- (a) the Heritage Anti-competitive Information (or any of it), on and from 24 November 2014, alternatively 12 March 2015, alternatively 4 December 2015; and/or
- (b) the Investigation Information, on and from 17 March 2016, alternatively, 18 June 2016,

it was the fact that Mayne was:

- (a) reasonably likely to face civil and/or criminal prosecution for violation of the Sherman Act and/or State Antitrust Acts;
- (c) exposed to the Reputation Risk; and, or alternatively,
- (d) more exposed to the Penalty Risk.

45. By reason of:

- (a) the Heritage Anti-competitive Information (or any of it) on and from 24 November 2014, alternatively 12 March 2015, alternatively 4 December 2015; and/or
- (b) the Investigation Information, on and from 17 March 2016, alternatively, 18 June 2016,

it was likely that shareholders, investors, debt holders, market analysts and US regulators would, if they became aware of the Heritage Anti-competitive Information (or any of it), consider that Mayne USA had, or may have, contravened the Sherman Act or State Antitrust Acts).

46. By no later than:

- (a) 24 November 2014, alternatively 12 March 2015, alternatively 4 December 2015, by reason of the matters pleaded in paragraphs 36 to 39 and/or 41 to 42 and/or 44 to 45(a), there was a material risk or likelihood that the business activities, revenues and profits of Mayne USA would be materially adversely affected, if the Heritage Anti-Competitive Information made known to customers, counterparties, shareholders, investors, debt holders, market analysts and regulators; and
- (b) 17 March 2016, alternatively, 18 June 2016, by reason of the matters pleaded in paragraphs 36 to 39 and/or 41 to 42 and/or 44 to 45(a) and (b), there was a material risk or likelihood that the business activities, revenues and profits of Mayne USA would be materially adversely affected, if the Heritage Anti-Competitive Information was made known to customers, counterparties, shareholders, investors, debt holders, market analysts and regulators .

#### **Particulars**

- i) *Mayne USA would, or may, not be able to continue conducting business on the basis of the Heritage Discussions and the Heritage Agreement.*
- ii) *Regulatory investigation of the generic pharmaceutical market and whether Sherman Act Contraventions had occurred would result in increased compliance costs, and the incurrence of significant legal costs, and downward pressure on price for Mayne USA's products.*
- iii) *The amount of the material adverse effect on Mayne USA's business activities, revenues and profits is a matter for evidence, but exceeded the cost of complying with the DOJ Subpoena and the AG Subpoena.*

#### **C.2 Continuous Disclosure Contraventions**

47. As at, and from:

- (a) 24 November 2014, alternatively 12 March 2015, alternatively 4 December 2015, the Heritage Anti-competitive Information; and, or alternatively,
- (b) 17 March 2016, alternatively, 18 June 2016, the Investigation Information;

was information that:



- (c) was not generally available within the meaning of s 674(2)(c)(i) of the Corporations Act; and
  - (d) a reasonable person would expect to have a material effect on the price or value of Mayne within the meaning of ASX Listing Rule 3.1 and s 674(2)(c)(ii) of the Corporations Act.
48. By reason of the Continuous Disclosure Obligations, the matters pleaded in paragraph 47, on and from:
- (a) 24 November 2014, Mayne became obliged immediately to tell the ASX the Heritage Anti-competitive Information; and, or alternatively,
  - (b) 17 March 2016, alternatively, 18 June 2016, Mayne became obliged immediately to tell the ASX the Investigation Information.
49. Mayne did not inform the ASX of:
- (a) the Heritage Anti-competitive Information immediately on 24 November 2014; and, or alternatively,
  - (b) the Investigation Information immediately on 17 March 2016, alternatively, 18 June 2016,
- or at all during the Relevant Period.
50. By reason of the matters pleaded in:
- (a) paragraph 40, 47(a), 48(a) and 49(a); and/or
  - (b) paragraph 43, 47(b), 48(b) and 49(b),

Mayne contravened ASX Listing Rule 3.1 (each being a **Continuous Disclosure Contravention**).

## **D MISLEADING OR DECEPTIVE CONDUCT**

### **D.1 Code of Conduct Compliance Representations**

51. At all material times during the Relevant Period, Mayne published on its website in the Corporate Governance section the 'Mayne Pharma Group Limited Business Code of Conduct, December 2013' (**Code of Conduct**), and referred in its Annual Reports to that Code as important information relating to Mayne's corporate governance policies and practices.

### **Particulars**

- i) Annual Report for the financial year ended 30 June 2013, pp 26 and 30.*
- ii) Annual Report for the financial year ended 30 June 2014, p 29.*
- iii) Annual Report for the financial year ended 30 June 2015, p.32.*
- iv) Annual Report for the financial year ended 30 June 2016, p.36.*

52. In the Code of Conduct, Mayne stated that it will:

- (a) ensure high ethical standards are maintained, demonstrating honesty, respect and fairness in every action that it takes;
- (b) do the right thing even when no one is looking or will find out;
- (c) honour the rights and beliefs of its shareholders and the community;
- (d) compete vigorously and effectively within the scope of the law;
- (e) obey the letter and spirit of the law;
- (f) abide by principles to assist to safeguard against a violation of the competition law;
- (g) not agree, even informally, with competitors on price (or any elements of price including discounts or rebates), production, customers or markets without a lawful reason;
- (h) not use unethical or illegal methods to gather information about other companies;
- (i) not accept, disclose or use information that was disclosed in breach of a confidentiality agreement;
- (j) limit contact with competitors;
- (k) not discuss competitively sensitive information when participating in industry associations;
- (l) leave industry meetings if the discussion turns to inappropriate topics (such as possible price fixing) and obtain legal advice promptly afterwards); and
- (m) comply with the continuous disclosure obligations of the ASX.

