



COOK

Principal Registrar &
Chief Executive Officer

Form 7A (version 5)
UCPR 14.3

DEFENCE TO FOURTH FURTHER AMENDED STATEMENT OF CLAIM FILED 31 MAY 2022

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Professional Negligence
Registry	Sydney
Case number	2017/279308

TITLE OF PROCEEDINGS

First plaintiff	AMY RICKHUSS
Number of plaintiffs	12
First defendant	THE COSMETIC INSTITUTE PTY LTD (IN LIQUIDATION) (ACN 153 061 155)
Number of defendants	19

FILING DETAILS

Filed for	Sri Balakrishnan Darshn , sixteenth defendant
Filed in relation to	Plaintiffs' claim
Legal representative	Robert Ishak, William Roberts Lawyers
Legal representative reference	702000416
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HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at


PLEADINGS AND PARTICULARS

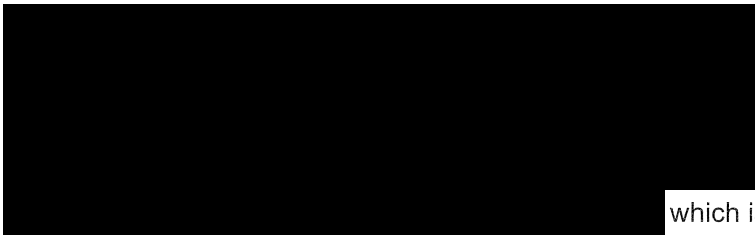
In respect of, and in answer to, the paragraphs set out in the plaintiffs' fourth further amended statement of claim (**4FASOC**), the sixteenth defendant:

- 1 In response to paragraph 1:
 - a. denies:
 - i. that the claims of the plaintiffs and group members:
 1. are in respect of, or arise out of, the same, similar or related circumstances; or

2. give rise to a substantial common question of law or fact;
for the purposes of s 157 of the *Civil Procedure Act 2005* (NSW) (**CPA**);
- b. in the premises of (a), denies that the proceeding is a validly commenced representative proceeding;
- c. further and in the alternative, denies:
 - i. that the claims of the twelfth plaintiff and the Darshn Sub-Group against him;
 1. are in respect of, or arise out of, the same, similar or related circumstances; or
 2. give rise to a substantial common question of law or fact,
for the purposes of s 157 of the CPA; and
 - ii. in the premises of (c)(i), denies:
 1. that the twelfth plaintiff has standing to commence Part 10 representative proceedings against him on behalf of the Darshn Sub-Group; and
 2. in the premises, that the proceedings as against him are a validly commenced Part 10 representative proceeding; and

Particulars

The twelfth plaintiff's BAS 



which is

denied.

- d. otherwise does not admit the allegations in the paragraph.

2 In respect of paragraphs 2 and 2A:

- a. denies that he utilised the One Size Fits All Approach (as defined) on any of his patients at The Cosmetic Institute;
- b. repeats *mutatis mutandis* the matters particularised in 1(c) above and says that the One Size Fits All Approach was not utilised in relation to the twelfth plaintiff or any of the Darshn sub-group members;

c. otherwise does not know and cannot admit the allegations.

3 Does not admit the allegations in paragraph 3.

4 Does not know and cannot admit the allegations in paragraph 4.

5 Does not know and cannot admit the allegations in paragraph 5.

6 Does not know and cannot admit the allegations in paragraph 6.

7 Does not know and cannot admit the allegations in paragraph 7.

8 Does not know and cannot admit the allegations in paragraph 8.

8A Does not know and cannot admit the allegations in paragraph 8A.

8B Does not know and cannot admit the allegations in paragraph 8B.

8C Does not know and cannot admit the allegations in paragraph 8C.

8D Does not know and cannot admit the allegations in paragraph 8D.

8E Does not know and cannot admit the allegations in paragraph 8E.

8F Does not know and cannot admit the allegations in paragraph 8F.

8G Does not know and cannot admit the allegations in paragraph 8G.

9 In response to paragraph 9:

a. does not admit sub-paragraphs (a)-(e) and says further that they do not contain any allegations against him;

b. in response to sub-paragraph (e1);

i. repeats *mutatis mutandis* paragraph [81L] below;

ii. denies that, after 2 February 2015, he was directed and controlled in the manner in which he was to perform BAS services;

iii. denies that he was directed or required to apply the One Size Fits All Approach to any procedures performed at TCI Premises; and

iv. does not otherwise admit the allegations in the subparagraph;

c. in response to sub-paragraph (f):

i. repeats *mutatis mutandis* paragraphs 14(b) and 21-22 below; and

ii. denies that he was directed or required to apply the One Size Fits All Approach to any procedures performed at TCI Premises; and

iii. does not otherwise admit the allegations in the sub-paragraph.

