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File Title: COMPUMOD INVESTMENTS PTY LIMITED AS TRUSTEE FOR THE
COMPUMOD PTY LIMITED STAFF SUPERANNUATION FUND v
UNIVERSAL EQUIVALENT TECHNOLOGY LIMITED (FORMERLY
A.C.N. 603 323 182 LIMITED AND FORMERLY AXSESSTODAY
LIMITED & ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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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Form 33
Rule 16.32

Defence to Third Further Amended Statement of Claim

No. NSD917 of 2020

Federal Court of Australia
District Registry: New South Wales
Division: General

Compumod Investments Pty Limited as trustee for the Compumod Pty Limited Staff Superannuation Fund

Applicant

Universal Equivalent Technology Limited (formerly A.C.N. 603 323 182 Limited and formerly Axesstoday Limited)

First Respondent

PricewaterhouseCoopers Securities Limited

Second Respondent

Hardy (Underwriting Agencies) Limited, Managing Agent for and on behalf of Lloyd's Syndicate HDU 382

Third Respondent

Liberty Managing Agency Limited for and on behalf of Syndicate 4473

Fourth Respondent

Asta Managing Agency Ltd acting for and on behalf of Everest Syndicate 2786

Fifth Respondent

Arch Underwriting at Lloyd's Limited for and on behalf of Syndicate 2012

Sixth Respondent

To the Third Further Amended Statement of Claim dated 22 December 2023 (**TFASOC**):

A. Nature of the proceedings

Filed on behalf of (name & role of party) Third, Fourth, Fifth and Sixth Respondents
Prepared by (name of person/lawyer) Thomas Cavanagh & Nadica Mirceska
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1. In answer to paragraph 1 of the TFASOC, the Third to Sixth Respondents:
 - a. repeats the matters pleaded in paragraphs 3 to 91 of this Defence in relation to the alleged conduct of the First Respondent; and
 - b. otherwise do not know and therefore do not admit the balance of the paragraph.
2. The Third to Sixth Respondents do not know and therefore do not admit paragraph 2 of the TFASOC.

B. The Parties and other entities

3. In answer to paragraph 3 of the TFASOC, the Third to Sixth Respondents:
 - a. admit that the Applicant is a company incorporated pursuant the *Corporations Act 2001* (Cth) (**the Corporations Act**) and is capable of suing in its own corporate name and style; and
 - b. otherwise do not know and therefore do not admit the balance of the paragraph.
4. In answer to paragraph 4 of the TFASOC, the Third to Sixth Respondents:
 - a. admits that the First Respondent was, until 29 October 2023:
 - i. a company incorporated pursuant to the Corporations Act;
 - ii. a person for the purpose of section 1041H of the Corporations Act;
 - iii. a listed corporation and listed disclosing entity within the meaning of section 9 and section 111AL of the Corporations Act; and
 - iv. a disclosing entity within the meaning of section 111AO of the Corporations Act;

- b. admits that the First Respondent was deregistered on 29 October 2023 by ASIC.
 - c. says that prior to the appointment of administrators on 7 April 2019, the First Respondent was in the business of lending to small and medium enterprises primarily in the hospitality and transport sectors under the name Axsesstoday Limited (**AXL**).
5. The Third to Sixth Respondents admit paragraph 5 of the TFASOC.
6. The Third to Sixth Respondents admit paragraph 6 of the TFASOC.
7. In answer to paragraph 7 of the TFASOC, the Third to Sixth Respondents:
- a. admit that as at 28 June 2018, ACN 603 303 126 Pty (**ACN 603**) was:
 - i. a company incorporated pursuant to the Corporations Act; and
 - ii. a related entity of AXL;
 - b. admit that ACN 603 also became subject to the Deed of Company Arrangement dated 3 September 2019 (**DOCA**); and
 - c. otherwise do not know and therefore does not admit the balance of the paragraph.
8. In answer to paragraph 8 of the TFASOC, the Third to Sixth Respondents:
- a. admit that as at 28 June 2018, Axsesstoday Retail Pty Limited (**Retail**) was:
 - i. a company incorporated pursuant to the Corporations Act; and
 - ii. a related entity of AXL;

- b. admit that Retail also became subject to the DOCA on or about 3 September 2019; and
 - c. otherwise do not know and therefore do not admit the balance of the paragraph.
- 9. In answer to paragraph 9 of the TFASOC, the Third to Sixth Respondents:
 - a. admit that as at 28 June 2018, Axesstoday Operations Pty Ltd (**Operations**) was:
 - i. a company incorporated pursuant to the Corporations Act; and
 - ii. a related entity of AXL;
 - b. admit that Operations also became subject to the DOCA on or about 3 September 2019; and
 - c. otherwise do not know and cannot admit the balance of the paragraph.
- 10. The Third to Sixth Respondents do not know and therefore do not admit the allegations in paragraph 10 of the SFASOC.
- 11. In answer to paragraph 11 of the TFASOC, the Third to Sixth Respondents:
 - a. admit that as at 28 June 2018, AET Corporate Trust Pty Ltd was a company incorporated pursuant to the *Corporations Act*; and
 - b. otherwise do not know and cannot admit the balance of the paragraph.
- 12. In answer to paragraph 12 of the TFASOC, the Third to Sixth Respondents:
 - a. admit that PwCS:

- i. is, and was at 28 June 2018, a company incorporated pursuant to the Corporations Act and is capable of being sued;
 - ii. conducted business in Australia as accountants and accounting advisors under the names 'PricewaterhouseCoopers Securities' and 'PwCS';
- b. say that PwCS provided AXL services prior to and at the time it offered the Bonds;
- c. say that the Prospectus states that PwCS:
 - i. provided accounting services for the offer of the Bonds; and
 - ii. reviewed section 5.1 of the Base Prospectus;
- d. otherwise do not admit the balance of the paragraph.

12A In answer to paragraph 12A of the TFASOC, the Third to Sixth Respondents:

- a. admit that PricewaterhouseCoopers:
 - i. conducted business in Australia as tax advisors and auditors under the names 'PricewaterhouseCoopers' and 'PwC';
 - ii. was named in the Prospectus as auditor; and
- b. otherwise do not admit the balance of the paragraph.

