

Affidavit

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

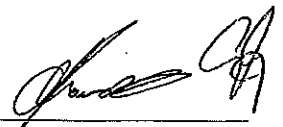
No. VID 562 of 2010

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 28 October 2010, I, **GEORGE GEORGES**, Level 29, 600 Bourke Street, Melbourne in the State of Victoria, chartered accountant and registered liquidator, say on oath:

- 1 I am a chartered accountant, a registered liquidator and a partner of the firm Ferrier Hodgson.
- 2 I refer to my affidavit sworn on 15 July 2010 together with exhibit GG-1 in this proceeding (**My First Affidavit**). I rely on this affidavit and My First Affidavit in support of the present application. In this affidavit I adopt the definitions and meanings that I have used in My First Affidavit.
- 3 Exhibited to this affidavit is a folder of documents marked "**GG-2**". References to GG-2 followed by a reference to a tab number are references to that exhibit and the tab number within the relevant exhibit folder where the document is to be found.
- 4 On 27 October 2010 the creditors of Sonray resolved under section 439(c) of the *Corporations Act 2001* (Cth) (**Act**) that Sonray be wound up. At that time Mr Lindholm and I became the liquidators of Sonray. In this affidavit I will refer to Mr Lindholm and me as **Administrators and Liquidators** to distinguish between our roles as the former voluntary administrators and current liquidators of Sonray.



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- 5 It remains my view that Sonray holds funds in the Client Segregated Account on trust for the clients. It is also my view that the financial instruments and other assets purchased on behalf of clients, and which either are in the possession of third party providers of financial services to Sonray or have been realised, and the proceeds returned to Sonray since my appointment, are also held on trust for clients of Sonray. I will refer to these funds and assets as the "Trust Fund" to distinguish them from assets beneficially owned by Sonray.
- 6 I believe it will be necessary in due course to seek a determination from the Court as to the identity of the clients entitled to the Trust Fund and as to the extent of their respective entitlements.
- 7 The affairs of Sonray and issues relating to the deficiency of client funds and entitlements of people to client funds are complex. I have identified a number of claims which I consider that Sonray may bring against third parties and which I consider may result in significant recoveries for investors. The funds and assets which Sonray may recover from third parties may form part of the pool of assets that may be subject to directions from the Court about whether they are held on constructive trust for the benefit of a particular investor, a particular class of investor or for the pool of investors generally.
- 8 It is my present proposal to seek directions from the Court about various issues and convene mediations with various parties in an attempt to avoid significant costly litigation.

Mediation Funding Deed

- 9 During the administration of Sonray the Administrators and their solicitors have held discussions with Saxo Bank A/S (**Saxo**) and its solicitors about a range of matters including:
- (a) the cause of the deficiency of assets in the Trust Fund;
 - (b) the rights and obligations of each party pursuant to agreements in place between Saxo and Sonray;
 - (c) causes of action available to Sonray or investors against Saxo; and
 - (d) the possibility of an early mediation involving some or all of the following parties: Saxo, Interactive Brokers LLP (**Interactive Brokers**), HLB Mann Judd (the auditor of the financial statements of Sonray), the auditor's insurers, PricewaterhouseCoopers (**PwC**), Russell Johnson, Scott Murray,

significant clients of Sonray, and possibly some others, to procure a settlement.

- 10 I believe that an early mediation will assist the creditors of Sonray and the beneficiaries of the Trust Fund to achieve a higher return than would otherwise be available if the claims against parties connected with the circumstances leading up to the administration of Sonray and the deficiency in the Trust Fund are left to be determined in court proceedings. This is because a successful mediation is likely to reduce the number of issues that will require court intervention and the likely costs and expenses of the Administration and winding up.
- 11 I believe that there are certain issues that must be further investigated before the Liquidators will be able to attend such mediation. If such investigations are not conducted I believe that the Liquidators are unlikely to be able to form a proper opinion about whether any proposed settlement arrangement is appropriate to accept.
- 12 The issues which I consider are necessary to investigate more fully prior to entering into mediation include the following:
 - (a) further analysis of the approximate 135 investor accounts which have been identified as unfunded in order to assist in identifying legitimate creditors and the total of legitimate creditors' entitlements;
 - (b) further analysis of the trading which occurred with unfunded transactions and the effect of that trading on the Trust Fund;
 - (c) the circumstances surrounding withdrawal of money after unfunded transactions within the Client Segregated Account and the identity and circumstances of the recipients of such money;
 - (d) the management and conduct of the Client Segregated Account and the arrangements between Sonray, its customers and third party providers;
 - (e) the terms of engagement, and the investigations that were done by the auditors of Sonray, including the scope of the investigation into the compliance of the Client Segregated Account and the controls and procedures in relation to the management of the Client Segregated Account;



