

FILED

24 NOV 2017



THIRD DEFENDANT'S COMMERCIAL LIST RESPONSE TO THE STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Class Action Panel
Registry	Sydney
Case number	2017/294069

TITLE OF PROCEEDINGS

First plaintiff	Haliburton Charles David Findlay
Second plaintiff	Marian Jennifer Denny Findlay
First defendant	DSHE Holdings Ltd ACN 166 237 841 (receivers and managers appointed) (in liquidation)
Number of defendants	3

FILING DETAILS

Filed for	Michael Potts , Third Defendant
Legal representative	Tobin Meagher, Clayton Utz
Legal representative reference	135/18481/80173502
Contact name and telephone	Lauren Stewart, +61 2 9353 5686
Contact email	lstewart@claytonutz.com

A. NATURE OF DISPUTE

1. The Third Defendant (**Potts**) agrees that the Plaintiffs' summary of the case (contained in paragraphs 1-19 of the Statement of Claim) reflects the Plaintiffs' contentions in the proceedings.
2. Potts denies liability to the Plaintiffs on the basis pleaded in paragraphs 1-19 of the Statement of Claim or otherwise and refers to his specific responses to the Plaintiffs' contentions pleaded in Part C of this List Response.

B. ISSUES LIKELY TO ARISE

1. Potts agrees that the common questions identified by the Plaintiffs in paragraphs 226-228 of the Statement of Claim are likely to arise in the proceedings.
2. Potts agrees that the issues identified by the Plaintiffs in paragraphs 229-231 of the Statement of Claim are likely to arise if the matters referred to in paragraphs 226-228 of the Statement of Claim are established, but says that the issues in paragraphs 229-231 raise questions which are individual to the claim of each Plaintiff and Group Member, and not common questions.
3. Potts says that further issues likely to arise are whether, if he engaged in misleading or deceptive conduct in contravention of the *Corporations Act 2001* (Cth) (**Corporations Act**) (which is denied):
 - (a) Potts ought fairly to be excused for the contravention and/or relieved wholly or partly from any liability to which he would otherwise be subject; and
 - (b) any liability which Potts may have to the Plaintiffs should be reduced to reflect the proportion of the Plaintiffs' loss that the Court considers just having regard to the extent of his responsibility for that loss, and the extent of any other concurrent wrongdoer for that same loss.

C. SECOND DEFENDANT'S RESPONSES TO CONTENTIONS

The Third Defendant, Michael Potts, responds as follows to the allegations in the Statement of Claim filed 28 September 2017. (Unless otherwise indicated, defined terms in the Statement of Claim have the same meaning where used below.)

1. In response to paragraphs 1-19 of the Statement of Claim, Potts refers to Part A of this List Response.
2. Potts does not plead to paragraphs 20-24 of the Statement of Claim.
3. In response to paragraphs 25-27 of the Statement of Claim, Potts:

- (a) denies the allegations in subparagraph 26(b) of the Statement of Claim so far as they concern Potts; and
 - (b) otherwise does not plead to paragraphs 25-27 of the Statement of Claim, as those paragraphs do not otherwise contain any allegations against him.
- 4. Potts does not admit paragraph 28 of the Statement of Claim.
- 5. Potts admits paragraphs 29-31 of the Statement of Claim.
- 6. Potts does not admit paragraph 32 of the Statement of Claim.
- 7. Potts admits paragraphs 33-36 of the Statement of Claim.
- 8. In response to paragraphs 37-46 of the Statement of Claim, Potts:
 - (a) relies upon Australian Accounting Standards AASB 101, AASB 102 and AASB 108 for their full terms and effect; and
 - (b) otherwise does not admit the matters alleged in paragraphs 37-46 of the Statement of Claim.
- 9. Potts does not admit paragraph 47 of the Statement of Claim.
- 10. Potts denies paragraph 48 of the Statement of Claim.
- 11. Potts does not admit paragraph 49 of the Statement of Claim.
- 12. In response to paragraph 50 of the Statement of Claim, Potts:
 - (a) does not admit there were Switched Invoice Rebates as alleged;
 - (b) denies there were Scan Rebates as alleged;
 - (c) admits that DSH had obtained O&A Rebates;
 - (d) says that the practice of obtaining O&A Rebates from suppliers commenced prior to May 2014 and since DSH was under the management Woolworths Limited and Anchorage Capital Partners.
- 13. In response to paragraph 51 of the Statement of Claim, Potts:
 - (a) admits that the rebates which DSH obtained from suppliers from time to time included rebates as generally described in each of subparagraphs 51(a)-(d) of the Statement of Claim; and
 - (b) otherwise does not admit the allegations in that paragraph.