12B The Third to Sixth Respondents admit paragraph 12B of the TFASOC.

C. AXL's Accounting Obligations

13. The Third to Sixth Respondents admit paragraph 13 of the TFASOC.

14. The Third to Sixth Respondents admit paragraph 14 of the TSFASOC.
15. The Third to Sixth Respondents admit paragraph 15 of the TFASOC.
16. The Third to Sixth Respondents admit paragraph 16 of the TFASOC.
17. The Third to Sixth Respondents admits paragraph 17 of the TFASOC.
18. The Third to Sixth Respondents admits paragraph 18 of the TFASOC.

D. The Syndicated Facilities Agreement

19. The Third to Sixth Respondents admit paragraph 19 of the TFASOC.
20. In answer to paragraph 20 of the TFASOC, the Third to Sixth Respondents:
 - a. admit that AXL was provided various facilities by the Syndicated Lenders;
 - b. otherwise do not admit the paragraph.
21. In answer to paragraph 21 of the TFASOC, the Third to Sixth Respondents:
 - a. admit that pursuant to the SFA, AXL covenanted to maintain an arrears ratio of 4% or less;
 - b. otherwise do not admit the paragraph.

E. The Offer

22. The Third to Sixth Respondents admit paragraph 22 of the TFASOC.
- 22A. The Third to Sixth Respondents admit paragraph 22A of the TFASOC.
23. The Third to Sixth Respondents admit paragraph 23 of the TFASOC.

24. The Third to Sixth Respondents do not know and therefore do not admit paragraph 24 of the TFASOC.
25. The Third to Sixth Respondents admit paragraph 25 of the TFASOC.
26. In answer to paragraph 26 of the TFASOC, the Third to Sixth Respondents:
- a. rely on the terms of the Offer Documents as if fully set out herein; and
 - b. otherwise do not admit the paragraph.
27. The Third to Sixth Respondents admit paragraph 27 of the TFASOC.
28. In answer to paragraph 28 of the TFASOC, the Third to Sixth Respondents:
- a. admit that it was a term of the Offer that:
 - i. the Bonds were interest paying, unsubordinated and unsecured debt obligations issued by AXL;
 - ii. each Bond was to be issued subject to the provisions of the Offer Specific Prospectus and the Replacement Offer Specific Prospectus;
 - iii. the term of the Bonds was 5 years with a maturity date of 20 July 2023 (**the Maturity Date**);
 - iv. the Face Value of the Bonds was \$100 per bond (**the Face Value**);
 - b. say that it was a term of the Offer that:
 - i. each Bond was to be issued subject to the provisions of a Trust Deed dated 26 June 2018 between AXL, the Guarantors and AET as trustee;

Particulars

Trust Deed for the Axesstoday Bonds Trust dated 28 June 2018

ii. the interest rate payable on the Bonds was the sum of the Market Rate and plus the Margin, where:

1. the Market Rate was the Base Rate;
2. the Base Rate was the rate which is designated as the mid-rate having a tenor closest to the Interest Period on the Thomson Reuters BBSW screen page at approximately 10.15am on the first day of the interest period; and
3. the Margin was expected to be in the range of 4.90% to 5.20% per annum but may be outside of that range;

iii. on the Maturity Date, unless the Bonds were redeemed early, Bond holders would receive:

1. the Face Value; and
2. the final payment of interest; and

c. otherwise rely on the terms of the Offer Documents as if fully set out herein.

29. The Third to Sixth Respondents admit paragraph 29 of the TFASOC.

30. The Third to Sixth Respondents do not know and therefore do not admit paragraph 30 of the TFASOC.

31. The Third to Sixth Respondents admit paragraph 31 of the TFASOC.

F. Representations made in the Prospectus

32. The Third to Sixth Respondents admit paragraph 32 of the TFASOC.
33. The Third to Sixth Respondents admit paragraph 33 of the TFASOC.
- 33A The Third to Sixth Respondents admit paragraph 33A of the TFASOC.
34. In answer to paragraph 34 of the TFASOC, the Third to Sixth Respondents:
- a. admit that the 2017 Pro Forma Balance Sheets contained the information set out in sub-paragraphs (a) and (b) for the Offer Specific Prospectus and Replacement Specific Prospectus respectively; and
 - b. otherwise rely on the terms of the 2017 Pro Forma Balance Sheets as if fully set out herein.
35. In answer to paragraph 35 of the TFASOC, the Third to Sixth Respondents:
- a. admit that section 3.4 at page 18 of the Offer Specific Prospectus recorded what were said to be the key financial ratios of AXL and its subsidiaries as alleged in sub-paragraph (a);
 - b. admit that section 3.4 at page 18 of the Replacement Specific Prospectus recorded what were said to be the key financial ratios of AXL and its subsidiaries as alleged in sub-paragraph (b); and
 - c. otherwise rely on the terms of the Offer Documents as if fully set out herein.
36. In answer to paragraph 36 of the TFASOC, the Third to Sixth Respondents:
- a. admit that section 3.8.1 of the Offer Specific Prospectus and Replacement Offer Specific Prospectus contains the following statement:

“Axsesstoday has not materially breached any loan covenant or debt obligations in the two years prior to the date of this Offer Specific Prospectus.”

b. otherwise rely on the terms of the Offer Documents as if fully set out herein.

37. The Third to Sixth Respondents deny paragraph 37 of the TFASOC.

38. In answer to paragraph 38 of the TFASOC, the Third to Sixth Respondents:

a. admit the section 4.4 on page 79 of the Base Prospectus contained the statement alleged in the paragraph; and

b. otherwise rely on the terms of the Offer Documents as if fully set out herein.

39. In answer to paragraph 39 of the TFASOC, the Third to Sixth Respondents:

a. admit that the Base Prospectus made no express reference to the fact that AASB 9 was to become compulsory from 1 July 2018;

b. say that the Offer Specific Prospectus and Replacement Offer Specific Prospectus referred to the fact that AASB 9 *"would apply from 1 July 2018"*;

Particulars

Offer Specific Prospectus Section 3.3.1 at page 16; and
Replacement Offer Specific Prospectus 3.3.1 at page 16.

c. otherwise repeat paragraphs 43 to 49 below in respect of Section G of the TFASOC.