- (f) the terms of engagement and the work that was undertaken by PwC during a compliance and solvency review conducted in 2009 and in further updated reports;
 - (g) the nature and timing of the dealings between Saxo and Sonray during the time that my investigations have revealed improper conduct and a lack of proper management of the Client Segregated Account; and
 - (h) further analysis of the size of the deficiency in the Client Segregated Account over time.
- 13 A number of these issues have been partially addressed in public examinations pursuant to section 596B of the Act of Scott Murray, which was part heard on 23 September 2010 and of Russell Johnson, which was part heard on 28 and 29 September 2010.
- 14 I also believe that I will need to seek further and ongoing advice from Norton Rose Australia (**Norton Rose**) about the rights of recovery by Sonray against parties whom the Liquidators propose to invite to attend to the mediation. Such advice will likely include advice about:
- (a) the terms of insurance policies held by Sonray and rights of recovery against relevant insurers;
 - (b) the obligations of the auditor of Sonray's financial statements and rights of recovery by Sonray against the auditor;
 - (c) rights of recovery, including any tracing remedies that are available, against recipients of funds withdrawn from the Client Segregated Account; and
 - (d) the scope of any liability of Saxo and its quantum.
- 15 It will be necessary, prior to the conduct of the mediation, to seek directions from the Court about the entitlements of various claimants to the Trust Fund and any settlement sum paid to Sonray. I also anticipate that any proposed negotiated outcome is likely to require Court approval. At certain points during the mediation it may become necessary to seek directions from the Court in relation to questions that arise during the mediation and declarations about the ability of parties to exercise certain powers, such as a power to liquidate financial instruments so that proceeds may be paid into to Sonray or into the Client Segregated Account.

- 16 Saxo has expressed to the Liquidators its desire to attend an early mediation and has offered to provide to the Liquidators a limited recourse loan facility in the sum of \$500,000 for the purposes of paying for the Liquidators' remuneration and expenses in conducting further investigations and preparing for and attending the proposed mediation and associated Court proceedings.
- 17 As an Administrator I instructed Norton Rose to prepare a loan deed to reflect the facility arrangements. The loan deed was executed by Saxo on or about 12 October 2010 (**Mediation Funding Deed**) and is attached at **GG-2 Tab-1**.
- 18 It was a condition precedent to the operation of the Mediation Funding Deed (as executed by Saxo) that the Administrators obtain an order under section 447A of the Act that they will not have any personal liability for the repayment of the advances made pursuant to the Mediation Funding Deed, other than in accordance with the limitations set out in the Mediation Funding Deed. The Administrators did not execute the Mediation Funding Deed before Sonray commenced to be wound up. Consequently, it is no longer necessary for the Administrators to obtain the originally proposed order under section 447A of the Act. However, the Liquidators do require approval under section 477(2B) of the Act.
- 19 On my instructions Norton Rose has amended the Mediation Funding Deed to take into account Sonray's transition to liquidation. A copy of the Mediation Funding Deed with those amendments marked up is at **GG-2 Tab-13**. At the time of swearing this affidavit Saxo has not executed nor indicated to me that it will execute the amended Mediation Funding Deed, although I have no reason to believe that Saxo will refuse to execute that document. It is the amended Mediation Funding Deed in respect of which I seek approval from this Court under section 477(2B) of the Act.
- 20 As Administrator I considered that the entry into the Mediation Funding Deed on the terms agreed with Saxo was in the best interest of Sonray's creditors because it would enable the Administrators to have access to funds to complete the preliminary investigations that it must undertake prior to any proposed mediation, to arrange, prepare for and attend a mediation to explore the possibility of a settlement which will maximize the return to creditors, and for any applications to Court that the Administrators deemed necessary to advance the mediation. I continue to hold this view now that Sonray is in liquidation.



- 21 If such a facility arrangement with Saxo is not put in place the Liquidators will need to seek to have recourse to the balance of the funds in Sonray's general trading account and, depending on whether they are entitled to do so pursuant to an order from this Court, the money in the Trust Fund, to pay their remuneration and expenses for future investigations and in preparing for the mediation.
- 22 I believe that the only other practical alternative for funding of the Liquidators' remuneration and expenses for work required for the mediation and for Court applications to seek directions which are necessary to advance the mediation is obtaining funding from a litigation funder. I am reluctant to seek funding from a litigation funder because in my experience the premium charged is likely to be between 25% to 40% of any amount recovered.