14. Potts denies paragraph 52 of the Statement of Claim and says that the performance of members of the buying team for DSH was monitored and assessed against a range of matters including:
 - (a) sales;
 - (b) margins;
 - (c) stock turnover (weeks cover);
 - (d) percentage of aged/obsolete inventory;
 - (e) percentage of in-stock position of inventory in store; and
 - (f) promotional support to market products.
15. Potts denies paragraph 53 of the Statement of Claim.
16. Potts admits paragraphs 54-57 of the Statement of Claim.
17. Potts does not admit paragraph 58 of the Statement of Claim.
18. Potts admits paragraph 59-60 of the Statement of Claim, and relies upon the declaration for its full terms and effect.
19. In response to paragraph 61 of the Statement of Claim, Potts:
 - (a) admits that he intended to, and did, join with the other DSH directors in making the declaration referred to in paragraph 59 of the Statement of Claim;
 - (b) says that he held the opinions stated in that declaration as at the date of the declaration;
 - (c) says that in forming the opinions stated in the declaration, Potts relied on:
 - (i) the contents of the report by DSH's auditor Deloitte Touche Tohmatsu (**Deloitte**) headed "Report to the Finance and Audit Committee for the half year ended 28 December 2014" and dated 11 February 2015 (**Deloitte 2015 Half-Year FAC Report**);
 - (ii) Deloitte's representation to the Board at the meeting on 16 February 2015 that Deloitte would be issuing an unqualified review report on its review of the financial report of DSH for the period ended 28 December 2014, being a report which stated, inter alia, that based on Deloitte's review of the financial report for the 26-week period ending 28 December 2014 (the **Deloitte 2015 Half Year Review**), Deloitte had not become aware of any matter that made it believe that the half-year financial report was not in accordance with the Corporations Act, including:

- A. giving a true and fair view of DSH's financial position as at 28 December 2014 and of its performance for the 26 weeks then ended, and
- B. complying with Accounting Standard AASB 134 *Interim Financial Reporting* and the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**).

Particulars

Minutes of Board Meeting held on 16 February 2015, "Adoption of the half year accounts for the period 28 December 2014".

Independent Auditor's Review Report to the Members of DSH dated 16 February 2015 (**Deloitte 2015 Half-Year Members Report**).

- (d) does not plead to the matters alleged in paragraph 61 of the Statement of Claim so far as they concern Mr Abboud;
 - (e) otherwise does not admit the matters alleged in paragraph 61 of the Statement of Claim.
20. Potts denies paragraph 62 of the Statement of Claim.
21. Potts does not plead to paragraphs 63 and 64 of the Statement of Claim as those paragraphs do not contain any allegations against him.
22. In response to paragraph 65 of the Statement of Claim, Potts:
- (a) admits that on or about 17 February 2015 DSH caused the 17 February 2015 ASX Announcement & Results Briefing to be made to the ASX;
 - (b) says that the announcement was made by DSH to the ASX following the passing of a resolution by the DSH directors which approved that announcement being made, and that Potts voted in favour of that resolution;

Particulars

Minutes of Board Meeting held on 16 February 2015, "Adoption of the half year accounts for the period 28 December 2014".

- (c) otherwise denies paragraph 65 of the Statement of Claim.
23. Potts admits paragraph 66 of the Statement of Claim and relies on the 17 February 2015 ASX Announcement & Results Briefing for its full terms and effect.
24. Potts admits paragraphs 67-70 of the Statement of Claim.
25. Potts does not admit paragraph 71 of the Statement of Claim.

26. Potts admits paragraphs 72-73 of the Statement of Claim, and relies upon the declaration for its full terms and effect.
27. In response to paragraph 74 of the Statement of Claim, Potts:
- (a) admits that he intended to and did join with the other DSH directors in making the declaration referred to in paragraph 74 of the Statement of Claim;
 - (b) says that he held the opinions stated in that declaration as at the date of the declaration;
 - (c) says that in forming the opinions stated in the declaration, Potts relied on:
 - (i) the contents of the report by Deloitte headed "Report to the Finance and Audit Committee for the year ended 28 June 2015" and dated 6 August 2015 (**Deloitte June 2015 FAC Report**);
 - (ii) Deloitte's representation to the Board at its meeting on 17 August 2015 that Deloitte "gave clearance on the accounts";

Particulars

Minutes of the meeting of the Board of DSH held on 17 August 2015,
"Adoption of full year accounts".

- (iii) the contents of Deloitte's report dated 17 August 2015 to the members of DSH on the financial report for the period ended 28 June 2015, which stated, inter alia, that:
 - A. Deloitte's audit of the financial report of DSH for the financial year ending 28 June 2015 had been conducted in accordance with Australian Accounting Standards, and had involved, inter alia, performing procedures to obtain audit evidence about the amounts and disclosures in the financial report, and also evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the directors;
 - B. Deloitte was of the opinion that the financial report of DSH for the period ended 28 June 2015 was in accordance with the Corporations Act, including:
 - 1) giving a true and fair view of the consolidated entity's financial position as at 28 June 2015 and of its performance for the year ended on that date, and
 - 2) complying with Australian Accounting Standards and the Corporations Regulations;

- C. Deloitte was of the opinion that the financial report also complied with International Financial Reporting Standards;

Particulars

Deloitte's Independent Auditor's Report to the Members of DSH dated 17 August 2015 (**Deloitte June 2015 Members Report**).

- (d) does not plead to the matters alleged in paragraph 74 of the Statement of Claim so far as they concern Mr Abboud;
 - (e) otherwise does not admit the matters alleged in paragraph 74 of the Statement of Claim.
28. Potts denies paragraph 75 of the Statement of Claim.
29. Potts does not plead to paragraphs 76-77 of the Statement of Claim as those paragraphs do not contain any allegations against him.
30. In response to paragraph 78 of the Statement of Claim, Potts:
- (a) admits that on or about 18 August 2015 DSH caused the 18 August 2015 ASX Announcement & Results Briefing to be made to the ASX;
 - (b) says that the announcement was made by DSH to the ASX following the passing of a resolution by the DSH directors which approved that announcement being made, and that Potts voted in favour of that resolution;

Particulars

Minutes of the meeting of the Board of DSH held on 17 August 2015, "Adoption of full year accounts".