### **Particulars**

i) *Code of Conduct, pp 2, 10, 13, 14, 15.*

53. By the matters pleaded in paragraphs 51 and 52 above, Mayne represented continuously to the Affected Market prior to and during the Relevant Period that it:

- (a) had in place effective policies, procedures and systems for ensuring compliance with competition law (including US competition law) including the letter and the spirit of the law;
- (b) was in fact compliant with relevant competition law (including US competition law), including obeying the letter and spirit of the law;
- (c) had in place effective policies, procedures and systems for ensuring Mayne and its subsidiaries did not engage in anti-competitive or unethical behaviour;
- (d) did not, and its subsidiaries did not, in fact engage in anti-competitive or unethical behaviour;
- (e) had in place effective policies, procedures and systems for ensuring Mayne and its subsidiaries did not discuss competitively sensitive information with competitors; and/or
- (f) did not, and its subsidiaries did not, in fact discuss competitively sensitive information with competitors;

(together and severally, the **Code of Conduct Compliance Representation**).

#### **Particulars**

- i) *The Code of Conduct Compliance Representation was partly express and partly implied:*
  - A) *insofar as it was express it was made in writing and contained within the Code of Conduct at pp 2, 10, 13, 14, 15 (which was incorporated by reference in Mayne's Annual Reports for FY13 through to FY16; and*
  - B) *insofar as it was implied, it was to be implied from the express statements in particular A) above.*

#### **D.2 June 2016 Compliance Representations**

54. On 28 June 2016, Mayne published and lodged with the ASX a presentation entitled 'Acquisition of U.S. general product portfolio from Teva and Allergan' (**June 2016 Presentation**).

55. In the June 2016 Presentation, Mayne stated to the Affected Market, among other things that:

- (a) Mayne is one of numerous generic companies to receive a subpoena from the Antitrust Division of US Department of Justice in the last two years seeking information relating to the marketing, pricing and sales of select generic products. Mayne has more recently received a subpoena from the Office of the Attorney General in the State of Connecticut seeking similar information. Based on currently available information, Mayne does not believe these investigations will have a material impact on its future earnings;
- (b) Estimated adjustments to EBITDA include \$1.2M of US Department of Justice Legal Costs; and
- (c) Mayne USA, a US subsidiary of Mayne, has received a subpoena from the Antitrust Division of the DOJ seeking information relating to the marketing, pricing and sale of certain generic products. The investigation appears to be focused on Doxy DR tablets (generic) and potassium chloride supplements. Mayne has more recently received a subpoena from the Office of the Attorney General in the State of Connecticut seeking similar information. Based on currently available information, Mayne does not believe these investigations will have a material impact on its future earnings. Since 2014, at least seven other generic pharmaceutical companies have received DOJ subpoenas relating to the marketing and pricing of generic products and some of them have received similar subpoenas from the State of Connecticut. Mayne is cooperating with the DOJ and the State of Connecticut. Responding to these investigations may be costly and time consuming for some members of our management team. It is possible that Mayne may be subject to additional investigations concerning the same subject matter by other regulatory bodies, be subject to class actions, have adverse judgments made against it, incur civil or criminal sanctions or enter into settlements that may be material and/or require operational changes. No assurance can be given as to the timing or outcome of these investigations.

### **Particulars**

*i) June 2016 Presentation, pp 21 and 28.*

56. By the matters pleaded in paragraph 55 above, Mayne represented to the Affected Market that it:
- (a) had in place effective policies, procedures and systems for ensuring compliance with competition law (including US competition law) and the letter and spirit of the law;
  - (b) was not exposed, or alternatively, meaningfully exposed, to:

- (i) the Reputation Risk; and, or alternatively,
- (ii) the Penalty Risk,

(together and severally, the **June 2016 Compliance Representations**).

#### **Particulars**

- i) *The June 2016 Compliance Representations were partly express and partly implied:*
  - A) *insofar as they were express, they were made in writing and contained within the June 2016 Presentation at p 22; and*
  - B) *insofar as they were implied, they were to be implied from the express statements in particular A) above.*

57. Further, or alternatively, by the matters pleaded in paragraph 55 above, Mayne represented to the Affected Market that the financial exposure of Mayne arising from the activities of the US Department of Justice was likely to be immaterial (**Further June 2016 Representation**).

### **D.3 June 2016 Capital Raising Representations**

58. Further and alternatively, on 28 June 2016, Mayne published and lodged with the ASX:

- (a) an announcement entitled 'Mayne Pharma Announces Acquisition of US Generic Product Portfolio from Teva and Allergan' (**June 2016 Announcement**); and
- (b) a notice entitled 'Notice under section 708AA(2)(f) of the Corporations Act 2001 (Cth) (**Entitlement Offer Cleansing Notice**).

59. By the June 2016 Announcement and June 2016 Presentation, Mayne announced to the Affected Market that:

- (a) it was to conduct an approximately \$888M equity raising to fund the acquisition of 37 approved FDA filed products from Teva Pharmaceutical Industries Limited and Allergan plc (**Capital Raising**); and
- (b) the Capital Raising was to comprise:
  - (i) an underwritten 1 for 1.725 pro-rata accelerated non-renounceable entitlement offer at a price of \$1.28 per new Mayne Share to raise approximately \$601M (**Entitlement Offer**); and
  - (ii) an institutional placement at a price of \$1.50 per new Mayne Share to raise approximately \$287M (**Institutional Placement**).