- 10 In response to paragraph 10:
- a. does not admit sub-paragraphs (a)-(g), and says further that they do not contain any allegations against him;
 - b. in response to sub-paragraph (g1):
 - i. repeats *mutatis mutandis* paragraph 81L below;
 - ii. denies that, after 2 February 2015, he was directed and controlled in the manner in which he was to perform BAS services;
 - iii. denies that he was directed or required to apply the One Size Fits All Approach to any procedures performed at TCI Premises; and
 - iv. does not otherwise admit the allegations in the subparagraph;
 - c. in response to sub-paragraph (h):
 - i. repeats *mutatis mutandis* paragraphs 14(b) and 21-22 below; and
 - ii. does not otherwise admit the allegations in the sub-paragraph.
- 11 Does not admit paragraph 11 and says further that it does not contain any allegations against him.
- 12 In response to paragraph 12:
- a. does not admit to sub-paragraphs (a)-(g), and says further that they do not contain any allegations against him;
 - b. in response to sub-paragraph (g1):
 - i. repeats *mutatis mutandis* paragraph [81L] below;
 - ii. denies that, after 2 February 2015, he was directed and controlled in the manner in which he was to perform BAS services;
 - iii. denies that he was directed or required to apply the One Size Fits All Approach to any procedures performed at TCI Premises; and
 - iv. does not otherwise admit the allegations in the subparagraph;
 - c. In response to sub-paragraph (h):
 - i. repeats *mutatis mutandis* paragraphs 14(b) and 21-22 below; and
 - ii. does not otherwise admit the allegations in the sub-paragraph.
- 13 In response to paragraph 13:

- a. does not admit sub-paragraphs (a)-(g), and says further that they do not contain any allegations against him;
- b. in response to sub-paragraph (g1):
 - i. repeats *mutatis mutandis* paragraph [81L] below;
 - ii. denies that, after 2 February 2015, he was directed and controlled in the manner in which he was to perform BAS services;
 - iii. denies that he was directed or required to apply the One Size Fits All Approach to any procedures performed at TCI Premises; and
 - iv. does not otherwise admit the allegations in the subparagraph;
- c. In response to sub-paragraph (h):
 - i. repeats *mutatis mutandis* paragraphs 14(b) and 21-22 below; and
 - ii. does not otherwise admit the allegations in the sub-paragraph.

14 In response to paragraph 14:

- a. does not admit sub-paragraphs (a)-(d) and (f) and says further that they do not contain any allegations against or concerning him;
- b. does not admit sub-paragraphs (e), and (g)-(o), and in further answer:
 - i. denies that he performed pre-operative consultations or surgery in accordance with the alleged “One Size Fits All Approach”, or any other standardised approach;
 - ii. denies that the fifth defendant supervised and/or trained him in the performance of the alleged “One Size Fits All Approach”, or any other standardised approach;
 - iii. says that he performed BAS procedures and/or declined to perform BAS procedures by reference to the specific physical features, surgical and psychological needs and/or aesthetic preferences of each individual patient.

14A-14J Does not admit paragraphs 14A-14J and says further that they do not contain any allegations against him.

14K In response to paragraph 14K:

- a. does not admit sub-paragraphs (a) and (b);

- b. admits sub-paragraph (c), save for sub-sub-paragraph (v) which is denied, and in further answer repeats *mutatis mutandis* paragraph 14(b) above;
- c. admits sub-paragraph (d), save for sub-sub-paragraph (v) which is denied, and in further answer repeats *mutatis mutandis* paragraph 14(b) above;
- d. in response to sub-paragraph (e):
 - i. admits that he performed BAS on Ms Sanchez; and
 - ii. does not otherwise admit the allegations in the subparagraph.

14L Does not admit paragraph 14L and says further that it does not contain any allegations against him.

14M Does not admit paragraph 14M and says further that it does not contain any allegations against him.

14N Does not admit paragraph 14N and says further that it does not contain any allegations against him.

15 Admits paragraph 15.

16 In response to paragraph 16:

- a. in so far as it relates to BAS performed by the other defendants, does not know and cannot admit the paragraph:
- b. in so far as it relates to BAS performed by the sixteenth defendant:
 - i. admits that he performed BAS at the TCI Facilities, but further says that the surgery performed at Southport was performed at Southport Day Hospital, which was an accredited day hospital;
 - ii. denies sub-paragraph (a);
 - iii. does not admit sub-paragraph (b);
 - iv. does not know and cannot admit sub-paragraphs (c)-(d).

17 In response to paragraph 17:

- a. repeats *mutatis mutandis* paragraph 9 above;
- b. says that the paragraph is embarrassing as it fails to define the “system” referred to in the paragraph; and
- c. without prejudice to sub-paragraph (b) above, does not admit the paragraph and further says that it does not contain any allegations against him.