- (c) otherwise denies paragraph 78 of the Statement of Claim.
31. Potts admits paragraph 79 of the Statement of Claim and relies on the 18 August 2015 ASX Announcement & Results Briefing for its full terms and effect.
32. Potts does not admit paragraphs 80-86 of the Statement of Claim, and says that in the period July 2014 until 1 December 2015 the accounting treatment of supplier rebates which was adopted in DSH's financial statements was reviewed by DSH's auditor, Deloitte, who confirmed that such treatment was in accordance with Australian Accounting Standards, and was reviewed and approved by Deloitte, as follows:
- (a) for the 26-week period ending 28 December 2014:

- (i) Deloitte undertook the Deloitte 2015 Half Year Review and the accounting treatment of supplier rebates was a "key area of focus and review response" in the course of that review;

Particulars

Deloitte 2015 Half-Year FAC Report, section 3.2a

- (ii) the procedures carried out by Deloitte in the December 2015 Half Year Review in respect of the accounting treatment of supplier rebates included:
 - A. analysing the various types of rebates recognised,
 - B. reviewing the rebates receivable as at 28 December 2014,
 - C. assessing whether any rebates represented amounts which should be deferred, and
 - D. analysing the gross margin, net advertising costs and overall costs of doing business as a percentage of sales to determine whether the recognition of rebates was reasonable and reflected the fundamental economic nature of the activities;

Particulars

Deloitte 2015 Half-Year FAC Report, pp. 8 and 9

- (iii) having undertaken the procedures referred to in subparagraph (ii) above, Deloitte reported that nothing had come to its attention that the manner in which rebates were recognised in the financial report of DSH as at 28 December 2014 was not appropriate;

Particulars

Deloitte 2015 Half-Year FAC Report, p. 9; and

- (iv) at the conclusion of the Deloitte 2015 Half Year Review, Deloitte issued the Deloitte 2015 Half-Year Members Report, which is pleaded in paragraph 19(c) above;
- (b) for the financial year ending 28 June 2015:
- (i) Deloitte audited the financial report of DSH for the financial year ending 28 June 2015 (the **June 2015 Audit**), and the accounting treatment of supplier rebates was a "key area of focus and audit response" in the course of that audit;

Particulars

Deloitte June 2015 FAC Report, pp. 10-11

- (ii) the procedures which were adopted by Deloitte in the June 2015 Audit in respect of rebates, when auditing the financial statements of DSH, included:
- A. understanding the key controls associated with the completeness and validity of the recording of rebate income;
 - B. critically evaluating management's methodologies in capturing, calculating and recognising rebates received and receivable, including the underlying key assumptions;
 - C. testing the controls in place to ensure that they are operating effectively throughout the year;
 - D. performing substantive testing on a sample of rebates recorded or accrued at balance sheet date as well as reviewing a sample of supplier agreements to ensure they have been correctly treated; and
 - E. assessing the completeness and accuracy of the provision for any disputed claims with suppliers.

Particulars

Deloitte presentation to DSH headed "External audit strategy for the year ending 28 June 2015", dated 18 November 2014 (the **FY15 Audit Strategy Presentation**), p. 8.

- (iii) The procedures carried out by Deloitte in the June 2015 Audit in respect of the accounting treatment of supplier rebates also included:
- A. analysing the various types of rebates recognised, by assessing the nature and the classification of the rebates,
 - B. performing a walkthrough of the process for classifying rebates,
 - C. detailed testing of a sample of rebates recognised throughout the year by tracing to supporting documentation, with a focus on rebates accrued as at 28 June 2015,
 - D. assessing whether any supplier rebates represented amounts which should be deferred; and

- E. analysing the gross margin, net advertising costs and overall costs of doing business as a percentage of sales to determine whether the recognition of rebates was reasonable and reflected the fundamental economic nature of the activities;

Particulars

Deloitte June 2015 FAC Report, pp. 10 and 11

- (iv) having undertaken the procedures referred to in subparagraphs (ii) and (iii) above, Deloitte reported that:

- A. Deloitte concurred with management's accounting treatment of O&A Rebates in the accounts of DSH;

Particulars

Deloitte June 2015 FAC Report, p. 10

- B. based on the procedures performed by Deloitte, Deloitte had not identified any unadjusted differences in respect of supplier rebates in the financial statements as at 28 June 2015; and

Particulars

Deloitte June 2015 FAC Report, p. 10

- C. DSH's processes, reconciliations and supporting evidence for O&A Rebates had significantly improved compared to the previous financial year ending 29 June 2014, with those rebates accrued in the accounts being based on supporting evidence provided by the buyers and reviewed by finance before accruals were raised;

Particulars

Deloitte June 2015 FAC Report, p. 10

- D. Deloitte concurred with the allocation by DSH management of a portion of the O&A Rebates in cost of sales where the rebates exceed the underlying promotional costs.

