

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 11/12/2019 10:14:59 AM AWST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: WAD613/2019
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v
THETA ASSET MANAGEMENT LIMITED (ACN 071 807 684) & ANOR
Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 11/12/2019 12:00:12 PM AWST

Registrar

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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



CONCISE STATEMENT

Federal Court of Australia
District Registry: Western Australia
Division: General

No WAD of 2019

Australian Securities and Investments Commission

Plaintiff

and

Theta Asset Management Limited (ACN 071 807 684) and another named in the Schedule
First Defendant

Overview

1. At all material times, the first defendant, Theta Asset Management Limited (ACN 071 807 684) (**Theta**) was the responsible entity of the Sterling Income Trust (ARSN 158 828 105) (**SIT**) and the second defendant, Robert Patrick Marie, was the managing director of Theta.
2. The SIT was a managed investment scheme that was utilised by Theta to act as the primary funding mechanism for the acquisition of property management agreements and property management businesses or rent rolls by Sterling Corporate Services Pty Ltd (ACN 158 361 507) (in liquidation) (**SCS**) and related entities.

PDS issued by Theta in relation to the SIT

3. On 20 May 2016, Theta issued product disclosure statements (**PDS**) for:
 - 3.1. Development Units in the SIT (**Development Units PDS**). Approximately, \$4,673,514 was raised under this PDS for investment in subordinated mortgage secured loans and to be held by the Property Development Trust of the SIT;
 - 3.2. Management Company Units in the SIT (**Management Company Units PDS**). Approximately, \$1,692,103 was raised under this PDS for investment in shares in Sterling First (Aust) Limited (**Sterling First**) and to be held by the Management Company Share Trust of the SIT; and

Filed on behalf of (name & role of party)

Australian Securities & Investments Commission, Plaintiff

Prepared by (name of person/lawyer)

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Attention: Ingrid McCormick

- 3.3. Income Units in the SIT (**Income Units PDS**). Approximately \$1,852,728 was raised under this PDS for investment in the rights to income over rental management agreements to be held by the RMA Holding Trust prior to its withdrawal in or about January 2017.
4. On or about 31 January 2017, Theta issued a PDS for Income Units and Growth Units in the SIT (**Income and Growth Units PDS**) in substitution for the Income Units PDS. Approximately, \$3,435,783 was raised under this PDS for investment in rights to income earned under rental management agreements to be held by the SIT Income Trust and rights to income generated from the sale of rental management agreements to be held by the SIT Growth Trust.
5. On or about 9 August 2017, ASIC issued an interim stop order and on or about 29 August 2017 ASIC issued a final stop order in relation to each of the Development Units PDS, the Management Company Units PDS and the Income and Growth Units PDS.
6. On or about 27 October 2017, Theta issued a revised PDS for Income Units and Growth Units in the SIT (**Revised Income and Growth Units PDS**). Approximately, \$5,056,541 was raised under this PDS for investment in rights to income earned under rental management agreements to be held by the Income Trust of the SIT and rights to income generated from the sale of rental management agreements to be held by the Growth Trust of the SIT.
7. On or about 30 April 2018, Theta withdrew the Revised Income and Growth Units PDS.
8. Each of the Development Units PDS, the Management Company Units PDS, the Income Units PDS, the Income and Growth Units PDS and the Revised Income and Growth Units PDS (together the **SIT PDS**) was marketed and promoted primarily to retirees and seniors who were entering into Sterling New Life Leases (SNLL) and were looking for an investment that would generate a sufficient and safe return to pay for a long-term residential lease (**SNLL investors**).
9. Theta represented in each of the Development Units PDS and the Management Company Units PDS that distributions from the SIT would be sufficient to enable SNLL investors to pay all of the rent due on their respective SNLL (**Rental Payment Representation**).
10. Theta represented in the Income and Growth Units PDS that the Sterling Group had provided a secured and enforceable guarantee of the payment of distributions to be made to unitholders (**Sterling Guarantee Representation**).
11. Theta represented in the Revised Income and Growth Units PDS that the SIT would particularly suit an investor looking for income and capital preservation and not capital growth (**Suitability Representation**).
12. Mr Marie was the officer of Theta principally responsible for authorising the issue of each of the SIT PDS and ensuring that each of them was not defective, in particular, that they did not contain:
 - 12.1. misleading or deceptive statements;

- 12.2. omissions in respect to the statements and information required to be disclosed under s1013C of the *Corporations Act, 2001 (Cth) (Act)*.