40. In answer to paragraph 40 of the TFASOC, the Third to Sixth Respondents:

a. say Section 3.7 on page 22 of the Offer Specific Prospectus recorded that PwCS would be paid \$60,000 (excluding GST) for its accounting services for the Offer;

b. say Section 3.7 on page 22 of the Replacement Offer Specific Prospectus recorded that PwCS would be paid \$65,000 (excluding GST) for its accounting services for the Offer; and

c. otherwise admit the paragraph.

41. In answer to paragraph 41 of the TFASOC, the Third to Sixth Respondents :

a. say the accounting services provided by PwCS referred to in section 3.7 of the Offer Specific Prospectus and Replacement Offer Specific Prospectus included:

- i. participating as a member of and being a reporting person to the due diligence committee (**DDC**) that AXL established for the purposes of co-ordinating due diligence investigations in connection with the Offer Documents;
- ii. preparing materiality guidance for consideration by AXL and the DDC pursuant to *APES 350 Participation by Members in Public Practice in Due Diligence Committees in connection with a Public Document* issued by the Accounting Professional & Ethical Standards Board (**APES 350**) in relation to the Offer Documents;
- iii. conducting a review in accordance with the Standard on Assurance Engagements *ASAE 3450 Assurance Engagements involving Corporate Fundraisings and/or Prospective Financial Information of the Financial Information* and preparing an independent limited assurance report to AXL;
- iv. assisting AXL and the DDC in their verification of certain statements in the Offer Documents by performing procedures to be agreed with AXL and the DDC and confirmed in writing in accordance with Standard on Related Services *ASRS 4400 Agreed-Upon Procedures Engagements to Report Factual Findings (ASRS 4400)* and preparing a report of factual findings;
- v. considering and commenting on drafts of the Initial Offer Document in relation to matters relevant to the scope of work set out above;
- vi. reviewing:

1. the historical financial information of AXL in order to state whether, on the basis of the review conducted, anything came to the attention of PwCS that would cause PwCS to believe that the historical financial information was not presented fairly, in all material respects, in accordance with the stated basis of preparation including the recognition and measurement principles contained in Australian Accounting Standards and the Company's adopted accounting policies; and
2. the pro forma historical financial information of AXL in order to state whether, on the basis of the review conducted, anything has come to the attention of PwCS that would cause PwCS to believe that the pro forma historical financial information was not presented fairly, in all material respects, in accordance with the stated basis of preparation.

Particulars

Engagement Letter dated 6 June 2018 between PwCS and AXL

42. The Third to Sixth Respondents admit paragraph 42 of the TFASOC.

F1. Failure to identify breaches of the Arrears Ratio Covenant

42A. The Third to Sixth Respondents do not know and therefore do not admit paragraph 42A of the TFASOC.

42B. In answer to paragraph 42B of the TFASOC, the Third to Sixth Respondents:

a. repeat the matters set out in paragraph 42A above in relation to the Old Policy;
and

b. therefore do not know and do not admit the paragraph.

42C. In answer to paragraph 42C of the TFASOC, the Third to Sixth Respondents:

- a. repeat the matters set out in paragraph 42A above in relation to the Old Policy;
and
- b. therefore do not know and do not admit the paragraph.

42D. In answer to paragraph 42D of the TFASOC, the Third to Sixth Respondents:

- a. repeat the matters set out in paragraph 42A above in relation to the Old Policy
and paragraphs 50 to 53 below; and
- b. otherwise do not know and therefore do not admit the paragraph.

G. AASB 9 and its application to AXL's accounts

43. The Third to Sixth Respondents admit paragraph 43 of the TFASOC.

44. In answer to paragraph 44 of the TFASOC, the Third to Sixth Respondents:

- a. do not know and therefore do not admit the allegations in the paragraph; and
- b. otherwise rely on the terms of AASB 9 as if fully set out herein.

45. In answer to paragraph 45 of the TFASOC, the Third to Sixth Respondents:

- a. do not know and therefore do not admit the allegations in the paragraph; and
- b. otherwise rely on the terms of AASB 9 as if fully set out herein.

46. In answer to paragraph 46 of the TFASOC, the Third to Sixth Respondents:

- a. admit that the AXL Annual Report dated 27 August 2018 (**the 2018 Annual Report**) stated that the Group's provisions for impairment of receivables for the year ended 30 June 2018 were:

- i. Current – (\$1,247,206)
 - ii. Non-current – (\$2,648,775)
 - b. otherwise do not know and therefore do not admit the balance of the paragraph.
- 46A. The Third to Sixth Respondents do not know and therefore do not admit paragraph 46A of the TFASOC.
- 46B. The Third to Sixth Respondents do not know and therefore do not admit paragraph 46B of the TFASOC.
- 47. In answer to paragraph 47 of the TFASOC, the Third to Sixth Respondents:
 - a. admit that the Revised AXL Annual Report dated 27 August 2018 (**the 2018 Annual Report**) stated that the Group's provisions for impairment of receivables for the year ended 30 June 2018 were:
 - i. Current – (\$2,064,651) plus a further "other" provision of (\$882,000);
 - ii. Non-current – (\$2,993,330);
 - b. otherwise do not know and therefore do not admit the balance of the paragraph.
- 48. In answer to paragraph 48 of the TFASOC, the Third to Sixth Respondents:
 - a. say that on about 5 September 2018, AXL reported to its Syndicated Lenders that AXL's arrears ratio increased from 3.25% to 7.67% following adoption of AASB 9 and was greater than 4%;
 - b. otherwise do not know and therefore do not admit the balance of the paragraph.
- 49. The Third to Sixth Respondents do not know and therefore do not admit paragraph 49 of the TFASOC.