Particulars

Deloitte June 2015 FAC Report, p. 11

- (v) At the conclusion of the June 2015 Audit, Deloitte issued the Deloitte June 2015 Members Report, which is pleaded in paragraph 27(c) above;

- 33. Potts does not admit paragraphs 87-89 of the Statement of Claim and repeats paragraph 32 of this List Response.
- 34. Potts denies paragraphs 90-94 of the Statement of Claim, and repeats paragraph 32 of this List Response.
- 35. Potts does not admit paragraphs 95-102 of the Statement of Claim and repeats paragraph 32 of this List Response.
- 36. Potts denies paragraph 103 of the Statement of Claim, and says that:
 - (a) on 7 December 2015, the Board discussed the inventory purchasing model, including how buyers are measured when buying inventory and the allocation of rebates, particularly O&A Rebates; and
 - (b) he otherwise relies on the minutes of the 7 December 2015 Board meeting.

Particulars

Minutes of Board Meeting held on 7 December 2015, "Inventory Analysis".

- 37. In response to paragraph 104 of the Statement of Claim, Potts repeats his denial of paragraphs 52 and 53 of the Statement of Claim above.
- 38. Potts denies paragraph 105 of the Statement of Claim.
- 39. Potts does not admit paragraph 106 of the Statement of Claim.
- 40. In response to paragraph 107 of the Statement of Claim, Potts:
 - (a) says that Agile Commerce Consulting was retained by DSH by a letter dated 25 September 2015, which was signed by Potts on behalf of DSH;
 - (b) relies on that retainer letter for its full terms and effect; and
 - (c) otherwise does not admit the allegations in that paragraph.
- 41. In response to paragraph 108 of the Statement of Claim, Potts:
 - (a) says that on or around 25 September 2015 he received a document headed "Dick Smith Holdings Inventory Paper" prepared by Mike Holtzer and Andy Powell (**Holtzer Paper**), and that he had a meeting with Mr Holtzer and Mr Powell on around 27 October 2015;

Particulars

Email from Mike Holtzer to Michael Potts dated 25 September 2015 and attachment titled "Dick Smith Holdings: Inventory Paper"

- (b) relies on the Holtzer Paper pleaded in subparagraph (a) above for its full terms and effect;
 - (c) says that at the meeting referred to in subparagraph (a) above, Mr Holtzer and Mr Powell informed Potts that they believed that the level of impairment of inventory was \$63m;
 - (d) says that Potts did not accept that the views in the Holtzer Paper and the information referred to in subparagraph (c) above were correct, and asked for further work to be done by Mr Holtzer and Mr Powell regarding these matters; and
 - (e) otherwise denies the matters alleged in paragraph 108 of the Statement of Claim.
42. In response to paragraphs 109 and 110 of the Statement of Claim, Potts:
- (a) says that on or about 26 November 2015 he received an email with two attachments named "Dick Smith analysis.docx" and "AP changes to DS pitch doc.docx" (**Holtzer 26 November 2015 Email and Attachments**);

Particulars

Email from Mike Holtzer to Michael Potts dated 26 November 2015 and attachments

- (b) relies on the Holtzer 26 November 2015 Email and Attachments pleaded in subparagraph (a) above for their full terms and effect;
 - (c) otherwise denies the matters alleged in paragraph 109 and 110 of the Statement of Claim.
43. Potts admits paragraph 111 of the Statement of Claim and says further that:
- (a) on 29 November 2015, the Board resolved to announce that:
 - (i) it had conducted a review which remained in progress, the objectives of which included:
 - A. achieving category right sizing;
 - B. optimising the depth and breadth of inventory;
 - C. identifying the anticipated impact of achieving preferred weeks cover and the level of marketing support required to achieve these objectives;
 - D. driving customer-centric outcomes; and

- (ii) while the inventory review had not concluded, the Board had determined that a non-cash impairment of \$60 million (pre-tax) was required; and

Particulars

Minutes of Board Meeting held on 24 November 2015, "Inventory Analysis".

- (b) an announcement to that effect was made by DSH on 30 November 2015.

Particulars

ASX Announcement dated 30 November 2015 "Non-cash adjustment following inventory review".

- 44. Potts does not admit paragraph 112 of the Statement of Claim.
- 45. Potts denies paragraphs 113-118 of the Statement of Claim, and further says that in the June 2015 Audit, Deloitte:
 - (a) identified the inventory provisions in the financial report of DSH as at 28 June 2015 as a "key area of focus and audit response";

Particulars

Deloitte June 2015 FAC Report, section 3.2

- (b) adopted the following procedures in respect of inventory provisions:
 - (i) testing of controls around the inventory obsolescence, reconciliation, review and approvals process;
 - (ii) reviewing the inventory costing and provisioning methodologies adopted as required under AASB 102 *Inventories*;
 - (iii) using data analytics to analyse reports developed by management to track actual selling prices for stock sold;
 - (iv) reviewing management's assessment of provisions based on this information and other evidence as to the appropriateness of the percentages provided on stock lines;

(the **FY15 Audit Inventory Procedures**)

Particulars

The FY15 Audit Strategy Presentation, p. 8.

- (c) having performed the FY15 Audit Inventory Procedures, reported to DSH that;
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- (i) Deloitte had assessed the assumptions and methodology applied by DSH in its accounts, and concurred with the revised methodology; and
- (ii) the overall costs which had been recognised in the total cost of inventory under Accounting Standard AASB 102 Inventories were appropriate.

