

Affidavit

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
DIVISION: CORPORATIONS**

No. VID 562 of 2010

IN THE MATTER OF: SONRAY CAPITAL MARKETS PTY LTD
(IN LIQUIDATION) ACN 104 482 993

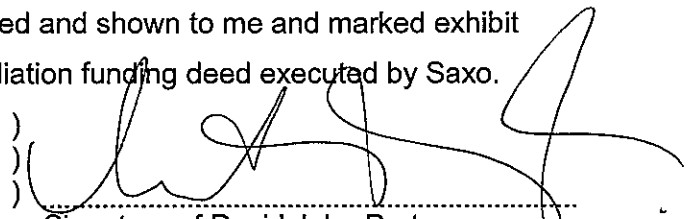
**RE AN APPLICATION BY GEORGE GEORGES & JOHN ROSS LINDHOLM
IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF
SONRAY CAPITAL MARKETS PTY LTD (IN LIQUIDATION) ACN 104 482 993
Plaintiffs**

On 29 November 2010, I, **David John Porter** of Level 15 485 Bourke Street Melbourne in the State of Victoria, lawyer, say on oath:

- 1 I am a partner of Norton Rose Australia, solicitors for the plaintiffs. I am responsible for the conduct of this file on behalf of the plaintiffs. I am authorised to make this affidavit on the plaintiffs' behalf. I make this affidavit from my own knowledge except where otherwise stated.
- 2 I refer to paragraph 19 and exhibit GG-2 Tab 13 of the Affidavit of George Georges sworn on 28 October 2010 referring to an amended mediation funding deed between Sonray Capital Markets Pty Ltd (in liquidation) (**Sonray**) and Saxo Bank A/S (**Saxo**). The amendments take into account the transition of the plaintiffs from being the administrators to being the liquidators of Sonray.
- 3 On 26 November 2010 I received by email from Samantha Kinsey of Mallesons Stephen Jaques solicitors for Saxo, a copy of the amended mediation funding deed executed by Saxo. Now produced and shown to me and marked exhibit **DJP-1** is a copy of the amended mediation funding deed executed by Saxo.

SWORN by David John Porter at
Melbourne in Victoria on 29 November
2010 before me:

.....
Signature of person taking affidavit

) 
Signature of David John Porter

ALLAN FARREL KAWALSKY
RACV Tower, 485 Bourke Street
Melbourne Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004.

Filed on behalf of: The plaintiffs
Prepared by:
Norton Rose Australia
RACV Tower, 485 Bourke Street
MELBOURNE VIC 3000

Solicitor's Code: 370
DX: 445 Melbourne
Tel: (03) 8686 6000
Fax: (03) 8686 6505
Ref: 2698457
Attention: Allan Kawalsky

CERTIFICATE OF COMPLIANCE

I, *Allan Farrel Kawalsky*, certify to the Court that the affidavit of David John Porter sworn on 29 November 2010 filed on behalf of the plaintiffs complies with Order 14, rule 2 of the Federal Court Rules.

Date: 29 November 2010

Norton Rose Australia
Solicitor for the plaintiffs

ALLAN FARREL KAWALSKY
RACV Tower, 485 Bourke Street
Melbourne Victoria 3000
An Australian Legal Practitioner
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Legal Profession Act 2004.

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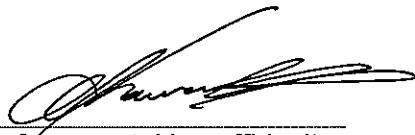
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SONRAY CAPITAL MARKETS PTY LTD (IN LIQUIDATION) ACN 104 482 993
Plaintiffs**

EXHIBIT DJP-1

This is the exhibit marked "DJP-1" produced and shown to **David Porter** at the time of swearing his affidavit on 29 November 2010.

Before me:



Signature of person taking affidavit

ALLAN FARREL KAWALSKY
RACV Tower, 485 Bourke Street
Melbourne Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004.