G1. AXL's and PwCS' knowledge in relation to AASB9

49A In answer to paragraph 49A of the TFASOC, Third to Sixth Respondents:

a. admit that the PwC Audit Committee Report for the financial year ending 30 June 2017 (**2017 Audit Report**) stated that:

- i. *AASB 9 "takes effect for Axsesstoday's 2019 financial year end and will revise the approach to provisioning for impairment of receivables" [page 5];*
- ii. *"The new standard will require a more detailed assessment of bad debt history and an actuarial type approach to the calculation of the provision" [page 5];*
- iii. *"The new standard requires the provision to cover both incurred and anticipated losses" [page 5];*
- iv. *"AASB 9 Financial Instruments will have the greatest impact on entities whose primary business is lending (i.e. banks, credit unions, leasing companies etc.)" [page 19];*
- v. *"New models and processes will have to be developed in order to determine loan loss provisions using a complex predictive loss model" [page 19];*
- vi. *"This new model could result in losses on loan defaults being recognised far earlier than they are under the current standard" [page 19];*
- vii. *"The new standard also requires far more disclosure about the credit deterioration of a lender's loan book, even if loan losses are not expected to eventuate" [page 19]; and*

b. otherwise do not know and therefore do not admit the balance of the paragraph.

49B In answer to paragraph 49B of the TFASOC, the Third to Sixth Respondents:

- a. admit that the PwC draft Half year Review Report to the AXL Board Audit Committee (**PwC Half year Review Report**) stated that:
 - i. “[AXL] management continue to monitor the provision against the growing arrears profile” [page 6];
 - ii. “Significant attention will be directed towards the completeness of the arrears balance for the purposes of the year end audit and we recommend that management strengthen the controls and policy surrounding what is included in arrears for the purposes of determining their year end provision.” [page 6];
 - i. “Guidance issued by ASIC will require your 30 June 2018 financial report to disclose how the change in standards are to impact your financial statements when applied” [page 7];
 - ii. “The change in the Financial Instruments standard is expected to have the greatest implication on Axesstoday considering the new impairment model requires the recognition of impairment provisions based on expected credit losses (ECL) rather than only incurred credit losses” [page 13];
 - iii. “The new standards would also introduce expanded disclosure requirements and changes in presentation” [page 13];
 - iv. “It is important to provide information around key assumptions and estimates in a way that helps users of the financial report understand the judgements made by management. These disclosures are important, as some of the information may be part of the key audit matter disclosures in the enhanced audit reports for listed entities. For Axesstoday Limited, disclosures about the provision for impairment of receivables will be relevant.” [page 15];

v. *“Notes to the financial statements should disclose the expected impact of new requirements for accounting for revenue, leases, and financial instruments.” [page 15]; and*

c. otherwise do not know and therefore do not admit the balance of the paragraph.

49C In answer to paragraph 49C of the TFASOC, the Third to Sixth Respondents:

a. admit that the PwC Audit Plan for AXL provided to AXL on 15 February 2018 stated that:

i. *“Guidance issued by ASIC will require your 30 June 2018 financial report to disclose how the change in AASB 9 and AASB 15 are to impact your financial statements when applied.” [page 13];*

ii. *“Assessing the adequacy of the provision against the amount in arrears.” [page 14];*

iii. *“A breach in covenants could result in the debt being called in...” [page 14];*

iv. *The following key dates have been agreed to with management.... Management to prepare an impact assessment for IFRS 9 and IFRS 15... 10 June 2018” [page 24];*

v. *“The new standard also introduces a new impairment model that will require impairment losses to be recognised using an expected rather than incurred credit loss model. This will impact how Axesstoday Limited currently accounts for receivables.” [page 28];*

vi. *“Preparers should provide required disclosure in the notes to financial statements prior to the effective date of the new standards regarding known or reasonably estimable information relevant to assessing the possible impact that adoption of the new standards will have on the issuer’s future financial statements.” [page 31]; and*

- b. otherwise do not know and therefore do not admit the balance of the paragraph.

49D In answer to paragraph 49D of the TFASOC, the Third to Sixth Respondents:

- a. admit that at page 26 of the PwC Audit Plan dated 28 May 2018 it states that PwC's "*One-off scope charges are made up of the following...Assessing impact of AASB 9 and AASB 15 for financial statement disclosure (\$15,000)...*"; and

- b. otherwise do not know and therefore do not admit the balance of the paragraph.

49E The Third to Sixth Respondents do not know and therefore do not admit paragraph 49E of the TFASOC.

H. The Initial Discovery of Covenant Breach

50. The Third to Sixth Respondents do not know and therefore do not admit paragraph 50 of the TFASOC.

51. The Third to Sixth Respondents admit paragraph 51 of the TFASOC.

52. In answer paragraph 52 of the TFASOC, the Third to Sixth Respondents:

- a. admit that on about 3 September 2018 Syndicated Lenders raised a query to AXL regarding its FY18 Annual Report; and

- b. otherwise do not know and therefore do not admit the balance of the paragraph.

53. In answer to paragraph 53 of the TFASOC, the Third to Sixth Respondents:

- a. say that on about 5 September 2018, AXL reported to its Syndicated Lenders that AXL's arrears ratio increased from 3.25% to 7.67% following adoption of AASB 9 and was greater than 4%; and

- b. otherwise do not know and therefore do not admit the balance of the paragraph.

54. The Third to Sixth Respondents do not know and therefore do not admit paragraph 54 of the SFASOC.
55. The Third to Sixth Respondents admit paragraph 55 of the TFASOC.
56. In answer to paragraph 56 of the TFASOC, the Third to Sixth Respondents:
- a. admit that on about 6 September 2018, AXL submitted a Compliance Certificate to the Syndicated Lenders which disclosed a breach of the financial covenant concerning its arrears ratio; and
 - b. otherwise do not know and therefore do not admit the balance of the paragraph.
57. In answer to paragraph 57 of the TFASOC, the Third to Sixth Respondents:
- a. say that on 12 September 2018 the Group placed a trading halt on the ASX in relation to its securities.

