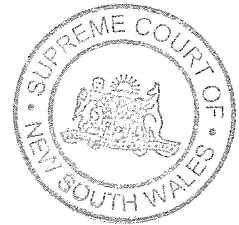


FILED

20 DEC 2017



## **DEFENCE TO FURTHER AMENDED STATEMENT OF CLAIM**

Pursuant to order 6 of the orders made on 7 December 2017

### **COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Equity Division
List	General List
Registry	Sydney
Case number	2016/35575

### **TITLE OF PROCEEDINGS**

First plaintiff	<b>Diana Leonie O'Dea</b>
Second plaintiff	<b>Thomas Vaarzon-Morel</b>
First defendant	<b><del>Anthony Samuel Famularo</del></b>
Second defendant	<b>Westpac Banking Corporation (ABN 33 007 457 141)</b>

### **FILING DETAILS**

Filed for	<b>Westpac Banking Corporation (ABN 33 007 457 141),</b> <del>second defendant</del>
Legal representative	Malcolm Stephens Allens, Solicitors
Legal representative reference	25764
Contact name and telephone	Malcolm Stephens (02) 9230 4828
Contact email:	Malcolm.Stephens@allens.com.au Daniel.MacPherson@allens.com.au

### **PLEADING AND PARTICULARS**

All references to paragraphs are references to paragraphs of the plaintiff's pleadings and particulars contained within its Further Amended Statement of Claim filed ~~5 August 2016~~ 19 December 2017 (***Statement of Claim***) unless the context indicates otherwise.

The terms defined by the plaintiff have the same meaning in this section, unless otherwise defined or stated.

1. In answer to paragraph 1, the ~~second~~-defendant admits that the plaintiffs have purported to commence this proceeding as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act* 2005 but does not admit that they have done so validly.
2. The ~~second~~-defendant does not admit the allegations in paragraph 2.
3. In answer to paragraph 3, the ~~second~~-defendant:
  - (a) does not admit the allegations in the paragraph insofar as they relate to Group Members;
  - (b) does not admit the allegations contained in paragraph 3(a) insofar as they relate to the plaintiffs;
  - (c) admits that on or around 26 June 2006, the Plaintiffs' Shares were lodged as third party security for the Shareequity margin loan;
  - (d) otherwise does not admit the allegations in paragraph 3(b) insofar as they relate to the plaintiffs;
  - (e) says that:
    - (i) on or around 6 September 2012, the second plaintiff lodged a dispute with the Financial Ombudsman Service (**FOS**) in relation to the contracts made by the entry into the Kangaroo Island Letter of Offer and Kangaroo Island Mortgage, which was assigned FOS case number 297443 (though was also sometimes referred to using case number 297444);
    - (ii) on 29 August 2014, FOS made a determination that required, in respect of those contracts, that, if the second plaintiff accepted the determination, the ~~second~~-defendant:
      - (A) reverse interest and fees charged on the second plaintiff's loan account XX4500 since February 2012 and cease charging interest and fees until the loan was repaid in full;
      - (B) credit the second plaintiff's loan account XX4500 with \$69,340.08; and

- (C) provide the second plaintiff with a statement for loan account XX4500 after those adjustments had been made;
- (iii) on 13 October 2014, the second plaintiff signed a form titled "Acceptance of Determination" that stated "I accept the terms of the Determination in full and final settlement of all matters between myself and St George Bank arising out of the Dispute [being the dispute with dispute number 297444 lodged with FOS about SGB]";
- (iv) the ~~second~~ defendant complied with the FOS determination;
- (v) FOS is a public company which operates an external dispute resolution scheme approved by ASIC for the purposes of s912A(2)(b)(i) of the Corporations Act;
- (vi) the FOS Terms of Reference dated 1 January 2010 (as amended 1 January 2012) (the Terms of Reference) applied in respect of the dispute lodged by the second plaintiff;
- (vii) clause 8.7(b) of the Terms of Reference provided that:
- A Determination is a final decision and is binding upon the Financial Services Provider if the Applicant accepts the Determination within 30 days of receiving the Determination.*
- (viii) clause 8.8 of the Terms of Reference provided that:
- In order to accept a Recommendation or a Determination, the Applicant must provide the Financial Services Provider (if the Financial Services Provider so requests) with a binding release of the Financial Services Provider from liability in respect of the matters resolved by the Recommendation or Determination. The release must be for the full value of the claim the subject of the Dispute, even if this amount exceeds the amount of the remedy decided upon by FOS. The release shall be effective from the date on which the Financial Services Provider fulfils all of its obligations under the Recommendation or Determination.*

