IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2022 04261

FNH UNITED PTY LTD (ACN 639 802 798) & ORS (according to the Schedule) — Plaintiffs

v

UNITED PETROLEUM FRANCHISE PTY LTD (ACN 127 764 989) & ANOR (according to the Schedule) — Defendants

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JUDGE:	DELANY J
WHERE HELD:	Melbourne
DATE OF HEARING:	4 October 2023
DATE OF RULING:	17 October 2023
CASE MAY BE CITED AS:	FNH United Pty Ltd v United Petroleum Franchise Pty Ltd
MEDIUM NEUTRAL CITATION:	[2023] VSC 608

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	B May	Levitt Robinson Solicitors
For the First Defendant	S Rosewarne KC with A Batrouney	King & Wood Mallesons
For the Second Defendant	N De Young KC with D McAloon	Norton Rose Fulbright

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GROUP PROCEEDING – Protocol for communications between parties and group members appropriate – Disclosure of the identity of represented group members not appropriate – Draft communications to group members as a whole to be provided to the parties before issuing such communications – s 33ZF of the *Supreme Court Act 1986* (Vic) – *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, applied – *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] FCA 984, *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2019] FCA 2214, *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 143 ACSR 553 referred to.

GROUP PROCEEDING – Communication from plaintiffs' solicitors containing assertions of fact and opinion to group members and prospective group members – Statements may mislead or confuse – Order for corrective notice – s 33ZF of the *Supreme Court Act 1986* (Vic) – *Johnstone v HIH Ltd* [2004] FCA 190, *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] FCA 984, *Uren v RMBL Investments Ltd* [2019] FCA 1163, *Hawker v Powercor Australia Ltd* [2018] VSC 661, applied – *Chowder Bay Pty Ltd v Paganin* [2018] FCAFC 25, *Ireland v WG Riverview Pty Ltd* (2019) 101 NSWLR 658, referred to.

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HIS HONOUR:

The proceeding

1 The plaintiffs represent all persons who at any time during a six-year period between 19 October 2016 and 20 October 2022 were or commenced to be a franchisee in the United Network pursuant to a standard form franchise agreement with United Petroleum Franchise Pty Ltd ('UPF'), and all persons who at any time during that period were a guarantor of a franchisee's obligations under a franchise agreement with UPF.

2 The first defendant, UPF, is the franchisor for United Petroleum sites. The second defendant, Avi Silver, is a director of UPF.

3 The plaintiffs allege that UPF engaged in wrongdoing in its capacity as franchisor of United Petroleum sites in relation to its conduct towards the group members. It is alleged that UPF engaged in misleading or deceptive conduct and in unconscionable conduct with respect to the installation of the 'Pie Face' franchise into United Petroleum sites, as well as the allocation of Pie Face stock to those sites. The proceeding alleges that the plaintiffs and group members suffered loss as a result of this conduct and that some group members would not have entered into franchises with UPF had the alleged wrongdoing not occurred.

4 The causes of action on which the plaintiffs rely are set out in their statement of claim dated 20 October 2022. There is a pending application to amend the writ and statement of claim and to extend the scope of the group members to include those persons who during the same six-year period are or were commission agents of a related company, United Petroleum Pty Ltd ('UP'), a company of which the second defendant, Mr Silver, is also a director,[1] and to join UP as a defendant to the proceeding ('the joinder and amendment application'). That application is presently listed to be heard on 22 November 2023 before Nichols J, the judge managing this proceeding.

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1 UPF, UP and other related entities are collectively referred to as 'United'.

The applications

5 These reasons concern two applications that were heard together.

6 The first application, by summons issued by the plaintiffs dated 19 September 2023, seeks orders that:

(a) the defendants, including by their servants and agents, be restrained from seeking any release from liability in relation to this proceeding or its subject matter as a condition attaching to the return of all or any part of the bank guarantee or other security granted by a group member to UPF or one of its related entities; and

(b) until further order, the parties and their legal representatives must comply with a communication protocol in the form annexed to the summons.

7 The second application, by summons issued by the first defendant on 28 September 2023, seeks orders that:

(a) within one week of orders being made, the solicitors for the plaintiffs file and serve an affidavit with the names and relevant email addresses or addresses of all persons to whom a circular headed 'Notice to all United Petroleum Franchisees and Commission Agents – 26 July 2023' ('Circular') was sent;

(b) within one week of orders being made, the plaintiffs' solicitors file and serve a draft correction notice correcting misleading statements made in the Circular; and

(c) following approval by the Court of the final form of the correction notice, the plaintiffs' solicitors send the correction notice to all addressees of the Circular.

8 The first defendant's summons also sought an order that two of the deponents of affidavits filed in support of the plaintiffs' summons attend for cross-examination. The application to cross-examine was not pressed in relation to one of those deponents, Ms Doherty, a solicitor. The other deponent, Mr Ittikunnath, previously a director of a former UPF corporate franchisee, was cross-examined.

9 The plaintiffs called evidence from a witness on subpoena, Mr Kumar. Mr Kumar is a director of a corporation which was previously a commission agent for UP. Mr Kumar gave evidence with the assistance of an interpreter and was cross-examined. He was separately represented during the hearing by his solicitor. As mentioned during the course of the hearing, it is appropriate that his reasonable costs, including the costs of his solicitor who filed an affidavit, who appeared on his behalf and who was instrumental in ensuring that an interpreter was available to assist Mr Kumar with his evidence, should be paid by the plaintiffs.

The issues

10 There was a large volume of material filed in relation to these applications by the plaintiffs and by the first defendant. It is unnecessary to list the affidavits relied on by the parties. They were listed in the appearance sheet and I have read and taken their contents into account.[2]

11 Submissions were filed on behalf the plaintiffs, the first defendant and the second defendant, and the plaintiffs filed submissions in reply. Oral submissions were made at the hearing.