Particulars

ASX Market Announcement dated 12 September 2018

- a. otherwise deny the paragraph.
58. In answer to paragraph 58 of the TFASOC, the Third to Sixth Respondents:
- a. repeat the matters set out in paragraph 57 above; and
 - b. admit that on 12 September 2018 the Group placed a trading halt on the Bonds on the ASX.
59. The Third to Sixth Respondents admit paragraph 59 of the TFASOC.
60. The Third to Sixth Respondents do not know and therefore do not admit paragraph 60 of the TFASOC.

61. The Third to Sixth Respondents admit paragraph 61 of the TFASOC.
62. In answer to paragraph 62 of the TFASOC, the Third to Sixth Respondents:
- a. say that the reissued FY18 Annual Report (**the Reissued Report**) revised the profit after tax reported in the 2018 Annual Report from \$7,034,756 to \$3,045,908; and
 - b. otherwise deny the balance of the paragraph.

63. The Third to Sixth Respondents admit paragraph 63 of the TFASOC.

64. The Third to Sixth Respondents admit paragraph 64 of the TFASOC.

I. Prospectus Contraventions

65. The Third to Sixth Respondents admit paragraph 65 of the TFASOC.

66. In answer to paragraph 66 of the TFASOC, the Third to Sixth Respondents:
- a. repeat the matters pleaded in paragraphs 34 to 38, 42A to 42D, 43 to 49, 49A to 49E and 53 to 54 above;
 - b. state that the Offer Specific Prospectus and the Replacement Specific Prospectus did not disclose the various matters set out at paragraph 66(a)(i) to (viii);
 - c. do not know whether the matters set out in paragraph 66(a)(i) to (viii) are correct statements;
 - d. say that the Offer Specific Prospectus states that:
 - i. the Group had not materially breached any loan covenant or debt obligations in the past two years prior to 26 June 2018;

ii. that the total current assets of the Group were \$131,239,000 and the total current liabilities were \$7,747,000;

e. say that the Replacement Offer Specific Prospectus states that:

i. the Group had not materially breached any loan covenant or debt obligations in the past two years prior to 4 July 2018;

ii. that the total current assets of the Group were \$136,098,000 and the total current liabilities were \$7,747,000; and

f. otherwise do not know and therefore do not admit the balance of the paragraph.

67. In answer to paragraph 67 of the SFASOC, the Third to Sixth Respondents:

a. repeat the matters pleaded in paragraph 66 above; and

b. otherwise do not know and therefore do not admit the balance of the paragraph.

68. In answer to paragraph 68 of the TFASOC, the Third to Sixth Respondents:

a. repeat the matters pleaded in paragraph 66 above; and

b. otherwise do not know and therefore do not admit the balance of the paragraph.

69. In answer to paragraph 69 of the TFASOC, the Third to Sixth Respondents:

a. repeat the matters pleaded in paragraphs 34 to 38, 42A to 42D, 43 to 49, 53 to 54 and 66 above; and

b. otherwise do not know and therefore do not admit the balance of the paragraph.

70. In answer to paragraph 70 of the TFASOC, the Third to Sixth Respondents:

- a. repeat that matters pleaded in paragraphs 43 to 49 and 53 to 54 above;
- b. otherwise do not know and therefore do not admit the balance of the paragraph.

71. In answer to paragraph 71 of the TFASOC, the Third to Sixth Respondents:

- a. repeat the matters pleaded at paragraph 70 above; and
- b. otherwise do not know and therefore do not admit the balance of the paragraph.

J. AXL's Contraventions

72. The Third to Sixth Respondents admit paragraph 72 of the TFASOC.

73. In answer to paragraph 73 of the TFASOC, the Third to Sixth Respondents:

- a. repeat the matters pleaded at paragraph 66 above; and
- b. otherwise do not know and therefore do not admit the balance of the paragraph.

74. In answer to paragraph 74 of the TFASOC, the Third to Sixth Respondents:

- a. repeats the matters pleaded at paragraph 66 above; and
- b. otherwise does not know and therefore does not admit the balance of the paragraph.

75. In answer to paragraph 75 of the TFASOC, the Third to Sixth Respondents:

- a. repeat the matters pleaded at paragraph 66 above; and
- b. otherwise do not know and therefore do not admit the balance of the paragraph.

76. In answer to paragraph 76 of the TFASOC, the Third to Sixth Respondents:

- a. repeat the matters pleaded at paragraph 66 above; and
- b. otherwise do not know and therefore do not admit the balance of the paragraph.

77. In answer to paragraph 77 of the TFASOC, the Third to Sixth Respondents:

- a. repeat the matters pleaded at paragraphs 72 to 76 above;
- b. rely on the terms of section 728 of the Corporations Act; and
- c. otherwise do not know and therefore do not admit the balance of the paragraph.

78. In answer to paragraph 78 of the TFASOC, the Third to Sixth Respondents:

- a. repeat the matters pleaded at paragraph 77 above;
- b. rely on the terms of section 729(1) of the Corporations Act; and
- c. otherwise do not know and therefore do not admit the paragraph.

79. In answer to paragraph 79 of the TFASOC, the Third to Sixth Respondents:

- a. repeat the matters pleaded at paragraph 66 above; and
- b. otherwise do not know and therefore do not admit the paragraph.

J1. Underwriters' Liability

79A. In answer to paragraph 79A of the TFASOC, the Third to Sixth Respondents:

- a. say clause 2.5 (Securities Entity Cover) of the Policy provides:

“We agree to pay on behalf of the **policyholder** its **loss** on account of a **securities claim** first made against the **policyholder** during the **insurance period**”.

- b. says the “policyholder” in the Policy was AXL; and
- c. otherwise relies on the terms of the Policy as if fully set out herein.

79B. In answer to paragraph 79A of the TFASOC, the Third to Sixth Respondents:

- a. say clause 6.25 of the Policy provides the definition of “loss”;
- b. say clause 6.42 of the Policy provides the definition of “securities claim”;
- c. say clause 6.48 of the Policy provides the definition of “wrongful act”;
- d. admit clause 6.41 of the Policy provides the definition of “securities”;
- e. otherwise rely on the terms of the Policy as if fully set out therein.