Filed on behalf of: The plaintiffs
Prepared by:
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Solicitor's Code: 370
DX: 445 Melbourne
Tel: (03) 8686 6000
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Dated

2010

Mediation Funding Deed

Parties

Saxo Bank A/S ARBN 109 605 610
(Bank)

Sonray Capital Markets Pty Ltd ACN 104 482 993
(In Liquidation)
(Borrower)

Andrew Bretherton
Norton Rose Australia
RACV Tower, 485 Bourke Street, Melbourne VIC 3000
Tel: +61 (0) 3 8686 6225
www.nortonrose.com
Our ref: 2698457

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Deed dated

2010

Parties

Saxo Bank A/S ARBN 109 605 610

care of Saxo Capital Markets Pte Ltd, 3 Church Street, #30-00 Samsung Hub, Singapore, 049483

("Bank")

Sonray Capital Markets Pty Ltd ACN 104 482 993 (In Liquidation)

of Ferrier Hodgson, Level 29, 600 Bourke Street, Melbourne, Victoria 3000

("Borrower")

Introduction

- A. The Bank has offered to provide funds to the Borrower to enable the Liquidators to facilitate convening a mediation.
- B. The funding to be provided by the Bank will be on a limited recourse basis as set out in this Deed.
- C. This Deed contains the terms and conditions upon which funding will in the future be provided by the Bank to the Borrower.
- D. The parties each acknowledge that they do not have aligned positions on all matters and that the Liquidators are obliged to, and will, investigate, and present arguments in the mediation in relation to, any liability which the Bank may have to the Borrower or to other persons.

It is agreed

1. Definitions and interpretation

1.1 Definitions

In this Deed the following definitions apply unless the context indicates otherwise:

- (1) **Administration and Liquidation Debts** means those liabilities and debts referred to in the Corporations Act section 443A and any other debts or liabilities incurred or damages or losses sustained, in good faith, by the Liquidators in the performance or exercise or purported performance or exercise of any of their functions or powers as liquidators and/or former administrators of the Borrower;
- (2) **Liquidators** means each of John Lindholm and George Georges, both of Ferrier Hodgson, in their capacity as liquidators and/or former administrators of the Borrower.
- (3) **Advance** means each advance made or to be made to or on behalf of the Borrower under the Facility;
- (4) **Approved Activities** means all activities relating to or incidental to the Proposed Mediation, being:

- (a) the negotiation, preparation and execution of the Transaction Documents;
 - (b) any application made in order to satisfy the condition precedent in clause 2.1;
 - (c) activities by way of seeking to have other parties participate in the Proposed Mediation;
 - (d) anything done pursuant to the Mediation Agreement other than pursuant to clause 6.8 of the Mediation Agreement (unless otherwise permitted under this definition of Approved Activities);
 - (e) investigations undertaken after the date of this Deed for the purposes of, and in the context of, the Proposed Mediation or identifying or investigating claims which may be made in the Proposed Mediation;
 - (f) reporting in respect of the Proposed Mediation;
 - (g) the making of any application to Court for directions and/or declarations concerning:
 - (i) the nature and status of any moneys or other assets held in any account maintained by the Borrower with any person other than the Lender, and/or the appropriate distribution of such moneys or assets (including by way of distribution to the Liquidators (as liquidators and/or former voluntary administrators) in respect of their fees and disbursements incurred as liquidators and/or former voluntary administrators of the Borrower); and
 - (ii) the rights of the Borrower's investors who were exclusively using the trading platform maintained by Interactive Brokers LLC to argue that they are individually beneficially entitled to financial products held by Interactive Brokers LLC; and
 - (h) any other activity which the Bank has agreed in writing is an Approved Activity.
- (5) **Authorised Officer** means, in relation to the Bank, any person whose title or office includes the word director, associate director, manager or company secretary, or any person acting in any of those offices, or any person appointed as an Authorised Officer by the Bank;
- (6) **Business Day** means a day that is not a Saturday, Sunday or public or bank holiday in Melbourne, Victoria;
- (7) **Corporations Act** means the *Corporations Act 2001* (Cth);
- (8) **Deposit Account** means a trust account established and maintained by the Liquidators for the purposes of this Mediation Funding Deed and which will only have deposited to it the Security Deposit and any Further Security Deposits, details of which account will be provided by the Borrower to the Bank upon execution of this Mediation Funding Deed.
- (9) **Facility** means the provision by the Bank of the Security Deposit, any Further Security Deposits and Advances to the Borrower as provided in this Deed;