12 On 25 September 2023 and 26 September 2023, the solicitors for the second and first defendants respectively issued two notices to produce directed to the plaintiffs and to their solicitors. The plaintiffs contended those notices should be set aside. In the course of the hearing, I ruled that I would not permit those notices to be called on. They sought the production of documents recording or evidencing communications that were legally privileged and which the plaintiffs argued were irrelevant. It was unnecessary to determine the relevance objection. The privilege in the communications to which the notices relate resides in Mr Kumar, a company of which he was the director, and his wife. None of those persons agreed to waive the privilege.

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[2] The plaintiffs' appearance sheet listed an affidavit of Ms Doherty dated 13 September 2023. That affidavit was rejected for filing by the Registry, and was not re-filed or otherwise provided to my Chambers. I proceed on the basis that, as stated at paragraph 5 of Ms Doherty's 21 September 2023 affidavit, the relevant parts of her 13 September 2023 affidavit are repeated in her 21 September 2023 affidavit, which I have read and considered.

13 There was some narrowing of the issues concerning the plaintiffs' summons. Leaving those matters to one side, the following issues remain and require determination:

(a) the plaintiffs and the first defendant agree this is an appropriate case for a communication protocol. The contents of the protocol remains in contention;

(b) whether the protocol is also to bind the second defendant; and

(c) while the plaintiffs are prepared to issue a corrective notice in relation to the Circular, the extent of the correction required and the content of the corrective notice remain in dispute.

Issue 1: The undertakings

14 The plaintiffs and the first defendant agreed upon the following undertakings given in open Court in the course of the hearing by senior counsel on behalf of UPF and on behalf of UP:

> The First Defendant and United Petroleum Pty Ltd undertake that they will not, including by their servants and agents:
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> - seek any release from liability in relation to this proceeding, or its subject matter, as a condition attaching to the return of all or any part of a bank guarantee or other security granted by a Group Member to the First Defendant or one of its related entities, where the First Defendant or one of its related entities is already legally required to return all or any part of the bank guarantee or other security to the Group Member at the time of the agreement;
>
> - represent to any Group Member that he, she, or it has no entitlement to receive the bank guarantee or other security in the absence of such a release, unless the Group Member is not entitled to receive the bank guarantee or security at the time because it is legally being withheld pursuant to the terms of the agreement between the First Defendant or United Petroleum Pty Ltd and the Group Member, to make good the cost of remedying breaches and/or the loss caused by the Group Member's failure to comply with their obligations under that agreement.

Issue 2: The protocol

Jurisdiction

15 The plaintiffs and the first defendant are agreed that the Court should make orders providing for a communication protocol governing communications between them

and group members.

16 The Court has power to make such orders. There are examples in other cases where orders have been made and communication protocols have been put in place.

17 Section 33ZF of the *Supreme Court Act 1986* (Vic) ('the Act') is the source of the power. That section provides:

> **General power of court to make orders**
>
> In any proceeding (including an appeal) conducted under this Part the Court may, of its own motion or on application by a party, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

18 The Court's power under s 33ZF is wide and should be construed generously.[3] The section empowers the Court to impose constraints on a defendant's communications with a group member if such constraints are considered necessary or appropriate to ensure that justice is done in the proceeding.[4]

19 Section 33ZF has been used to establish communication protocols where the Court has determined that such orders are necessary to ensure that communications with group members are accurate and not misleading in any material respect.[5]

20 In *Courtney v Medtel Pty Ltd* ('*Courtney*'),[6] Sackville J held:[7]

> 66 In the present case, there are particular reasons for the Court to intervene. The evidence demonstrates that the respondents put offers directly to individual Group Members before the opt out period expired. These offers were made by telephone, apparently in the hope that the Group Members concerned would accept the offer more or less immediately. The notes of the telephone conversations suggest that the respondents' representatives stated to Group Members, as a matter of course, that the respondents were unable to pay compensation because to do so could be seen as an admission in the representative proceeding. It is neither necessary nor appropriate for me to make a finding that these representations were misleading, nor that they induced any particular Group Member to settle his or her claims. It is enough to say

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3 *Courtney v Medtel Pty Ltd* [2002] FCA 957; (2002) 122 FCR 168, 182 [48] (Sackville J).

4 *Lenehan v Powercor Australia Ltd* [2018] VSC 579, [25] (J Dixon J).

5 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] FCA 984, [8] (Middleton J), citing *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2002] FCA 872; (2002) 121 FCR 480; *Courtney v Medtel Pty Ltd* [2002] FCA 957; (2002) 122 FCR 168; *Williams v FAI Home Security Pty Ltd (No 3)* [2000] FCA 1438, [24].

6 [2002] FCA 957; (2002) 122 FCR 168.

7 Ibid 187 [66]-[67] (emphasis in original).

that, depending on the particular circumstances, the representations *may* have been misleading and *may* have induced settlements. The fact that the representations were made in telephone conversations that were designed to yield immediate acceptance of the offers heightens my concern about the fairness of the approaches made by the respondents to Group Members prior to the opt out period.

67 Because of this evidence, I think that this a stronger case for the Court intervening than one where there is nothing to indicate that a respondent has acted unfairly towards group members. The conduct of the respondents in relation to Group Members prior to the closure of the opt out period raises questions in my mind as to whether any further approaches to Group Members might involve conduct that is arguably misleading or unfair. In these circumstances I think it is appropriate, in order to ensure that justice is done in the proceedings, to require the respondents to notify the applicant's solicitors of the terms of the offers they intend to make and of the manner in which the offers are to be communicated.

