

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Concise Statement  
File Number: VID146/2019  
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v  
GETSWIFT LIMITED (ACN 604 611 556) & ORS  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 22/02/2019 4:05:09 PM AEDT

Registrar

A handwritten signature in blue ink, appearing to read 'Warwick Soden'.

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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## CONCISE STATEMENT

No. VID



of 2019

IN THE FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: VICTORIA  
DIVISION: GENERAL

NPA: Commercial and Corporations, Regulator and Consumer Protection

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

GETSWIFT LIMITED (ACN 604 611 556) AND OTHERS NAMED IN THE SCHEDULE

Defendants

**A. Important facts giving rise to the claim**

1. This is a claim against GetSwift Limited (**GSW**), its director and then executive chairman (**Hunter**) and its director and then managing director (**Macdonald**) in relation to a series of announcements that GSW submitted to ASX Limited (**ASX**) in 2017 (**Relevant Period**). GSW is a listed company that carries on business providing a proprietary "software as a service" platform for the management of "last mile delivery" services (**GSW Platform**).
2. The announcements omitted material information concerning agreements which had been entered into by GSW. GSW failed to immediately disclose that material information, and other relevant material information, thereby contravening s 674 of the *Corporations Act 2001* (Cth) (**Corporations Act**). In the circumstances in which they were made, the announcements also amounted to misleading or deceptive conduct in contravention of s 1041H of the *Corporations Act* and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).
3. On 26 October 2016, GSW released a prospectus for its initial public offering in which it told the market that: (a) it was an "early stage" and "startup" technology company; (b) to date it had made accumulated losses of approximately \$946,402; and (c) for enterprise clients (being those with average deliveries of 10,000 per month or more), typically a 90-day proof of concept trial (**POC**) occurred and the client then moved to a standard contract, which was for two years.
4. On 7 December 2016, GSW was admitted to the official list of ASX and from that date it had continuous disclosure obligations under s 674 of the *Corporations Act*.
5. During the Relevant Period, GSW made announcements to ASX in relation to agreements it or its related entities had entered into, including with the following companies: The Fruit Box Group Pty Ltd (**Fruit Box**), Commonwealth Bank of Australia (**CBA**), Pizza Pan Group Pty Ltd (**Pizza Pan**), All Purpose Enterprises Pty Ltd (**APT**), CITO Transport Pty Ltd (**CITO**), Hungry Harvest LLC (**Hungry Harvest**), FHL Distribution Centre Pty Ltd (**Fantastic Furniture**), BSR Franchising Pty Ltd (**Betta Homes**), Bareburger Group LLC (**Bare Burger**), N.A. Williams Company (**NA Williams**), an entity trading as Johnny Rockets Kuwait (**Johnny Rockets**), Yum Restaurant Services Group LLC (**Yum**) and Amazon Corporate LLC (**Amazon**). These announcements are described below.  
**Fruit Box**
6. On 24 February 2017, GSW announced that it had signed an exclusive three-year agreement with Fruit Box.
7. At the time of the announcement, material circumstances concerning the agreement included that the 3-year term was conditional on the expiry of a 30-day trial period, during which Fruit Box was permitted to terminate with 7 days' notice.

|   |   |     |             |
|---|---|-----|-------------|
| Filed on behalf of (name & role of party)           | Australian Securities and Investments Commission, the Plaintiff |     |             |
| Prepared by (name of person/lawyer)                 | Tom Jarvis  |     |             |
| Law firm (if applicable)                            | Johnson Winter & Slattery                                       |     |             |
| Tel   | 03 86111336   | Fax | 03 92803402 |
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8. The announcement also contained a projection as to the number of deliveries the agreement might generate for the GSW Platform. The projection was made without reasonable grounds including because GSW had not obtained relevant information about delivery volumes from Fruit Box.
9. GSW was aware of, but did not disclose to ASX, the matters referred to in paragraphs 7 and 8.
10. On 20 March 2017, Fruit Box terminated its agreement with GSW before the expiry of the trial period. GSW was aware of, but did not disclose this matter to ASX until 25 January 2018.

**CBA**

11. On 4 April 2017, GSW announced that it had signed an exclusive multi-year partnership with CBA. The announcement also contained a projection as to the number and value of the deliveries the agreement might generate "over the next five years".
12. At the time of the announcement, material circumstances concerning the agreement with CBA included that it was for 2 years only, not 5 years. Further, the projections were made without reasonable grounds including, because: (a) GSW had not obtained the necessary information about delivery volumes from CBA; (b) GSW had assumed a certain number of CBA terminals being available, which number CBA had informed GSW was incorrect; (c) GSW had assumed the projections over a 5 year period despite the agreement being for 2 years.
13. GSW was aware of, but did not disclose to ASX, the matters referred to in paragraph 12.