- (10) **Further Security Deposits** means such further deposits as may be provided in accordance with clause 3.2, together with any interest accrued thereto in the Deposit Account;
- (11) **GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
- (12) **Interest Rate** means 5 % per annum;
- (13) **Mediation Agreement** means any agreement governing the Proposed Mediation, between the Bank and the Borrower and any other persons who subscribe to it.
- (14) **Permitted Repayment Method** means by way of deduction from any amount which the Bank is adjudged liable, or agrees, to pay the Borrower, in settlement of any claims which the Borrower may have against the Bank relating to the time prior to the voluntary administration of the Borrower;
- (15) **Principal Outstanding** means the aggregate of all amounts deposited by the Bank into the Deposit Account (being the total amount of the Security Deposit and any Further Security Deposits);
- (16) **Proposed Mediation** means a mediation to which at least the Borrower and the Bank are participants and which is intended to explore options for the global resolution of potential claims by or against the Bank, and between any other relevant persons, arising from the activities of the Borrower prior to the appointment of the Administrators or arising from that appointment.
- (17) **Security Deposit** means the sum of \$500,000, together with any interest earned thereon in the Deposit Account.
- (18) **Termination Date** means 1 January 2012 or such earlier date as may be agreed between the parties; and
- (19) **Transaction Documents** means:
 - (a) this Deed;
 - (b) any Mediation Agreement;
 - (c) any document or agreement entered into or provided under or in connection with, or for the purpose of amending or novating, any of the above;
 - (d) any undertaking by or to a party or its lawyers under or in relation to any of the above; and
 - (e) any other document that the Lender and the Borrower agree in writing is a Transaction Document.

1.2 Interpretation

- (1) In this Deed, unless the context indicates otherwise, reference to:
 - (a) one gender includes the others;
 - (b) the singular includes the plural and the plural includes the singular;
 - (c) a statute, regulation or provision of a statute or regulation (**Statutory Provision**) includes:

- (i) that Statutory Provision as amended or re-enacted;
 - (ii) a statute, regulation or provision enacted in replacement of that Statutory Provision; and
 - (iii) another regulation or other statutory instrument made or issued under that Statutory Provision;
- (d) this Deed includes any annexure or schedule to it;
 - (e) a clause, annexure or schedule is a reference to a clause of, or annexure or schedule to, this Deed;
 - (f) an agreement or document is to the agreement or document as amended, novated, supplemented or replaced, except to the extent prohibited by this Deed; and
 - (g) "writing" includes a facsimile transmission and any means of reproducing words in a tangible and permanently visible form.
- (2) Where word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
 - (3) Headings and any table of contents or index are for convenience only and do not form part of this Deed or affect its interpretation.
 - (4) A provision of this Deed must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the document or the inclusion of the provision in the document.
 - (5) The Introduction shall form part of this Deed.

2. Condition precedent

2.1 Condition to operation

It is a condition precedent to the operation of this Deed that the Liquidators obtain approval under section 477(2B) of the Corporations Act to enter into this Deed.

2.2 Condition to draw down

It is a condition precedent to the Borrower's entitlement to draw any Advance under the Facility that a Mediation Agreement has been signed by the Bank and the Borrower.

3. Availability

3.1 Availability of Security Deposit

The Bank will provide the Security Deposit by depositing the amount thereof to the Deposit Account within the later to occur of:

- (1) 2 Business Days of the date hereof; and
- (2) 2 Business Days following notice in writing by the Liquidators to the Bank that the condition precedent contained in clause 2.1 has been satisfied; and

- (3) 2 Business Days following satisfaction of the conditions precedent contained in clause 2.2.

3.2 Further Advances

The Bank may, in its absolute discretion, agree to provide Further Security Deposits to the Borrower to enable it to meet payments pursuant to clause 4 in a timely manner, where that Borrower does not have otherwise readily available funds to meet that payment.