79C. In answer to paragraph 79C of the TFASOC, the Third to Sixth Respondents:

- a. admit that the Policy responds to this Proceeding subject to the terms and conditions of the Policy, including the 17/18 Entities Limits and known facts and circumstances.

79D. In answer to paragraph 79D of the TFASOC, the Third to Sixth Respondents:

- a. repeat the matters pleaded at paragraph 79C above.

79E. The Third to Sixth Respondents admit paragraph 79E of the TFASOC.

K. PwCS's Liability

80. In answer to paragraph 80 of the TFASOC, the Third to Sixth Respondents:
- a. repeat the matters pleaded at paragraph 41 above; and
 - b. otherwise do not know and therefore do not admit the paragraph.
81. In answer to paragraph 81 of the TFASOC, the Third to Sixth Respondents:
- a. repeat the matters pleaded at paragraph 41 above; and
 - b. otherwise do not know and therefore do not admit the paragraph.
82. In answer to paragraph 82 of the TFASOC, the Third to Sixth Respondents:
- a. repeat the matters pleaded at paragraph 42B above; and
 - b. otherwise do not know and therefore do not admit the paragraph.
83. [not used]
84. The Third to Sixth Respondents do not plead to paragraph 84 of the TFASOC as it makes no allegation against them or AXL.
- 84A. The Third to Sixth Respondents do not plead to paragraph 84A of the TFASOC as it makes no allegation against them or AXL.
- 84B. The Third to Sixth Respondents does not plead to paragraph 84B of the TFASOC as it makes no allegation against them or AXL .
- 84C. The Third to Sixth Respondents do not plead to paragraph 84C of the TFASOC as it makes no allegation against them or AXL .

84D The Third to Sixth Respondents do not plead to paragraph 84D of the TFASOC as it makes no allegation against them or AXL .

84E The Third to Sixth Respondents do not plead to paragraph 84E of the TFASOC as it makes no allegation against them or AXL .

84F The Third to Sixth Respondents do not plead to paragraph 84F of the TFASOC as it makes no allegation against them or AXL .

84G The Third to Sixth Respondents do not plead to paragraph 84G of the TFASOC as it makes no allegation against them or AXL .

84H The Third to Sixth Respondents do not plead to paragraph 84H of the TFASOC as it makes no allegation against them or AXL .

84I The Third to Sixth Respondents do not plead to paragraph 84I of the TFASOC as it makes no allegation against them or AXL .

84J The Third to Sixth Respondents do not plead to paragraph 84J of the TFASOC as it makes no allegation against them or AXL .

L. Loss

85. The Third to Sixth Respondents do not know and therefore do not admit paragraph 85 of the TFASOC.

86. In answer to paragraph 86 of the TFASOC, the Third to Sixth Respondents:

a. repeat the matters pleaded at paragraphs 32 to 36, 43 to 49 and 53 to 54 above;
and

b. do not know and therefore do not admit the balance of the paragraph.

87. [not used]

88. In answer to paragraph 88 of the TFASOC, the Third to Sixth Respondents:
- a. repeat the matters pleaded at paragraphs 42C, 42D, 43 to 49 and 53 to 54 above; and
 - b. do not know and therefore do not admit the balance of the paragraph.
- 88A. The Third to Sixth Respondents do not know and therefore do not admit paragraph 88A of the TFASOC.
- 88B. In answer to paragraph 88B of the TFASOC, the Third to Sixth Respondents:
- a. repeat the matters pleaded at paragraphs 72 to 79 above; and
 - b. do not know and therefore do not admit the balance of the paragraph.
- 88C. The Third to Sixth Respondents do not plead to paragraph 88C of the TFASOC as it makes no allegation against them or AXL.
89. The Third to Sixth Respondents do not know and therefore do not admit paragraph 89 of the TFASOC.
90. In answer to paragraph 90 of the TFASOC, Third to Sixth Respondents:
- a. say that any entitlement of the Applicant and the Group Members (which is not admitted) to recover from Underwriters (standing in the place of AXL) is limited to the relevant limit of indemnity in the Policy of \$2,000,000 less:
 - i. amounts already paid out under the Policy for previously indemnified claims made by AXL;
 - ii. amounts incurred and paid to or on behalf of AXL as **defence costs** for this Proceeding;

iii. amounts incurred by the Third to Sixth Respondents in defending this Proceeding in accordance with section 4(3) of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW).

b. otherwise do not know and therefore do not admit paragraph 90 of the TFASOC.

91. The Third to Sixth Respondents do not plead to paragraph 91 of the TFASOC as it makes no allegation against them or AXL.

Further, and in the alternative:

92. On or about 7 April 2019 Messrs Strawbridge, Kanevsky and Algeri were appointed as administrators of the AXL Entities (**Administrators**), including the First Respondent, pursuant to Part 5.3A of the Corporations Act.

93. At meetings held on 30 August 2019 and convened pursuant to section 439A of the Corporations Act, the creditors of each of the AXL Entities, including the First Respondent, resolved that the AXL Entities execute a deed of company arrangement proposed by Promontoria Holding 304 BV as deed proponent (**Deed Proponent**) under section 444B(2)(b) of the Corporations Act.

Particulars

Minutes of Meeting of Members, Creditors, Contributories or Committee of Inspection under s436E or s439A – ASIC Document No. 7EAP06906

94. On or about 3 September 2019, the Administrators as deed administrators, the AXL Entities including the First Respondent, and the Deed Proponent executed a Deed of Company Arrangement to give effect to the 30 August 2019 resolutions (**DOCA**).

95. By its operation, the DOCA binds all Creditors of the First Respondent in accordance with section 444D of the Corporations Act and also bound the First Respondent, its officers and members in accordance with section 444G of the *Corporations Act*.