Particulars

Deloitte June 2015 FAC Report, pp. 5 and 9

- (d) at the conclusion of the June 2015 Audit, issued the Deloitte June 2015 Members Report.
46. Potts does not plead to paragraphs 119-122 of the Statement of Claim as those paragraphs do not contain any allegations against him.
 47. In response to paragraph 123 of the Statement of Claim, Potts:
 - (a) denies the allegations in subparagraphs (a)-(d) so far as they concern Potts; and
 - (b) otherwise does not plead to paragraph 123.
 48. Potts does not plead to paragraphs 124-127 of the Statement of Claim as those paragraphs do not contain any allegations against him.
 49. In response to paragraph 128 of the Statement of Claim, Potts:
 - (a) denies the allegations in subparagraphs (a)-(d) so far as they concern Potts; and
 - (b) otherwise does not plead to paragraph 128.
 50. Potts does not plead to paragraphs 129-133 of the Statement of Claim as those paragraphs do not contain any allegations against him.
 51. In response to paragraph 134 of the Statement of Claim, Potts:
 - (a) denies the allegations in subparagraphs (a)-(d) so far as they concern Potts; and
 - (b) otherwise does not plead to paragraph 134.
 52. Potts does not plead to paragraphs 135-142 of the Statement of Claim as those paragraphs do not contain any allegations against him.
 53. In response to paragraph 143 of the Statement of Claim, Potts:
 - (a) denies the allegations in subparagraphs (a)-(d) so far as they concern Potts; and
 - (b) otherwise does not plead to paragraph 143.

54. Potts does not plead to paragraphs 144-160 of the Statement of Claim as those paragraphs do not contain any allegations against him.
55. Potts admits paragraph 161 of the Statement of Claim.
56. Potts does not plead to paragraphs 162-177 of the Statement of Claim as those paragraphs do not contain any allegations against him.
57. Potts admits paragraph 178 of the Statement of Claim.
58. Potts does not plead to paragraphs 179-182 of the Statement of Claim as those paragraphs do not contain any allegations against him.
59. Potts denies paragraph 183 of the Statement of Claim.
60. Potts admits paragraph 184 of the Statement of Claim.
61. In response to paragraph 185 of the Statement of Claim, Potts:
 - (a) says that on or about 16 February 2015 the DSH directors by resolution authorised the issue and publication of the 2015 Half Year Financial Statements;

Particulars

Minutes of Board Meeting held on 16 February 2015, "Adoption of the half year accounts for the period 28 December 2014".

- (b) says that Potts voted in favour of the resolution referred to in subparagraph (a) above;
 - (c) otherwise denies paragraph 185 of the Statement of Claim.
62. Potts denies paragraphs 186-193 of the Statement of Claim.
63. Potts admits paragraph 194 of the Statement of Claim.
64. In response to paragraph 195 of the Statement of Claim, Potts:
 - (a) says that on or about 16 February 2015 the DSH directors by resolution authorised the issue and publication of the 17 February 2015 ASX Announcement & Results Briefing;

Particulars

Minutes of Board Meeting held on 16 February 2015, "Adoption of the half year accounts for the period 28 December 2014".

- (b) says that Potts voted in favour of the resolution referred to in subparagraph (a) above;

- (c) otherwise denies paragraph 195 of the Statement of Claim.
- 65. Potts admits paragraph 196 of the Statement of Claim.
- 66. Potts denies paragraph 197-200 of the Statement of Claim.
- 67. Potts admits paragraph 201 of the Statement of Claim.
- 68. In response to paragraph 202 of the Statement of Claim, Potts:
 - (a) says that on or about 17 August 2015 the DSH directors by resolution authorised the issue and publication of the 2015 Full Year Financial Statements;

Particulars

Minutes of the meeting of the Board of DSH held on 17 August 2015, "Adoption of full year accounts".

- (b) says that Potts voted in favour of the resolution referred to in subparagraph (a) above;
- (c) otherwise denies paragraph 202 of the Statement of Claim.
- 69. Potts denies paragraph 203-210 of the Statement of Claim.
- 70. Potts admits paragraph 211 of the Statement of Claim.
- 71. In response to paragraph 212 of the Statement of Claim, Potts:
 - (a) says that on or about 17 August 2015 the DSH directors by resolution authorised the issue and publication of the 18 August 2015 ASX Announcement & Results Briefing;

Particulars

Minutes of the meeting of the Board of DSH held on 17 August 2015, "Adoption of full year accounts".

- (b) says that Potts voted in favour of the resolution referred to in subparagraph (a) above;
- (c) otherwise denies paragraph 212 of the Statement of Claim.
- 72. Potts admits paragraph 213 of the Statement of Claim.
- 73. Potts denies paragraphs 214-217 of the Statement of Claim.
- 74. Potts does not admit paragraph 218 of the Statement of Claim.
- 75. In response to paragraph 219 of the Statement of Claim, Potts:

- (a) admits that the market in which DSH shares were traded was and is regulated by the ASX Listing Rules;
 - (b) admits that at all material times the provisions of the Corporations Act which were in force included ss. 674(2), 1041E and 1041H;
 - (c) repeats his response to Parts V and VII-VIII of the Statement of Claim; and
 - (d) otherwise denies the allegations in paragraph 219.
76. Potts denies paragraphs 220-221 of the Statement of Claim.
77. Potts does not admit paragraph 222 of the Statement of Claim.
78. Potts denies paragraphs 223-224 of the Statement of Claim.
79. Potts does not plead to paragraphs 225-231 of the Statement of Claim, as those paragraphs do not contain any allegations against him.