- (f) denies the allegations in paragraph 3(c) insofar as they allege loss or damage suffered by reason of the conduct of the ~~second~~-defendant;
  - (g) does not admit the allegations in paragraph 3(c) insofar as they allege loss or damage suffered by reason of the conduct of ~~the first defendant~~ Mr Famularo; and
  - (h) denies the allegations in paragraph 3(d) insofar as they relate to the plaintiffs and says that the consequence of the matters pleaded in paragraph (e) above is that the second plaintiff has released any claims he had against the ~~second~~-defendant in respect of the matters pleaded in paragraphs 55-71 and 181-185 of the Statement of Claim.
4. The ~~second~~-defendant does not admit the allegations in paragraph 4.
  5. In answer to paragraph 5, the ~~second~~-defendant:
    - (a) admits the allegations in paragraph 5(c);
    - (b) says that Mr Famularo was the sole director and company secretary for Sharequity Pty Limited (**Sharequity**) from 13 July 1998 until the date that it was deregistered on 14 April 2014; and
    - (c) otherwise does not admit the allegations in the paragraph.
  6. The ~~second~~-defendant admits the allegations in paragraph 6.
  7. In answer to paragraph 7, the ~~second~~-defendant:
    - (a) admits that SGB was a trading bank at all Relevant Times;
    - (b) admits that SGB provided banking and financial services, including margin lending;
    - (c) denies that SGB provided margin lending services to the plaintiffs;
    - (d) admits that SGB operated a division known as St George Margin Lending which carried on a business of providing margin loans (~~but denies the description of that business in paragraph 7(e)~~);
    - (e) does not admit the allegations in the paragraph insofar as they relate to Group Members; and
    - (f) otherwise does not admit the allegations in the paragraph.

8. The ~~second~~-defendant denies the allegations in paragraph 8.
9. The ~~second~~-defendant denies the allegations in paragraph 9.
10. In answer to paragraph 10, the ~~second~~-defendant:
  - (a) denies the Famularo Strategy;
  - (b) denies the allegations in paragraphs 10(c) and 10(d); and
  - (c) otherwise does not admit the allegations in the paragraph.
11. In answer to paragraph 11, the ~~second~~-defendant:
  - (a) denies the Famularo Scheme;
  - (b) repeats its answer to paragraph 18 below; and
  - (c) otherwise does not admit the allegations in the paragraph.
12. The ~~second~~-defendant does not admit the allegations in paragraph 12.
13. The ~~second~~-defendant admits the allegations in paragraph 13.
14. In answer to paragraph 14, the ~~second~~-defendant:
  - (a) says that in around June 2005, SGB launched a pilot program of a product called DIY Options. The product was officially launched in September 2006;
  - (b) says the DIY Options product allowed borrowers with PELs to write call options against "protected securities", subject to the terms and conditions as set out at paragraph 16 below;
  - (c) says that neither the plaintiffs nor Sharequity had a loan that used the DIY Options product at any Relevant Time; and
  - (d) otherwise denies the allegations in the paragraph.
15. In answer to paragraph 15, the ~~second~~-defendant:
  - (a) says that the pilot program for the DIY Options product commenced in about June 2005, in which Mr Famularo participated;
  - (b) says that the DIY Options product was officially launched in September 2006; and
  - (c) otherwise denies the allegations in the paragraph.

16. In answer to paragraph 16, the ~~second~~ defendant:

- (a) says that the terms governing a customer's use of the DIY Options product were contained in:
  - (i) SGB's standard margin lending terms and conditions, as contained in a document entitled "Margin Lending Terms & Conditions" (***SGML Terms***); and
  - (ii) the supplementary terms and conditions, as contained in a document entitled "DIY Options Supplementary Terms and Conditions" (***DIY Options Terms***),  
as updated and amended from time; and
- (b) repeats paragraph 14 above; and
- (c) denies that the terms of the DIY Options product were developed by SGML and Mr Famularo jointly; and
- (d) otherwise denies the allegations in the paragraph.

17. In answer to paragraph 17, the ~~second~~ defendant:

- (a) denies the Famularo Strategy;
- (b) denies that the terms of the DIY Options product were expressly designed in order to facilitate trading through the Famularo Strategy;
- (c) admits the terms of the DIY Options product included the terms pleaded in paragraphs 17(a) and 17(c)(i);
- (d) says that the borrower under the DIY Options product, or a "third party security provider" (as defined in the DIY Options Terms), was permitted to write call options provided that:
  - (i) SGML agreed; and
  - (ii) the call options had:
    - (A) a strike price which was greater than the strike price of the put option in respect of the relevant protected securities; and
    - (B) an expiry date that occurred no later than the expiry date of the put option in respect of the relevant protected securities.

### Particulars

Clause 5.3 of the DIY Options Supplementary Terms and Conditions.

- (e) says that the ~~second~~-defendant's policy governing the LVR of a particular product depended on the specific characteristics of that product;
  - (f) says that SGB allowed customers who took out the DIY Options product to borrow up to 100% of the "protected price" of the "protected securities", as the effect of the customer obtaining a put option was that the protected securities could be sold at the strike price specified under the terms of the put option, rather than the spot price; and
  - (g) otherwise denies the allegations in the paragraph.
18. In answer to paragraph 18, the ~~second~~-defendant:
- (a) admits the terms of the DIY Options product pleaded in paragraphs 18(a) to (c);
  - (b) denies that the terms pleaded in paragraphs 18(a) to (c) gave SGML control, or a substantial degree of control, over protected securities;
  - (c) says that the DIY Options Supplementary Terms and Conditions applied in addition to the "facility agreement";

### Particulars

Clause 1.1 of the DIY Options Supplementary Terms and Conditions.