18 In response to paragraph 18:

- a. admits that, from in or about January 2015 to in or about January 2018 he was engaged to perform BAS at TCI Parramatta Premises, TCI Bondi Premises, TCI Southport Premises, Concord Private Hospital and Holroyd Private Hospital; and
- b. does not otherwise admit the allegations in the paragraph.

19 In response to paragraph 19:

- a. in so far as it relates to the other defendants, does not know and cannot admit the paragraph:
- b. in so far as it relates to the sixteenth defendant:
 - i. admits sub-paragraphs (a)-(f);
 - ii. admits sub-paragraph (g), but further says that this was for the limited purposes specified in cl 4.4 of the accreditation deed;
 - iii. admits sub-sub-paragraphs (i)-(ii);
 - iv. does not admit sub-sub-paragraph (iii); and
 - v. in respect of sub-sub-paragraph (iv), relies on cl 5.4 of the accreditation deed and otherwise does not admit the sub-sub-paragraph.

20 Admits paragraph 20 in so far as it relates to the sixteenth defendant but otherwise does not admit the paragraph.

21 In response to paragraph 21:

- a. In so far as it relates to the sixteenth defendant, denies that he followed or adopted an approach or practice of the type described by the plaintiffs as a “One Size Fits Approach” and further:
 - i. denies sub-paragraphs (a) and (d);
 - ii. as to sub-paragraph (b1) admits he injected local anaesthesia when performing BAS but does not otherwise admit the sub-paragraph;
 - iii. admits sub-paragraphs (b), (c) and (h) and (i);
 - iv. in response to sub-paragraph (e), denies that implants were uniformly inserted into subpectoral pockets and/or using a dual plane approach and says further that:

1. the only other recognised technique for insertion of the implants was the sub-glandular approach;
 2. in appropriate cases, a sub-glandular approach was employed;
- v. denies the allegations in sub-paragraph (f), and in further answer:
1. repeats *mutatis mutandis* paragraph 14(b) above and paragraphs 77LF and 81L below;
 2. says that the surgical approach taken by him for each patient was determined by reference to the surgical needs and physical features of the patient;
 3. denies that the same surgical technique was used for each patient;
 4. otherwise does not admit the sub-paragraph;
- vi. in response to sub-paragraph (g):
1. repeats *mutatis mutandis* paragraph 21(a)(ii) and (iv) above;
 2. denies that the same surgical technique was used for each patient;
 3. otherwise does not admit the sub-paragraph;
- b. otherwise does not admit paragraph 21.
- 22 In response to paragraph 22:
- a. repeats *mutatis mutandis* paragraphs 14(b) and 21(a)(vi) above and denies that he used a One Size Fits All Approach as alleged; and
 - b. denies the allegations contained in the paragraph.
- 23 Not used.
- 23A Not used.
- 24 In response to paragraph 24 insofar as it relates to the sixteenth defendant:
- a. admits that his patients attended a pre-surgery consultation;
 - b. otherwise does not know and cannot admit the paragraph.
- 24A In response to paragraph 24A insofar as it relates to the sixteenth defendant:
- a. admits that his patients attended a post-surgery consultation;
 - b. otherwise does not know and cannot admit the paragraph.

- 24B In response to paragraph 24B:
- a. admits that, from time to time, he consulted the fifth defendant about BAS complications associated with his performance of BAS on his patients; and
 - b. otherwise does not admit the allegations in the paragraph.
- 24C In response to paragraph 24C:
- a. admits that, from time to time, the fifth defendant assisted in the treatment of his BAS patients; and
 - b. otherwise does not admit the allegations in the paragraph.
- 24D Does not admit paragraph 24D.
- 24E Does not admit paragraph 24E.
- 24F Does not admit paragraph 24F.
- 24G Does not admit paragraph 24G.
- 24H In response to paragraph 24H insofar as it relates to the sixteenth defendant:
- a. repeats *mutatis mutandis* paragraphs 14(b) and 21(a)(vi) above and denies that he used or promoted a One Size Fits All Approach (or the “System of BAS”) as alleged;
 - b. admits that, from time to time, he performed BAS at TCI Premises as a TCI Surgeon;
 - c. further says that the first-fourth and/or fifth defendants:
 - i. had full control of, and published, marketing or advertising material concerning TCI and BAS performed at TCI Premises, including the web-sites, radio advertisements and promotional material referred to in the particulars to paragraph [24D] of the 4FASOC (“Material”);
 - ii. had responsibility for and control of any representations made or conveyed by that Material (and if the Representations as defined at paragraph [24D] of the 4FASOC were made, which is not admitted, those Representations);
 - iii. had full control of, and responsibility for, any representations made or conveyed in advertisements, promotional material, and on webpages (including on social media) published or otherwise disseminated for or on behalf of the first to fourth defendants;

d. otherwise denies the allegations in the paragraph.