21 The contest between the plaintiffs and the first defendant concerns paragraphs 2 and 9 of what is otherwise an agreed protocol. It is helpful to reproduce part of the protocol, including the contested paragraphs:

1. In relation to a Group Member that is known to either United Petroleum Franchise Pty Ltd (**UPF**), or Mr Avi Silver (**Silver**) to be a client of Levitt Robinson Solicitors, or to be otherwise represented by any solicitor in relation to these proceedings, UPF and Silver, and their related parties, servants, or agents, shall not communicate with that Group Member in relation to the proceeding, other than to inform that person that his or her enquiry should be directed to Levitt Robinson Solicitors or their own solicitor, as the case may be. For the avoidance of doubt, a Group Member is relevantly known to be represented (by Levitt Robinson or otherwise) if a Group Member confirms they are represented following an enquiry made pursuant to clauses 3(a), 4(a), 5 or 6 of this Protocol.

2. In order to assist UPF, Silver and their related parties, servants, and agents, to comply with clause 1 of this Protocol, Levitt Robinson will periodically inform UPF and Silver which Group Members are clients of Levitt Robinson in relation to the proceeding.

…

Unsolicited communications by the Defendants which could have an effect on a Group Member's participation in the proceeding

4. In relation to Group Members who are not known clients of Levitt Robinson Solicitors or any other solicitor, UPF and Silver shall use all reasonable measures to ensure that:

   (a) any unsolicited communication made by UPF or Silver, their related parties, servants or agents to a Group Member or Group

Members which could have an effect on a Group Member's participation in the proceeding, shall be made only after querying with that Group Member whether they are legally represented in relation to the proceeding; and

(b) any such unsolicited communication made by UPF or Silver, their related parties, servants or agents to a Group Member or Group Members which could have an effect on a Group Member's participation in the proceeding, shall include a statement to the effect that the Group Member is a Group Member in these proceedings, and refer the Group Member to the website of the Supreme Court of Victoria where the Further Amended Group Proceeding Summary Statement is to be found.

…

Communications by the Defendants to Group Members as a whole

9. In relation to any unsolicited communication which either or both the Defendants intend to make with Group Members as a whole in relation to the proceeding, the Defendants shall use all reasonable measures to ensure that any such communications shall be made in writing only after providing the Plaintiffs with a draft of the proposed communication no less than five business days prior to its intended delivery.

Issue 2(a): Client details

22 The first defendant presses for the inclusion of paragraph 2 which the plaintiffs say should be deleted.

23 Paragraph 4 of the protocol is relevant to the competing contentions. It is an agreed part of the protocol. It applies to unsolicited communications by UPF or by Mr Silver and their related parties, servants or agents with group members. It places the onus on UPF or Mr Silver and their related parties, servants or agents, at the outset of a communication which could have an effect on a group member's participation in the proceeding, to ascertain whether the group member is legally represented in relation to the proceeding. That enquiry is to be made of the group member themselves. In contrast to paragraph 4, paragraph 2 does not capture all persons who are legally represented in relation to the proceedings. It is restricted to those persons legally represented by Levitt Robinson. It places the onus on Levitt Robinson to 'periodically inform UPF and Silver which Group Members are clients of that firm in relation to the proceeding'.

24 No authority was cited by the first defendant in support of the proposition that the plaintiffs should be required to periodically inform the defendants which group members are clients of Levitt Robinson.

25 The first defendant submits that:

> [T]he additional proposal by UPF to ask whether a person is legally represented before discussing the proceeding with them. This proposal by UPF achieves the same objective sought by the Plaintiffs' requirement to ask Levitt Robinson first whether a person is a client of the firm, but is more reasonable given that it does not require UPF to identify a group member to Levitt Robinson before a communication takes place (recognising that group members may not wish to be identified). To a similar end, UPF has proposed that Levitt Robinson provide it with a list of its clients.

26 The plaintiffs submit that they should 'most certainly *not* be ordered to provide UPF a list of their other clients'.

27 No substantive reason was identified by the first defendant why, in addition to what is provided for in paragraph 4, the first defendant should be informed of the names and addresses of the Levitt Robinson clients 'periodically'. It was not demonstrated that it is appropriate or necessary to require Levitt Robinson to periodically inform the defendants which group members are their clients.

28 I am not satisfied that paragraph 2 should form part of the protocol. Paragraph 4 provides a practical and workable solution where there is a need to identify group members who are legally represented, both those who are and who are not clients of Levitt Robinson. Given paragraph 4, the first defendant has no need to know who the clients of the plaintiffs' solicitors firm are, which is all paragraph 2 adds.

29 As well as paragraph 2 being unnecessary, there is evidence which gives rise to concerns about what use might be made of information identifying clients should Levitt Robinson be required to provide such information.

30 The sequence of events of which Mr Kumar gave evidence through an interpreter, and of which Ms Doherty gave evidence in her affidavit dated 21 September 2023, gives sufficient cause for concern that it would not be appropriate to require client lists to

be provided, whether on a one-off basis or 'periodically' as is contended for by the first defendant. In short, the sequence was first, that a company of which Mr Kumar was a director, Radhu IT Solutions Pty Ltd ('Radhu') was identified as a person to be appointed as a lead plaintiff representing commission agents in support of the proposed amended statement of claim. After that occurred and after the first defendant learned of that fact, a telephone discussion took place between a representative of UP and Mr Kumar. In the course of that conversation, there was discussion of this proceeding. After the telephone call, Mr Kumar withdrew his agreement that Radhu, the company of which he was, and his wife currently still is, a director, should be added as a named plaintiff in the proceeding.

31 It is unnecessary to make any findings about the behaviour of the persons involved. I nevertheless found it curious when Mr Kumar gave evidence that, while he ceased to be a commission agent in 2021 and said that he sent many emails between 2021 and 2023 seeking the release of the guarantee held by UP, he said he received no replies to those emails. He had been told that he was not entitled to the return of his guarantee because of a property damage issue which he contested. He contested whether he was liable for the particular damage which, as I understood his evidence, was not covered by the insurance policy he took out in relation to the premises. Whether he was insured or not and whether or not UP had a right to withhold payment, the fact is that it did not return his guarantee between 2021, when Mr Kumar's company ceased to be a commission agent, and mid to late 2023. His guarantee was then returned.

