

NOTICE OF FILING AND HEARING

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. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating process (Rule 2.2): Federal Court (Corporations) Rules 2000 form 2
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
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 11/12/2019 12:00:05 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 Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

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.



ORIGINATING PROCESS

Federal Court of Australia

No WAD of 2019

District Registry: Western Australia

Division: General

Australian Securities and Investments Commission

Plaintiff

and

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

First Defendant

A. DETAILS OF APPLICATION

This application is made under sections 206C, 601FC, 601FD, 1041H, 1317E and 1317G of the *Corporations Act 2001 (Cth) (Act)*, sections 21 and 43 of the *Federal Court of Australia Act 1976 (Cth)* and the implied/inherent jurisdiction of the Court.

The plaintiff claims that the first defendant contravened:

- (a) sub-section 601FC(1)(b) of the Act by failing to exercise the degree of care and diligence that a reasonable person would exercise in the position of the first defendant in issuing product disclosure statements for the Sterling Income Trust (ARSN 158 828 105) (**SIT**) for Development Units on 20 May 2016 (**Development Units PDS**), Management Company Units on 20 May 2016 (**Management Company Units PDS**), Income Units on 20 May 2016 (**Income Units PDS**), Income and Growth Units on 31 January 2017 (**Income and Growth Units PDS**) and Income and Growth Units on 27 October 2017 (**Revised Income and Growth Units PDS**), (together **SIT PDS**);

Filed on behalf of (name & role of party) Australian Securities & Investments Commission, Plaintiff

Prepared by (name of person/lawyer) Ingrid McCormick, Litigation Counsel

Law firm (if applicable) _____

Tel 0481 400 447 Fax (08) 9261 4227

Email ingrid.mccormick@asic.gov.au

Address for service Level 1, 11 Mounts Bay Road, Perth WA 6000
(include state and postcode) Attention: Ingrid McCormick



- (b) sub-section 601FC(1)(h) of the Act in failing to comply with the compliance plan that it had issued for the SIT (**SIT compliance plan**); and
- (c) section 1041H of the Act in making representations in the SIT PDS that were misleading and deceptive or likely to mislead or deceive investors.

The plaintiff claims that the second defendant contravened:

- (a) sub-section 601FD(1)(b) of the Act by failing to exercise the degree of care and diligence that a reasonable person would exercise if they were in his position as the managing director of the first defendant in authorising the issue of each of the SIT PDS as each PDS was defective within the meaning of section 1022A of the Act;
- (b) sub-section 601FD(1)(f)(i) of the Act by failing to take all necessary steps that a reasonable person in his position would take to ensure that the first defendant complied with its statutory obligations pursuant to sub-section 601FC(1)(b) and section 1041H of the Act; and
- (c) sub-section 601FD(1)(f)(iv) of the Act by failing to take all necessary steps that a reasonable person in his position would take to ensure that the first defendant complied with the SIT compliance plan.

On the facts stated in the concise statement filed in these proceedings and served with this originating process the plaintiff claims:

Against the First Defendant (Theta Asset Management Limited)

1. Declarations of contravention under section 1317E of the Act in that the first defendant contravened:
 - (a) sub-section 601FC(1)(b) of the Act in issuing the Development Units PDS in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading or deceptive statement to the effect that the distributions from the SIT would be sufficient to enable investors, being retirees and seniors, who had entered into a Sterling New Life Lease (SNLL) to pay all of the rent due on their respective SNLL (**Rental Payment Representation**) and there was no or no clear, concise and effective disclosure of:



- (i) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by Sterling First (Aust) Limited (**Sterling First**) and its wholly owned subsidiaries (together **Sterling Group**) and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (ii) 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;
 - (iii) 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;
 - (iv) the allocation policy utilised by Sterling Corporate Services Pty Ltd (**SCS**), as investment manager of the SIT, to determine the investment mix of units in the SIT for each of the investors in the SIT who were retirees and seniors and who had entered into SNLLs (**SNLL investors**);
 - (v) the risks relating to the underlying investment of the Development Units, being loans issued to fund the building of residential homes in connection with SNLLs;
 - (vi) the assumptions used and contingencies relied on in stating that the target distributions for the Development Units was 20%; and
 - (vii) 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.
- (b) sub-section 601FC(1)(b) of the Act in issuing the Management Company Units PDS in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading or deceptive statement, namely the Rental Payment Representation and there was no or no clear, concise and effective disclosure of:



- (i) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (ii) 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;
 - (iii) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (iv) 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**);
 - (v) the constraints on investors' ability to redeem their investment;
 - (vi) information relating to the underlying assets of the Management Company Units being shares in Sterling First, including its financial position, board constitution and shareholdings; and
 - (vii) 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.
- (c) sub-section 601FC(1)(b) of the Act in issuing the Income Units PDS in that it was defective within the meaning of section 1022A of the Act in that there was no or no clear, concise and effective disclosure of:
- (i) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (ii) 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;