- (d) will rely on the DIY Options Terms for their full force and effect; and
  - (e) otherwise does not admit the allegations in the paragraph.
19. In answer to paragraph 19, the ~~second~~-defendant:
- (a) denies the Famularo Strategy;
  - (b) repeats its answer to paragraph 17 above; and
  - (c) otherwise denies the allegations in the paragraph.
20. In answer to paragraph 20, the ~~second~~-defendant:

- (a) admits the allegations in paragraph 20(a)(i), except to the extent it refers to the Famularo Entities, and says that the exposure was through accounts aggregated to Mr Famularo;
- (b) admits the allegations in paragraph 20(b)(i) to 20(b)(ii), except to the extent they refer to the Famularo Entities, and says that the 5 February 2007 draft memo referred to Mr Famularo's "aggregated accounts";
- (c) says that the 5 February 2007 draft memo stated that each account generally had a facility limit of \$3m, although some had a limit of \$5m;

#### **Particulars**

The draft memorandum dated 5 February 2007 entitled, "Tony Famularo - \$150M Aggregated Loan Protected Put Options" from Don Ellett to Peter Ewers and copied to Liam Aylmer and Andrew Black.

- (d) admits that in around May 2007, Michael King conducted an audit in relation to the DIY Options product, which identified, among other things, the matters set out in paragraphs 20(c)(ii)(E), (F) and (I) of the Statement of Claim;
  - (e) admits that a draft report was prepared following the audit referred to in paragraph (d) above; and
  - (f) otherwise denies the allegations in the paragraph.
21. The ~~second~~-defendant denies the allegations in paragraph 21.
22. In answer to paragraph 22, the ~~second~~-defendant:
- (a) denies the circumstances pleaded in paragraphs 20 and 21 of the Statement of Claim, except to the extent of the admissions in paragraph 20 above;
  - (b) admits that on or about 20 February 2007, Paul Lewis, National Sales Manager at SGML, had a discussion with Mr Famularo in relation to terminating certain facilities held by Mr Famularo, and otherwise denies the allegations in paragraph 22(a);

- (c) admits the allegations in paragraphs 22(b) to 22(c), except to the extent that those paragraphs refer to the "Famularo SGML Facilities", and says instead that the letters dated 21 February 2007 and 6 March 2007 referred to margin lending facilities held by certain entities specified in a schedule marked "Schedule A" to each respective letter;
  - (d) says in respect of the letter dated 6 March 2007 that:
    - (i) the letter requested that Mr Famularo submit a revised proposal to SGML; and
    - (ii) Mr Famularo countersigned a copy of the letter, dated 9 March 2007; and
  - (e) otherwise denies the allegations in the paragraph.
23. In answer to paragraph 23, the ~~second~~-defendant:
- (a) admits the allegations in paragraph 23(a);
  - (b) says that the letter dated 26 February 2007 from Mr Famularo to Andrew Black stated that the assets for the entities referred to in the letter from Mr Black dated 21 February 2007, being shares and put options, comfortably exceeded the value of the amount outstanding under their respective facilities, being \$165,464,401; and
  - (c) otherwise does not admit the allegations in the paragraph.
24. In answer to paragraph 24, the ~~second~~-defendant:
- (a) says that by 11 July 2007, Mr Famularo had, at SGML's direction, substantially reduced the amounts outstanding under his margin lending facilities;
  - (b) says that by letter dated 11 July 2007, SGML requested that Mr Famularo confirm that the remaining amounts outstanding under the margin lending facilities (being \$57,242,729.45) would be repaid by 30 September 2007;

#### **Particulars**

Letter from SGML to Mr Famularo dated 11 July 2007, signed by  
Geoffrey Lloyd.

- (c) says that on 26 July 2007, Rohan Vincent and Jay Pottenger from SGML met with Mr Famularo to discuss how he would comply with the requirement to repay amounts outstanding under the margin lending facilities. Mr Famularo said that he would reduce the position of the companies aggregated to him under the DIY Options product to nil by 30 September 2007, but requested that some of those companies be entitled to retain PELs;

#### Particulars

Meeting between Rohan Vincent and Jay Pottenger of SGML and Mr Famularo on 26 July 2007.

- (d) says that in early August, there was approximately \$25 million outstanding under PEL facilities associated with Mr Famularo;
  - (e) says that in about early August 2007, representatives of SGML met with Mr Famularo. Mr Famularo requested that he be entitled to retain PELs;
  - (f) admits the allegations in paragraph 24(c);
  - (g) admits the allegations in paragraph 24(d);
  - (h) says that Mr Famularo closed his DIY Options positions by 5 October 2007. The DIY Options functionality, however, was not removed from certain of the accounts and Mr Famularo began using that functionality again in February 2008. This came to the attention of representatives of SGML in around July 2008; and
  - (i) otherwise denies the allegations contained in the paragraph.
25. In answer to paragraph 25, the ~~second~~ defendant:
- (a) repeats its answers in relation to paragraph 24 above;
  - (b) says that, as at May 2007, SGB had put in place monitoring and reporting arrangements directed at ensuring that Divisional Group Executives, the GEM, the CEO and the BRMC were kept appropriately apprised of the DIY Options position; and
  - (c) otherwise denies the allegations in the paragraph.
26. The ~~second~~ defendant does not admit the allegations in paragraph 26.