32 The timing of the events and also the decision to return the guarantee after a two year interval where there were no substantive responses from UP gives rise to sufficient concern to reject the proposition that the inclusion of paragraph 2 in the protocol is 'appropriate' and in the interests of justice.

Issue 2(b): Advance drafts of communications

33 There is a dispute concerning the inclusion of paragraph 9 of the draft protocol. That is, whether unsolicited communications with group members as a whole in relation to the proceeding should be provided to the plaintiffs' representatives before they are

sent.

34 Paragraph 9 is in the same terms as paragraph 8. Whereas paragraph 8 imposes an obligation upon the plaintiffs and their solicitors and thereby provides an opportunity in favour of the defendants to seek to intervene in proposed communications to group members before they are sent, paragraph 9 contains identical rights and obligations but in the reverse.

35 In opposition to the inclusion of paragraph 9, the first defendant placed reliance on statements by Sackville J in *Courtney* and on a series of decisions of the Federal Court in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* ('the 7-Eleven group proceedings'), in which Levitt Robinson were the solicitors for the plaintiffs where it was submitted similar orders were requested but were refused.

36 In a 2018 decision in the 7-Eleven group proceedings, '*Davaria No 1*',[8] Middleton J refused to make such an order. His Honour discussed the principles to be applied:[9]

> 6 Section 33Z(1)(g) of the FCAA empowers the Court to make such orders as it "thinks just". Section 33ZF of the FCAA allows the Court, of its own motion or on application of a party or group member, to "make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding."
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> 7 In acting pursuant to s 33ZF, it is not necessary for the Court to be satisfied that unless the order is made the administration of justice will collapse or that justice in the proceeding will not be "ensured" in the sense of being certain: see *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 ('***Money Max***'); (2016) 338 ALR 188 at [165]. Rather, the expression "necessary to ensure that justice is done" requires that "the proposed order be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding": see *Money Max* at [165]. In the alternative, an order may be made where "appropriate … to ensure that justice is done".
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> 8 The s 33ZF power has been used by the Court to require corrective notices to be sent to group members or to establish communication protocols where the Court has determined that such orders are necessary to ensure that communications with group members are accurate and not misleading in any material respect: see eg *King v GIO Australia Holdings Ltd* [2002] FCA 872; (2002) 121 FCR 480; *Courtney v Medtel Pty Ltd* [2002] FCA 957; (2002) 122 FCR 168 ('***Courtney***'); *Williams*

[8] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] FCA 984.
[9] Ibid [6]-[12].

v FAI Home Security Pty Ltd (No 3) [2000] FCA 1438 at [24] (‘***Williams***’).

9 The Court in *Courtney* considered the limits to this power to control communications between a respondent and unrepresented group members. As Sackville J observed at [52], it may be accepted that the Court should not restrain communications which are not misleading or otherwise unfair and which do not infringe any other law or ethical constraint.

10 In *Courtney* at [33] to [46], as an important and relevant consideration to these proceedings, it was articulated that even if each of the group members to whom an offer was made accepted that offer, it would not resolve the class action or even a part of the class action. In this way, on the facts before him, Sackville J was able to conclude that s 33V(1) of the FCAA would not render any individual settlement so reached invalid even though not approved by the Court.

11 With respect to s 33ZF of the FCAA, it is important to note what Sackville J stated in *Courtney* at [52]:

> While s 33ZF(l) of the Federal Court Act should be given a broad construction, that does not mean it can or should become a vehicle for rewriting the legislation. For example, in my view s 33ZF(l) cannot be read as prohibiting the respondent to a representative proceeding from communicating with a group member unless the Court has given prior approval. The provision itself merely confers power on the Court to make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding; it does not prohibit conduct which is otherwise lawful. Accordingly, neither s 33ZF(l) nor any other provision in Part IVA prevents a respondent communicating with a group member in a manner which is not misleading or otherwise unfair and which does not infringe any other law or ethical constraint (such as a professional conduct rule which requires solicitors to communicate with a represented group member through the latter’s own legal representatives). The principle also applies, in my opinion, to an offer made by a respondent to settle the claims of individual group members. This reflects the general policy of the law to encourage out of court settlement of disputes and to promote the individual’s right to enter negotiations for settlement without inhibition.

12 In my view, the entirety of this passage is an accurate statement of the law.

37 In his 2019 decision in the same litigation, Middleton J observed:[10]

> 9 The question before me involves balancing the interests of the applicant and group members and the business and legitimate interests of 7-Eleven. I readily accept that group members should not be treated unfairly. And there is evidence before the Court that indicates that the Court needs to make sure that group members do not give up their

[10] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2019] FCA 2214, [9], [14].

> entitlements in these proceedings without proper guidance, and being unfairly or inappropriately influenced.
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> …
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> 14 I have come to the view that the undertaking offered by Mr Young QC on behalf of 7-Eleven will be enough to protect, and more importantly inform, the group members without the need for further intervention that will impact upon the legitimate lawful activities of 7-Eleven. The proposal set out by 7-Eleven provides an explanation to the effect of the release sought, indicates that the group members should seek legal advice, and provides a period of time in which advice can be considered. I cannot, sitting here, direct that such advice be sought. All one can do at this stage is to put a mechanism in place whereby the group members are advised, in a [sic] appropriate form, as to their opportunities to seek legal advice, and the effect of a release.