- 24I Denies paragraph 24I.
- 24J Does not admit paragraph 24J.
- 24K Does not admit paragraph 24K.
- 24L-24AE Does not admit paragraphs 24L-24AE and says that they do not contain any allegations against him.
- 24AF In response to paragraph 24AF:
- a. admits that he attended pre-surgery consultations;
 - b. repeats *mutatis mutandis* paragraphs 14(b) and 21(a)(vi) above and denies that he used or promoted a One Size Fits All Approach (or the “System of BAS”) as alleged;
 - c. admits that, from time to time, he performed BAS at TCI Premises as a TCI Surgeon;
 - d. repeats *mutatis mutandis* paragraph 24H(c) above; and
 - e. otherwise denies the allegations in the paragraph.
- 24AG Denies paragraph 24AG.
- 25 Does not admit paragraph 25.
- 26-77GJ Does not admit paragraphs 26-77GJ and says that they do not contain any allegations against him.
- 77HA Does not admit paragraph 77HA.
- 77HAA Does not admit paragraph 77HAA.
- 77HAB Does not admit paragraph 77HAB.
- 77HB In response to paragraph 77HB:
- a. admits that he had a consultation with Ms Zahr on or about 11 April 2015; and
 - b. otherwise does not admit the allegations in the paragraph.
- 77HC Admits paragraph 77HC.
- 77HD Admits paragraph 77HD.
- 77HE Admits paragraph 77HE.

77HF-77HG Does not admit paragraphs 77HF-77HG and further says that they do not contain any allegations against him.

77HGA In response to paragraph 77HGA:

- a. repeats *mutatis mutandis* paragraphs 24AF-25;
- b. otherwise does not admit the paragraph.

77HGB Does not admit paragraph 77HGB and further says that it does not contain any allegations against him.

77HGC In response to paragraph 77HGC:

- a. repeats *mutatis mutandis* paragraphs 24AF-25;
- b. otherwise does not admit the paragraph.

77HH-77KI Does not admit paragraphs 77HH-77KI and further says that they do not contain any allegations against him.

77LA Does not know and cannot admit paragraph 77LA.

77LAA Does not know and cannot admit paragraph 77LAA.

77LAB Does not know and cannot admit paragraph 77LAB.

77LAC Does not know and cannot admit paragraph 77LAC.

77LAD Does not know and cannot admit paragraph 77LAD.

77LAE Does not know and cannot admit paragraph 77LAE.

77LB Does not know and cannot admit paragraph 77LB.

77LC Does not know and cannot admit paragraph 77LC.

77LD Does not know and cannot admit paragraph 77LD.

77LE In response to paragraph 77LE:

- a. admits that he had a consultation with Ms Sanchez on or about 11 January 2017; and
- b. otherwise does not admit the allegations in the paragraph.

77LF In response to paragraph 77LF:

- a. admits that it was agreed that Ms Sanchez would receive [REDACTED]
[REDACTED]
- b. admits that it was [REDACTED]

- c. admits that it was [REDACTED]
[REDACTED]
- d. admits that it was [REDACTED]
[REDACTED]
- e. further says that Ms Sanchez [REDACTED]
[REDACTED]
- f. otherwise does not admit the allegations in the paragraph.

77LFA In response to paragraph 77LFA:

- a. insofar as the paragraph relates to the sixteenth defendant, repeats *mutatis mutandis* paragraphs 24AF-25;
- b. does not admit the paragraph.

77LFB In response to paragraph 77LFB:

- a. repeats *mutatis mutandis* paragraphs 24AF-25 and 77LE-77LF;
- b. further says that the first-fourth and/or fifth defendants:
 - i. had full control of, and published, the material as pleaded and defined at paragraphs [77LA]-[77LAE] of the 4FASOC;
 - ii. had responsibility for and control of any representations made or conveyed by that material (and if the Representations alleged and defined in paragraphs [24D] and [77LAA]-[77LAE] of the 4FASOC were made, which is not admitted, those Representations);
 - iii. had full control of, and responsibility for, any representations made or conveyed in advertisements, promotional material, and on webpages (including on social media) published or otherwise disseminated for or on behalf of the first to fourth defendants; and
- c. denies the allegations in the paragraph.

77LFC In response to paragraph 77LFC:

- a. insofar as the paragraph relates to the sixteenth defendant, repeats *mutatis mutandis* paragraphs 77LFA-77LFB;
- b. does not admit the paragraph.

77LG In response to paragraph 77LG:

- a. admits that he performed BAS on Ms Sanchez and was assisted by James Kenny;
- b. says that the surgery was performed at Southport Day Hospital, which was an accredited day hospital.

77LH Does not admit paragraph 77LH.