Particulars

- (a) Clause 1.1 of the DOCA
- (b) Clause 4.1 of the DOCA

96. Clause 1.1 of the DOCA contains the following relevant definitions:

- a. The Appointment Date is 7 April 2019.
- b. Completion was defined to mean completion of the steps set out in cl 6.2 of the DOCA.
- c. Claim is defined to mean, inter alia:

“...a debt owing by, or a claim against, an AXL Entity (whether present or future, certain or contingent, ascertained or sounding only in damages), irrespective of whether the debt or claim arose by virtue of contract, at law (including by statute), in equity or otherwise, being a debt or claim any of the circumstances giving rise to which occurred on or before the Appointment Date and which would be admissible to proof (or would be admissible to proof but for the operation of section 553B of the Act) against the AXL Entity had that entity been wound up and the winding up was taken to have commenced on the Appointment Date, including:

(a) any Claim of a Simple Corporate Bondholder;

...

but does not include an Excluded Claim.”

- d. Creditor is defined to mean

“any person who would have been entitled to prove (or would have been entitled to prove but for the operation of section 553B of the Act) in a winding up of an AXL Entity, if the AXL Entities had been wound up and the winding up was taken to have commenced on the Appointment Date.”

- e. Creditor Indemnity has the meaning given to it in cl 12.1(d)(i) of the DOCA.
- f. Excluded Claim is defined to mean, inter alia, “...*any Insured Claim*”.
- g. Excluded Creditor is defined to mean, inter alia, a Creditor with an Excluded Claim to the extent of the Excluded Claim.
- h. Insured Claim is defined to mean:

“...a Claim which a Creditor has against an AXL Entity, which would have been entitled to priority in a liquidation of the AXL Entity under section 562 of the Act, where:

(a) that AXL Entity is insured against the Claim under a contract of insurance (not being a contract of reinsurance) entered into before the Appointment Date; and

(b) an amount in respect of that Claim would be payable by the insurer to the AXL Entity under the contract of insurance, but only to the extent of such part of the Claim as would be discharged by the payment from the insurer and provided that the Creditor complies with the requirements of clause 12 in relation to such a Claim.”

- i. Simple Corporate Bondholder is defined to mean:

“means each holder of the Simple Corporate Bonds as at the Appointment Date.”

- j. Simple Corporate Bonds is defined to mean:

“...the Bonds issued pursuant to the Trust Deed dated 26 June 2018 between AET Corporate Trust Pty Limited (now known as Sargon CT Pty Ltd) ACN 106 424 088 and the AXL Entities.”

k. Trust Creditor is defined to mean Creditors other than, inter alia, Excluded Creditors.

97. It was a term of the DOCA that each Creditor who is not a Trust Creditor agreed that on the occurrence of Completion, its Claims (other than any Excluded Claim) were fully extinguished and released in respect of each AXL Entity.

Particulars

Clause 11.1 of the DOCA.

98. It was a term of the DOCA that any uninsured component of an Insured Claim is extinguished and released on the Completion Date and Creditors with Insured Claims are not entitled to participate in or receive any distribution from, and will not prove to recover any Insured Claim for the purpose of, or in relation to, the Trust Fund, in respect of an Insured Claim.

Particulars

Clause 11.3 of the DOCA.

99. On or about 14 August 2020 the Completion of the DOCA was achieved. Vaughan Strawbridge, an administrator of AXL, by notice in the form of Schedule 2 of the DOCA and dated 14 August 2020 certified that the DOCA had been wholly effectuated in respect of AXL (**Certificate of Effectuation**).

Particulars

The Certificate of Effectuation is signed by Vaughan Strawbridge an administrator of AXL and dated 14 August 2020.

Notice that Deed wholly effectuated was lodged with ASIC on 25 August 2020 – ASIC Document No. 7EAZ79867.

100. It was a term of the DOCA that the signing of the Certificate of Effectuation in respect of AXL terminates, in respect of AXL, this DOCA and all Claims of Creditors of AXL will be extinguished, discharged and released if not extinguished or released earlier under the DOCA.

Particulars

Clause 21.4(b) of the DOCA

101. It was a term of the DOCA that if insurance is held by or on behalf of any AXL Entity in respect of an Insured Claim:
- a. the Creditor may, in relation to its Insured Claim and notwithstanding that Completion has occurred, take action to recover the amount due in respect of the Insured Claim against the AXL Entity, but such action must not exceed what is necessary to obtain payment from the insurer;
 - b. to the extent that the Creditor is able, by settlement, arbitral award or judgment, to obtain payment from the insurer on account of the Insured Claim, the Creditor may retain that amount in full satisfaction of its Claim;
 - c. the AXL Entity is not required to provide assistance to a Creditor in relation to any Insured Claim under this clause or take any action in response to enforcement action taken by a Creditor in accordance with this clause; and
 - d. where a Creditor intends to take action in relation to a Claim under this clause:
 - i. the Creditor must, prior to taking any action in relation to the Claim, provide the AXL Entity with an indemnity in the form of Schedule 5 of the DOCA prior to, or during, any action in relation to the Claim;
 - ii. if requested by the AXL Entity, provide the AXL Entity with evidence, to the reasonable satisfaction of the AXL Entity, that the Creditor will be (and will continue to be) in a financial position, or have access to sufficient funds, to enable it to satisfy the Creditor Indemnity; and
 - iii. the AXL Entity (and its insurers standing in the place of an AXL Entity) may plead this Deed as a bar to any action taken by a Creditor in relation to the Claim in circumstances where the Creditor has not, prior to commencing that action, given the Creditor Indemnity to the AXL Company.

Particulars

CI 12.1 of the DOCA

102. It was a term of the DOCA that to the extent that the Creditor is unable to seek or obtain payment on account of its Insured Claim from the insurer (including by reason of any excess or deductible applicable to the insurance policy, or failure by the relevant AXL Entity to take any action) the DOCA operates as a complete release and bar to that part of the Creditor's Insured Claim which has not been met by the insurer.

Particulars

CI 12.2 of the DOCA.

Limitation of Applicant's Claim

103. On or about November 2017 DUAL Australia Pty Limited on behalf of certain the Third to Sixth Respondents issued a DUAL Evolution Insurance Policy to the First Respondent as policyholder for a period commencing on 25 November 2017, which was amended from time to time thereafter by endorsement (**17/18 Policy**).
104. It was a term of the 17/18 policy that the Third to Sixth Respondents agreed to pay on behalf of the policyholder its **loss** on account of a **securities claim** first made against the policyholder during the **insurance period**.