3.3 Deposit Trust

The Borrower will hold any unexpended portion of the Security Deposit (or any Further Security Deposits) separately in the Deposit Account on trust for the Bank and each drawing from that account, by the Liquidators for an Approved Activity, will be deemed to be an Advance under this Mediation Funding Deed.

4. Purpose

4.1 Limited use of borrowed funds

The Borrower will only use the Facility for:

- (1) the payment of Administration and Liquidation Debts; and
- (2) the payment of the Liquidators' remuneration incurred as liquidators and/or former voluntary administrators of the Borrower as approved under the Corporations Act section 473(3) or fixed under the Corporations Act section 449E or otherwise;

to the extent that they relate to the Approved Activities.

4.2 Other activities

Subject to clause 4.1, it is expressly acknowledged that nothing in this Deed in any way limits or restricts the right and duty of the Liquidators to engage in whatever activities they deem appropriate, in their absolute discretion, in the orderly conduct of the voluntary administration of the Borrower in accordance with the Corporations Act, including any activity which might be contrary to the interests of the Bank.

4.3 Application of Advances

Upon making any drawing from the Deposit Account, the Borrower will provide the Bank with a statement in writing setting out, in reasonable detail, the liabilities to be discharged by that drawing, and certifying that those liabilities relate to specified Approved Activities.

5. Interest/Commitment Fee

Interest accrues daily at the Interest Rate on the Principal Outstanding. To the extent that, from time to time, any amount of the Principal Outstanding remains deposited to the credit of the Deposit Account, the interest accruing on that amount represents an undrawn commitment fee. All unpaid interest shall be capitalised and added to the Principal Outstanding at the end of each calendar month. The Borrower must pay accrued interest on or before the Termination Date.

6. Repayments

6.1 Payment on Termination Date

Subject to clause 9, the Borrower must pay to the Bank on the Termination Date:

- (1) the whole of any Advances made under this Deed;
- (2) all interest accrued to the Principal Outstanding pursuant to clause 5; and
- (3) all other money then payable by the Borrower under this Deed and unpaid.

6.2 Early Repayment

The Borrower must repay to the Bank, on the earlier of the Termination Date and the date which is 7 days after receipt by the Borrower of notice in writing from the Bank to do so, the whole of any balance of the Security Amount (and any further Security Amounts) which have not been used for the purpose set out in clause 4.1 if the purpose in clause 4.1 fails in that either the Borrower or the Bank refuses to participate in, or continue to participate in the Proposed Mediation before a binding agreement is reached.

6.3 No Set-off

Any payments to be made by the Borrower under clauses 6.1 and 6.2 will be made without any deduction, set-off or counterclaim of whatsoever nature.

7. Payments

7.1 Payments by Borrower

The Borrower must make all payments under this Deed by cheque to the address for service of notices of the Bank or by transfer of immediately available funds to the account or accounts in Australia specified by the Bank, by 11.00am (Melbourne time) on the due date.

7.2 Payment to be made on Business Day

Whenever any payment by the Borrower becomes due on a day that is not a Business Day, the due date will be the subsequent Business Day.

8. Representations and warranties

8.1 Representations and warranties

The Borrower represents and warrants that:

- (1) It has the power to enter into and perform its obligations under the Transaction Documents to which it is expressed to be a party and to carry out the transactions contemplated by those documents; and
- (2) the Facility will only be used for the purposes identified in clause 4.1 and not for any other purpose.

8.2 Reliance on representations and warranties

The Borrower acknowledges that the Bank has entered into the Transaction Documents in reliance on the representations and warranties in this Deed.

8.3 Repetition

The Borrower will be taken to have represented and warranted to the Bank that the representations and warranties contained in this clause 8 are true, correct and not misleading as at the date of each Advance to it.

8.4 Survival of representations and warranties

All representations and warranties in any Transaction Document survive the execution and delivery of the Transaction Documents and the provision of Advances.

9. Limitation on Liability

9.1 Non-Recourse Limitations

Other than in respect of a payment required under clause 6.2:

- (1) the Borrower's liability to pay any amount under this Deed is to be discharged from, and the recourse is limited to, only the Permitted Repayment Method; and
- (2) the Bank may not seek to recover any shortfall in the moneys secured by this Deed by bringing proceedings against the Borrower.