77LI Does not admit paragraph 77LI.

77LJ Does not admit paragraph 77LJ.

77LK Does not admit paragraph 77LK.

77LL Does not admit paragraph 77LL.

78 Does not admit paragraph 78 and further says that it does not contain any allegations against him.

78A In response to paragraph 78A, and insofar as it concerns the sixteenth defendant:

- a. repeats *mutatis mutandis* paragraphs 14(b) and 21 in respect of the "System of BAS";
- b. does not admit the paragraph and further says that it does not contain any allegations against him.

78B-78K Does not admit paragraphs 78B-78K and further says that they do not contain any allegations against him.

78L In response to paragraph 78L:

- a. admits that he owed the twelfth plaintiff a duty to exercise reasonable care and skill in the provision of advice about, and in the performance of, BAS; and
- b. otherwise does not admit the paragraph.

79 In response to paragraph 79, says that any form of BAS has inherent risk but does not admit paragraph 79.

79A In response to paragraph 79A:

- a. repeats *mutatis mutandis* paragraphs 14(b), 14K and 21;
- b. further says that any form of BAS has inherent risk;
- c. does not admit the allegations in the paragraph.

79B In response to paragraph 79B:

- a. repeats *mutatis mutandis* paragraphs 14(b), 14K and 21;

b. does not admit the allegations in the paragraph.

80 Not used.

81-81K In response to paragraphs 81 to 81K:

- a. in so far as it relates to the sixteenth defendant, repeats *mutatis mutandis* paragraph 81L;
- b. otherwise does not admit paragraphs 81 to 81K and says that they do not contain any allegations against him.

81L In response to paragraph 81L:

- a. repeats *mutatis mutandis* paragraphs 9, 24AF-25, 77LFB and 79-79B;
- b. in so far as it relates to the twelfth plaintiff:

- i. denies paragraph 81L;

- ii.

[REDACTED]

[REDACTED] and repeats *mutatis mutandis* paragraph 77LF;

- iii. further says in response that:

1. the twelfth plaintiff received detailed information confirming the risks involved in her BAS procedure, including but not limited to, pain in the breasts, breast asymmetry, capsular contracture, malposition/displacement, bottoming out, ptosis and “double bubble”, and that he explained that information to her;
 2. the information provided to the twelfth plaintiff enabled her to make a reasonably informed decision about whether to undergo the treatment or follow the advice, within the meaning of s 21 *Civil Liability Act 2003* (Qld);

Particulars

Patient Evaluation and Operative Plan for Ms Sanchez dated 11 January 2017

Patient Consent Form for Ms Sanchez dated 11 January 2017

Surgery Discussion Points for Ms Sanchez dated 11 January 2017

Operative Report for Ms Sanchez dated 14 January 2017

- iv. further says in response to sub-paragraph 81L(m) that the BAS was performed under general anaesthetic at a properly accredited day hospital, and repeats *mutatis mutandis* paragraph 77LG(b);
 - v. further says that in performing BAS on the twelfth plaintiff, he acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice within the meaning of s 22 *Civil Liability Act 2003* (Qld);
- c. in so far as it relates to the claims of group members:
- i. denies paragraph 81L;
 - ii. denies ever performing, or assisting in the performance of BAS in accordance with the alleged One Size Fits All Approach on any patient;
 - iii. says further in response that all of his patients:
 - 1. received detailed information confirming the risks involved in her BAS procedure, including but not limited to pain in the breasts, breast asymmetry, capsular contracture, malposition/displacement, bottoming out, ptosis and “double bubble”, and that he explained that information to them;
 - 2. received further information enabling them to make a reasonably informed decision about whether to undergo the treatment or follow the advice;

Particulars

TCI Standard Patient Evaluation and Operative Plan Form

TCI Standard Patient Consent Form

TCI Standard Surgery Discussion Points

- iv. says further that, at all material times, he was fit to carry out the duties or activities referred to in sub-paragraph 81L(a) (other than the One Size Fits all Approach to BAS which he denies performing);
- v. further says that, he acted, at all relevant times, in a way that was widely accepted by peer professional opinion by a significant number

of respected practitioners in the field as competent professional practice within the meaning of s 22 *Civil Liability Act 2003* (Qld) and was widely accepted in Australia by peer professional opinion as competent professional practice within the meaning of s50 of the *Civil Liability Act 2002* (NSW).