**Pizza Pan**

14. On 28 April 2017, GSW announced that it had signed an exclusive multiyear partnership with Pizza Hut and that, among other things, Pizza Hut was the largest pizza chain in the world, operating worldwide.
15. At the time of the announcement, material circumstances concerning the agreement included that: (a) it was not with Pizza Hut but with Pizza Pan Group Pty Ltd, an Australian franchisee of the Pizza Hut chain; (b) it was for one year only; (c) the one year term had not commenced as it was conditional on successful completion of a limited roll out to one store in Australia.
16. GSW was aware of, but did not disclose to ASX, the matters referred to in paragraph 15.

**APT**

17. On 8 May 2017, GSW announced that it had signed an exclusive commercial multi-year agreement with APT.
18. At the time of the announcement, material circumstances concerning the agreement included that the 3-year term was conditional on the expiry of a 30-day trial period, during which APT was permitted to terminate with 7 days' notice. Further, during May 2017, commencement of the trial period was deferred. By 17 July 2017, APT had not yet made any deliveries using the GSW Platform, had ceased engaging with GSW and the commercial relationship between GSW and APT had broken down.
19. GSW was aware of, but did not disclose to ASX, the matters referred to in paragraph 18.

**CITO**

20. On 22 May 2017, GSW announced that it had signed an exclusive commercial multi-year agreement with CITO.
21. At the time of the announcement, there was no multi-year agreement and material circumstances concerning the agreement included that CITO had not tested or piloted the GSW Platform. Further, by about 1 July 2017, CITO had not sought, nor been provided with, access to the GSW Platform, had not made any deliveries using the GSW Platform and had ceased engaging with GSW.
22. GSW was aware of, but did not disclose to ASX, the matters referred to in paragraph 21.

**Hungry Harvest**

23. On 1 June 2017, GSW announced that it had signed an exclusive multiyear partnership with Hungry Harvest.
24. At the time of the announcement, material circumstances concerning the agreement included that the 3-year term was conditional on the expiry of a 30-day trial period, during which Hungry Harvest was permitted to terminate with 7 days' notice.
25. GSW was aware of, but did not disclose to ASX, the matters referred to in paragraph 24.

**Fantastic Furniture & Betta Homes**

26. On 23 August 2017, GSW announced that it had signed exclusive commercial multi-year agreements with each of Fantastic Furniture and Betta Homes.

27. At the time of the announcement, material circumstances concerning the agreements included that, for Fantastic Furniture, the 3 year term was conditional on the expiry of a trial period, during which Fantastic Furniture was permitted to terminate with 7 days' notice. For Betta Homes, the 18 month term was conditional on Betta Homes electing, during the trial period, to continue the agreement beyond the trial period.
28. On 22 September 2017, Fantastic Furniture terminated its agreement with GSW before expiry of the trial period. As at 1 November 2017, Betta Homes had not yet commenced its trial of the GSW Platform because, among other things, it had not agreed that the platform was operating effectively and Betta Homes had ceased engaging with GSW.
29. GSW was aware of, but did not disclose to ASX, the matters referred to in paragraphs 27 and 28.
- Bare Burger**
30. On 30 August 2017, GSW announced that it had signed an exclusive commercial multi-year agreement with Bare Burger.
31. At the time of the announcement, material circumstances concerning the agreement included that the 3-year term was conditional on the expiry of a 30-day trial period, during which Bare Burger was permitted to terminate with 7 days' notice.
32. GSW was aware of, but did not disclose to ASX, the matters referred to in paragraph 31.
- NA Williams**
33. On 12 September 2017, GSW announced that it had signed an exclusive commercial 5 year agreement with NA Williams.
34. The agreement with NA Williams had been executed by the parties on 18 August 2017 but GSW withheld disclosure to ASX until 12 September 2017, following the end of the financial reporting season, in order for the announcement to receive greater media and market attention.
35. Material circumstances concerning the agreement included that: (a) NA Williams was only to provide sales and marketing services to GSW; (b) it was for 3 years and not 5 years. The announcement also contained a projection as to the annual transactions (1.15 billion) and revenue (\$138 million) which the agreement might yield. The projections were made without reasonable grounds, including because: (aa) NA Williams was a representative body of North American automotive after-market industry retailers, and not a client who would, or could, make any deliveries itself; (bb) revenue would only be generated for GSW if retailers entered into separate agreements with GSW; (cc) none of the NA Williams retailers had entered into any agreements with GSW; (dd) GSW had not obtained the necessary information about delivery volumes and price from NA Williams in order to make the projections.
36. GSW was aware of, but did not disclose to ASX, the matters referred to in paragraph 35.
- Johnny Rockets**
37. On 25 October 2017, GSW announced that it had signed an exclusive multi-year agreement with Johnny Rockets.
38. At the time of the announcement, material circumstances concerning the agreement included that the 3-year term was conditional on the expiry of a 30-day trial period, during which Johnny Rockets was permitted to terminate with 7 days' notice. On or about 15 December 2017, the parties agreed to defer the commencement of the trial period to mid-January 2018. On 9 January 2018, Johnny Rockets terminated the agreement.
39. GSW was aware of, but did not disclose to ASX, the matters referred to in paragraph 38.
- Yum**
40. On 1 December 2017, GSW announced that it had signed a global multiyear partnership with Yum! Brands.
41. At the time of the announcement, material circumstances concerning the agreement included that: (a) the agreement was a master services agreement only and was not for a fixed term; (b) the agreement permitted, but did not oblige, Yum and/or its affiliates to receive services from GSW; and (c) Yum was permitted to terminate the agreement at any time, for any reason, by giving 30 days' notice.