Remuneration Report

- 23 On 19 October 2010 I (as Administrator) prepared a Remuneration Report to Creditors pursuant to my obligations under Section 449E of the Act which I sent out to Creditors that day. The Remuneration Report is at **GG-2 Tab-2**. The Remuneration Report includes the following schedules:

| Schedule | Name |
|----------|--|
| A1 | Schedule of hourly rates and general guide to staff experience |
| A2 | General tasks undertaken by the Administrators and remuneration calculation for the period 22 June 2010 to 30 September 2010 |
| A3 | Tasks related to the Segregated Account undertaken by the Administrators and remuneration calculation for the period 22 June 2010 to 30 September 2010 |
| A4 | Schedule of the Administrators' anticipated general tasks and remuneration estimate for the period 1 October 2010 to 27 October 2010 |
| A5 | Schedule of the Administrators' anticipated tasks related to the Segregated Account and remuneration estimate for the period 1 October 2010 to 27 October 2010 |
| A6 | Where Liquidators are appointed, a schedule of the Liquidators' anticipated general tasks and remuneration estimate from 28 October 2010 to the conclusion of the administration |

| | |
|----|--|
| A7 | Where Liquidators are appointed, a schedule of the Liquidators' anticipated tasks related to the Segregated Account and remuneration estimate from 28 October 2010 to the conclusion of the administration |
| A8 | Remuneration approved and drawn to date |
| A9 | Resolutions to be put to creditors at the meeting convened for 27 October 2010 |
| B1 | Administrators' disbursements |
| B2 | Summary of Receipts and Payments for the period 22 June 2010 to 15 October 2010 |
| B3 | Other creditor information on remuneration |

Activities to Preserve and Administer the Trust Fund

- 24 A schedule of activities that have been undertaken by Ferrier Hodgson that are referable to the preservation and administration of the Trust Fund from 22 June 2010 to 30 September 2010 (**Past Period**) is at schedule A3 of the Remuneration Report.
- 25 The Administrators have undertaken a number of activities to ensure that the assets, financial instruments and money held by third party service providers on behalf of Sonray and/or its clients are preserved. In some cases, where authorised to do so, third party service providers have taken steps to transfer funds to accounts under their control. In relation to each third party provider it has been necessary to collate and review the numerous documents which establish the contractual framework between Sonray and that third party provider, investigate Sonray's books and records and interview Sonray staff in order to verify the history of the transactions.
- 26 A brief summary of the culmination of the steps taken to get in and preserve funds, which form part of the Trust Fund in relation to each third party provider is as follows:
- (a) Saxo - Saxo has served Sonray with notices of termination of all relevant agreements between it and Sonray and has also notified Sonray that it is entitled to instruct its custodian to proceed with the sale of stock lodged as margin cover for the total amount owed to Sonray. I am informed by Saxo

that as at 25 June 2010 the total unrealized value of positions and money held by Saxo was \$19,467,172.90. Saxo has asserted that, as at 25 June 2010, the sum of \$8,546,502.19 is payable to Sonray as a consequence of the early termination of the ISDA Master Agreement between Sonray and Saxo dated 23 December 2003. In consultation with the Administrators, Saxo has agreed to preserve the status quo by continuing to hold the stock and those funds.

- (b) Interactive Brokers – The Administrators and Interactive Brokers have been in regular correspondence about the manner in which money and financial instruments held by Interactive Brokers is to be treated. It is estimated that approximately \$9,400,000 in cash and financial positions is held by Interactive Brokers.
- (c) MF Global Australia Limited (**MF Global**) - The full amount held by MF Global, following the close out of financial instruments, being the sum of \$3,165,468.79 was transferred into the Client Segregated Account on 26 August 2010.
- (d) Macquarie Equities Limited (**Macquarie**) – Macquarie has closed out of exchange traded option positions and transferred into Sonray's Macquarie Cash Management Account funds in the sum of \$3,346,480.74. The Liquidators are signatories to that account.
- (e) Forex Capital Markets LLC (**Forex Capital**) – On 26 August 2010 the sum of \$484,982.48 was transferred from Forex Capital to Sonray's Client Segregated Account held at the Australia and New Zealand Banking Group Ltd (**ANZ**).
- (f) D2MX Pty Ltd (**D2MX**) – the amount, if any, held by D2MX on behalf of Sonray is being investigated and enquiries with D2MX are continuing. I note the amount which may be held by D2MX is estimated to be approximately \$5,000.

27 The schedule of activities of the Administrators proposed to be undertaken and referable to the preservation and administration of the Trust Fund for the period from 1 October 2010 to 27 October 2010 is at schedule A5 of the Remuneration Report. The schedule of activities of the Liquidators proposed to be undertaken and referable to the preservation and administration of the Trust Fund for the period from 28 October 2010 to the conclusion of the winding up is at schedule A7 of the Remuneration Report. For the purposes of this affidavit I will refer to the

period from 1 October 2010 to the end of the winding up as the "Future Period". In preparing the schedules of work required to be performed and the costs likely to be incurred in the Future Period I have assumed that the proposed mediation will be successful and have not taken into account an end date much later than the conclusion of that mediation.