60. By the Entitlement Offer Cleansing Notice, on and from 28 June 2016, Mayne represented to the Affected Market that:
- (a) as at the date of the notice, Mayne had complied with:
    - (i) the provisions of Chapter 2M of the Corporations Act as they apply to Mayne; and
    - (ii) section 674 of the Corporations Act; and
  - (b) as at the date of the notice, there was no ‘excluded information’ of the type referred to in sections 708AA(8) and 708AA(9) of the Corporations Act that was required to be set out in the notice under section 708A(7) of the Corporations Act,
- (the **Entitlement Offer Cleansing Notice Compliance Representation**).

#### **Particulars**

- i) *The Entitlement Offer Cleansing Notice Compliance Representation was express, made in writing, and contained within the Entitlement Offer Cleansing Notice.*

#### **D.4 July 2016 Capital Raising Representations**

61. On 7 July 2016, Mayne published and lodged with the ASX a notice entitled ‘Notice under section 708A(5)(e) of the *Corporations Act 2001* (Cth)’ (**Institutional Placement Cleansing Notice**).
62. By the Institutional Placement Cleansing Notice, on and from 7 July 2016, Mayne represented to the Affected Market that:
- (a) as at the date of the notice, Mayne had complied with:
    - (i) the provisions of Chapter 2M of the Corporations Act as they apply to Mayne; and
    - (ii) section 674 of the Corporations Act; and
  - (b) as at the date of the notice, there was no ‘excluded information’ of the type referred to in sections 708A(7) and 708A(8) of the Corporations Act that was required to be set out in the notice under section 708A(6)(e) of the Corporations Act,
- (the **Institutional Placement Cleansing Notice Compliance Representation**).

## Particulars

- i) *The Institutional Placement Cleansing Notice Compliance Representation was express, made in writing, and contained within the Institutional Placement Cleansing Notice.*

### D.5 November 2016 Compliance Representations

63. On 4 November 2016 (3 November 2016 in the United States), Bloomberg ran a televised news segment which:

- (a) reported that:
  - (i) the US Department of Justice was preparing to lay criminal charges against generic drug makers by the end of the year;
  - (ii) Mayne USA was not cooperating with US Department of Justice investigation; and
- (b) linked Mayne USA to the criminal charges being brought by US Department of Justice by the year's end,

(the **Bloomberg Report**).

## Particulars

- i) *Bloomberg, 'U.S. Prosecutors Bear Down on Generic-Drug Companies' 3 November 2016, video, <https://www.bloomberg.com/news/articles/2016-11-03/u-s-charges-in-generic-drug-probe-said-to-be-filed-by-year-end>*

64. On 4 November 2016, Mayne published and lodged to the ASX an announcement entitled 'Update on Status of DOJ Investigation (**November 2016 Announcement**)'.

65. In the November 2016 Announcement, Mayne stated to the Affected Market that:

- (a) previously on 28 June 2016, Mayne disclosed that it was one of several generic companies to receive a subpoena from the Antitrust Division of the US Department of Justice seeking information relating to the marketing, pricing and sales of select generic products;
- (b) the investigation relating to Mayne is focused on doxycycline hyclate delayed-release tablets (generic) and potassium chloride powders;

- (c) contrary to an inaccurate statement made in the US press overnight, Mayne has previously stated that it is cooperating with the US Department of Justice in its investigation and continues to do so; and
- (d) Mayne continues to believe these investigations will not have a material impact on its future earnings.

**Particulars**

- i) *November 2016 Announcement, p 1.*

66. By the matters pleaded in paragraph 65 above, Mayne repeated to the Affected Market the June 2016 Compliance Representations, and represented that they remained true notwithstanding that the United States Department of Justice was investigating Mayne in relation to Doxy DR and potassium chloride powders (the **November 2016 Compliance Representation**).

**Particulars**

- i) *The November 2016 Compliance Representation was partly express and partly implied:*
  - A) *insofar as it was express, it was made in writing and contained within the November 2016 Announcement at p 1; and*
  - B) *insofar as it was implied, it was to be implied from the express statements in particular A) above.*

**D.6 Continuing nature of the representations**

67. Mayne did not at any time prior to 16 December 2016 make any statement which corrected, qualified or contradicted:

- (a) the Code of Conduct Compliance Representation;
- (b) the June 2016 Compliance Representation (save for its repetition, as modified, by the November 2016 Compliance Representation);
- (c) the Further June 2016 Representation;
- (d) the Entitlement Offer Cleansing Notice Compliance Representation;
- (e) the Institutional Placement Cleansing Notice Compliance Representation; and, or alternatively,
- (f) the November 2016 Compliance Representation.

68. The:



- (a) Code of Conduct Compliance Representation;
- (b) June 2016 Compliance Representation;
- (c) Further June 2016 Representation;
- (d) Entitlement Offer Cleansing Notice Compliance Representation;
- (e) Institutional Placement Cleansing Notice Compliance Representation; and, or alternatively,
- (f) November 2016 Compliance Representation,

were continuing representations throughout the Relevant Period.

### **Particulars**

- i) *The Code of Conduct Compliance Representation, June 2016 Compliance Representation, Further June 2016 Representation, Entitlement Offer Cleansing Notice Compliance Representation, Institutional Placement Cleansing Notice Compliance Representation, and November 2016 Compliance Representation, were of their nature likely to be continuing unless and until information was published to the Affected Market information which corrected or qualified them.*
- ii) *Paragraph 67 is repeated.*

## **D.7 Mayne's liability for misleading or deceptive conduct**

### ***D.7.1 24 November 2014 Misleading or Deceptive Conduct Contraventions***

69. By reason of:

- (a) the Heritage Anti-competitive Information;
- (b) the Investigation Information; and, or alternatively
- (c) the matters pleaded in paragraphs 44 to 46,

on and from at least 24 November 2014, in making the Code of Conduct Compliance Representation, Mayne engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.