42. The announcement also contained a projection as to the number of deliveries that GSW estimated the agreement would generate for the GSW Platform (more than 250 million annually) and the number of countries in which the GSW Platform might be rolled out under the agreement. The projections were made without reasonable grounds including because: (a) Yum had not given the projection figure to GSW; (b) Yum was permitted to terminate at any time, for any reason, by giving 30 days' notice; (c) the revenues to be derived under the agreement were to be determined pursuant to statements of work that may be issued by Yum and/or Yum affiliates, and accepted by GSW in the future; (d) Yum could not compel its affiliates to issue any statement of work; (e) no statement of work had been issued under the master services agreement; (f) Yum was contemplating conducting proof of concept trials of the GSW Platform in two test markets which it had not yet determined; (g) any adoption by Yum of the GSW Platform beyond the two test markets was dependent on successful completion of the trials in those markets.
43. GSW was aware of, but did not disclose to ASX, the matters referred to in paragraphs 41 and 42.
- Amazon**
44. On 1 December 2017, GSW announced that it had signed a global agreement with Amazon.
45. At the time of the announcement, material circumstances concerning the agreement included that: (a) the agreement with Amazon was a master services agreement only; (b) the extent of the services to be provided and the revenues to be derived would be generated from specific transactions to be agreed with Amazon in the future; (c) the agreement did not oblige Amazon to request any services from GSW; (d) Amazon was permitted to terminate at any time, for any reason, by giving 30 days' notice.
46. GSW was aware of, but did not disclose (alternatively did not disclose immediately) to ASX, all of the matters referred to in paragraph 45.
- Continuous Disclosure Breaches**
47. Each of the matters referred to in paragraphs 7, 8, 10, 12, 15, 18, 21, 24, 27, 28, 31, 34, 35, 38, 41, 42 and 45 was material information (either individually, collectively, or in any combination) and satisfied the other criteria for disclosure under ss 674 and 677 of the Corporations Act. GSW was therefore obliged to disclose each of those matters to ASX immediately upon becoming aware of those matters.
- Misleading or Deceptive Conduct**
48. The announcements were made in relation to GSW shares and were therefore made in relation to a financial product or a financial service.
49. By reason of the matters referred to in paragraphs 6 to 33 and 35 to 46 above, the representations contained in the announcements referred to above amounted to misleading or deceptive conduct in relation to each announcement.
50. Further, in circumstances where GSW had made each of the announcements referred to above, GSW's omission of the matters referred to in paragraphs 7, 8, 10, 12, 15, 18, 21, 24, 27, 28, 31, 35, 38, 41, 42 and 45 above amounted to misleading or deceptive conduct in relation to each announcement.
51. At or about the time of submitting certain of the announcements to ASX (including at least those for NA Williams, Johnny Rockets, Yum and Amazon), GSW asked (and thereby intended) ASX to release the announcement marked as "price sensitive" and ASX did so. GSW thereby represented that it had reasonable grounds to expect that each such agreement was likely to materially affect either the price or the value of GSW shares. GSW did not have such reasonable grounds for the reasons set out in relation to each agreement above.
52. Further, on 28 April 2017, 31 October 2017 and 14 November 2017, GSW made statements in documents lodged with ASX which represented that GSW would only announce an agreement when the associated financial benefit to GSW was secure, quantifiable and measurable. Despite these representations, GSW made the announcements referred to above when it did not have reasonable grounds to expect that the financial benefit to GSW was secure, quantifiable and measurable, and GSW thereby engaged in conduct in respect of each announcement which was misleading or deceptive. Further, the 31 October 2017 and 14 November 2017 representations were misleading or deceptive when made because GSW did not have reasonable grounds for making them.

