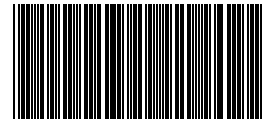




Filed: 5 June 2024 9:22 AM



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Form 40  
UCPR 35.1

### AFFIDAVIT OF Jason Tracy - 4 June 2024

#### COURT DETAILS

|             |                      |
|-------------|----------------------|
| Court       | Supreme Court of NSW |
| Division    | Equity               |
| List        | Corporations List    |
| Registry    | Supreme Court Sydney |
| Case number | 2020/00152668        |

#### TITLE OF PROCEEDINGS

|                  |                           |
|------------------|---------------------------|
| First Applicant  | Jason Tracy               |
| Second Applicant | Direct Fx Trading Pty Ltd |

#### FILING DETAILS

|           |  |
|-----------|--|
| Filed for | Jason Tracy, Applicant 1<br>Direct Fx Trading Pty Ltd, Applicant 2 |
|-----------|--|

|                                |                 |
|--------------------------------|-----------------|
| Legal representative           | Alexandra Smith |
| Legal representative reference |                 |

|                |               |
|----------------|---------------|
| Telephone      | 0295132434    |
| Your reference | 7412431.00001 |

#### ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Affidavit (General) (e-Services), along with any other documents listed below, were filed by the Court.

Affidavit (UCPR 40) (20240604\_Affidavit of Jason Tracy dated 4 June 2024 [Executed].pdf)

[attach.]

IN THE SUPREME COURT OF NEW SOUTH WALES      No. 00152668 of 2020

DIVISION:    EQUITY

REGISTRY:   SYDNEY

CORPORATIONS LIST

IN THE MATTER OF DIRECT FX TRADING PTY LTD  
ACN: 120 189 424

**JASON TRACY IN HIS CAPACITY AS LIQUIDATOR OF DIRECT FX TRADING PTY LTD  
(IN LIQUIDATION) ACN 120 189 424**  
First Plaintiff

**DIRECT FX TRADING PTY LTD (IN LIQUIDATION) ACN 120 189 424**  
Second Plaintiff

**AFFIDAVIT OF JASON TRACY SWORN 4 JUNE 2024**

I, Jason Tracy of Quay Quarter Tower Level 46, 50 Bridge St Sydney, NSW 2000, Registered Liquidator, say on oath:

1.     I am a partner of Deloitte Financial Advisory Pty Limited (**Deloitte**).
2.     I am the liquidator of the second plaintiff, Direct FX Trading Pty Ltd (In Liquidation) ACN 120 189 424 (**Direct FX**).
3.     I make this affidavit in support of the plaintiffs' interlocutory process (**Application**).
4.     Shown to me at the time of swearing this affidavit is a paginated bundle of documents marked "**JT-2**" (**Exhibit**). Also shown to me at the time of swearing this affidavit is a folder of documents marked "**CE JT-2**" (**Confidential Exhibit**). Where I refer to a page number or numbers in this affidavit, I refer to the page numbers of the Exhibit or Confidential Exhibit, as applicable.
5.     I refer to my affidavit sworn 21 May 2020 in these proceedings (**2020 Affidavit**) and Exhibit JT-1 (**2020 Exhibit**).
6.     I make this affidavit based on my own knowledge and belief unless otherwise stated.

**Professional Background**

7.     I refer to paragraphs 6 to 8 of my 2020 Affidavit. To the extent that I express an opinion in this affidavit, such opinions are based on my experience of over 20 years working in the insolvency industry.
8.     I refer to paragraphs 12 to 16 of my 2020 Affidavit. As set out therein, prior to October 2018, Direct FX operated an online financial services and currency exchange business



through its website [www.directfx.com](http://www.directfx.com) and held its own Australian Financial Services License (**AFSL**), AFSL No 305539.