- 28 The hourly rates charged by partners and employees of Ferrier Hodgson which apply to the voluntary administration of Sonray are at schedule A1 of the Remuneration Report.
- 29 Adopting those hourly rates I calculate that my remuneration in relation to the activities identified in schedule A3 is \$1,040,523.50 plus GST. I have also incurred general disbursements of \$1,352.73. A breakdown of the rate, nature of activity performed, and time spent by each member of my staff for the Past Period for activities referable to the preservation and administration of the Trust Fund is contained in the spreadsheet in schedule A3 of the Remuneration Report.
- 30 Adopting the hourly rates charged by partners and employees of Ferrier Hodgson at schedule A1 of the Remuneration Report I estimate that my remuneration in relation to the activities identified in schedules A5 and A7 of the Remuneration Report for the Future Period will be between \$550,000 and \$830,000 plus GST. I also estimate that I will incur general disbursements of \$5,000.
- 31 I have instructed Norton Rose to provide legal services in relation to the administration and winding up of Sonray and matters referable to the preservation and administration of the Trust Fund. The legal fees and disbursements that the Administrators have incurred for the Past Period for work conducted in relation to the Client Segregated Account held by Sonray on behalf of its clients, and issues connected with the preservation and administration of the Trust Fund is \$494,621.41 exclusive of GST.
- 32 I anticipate that I will require further legal advice and representation concerning matters referable to the Trust Fund on matters including:
- (a) advice on legal issues associated with:
- (i) how to determine the value of the assets held by third party providers and whether positions held may be closed and liquidated;
- (ii) whether the financial instruments may be claimed by individual investors or are the subject of a constructive trust and, if the latter,,

whether they ought to be separated into separate pools on trust for separate classes of beneficiaries or treated as a single pool on trust with one class of beneficiary;

- (iii) how to determine who are the beneficiaries of the assets in the Trust Fund;
 - (iv) what is the appropriate method to use to assess the entitlement of beneficiaries to assets and money in the Trust Fund.
- (b) making applications to the Court seeking directions on, inter-alia, the above questions;
 - (c) considering the impact of recovery claims for the benefit of creditors of Sonray and beneficiaries of the Trust Fund;
 - (d) negotiation and mediation with other parties in relation to a settlement proposal for payment of assets and funds into the account for the benefit of beneficiaries of the Trust Fund;
 - (e) dealing with court proceedings initiated against the Liquidators in relation to assets and funds in the Trust Fund;
 - (f) dealing with correspondence from investors asserting claims to assets and funds in the Trust Fund;
 - (g) reviewing and advising on contractual arrangements with third party providers of services to Sonray;
 - (h) advice on and preparing correspondence in relation to dealings with counterparties, and Sonray's previous advisors, insurers and auditors;
 - (i) advice on a range of matters in relation to the investigation of the source of the deficiencies in various investors' accounts in the Trust Fund; and
 - (j) undertaking public examinations under Part 5.9 Division 1 of the Act.
- 33 Norton Rose have informed me that they estimate their professional fees for the Future Period in relation to issues that are referable to the preservation and administration of the Trust Fund will be approximately \$580,709 exclusive of GST.
- 34 Norton Rose have also informed me that they estimate their disbursements, comprising mainly fees for both junior and senior counsel, for the proposed

mediation and any court proceedings that are likely to be required in relation to the Trust Fund, for the Future Period, to be approximately \$315,000.

- 35 The Administrators have incurred expenses in relation to the continuing operations of Sonray for the Past Period in the total sum of \$336,694, and estimate that the ongoing expenses of operating Sonray in the Future Period will be \$157,339.
- 36 I have caused my staff to prepare a spreadsheet which summarises the main constituent elements of the operating expenses of Sonray in the Past Period and in the Future Period. That spreadsheet is at **GG-2 Tab-3**.

Activities in relation to General Issues in the Voluntary Administration or Winding Up of Sonray

- 37 A schedule of activities that have been undertaken in the Past Period by the Administrators that are referable to general issues concerned with the voluntary administration of Sonray and are generally unrelated to the issues connected with the administration and preservation of the Trust Fund is at schedule A2 of the Remuneration Report.
- 38 A schedule of activities of Ferrier Hodgson proposed to be undertaken and referable to general issues concerned with the voluntary administration of Sonray for the period 1 October 2010 to 27 October 2010 is at schedule A4 of the Remuneration Report and for the period 28 October 2010 to the end of the winding up is at schedule A6 of the Remuneration Report.
- 39 I estimate that the Administrators remuneration in relation to the activities identified in schedule A2 for the Past Period is \$554,139.50 exclusive of GST. My disbursements for the Past Period are \$66,432.67. A breakdown of the rate, nature of activity performed and time spent by each member of my staff for the Past Period for activities related to general issues in the voluntary administration of Sonray is contained in the spreadsheet at A2.
- 40 Adopting the hourly rates charged by partners and employees of Ferrier Hodgson I estimate that my remuneration in relation to the activities identified in schedules A4 and A6 for the Future Period will be between \$100,000 and \$225,000 with general disbursements of approximately \$50,000.
- 41 I have engaged Norton Rose to provide legal services to Ferrier Hodgson in relation to the administration and winding up of Sonray. The legal fees and disbursements that the Administrators have incurred for the Past Period for work

conducted in relation to general issues concerned with the voluntary administration of Sonray is \$95,876.02 exclusive of GST.