38 On an application for leave to appeal that decision, Beach J dismissed the application, concluding that commerciality and common sense were reflected in the earlier decision of Middleton J,[11] and holding there was no need for a protocol:[12]

> 48 Fourth, the proposed restraint contained a mandatory requirement that 7-Eleven give Levitt Robinson 14 days' notice of two matters: first, the terms of the proposed communication, and second, the identity of the relevant group member. This mandatory requirement was required regardless of whether the group member was desirous of their identity being known by Levitt Robinson and regardless of whether they had independent legal representation. This is no longer an issue in the final evolution of the order sought.
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> 49 Fifth, the original form of the restraint contemplated that Levitt Robinson could within 12 days after receipt apply to the Court in respect of any proposed communication which it determined was misleading or unfair to another group member. But as 7-Eleven pointed out, such an application could be made by Levitt Robinson unreasonably or irrespective of the view taken by the group member or their independent lawyer. Further, such an application could be made regardless of any sense of urgency desired by a group member seeking a resolution of its concerns with 7-Eleven. And until the Court then adjudicated on such an application, 7-Eleven would be restrained from making the communication with the group member. So, in essence, such a restraint could be imposed in the first instance solely as a result of Levitt Robinson's subjective determination.

39 Responding to the submissions of the first defendant, the plaintiffs submitted that the decisions in the 7-Eleven group proceedings are irrelevant to the present circumstances. The 7-Eleven group proceedings concerned communications with

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11 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCA 398; (2020) 143 ACSR 553, 556 [13].

12 Ibid 561 [48]-[49].

individual group members. As Beach J observed:[13]

> 45 First, the communications the subject of the proposed restraint applied to communications with any group member. It was not restricted to unrepresented group members or group members who were clients of Levitt Robinson, but even applied to communications with group members who had chosen independent legal representation in their dealings with 7-Eleven. Moreover, even in the final evolution of the orders as sought, which I will discuss in a moment, the proposed restraint had this breadth.

40 It was submitted that paragraph 9 is a different in its scope. It is restricted to requiring prior notice of proposed communications to group members as a whole. It is not directed to or concerned with individual communications with group members or the business or dealings of individual persons with UPF.

41 I accept the validity of the distinction between paragraph 9 and the communication protocol contended for and rejected in the 7-Eleven group proceedings decisions. The concerns expressed by Middleton J and Beach J about balancing the interests of group members with the legitimate business interests of the defendants, and the freedom of parties to contract to communicate with one another, are valid concerns. However there is nothing about paragraph 9 that will inhibit individual communications between group members and UPF. There is no requirement that any individual communication proposed to be sent by UPF needs first to be provided to the plaintiffs or to their solicitors for scrutiny. The only circumstances where the opportunity for the plaintiffs and their solicitors to scrutinise communications will arise is where there is a communication proposed to be sent to all group members. The same procedure is included in paragraph 8.

42 I consider it is appropriate and in the interests of justice to include paragraph 9 in the protocol. It provides a mechanism whereby potentially misleading statements in communications can be addressed in a timely, proactive and efficient manner. To include paragraph 9 should assist in avoiding the need for further corrective notices.

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13 Ibid 560 [45].

Issue 3: Is Mr Silver to be bound?

43 Mr Silver submitted that he should not be bound to the protocol. There is no factual basis to make orders concerning him. There is no suggestion he was involved in the matters that gave rise to the concerns upon which the plaintiffs rely in support of the adoption of the protocol. It was submitted that where reference was made to Mr Silver in paragraph 1 of the protocol, that reference should be read as a reference to him in his capacity as a director of UPF only, that corporate entity having agreed to the wording of that paragraph. Mr Silver, who was separately represented, did not personally agree to that wording.

44 As a matter of construction, I do not agree that paragraph 1 of the protocol only applies to Mr Silver in his capacity as a director of UPF. The same applies to the reference to Mr Silver in paragraph 4. The manner in which the protocol is drafted binds Mr Silver personally, no matter the capacity in which he may be acting.

45 In addition, as a matter of case management it is undesirable that a protocol put in place for communications between the plaintiffs and their legal advisers and group members, and the first defendant and its legal advisers and group members, not bind all parties to the proceeding.

46 It is consistent with the overarching purpose in the *Civil Procedure Act 2010* (Vic), namely, to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute, to bind the other defendant to the protocol.

47 To bind Mr Silver personally to the protocol is, using the language of s 33ZF, 'appropriate' in the interests of justice. It is in the interests of justice that the defendants in the same proceeding, even though separately represented and even though the claims against them are different, should have such communications as they may engage in with group members regulated in the same way.

Issue 4: The corrective notice

Jurisdiction

48 As discussed in the context of the power to order a communications protocol, s 33ZF

confers broad power on the Court to regulate group proceedings. The corresponding provision in the *Federal Court of Australia Act 1976* (Cth), also s 33ZF, has been held to support the making of orders for the publication of corrective notices. The same is the case in this Court, relying on s 33ZF of the Act.

49 In *Johnstone v HIH Ltd* ('*Johnstone*'),[14] Tamberlin J expressed his view that a corrective communication might be directed both to existing and potential group members. His Honour found that a letter sent by the applicant's solicitors to shareholders was misleading.[15] The letter indicated, among other things, that a person was 'still able to join' (when the position was that members were not required to join in the proceedings but could at their choice opt out of the proceedings), and that a person could join the class action by paying a fee to join (when it was not necessary to pay money to be involved in the proceeding).[16] His Honour concluded:[17]

> 102 … A misleading communication of this nature can undermine the integrity of Pt IVA proceedings, by inducing a misunderstanding on the part of recipients as to the nature and operation of the representative proceeding, and the rights and liabilities of the recipients in respect of the proceeding. Such a letter may well dissuade a shareholder from being included in the action, and lead to an opting out, if he or she thought that it was necessary to pay money in order to be involved in the proceeding.
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> 103 Section 33Z of the FCA confers a wide discretion on the Court to determine a matter in a representative action, and empowers the Court to control representative proceedings, and to make any order which it thinks just. Section 33X(5) of the FCA enables the Court, at any stage of the proceedings, to order that a notice of any matter be given to a group member or to group members. As Wilcox J pointed out in *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 (McMullin") at 4:
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> > In enacting Pt IVA of the Federal Court of Australia Act, Parliament was introducing into Australian law an entirely novel procedure. It was impossible to foresee all the issues that might arise in the operation of the Part. In order to avoid the necessity for frequent resort to Parliament for amendments to the legislation, it was obviously desirable to empower the court to make the orders necessary to resolve unforeseen difficulties; the only limitation being that the court must think the order appropriate or necessary to ensure 'that justice is done in the

14 [2004] FCA 190.
15 Ibid [102].
16 Ibid [101].
17 Ibid [102]-[106].

proceeding.'

