

NOTICE OF FILING AND HEARING

Filing and Hearing Details

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File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v ETORO
AUS CAPITAL LIMITED ACN 612 791 803
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing: To Be Advised
Time and date for hearing: To Be Advised
Place: To Be Advised



Sia Lagos

Registrar

Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



AMENDED ORIGINATING PROCESS

Filed pursuant to orders made by Nicholas J on 22 August 2023 and 8 September 2023

No. NSD 805 of 2023

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: COMMERCIAL AND CORPORATIONS**

**IN THE MATTER OF ETORO AUS CAPITAL LIMITED
ACN 612 791 803**

AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION

Plaintiff

ETORO AUS CAPITAL LIMITED (ACN 612 791 803)

Defendant

A. DETAILS OF APPLICATION

This application is made under sections 19 and 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and sections 1101B, 1317E, 1317G and 1324 of the *Corporations Act 2001* (Cth) (**Corporations Act**).

The plaintiff seeks declarations of contraventions of the Corporations Act, pecuniary penalty orders, injunctive relief and ancillary orders.

On the facts stated in the accompanying concise statement, the plaintiff seeks:

Declarations

- 1 A declaration pursuant to section 1317E(1) of the Corporations Act and/or section 21(1) of the FCA Act that during the period 5 October 2021 to at least 25 September 29 July 2023, the defendant contravened section 994B(2) of the Corporations Act by engaging in

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|--|---|-----|--------------|
| Filed on behalf of (name & role of party) | the Plaintiff, Australian Securities and Investments Commission | | |
| Prepared by (name of person/lawyer) | Stephen Johnson | | |
| Law firm (if applicable) | | | |
| Tel | (02) 9911 5883 | Fax | 1300 729 000 |
| Email | stephen.johnson@asic.gov.au | | |
| Address for service (include state and postcode) | Level 5, 100 Market Street, Sydney, NSW, 20000 | | |



retail product distribution conduct in relation to a contract for difference financial product (**CFD Product**) without first making a target market determination for the CFD Product.

2 A declaration pursuant to section 21(1) of the FCA Act that the purported target market determinations made by the defendant for the CFD Product dated respectively 5 October 2021, 30 March 2023, 6 February 2023 and 30 July 2023, and applied by the defendant during the period 5 October 2021 to ~~at least 25 September~~ 29 July 2023 (purported TMDs), did not satisfy the requirements of sections 995B(5) and 995B(8) of the Corporations Act, and were not target market determinations for the purpose of section 994A of the Act, in that:

- a. the purported TMDs dated 5 October 2021 and 30 March 2022 purported to define the target market by reference to undisclosed or inadequately disclosed criteria, and thus did not describe the class of retail clients that comprises the target market for the CFD Product as required by section 994B(5)(b);
- b. it would not be reasonable to conclude from the purported TMDs that, if the CFD Product were to be issued to a retail client in the target market, the CFD Product would likely be consistent with the likely objectives, financial situation and needs of the retail client as required by section 994B(8)(b);
- c. further or in the alternative to (a) above, the purported TMDs included a purported distribution conditions within the meaning of section 994B(5)(c) of the Corporations Act (**Distribution Conditions**) that were was of unstated and uncertain content, meaning and application, such that each purported TMD did not specify or properly specify conditions and restrictions on retail product distribution conduct in relation to the CFD Product as required by section 994B(5)(c);
- d. further or in the alternative to (a), ~~and~~ (b) and (c) above, it would not be reasonable to conclude that, if the CFD Product were to be issued to a retail client in accordance with the Distribution Conditions, it would be likely that the retail client is in the target market as required by section 994B(8)(a).

2A Further or in the alternative to prayers 1 and 2 above, if (which is denied) the purported TMD dated 30 July 2023 (Fourth TMD) was a target market determination within the meaning of section 994A(1) of the Corporations Act, a declaration pursuant to section 1317E(1) of the Corporations Act and/or section 21(1) of the FCA Act that during the period 30 July 2023 to at least 25 September 2023, the defendant contravened section 994E(1) and/or section 994E(3) of the Corporation Act by failing to take reasonable steps that would, or would be reasonably likely to, result in retail product distribution conduct in relation to the CFD Product consistent with the determination.



- 3 A declaration pursuant to section 1317E(1) of the Corporations Act and/or section ~~24(1)~~ of the FCA Act that the defendant, by its conduct with respect to the purported TMDs and by its use of a screening test to screen retail clients from trading the CFD Product during the period 5 October 2021 to at least 25 September ~~29 July~~ 2023, failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence were provided efficiently, honestly and fairly in contravention of sections 912A(1)(a) and 912A(5A) of the Act.