- 81M-81W Does not admit paragraphs 81M to 81W and says that they do not contain any allegations against him.
- 81X In response to paragraph 81X:
- a. repeats *mutatis mutandis* paragraph 81L; and
 - b. denies the allegations in the paragraph.
- 82 In response to paragraph 82:
- a. admits that the twelfth plaintiff acquired BAS for personal use;
 - b. says that the term 'service' is not given a particular meaning by s 3 of the ACL; and
 - c. otherwise does not admit the paragraph.
- 83 In response to paragraph 83:
- a. admits that the twelfth plaintiff was supplied BAS as a consumer within the meaning of s 3 of the ACL; and
 - b. otherwise does not admit the paragraph.
- 83A In response to paragraph 83A:
- a. does not admit sub-paragraphs (a)-(l); and
 - b. denies sub-paragraph (m).
- 84 Admits that the twelfth plaintiff acquired BAS as a consumer within the meaning of s 3(3) of the ACL but otherwise does not admit paragraph 84.
- 85 In response to paragraph 85:
- a. admits that BAS was performed for purposes which may include one or more of the purposes identified in sub-paragraphs (a)-(d); and
 - b. does not otherwise admit the allegations in the paragraph.
- 86 In response to paragraph 86:

- a. admits that the twelfth plaintiff informed him that she wanted BAS in order to improve self-esteem and because of weight loss changes;
- b. admits that it was his standard practice to ascertain the BAS purpose of each of his patients;
- c. does not otherwise admit the allegations in the sub-paragraph.

87 In response to paragraph 87:

- a. admits that the twelfth plaintiff had a reasonable expectation that her BAS surgery would result in enlargement of her breasts;
- b. repeats paragraph 81L above and says that the twelfth plaintiff, and all of the sixteenth defendant's patients, were warned of potential complications with BAS, including but not limited to, pain in the breasts, breast asymmetry, malposition/displacement, bottoming out, ptosis and "double bubble" and provided with information enabling them to make a reasonably informed decision about whether to undergo the treatment or follow the advice;
- c. otherwise does not admit the paragraph.

88 In response to paragraph 88:

- a. admits that he knew that the twelfth plaintiff had the expectations identified in paragraph 87(a), and had informed him of the matters identified in paragraph 85(a); and
- b. does not know and cannot otherwise admit the allegations in the sub-paragraph.

89-89K Does not admit paragraphs 89 to 89K and says that they do not contain any allegations against him.

89L In response to paragraph 89L:

- a. denies the allegations in so far as they concern the twelfth plaintiff and the Darshn Sub-Group members and any other patient with whom he consulted with or on whom he performed (or assisted in performing) BAS;
- b. repeats *mutatis mutandis* the matters pleaded and particularised in paragraphs 9, 14, 14K, 21, 22 and 81L above;
- c. further says that:
 - i. he is a natural person;

- ii. by reason of the fact that he is a natural person, ss 60, 61(1) and 61(2) of the ACL do not apply to his conduct;

Particulars

Competition and Consumer Act 2010 (Cth) s 131

- d. does not otherwise admit the allegations in the paragraph.
- 90 In response to paragraph 90:
- a. denies the allegations in so far as they concern the twelfth plaintiff and the Darshn Sub-Group members and any other patient with whom he consulted with or on whom he performed (or assisted in performing) BAS;
- b. does not otherwise admit the allegations in the paragraph.
- 91 In response to paragraph 91:
- a. repeats *mutatis mutandis* paragraphs 89L and 90 above; and
- b. does not otherwise admit the allegations in the paragraph.
- 92 In response to paragraph 92:
- a. repeats *mutatis mutandis* paragraphs 89L and 90 above; and
- b. does not otherwise admit the allegations in the paragraph.
- 93 Not used.
- 94 In response to paragraph 94:
- a. in so far as it relates to the sixteenth defendant:
- i. repeats *mutatis mutandis* paragraphs 24AF-25, 77LFB, 81X, 89L and 90 above; and
- ii. denies the allegations in the paragraph;
- iii. further says (without admission and without prejudice to his defence, including the non-admissions and denials contained therein), if any representations were made as to future matters there were reasonable grounds for making the representations;
- b. otherwise does not admit the paragraph.
- 94A-94K Does not admit paragraphs 94A to 94K and says that they do not contain any allegations against him.
- 94L In response to paragraph 94L:

a. repeats *mutatis mutandis* paragraphs 24AF-25, 77LFB, 81X, 89L, 90 and 94 above; and

b. denies the allegations in the paragraph.

95-95K Does not admit paragraphs 95 to 95K and says that they do not contain any allegations against him.

95L Does not admit paragraph 95L.

96-96AG Does not admit paragraphs 96 to 96AG and says that they do not contain any allegations against him.