I think an order fixing a date by which claimants must identify themselves is capable of falling within s 33ZF(1). The criterion 'justice is done', involves consideration of the position of all parties. An order preventing unfairness to a particular party may be necessary to ensure justice is done in the proceeding.

104 This power is not limited to the actual determination of the matter in question but extends to encompass all procedures necessary to bring the matter to a fair hearing on a just basis. This includes basic considerations regarding the manner in which members of a class are notified about their entitlements to opt out, and the way in which the proceedings are to be conducted. If a misleading representation is made to group members, this could well serve to confuse and disrupt the progress of the proceeding. It is essential that communications with class members or potential class members do not give rise to misunderstandings regarding their entitlements to opt out, or as to their responsibility for costs and expenses or their obligations to contribute to the proceedings in order to benefit from those proceedings. …

105 The Court has an important and continuing role in managing representative proceedings in the public interest to rectify any potentially misleading communications to class members or potential class members, in order to ensure that there is no misunderstanding engendered by such communications, particularly when they emanate from legal advisers, as to rights and obligations and procedures to be followed by recipients of such communications.

106 I therefore accept the submission that it is appropriate to require the solicitors for the applicant, Dennis and Co, to file an affidavit identifying each of the addressees of this or any letter in identical or substantially similar terms and to require that firm to file within fourteen days a draft letter of correction, which after settlement of its terms is to be sent to each of the recipients. I also direct that a copy of such letter be served on all applicants in this proceeding, who may make submissions as to the appropriate terms to be included in the letter if they so wish.

50 While in *Johnstone* an order was made requiring disclosure of the names of the persons to whom the original letter was sent, unlike the present case there does not appear to have been debate about whether the names of the addressees should remain confidential to the applicant and his solicitors.

51 In *Davaria No 1*, Middleton J made the following observations concerning the rationale underpinning orders requiring the issue of corrective notices:[18]

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18 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] FCA 984, [26]-[29].

> 26 Misleading communications can undermine the integrity of Part IVA proceedings by inducing a misunderstanding on the part of recipients as to the nature and operation of the representative proceeding, and the rights and liabilities of the recipients in respect of the proceeding: see eg *Johnstone v HIH Ltd* [2004] FCA 190 at [102] ('***Johnstone***').
>
> 27 As Tamberlin J stated in *Johnstone*, in this context of potential misleading communications the Court has an important and continuing role in managing representative proceedings in the public interest. …
>
> 28 The importance of accuracy in communications to group members was articulated by Goldberg J in *Williams* at [24]:
>
> > The nature of class actions brought pursuant to provisions of Pt IVA of the Act are such that it is imperative that any communications made to group members, in whatever form, be accurate especially in relation to the rights which they have in relation to class actions of which they are a group member and the rights which they have to opt out of such proceedings.
>
> 29 The power conferred on the Court by the FCAA extends to encompass all procedures necessary to bring the matter to a fair hearing on a just basis. Thus, an order may be made that a correcting notice be issued to remedy any misstatements that may be made during the course of a proceeding: see eg *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2008] FCA 575; *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 4)* [2010] FCA 749 at [24]. …

52 In *Uren v RMBL Investments Ltd* ('*Uren*'),[19] Murphy J observed:[20]

> When the Court is considering the effect, or possible effect, of a communication between a party and class members it exercises a protective role in relation to class member's interests. If such a communication *may* mislead or confuse class members it may be appropriate to require that a corrective notice be sent to class members.

53 In *Hawker v Powercor Australia Ltd*,[21] the insurers' solicitors were concerned that statements (attributed to the plaintiff's solicitors) made in a newspaper article were misleading. They proposed amendments to the opt-out notice to clarify those statements. J Dixon J considered it was appropriate to require a correction to the misstatements. His Honour considered the most convenient method for publication of the corrections notice in that case was via inclusion in the opt-out notice.[22]

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19 [2019] FCA 1163.

20 Ibid [17] (emphasis in original); citing *Johnstone v HIH Ltd* [2004] FCA 190, [105]; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2008] FCA 575, [18]–[19].

21 [2018] VSC 661.

22 Ibid [42]-[43].

54 I am satisfied that the Court has power under s 33ZF of the Act to order that a corrective notice be issued. Although some of the earlier decisions were concerned with misleading communications to group members during the opt-out process, the authorities clearly establish that the power conferred by s 33ZF of the Act, which is identical in all material respects to the equivalent under the Federal legislation, is broad. The only express limitation is that the order must be one that the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

Whether corrective notice appropriate or necessary to ensure that justice is done

55 The first defendant submits that the Circular contains the following misleading statements:

(a) 'However, **you cannot participate in the case if you have entered into a deed of settlement and release** with United Petroleum Franchise Pty Ltd, United Petroleum Pty Ltd, Avi Silver or any of their associated companies. We know that United has offered to return bank guarantees to former franchisees and commission agents – which it had to do anyway – in exchange for signing a full release' (original emphasis) (the 'First Statement'); and

(b) 'You should be very cautious about signing anything that United asks you to sign as it is highly probable that it will contain a release buried within it' (the 'Second Statement').

56 The first defendant proposes a corrective notice in the following terms:

> Levitt Robinson acknowledges that the unsolicited notice we sent by email to you to on 26 July 2023 was false and misleading. We retract the notice and regret having sent it. Levitt Robinson undertakes not to send any further false or misleading notices in future.