27. In answer to paragraph 27, the ~~second~~-defendant:
  - (a) says that on or around 5 September 2008:
    - (i) there were 46 accounts associated with Mr Famularo as either adviser or director, with an aggregate loan amount of \$15.15 million and comprising:
      - (A) 2 DIY Options accounts;
      - (B) 10 PEL only accounts; and
      - (C) 34 margin loan accounts; and
    - (ii) there were 3 accounts associated with Mark Fenech, with an aggregate loan amount of \$10.5 million and comprising 1 DIY Options & PEL account, 1 DIY Options only account, and 1 margin loan account; and
  - (b) otherwise does not admit the allegations in the paragraph.
28. In answer to paragraph 28, the ~~second~~-defendant:
  - (a) admits the allegations in sub-paragraphs 28(a)-(f) of the Statement of Claim; and
  - (b) otherwise denies the allegations in the paragraph.
29. The ~~second~~-defendant does not admit the allegations in paragraph 29.
30. The ~~second~~-defendant does not admit the allegations in paragraph 30.
31. The ~~second~~-defendant does not admit the allegations in paragraph 31.
32. The ~~second~~-defendant does not admit the allegations in paragraph 32.
33. The ~~second~~-defendant does not admit the allegations in paragraph 33.
34. The ~~second~~-defendant does not admit the allegations in paragraph 34.
35. The ~~second~~-defendant does not admit the allegations in paragraph 35.
36. In answer to paragraph 36, the ~~second~~-defendant:
  - (a) admits that the first and second plaintiffs signed a Third Party Security Form dated 7 June 2006 in favour of Sharequity Pty Ltd;

- (b) admits that the first and second plaintiffs signed a document titled "Account Application Form" with Andrew West & Co Ltd dated 7 June 2006; and
  - (c) otherwise does not admit the allegations in the paragraph.
37. The ~~second~~-defendant does not admit the allegations in paragraph 37.
38. The ~~second~~-defendant denies the allegations in paragraph 38.
39. The ~~second~~-defendant admits the allegations in paragraph 39.
40. The ~~second~~-defendant admits the allegations in paragraph 40.
41. In answer to paragraph 41, the ~~second~~-defendant:
- (a) admits that, on or around 9 December 2004, Sharequity, through Mr Famularo, entered into a margin lending agreement with SGML; and
  - (b) says that the terms of the margin lending agreement included the St George Margin Lending Terms & Condition – version dated March 2004.
42. The ~~second~~-defendant admits the allegations in paragraph 42.
43. The ~~second~~-defendant denies the allegations in paragraph 43.
44. In answer to paragraph 44, the ~~second~~-defendant:
- (a) admits that, as at 7 June 2006, the plaintiffs and Charles Sharpe had signed documents entitled "Third Party Security Provider";
  - (b) will rely on the SGML Terms for their full effect; and
  - (c) otherwise does not admit the allegations in the paragraph.
45. The ~~second~~-defendant does not admit the allegations in paragraph 45.
46. The ~~second~~-defendant does not admit the allegations in paragraph 46.
47. The ~~second~~-defendant does not admit the allegations in paragraph 47.
48. The ~~second~~-defendant does not admit the allegations in paragraph 48.
49. In answer to paragraph 49, the ~~second~~-defendant:
- (a) says that on 9 June 2006 the ~~second~~-defendant received a document entitled "Third Party Security Provider" which appeared to be signed by each of the plaintiffs;

- (b) says that pursuant to the above form, the plaintiffs agreed to become third party security providers for the Sharequity Margin Loan;
- (c) says that the shares set out at paragraph 48 of the Statement of Claim were lodged as security for the Sharequity Margin Loan on or around 29 June 2006; and
- (d) otherwise denies the allegations in the paragraph.

50. The ~~second~~-defendant does not admit the allegations in paragraph 50.

51. The ~~second~~-defendant does not admit the allegations in paragraph 51.

52. The ~~second~~-defendant does not admit the allegations in paragraph 52.

53. The ~~second~~-defendant does not admit the allegations in paragraph 53.

54. The ~~second~~-defendant does not admit the allegations in paragraph 54.

55. In answer to paragraph 55, the ~~second~~-defendant:

- (a) repeats its answers to paragraphs 21 and 22 above; and
- (b) otherwise denies the allegations in the paragraph.

56. In answer to paragraph 56, the ~~second~~-defendant:

- (a) admits that the Sharequity Margin Loan was used after 30 September 2007; and
- (b) otherwise denies the allegations contained in the paragraph.

57. The ~~second~~-defendant does not admit the allegations in paragraph 57.

58. The ~~second~~-defendant does not admit the allegations in paragraph 58.

59. The ~~second~~-defendant does not admit the allegations in paragraph 59.

60. The ~~second~~-defendant does not admit the allegations in paragraph 60.

61. In answer to paragraph 61, the ~~second~~-defendant:

- (a) admits that it received the document described in paragraph 61(a) and says further that:

- (i) page 4 of the Second Plaintiff's Mortgage Application indicated that the purpose of the loan was to refinance a property used for investment purposes described as "INV HOUSE"; and
    - (ii) it will rely on the terms of the Second Plaintiff's Mortgage Application for their full force and effect; and
  - (b) otherwise does not admit the allegations in the paragraph.
62. The ~~second~~-defendant admits the allegations in paragraph 62, save that it says that:
- (a) the fixed interest rate of 8.29% per annum for the first five years of the loan was subject to certain conditions set out in the Kangaroo Island Letter of Offer; and
  - (b) it will rely on the terms of the Kangaroo Island Letter of Offer for their full force and effect.
63. The ~~second~~-defendant admits the allegations in paragraph 63.
64. The ~~second~~-defendant admits the allegations in paragraph 64, save that it says that the funds were advanced on 29 February 2008.
65. The ~~second~~-defendant does not admit the allegations in paragraph 65.
66. The ~~second~~-defendant does not admit the allegations in paragraph 66.
67. The ~~second~~-defendant does not admit the allegations in paragraph 67.
68. The ~~second~~-defendant does not admit the allegations in paragraph 68.
69. The ~~second~~-defendant does not admit the allegations in paragraph 69.
70. The ~~second~~-defendant does not admit the allegations in paragraph 70.
71. The ~~second~~-defendant does not admit the allegations in paragraph 71.
72. The ~~second~~-defendant does not admit the allegations in paragraph 72.
73. The ~~second~~-defendant does not admit the allegations in paragraph 73.
74. The ~~second~~-defendant does not admit the allegations in paragraph 74.
75. The ~~second~~-defendant does not admit the allegations in paragraph 75.
76. In answer to paragraph 76, the ~~second~~-defendant:

- (a) admits that on 15 January 2008 it received a copy of a document titled "Loan Application", being an application for a home loan signed by the first plaintiff;
  - (b) admits that on 17 January 2008 it received a copy of a particulars page for a document titled "Contract for the sale of land – 2000 edition" that included details for a property described as "30 Headland Parade, Barrack Point" and which appeared to have been signed by the vendor; and
  - (c) otherwise does not admit the allegations in the paragraph.
77. In answer to paragraph 77, the ~~second~~-defendant:
- (a) repeats paragraphs 76(a) and (b); and
  - (b) otherwise does not admit the allegations in the paragraph.
78. In answer to paragraph 78, the ~~second~~-defendant:
- (a) says that SGB advanced \$820,000 to the first plaintiff on or about 5 May 2008, pursuant to the Barrack Point Letters of Offer, which the first plaintiff used to purchase the Barrack Point property; and
  - (b) otherwise does not admit the allegations in the paragraph.
79. The ~~second~~-defendant does not admit the allegations in paragraph 79.
80. The ~~second~~-defendant does not admit the allegations in paragraph 80.
81. The ~~second~~-defendant does not admit the allegations in paragraph 81.
82. In answer to paragraph 82, the ~~second~~-defendant:
- (a) says that the Barrack Point Letters of Offer were subject to the conditions set out in those offers, including the Residential Loan Agreement General Terms and Conditions dated 2 March 2008;
  - (b) the Barrack Point Letters of Offer contained a statement that, by signing the document, the first plaintiff declared that she understood that the mortgaged or other secured property would be at risk if the first plaintiff defaulted on the loan; and

### Particulars

Paragraph 5 of the section entitled "Acceptance by Borrower" contained in the Barrack Point Letters of Offer.

- (c) otherwise admits the allegations in the paragraph.
- 83. The ~~second~~-defendant admits the allegations in paragraph 83.
- 84. In answer to paragraph 84, the ~~second~~-defendant:
  - (a) admits that it advanced \$820,000 to the first plaintiff on 5 May 2008; and
  - (b) otherwise does not admit the allegations in the paragraph.
- 85. In answer to paragraph 85, the ~~second~~-defendant:
  - (a) admits that the LVR of the Sharequity Margin Loan did not reach a level that would entitle SGB to make a margin call in early 2008;
  - (b) otherwise does not admit the allegations in the paragraph.
- 86. In answer to paragraph 86, the ~~second~~-defendant:
  - (a) says that from about late April to early May 2008, the Plaintiffs' Shares were sold without SGB's prior knowledge or direction and without using any sale powers pursuant to the terms of the Sharequity Margin Loan;
  - (b) says that from about late April to 5 June 2008, SGB received copies of sell confirmations from the Plaintiffs' broker, CMC Market Stockbroking (formerly known as Andrew West Stockbroking), which were also addressed to the plaintiffs, in relation to the Plaintiffs' Shares;

### Particulars

The ~~second~~-defendant received copies of sell confirmations from CMC Market Stockbroking informing it of the sale of the Plaintiffs' Shares as set out in the following table.

Settlement Date	Shares	Number	Proceeds
9 May 2008	SAINTS	1500	\$142,193.41
9 May 2008	PERLS II	2000	\$398,569.84

12 May 2008	SAINTS	500	\$47,068.90
12 May 2008	PERLS III	786	\$151,727.86
13 May 2008	SAINTS	650	\$61,212.50
13 May 2008	PERLS III	989	\$187,962.71
2 June 2008	PERLS III	101	\$19,496.78
3 June 2008	PERLS III	113	\$21,813.23

- (c) the proceeds from the sale of the plaintiffs' shares were used to reduce the balance of the Sharequity Margin Loan; and
- (d) otherwise denies the allegations in the paragraph.

87. In answer to paragraph 87, the ~~second~~-defendant:

- (a) repeats paragraph 86 above; and
- (b) otherwise denies the allegations in the paragraph.