96AH In response to paragraph 96AH:

a. denies the allegations in so far as they concern the twelfth plaintiff;

b. in respect of the twelfth plaintiff, says further that:

i. the twelfth plaintiff's action in negligence against him is statute barred by reason of s 11 of the *Limitation of Actions Act 1974* (Qld);

ii. further says, in consulting with and performing BAS on the twelfth plaintiff, he:

1. gave the twelfth plaintiff information enabling her to make a reasonably informed decision about whether to undergo the treatment or follow the advice, within the meaning of s 21 *Civil Liability Act 2003* (Qld);

2. acted, at all relevant times, in a way that was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice within the meaning of s 22 *Civil Liability Act 2003* (Qld);

Particulars

Civil Liability Act 2003 (Qld) Chapter 2 Division 5

The sixteenth defendant repeats *mutatis mutandis* paragraph 81L

iii. in the alternative, any failure by him to take precautions against the risk of harm in respect of the twelfth plaintiff (such failure being denied) was not negligent;

Particulars

Civil Liability Act 2003 (Qld) ss 9 and 10

Judiciary Act 1903 (Cth) ss 79 and 80

- iv. if the twelfth plaintiff suffered harm as a result of BAS performed by the sixteenth defendant:
 - 1. any such harm was a result of the materialisation of an “inherent risk” of the surgery within the meaning of s 16 of the *Civil Liability Act 2003* (Qld); and
 - 2. in the premises, the sixteenth defendant is not liable for any harm suffered by the twelfth plaintiff as a result of her BAS;
- v. any entitlement to damages on the part of the twelfth plaintiff against Dr Darshn (such entitlement being denied) falls to be assessed in accordance with Chapter 2 and Chapter 3 of the *Civil Liability Act 2003* (Qld);

Particulars

Civil Liability Act 2003 (Qld)

Australian Consumer Law s 275 (without admission and without prejudice to the non-admissions and denials in this defence concerning the allegations in Part VI of 4FASOC, which are maintained)

- vi. says that, if (which is denied), he has any liability as alleged, the twelfth plaintiff was contributorily negligent with respect to the harm she alleges she suffered.

Particulars

The twelfth plaintiff failed to attend any further post-operative consultations and to submit any further post-operative photographs after her six week consultation.

- vii. further or in the alternative to (v), says that, if (which is denied), he has any liability as alleged, the twelfth plaintiff failed to mitigate her alleged loss.

Particulars



- c. does not otherwise admit the allegations in the paragraph;
- d. in relation to the other Darshn sub-group members (and any other group member on whom the sixteenth defendant performed BAS) says further that:
 - i. the action in negligence against Dr Darshn of any Darshn sub-group member (and any other group member on whom the sixteenth defendant performed BAS):
 - 1. whose claim was discoverable three or more years before 19 June 2020, is statute barred by reason of s 50C of the *Limitation Act 1969* (NSW); or
 - 2. where applicable, whose cause of action accrued three or more years before 19 June 2020 is statute barred by reason of s 11 of the *Limitation of Actions Act 1974* (Qld);
 - ii. he acted, at all relevant times, in a way that was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice within the meaning of s 22 *Civil Liability Act 2003* (Qld) and was widely accepted in Australia by peer professional opinion as competent professional practice within the meaning of s 50 of the *Civil Liability Act 2002* (NSW);
 - iii. in the alternative, any failure to take precautions against the risk of harm suffered by any Darshn sub-group member (and any other group member on whom the sixteenth defendant performed BAS) and any liability on the part of Dr Darshn (such failure, harm and liability being

denied) will need to be assessed by reference to Part 1A of the *Civil Liability Act 2002* (NSW) or, where applicable, Chapter 2 of the *Civil Liability Act 2003* (Qld);

Particulars

The sixteenth defendant repeats *mutatis mutandis* paragraph 81L

- iv. if any of the Darshn sub-group members suffered harm as a result of BAS performed by the sixteenth defendant:
 - 1. any such harm was a result of the materialisation of an “inherent risk” of the surgery within the meaning of s 51(2) of the *Civil Liability Act 2002* (NSW) or, where applicable, s 16 of the *Civil Liability Act 2003* (Qld); and
 - 2. in the premises, the sixteenth defendant is not liable for any harm suffered by any of the Darshn sub-group members; and
- v. any entitlement to damages on the part of any Darshn sub-group member against Dr Darshn (such entitlement being denied) falls to be assessed in accordance with Parts 1A, 2 and 4 of the *Civil Liability Act 2002* (NSW) or, where applicable, Chapters 2 and 3 of the *Civil Liability Act 2003* (Qld);

Particulars

Civil Liability Act 2003 (Qld) or *Civil Liability Act 2002* (NSW) as applies

Australian Consumer Law s 275 (without admission and without prejudice to the non-admissions and denials in this defence concerning the allegations in Part VI of 4FASOC, which are maintained)

- e. further says, in respect of the twelfth plaintiff and the Darshn sub-group members (and any other group member on whom the sixteenth defendant performed BAS), to the extent any loss or damage is claimed under s 236 of the ACL, by reason of ss 137C(1) and 137E(1) of the *Competition and Consumer Act 2010* (Cth), they are not entitled to recover the damages claimed.