57 The plaintiffs and Levitt Robinson accept that so far as the Circular referred to commission agents, it was in error. The plaintiffs have offered to undertake to issue a corrective notice in the following terms:

> We refer to our earlier communication dated 26 July 2023.
>
> That document contained the following statement which we wish to correct:

> "United has offered to return bank guarantees to former franchisees and commission agents – which it had to do anyway – in exchange for signing a full release" (underline added).
>
> Levitt Robinson is not aware of any former commission agent to whom United offered to return a bank guarantee in exchange for a full release.
>
> Should you have any questions about this corrective notice, please contact us on the details below.

58 While the plaintiffs' solicitors accept that there was no proper basis to refer to 'commission agents' and that a corrective notice is required, there is a dispute about the terms of the notice and whether the misleading statements extend beyond the reference to commission agents. There is also a dispute about whether, as part of the relief to be provided, the names and addresses of persons to whom the Circular was sent are to be provided to the solicitors for the defendants.

59 For the reasons that follow, I am satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding to order that Levitt Robinson issue a corrective notice correcting both the First Statement and the Second Statement in the Circular of which complaint is made. It is neither appropriate nor necessary that the names and addresses of the persons to whom the Circular was provided be provided to the defendants' solicitors.

The First Statement

60 In defence of the accuracy of both impugned statements, the plaintiffs rely on the evidence of Mr Ittikunnath.

61 Mr Ittikunnath is a former director of a company (Australian Angels Group of Petroleum Pty Ltd) ('Australian Angels') which entered into a franchise agreement with UPF on about 21 August 2018, guaranteed by his wife and another person. He gave evidence on affidavit about the provision by the company of a $50,000 bank guarantee in favour of UP.

62 He gave evidence of discussions in February 2023 with Shan Thuraisignam, 'United State Manager', concerning the performance of the site of which Australian Angels was franchisee and of which he was the site manager. It is his evidence that, in a

conversation with Mr Thuraisignam in February 2023, he was told that, unless he signed an agreement with United, Australian Angels will not get all its fuel bond ($50,000) back and the fuel bond money would be 'stuck forever'.

63 Mr Ittikunnath also gave evidence of his attendance at two meetings at the United Head Office in April 2023 with two persons, one of whom is described as United General Counsel.

64 Following those discussions, Australian Angels entered into a buy back agreement with UPF. The buy back agreement included a release in favour of UPF and its directors from a number of express matters including 'the introduction of Pie Face products being sold in the Business'.

65 The first defendant submitted that the real vice of the First Statement was the words 'which it had to do anyway'. It drew attention to the fact that, while the contractual obligation in the franchise agreement was to return the bank guarantee within six months after the agreement has ended, the buy back agreement entered into with Australian Angels provides for the return of the bank guarantee in three months in exchange for which, amongst other things, the release was provided. Further, the Circular refers to deeds of settlement and release, but what Mr Ittikunnath entered into was a broader buy back agreement. The first defendant submitted it is misleading to say that the return of the bank guarantee was in exchange for signing a full release, because the release was just a term of the wider buy back arrangement.

66 The plaintiffs submitted that the three and six month debate misses the point. They submitted that the statement allegedly made by Mr Thuraisignam in February 2023 that '[t]he fuel bond money will be stuck forever if you don't sign an agreement with United' was a threat which supported the statement in the Circular that United offered to return the bank guarantee to a former franchisee, which it had to do anyway, in exchange for a release. They submitted that Australian Angels had a contractual right to have the $50,000 returned. They noted that the buy back agreement executed between Australian Angels and UPF purports to expressly release the defendants

from the subject matter of the proceeding.

67 Mr Thuraisignam, formerly the Area Retail and Convenience Manager of UP and now the State Retail and Convenience Manager, has given evidence on affidavit that the statements alleged to have been made by him in February 2023 that the fuel bond money will be 'stuck forever' unless an agreement is signed, were never made.

68 Taking the evidence of Mr Ittikunnath at face value, I am not satisfied that the evidence supports the asserted statement of fact contained in the First Statement. The First Statement is framed in the plural, 'former franchisees and commission agents'. Mr Ittikunnath's evidence is evidence of a single incident in February 2023. Such evidence does not support the making of the statement in the plural as is the manner in which the First Statement is framed. The First Statement conveys not just a single instance of an offer in exchange for a release but multiple instances of such behaviour.

69 For that reason alone, the First Statement is a statement that may mislead or confuse group members.

70 There is a second issue with the First Statement. It is not correct to say in respect of Mr Ittikunnath that United, who offered to return the bank guarantee, 'had to do it anyway'. While there was a contractual obligation to return the bank guarantee within six months, the agreement reached provided for the return within three months. The 'full release' which was provided was not in exchange for the return of the bank guarantee as required by the franchise agreement. It was part of the terms of a separate transaction, a buy back arrangement. The First Statement makes no reference to the buy back agreement. To omit that context may mislead or confuse the reader of the Circular.

71 Finally, there is a factual contest about whether the statement attributed to Mr Thuraisignam and relied on by the plaintiffs for the First Statement was in fact made. Mr Ittikunnath was cross-examined about the contested statement. In cross-examination, he confirmed his evidence that the February statement was made by Mr Thuraisignam. Mr Thuraisignam, who denies making any such statement, was

not cross-examined.

72 I am unable to resolve that factual contest, but the existence of it provides a further reason why it is appropriate or necessary that a corrective notice that corrects the First Statement should be issued.

The Second Statement

73 Attention was drawn during argument to the difference between statements of fact and statements of opinion, with relevant authorities cited. As discussed by the Full Federal Court in *Chowder Bay Pty Ltd v Paganin*,[23] a distinction is to be made between statements of fact and statements of opinion.[24] In *Ireland v WG Riverview Pty Ltd*,[25] the New South Wales Court of Appeal discussed what constitutes a statement of opinion.[26] It is unnecessary to reproduce those discussions in these reasons.