88. In answer to paragraph 88, the ~~second~~-defendant:

- (a) repeats paragraphs 86 and 87 above;
- (b) says the Plaintiffs' Shares were sold without SGB's prior knowledge or direction and without using any sale powers pursuant to the terms of the Sharequity margin loan, for a total of \$1,030,045.23;
- (c) says the proceeds of the sale of the Plaintiffs' Shares were applied to reduce the balance of the Sharequity Margin Loan;
- (d) does not admit that the Plaintiffs' Shares were sold without the knowledge or consent of the Plaintiffs; and
- (e) otherwise denies the allegations in the paragraph.

89. The ~~second~~-defendant admits the allegations in paragraph 89.

90. In answer to paragraph 90, the ~~second~~-defendant:

- (a) repeats paragraph 87 above;

(b) says that the proceeds from the sale of the plaintiffs' shares were used to reduce the balance of the Sharequity Margin Loan; and

(c) otherwise does not admit the allegations in the paragraph.

91. The ~~second~~-defendant does not admit the allegations in paragraph 91.

92. The ~~second~~-defendant does not admit the allegations in paragraph 92.

93. The ~~second~~-defendant does not admit the allegations in paragraph 93.

94. The ~~second~~-defendant does not admit the allegations in paragraph 94.

95. The ~~second~~-defendant does not admit the allegations in paragraph 95.

96. The ~~second~~-defendant denies the allegations in paragraph 96.

97. The ~~second~~-defendant denies the allegations in paragraph 97.

98. The ~~second~~-defendant denies the allegations in paragraph 98.

99. The ~~second~~-defendant denies the allegations in paragraph 99.

100. The ~~second~~-defendant denies the allegations in paragraph 100.

101. The ~~second~~-defendant admits the allegations in paragraph 101.

102. The ~~second~~-defendant denies the allegations in paragraph 102.

103. The ~~second~~-defendant denies the allegations in paragraph 103.

104. The ~~second~~-defendant denies the allegations in paragraph 104.

105. The ~~second~~-defendant denies the allegations in paragraph 105.

106. The ~~second~~-defendant denies the allegations in paragraph 106.

107. The ~~second~~-defendant denies the allegations in paragraph 107.

108. ~~The second defendant denies the allegations in paragraph 108.~~[Intentionally left blank]

109. ~~The second defendant denies the allegations in paragraph 109.~~[Intentionally left blank]

110. In answer to paragraph 110, the ~~second~~-defendant repeats its answer to paragraph 21 above.

111. The ~~second~~-defendant denies the allegations in paragraph 111.
112. In answer to paragraph 112, the ~~second~~-defendant:
- (a) says that the Internal Audit Report was prepared in or around May 2007;
  - (b) says that the Internal Audit Report stated that where shareholders were not identified when companies opened accounts, there could be increased risks of money laundering or reputational damage if those shareholders were retail customers relying on an unlicensed advisor to act as intermediary for their investments;
  - (c) will rely on the terms of the Internal Audit Report for their full effect; and
  - (d) otherwise denies the allegations in the paragraph.
113. In answer to paragraph 113, the ~~second~~-defendant:
- (a) admits that Mr Famularo did not have an AFSL; and
  - (b) otherwise does not admit the allegations in the paragraph.
114. The ~~second~~-defendant denies the allegations in paragraph 114.
115. In answer to paragraph 115, the ~~second~~-defendant:
- (a) repeats its answers to paragraphs 14 and 28 above; and
  - (b) otherwise denies the allegations in the paragraph.
116. In answer to paragraph 116, the ~~second~~-defendant:
- (a) repeats its answer to paragraphs 9, 14, 17, 19 and 28 above; and
  - (b) otherwise denies the allegations in the paragraph.
117. The ~~second~~-defendant denies the allegations in paragraph 117.
118. In answer to paragraph 118, the ~~second~~-defendant:
- (a) admits the allegations in paragraph 118(d); and
  - (b) otherwise denies the allegations in the paragraph.
119. The ~~second~~-defendant denies the allegations in paragraph 119.
120. The ~~second~~-defendant denies the allegations in paragraph 120.

121. The ~~second~~-defendant denies the allegations in paragraph 121.
122. The ~~second~~-defendant denies the allegations in paragraph 122.
123. The ~~second~~-defendant denies the allegations in paragraph 123.
124. The ~~second~~-defendant denies the allegations in paragraph 124.
125. The ~~second~~-defendant denies the allegations in paragraph 125.
126. The ~~second~~-defendant denies the allegations in paragraph 126.
127. The ~~second~~-defendant denies the allegations in paragraph 127.
128. The ~~second~~-defendant denies the allegations in paragraph 128.
129. The ~~second~~-defendant denies the allegations in paragraph 129.
130. The ~~second~~-defendant denies the allegations in paragraph 130.
131. The ~~second~~-defendant denies the allegations in paragraph 131.
132. The ~~second~~-defendant denies the allegations in paragraph 132.
133. The ~~second~~-defendant denies the allegations in paragraph 133.
134. In answer to paragraph 134, the ~~second~~-defendant:
  - (a) repeats the matters set out at paragraphs 9, 14, 18 and 30 above; and
  - (b) otherwise does not admit the allegations in the paragraph.
135. In answer to paragraph 135, the ~~second~~-defendant:
  - (a) repeats the matters set out at paragraphs 9, 14, 18, 30 and 32 above; and
  - (b) otherwise does not admit the allegations contained in the paragraph.
136. In answer to paragraph 136, the ~~second~~-defendant:
  - (a) repeats the matters set out at paragraphs 9, 14, 18, 30, 32 and 35 above;  
and
  - (b) otherwise does not admit the allegations contained in the paragraph.
137. In answer to paragraph 137, the ~~second~~-defendant:
  - (a) repeats the matters set out at paragraphs 49 and 50 above; and
  - (b) otherwise does not admit the allegations contained in the paragraph.