70. Further or alternatively, by reason of:

- (a) the Heritage Anti-competitive Information; and, or alternatively,
- (b) the Likely Prosecution Risk Information,

on and from at least 24 November 2014, in maintaining and/or failing to correct or qualify the Code of Conduct Compliance Representation, Mayne engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.

71. The conduct pleaded in paragraphs 51 to 53, and 69 and/or 70 (including the making of the Code of Conduct Compliance Representation) was conduct engaged in by Mayne:

- (a) in relation to financial products (being Mayne Securities), within the meaning of subsections 1041H(1) and 1041H(2)(b) of the Corporations Act;
- (b) in trade or commerce, in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and/or
- (c) in trade or commerce within the meaning of section 18 of the ACL.

72. By reason of the matters pleaded in paragraphs 69 and 71, on and from at least 24 November 2014, Mayne contravened:

- (a) section 1041H of the Corporations Act;
- (b) section 12DA(1) of the ASIC Act; and/or
- (c) section 18 of the ACL,

(each being a **November 2014 Misleading Representation Contravention**).

73. By reason of the matters pleaded in paragraphs 70 and 71 and 72, on and from at least 24 November 2014, Mayne contravened:

- (a) section 1041H of the Corporations Act;
- (b) section 12DA(1) of the ASIC Act; and/or
- (c) section 18 of the ACL,

(each being a **November 2014 Misleading Silence Contravention**).

#### ***D.7.2 28 June 2016 Misleading or Deceptive Conduct Contraventions***

74. By reason of:

- (a) the Heritage Anti-competitive Information;

(b) the Investigation Information; and, or alternatively,

(c) the matters pleaded in paragraphs 44 to 46,

on and from 28 June 2016, in making the:

(d) June 2016 Compliance Representation; and, or alternatively,

(e) Further June 2016 Representation,

Mayne engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.

75. Further or alternatively, by reason of:

(a) the Heritage Anti-competitive Information;

(b) the Investigation Information; and, or alternatively,

(c) the matters pleaded in paragraphs 44 to 46,

on and from 28 June 2016, in maintaining and/or failing to correct or qualify:

(d) the Code of Conduct Compliance Representation; and, or alternatively,

(e) the June 2016 Compliance Representation and, or alternatively

(f) the Further June 2016 Representation,

Mayne engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.

76. The conduct pleaded in paragraphs 51 to 53, 54 to 57, and 74 and/or 75 (including the making of the Code of Conduct Compliance Representation, the June 2016 Compliance Representation and the Further June 2016 Representation) was conduct engaged in by Mayne:

(a) in relation to financial products (being Mayne Securities), within the meaning of subsections 1041H(1) and 1041H(2)(b) of the Corporations Act;

(b) in trade or commerce, in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and/or

(c) in trade or commerce within the meaning of section 18 of the ACL.

77. By reason of the matters pleaded in paragraphs 74 and 76, on and from 28 June 2016, Mayne contravened:

(a) section 1041H of the Corporations Act;

(b) section 12DA(1) of the ASIC Act; and/or

(c) section 18 of the ACL,

(each being a **June 2016 Misleading Representation Contravention**).

78. By reason of the matters pleaded in paragraphs 75 and 76, on and from 28 June 2016, Mayne contravened:

(a) section 1041H of the Corporations Act;

(b) section 12DA(1) of the ASIC Act; and/or

(c) section 18 of the ACL,

(each being a **June 2016 Misleading Silence Contravention**).

#### ***D.7.3 28 June 2016 - Defective Entitlement Offer Cleansing Notice***

79. Further or alternatively, by reason of the fact that the Entitlement Offer Cleansing Notice did not contain:

(a) the Heritage Anti-competitive Information;

(b) the Investigation Information and, or alternatively,

(c) the matters pleaded in paragraphs 44 to 46,

the Entitlement Offer Cleansing Notice:

(d) was false or misleading in a material particular; and/or

(e) had omitted from it a matter or thing, the omission of which rendered the notice misleading in a material respect.

80. By reason of the matters set out in paragraph 79 above, the Entitlement Offer Cleansing Notice was defective within the meaning of s 708AA(11) of the Corporations Act.

81. Mayne did not at any time within 12 months after the securities were issued under the Entitlement Offer give the ASX a notice under s 708AA(10)(c) that set out the information necessary to correct the defects pleaded in paragraph 80.

82. Further or alternatively, the conduct of Mayne in making and failing to correct or qualify the Entitlement Offer Cleansing Notice Compliance Representation was:

- (a) in relation to financial products (being Mayne Securities), within the meaning of subsections 1041H(1) and 1041H(2)(b) of the Corporations Act;
- (b) in trade or commerce, in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and/or
- (c) in trade or commerce within the meaning of section 18 of the ACL.

83. By reason of the Continuous Disclosure Contraventions (or any of them) so far as they had commenced and not ceased by 28 June 2016, and the matters set out in paragraphs 79 to 81 and 82, by making and/or failing to correct the Entitlement Offer Cleansing Notice Compliance Representation, on and from at least 28 June 2016, Mayne contravened:

- (a) section 1041H of the Corporations Act;
- (b) section 12DA(1) of the ASIC Act; and/or
- (c) section 18 of the ACL,

(each being an **Entitlement Offer Misleading Conduct Contravention**).