9. On 11 October 2018, I was appointed by the Supreme Court of New South Wales, together with Vaughan Strawbridge, to act as the liquidators of Direct FX (**Liquidators**) following orders that Direct FX be wound up in insolvency under section 459P of the *Corporations Act 2001* (Cth). Exhibited at pages 19 to 20 of the 2020 Exhibit is a sealed copy of the orders which were made by the Court on 11 October 2018.
10. On 7 May 2021, Mr Strawbridge resigned as one of the joint and several liquidators of Direct FX and I remain the sole liquidator. A copy of a historical company extract, which was obtained on 4 June 2024 from the database maintained by the Australian Securities and Investments Commission (**ASIC**), in respect of Direct FX is at **pages 1 to 19** of the Exhibit.

### Purpose of this Affidavit

11. The purpose of this affidavit is to update the Court that, in my capacity as liquidator of Direct FX, I have identified that the CLM Accounts (defined in paragraph 17(c) below) hold client monies within the meaning of Division 2 of Part 7.8 of the *Corporations Act*. I now seek to distribute the Outstanding Client Balances (defined in paragraph 20 below) before finalising the liquidation of Direct FX.
12. To assist with the process described in paragraph 11 above, I seek a direction, and judicial advice, as to whether I, as liquidator of Direct FX, and Direct FX, are justified in treating the Identified Beneficiaries (as that term is defined in paragraph 20 below) who have a credit balance of AUD\$100 or less as having no right to participate in the distribution of funds by me.

### Previous application

13. By Originating Process filed on 22 May 2020, the Liquidators applied to the Court for directions concerning monies and recoveries totalling AUD\$269,014 which the Liquidators suspected were client monies within the definition in s 981A of the *Corporations Act* (**Client Monies**).
14. On 1 October 2020, the Court made orders, *inter alia*, that the liquidators of Direct FX were justified in pooling certain funds and distributing the pooled funds rateably amongst creditors with debts proved to be greater than AUD\$25.
15. At the time of swearing my 2020 Affidavit, the Liquidators did not seek any directions in respect of the CLM Accounts.

### CLM Accounts

16. Following my appointment in October 2018, the Liquidators and their staff conducted extensive investigation into the business, property, affairs and financial circumstances of Direct FX. The outcome of these investigations is set out in my 2020 Affidavit, specifically at paragraphs 18 to 46 of my 2020 Affidavit.
17. Based on those investigations, I have identified that Direct FX entered into a revenue sharing agreement and various loan agreements with Core Liquidity Markets Pty Ltd ACN 164 994 049 (**CLM**), which is a financial services and foreign currency investment and trading company. Specifically:





- (a) in or around 2016, Direct FX entered into a revenue sharing arrangement under which CLM was appointed to act as the "Corporate Authorised Representative" for Direct FX in Australia. A copy of the Corporate Authorised Representative Agreement (**CAR Agreement**) is at pages 196 to 219 of the 2020 Exhibit;
- (b) in addition to the CAR Agreement, Direct FX and CLM entered into the following loan agreements:
- (i) loan agreement dated 7 December 2016 pursuant to which Direct FX agreed to lend CLM a maximum amount of US\$200,000 or such other amount as the parties agree in writing from time to time by way of cash advance on the Drawdown Date, being 7 December 2016 "or such other date as writing between the Lender and the Borrower". A copy of this agreement is at pages 163 to 171 of the 2020 Exhibit;
  - (ii) loan agreement dated 5 July 2017 varying the amount of the principal under the loan agreement dated 7 December 2017 from US\$200,000 to US\$183,925.98. A copy of this agreement is at pages 172 to 180 of the 2020 Exhibit; and
  - (iii) loan agreement dated 5 January 2018 changing the repayment terms of the loan from Direct FX to CLM. A copy of this agreement is at pages 181 to 189 of the 2020 Exhibit,
- (together, the **Loan Agreements**); and
- (c) as set out at items 8 - 11 inclusive in the table referred to at paragraph 20 of my 2020 Affidavit, as at the date of my appointment, Direct FX held the following four bank accounts which included the reference "Core Liquidity" in the name of the account (**CLM Accounts**):