- 42 Norton Rose have informed me that they estimate their professional fees and disbursements that are likely to be incurred in the Future Period in relation to general issues in the winding up of Sonray will be approximately \$146,139 exclusive of GST.

Available Funds

- 43 At paragraph 41(a) of my First Affidavit I deposed that as at 22 June 2010 the sum of cash held in the Client Segregated Account and the Macquarie Cash Management Account, comprising accounts held by Sonray investors at ANZ, HSBC and Macquarie, was \$6,509,729.80. As at 13 September 2010 the cash balance of those accounts had increased to \$10,414,807.29. The increase in the cash balance total is attributable to the closing out or liquidation of financial instruments held with third party providers.
- 44 The Client Segregated Account and the Macquarie Cash Management Account comprise the following accounts:
- (a) Australia and New Zealand Banking Group account numbers 013006-1087-85428, 120824CAD00001, 120824USD00001, 120824NZD00001, 120824JPY00001, 120824GBP00001, 120824EUR00001, 120824CHF00001;
 - (b) Hong Kong Shanghai Banking Corporation account numbers 002-225333-002, 003-225333-003, 001-225333-901, 001-225333-160, 001-225333-904, 001-225333-900, 001-225333-902, 001-225333-903, 001-225333-159, and
 - (c) Macquarie Cash Management Account number 961009129.
- 45 At paragraph 41(b) of my First Affidavit I deposed that as at 22 June 2010 the sum total of all cash and the estimated realisable value of holdings (**Holdings**) in possession of third party providers was approximately \$30,157,772. As at 13 September 2010 the sum total had decreased to approximately \$28,391,505. The decrease is due to a number of reasons, including further interrogation of Sonray's systems to ascertain more precisely the holdings in question, a decrease in the value of Saxo's Holdings (estimated to be approximately \$9.2 million at 22 June 2010, and with the most recent information provided by Saxo showing a value of

- approximately \$8.5 million) and a decrease in Interactive Brokers' Holdings (estimated to be approximately \$10.2 million at 22 June 2010, and currently estimated to be approximately \$9.4 million).
- 46 The cash balance of Sonray's general trading account as at 30 September 2010 was \$107,783.
- 47 I expect there to be a further net increase in funds available to Sonray of approximately \$398,271 as a result of the realisation of various assets held by Sonray. The nature of the assets are described under the receipts column for the period from 1 October 2010 to the end of the winding up in the table at **GG-2 Tab-3**.
- 48 The Administrators have discharged liabilities for the expenses incurred in operating Sonray, such as employee wages, utilities and equipment leasing costs out of Sonray's general trading account. The Liquidators have not yet paid Norton Rose any professional fees and disbursements incurred in the Past Period or the Future Period, and have not been paid any remuneration for their services as Administrators.

Summary Tables

- 49 A spreadsheet showing estimated funds and, as at 13 September 2010, assets in Sonray's Trust Fund is contained at **GG-2 Tab-4**.
- 50 A summary of the total of the remuneration, general disbursements and legal fees and disbursements that have been incurred and which I estimate are likely to be incurred in attending to the administration and preservation of the Trust Fund as I have deposed to in this affidavit is contained in a table at **GG-2 Tab-5**
- 51 A summary of the total of the remuneration, general disbursements and legal fees and disbursements that have been incurred, and which I estimate are likely to be incurred, in attending to general issues in the voluntary administration, and winding up, of Sonray as I have deposed to in this affidavit is contained in a table at **GG-2 Tab-6**. As demonstrated in this table I anticipate that in the period 1 October 2010 to the end of the administration or winding up of Sonray, the funds available to Sonray will increase to approximately \$506,054. In this regard, there will be a deficiency of funds to pay for remuneration, general disbursements and legal fees



and disbursements in attending to general issues in the voluntary administration or winding up of Sonray.

52 A spreadsheet showing the estimated deficiency of funds in Sonray's general account to pay for the total of:

- (a) expenses for operating Sonray;
- (b) the Administrators' and Liquidators' remuneration and disbursements; and
- (c) legal fees and disbursements,

for the period from 22 June 2010 until the end of the winding up of Sonray is contained at **GG- 2 Tab-7**.

53 Despite the additional expected funds which may come into Sonray's possession and control, as referred to in paragraph 47 above, I believe that the total of Sonray's assets will not be sufficient to pay for Sonray's operating expenses, my remuneration and general disbursements, and legal fees and disbursements for activities that are necessary to be undertaken for general winding up issues and the administration and preservation of the Trust Fund. Further, it is possible that some of Sonray's clients may have a proprietary claim to funds which Sonray may control or recover from other parties which may further increase the net deficiency in funds available to pay for such costs and fees.

Overlap

54 The purpose of the activities itemised in Schedules A2, A3, A4, A5, A6 and A7 in the Remuneration Report overlap in that they are or will be required for the general administration, or winding up, of Sonray but are or will also need to be undertaken to ensure the proper administration and preservation of the Trust Fund.