Material Defects in the SIT PDS and misrepresentations

13. ASIC alleges that each of the SIT PDS was defective within the meaning of s1022A of the Act:

13.1. as to the Development Units PDS and the Management Units PDS, each contained a misleading and deceptive statement, being the Rental Payment Representation, in that none of the distributions to be paid from the SIT were guaranteed and each was entirely dependent upon the performance of the underlying investments of the SIT and the financial position of the Sterling Group;

13.2. as to the Income and Growth Units PDS, it contained a misleading and deceptive statement, being the Sterling Guarantee Representation, in that the Sterling Group had not provided any secured or enforceable guarantee of the distributions to be made to unitholders;

13.3. as to the Revised Income and Growth Units PDS, it contained a misleading and deceptive statement, being the Suitability Representation, in that given the financial position of the SIT at the date of the issue of each of the SIT PDS, the SIT was not a suitable investment for an investor, in particular the SNLL investors, looking for income and capital preservation;

13.4. as to each of the SIT PDS, each contained omissions in respect to the statements and information required to be disclosed under s1013C of the Act, in that each did not contain statements and information:

13.4.1. about significant risks and other significant characteristics or features of units in the SIT that a retail client would reasonably require for the purpose of making a decision to acquire units in the SIT; and/or

13.4.2. that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, to acquire units in the SIT,

as identified collectively in paragraph 14 below and individually with respect to each of the SIT PDS in the accompanying Originating Process.

14. ASIC alleges that there was no or no clear, concise and effective disclosure in the SIT PDS of:

14.1. the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by Sterling First and its wholly owned subsidiaries

- (**Sterling Group**) and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016 and 30 June 2017;
- 14.2. the risks attached to the different classes of investment units in the SIT by reason of the competing rights and interests attached to each of those unit classes;
 - 14.3. the provision and extent of the income support provided by the Sterling Group to the SIT to enable it to meet its obligations as and when they fell due, in particular the targeted rates of return to investors in the SIT (**Sterling income support**) and the financial position of the Sterling Group;
 - 14.4. the allocation policy utilised by SCS, as investment manager of the SIT, to determine the investment mix of units in the SIT for each of the SNLL investors (**SNLL unit allocation policy**);
 - 14.5. the constraints on investors' ability to redeem their investment;
 - 14.6. the risks of and information relating to the underlying investments of the SIT;
 - 14.7. the assumptions used and contingencies relied on in identifying and stating target distribution percentages for units in the SIT;
 - 14.8. the differences and disparity in the risks attached to investments in Income Units as opposed to Growth Units;
 - 14.9. the allocation policy or statement regarding how investors' funds were to be applied between Income Units and Growth Units;
 - 14.10. the terms and attrition rates of the rental management agreements;
 - 14.11. the fact that income generated from the rental management agreements used to pay returns on units was also the subject of a first ranking registered security interest under the *Personal Property Securities Act 2009* (Cth) held by Macquarie Bank Ltd;
 - 14.12. the concerns of the auditors of the SIT as to the financial viability of the SIT;
 - 14.13. the assumptions used and contingencies relied on in stating target distributions for units in the SIT;
 - 14.14. the inherent risks by reason of the matters outlined above of any investment in the SIT for SNLL investors who were looking for a stable and secure long term income stream to meet rental payments under their respective SNLL and capital preservation.

Failure to comply with SIT compliance plan

15. Contrary to the terms of the compliance plan that Theta issued for the SIT (**SIT compliance plan**) Theta (a) failed to take all steps necessary to monitor effectively the performance of SCS as the investment manager of the SIT and satisfy itself that SCS had carried out its contractual

obligations adequately, prepared and retained appropriate scheme records and not contravened the personal advice provisions of the Act by its implementation of the SNLL unit allocation policy; (b) issued defective PDS; (c) failed to ensure all valuations and unit prices for the SIT were correct and calculated in a timely manner; (d) failed to ensure all redemptions were processed in a timely manner; (e) failed to identify, document, assess, evaluate and effectively manage and control all conflicts of interest; and (f) failed to ensure all financial statements of the SIT were completed and available for audit within 2 months of the relevant period and were lodged with ASIC on or before the lodgement date.

Causes of action advanced and relief sought by ASIC

16. By reason of the matters alleged above, ASIC contends that:

- 16.1. Theta contravened s 601FC(1)(b) of the Act, in that it failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in Theta's position in issuing each of the SIT PDS;
- 16.2. Theta contravened s 1041H of the Act by making each of the Rental Payment Representation, the Sterling Guarantee Representation and the Suitability Representation;
- 16.3. Theta contravened s 601FC(1)(h) of the Act, in that it failed to comply with the SIT compliance plan;
- 16.4. Mr Marie contravened s 601FD(1)(b) of the Act, in that he failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in his position in authorising the issue of each of the SIT PDS;
- 16.5. Mr Marie contravened s 601FD(1)(f)(i) of the Act, in that he failed to take all necessary steps that a reasonable person would take, if they were in his position, to ensure that Theta did not contravene s 601FC(1)(b) and s 1041H of the Act;
- 16.6. Mr Marie contravened s 601FD(1)(f)(iv) of the Act, in that he failed to take all necessary steps that a reasonable person would take, if they were in his position, to ensure that Theta complied with the SIT compliance plan.

17. ASIC seeks the relief in the accompanying Originating Process.

Date: 11 December 2019

Signed by

Ingrid McCormick

Lawyer for the Applicant