- (iii) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (iv) the SNLL unit allocation policy;
 - (v) the assumptions used and contingencies relied on in stating that the target distributions were 9.25% for Income Units;
 - (vi) the terms of and attrition rates for the rental management agreements;
 - (vii) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the PPSA held by Macquarie Bank Limited; and
 - (viii) 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.
- (d) sub-section 601FC(1)(b) of the Act in issuing the Income and Growth Units PDS in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading and deceptive statement to the effect that the Sterling Group had provided a secured and enforceable guarantee of the payment of distributions to be made to unitholders (**Sterling Guarantee Representation**) and there was no or no clear, concise and effective disclosure of:
- (i) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (ii) 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;
 - (iii) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (iv) the SNLL unit allocation policy;



- (v) the differences and disparity in the risks attached to investments in Income Units as opposed to Growth Units;
 - (vi) the allocation policy or statement regarding how investors' funds were to be applied between Income Units and Growth Units;
 - (vii) the assumptions used and contingencies relied on in stating that the target distributions were 9.25% for Income Units and 12% for Growth Units;
 - (viii) the terms of and attrition rates for the rental management agreements;
 - (ix) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the PPSA held by Macquarie Bank Limited; and
 - (x) 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.
- (e) sub-section 601FC(1)(b) of the Act in issuing the Revised Income and Growth Units PDS in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading or deceptive statement to the effect that the SIT was a particularly suitable investment for investors looking for income and capital preservation and not capital growth (**Suitability Representation**) and there was no or no clear, concise and effective disclosure of:
- (i) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2017;
 - (ii) 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;
 - (iii) the provision and extent of the Sterling income support and the financial position of the Sterling Group;



- (iv) the SNLL unit allocation policy;
 - (v) the terms of and attrition rates for the rental management agreements;
 - (vi) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the PPSA held by Macquarie Bank Limited;
 - (vii) the concerns of the auditors of the SIT as to the financial viability of the SIT; and
 - (viii) 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.
- (f) section 1041H of the Act in that in making each of the Rental Payment Representation, the Sterling Guarantee Representation and the Suitability Representation it engaged in conduct in relation to a financial product, being units in the SIT, that was misleading or deceptive or likely to mislead or deceive investors.
- (g) sub-section 601FC(1)(h) of the Act in that it failed to comply with the SIT compliance plan in that it:
- (i) 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, that SCS had prepared and retained appropriate records to document the actions that it had taken as the SIT investment manager and that SCS had not contravened the personal advice provisions in the Act by its implementation of the SNLL unit allocation policy;
 - (ii) issued defective PDS, being each of the SIT PDS;
 - (iii) failed to ensure that the valuations and unit prices for the SIT were correct and calculated in a timely manner;
 - (iv) failed to ensure that all redemptions were processed in a timely manner;



- (v) failed to identify, document, assess, evaluate and effectively manage and control all conflicts of interest; and
 - (vi) 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.
2. Orders pursuant to section 1317G of the Act that the first defendant pay to the Commonwealth of Australia a pecuniary penalty in relation to each of the civil penalty contraventions pleaded against it, in such amounts as the Court thinks fit.
 3. Costs.
 4. Such further or other orders or relief as the Court thinks fit.

Against the Second Defendant (Robert Marie)

5. Declarations of contravention under section 1317E of the Act in that the second defendant contravened:
 - (a) sub-section 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 as the managing director of the first defendant in authorising the issue of the Development Units PDS in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading or deceptive statement, namely the Rental Payment Representation and there was no or no clear, concise and effective disclosure of:
 - (i) the conflicts of interests that existed in relation to the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (ii) 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;
 - (iii) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (iv) the SNLL unit allocation policy;



- (v) the risks relating to the underlying investment of the Development Units, being loans issued to fund the building of residential homes in connection with SNLLs;
 - (vi) the assumptions used and contingencies relied on in stating that the target distributions for the Development Units was 20%; and
 - (vii) 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.
- (b) sub-section 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 as the managing director of the first defendant in authorising the issue of the Management Company Units PDS in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading or deceptive statement, namely the Rental Payment Representation and there was no or no clear, concise and effective disclosure of:
- (i) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (ii) 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;
 - (iii) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (iv) the SNLL unit allocation policy;
 - (v) the constraints on investors' ability to redeem their investment;
 - (vi) information relating to the underlying assets of the Management Company Units being shares in Sterling First, including its financial position, board constitution and shareholdings



- (vii) 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.
- (c) sub-section 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 as the managing director of the first defendant in authorising the issue of the Income Units PDS in that it was defective within the meaning of section 1022A of the Act in that there was no or no clear, concise and effective disclosure of:
- (i) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (ii) 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;
 - (iii) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (iv) the SNLL unit allocation policy;
 - (v) the assumptions used and contingencies relied on in stating that the target distributions were 9.25% for Income Units;
 - (vi) the terms of and attrition rates for the rental management agreements;
 - (vii) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the PPSA held by Macquarie Bank Limited; and
 - (viii) 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.