Penalties

- 4 An order pursuant to section 1317G(1) of the Corporations Act that, within 30 days of the order, the defendant pay to the Commonwealth of Australia such pecuniary penalties as the Court determines to be appropriate in respect of the defendant's conduct declared to contravene section 994B(2) of the Corporations Act occurring during the period 5 October 2021 to at least 25 September ~~29 July~~ 2023.

- 4A Further or in the alternative to prayer 4, if (which is denied) the Fourth TMD was a target market determination within the meaning of section 994A(1) of the Corporations Act, an order pursuant to section 1317G(1) of the Corporations Act that, within 30 days of the order, the defendant pay to the Commonwealth of Australia such pecuniary penalties as the Court determines to be appropriate in respect of the defendant's conduct declared to contravene sections 994E(1) and/or 994E(3) of the Corporations Act occurring during the period 29 July 2023 to at least 25 September 2023.

- 5 An order pursuant to section 1317G(1) of the Corporations Act that, within 30 days of the order, the defendant pay to the Commonwealth of Australia such pecuniary penalties as the Court determines to be appropriate in respect of the defendant's conduct declared to contravene sections 912A(1)(a) and 912A(5A) of the Corporations Act occurring during the period 5 October 2021 to at least 25 September ~~29 July~~ 2023.

Injunctive and other relief

- 6 An order pursuant to section 994P(1) and/or 1101B(1) and/or 1324(1) of the Corporations Act that, within 30 days of the order, the defendant send a letter by email and post to those persons based in Australia who were assessed by the defendant in the period from 5 October 2021 to at least 25 September ~~29 July~~ 2023 as falling within the target market for the CFD Product and who remain retail clients of the defendant able to trade in the CFD Product (**Relevant Clients**), to inform each such client:

- (a) of the declarations made by the Court in these proceedings;



- (b) that they were assessed by the defendant in the period from 5 October 2021 to at least 25 September 2023 as falling within the target market for the CFD Product even though the CFD Product may not have been consistent with their likely objectives, financial situation and needs;
- (c) that the defendant's testing to assess whether the CFD Product was appropriate for that client was inadequate;
- (d) of the matters contained under the heading "CFDs" in the defendant's "General Risk Disclosure" webpage as it existed at the date of commencement of these proceedings;
- (e) of the contact information and procedures if the client wishes to make a complaint about the defendant:
 - (i) to the defendant in accordance with the defendant's dispute resolution system within the meaning of section 912A(s) of the Corporations Act; and/or
 - (ii) to the Australian Financial Complaints Authority; and
- (f) of the terms of sections 994M and 994N of the Corporations Act.

7 An order under section 994P or 1101B(1) or 1324(1) of the Act that the defendant be restrained from allowing or permitting any Relevant Client from trading in the CFD Product unless the defendant has first:

- (a) made a target market determination for the CFD Product within the meaning of section 994A of the Corporations Act; and
- (b) taken reasonable steps that will, or are reasonably likely to, result in retail product distribution conduct in relation to the CFD Product (other than excluded conduct) being consistent with that assessed that the Relevant Client falls within the target market described in that target market determination.

8 Such further orders under section 994P(1) or 1101B(1) or 1324(1) of the Corporations Act as the Court considers appropriate in respect of the defendant's conduct declared to contravene sections 994B(2), 994E(1), 994E(3), ~~and/or section 912A(1)(a)~~ and/or 912A(5A) of the Corporations Act.

9 An order that the defendant pay the plaintiff's costs of and incidental to the proceeding.



10 Such further or other orders as the Court considers appropriate.

Date: ~~2 August~~ 25 September 2023

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Stephen Johnson
Lawyer for the Plaintiff

This application will be heard by at 184 Phillip Street,
Queens Square, NSW, 2000 at *am/*pm on

B. NOTICE TO DEFENDANT(S) (IF ANY)

TO: eToro Aus Capital Limited (ACN 612 791 803)
Level 3, 60 Castlereagh 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.

D. FILING

Date of filing:

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Registrar

This originating process is filed by the Plaintiff.

E. SERVICE

The plaintiff's address for service is:



Australian Securities and Investments Commission
Level 5, 100 Market Street, Sydney, NSW 2000
Email: stephen.johnson@asic.gov.au

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