#### ***D.7.4 7 July 2016 - Defective Institutional Placement Cleansing Notice***

84. Further or alternatively, by reason of the fact that the Institutional Placement Cleansing Notice did not contain:

- (a) the Heritage Anti-competitive Information;
- (b) the Investigation Information and, or alternatively,
- (c) the matters pleaded in paragraphs 44 to 46,

the Institutional Placement Cleansing Notice:

- (d) was false or misleading in a material particular; and/or
- (e) had omitted from it a matter or thing, the omission of which rendered the notice misleading in a material respect.

85. By reason of the matters set out in paragraph 84 above, the Institutional Placement Cleansing Notice was defective within the meaning of s 708A(10) of the Corporations Act.

86. Mayne did not, at any time within 12 months after the securities were issued under the Institutional Placement give the ASX a notice under s 708A(9)(c) that set out the information necessary to correct the defects referred to in paragraph 85.

87. Further or alternatively, the conduct of Mayne in making and failing to correct or qualify the Institutional Cleansing Notice Compliance Representation was:
- (a) in relation to financial products (being Mayne Securities), within the meaning of subsections 1041H(1) and 1041H(2)(b) of the Corporations Act;
  - (b) in trade or commerce, in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and/or
  - (c) in trade or commerce within the meaning of section 18 of the ACL.
88. By reason of the Continuous Disclosure Contraventions (or any of them) so far as they had commenced and not ceased by 28 June 2016, and the matters set out in paragraphs 84 to 86 and 87, by making and/or failing to correct the Institutional Placement Cleansing Notice Compliance Representation, on and from at least 28 June 2016, Mayne contravened:
- (a) section 1041H of the Corporations Act;
  - (b) section 12DA(1) of the ASIC Act; and/or
  - (c) section 18 of the ACL,
- (each being an **Institutional Placement Misleading Conduct Contravention**).

***D.7.5 4 November 2016 Misleading or Deceptive Conduct Contraventions***

89. By reason of:
- (a) the Heritage Anti-competitive Information;
  - (b) the Investigation Information; and, or alternatively,
  - (c) the matters pleaded in paragraphs 44 to 46,
- on and from at least 4 November 2016, in making the November 2016 Compliance Representation, Mayne engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.
90. Further or alternatively, by reason of:
- (a) the Heritage Anti-competitive Information;
  - (b) the Investigation Information; and, or alternatively,
  - (c) the matters pleaded in paragraphs 44 to 46,

on and from at least 4 November 2016, in maintaining and/or failing to correct or qualify:

- (d) the Code of Conduct Compliance Representation;
- (e) the June 2016 Compliance Representation;
- (f) the Further June 2016 Representation and, or alternatively,
- (g) the November 2016 Compliance Representation,

Mayne engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.

91. The conduct pleaded in paragraphs 51 to 53, 54 to 57, 63 to 66, 89 and/or 90 (including the making of the Code of Conduct Compliance Representation, the June 2016 Compliance Representation, the Further June 2016 Representation and the November 2016 Compliance Representation) was conduct engaged in by Mayne:

- (a) in relation to financial products (being Mayne Securities), within the meaning of subsections 1041H(1) and 1041H(2)(b) of the Corporations Act;
- (b) in trade or commerce, in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and/or
- (c) in trade or commerce within the meaning of section 18 of the ACL.

92. By reason of the matters pleaded in paragraphs 89 and 91, on and from 4 November 2016, Mayne contravened:

- (a) s 1041H of the Corporations Act;
- (b) s 12DA(1) of the ASIC Act; and/or
- (c) section 18 of the ACL,

(each being a **November 2016 Misleading Representation Contravention**).

93. By reason of the matters pleaded in paragraphs 90 and 91, on and from 4 November 2016, Mayne contravened:

- (a) s 1041H of the Corporations Act;
- (b) s 12DA(1) of the ASIC Act; and/or
- (c) section 18 of the ACL,

(each being a **November 2016 Misleading Silence Contravention**).

## **E THE CORRECTIVE DISCLOSURES AND THEIR IMPACT**

### **E.1 June 2016 Disclosures**

94. Following the disclosure of the matters pleaded in paragraph 55 above (the **June 2016 Disclosures**), the price of Mayne Securities did not increase by as much as the price of Mayne Securities would have increased if the June 2016 Disclosures had not been made (and would have resulted in a decline in the price of Mayne Securities were it not for other information contained in the June 2016 Disclosures).

#### **Particulars**

- i) On 30 June 2016, being the first day of trading following the date of the release of the June 2016 Disclosures, the price of Mayne Shares increased from \$1.401 at close of trade on 27 June 2016 to \$1.905 at close of trade on 30 June 2016.*
- ii) The price of Mayne ADRs rose in a manner correlating to the rise in the price of Mayne Shares.*
- iii) The other information contained in the June 2016 Disclosures was the information pleaded in paragraphs 58 and 59, and information relating thereto.*

### **E.2 November 2016 Disclosures**

95. Following the disclosure of the matters pleaded in paragraph 65 above, the **November 2016 Disclosures**), the price of Mayne Securities declined substantially.

#### **Particulars**

- i) On 4 November 2016, the price of Mayne Shares fell \$0.265, from \$1.705 to \$1.440.*
- ii) The price of Mayne ADRs fell in a manner correlating to the falls in the price of Mayne Shares.*

### **E.3 December 2016 Disclosures**

96. On 15 December 2016 US time (and prior to the opening of the ASX on 16 December 2016):



- (a) the Attorney General of the State of Connecticut released an announcement entitled ‘Connecticut Leads 20 State Coalition Filing Federal Antitrust Lawsuit against Heritage Pharmaceuticals, other Generic Drug Companies’ (**AG Announcement**);
- (b) the Attorney General of the State of Connecticut and 19 other state attorneys general filed a complaint against Mayne USA, and others, in the United States District Court for the District of Connecticut, civil action 17-3768 (**Original Complaint**).