DEFENCES

Relief pursuant to Corporations Act, s.1318

80. In further answer to the whole of the Statement of Claim, Potts says that, if it is established that he engaged in misleading or deceptive conduct in contravention of the Corporations Act (which is denied), he acted honestly and, having regard to all the circumstances of the case, he ought fairly be excused for the contravention pursuant to s.1318 of the Corporations Act.

Proportionate Liability – Apportionable Claims

81. In further answer to the whole of the Statement of Claim, Potts says that, if (which is denied) Potts contravened s.1041H of the Corporations Act and is liable to the Plaintiffs or Group Members for any loss or damage which resulted from such contravention, then:
- (a) the claims of the Plaintiffs and Group Members against Potts in respect of such loss or damage are apportionable claims within the meaning of s.1041L of the Corporations Act; and
 - (b) by reason of the matters pleaded below, each of Potts, Abboud, DSH, the DSH directors and Deloitte is a concurrent wrongdoer in respect of such loss or damage, within the meaning of s.1041L of the Corporations Act.

Proportionate Liability - DSH and Abboud

82. If the Plaintiffs establish that:

- (a) Potts engaged in misleading or deceptive conduct in contravention of the Corporations Act (which is denied); and
- (b) Abboud engaged in misleading or deceptive conduct in contravention of the Corporations Act, as pleaded in Part XI of the Statement of Claim (which is not admitted);
- (c) DSH engaged in misleading or deceptive conduct in contravention of the Corporations Act, as pleaded in Part X of the Statement of Claim (which is not admitted); and
- (d) any such contravention by Potts, Abboud and DSH caused the loss to the Plaintiffs and/or Group Members pleaded in Part XIII of the Statement of Claim (which is denied);

then each of Potts, Abboud and DSH is a person whose acts or omissions caused the loss allegedly suffered by the Plaintiffs and/or Group Members which is the subject of their claim, and therefore each is a concurrent wrongdoer within the meaning of s.1041L of the Corporations Act.

83. By reason of the matters pleaded in paragraphs 81-82 above, and pursuant to s.1041L of the Corporations Act, any liability (which is denied) of Potts to the Plaintiffs and/or Group Members is to be limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just having regard to the extent of Potts' responsibility, and the extent of Abboud's and DSH's responsibility, for such loss or damage.

Proportionate Liability – Other DSH Directors

84. In the period from January 2015 to 3 January 2016, the directors of DSH were:

- (a) Abboud;
- (b) Potts;
- (c) Robert Murray;
- (d) Lorna Kathleen Raine;
- (e) Robert Ishak;
- (f) Jamie Clifford Tomlinson;
- (g) Phillip John Cave (**Cave**) (until 28 February 2015, when he ceased to be a director of DSH); and
- (h) William Paul Renton Wavish (**Wavish**) (until 25 March 2015, when he ceased to be a director of DSH).

(together, the **DSH Directors**)

85. For the purpose only of this proportionate liability defence, and without admission, Potts repeats paragraphs 59-62, 65-66, 72-75, 78-79, 80-118, 120-129, 131, 140, 183, and 218-224 of the Statement of Claim. If those matters (which are the subject of denials and non-admissions pleaded above) are established, then:

- (a) each of the DSH Directors made the declaration in relation to the 2015 Half-Year Financial Statements pleaded at paragraphs 59-60 of the Statement of Claim, and thereby made the representations in relation to the 2015 Half-Year Financial Statements which are pleaded at paragraphs 61-62 of the Statement of Claim;
- (b) each of the DSH Directors caused the 2015 Half-Year Financial Statements to be issued to the ASX, by joining in the resolution referred to in paragraph 61(a) above;
- (c) each of the DSH Directors caused the 17 February 2015 ASX Announcement & Results Briefing pleaded in paragraphs 65-66 of the Statement of Claim to be made to the ASX, by joining in the resolution referred to in paragraph 22(b) and 64(a) above;
- (d) each of the DSH Directors (other than Cave and Wavish) made the declaration in relation to the 2015 Full Year Financial Statements which is pleaded in paragraphs 72-73 of the Statement of Claim, and thereby made the representations in relation to the 2015 Full Year Financial Statements which are pleaded at paragraphs 74-75 of the Statement of Claim;
- (e) each of the DSH Directors (other than Cave and Wavish) caused the 2015 Full-Year Financial Statements to be issued to the ASX, by joining in the resolution referred to in paragraph 68(a) above;
- (f) each of the DSH Directors (other than Cave and Wavish) caused the 18 August 2015 ASX Announcement & Results Briefing pleaded in paragraphs 78-79 of the Statement of Claim to be made to the ASX, by joining in the resolution referred to in paragraphs 30(b) and 71(a) above;
- (g) by reason of the matters in paragraphs (a)-(f) above, each of the DSH Directors engaged in the conduct pleaded against Potts in paragraphs 183(a)-(c) of the Statement of Claim, and each of the DSH Directors (other than Cave and Wavish) engaged in the conduct pleaded against Potts in paragraphs 183(e)-(g) of the Statement of Claim, being in each case conduct in relation to a financial product or a financial service within the meaning of s.1041H of the Corporations Act;
- (h) the conduct of the DSH Directors referred to in paragraph (g) above was misleading or deceptive, in contravention of s.1041H of the Corporations Act, for the reasons pleaded in paragraphs 120-122, 124, 125-127, 129, 131 and 140 of the Statement of Claim; and

- (i) the Plaintiffs and Group Members have suffered loss as a result of the contraventions referred to in paragraph (h) above, for the reasons pleaded in paragraphs 218-224 of the Statement of Claim.

