

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Concise Statement  
File Number: VID462/2020  
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v  
FOREX CAPITAL TRADING PTY LIMITED & ANOR  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 16/07/2020 11:48:55 AM AEST

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

Registrar

### Important Information

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# Concise Statement

No.



Federal Court of Australia  
District Registry: Victoria  
Division: General

## IN THE MATTER OF FOREX CAPITAL TRADING PTY LIMITED (ACN 119 086 270)

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**  
Plaintiff

**FOREX CAPITAL TRADING PTY LTD (ACN 119 086 270) AND SHLOMO YOSHAI**  
Defendants

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

1. The First Defendant, Forex Capital Trading Pty Ltd (**Forex CT**), held an Australian Financial Services Licence (**AFSL**) number 306400 between at least 1 January 2017 and 1 April 2019 (the **Relevant Period**), which permitted it to carry on a financial services business, including providing financial product advice in relation to derivatives and foreign exchange contracts, dealing in those products and making a market for them to retail and wholesale clients. Forex CT's AFSL permitted it to provide personal advice.
2. During the Relevant Period, the Second Defendant, Mr Shlomo Yoshai, was the Australian-based director and responsible manager of Forex CT.
3. During the Relevant Period, Forex CT offered "over the counter" (**OTC**) derivative products, including foreign exchange contracts (**FX contracts**) and contracts-for-difference (**CFDs**), to retail investors in Australia. Forex CT carries on business in Melbourne, from where it operates a call centre.
4. CFDs are agreements to exchange, at the closing of the contract, the difference between the opening and closing price of an underlying asset, subject to any margin or spread applied by the provider, multiplied by the number of units of that asset specified in the agreement. An FX contract is a form of CFD that allows a person to take a position on the change in value over a defined period of one currency relative to another.
5. FX contracts and CFDs are highly leveraged derivative financial products which essentially allow a person to bet on whether the value of an underlying asset will increase or decrease

over a defined period, without having to purchase the underlying asset. An investor pays only a fraction of the price of the value of the underlying asset or currency to open the position, but is exposed to the total of the movement in the price of the underlying asset or currency. While FX contracts and CFDs can be used to magnify profits relative to the initial investment, they have a commensurate potential to magnify losses.

6. OTC derivative products are issued directly between the product issuer (in this case, Forex CT) and the client. Such products are not offered on any formal exchange. Products offered by Forex CT could be traded using either Forex CT's trading platform known as Web PROfit, or MetaTrader 4, the latter being a trading platform operated under licence from an unrelated third-party. Forex CT clients could also trade products issued by Forex CT using a mobile trading application on their smart phone.
7. As the issuer of the FX contracts and the CFDs, Forex CT was the counterparty to every trade placed by a client. Forex CT did not hedge each trade placed by its clients, and therefore it made money when a trade was closed with a negative result for a client and lost money when a trade was closed with a positive result for the client.
8. During the Relevant Period, Forex CT employed sales agents (often referred to as "acquisition" agents) to engage new clients, and account agents (often referred to as "retention" agents) who acted as account managers for Forex CT's clients, providing information in relation to the trading platform, the FX contracts and CFDs and the client's account.
9. During the Relevant Period, account managers were remunerated by a base salary with an entitlement to a monthly bonus paid in accordance with a Retention Desk Bonus Structure. Pursuant to the Bonus Structure, Forex CT paid account managers a monthly bonus calculated by reference to the account manager's performance against targets, with the most significant factor being the amount of the total net deposits (total deposits less withdrawals, excluding any first time deposits) paid to Forex CT by clients in the account manager's "trading book" during the month. Retention desk team leaders were remunerated under an analogous bonus structure.
10. During the Relevant Period, representatives of Forex CT provided financial product advice to clients that was personal advice within the meaning of s 766B of the *Corporations Act 2001* (Cth) (the **Act**).
11. In providing personal advice to clients during the Relevant Period, representatives of Forex CT:
  - (1) failed to act in the best interests of the client in relation to the advice;

- (2) provided advice in circumstances where it was not reasonable to conclude that the advice was appropriate to the client, had the provider satisfied the duty under s 961B of the Act to act in the best interests of the client; and
  - (3) failed to give priority to the clients' interests when giving the advice in circumstances where the representative knew or ought reasonably to have known, that there was a conflict between the interests of the client and the interests of Forex CT and/or the interests of the representative.
12. During the Relevant Period, Forex CT failed to provide a Statement of Advice in relation to the provision of personal advice to retail clients by representatives of Forex CT.
13. During the Relevant Period, Forex CT, including by the conduct of account managers allocated to clients, engaged in misleading or deceptive conduct by making false or misleading statements and representations to clients of Forex CT to the effect that:
  - (1) the interests of Forex CT were aligned with the interests of the client;
  - (2) the account manager of the client did not benefit from the deposit by the client of funds into the client's trading account with Forex CT;
  - (3) the risk of trading losses would be reduced if further funds were deposited in the client's trading account with Forex CT;
  - (4) the client would make a profit, including from a particular trading position or strategies identified by the account manager;
  - (5) it was in the best interests of the client to make a particular trade or to deposit additional funds.

In so far as any of those statements and representations were made with respect to any future matter, the person who made the representation did not have reasonable grounds for making the representation.