### **Particulars**

- i) *<https://portal.ct.gov/AG/Press-Releases-Archived/2016-Press-Releases/Connecticut-Leads-20-State-Coalition-Filing-Federal-Antitrust-Lawsuit-against-Heritage-Pharmaceutical>*

97. In the AG Announcement, the Attorney General of the State of Connecticut stated that:

- (a) 20 State attorneys general had filed a federal lawsuit against generic drug-makers Mayne USA, Heritage and others alleging that they entered into illegal conspiracies in order to unreasonably restrain trade, artificially inflate and manipulate prices and reduce competition in the United States for two drugs, including Doxy DR;
- (b) the lawsuit was filed under seal in the US District Court for the District of Connecticut;
- (c) the office of the Attorney General of the State of Connecticut:
  - (i) had dedicated significant resources to this investigation for more than two years and has developed compelling evidence of collusion and anticompetitive conduct across many companies that manufacture and market generic drugs in the United States;
  - (ii) had evidence of widespread participation in illegal conspiracies across the generic drug industry;
  - (iii) intended to pursue this and other enforcement actions aggressively, and looked forward to working with colleagues across the country to restore competition and integrity to this important market.
- (d) In July 2014, the State of Connecticut initiated an investigation of the reasons behind suspicious price increases of certain generic pharmaceuticals;

- (e) the investigation, is still ongoing as to a number of additional generic drugs, and had uncovered evidence of a well-coordinated and long-running conspiracy to fix prices and allocate markets for Doxy DR and glyburide;
- (f) in the Original Complaint, the States allege that:
  - (i) the misconduct was conceived and carried out by senior drug company executives and their subordinate marketing and sales executives;
  - (ii) the defendants routinely coordinated their schemes through direct interaction with their competitors at industry trade shows, customer conferences and other events, as well as through direct email, phone and text message communications;
  - (iii) the anticompetitive conduct – including efforts to fix and maintain prices, allocate markets and otherwise thwart competition – caused significant, harmful and continuing effects in the country’s healthcare system;
  - (iv) the drug companies knew that their conduct was illegal and made efforts to avoid communicating with each other in writing or, in some instances, to delete written communications after becoming aware of the investigation;
  - (v) the companies’ conduct violated the federal Sherman Act;
- (g) in the Original Complaint, the States are asking the court to enjoin the companies from engaging in illegal, anticompetitive behaviour and for equitable relief, including substantial financial relief, to address the violations of law and restore competition.

98. The Original Complaint alleged the matters pleaded in paragraphs 97(f) and (g) above.

99. On 16 December 2016, Mayne published and lodged to the ASX an announcement entitled ‘Update on Status of DOJ Investigation’ (**December 2016 Announcement**).

100. In the December 2016 Announcement, Mayne stated to the Affected Market that:

- (a) Mayne previously disclosed that it was one of several generic companies to receive a subpoena from the Antitrust Division of the US Department of Justice seeking information relating to the marketing, pricing and sales of select generic products;
- (b) the investigation relating to Mayne is focused on doxycycline hyclate delayed-release tablets (generic) and potassium chloride powders;

- (c) on 15 December 2016, multiple US States commenced legal proceedings in the United States District Court of Connecticut against a number of US generic companies including Mayne;
- (d) the US States allege that Mayne had engaged in conduct in the Doxy DR Market with Heritage that was anti-competitive; and
- (e) after reviewing the complaint, the Mayne Board continues to believe the investigations and legal proceedings will not have a material impact on its future earnings.

#### **Particulars**

- i) December 2016 Announcement, p 1.*

101. Following the disclosure of:

- (a) the matters pleaded in paragraph 97 above;
- (b) the matters pleaded in paragraph 98 above; and
- (c) the matters pleaded in paragraph 100 above

(together and severally, the **December 2016 Disclosures**), the price of Mayne Securities declined substantially.

#### **Particulars**

- i) On 16 December 2016, the price of Mayne Shares fell \$0.124, from \$1.425 to \$1.30.*
- ii) On 19 December 2016, the price of Mayne Shares fell \$0.075, from \$1.130 to \$1.225.*
- iii) The price of Mayne ADRs fell in a manner correlating to the falls in the price of Mayne Shares.*

## **F CONTRAVENING CONDUCT CAUSED LOSS**

### **F.1 Market-based causation (on-market acquisitions)**

102. The Plaintiff and some Group Members acquired an interest in Mayne Shares in a market of investors or potential investors in Mayne Shares:

- (a) operated by the ASX;

- (b) regulated by, inter alia, ss 674(2) and 674(3) of the Corporations Act and ASX Listing Rule 3.1;
- (c) where the price or value of Mayne Shares would reasonably be expected to have been informed or affected by information disclosed in accordance with ss 674(2) and 674(3) of the Corporations Act and ASX Listing Rule 3.1;
- (d) where material information had not been disclosed, which a reasonable person would expect, had it been disclosed, would have had a material adverse effect on the price or value of Mayne Shares (namely the information the subject of:
  - (i) the Heritage Anti-competitive Information (or any of it); and, or alternatively,
  - (ii) the Investigation Information;
 (individually, and in any combination, the **Continuous Disclosure Contraventions**));
- (e) where misleading or deceptive conduct had occurred, namely:
  - (i) the November 2014 Misleading Representation Contraventions (or any of them);
  - (ii) the November 2014 Misleading Silence Contraventions (or any of them);
  - (iii) the June 2016 Misleading Representation Contraventions (or any of them);
  - (iv) the June 2016 Misleading Silence Contraventions (or any of them);
  - (v) the Entitlement Offer Misleading Conduct Contraventions (or any of them);
  - (vi) the Institutional Placement Misleading Conduct Contraventions (or any of them);
  - (vii) the November 2016 Misleading Representation Contraventions (or any of them); and/or
  - (viii) the November 2016 Misleading Silence Contraventions (or any of them),
 (individually, and in any combination, the **Misleading Conduct Contraventions**), that a reasonable person would expect to have a material effect on the price or value of Mayne Shares insofar as, if they had not been made, no investors or potential investors in Mayne Shares would have been in a position to read or rely upon them.