**Hunter and Macdonald**

53. Hunter and Macdonald, in respect of each announcement referred to above: (a) contributed to the drafting; (b) reviewed it; (c) approved its contents; and (d) authorised and directed its transmission to ASX (for the purpose of release by ASX); (e) made or caused to be made, the request of ASX referred to in paragraph 51; (f) reviewed and approved the release of the documents referred to in paragraph 52.
54. Hunter and Macdonald each knew of the content of each announcement, of the material information referred to in paragraphs 6 to 46 above, and that such information was required to be disclosed.
55. Each of Hunter and Macdonald knew of the matters referred to in paragraphs 51, 52 and 54 and failed to ensure that he:
- (a) took all necessary steps to ensure that any announcement or other document he approved for submission to ASX was not misleading;
  - (b) took all necessary steps to qualify, withdraw or correct any existing announcement or document lodged with ASX to ensure such announcements or documents were not misleading;
  - (c) only announced an agreement when the associated financial benefit to GSW was secure, quantifiable and measurable; and
  - (d) took all necessary steps to ensure that material information concerning GSW was disclosed to ASX.
56. Further, each of Hunter and Macdonald exposed GSW to the risk of declarations of contraventions of the law and civil pecuniary penalties.
57. Hunter and Macdonald each thereby failed to exercise his powers and discharge his duties with the degree of care and diligence imposed by s 180 of the Corporations Act.

**B. Summary of the relief sought from the Court**

58. ASIC seeks:
- (a) declarations of contravention against GSW, Hunter and Macdonald as set out in its Originating Process dated 22 February 2019;
  - (b) orders pursuant to s 1317G(1A) of the Corporations Act that GSW, Hunter and Macdonald each pay a pecuniary penalty in respect of their contraventions of s 674(2) and 674(2A) respectively in such amount as the Court considers appropriate;
  - (c) orders pursuant to s 1317G(1A) of the Corporations Act that Hunter and Macdonald pay a pecuniary penalty in respect of each of their contraventions of s 180(1) of the Corporations Act in such amount as the Court considers appropriate;
  - (d) orders pursuant to s 206C(1) or s 206E(1) of the Corporations Act disqualifying each of Hunter and Macdonald from managing corporations for a period to be determined by the Court;
  - (e) costs and such further or other relief that the Court deems appropriate.

**C. Primary legal grounds for the relief sought**

59. By engaging in the conduct described above, GSW contravened s 674(2) and s 1041H(1) of the Corporations Act and ss 12DA(1) of the ASIC Act.
60. By reason of the matters set out in paragraphs 53 and 54 above, Hunter and Macdonald each contravened s 674(2A) and s 1041H(1) of the Corporations Act and s 12DA(1) ASIC Act.
61. Further, by reason of the matters set out in paragraphs 55 to 57 above, each of Hunter and Macdonald contravened s 180(1) of the Corporations Act.

**D. Harm suffered**

62. As a result of GSW's failure to make continuous disclosure and its misleading or deceptive conduct, the market traded on a materially uninformed or misinformed basis. Further, the price for GSW securities were higher than it would have been had disclosure of the relevant and material information been made as required by the Corporations Act.

This Concise Statement has been prepared by N J O'Bryan and N Moncrief, of counsel.

**Certificate of lawyer**

I Thomas Litchfield Jarvis certify to the Court that, in relation to the Concise Statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the Concise Statement.

Date: 22 February 2019



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Signed by Thomas Litchfield Jarvis

Lawyer for the Plaintiff

**SCHEDULE**

No VID of 2019

**IN THE FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: VICTORIA  
DIVISION: GENERAL****NPA: Commercial and Corporations, Regulator and Consumer Protection**

|                  |   |
|------------------|---|
| Plaintiff        | <b>AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION</b> |
| First Defendant  | <b>GETSWIFT LIMITED (ACN 604 611 556)</b>               |
| Second Defendant | <b>BANE HUNTER</b>                                      |
| Third Defendant  | <b>JOEL RICHARD STUART MACDONALD</b>                    |