74 The parties appeared to proceed on the basis, and I think it is correct to characterise the Second Statement, which refers to what may occur in the future, as a statement of opinion.

75 The statement says that it is 'highly probable' that 'anything' United may ask a franchisee to sign may contain 'buried' within it a release from the subject matter of this proceeding.

76 Just as Middleton J observed in *Davaria No 1*, the Second Statement might fairly be described as a somewhat dramatic statement of opinion about United, which carried with it the implication that there was a reasonable basis for the asserted opinion. I do not accept that the plaintiffs have established that there was a reasonable basis for the opinion expressed in the Second Statement.

77 The evidence of Mr Ittikunnath was relied on as the basis for the Second Statement. Mr Ittikunnath gave evidence that he only had a few days to read the buy back agreement which contained the release. He received it on Monday, 17 April 2023 and

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23 [2018] FCAFC 25.
24 Ibid [30] (Besanko, Markovic and Lee JJ).
25 [2019] NSWCA 307; (2019) 101 NSWLR 658.
26 Ibid 665-667 [24]-[34].

it was returned signed on Thursday, 20 April 2023. I accept that English is not his first language and that the buy back agreement was a lengthy and very complicated legal document. Mr Ittikunnath told representatives of United and sent an email in which he said he intended to obtain legal advice. It seems he did not so before signing the agreement. However I do not consider that what occurred in relation to Mr Ittikunnath and the buy back agreement provides a reasonable or a proper basis for the Second Statement.

78 There is no proper basis to say that, because when Mr Ittikunnath entered into a buy back agreement that agreement contained a release, it is 'highly probable' that 'anything' that United asks a franchisee or commission agent to sign will contain a release.

79 Nothing about what occurred with Mr Ittikunnath supports the making of a statement that group members should be 'very cautious about signing anything' United asks them to sign in the future or that it is 'highly probable' that any such document will contain a release 'buried' within it.

80 Caution should be exercised to ensure the accuracy of any statements published to group members. No such caution was present in the Second Statement. The statement should not have been made. Taking up the observations of Murphy J in *Uren*, the Second Statement involves a communication that may mislead or confuse group members. A corrective notice is necessary and one should be sent.

Corrective notice

81 I am satisfied that it is appropriate to ensure that justice is done in the proceeding to require the plaintiffs' solicitors to issue a corrective notice to the recipients of the Circular correcting both the First Statement and the Second Statement. A draft corrective notice which expressly addresses and corrects both statements in the Circular should be prepared and provided to my Chambers.

82 The first defendant failed to establish that disclosure of the names and relevant email addresses or addresses of all persons to whom the Circular was sent by Levitt

Robinson is appropriate or necessary to ensure that justice is done in the proceeding. Instead, I will order that following approval of its contents, the solicitors for the plaintiffs send the corrective notice to each of the persons to whom the Circular was sent and that within two business days they file (but not serve) an affidavit which exhibits a confidential list of those persons and of the addresses to which the corrective notice was sent.

Disposition

83 For the reasons set out above, it is appropriate to implement a communication protocol which includes the agreed parts and contested paragraph 9, but which excludes contested paragraph 2. I will order that the second defendant, Mr Silver, be bound to the protocol both personally and in his capacity as director of the first defendant.

84 It is also appropriate to order that a corrective notice be issued to all recipients of the Circular correcting both the First Statement and the Second Statement. I will order that the plaintiffs' solicitors provide a draft corrective notice to my Chambers, with the final form of the corrective notice to be settled by the Court. I will order that the solicitors for the plaintiffs send the corrective notice to each of the persons to whom the Circular was sent and that within two business days they file (but not serve) an affidavit which exhibits a confidential list of those persons and of the addresses to which the corrective notice was sent. I will order, pursuant to r 28.05(4) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), subject to further order of the Court, that the confidential list to be exhibited to the affidavit to be filed is confidential and must not be published or made available to any persons (including the defendants and their representatives) except to the Court.

Costs

85 Although there was some discussion during the hearing about costs being dealt with by written submissions, it is inefficient and unnecessary to defer costs questions. I consider that the costs of both summonses should be considered separately.

86 Concerning the plaintiffs' summons, the communication protocol represents a benefit

to group members. The contested issues have been determined in favour of the plaintiffs. The provision of the undertakings offered shortly prior to the hearing represents an appropriate resolution of that aspect of the plaintiffs' summons. Given the timing, it seems unlikely that such undertakings would have been agreed but for the application. In those circumstances I consider that the costs of the plaintiffs' summons should be borne by the first defendant.

87 During the hearing, I indicated that I would reserve the second defendant's costs and excused counsel appearing for the second defendant from further attendance. Counsel elected to remain, and were involved in later discussion of the issue concerning whether Mr Silver should be bound to the protocol. However, as their role was a minor role, I consider it remains appropriate that Mr Silver's costs of the hearing are reserved.

88 The first defendant has been successful in relation to the relief sought by its summons. Costs should follow the event.

Orders

89 I direct the solicitors for the plaintiffs to prepare a form of order that gives effect to these reasons, including orders for the payment of Mr Kumar's costs, and a draft form of corrective notice and provide both documents to my Chambers by no later than 4:00pm on 20 October 2023.

CERTIFICATE

I certify that this and the 24 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Delany of the Supreme Court of Victoria delivered on 17 October 2023.

DATED this seventeenth day of October 2023.

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SCHEDULE OF PARTIES

FNH UNITED PTY LTD (ACN 639 802 798)	First Plaintiff
and	
FAHIM ISTANIKZAI	Second Plaintiff
and	
JIGARKUMAR BHARATBHAI PATEL	Third Plaintiff
and	
JAYDEEP DEVJIBHAI BHATTI	Fourth Plaintiff
and	
UNITED PETROLEUM FRANCHISE PTY LTD (ACN 127 764 989)	First Defendant
and	
AVI SILVER	Second Defendant