55 The major activities that have been or I anticipate will be necessary to undertake in the winding up of Sonray generally, and which are also necessary for the proper administration and preservation of the Trust Fund in the Future Period are as follows:

- (a) Continuing investigations into:
 - (i) the cause of the deficiency in the Client Segregated Account;

- (ii) the identification of the investor transactions which are unfunded, the consequences of the trading, and the effect of the trading on the Trust Fund;
 - (iii) the assets purchased with funds withdrawn from the accounts following unfunded transaction, or withdrawn from the Trust Fund in other circumstances in contravention of obligations under the Act;
 - (iv) the terms of engagement of the auditors that audited Sonray and the insurance policies held by these auditors and Sonray.
- (b) Possibly continuing the public examinations of Scott Murray, Russell Johnson, and conducting public examinations of other relevant persons who are able to assist with the Liquidators' investigations;
 - (c) Potentially conducting a marketing campaign and sale of Sonray's wholesale trading platform and/or client list and/or registered domain names;
 - (d) Preparing a report under section 439A of the Act to creditors and investors with an interest in the Trust Fund and reporting to creditors generally from time to time about the progress of the administration;
 - (e) Investigating relationships between Sonray and third party providers and whether rights of recovery are available against those service providers;
 - (f) Attempting to arrange a mediation between Saxo, Interactive Brokers, the auditors, the auditor's insurers, PwC, Russell Johnson, Scott Murray, and significant clients of Sonray in order to negotiate a settlement;
 - (g) Providing necessary information to assist in the preparation of an application to Court to seek directions on the rights of investors to funds and financial instruments in the Trust Fund and how those funds and financial instruments ought to be dealt with and distributed; and
 - (h) Investigating the timing of the deposit of funds, the investments made on behalf of clients in the Client Segregated Account, the trading profits and losses made as a consequence of those investments, the relevant third party provider who executed the trade, the state of the Client Segregated Account at the time the trade was executed, and other forensic activities in relation to determining the entitlements of investors.

56 In the context of paragraph 55(f) above, it will be beneficial to creditors of Sonray for the Liquidators to investigate the prospects of bringing claims against various persons including those referred to in that paragraph, as these claims may result in recoveries which, if not directly referable to the reinstatement of the Trust Fund, might result in further monies being available to the creditors of Sonray which would reduce the claims of some creditors against the Trust Fund and otherwise increase the recoveries available to creditors of Sonray generally. I believe that the bulk of client creditors are likely to assert both an entitlement to an interest in the Trust Fund and to be company creditors as well.

Duty necessary to be performed by the trustee of the Trust Fund

57 I believe that the activities that are required to be undertaken for the benefit of the creditors of Sonray and the investors who may be beneficiaries of the Trust Fund are required to be performed by professionally skilled and qualified personnel, with the benefit of experienced legal counsel. In my view it is unlikely that a suitably qualified and experienced person will agree to act in that role without being paid for his or her work.

View of the Committee of Creditors

58 On 9 September 2010 the Administrators convened a meeting of the committee of creditors (**Committee**).

59 I informed the Committee that the Administrators:

- (a) proposed to make an application to the Court for their remuneration and expenses to be paid out of the Trust Fund;
- (b) had entered into an agreement with Saxo for a limited recourse facility in the sum of \$500,000 in accordance with the terms of the Mediation Funding Deed conditional upon Court approval;
- (c) proposed to seek an order pursuant to section 447A of the Act that they will not have any personal liability for the repayment of the advances made pursuant to the Mediation Funding Deed, other than in accordance with the limitations set out in the Mediation Funding Deed;
- (d) proposed to conduct an early mediation involving some or all of the following parties: Saxo, Interactive Brokers, the auditors, the auditor's insurers, PwC, Russell Johnson, Scott Murray, significant clients of Sonray and possibly some others to procure a settlement; and

- (e) would send a draft copy of the mediation agreement and Mediation Funding Deed; once the terms of those documents had been agreed between Saxo and the Administrators for their comment.
- 60 I asked the Committee if anyone had any objections to the terms in the Mediation Funding Deed and the orders that the Administrators propose to seek in respect of the Trust Fund.
- 61 I was informed by the Committee that there was broad agreement with each of the Administrators' proposed courses of action.
- 62 On 20 October 2010 I caused to be sent by email to each of the members on the Committee, a draft copy of the interlocutory process, a draft copy of this affidavit including exhibit GG-2, a draft copy of a redacted version of the Mediation Agreement and the Mediation Funding Deed. A redacted version of the Mediation Agreement is attached at **GG-2 Tab-8**. I also seek approval from this Court under section 477(2B) of the Act to enter the Mediation Agreement.
- 63 An email dated 20 October 2010, sent on my instruction by Mr Stewart McCallum of Ferrier Hodgson to each of the members on the Committee of Creditors, read as follows:

Dear Committee members

Sonray Capital Markets Pty Ltd (Administrators Appointed) (Sonray) and related entities

I write on behalf of the Administrators, and refer to previous correspondence and discussions in relation to the proposed mediation and the funding of the administration.