96AJ In response to paragraph 96AJ:

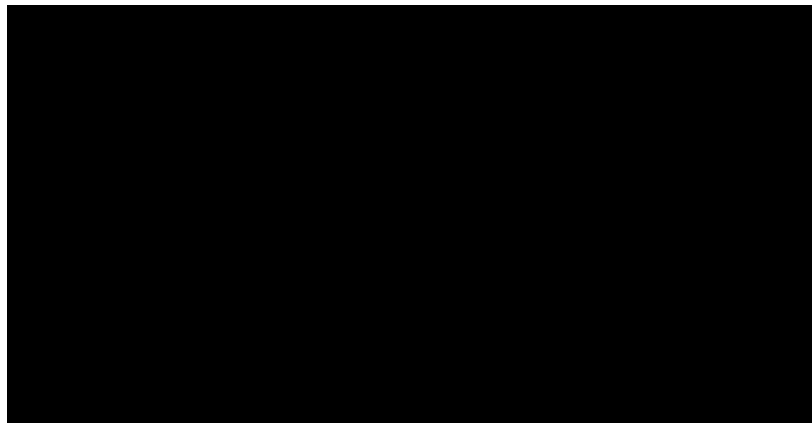
- a. denies the allegations in so far as they concern the twelfth plaintiff;
- b. does not otherwise admit the allegations in the paragraph;
- c. repeats *mutatis mutandis* paragraph 96AH;
- d. says further:
 - i. the claim under the ACL against Dr Darshn made by the twelfth plaintiff and the Darshn sub-group members (and any other group member on whom the sixteenth defendant performed BAS) was discoverable three or more years before 19 June 2020; and
 - ii. the twelfth plaintiff's action under the ACL, and the action of the Darshn sub-group members (and any other group member on whom the sixteenth defendant performed BAS), is statute barred by reason of ss 87F-87G of the *Competition and Consumer Act 2010* (Cth);
- e. says that, if (which is denied), he has any liability as alleged, the twelfth plaintiff was contributorily negligent with respect to the harm she alleges she suffered.

Particulars

The twelfth plaintiff failed to attend any further post-operative consultations and to submit any further post-operative photographs after her six week consultation

- f. further or in the alternative to (e), says further that, if (which is denied), he has any liability as alleged, the twelfth plaintiff failed to mitigate her alleged loss.

Particulars



g. says further that any claim for damages made against him pursuant to the claims under the ACL and any liability that he may have arising from those claims (which is denied) must be determined:

iii. by reference to sections 87CB-87CI of the *Competition and Consumer Act 2010* (Cth); and

Particulars

The plaintiffs have in their 4FASOC identified the first-fifth defendants as concurrent wrongdoers with the sixteenth defendant in respect of the claims made under the ACL and the bases relied upon for those allegations.

If Dr Darshn has any liability (which is denied) and if the plaintiffs make good the allegations against any of the first to fifth defendants, Dr Darshn will rely upon those matters, without prejudice to his defence (including the non-admissions and denials contained therein), for the purposes of ss 87CB-87CI. Further, without limitation of the matters which may be relied upon for the purposes of ss 87CB-87CI, Dr Darshn repeats the matters as pleaded at paragraphs 24H and 77LFB above.

iv. section 137B of the *Competition and Consumer Act 2010* (Cth).

Particulars

The matters in paragraphs 96AJ(e)-(f) are repeated.

97-131 Does not admit paragraphs 97-131 and says that they do not contain any allegations against him.

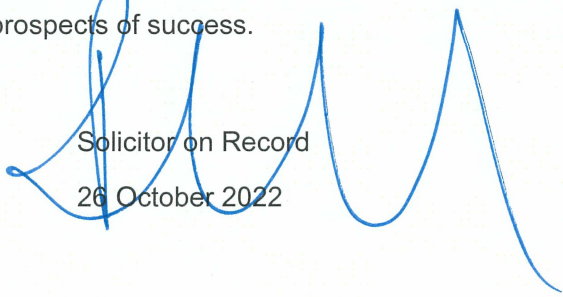
SIGNATURE OF LEGAL REPRESENTATIVE

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

Capacity

Date of signature

A handwritten signature in blue ink, consisting of a large initial 'S' followed by several loops and a long tail.

Solicitor on Record

26 October 2022

AFFIDAVIT VERIFYING

Name Sri Balakrishnan Darshn
 Address 1102/187 Liverpool Street SYDNEY NSW 2000
 Occupation Cosmetic Surgeon
 Date 26 October 2022

I affirm:

- 1 I am the sixteenth defendant.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at SYDNEY

Signature of deponent

Name of witness

Euphemia Dimos

Address of witness

Level 22, 66 Goulburn Street Sydney NSW 2000

Capacity of witness

Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the defendant for at least 12 months.

Signature of witness

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.