9.2 Liquidators' limitation

The Bank acknowledges that:

- (1) the Liquidators have been appointed as Liquidators of the Borrower and were formerly the voluntary administrators of the Borrower ;and
- (2) upon satisfaction of the conditions precedent contained in this Deed:-
 - (a) the Liquidators act as agents of the Borrower in connection with the Transaction Documents to which they are a party;
 - (b) the Liquidators accept no personal liability whatsoever in relation to any debts incurred as a result of the liquidation and/or administration of the Borrower; and
 - (c) the Bank will make no demand or claim against the Liquidators either personally or in respect of any right of indemnity which they may have, and irrevocably forbears from doing so.

9.3 Liquidators' obligations

No Liquidator is obliged to do or refrain from doing anything under this Deed (including incurring any liability) unless that Liquidator's liability is limited in the same manner as set out in this clause.

9.4 Other provisions and laws

This clause 9 applies despite any other provisions of this Deed or any principle of equity or law to the contrary.

10. Assignment

10.1 No assignment by Borrower

The Borrower must not at any time assign or transfer to any person or cause or permit any person to acquire an interest in the Borrower's rights under the Transaction Documents.

10.2 Assignment by Bank

The Bank may not assign or transfer all or any of its rights or obligations under the Transaction Documents without the prior approval of the Liquidators, such approval not being unreasonably withheld.

11. Costs

Each party will bear its own costs of this Deed.

12. Cumulative rights

The rights, powers and remedies provided in this Deed are in addition to those provided by law independently of this Deed and each right, power and remedy provided in this Deed (including any right of indemnity) is additional to and not exclusive of every other right, power or remedy provided in this Deed.

13. Approvals and consent

Subject to any express provision in the Transaction Documents to the contrary or unless this Deed expressly provides otherwise, the Bank may conditionally or unconditionally give or withhold its approval or consent in its absolute discretion.

14. Time of the essence

- (1) Time is of the essence of this Deed.
- (2) If the parties agree to vary a time requirement, the time requirement so varied is of the essence of this Deed.
- (3) An agreement to vary a time requirement must be in writing.

15. Time for performance

Subject to any express provision to the contrary in this Deed, if:

- (1) the day on which anything is to be done is not a Business Day, that thing must be done on the next following Business Day; and

- (2) an act, other than a payment or the giving of a communication, is required to be done on a particular day and the act is done after 5.00pm on that day, it will be treated as having been done on the following day.

16. Records as evidence

The Bank may maintain records specifying:

- (1) payments made by the Bank for the account of any Borrower;
- (2) payments by any Borrower for the account of the Bank under any Transaction Document; and
- (3) interest, fees, charges, costs and expenses payable in relation to the Transaction Documents,

and those records will as against the Borrower constitute conclusive evidence, in the absence of manifest error, of the matters set out in them.

17. Supervening legislation

Any present or future legislation that operates:

- (1) to lessen or vary in favour of the Borrower any of its obligations in connection with this Deed; or
- (2) to postpone, stay, suspend or curtail any rights of the Bank under this Deed,

is excluded except to the extent that its exclusion is prohibited or rendered ineffective by law.

18. Goods and Services Tax

18.1 GST

- (1) Unless expressly specified otherwise, all payments to be made by the Borrower under or in connection with any Transaction Document have been calculated or determined without regard to GST.
- (2) If all or part of any such payment is the consideration for a taxable supply for GST purposes then, when the Borrower makes the payment:
 - (a) it must pay to the Bank an additional amount equal to that payment (or part) multiplied by the appropriate rate of GST (currently 10%); and
 - (b) the Bank will promptly provide to the Borrower a tax invoice complying with the relevant GST legislation.
- (3) Where under any Transaction Document the Borrower is required to reimburse or indemnify for an amount, the Borrower must pay the relevant amount (including any sum in respect of GST) less any GST input tax credit the Bank determines that it is entitled to claim in respect of that amount.