Please find attached a draft copy of my affidavit together with all the documents included in the exhibit, other than the report at GG-2 Tab-12, which was sent by email to you earlier today, and the draft interlocutory process. The Mediation Funding Deed that has been executed by Saxo is contained in GG-2 Tab-1. The draft Mediation Agreement is in GG-2 Tab-8. You will note that the names of the parties proposed to join in the mediation have been redacted from the attached draft, as they have yet to be invited to attend the mediation, although the identity of those parties has previously been discussed with the Committee. The attached documents are strictly confidential and the information contained therein should not be divulged to anyone else until they are filed with the Court.

We would like to discuss the contents of the attached documents with you at our next Committee meeting which has been scheduled for Tuesday 26 October 2010 at 3:00pm, and for which you should have received an earlier invitation.

In the meantime, should you have any queries or require any further information, please do not hesitate to contact me.

Regards

Stewart McCallum

- 64 I attended the meeting of the Committee of Creditors on 26 October 2010 which was held at the offices of Ferrier Hodgson at 600 Bourke Street, Melbourne.
- 65 I asked the Committee if anyone had any objections to the proposed interlocutory process, the terms of the Mediation Funding Deed, the Mediation Agreement or any of the material proposed to be filed in support of the interlocutory process. There was general consensus in favour of the proposed interlocutory process, the terms of the Mediation Funding Deed, the Mediation Agreement and the material proposed to be filed in support of the interlocutory process.

Communication with Creditors

- 66 Prior to the appointment of Administrators Sonray maintained a database containing the contact details of investor clients. These contact details comprised email addresses, telephone numbers and postal addresses. I am informed that the primary method of communication in respect to circulars and newsletters which were sent to investor clients of Sonray was by email.
- 67 On 22 June 2010, the day of the appointment of the Administrators, I caused to be sent to the email addresses of all Sonray's investor clients as recorded in Sonray's database on that day, a notification informing them, inter alia, of the appointment of Administrators to the Sonray Group and that trading of all financial products on Sonray's systems would immediately cease.
- 68 On or about 24 June 2010 I caused to be sent by ordinary post a letter to each of Sonray's investor clients and creditors of the Sonray Group a letter to creditors dated 24 June 2010 which also attached:
- (a) A Statement Regarding Remuneration;

- (b) A Notice of First Meeting of Creditors of the Group;
- (c) An Informal Proof of Debt form;
- (d) An Appointment of Proxy for Creditors Meeting form;
- (e) An ASIC Insolvency Information Sheet; and
- (f) A Declaration of Independence, Relevant Relationships and Indemnities.

A copy of the letter dated 24 June 2010 with the above attachments is at **GG-2 Tab-9**

- 69 The First Meeting of Creditors of the Sonray Group was held simultaneously at venues in Victoria, Queensland and New South Wales on Friday 2 July 2010. I was the chair of that meeting and I informed the meeting that it would be the intention of the Administrators to communicate with all investors by email rather than by hard written correspondence other than in respect of the provision of statutory notices. By circular to creditors dated 14 July 2010 John Lindholm and I prepared an update to creditors of the Sonray Group, which I caused to be sent by email to all creditors at the email address noted on Sonray's system, or as communicated to my staff by creditors since the appointment. A copy of the circular to creditors dated 14 July 2010 is at **GG-2 Tab-10**.
- 70 By circulars to creditors dated 11 August 2010 and 23 September 2010 John Lindholm and I prepared further updates to creditors of the Sonray Group which we caused to be sent by email to all creditors at the email address noted on Sonray's system, or as communicated to my staff by creditors since the appointment. Copies of the circulars to creditors dated 11 August 2010 and 23 September 2010 are at **GG-2 Tab-11**.
- 71 The circulars to creditors dated 14 July 2010 and 11 August 2010 were emailed to 4660 email addresses. Of the 4,660 emails that were sent on 11 August 2010 to creditors, approximately 131 emails were unable to be delivered due to the destination email address being inactive.
- 72 My staff have since attempted to contact each of the persons associated with the undeliverable 131 email addresses in order to obtain an updated email address and to ensure they received copies of the circulars to creditors. As a consequence:
- (a) 39 email addresses were updated;

- (b) 12 persons advised they were in fact successfully receiving emails;
- (c) 10 persons advised they were not investors of Sonray;
- (d) 7 persons had closed their account prior to 22 June 2010;
- (e) 59 persons were unable to be contacted; and
- (f) 4 persons requested that correspondence be sent by mail.