138. The ~~second~~-defendant does not admit the allegations in paragraph 138.
139. The ~~second~~-defendant does not admit the allegations in paragraph 139.
140. The ~~second~~-defendant does not admit the allegations in paragraph 140.
141. The ~~second~~-defendant does not admit the allegations in paragraph 141.
142. The ~~second~~-defendant does not admit the allegations in paragraph 142. [Intentionally left blank]
143. [Intentionally left blank] ~~The second defendant denies the allegations in paragraph 143.~~
144. The ~~second~~-defendant does not admit the allegations in paragraph 144.
145. The ~~second~~-defendant does not admit the allegations in paragraph 145.
146. [Intentionally left blank] ~~The second defendant denies the allegations in paragraph 146.~~
147. In answer to paragraph 147, the ~~second~~-defendant:
- (a) repeats its answer to paragraph 134 above; and
  - (b) otherwise denies the allegations in the paragraph.
148. The ~~second~~-defendant does not admit the allegations in paragraph 148.
149. The ~~second~~-defendant denies the allegations in paragraph 149.
150. The ~~second~~-defendant does not admit the allegations in paragraph 150.
151. The ~~second~~-defendant does not admit the allegations in paragraph 151.
152. [Intentionally left blank] ~~The second defendant does not admit the allegations in paragraph 152.~~
153. [Intentionally left blank] ~~The second defendant does not admit the allegations in paragraph 153.~~
154. The ~~second~~-defendant does not admit the allegations in paragraph 154.
155. The ~~second~~-defendant does not admit the allegations in paragraph 155.
156. In answer to paragraph 156, the ~~second~~-defendant:
- (a) repeats the matters set out at paragraph 18 above; and

- (b) otherwise does not admit the allegations contained in the paragraph.
157. In answer to paragraph 157, the ~~second~~-defendant:
- (a) repeats the matters set out at paragraph 18 above; and
  - (b) otherwise does not admit the allegations contained in the paragraph .
158. The ~~second~~-defendant does not admit the allegations in paragraph 158.
159. The ~~second~~-defendant does not admit the allegations in paragraph 159.
160. The ~~second~~-defendant does not admit the allegations in paragraph 160.
161. The ~~second~~-defendant does not admit the allegations in paragraph 161.
162. The ~~second~~-defendant does not admit the allegations in paragraph 162.
163. The ~~second~~-defendant does not admit the allegations in paragraph 163.
164. In answer to paragraph 164, the ~~second~~-defendant:
- (a) repeats the matters set out at paragraphs 19 to 21, 110 to 116 and 117-129 above; and
  - (b) otherwise denies the allegations in the paragraph.
165. The ~~second~~-defendant denies the allegations in paragraph 165.
166. The ~~second~~-defendant denies the allegations in paragraph 166.
167. The ~~second~~-defendant denies the allegations in paragraph 167.
168. In answer to paragraph 168, the ~~second~~-defendant:
- (a) repeats the matters set out at paragraph 20 above; and
  - (b) otherwise denies the allegations in the paragraph.
169. In answer to paragraph 169, the ~~second~~-defendant:
- (a) repeats the matters set out at paragraphs 61(a), 86-88 and 168 above;
  - (b) says that on 28 February 2008, the second plaintiff granted to it the Kangaroo Island Mortgage as consideration for a loan (but denies that was done pursuant to any permission granted by SGB);
  - (c) says that the Sharequity Margin Loan did not use the DIY Options product;

- (d) says that advances were made to Sharequity under the Sharequity Margin Loan between November 2006 and May 2008; and

**Particulars**

The following advances were made under the Sharequity Margin Loan between November 2006 and May 2008.

<b>Date</b>	<b>Amount</b>
1 November 2006	\$50,000
15 November 2006	\$50,000
20 November 2006	\$20,000
20 November 2006	\$40,000
22 January 2007	\$40,000
30 January 2007	\$40,000
26 March 2007	\$40,000
30 May 2007	\$50,000
8 June 2007	\$30,000
13 May 2008	\$70,000

- (e) otherwise denies the allegations in the paragraph.
170. The ~~second~~-defendant denies the allegations in paragraph 170.
171. The ~~second~~-defendant does not admit the allegations in paragraph 171.
172. The ~~second~~-defendant does not admit the allegations in paragraph 172.
173. The ~~second~~-defendant does not admit the allegations in paragraph 173.
174. The ~~second~~-defendant does not admit the allegations in paragraph 174.
175. The ~~second~~-defendant does not admit the allegations in the paragraph 175.
176. In answer to paragraph 176, the ~~second~~-defendant:
- (a) repeats its answer to paragraph 164 above; and
  - (b) otherwise denies the allegations in the paragraph.