103. During the Relevant Period, the market for Mayne ADRs was a market that traded on the basis that the market for Mayne Shares had the features pleaded in paragraph 102 above.
104. During the Relevant Period each or a combination of the Continuous Disclosure Contraventions and/or the Misleading Conduct Contraventions (each being a **Market Contravention**) caused or materially contributed to the market price of Mayne Shares being greater than their true value and/or the market price that would have prevailed but for the Market Contraventions, from the respective dates that those Market Contraventions commenced, as pleaded in this General Indorsement.

### **Particulars**

- i) *The extent to which the Market Contraventions caused the market price for Mayne Securities to be greater than their true value and/or the market price that would otherwise have prevailed (that is, inflated) during the Relevant Period is a matter for evidence, particulars of which will be served immediately following the Plaintiff filing opinion evidence in the proceeding.*
105. The impacts on the price of Mayne Securities pleaded in paragraphs 94, 96 and/or 101 above:
- (a) was caused or materially contributed to by:
- (i) the market's reaction to the information respectively communicated to the Affected Market in the:
- (A) June 2016 Disclosures;
- (B) November 2016 Disclosures; and
- (C) December 2016 Disclosures,
- in the context of what had been communicated to the Affected Market prior to those announcements; and
- (ii) the Market Contraventions; and
- (b) would have occurred, or substantially occurred, earlier if:
- (i) Mayne had disclosed to the Affected Market the information that was the subject of Continuous Disclosure Contraventions; and/or
- (ii) Mayne had not engaged in the Misleading Conduct Contraventions.

### **Particulars**

- i) *The extent to which price impacts resulted in inflation in and/or the removal of inflation from the price of Mayne Securities, and the extent to which those impacts would have occurred at earlier points in time during the Relevant Period is a matter for evidence, particulars of which will be served immediately following the Plaintiff filing expert evidence.*

### **F.2 Market-based causation (capital raising acquisitions)**

106. On 30 June 2016, Mayne successfully completed:

- (a) the institutional component of the Entitlement Offer; and
- (b) the Institutional Placement.

### **Particulars**

- i) *Announcement published and lodged by Mayne to the ASX entitled 'Mayne Pharma Group Limited Announces Successful Completion of Institutional Entitlement Offer and Placement'.*

107. On 20 July 2016, Mayne successfully completed the retail component of the Entitlement Offer.

### **Particulars**

- i) *Announcement published and lodged by Mayne to the ASX entitled 'Mayne Pharma Group Limited Announces Successful Completion of Retail Entitlement Offer'.*

108. On 22 July 2016, Mayne issued:

- (a) 469,592,084 Mayne Shares at \$1.28 per share pursuant to the Entitlement Offer; and
- (b) 191,300,000 Mayne Shares at \$1.50 per share pursuant to the Placement;

### **Particulars**

- i) *Appendix 3B published and lodged by Mayne to the ASX on 22 July 2016.*

109. The Entitlement Offer and Placement:

- (a) were undertaken at an offer price of \$1.28 and \$1.50 per new Mayne Share respectively, being prices fixed by reference to the market price of Mayne Shares, which traded in a market with the features pleaded in paragraphs 102 and 104, and
- (b) were undertaken at a price which, by reason of the matters pleaded in sub-paragraph (a) would reasonably be expected to have been informed or affected by information disclosed in accordance with sections 674(2) of the Corporations Act and ASX Listing Rule 3.1 (and by s 708A of the Corporations Act in respect of share issues such as the Placement, and by s 708AA in respect of share issues such as the Entitlement Offer);
- (c) was set in circumstances where material information had not been disclosed, which a reasonable person would expect, had it been disclosed, would have had a material adverse effect on the price or value of Mayne Shares (namely the information the subject of the Continuous Disclosure Contraventions); and
- (d) was set in circumstances where the Misleading Conduct Contraventions had occurred, being conduct involving making, and failing to correct or qualify representations that a reasonable person would expect to have a material effect on the price or value of Mayne Shares, in that if they had not been made no investors or potential investors in Mayne Shares would have been in a position to read or rely upon them.

### **Particulars**

- i) *The extent to which the Market Contraventions caused the offer price for Mayne Shares under the Entitlement Offer and Placement to be substantially greater than their true value and/or the price that they would have been offered had they been set by reference to the market price that would otherwise have prevailed (that is, inflated) is a matter for evidence, particulars of which will be served immediately following the Plaintiff filing opinion evidence in the proceeding.*

110. Paragraph 105 is repeated.

### **F.3 Reliance**

111. Further, or in the alternative to paragraphs 102 to 104, and 109 to 110 above:

- (a) the Plaintiff and some Group Members would not have entered into the transactions pursuant to which they acquired an interest in Mayne Securities if they had known the information the subject of the Continuous Disclosure Contraventions; and/or

- (b) the Plaintiff and some Group Members relied on some or all of the Misleading Conduct Contraventions in entering into the transactions pursuant to which they acquired an interest in Mayne Securities.