86. By reason of the matters pleaded in paragraph 85 above:

- (a) each of the DSH Directors is a person whose acts or omissions caused the loss allegedly suffered by the Plaintiffs and/or Group Members which is the subject of their claim, and therefore each is a concurrent wrongdoer within the meaning of s.1041L of the Corporations Act; and
- (b) pursuant to s.1041L of the Corporations Act, any liability (which is denied) of Potts to the Plaintiffs and/or Group Members is to be limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just having regard to the extent of Potts' responsibility, and the extent of the responsibility of each of the other DSH Directors, for such loss or damage.

Proportionate Liability – Deloitte

87. Deloitte:

- (a) was appointed as auditor by DSH; and
- (b) had professional or expert competence in providing auditing and accounting services.

88. Deloitte performed the Deloitte 2015 Half Year Review, in the course of which Deloitte performed the work and expressed the opinions in respect of the accounting treatment of rebates referred to in paragraph 32 above.

89. By issuing the Deloitte 2015 Half-Year Members Report, Deloitte made representations that:

- (a) based on the Deloitte 2015 Half Year Review, Deloitte had not become aware of any matter that made it believe that the half-year financial report was not in accordance with the Corporations Act, including:
 - (i) giving a true and fair view of DSH's financial position as at 28 December 2014 and of its performance for the 26 weeks then ended, and
 - (ii) complying with Accounting Standard AASB 134 *Interim Financial Reporting* and the Corporations Regulations;

Particulars

The representation was express and was set out on page 2 of the Deloitte 2015 Half-Year Members Report.

- (b) Deloitte had a reasonable basis for the representation in paragraph (a) above, and in particular the view conveyed by that representation was based upon sufficient appropriate audit evidence, and based on a proper interpretation of Australian Accounting Standards.

Particulars

The representation was implied from Deloitte's statement in the Deloitte 2015 Half-Year Members Report that it had conducted its review in accordance with the Auditing Standard on Review Engagements ASRE 2410, and from Deloitte's expertise in auditing and accounting matters.

90. The representations referred to in paragraph 89 above (the **Deloitte Half-Year Representations**) constituted:
 - (a) conduct by Deloitte in trade or commerce within the meaning of s. 18 of the *Australian Consumer Law* (NSW) (**ACL**);
 - (b) further or in the alternative, conduct in relation to a financial product or a financial service within the meaning of s. 1041H of the Corporations Act; and
 - (c) further or in the alternative, conduct in relation to financial services within the meaning of s. 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).
91. For the purpose only of this proportionate liability defence and without any admission, Potts repeats paragraphs 80-103 of the Statement of Claim and says that if (which is denied) the Plaintiffs establish that:
 - (a) the accounting treatment in respect of supplier rebates adopted by DSH in its financial report as at 28 December 2014 did not comply with Australian Accounting Standards AASB 101, AASB 102 and/or AASB 108;
 - (b) the financial report of DSH as at 28 December 2014:
 - (i) did not give a true and fair view of the financial position and performance of DSH and the DSE Group as at the reporting date; or
 - (ii) did not comply with the Corporations Act; or
 - (iii) did not comply with Australian Accounting Standards; or
 - (c) there was no proper or adequate basis to form the opinion that the financial report of DSH as at 28 December 2014:

- (i) gave a true and fair view of the financial position and performance of DSH and the DSE Group as at the reporting date; or
- (ii) complied with the Corporations Act; or
- (iii) complied with Australian Accounting Standards,

then Deloitte, in making the Deloitte Half-Year Representations engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s. 18 of the ACL or alternatively s. 1041H of the Corporations Act, or alternatively s. 12DA of the ASIC Act.

Particulars

If the matters in any of subparagraphs (a)-(c) are established, then Deloitte did not have a reasonable basis for the Deloitte Half-Year Representations, and/or did not have sufficient appropriate audit evidence in respect of the matters the subject of the Deloitte Half-Year Representations, and/or the Deloitte Half-Year Representations were not based upon a proper interpretation of Australian Accounting Standards.