| Item         | Account Name per Bank Statements           | Account Name per Direct FX Xero Accounting Records | Balance in original currency | Balance in (AUD) at the exchange rate available upon the day in which the respective account was realised |
|--------------|--|--|------------------------------|---|
| 1.           | Direct FX Trading Pty Ltd - Core Liquidity | DFXT Core liquidity 7589                           | AU\$229,780                  | \$229,780   |
| 2.           | Direct FX Trading Pty Ltd - Core Liquidity | DFXT Core liquidity 7634 (EUR)                     | €193,611                     | \$304,836   |
| 3.           | Direct FX Trading Pty Ltd - Core Liquidity | DFXT Core liquidity 7650 (USD)                     | US\$95,814                   | \$131,933   |
| 4.           | Direct FX Trading Pty Ltd - Core Liquidity | DFXT Core liquidity 7669 (GBP)                     | £16,000                      | \$27,566  |
| <b>Total</b> |  |  |                              | <b>\$694,115</b>  |

18. In October and November 2018, the CLM Funds were transferred to four separate accounts with the National Australia Bank (**NAB**), and converted from their base currency to AUD.

19. As stated at paragraph 21(b)(i) of my 2020 Affidavit, based on my investigations, I have formed the view that the CLM Accounts contained AUD\$694,115 in funds which were paid by CLM to Direct FX (**CLM Funds**).
20. As at the date of my 2020 Affidavit, I held the view that all of the CLM Funds were not client funds as they were in operating accounts, as recorded at paragraph 21(b)(i) of that affidavit. However, as a result of my investigations since then, including as set out below at paragraphs 23-24, I consider that a *portion* of the CLM Funds are outstanding client balances (**Outstanding Client Balances**) owing to clients referred to Direct FX by CLM (**Identified Beneficiaries**). My investigations have identified that the Outstanding Client Balances owed to Identified Beneficiaries total AUD\$43,205.60. Those funds have been ring-fenced in the liquidation and remain in a NAB account called Direct FX Trading FC 650 with BSB 082-057 and account number 22-761-6416 (**Outstanding Client Balances Account**) earning interest. The Outstanding Client Balances Account had a balance of AUD\$48,714.73 as at 30 April 2024. A copy of the most recent statement for the Outstanding Client Balances Account is at **page 20** of the Exhibit.
21. Based on my investigations to date, I have also formed the view that:
- (a) the Identified Beneficiaries deposited monies into an account or accounts held by CLM. Subsequently, CLM transferred the monies into the CLM Accounts, being the Outstanding Client Balances; and
  - (b) no other person, other than the Identified Beneficiaries has established an entitlement to the Outstanding Client Balances.
22. In light of my views above, I suspect that:
- (a) the Outstanding Client Balances are assets held on trust for individual clients referred to Direct FX by CLM (pursuant to the CAR Agreement);
  - (b) the Outstanding Client Balances are client moneys within the definition provided for in section 981A of the *Corporations Act*.

### Overview of Outstanding Client Balances

23. During my investigations, I obtained details of the Outstanding Client Balances and limited contact details of some CLM clients from Carlos Cadavid, Managing Director of CLM. Based on that information, my staff prepared a spreadsheet entitled "CLM Beneficiary Analysis" (**CLM Spreadsheet**) which is exhibited to this affidavit at **pages 1 to 36** of the Confidential Exhibit.
24. For the purpose of the CLM Spreadsheet, the value of the Outstanding Client Balances is AUD\$43,205.60. I arrive at this figure by applying the applicable RBA Exchange Rate and converting the base currencies into Australian Dollars as at 11 October 2018, being the date of the liquidator's appointment. Based on my staff's calculations, the RBA historical exchange rate in respect of USD, Euro and GBP on 11 October 2018 result in a greater return to the Identified Beneficiaries than the CBA historical exchange rates that applied in respect of USD, Euro and GBP on 11 October 2018. I have not considered exchange rates other than CBA or RBA.
25. The CLM Spreadsheet has the following worksheets as described below:





(a) *Analysis*

Tables A to G of this worksheet contain the following information:

- (i) the number of Identified Beneficiaries by their base currency (being either AUD, EURO, GBP, USD);
- (ii) the total value of the Identified Beneficiaries' accounts in their base currency and converted to AUD (using the RBA exchange rates as at 11 October 2018);
- (iii) the number (and total value) of Identified Beneficiaries that would be entitled to a dividend in the liquidation in circumstances where dividends were distributed to Identified Beneficiaries with a credit balance of:
  - (A) greater than AUD\$25 (as set out in Table A);
  - (B) greater than AUD\$50 (as set out in Table B);
  - (C) greater than AUD\$100 (as set out in Table C);
  - (D) greater than AUD\$150 (as set out in Table D);
  - (E) greater than AUD\$200 (as set out in Table E);
  - (F) greater than AUD\$250 (as set out in Table F);
  - (G) greater than AUD\$300 (as set out in Table G).

Table H (at columns M to Q) summarises the value of the total dividend payable depending on the proposed minimum threshold that may apply (as described immediately above), the amount held by the Liquidator in the Outstanding Client Balances Account, and the residual balance in that account assuming a dividend payment in accordance with each minimum dividend threshold (and prior to expenses associated with this application being deducted).

Finally, rows 12 to 16 of the Analysis worksheet of the CLM Spreadsheet disclose the RBA exchange rates that applied as at 11 October 2018, being the date of the Liquidator's appointment.

(b) *Clients GBP Balances*

This worksheet shows the following information with respect to the Identified Beneficiaries which are denominated in GBP:

- (i) Client name;
- (ii) Client balance in GBP;
- (iii) the multiplier for converting from GBP to AUD; and
- (iv) Client balance in AUD (exact and to 2 decimal places),

(c) *Clients USD Balances*

This worksheet shows the following information with respect to the Identified Beneficiaries which are denominated in USD:

- (i) Client name;
- (ii) Client balance in USD;



- (iii) the multiplier for converting from USD to AUD; and
  - (iv) Client balance in AUD (exact and to 2 decimal places),
- (d) *Clients AUD Balances*

This worksheet shows the following information with respect to the Identified Beneficiaries which are denominated in AUD:

- (i) Client name; and
- (ii) Client balance in AUD,

- (e) *Clients EUR Balances*

This worksheet shows the following information with respect to the Identified Beneficiaries which are denominated in EUR:

- (i) Client name;
- (ii) Client balance in EUR;
- (iii) the multiplier for converting from EUR to AUD; and
- (iv) Client balance in AUD (exact and to 2 decimal places).

26. In total, there are 2,653 Identified Beneficiaries that have outstanding positive balances owing to them and which have claims to the Outstanding Client Balances.
27. Of these, 2,579 have outstanding positive account balances less than AUD\$100.00 and only 74 Identified Beneficiaries have balances greater than AUD\$100.00 (**74 Proposed Beneficiaries**). The balances owing to the 74 Proposed Beneficiaries together comprise over half of the value of the Outstanding Client Balances, being a total amount of AUD\$23,276.52. The table below summarises CLM Accounts with a balance greater than AUD\$100.00 (i.e. the balances owing to the 74 Proposed Beneficiaries):

| Currency     | Number of clients with >AUD\$100 | Total amount of client accounts with >AUD\$100 (in AUD) |
|--------------|----------------------------------|---|
| USD          | 41                               | \$10,718.01   |
| GBP          | 2                                | \$674.21  |
| AUD          | 3                                | \$1,540.68  |
| EUR          | 28                               | \$10,343.62   |
| <b>Total</b> | <b>74</b>                        | <b>\$23,276.52</b>                                      |

### Costs of distribution

28. It is difficult to quantify the costs associated with distributing the Outstanding Client Balances to the 2,653 Identified Beneficiaries but it is likely that the cost of distributing the Outstanding Client Balances to all 2,653 Identified Beneficiaries would exceed the available funds, as:



- (a) I do not hold contact details for the Identified Beneficiaries, save for email addresses which were obtained from Mr Cadavid. It is not clear to me whether the email addresses provided are accurate and/or still being actively maintained by the Identified Beneficiaries; and
  - (b) I do not hold bank account details for any of the Identified Beneficiaries.
29. Accordingly, I expect that my staff and I will be required to undertake the following activities in order to facilitate payment to the Identified Beneficiaries (including the 74 Proposed Beneficiaries):
- (a) Provide each beneficiary with formal notice of any distribution;
  - (b) Liaise with beneficiaries to request their bank account to process the distribution;
  - (c) Attend to verbal confirmations of bank account details; and
  - (d) Provide confirmation of the completed distribution.
30. I also expect that my staff and I will be required to take steps to pay any unclaimed monies to the applicable government fund in respect of any of the Identified Beneficiaries whose details we are unable to verify.
31. In my view, having regard to the activities associated with distributing the Outstanding Client Balances as detailed in paragraphs 29 to 30 and taking into account the numbers of clients affected and the potential difficulties in contacting clients, it is not practically feasible to distribute the Outstanding Client Balances to those clients with claim balances of under AUD\$100.

### Costs

32. As at 30 April 2024, there is an amount of AUD\$48,714.73 held in the Outstanding Client Balances Account and an amount of AUD\$22,210.82 held in a NAB account bearing BSB 082-057 and account number 88-835-3764 (**Further Account**). The Further Account was created for the purpose of holding and transacting certain general company funds of Direct FX. As noted above, a copy of the most recent statement for the Outstanding Client Balances Account is at **page 20** of the Exhibit. A copy of the most recent statement for the Further Account is at **page 21** of the Exhibit.
33. As at the date of swearing this affidavit there are no further funds from which to draw my costs and expenses save for the funds held in the Outstanding Client Balances Account and the Further Account.
34. In the event that the Court grants the orders sought at paragraph 1 of the Application, based on the balance of the Outstanding Client Balances as at 30 April 2024 and the proposed distribution to the 74 Proposed Beneficiaries, there will be a residual balance of AUD\$25,438.21 in that account (**Residual Balance**).
35. I estimate that my expenses incurred in relation to making this Application and associated with the distribution to the 74 Proposed Beneficiaries are likely to exceed the Residual Balance. I estimate that the net amount that will be available to the 74 Proposed Beneficiaries (in the event that the Court makes the orders sought at paragraph 1 of the Application) will be less than the total value of the claims of the 74





Proposed Beneficiaries. Because of this, I propose that the distribution to the 74 Proposed Beneficiaries be on a pro rata basis.

36. I do not seek to draw from the Outstanding Client Balances Account any remuneration in relation to either the making of the Application or the future distribution of the Outstanding Client Balances. Therefore I do not seek approval from this Court for the drawing of any remuneration from the Outstanding Client Balances.

### Representative defendants

37. I refer to paragraphs 67 to 69 of my 2020 Affidavit, in which I doubted there would be sufficient utility in appointing representative defendants in these proceedings. I reiterate those views here and confirm that since swearing my 2020 Affidavit, no creditor or client of Direct FX has written to me to advise that they wish to appear in these proceedings as a representative defendant.

### Personal information

38. The CLM Spreadsheet is a spreadsheet containing certain worksheets as set out above at paragraph 25, and which include the names of clients of Direct FX ("**Personal Details**"). I have included the names of Identified Beneficiaries in the 'Clients GPB Balances', 'Clients USD Balances', 'Clients AUD Balances' and 'Clients EUR Balances' in order to identify the value of each client balance. The Personal Details have been redacted for the purposes of this Application.
39. I respectfully seek that this honourable Court make the orders sought in the Application.

SWORN at

Sydney

Signature of deponent



Name of witness

Katherine Marie Smith

Address of witness

Level 31, 1 O'Connell Street, Sydney NSW

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 deponent for at least 12 months.

Signature of witness



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