**Particulars**

- i) *The Plaintiff would not have entered into the transactions pursuant to which he acquired an interest in Mayne Securities had he known the information the subject of the Continuous Disclosure Contraventions and, he relied upon the Misleading Conduct Contraventions.*
- ii) *The identities of all those Group Members which or who would not have entered into the transactions pursuant to which they acquired an interest in Mayne Securities, had they known of any or all of the information that was the subject of the Continuous Disclosure Contraventions and/or which or who relied on any or all of the Misleading Conduct Contraventions are not known within the current state of the Plaintiff's knowledge and cannot be ascertained unless and until those advising the Plaintiff take detailed instructions from all Group Members on individual issues relevant to the determination of those individual Group Members' claims; those instructions will be obtained (and particulars of the identity of those Group Members will be provided) following opt out, the determination of the Plaintiff's claim and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Group Members.*

**F.4 Loss or damage suffered by the Plaintiff and Group Members**

112. By reason of the matters pleaded in paragraphs 102 to 104, 109 to 110, and/or 111 above, the Plaintiff and Group Members have suffered loss and damage by and resulting from the Market Contraventions (or any one or combination of them).

**Particulars**

- i) *The loss suffered by the Plaintiff will be calculated by reference to:*



- A) *the difference between the price at which Mayne Shares were acquired by the Plaintiff during the Relevant Period and the true value of that interest; or*
  - B) *the difference between the price at which the Plaintiff acquired Mayne Shares and the market price that would have prevailed had the Market Contraventions not occurred; or*
  - C) *alternatively, the days during the Relevant Period where the traded price of Mayne Shares fell as a result of the disclosure information which had not previously been disclosed because of the Market Contraventions, and the quantum of that fall; or*
  - D) *alternatively, the days after the Relevant Period when the traded price of Mayne Shares fell as a result of the disclosure of information which had not previously been disclosed because of the Market Contraventions, and the quantum of that fall;*
  - E) *alternatively, the difference between the price at which Mayne Shares were acquired by the Plaintiff and the price left in hand.*
- ii) *Further particulars in relation to the Plaintiff's losses will be provided after the service of evidence in chief.*
- iii) *Particulars of the losses of Group Members are not known within the current state of the Plaintiff's knowledge and cannot be ascertained unless and until those advising the Plaintiff take detailed instructions from all Group Members on individual issues relevant to the determination of those individual Group Members' claims; those instructions will be obtained (and particulars of the losses of those Group Members will be provided) following opt out, the determination of the Plaintiff's claim and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Group Members.*

**G COMMON QUESTIONS OF LAW OR FACT**

113. When did the Defendant become aware (within the meaning of Listing Rule 19.12) of:

- (a) the Heritage Anti-competitive Information;
- (b) the Investigation Information?

114. Whether:

- (a) the Heritage Anti-competitive Information;
- (b) the Investigation Information,

was:

- (c) material information; and
- (d) not generally available,

within the meaning of ASX Listing Rule 3.1 or Chapter 6CA of the Corporations Act that the Defendant was obliged to disclose, but failed to disclose such that the Defendant contravened section 674(2) of the Corporations Act?

115. Whether the Defendant contravened section 1041H of the Corporations Act or section 12DA(1) of the ASIC Act or s 18 of the ACL by making, maintaining and/or failing to qualify:

- (a) the Code of Conduct Compliance Representation;
- (b) the June 2016 Compliance Representation;
- (c) the Further June 2016 Representation;
- (d) the Entitlement Offer Cleansing Notice Compliance Representation;
- (e) the Institutional Placement Cleansing Notice Compliance Representation; and/or
- (f) the November 2016 Compliance Representation?

116. Whether the Market Contraventions had the effect that the price of acquisition for Mayne Shares was greater than their true value and/or the market price that would have prevailed but for the Market Contraventions and if so:

- (a) whether statutory compensation is recoverable by the Plaintiff and some or all of the Group Members?

- (b) the correct measure of the statutory compensation for which the Defendant may be liable to the Plaintiff and some or all of the Group Members?

117. Whether any, and if so what, relief other than monetary relief should be granted in favour of the Plaintiff and some or all of the Group Members?

**AND THE PLAINTIFF CLAIMS on their own behalf and on behalf of the Group Members:**

- A. A declaration that the Defendant contravened ASX Listing Rule 3.1 and section 674(2) of the Corporations Act by not informing the ASX immediately of some or all of:
  - (a) the Heritage Anti-competitive Information;
  - (b) the Investigation Information;
  - (c) any combination of two or more items of the information referred to in sub-paragraphs (a) to (b);
- B. An order pursuant to section 1317HA(1) of the Corporations Act that the Defendant pay compensation to the Plaintiff and Group Members for damage caused by its contraventions of section 674(2) of the Corporations Act.
- C. A declaration that the Defendant engaged in conduct in contravention of:
  - (a) section 1041H(1) of the Corporations Act;
  - (b) section 12DA(1) of the ASIC Act; and
  - (c) section 18 of the ACL.
- D. An order pursuant to:
  - (a) section 1041I of the Corporations Act that the Defendant pay compensation to the Plaintiff and Group Members for damage caused by the conduct of the Defendant in contravention of section 1041H of the Corporations Act.
  - (b) section 12GF of the ASIC Act that the Defendant pay compensation to the Plaintiff and Group Members for damage caused by the conduct of the Defendant in contravention of section 12DA(1) of the ASIC Act.
  - (c) section 236 of the ACL that the Defendant pay compensation to the Plaintiff and Group Members for damage caused by the conduct of the Defendant in contravention of section 18 of the ACL.

- E. Interest pursuant to statute.
- F. Costs.
- G. Such further order as the Court determines is appropriate.

Dated: 8 October 2021

W A D EDWARDS

D J FAHEY



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**Phi Finney McDonald Pty Ltd**

Solicitors for the Plaintiff