- 73 Since 11 August 2010 my staff have been contacted by investors who have sought to add their name and email addresses to the list of creditors known to me and have also identified further investors, together with their contact details, from Sonray's databases.
- 74 The circular to creditors dated 23 September 2010 was successfully sent via email to 4768 email addresses and mailed to a further 4 investors.
- 75 In relation to the distribution of a Notice of Meeting of Creditors, to be held at 2:30pm on 27 October 2010, and a report to creditors pursuant to section 439A(4)(a) of the Act (a copy of which is contained at **GG-2 Tab-12**) John Lindholm and I caused the following to occur:
- (a) On 19 October 2010, the report and Notice of Meeting was uploaded onto the Ferrier Hodgson website;
 - (b) On 19 October 2010, an email was sent to all investors informing them that the report and Notice of Meeting had been placed on the Ferrier Hodgson website with details of how to access those documents;
 - (c) On 19 October 2010, the report and Notice of Meeting were sent to 798 investors who had opted in to receive documents electronically; and
 - (d) On 20 October 2010, the report and Notice of Meeting were sent by ordinary post to the remaining investors (i.e. who had not opted in to receive documents electronically), as well as employees and unsecured creditors.
- 76 Copies of the above communications with creditors, as well as other documents which the Liquidators believe should be made publicly available for the benefit of the creditors of the Sonray Group, are posted on the website www.ferrierhodgson.com and are available to be downloaded by anyone.

Second Meeting of Creditors

- 77 The Second Meeting of Creditors was held at 2:30pm at the Melbourne Exhibition and Convention Centre, room 219, 1 Convention Centre Place, South Wharf with audio visual conferencing available at locations in Sydney and Brisbane.
- 78 I was the chairman of the meeting and recorded that the following resolutions were passed:
- (a) Sonray be wound up.
 - (b) That the Administrator's remuneration in respect of general administration tasks, as set out in Annexure 1 of the s439A report ("Creditors' Report"), for the period 22 June 2010 to 30 September 2010 in the amount of \$554,139.50 plus GST be approved and that the Administrators be authorised to draw those fees when funds come to hand.
 - (c) That the Administrators' estimated remuneration in respect of general administrative tasks, as set out in Annexure 1 of the Creditors' Report, for the period 1 October to the end of the administration in an amount not exceeding \$75,000.00 plus GST, be approved and that the Administrators be authorized to draw those fees when funds come to hand.
 - (d) That the Administrators' remuneration in respect of tasks related to dealing with the Client Segregated Account, as set out in Annexure 1 of the Creditors' Report, for the period 22 June to 30 September 2010 in the amount of \$1,040,523.50 plus GST, be approved and that the Administrators be authorised to draw those fees when funds come to hand.
 - (e) That the Administrators' estimated remuneration in respect of tasks related to dealing with the Client Segregated Account, as set out in Annexure 1 of the Creditors' Report, for the period 1 October 2010 to the end of the administration in an amount not exceeding \$80,000 plus GST, be approved and that the Administrators be authorised to draw those fees when funds come to hand.
 - (f) That the meeting appoint a Committee of Inspection for Sonray and if so, accept nominations for members of the Committee of Inspection;
 - (g) That the Liquidators are authorised under s. 477(2A) of the Corporations Act 2001 to compromise a debt owed to Sonray Capital Markets Pty Ltd up to an amount of \$50,000;



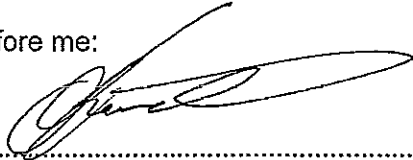
(h) That the books and records of Sonray Capital Markets Pty Ltd be disposed of 12 months after dissolution of Sonray Capital Markets Pty Ltd or earlier at the discretion of ASIC.

79 At the time of swearing this affidavit the minutes of the meeting are still being prepared by my staff.

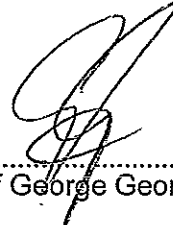
80 Before the resolutions referred to at paragraphs 78(d) and 78(e) were passed I informed the creditors present at the meeting that that resolutions were not binding and that in order to have that remuneration paid out of the Trust Fund I would first have to obtain orders from a court. I put the resolutions to creditors knowing that they were not binding because I thought it important to obtain an indication from the creditors present at the meeting that they approved of the remuneration I was seeking to be paid out of the Trust Fund.

SWORN by George Georges at Melbourne
in Victoria on 28 October 2010

Before me:



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Signature of person taking affidavit



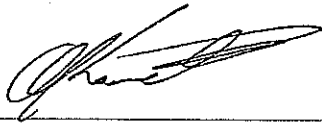
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Signature of George Georges

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

CERTIFICATE OF COMPLIANCE

I, *Allan Farrel Kawalsky*, certify to the Court that the affidavit of George Georges sworn on 28 October 2010 filed on behalf of the plaintiffs complies with Order 14, rule 2 of the Federal Court Rules.

28
Date: October 2010



Solicitor for the plaintiffs

Filed on behalf of: The plaintiffs
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