- (d) sub-section 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 as the managing director of the first defendant in authorising the issue of the Income and Growth Units PDS in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading or deceptive statement, namely the Sterling Guarantee Representation and there was no or no clear, concise and effective disclosure of:
- (i) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (ii) 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;
 - (iii) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (iv) the SNLL unit allocation policy;
 - (v) the differences and disparity in the risks attached to investments in Income Units as opposed to Growth Units;
 - (vi) the allocation policy or statement regarding how investors' funds were to be applied between Income Units and Growth Units;
 - (vii) the assumptions used and contingencies relied on in stating that the target distributions were 9.25% for Income Units and 12% for Growth Units;
 - (viii) the terms of and attrition rates for the rental management agreements;
 - (ix) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the PPSA held by Macquarie Bank Limited;



- (x) 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.
- (e) sub-section 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 as the managing director of the first defendant in authorising the issue of the Revised Income and Growth Units PDS in that it was defective within the meaning of section 1022A of the Act in that contained a misleading or deceptive statement, namely the Suitability Representation, and there was no or no clear, concise and effective disclosure of:
- (i) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2017;
 - (ii) 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;
 - (iii) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (iv) the SNLL unit allocation policy;
 - (v) the terms of and attrition rates for the rental management agreements;
 - (vi) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the PPSA held by Macquarie Bank Limited;
 - (vii) the concerns of the auditors of the SIT as to the financial viability of the SIT; and
 - (viii) 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.

- (f) sub-section 601FD(1)(f)(i) of the Act in that he failed to take all necessary steps that a reasonable person in his position as the managing director of the first defendant would take if they were in his position to ensure that the first defendant complied with its statutory obligations pursuant to:
- (i) section 601FC(1)(b) of the Act in that the first defendant failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the position of the first defendant as each of SIT PDS issued by the first defendant was defective;
 - (ii) section 1041H of the Act in that in making each of the Rental Payment Representation, the Sterling Guarantee Representation and the Suitability Representation the first defendant engaged in conduct in relation to a financial product, being units in the SIT, that was misleading or deceptive or likely to mislead or deceive investors.
- (g) sub-section 601FD(1)(f)(iv) of the Act in that he failed to take all necessary steps that a reasonable person in his position as the managing director of the first defendant would take if they were in his position to ensure that the first defendant complied with the SIT compliance plan in that the first defendant:
- (i) 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, that SCS had prepared and retained appropriate records to document the actions that it had taken as the SIT investment manager and that SCS had not contravened the personal advice provisions in the Act by its implementation of the SNLL unit allocation policy;
 - (ii) issued defective PDS, being each of the SIT PDS;
 - (iii) failed to ensure that the valuations and unit prices for the SIT were correct and calculated in a timely manner;
 - (iv) failed to ensure that all redemptions were processed in a timely manner;



- (v) failed to identify, document, assess, evaluate and effectively manage and control all conflicts of interest; and.
- (vi) 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.
6. Orders pursuant to section 1317G of the Act that the second defendant pay to the Commonwealth of Australia a pecuniary penalty in relation to each of the civil penalty contraventions pleaded against it, in such amounts as the Court thinks fit.
7. Orders pursuant to section 206C of the Act that the second defendant be prohibited from managing a corporation, for such period as the Court thinks fit.
8. Costs.
9. Such further or other orders or relief as the Court thinks fit.

Date: 11 December 2019

A handwritten signature in black ink, appearing to read 'Ingrid McCormick', written over a horizontal dotted line.

Ingrid McCormick

Solicitor for the Australian Securities and Investments Commission

This application will be heard by _____ at the Federal Court of Australia at Peter Durack Commonwealth Law Courts Building, 1 Victoria Avenue, Perth, Western Australia at _____ am/pm on _____ 2020.

B. NOTICE TO THE DEFENDANTS

TO: Theta Asset Management Limited (ACN 071 807 684)

AT: Suite 501, Level 5, 210 Clarence Street
Sydney NSW 2000

TO: Robert Marie



AT: Colin Bigger & Paisley
 Level 42
 2 Park Street
 Sydney NSW 2000

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence. As soon after that time as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard and final relief given;
- (b) directions may be given for the future conduct of the proceeding;
- (c) any interlocutory application may be heard.

Before appearing before the Court, you must file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the plaintiff.

Note: Unless the Court otherwise orders, a defendant that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.

C. FILING

Date of filing: December 2019

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 By the Court

This originating process is filed by Ingrid McCormick for the plaintiff.

D. SERVICE

The plaintiff's address for service is:

Australian Securities and Investments Commission
 Level 1, 11 Mounts Bay Road
 PERTH WA 6000

It is intended to serve a copy of this originating process on the defendants.



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

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

and

**THETA ASSET MANAGEMENT LIMITED (ACN 071 807 684) and another named in
the Schedule**

First Defendant

Schedule

ROBERT MARIE

Second Defendant