14. During the Relevant Period, Forex CT, including by the conduct of account managers allocated to clients, engaged in unconscionable conduct by:
  - (1) facilitating and assisting clients to trade in FX Contracts and CFDs even if the client had no, or no significant, experience in trading such financial products, and without conducting an adequate assessment of the client's objectives, financial situation and needs to determine whether such financial products were appropriate for the client;

- (2) facilitating and assisting clients to trade in FX Contracts and CFDs in circumstances where it was reasonably obvious that the client did not have a sufficient understanding of the nature of the financial products and the risks inherent in them, and was heavily reliant on the advice and recommendations of the account manager;
  - (3) adopting and implementing strategies to increase clients' trading volume, encourage frequent trading, elicit further client deposits and deter client withdrawals;
  - (4) implementing an employee remuneration scheme that rewarded employees according to, amongst other things, their clients' net deposits, which was likely to provide an incentive to account managers to encourage clients to deposit funds and to discourage them from withdrawing funds;
  - (5) responding to client requests to withdraw funds in a way that was intended to delay or prevent the withdrawal, without considering the client's best interests;
  - (6) entering into transactions with clients who had an incomplete or inadequate understanding of the operation of the products offered by Forex CT and was thereby at a disadvantage, without an adequate explanation of risks and without taking adequate steps to assess the appropriateness of the products for the client;
  - (7) making false or misleading statements to the clients;
  - (8) using high pressure sales tactics, such as offering incentives (credits and rebates) to encourage the client to transfer more money to Forex CT, even after the client had told the account manager that they could not afford to invest more money, or were reluctant to do so; and
  - (9) recommending strategies that were inappropriate to the clients, such as placing more trades or trading with greater volume, and/or leaving open trades that were in a loss.
15. Further, Forex CT engaged in a system of conduct or pattern of behaviour that amounted to unconscionable conduct, including by:
- (1) engaging in, facilitating and/or encouraging the conduct referred to in paragraph 14 above;
  - (2) establishing and enforcing key performance indicators for team leaders, retention agents and acquisition agents;
  - (3) implementing and encouraging a trading floor culture that was directed towards maximising trading volume and client deposits rather than promoting a culture of compliance with applicable legal requirements;

- (4) establishing and implementing incentives for clients to deposit funds and disincentives for clients to withdraw funds from their trading accounts;
  - (5) providing inadequate or inappropriate training and guidance to employees including account managers allocated to clients; and
  - (6) failing to ensure compliance with financial services laws.
16. In contravention of ss 963F and 963J of the Act, by paying remuneration to account managers comprising bonuses that were based primarily or significantly on net deposits to the trading accounts of the account manager's clients, Forex CT:
  - (1) failed to take reasonable steps to ensure that its representatives did not accept conflicted remuneration; and
  - (2) gave its representatives conflicted remuneration for work carried out as an employee of Forex CT.
17. As a consequence of the matters set out above, in contravention its obligations under s 912A(1) of the Act, Forex CT:
  - (1) failed to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly;
  - (2) failed to have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by Forex CT or its representatives in the provision of financial services as part of the financial services business of Forex CT or its representatives;
  - (3) failed to comply with the financial services laws;
  - (4) failed to take reasonable steps to ensure that its representatives complied with the financial services laws; and
  - (5) failed to ensure that its representatives were adequately trained, and were competent, to provide the financial services covered by the licence.
18. Mr Yoshai, in his capacity as a director of Forex CT, failed to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise in the circumstances in contravention of s 180(1) of the Act, including by exposing Forex CT to a foreseeable risk of harm as a result of contraventions of the Act and the ASIC Act, including criminal liability, imposition of pecuniary penalties, civil liability and cancellation of its AFSL.

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

19. ASIC seeks the relief set out in its Originating Application dated 15 July 2020.
20. Against Forex CT and Mr Yoshai, it seeks declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) of contravention of various provisions of the Act and the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**), and declarations pursuant to s 1317E of the Act of contravention by Forex CT of ss 961K(2) and 961L of the Act.
21. Against Mr Yoshai, ASIC seeks a disqualification order pursuant to s 206C of the Act.
22. ASIC also seeks pecuniary penalties:
  - (1) against Forex CT pursuant to s 1317G(1E) of the Act for its contraventions of ss 961K(2), 961L, 963F and 963J of the Act;
  - (2) against Forex CT pursuant to s 12GBA(1) of the ASIC Act for its contravention of s 12CB(1) of the ASIC Act; and
  - (3) against Mr Yoshai pursuant to s 12GBA(1) of the ASIC Act for aiding, abetting, counselling or procuring Forex CT's contravention of s 12CB(1) of the ASIC Act; and
  - (4) against Mr Yoshai pursuant to s 1317G(1) of the Act for his contravention of s 180(1) of the Act.

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

23. By engaging in the conduct described above:
  - (1) representatives of Forex CT contravened ss 961B, 961G and 961J of the Act;
  - (2) Forex CT contravened ss 961K(2), 961L, 963F, 963J, 912A(1)(a), (aa), (c), (ca) and (f), 946A(4), 991A, 1041H of the Act and ss 12CB and 12DA of the ASIC Act; and
  - (3) Mr Yoshai aided, abetted, counselled or procured Forex CT's contravention of s 12CB of the ASIC Act and contravened s 180 of the Act.

**D. Harm suffered**

24. As a result of the contraventions of the Act and the ASIC Act, clients of Forex CT lost significant amounts of money, ranging from a few thousand dollars to many hundreds of thousands of dollars.

Date: 15 July 2020

This concise statement was prepared by Chris Horan QC and Zoe Maud, counsel for the Australian Securities and Investments Commission.

**Certificate of lawyer**

I Andrew Riordan 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 document.

Date: 15 July 2020



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Signed by Andrew Riordan

Lawyer for the Plaintiff