92. Deloitte performed the June 2015 Audit, in the course of which Deloitte performed the work and expressed the opinions in respect of the accounting treatment of rebates referred to in paragraph 32 above and also performed the work and expressed the opinions in respect of inventory provisions at paragraph 45 above, and at the conclusion of the June 2015 Audit Deloitte issued the Deloitte June 2015 Members Report.
93. By issuing the Deloitte June 2015 Members Report, Deloitte made representations that:
 - (a) the June 2015 Audit had been conducted in accordance with Australian Accounting Standards, and had involved, inter alia, performing procedures to obtain audit evidence about the amounts and disclosures in the financial report, and also evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the directors;
 - (b) Deloitte was of the opinion that the financial report of DSH for the period ended 28 June 2015 was in accordance with the Corporations Act, including:
 - (i) giving a true and fair view of the consolidated entity's financial position as at 28 June 2015 and of its performance for the year ended on that date, and
 - (ii) complying with Australian Accounting Standards and the Corporations Regulations;
 - (c) Deloitte was of the opinion that the financial report also complied with International Financial Reporting Standards; and

- (d) Deloitte had a reasonable basis for the representations in paragraphs (b)-(c) above, and the views of Deloitte conveyed by those representations were based upon its audit work including the procedures and other analysis referred to in paragraph (a) above, based on sufficient appropriate audit evidence, and based on a proper interpretation of Australian Accounting Standards.

Particulars

The representations in paragraphs (a)-(c) above were express and were contained in the Deloitte June 2015 Members Report.

The representation in paragraph (d) was implied from the representations in paragraphs (a)-(c) above, and from Deloitte's expertise in auditing and accounting matters.

94. The representations referred to in paragraph 93 above (the **Deloitte 2015 Audit Representations**) constituted:
- (a) conduct by Deloitte in trade or commerce within the meaning of s. 18 of the ACL;
 - (b) further or in the alternative, conduct in relation to a financial product or a financial service within the meaning of s. 1041H of the Corporations Act;
 - (c) further or in the alternative, conduct in relation to financial services within the meaning of s. 12DA of the ASIC Act.
95. For the purpose only of this proportionate liability defence and without any admission, Potts repeats paragraphs 80-118 of the Statement of Claim and says that if (which is denied) the Plaintiffs establish that:
- (a) the accounting treatment in respect of supplier rebates adopted by DSH in its financial statements did not comply with Australian Accounting Standards AASB 101, AASB 102 and/or AASB 108; or
 - (b) the provision adopted in respect of inventory in the financial report of DSH as at 28 June 2015 was inadequate, and/or the assumptions or methodology used to determine that provision were inadequate, and/or the financial statements of DSH as at 28 June 2015 overstated the carrying value of Inventories and did not comply with Australian Accounting Standard AASB 102; or
 - (c) the financial report of DSH as at 28 June 2015:
 - (i) did not give a true and fair view of the financial position and performance of DSH and the DSE Group as at the reporting date; or

- (ii) did not comply with the Corporations Act; or
- (iii) did not comply with Australian Accounting Standards; or
- (d) there was no proper or adequate basis to form the opinion that the financial report of DSH as at 28 June 2015:
 - (i) gave a true and fair view of the financial position and performance of DSH and the DSE Group as at the reporting date; or
 - (ii) complied with the Corporations Act; or
 - (iii) complied with Australian Accounting Standards,

then Deloitte, in making the Deloitte 2015 Audit Representations engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s. 18 of the ACL or alternatively s. 1041H of the Corporations Act, or alternatively s. 12DA of the ASIC Act.

Particulars

If the matters in any of subparagraphs (a)-(d) are established, then Deloitte did not have a reasonable basis for the Deloitte 2015 Audit Representations, and/or did not have sufficient appropriate audit evidence in respect of the matters the subject of the Deloitte 2015 Audit Representations, and/or the Deloitte 2015 Audit Representations were not based upon a proper interpretation of Australian Accounting Standards.

96. For the purposes only of this proportionate liability defence and without any admission, Potts repeats paragraphs 219-221 of the Statement of Claim and says that if the matters pleaded in those paragraphs 219-221 are established (which is denied), then it will also be the case that the contraventions by Deloitte pleaded above caused, after 16 February 2015 and further or alternatively after 18 August 2015, the market price of DSH shares to be substantially greater than (a) their true value or (b) the market price that would have prevailed but for those pleaded contraventions.
97. Further or in the alternative, insofar as any of the Plaintiffs or Group Members acquired an interest in DSH shares in reliance on the reports of DSH as at 28 December 2014 or as at 28 June 2015 (which is not admitted), then such acquisitions were made in reliance on the Deloitte 2015 Half-Year Members Report and/or the Deloitte June 2015 Members Report, which were published in those financial reports.
98. By reason of the matters in paragraphs 87-97 of this List Response, any misleading or deceptive conduct of Deloitte in making the Deloitte Half-Year Representations and/or the

Deloitte 2015 Audit Representations was a cause of the loss or damage claimed by the Plaintiffs and Group Members in these proceedings.

99. In the premises, if it is established (which is denied) that Potts is liable to the Plaintiffs for any loss or damage, then:

- (i) each of Potts and Deloitte is a concurrent wrongdoer within the meaning of s.1041L of the Corporations Act; and
- (ii) pursuant to s.1041L of the Corporations Act, any liability (which is denied) of Potts to the Plaintiffs for any such loss is to be limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just having regard to the extent of Potts' responsibility, and the extent of the responsibility of Deloitte, for that loss or damage.

D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

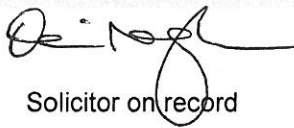
None.

E. MEDIATION STATEMENT

The parties have not attempted mediation. The Third Defendant is willing to proceed to mediation at an appropriate time.

SIGNATURE OF LEGAL REPRESENTATIVE

Signature



Capacity

Solicitor on record

Date of signature

24 November 2017