177. The ~~second~~-defendant denies the allegations in paragraph 177.
178. The ~~second~~-defendant denies the allegations in paragraph 178.
179. The ~~second~~-defendant denies the allegations in paragraph 179.
180. The ~~second~~-defendant denies the allegations in paragraph 180.
181. In answer to paragraph 181, the ~~second~~-defendant:
- (a) says that the Sharequity Margin Loan was not subject to the DIY Options Terms;
  - (b) repeats the matters set out at paragraph 61(a);
  - (c) says that Tradeshare had a Margin Loan account with SGML between January and April 2007; and
  - (d) otherwise denies the allegations in the paragraph.
182. The ~~second~~-defendant does not admit the allegations in ~~the paragraph 182.~~
- ~~182.~~ 182A. The defendant does not admit the allegations in paragraph 182A.
183. In answer to paragraph 183, the ~~second~~-defendant:
- (a) repeats the matters set out at paragraph 3(e) above; and
  - (b) denies the allegations in the paragraph.
184. In answer to paragraph 184, the ~~second~~-defendant:
- (a) repeats the matters set out at paragraph 3(e) above; and
  - (b) denies the allegations in the paragraph.
185. In answer to paragraph 185, the ~~second~~-defendant:
- (a) repeats the matters set out at paragraph 3(e) above; and
  - (b) denies the allegations in the paragraph.
186. The ~~second~~-defendant does not admit the allegations in paragraph 186.
187. The ~~second~~-defendant denies the allegations in paragraph 187.
188. The ~~second~~-defendant denies the allegations in paragraph 188.
189. The ~~second~~-defendant denies the allegations in paragraph 189.

190. The ~~second~~-defendant denies the allegations in paragraph 190.
191. The ~~second~~-defendant does not admit the allegations in paragraph 191.
- 191A. 191A. The defendant does not admit the allegations in paragraph 191A.
192. The ~~second~~-defendant denies the allegations in paragraph 192.
193. The ~~second~~-defendant denies the allegations in paragraph 193.
194. The ~~second~~-defendant denies the allegations in paragraph 194.
195. On the basis of the responses to the plaintiffs' contentions set out above, the ~~second~~-defendant denies that the plaintiffs are entitled to any of the relief claimed against the ~~second~~-defendant.
196. If, which is denied, the plaintiffs would otherwise be entitled to relief against the ~~second~~-defendant, the ~~second~~-defendant says:
- (a) Any cause of action of the plaintiffs was complete no later than 9 May 2008 (when the first of the Plaintiffs' Shares was sold) or, alternatively, 5 June 2008 (when the last of the Plaintiffs' Shares was sold).
  - (b) In 2014, the plaintiffs' solicitors, acting on behalf of Erutuf Pty Ltd, brought an application for preliminary discovery against the ~~second~~-defendant in order to obtain documents to decide whether to commence a representative action concerning the matters pleaded in the Statement of Claim.
  - (c) That preliminary discovery was granted on 17 December 2014, following a judgment made on 27 November 2014: *Erutuf Pty Ltd v Westpac Banking Corporation* [2014] NSWSC 1679.
  - (d) The ~~second~~-defendant produced documents to the plaintiffs' solicitors pursuant to those preliminary discovery orders on 2 March 2015.
  - (e) If, which is denied, the plaintiffs required preliminary discovery in order to decide whether to commence this proceeding, in the circumstances of the present case, a competent solicitor would have taken no more than 1 month from the receipt of preliminary discovery to provide advice to his or her clients on the prospects of proceeding against the ~~second~~-defendant.
  - (f) This proceeding was not commenced until 3 February 2016.

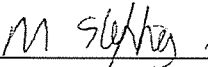
- (g) Mr Famularo died on 24 July 2016.
- (h) As a result of the plaintiffs' delay in commencing this proceeding, in addition to the inevitable prejudice caused by the effluxion of time, the ~~second~~ defendant has been prejudiced because, amongst other things:
  - (i) Mr Famularo is not personally defending the allegations made against him in the Statement of Claim;
  - (ii) Mr Famularo is no longer available as a witness to the ~~second~~ defendant to contradict the accounts of the plaintiffs and group members of conversations and events involving Mr Famularo or to give evidence concerning the alleged Famularo Strategy and Famularo Scheme; and
  - (iii) Mr Famularo is not available to assist the ~~second~~ defendant's defence of the allegations in the Statement of Claim by providing information and documents relating to the accounts of the plaintiffs and group members of conversations and events involving Mr Famularo, the alleged Famularo Strategy and the alleged Famularo Scheme.
- (i) In the circumstances above:
  - (i) The plaintiffs' claims for restitution are barred by s14(1)(a) of the *Limitation Act 1969*.
  - (ii) The plaintiffs' claims for relief under s1325 of the Corporations Act are barred by s1325(10).
  - (iii) The Court should decline relief in respect of the plaintiffs' equitable claims:
    - (A) by applying s14 of the *Limitation Act* by analogy; alternatively,
    - (B) on grounds of laches.

197. The defendant says that the particular defences available in respect of a Group Member's claims cannot be determined until after that Group Member has been identified but that those defences are likely to include limitations defences and laches.

**SIGNATURE OF LEGAL REPRESENTATIVE**

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



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Capacity

Solicitor for the ~~second~~ defendant

Date of signature

~~27 October 2016~~ 20 December 2017