19. Severability

A provision of a Transaction Document that is prohibited or unenforceable in any jurisdiction is ineffective in that jurisdiction to the extent of the prohibition or unenforceability. This does not invalidate the remaining provisions of that Transaction Document nor affect the validity or enforceability of that provision in any other jurisdiction.

20. Variation

An amendment or variation to this Deed is not effective unless it is in writing and signed by the parties.

21. Waiver and exercise of rights

21.1 Waiver

A right in favour of the Bank under a Transaction Document, a breach of an obligation of the Borrower under a Transaction Document can only be waived by a written instrument signed by the Bank. No other act, omission or delay of the Bank will constitute a waiver.

21.2 Exercise of rights

A single or partial exercise or waiver by the Bank of any right under a Transaction Document will not prevent any other exercise of that right or the exercise of any other right.

21.3 No liability

The Bank will not be liable for any loss, cost or expense of the Borrower caused or contributed to by the waiver of, exercise of, attempted exercise of, failure to exercise or delay in exercising a right of the Bank.

22. Notices

22.1 Method of service

All notices or other communications to or by a party to this Deed:

- (1) must be in writing;
- (2) must be signed by an Authorised Officer of the Bank or by the Borrower;
- (3) will be treated as being given or made:
 - (a) (in the case of delivery in person or by post) when delivered, received or left at the address of the recipient set out in Schedule 1; or
 - (b) (in the case of a facsimile transmission) on receipt by the sender of an error free transmission report at the end of transmission,

but if delivery or receipt is on a day that is not a Business Day in the place to which the communication is sent or is later than 4.00pm (local time), it will be treated as being given or made at the commencement of business on the next Business Day in that place; and

- (4) must be addressed to the recipient at the address or facsimile number specified in Schedule 1 for that party or any other address or facsimile number in the same country subsequently notified by one party to the other parties for the purposes of this Deed.

23. Governing law and jurisdiction

23.1 Relevant Jurisdiction

The law of Victoria governs this Deed.

23.2 Non-exclusive jurisdiction

The parties submit to the non-exclusive jurisdiction of the courts of Victoria and of the Commonwealth of Australia.

24. Inconsistency of provisions

If there is any inconsistency between the provisions of this Deed and the provisions of any other Transaction Document, the provisions of this Deed will govern and apply to the extent of the inconsistency.

25. Counterparts

This Deed may be executed in any number of counterparts. Each counterpart is an original but the counterparts together are one and the same instrument.

26. Execution by attorney

If an attorney executes this Deed, the attorney declares that the attorney has no notice of revocation, termination or suspension of the power of attorney under which the attorney executes this Deed.

Schedule 1
Details for the service of notices

The Borrower
C/o Ferrier Hodgson
Level 29
600 Bourke Street
MELBOURNE VIC 3000

Attention: George Georges

Facsimile No: (03) 9642 5887

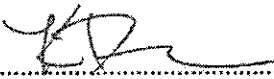
The Bank
Saxo Bank A/S
c/- Saxo Capital Markets Pte Ltd
3 Church Street
#30-00 Samsung Hub
Singapore 049483

Attention: Kazuaki Takabatake

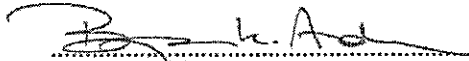
Facsimile No: +65 6303 7808

Executed as a deed and delivered on the date shown on the first page.

EXECUTED by **Saxo Bank A/S** in
accordance with section 127(1) of the
Corporations Act 2001 (Cwlth) by
authority of its directors:


.....
Signature of director

Karina Deacon
..... **Chief Financial Officer**
Name of director (block letters)


.....
Signature of director/company
secretary* **Bjørn Krog Andersen**
*delete whichever is not applicable Senior Vice President
Saxo Bank A/S
..... Philip Heymans Allé 15
Name of director/company secretary*
(block letters) 2000 Hellerup
*delete whichever is not applicable

Executed by **Sonray Capital Markets Pty**
Ltd ACN 104 482 993 (In Liquidation) by
its joint and several liquidator in the
presence of:

.....
Witness

.....
Name of witness
(BLOCK LETTERS)

.....
Liquidator

.....
Name of Liquidator
(BLOCK LETTERS)