Particulars

CI 2.5 of the 17/18 Policy.

105. For the purposes of the operation of cl 2.5 of the 17/18 Policy:
- a. 'loss' was defined in cl 6.25(a) and (b) to mean the total amount which an insured becomes legally obliged to pay on account of a claim, and included, but was not limited to, damages, judgments, settlements, and adverse costs orders and defence costs.
 - b. 'securities claim' was defined in cl 6.42(b) to mean, inter alia, a civil proceeding commenced by the service of a writ, complaint, summons, statement of claim, or

similar originating process alleging a **wrongful act** in connection with the purchase or sale of, or offer to purchase or sell, **securities**.

- c. 'wrongful act' was defined in cl 6.48(b) to mean for the purposes of insuring cl 6.25, any actual or alleged breach of duty, breach of trust, breach of fiduciary duty, neglect, error, omission, misstatement, misleading statement, or other act, error or omission, committed or attempted by a policyholder, in connection with the purchase or sale of, or offer to purchase or sell, **securities**.
- d. 'securities' was defined in cl 6.41 to mean a bond, debenture, note, share, preference share, warrant, option, promissory note or other equity, debt or hybrid security which is issued or given by the policyholder.

106. For the purposes of the 17/18 Policy, coverage under cl 2.5 was subject to:

- a. a deductible of \$150,000; and
- b. a limit of \$2,000,000.

Hereinafter **17/18 Entities Limits**.

107. The Third to Sixth Respondents repeat the matters pleaded at paragraphs 79C and 79D. Underwriters have accepted that the 17/18 Policy responds to this Proceeding commenced by the Applicant subject to the terms and conditions of the 17/18 Policy including the 17/18 Entities Limits and known facts and circumstances.

108. By operation of the terms of the DOCA:

- a. The Applicant for itself and on behalf of the Group Members brings these proceedings in its capacity and their capacities as Simple Corporate Bondholders.
- b. The Proceeding is a Claim under the DOCA.

- c. The Applicant and the Group Members are persons within the definition of Creditors under the DOCA.
 - d. The effect of the DOCA is that the right of the Applicant and the Group Members to maintain proceedings against the First Respondent (and/or its insurer being the Third to Sixth Respondents) is extinguished and released by operation of the DOCA, except to the extent the proceedings satisfy the definition of Insured Claim under the DOCA.
 - e. The effect of the DOCA is that the right of the Applicant and the Group Members to maintain proceedings against the First Respondent (and/or its insurer being the Third to Sixth Respondents) is limited to that part of the Claim that is insured under the 17/18 Policy, and only to the extent that that part of the Claim would be discharged by payment by the insurer.
 - f. The extent of payment available under the 17/18 Policy is:
 - i. Subject to the application of the deductible of \$150,000; and
 - ii. The total amount which an insured becomes legally obliged to pay on account of a claim by way of damages, judgments, settlements, and adverse costs orders, at the time that such liability is established (**Liability Date**), is the sum of the limit of \$2,000,000 less the sums due and payable by way of defence costs prior to the Liability Date.
109. Further, by commencing this Proceeding, the Applicant has taken, and has evinced an intention to take, action against the First Respondent and/or the Third to Sixth Respondents by operation of s 4 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW).
110. By operation of cl 12.1(d) of the DOCA, where a Creditor intends to take action in relation to a Claim under cl 12.1:
- a. The Creditor must prior to taking any action in relation to the Claim, provide, relevantly, the First Respondent with an indemnity in the form of Schedule 5 of

the DOCA (**Creditor Indemnity**) prior to, or during, any action in relation to the Claim; and

- b. if requested by, relevantly the First Respondent, provide the First Respondent with evidence to the reasonable satisfaction of the First Respondent, that the Creditor will be (and will continue to be) in a financial position, or have access to sufficient funds, to enable it to satisfy the Creditor Indemnity.

Particulars

Clauses 12.1(d)(i) and 12.1(d)(ii) of the DOCA

- 111. The Third to Sixth Respondents pleads the terms of Schedule 5 as if fully set out herein.
- 112. The Applicant did not provide the Creditor Indemnity prior to commencing this Proceeding.
- 113. On 25 March 2021, the First Respondent requested that the Applicant:
 - a. provide the Creditor Indemnity in accordance with the DOCA; and
 - b. provide the First Respondent with evidence that the Applicant had the financial means the satisfy the Creditor Indemnity.

Particulars

Letter from Wotton + Kearney to Hicksons Lawyers dated 25 March 2021

- 114. On 14 April 2021, the Applicant refused to provide the Creditor Indemnity or otherwise confirm that it had the financial means to satisfy the Creditor Indemnity.

Particulars

Letter from Hicksons Lawyers to Wotton + Kearney dated 14 April 2021

- 115. On 8 July 2021, the First Respondent reiterated its request that the Creditor Indemnity be provided in accordance with the DOCA.

Particulars

Letter from Wotton + Kearney to Hicksons Lawyers dated 8 July 2021

116. On 15 September 2021, the Applicant again refused to provide the Creditor Indemnity.

Particulars

Letter from Hicksons Lawyers to Wotton + Kearney dated 15 September 2021

117. In the circumstances, the Applicant is, and continues to be, in breach of cl 12.1(d)(i) and (ii) of the DOCA.
118. The Third to Sixth Respondents deny that the Applicant is entitled to any relief in these proceedings until it complies with cll 12.1(d)(i) and (ii).

Date: 16 February 2024



Signed by Thomas Cavanagh
Lawyer for the Third to Sixth Respondents

This pleading was settled by Michael Jones SC and Thomas Liu, counsel

Certificate of lawyer

I Thomas Cavanagh certify to the Court that, in relation to the defence filed on behalf of the Third to Sixth Respondents, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 16 February 2024

A handwritten signature in black ink, appearing to read 'Thomas Cavanagh', written in a cursive style.

Signed by Thomas Cavanagh
Lawyer for the Third to Sixth Respondents