

NOTICE OF FILING

Details of Filing

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File Number: SAD187/2023
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v
OPEN4SALE GLOBAL LTD ACN 159 248 067 & ORS
Registry: SOUTH AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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.

Concise Statement

No. of 2023

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

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

OPEN4SALE GLOBAL LTD (ACN 159 248 067) and others
(named in the attached schedule)

Defendants

The Plaintiff (**ASIC**) contends that during the period 13 March 2019 to 26 July 2023 (**Relevant Period**), each of the Defendants made offers, and/or distributed application forms, to Australian investors for the issue of shares in the First Defendant, Open4Sale Global Ltd (ACN 159 248 067) (**Open4Sale Global**), in contravention of ss 727(1), (2) and (6) of the *Corporations Act 2001* (Cth) (the **Act**) (**Contravening Offers**). Each of the Contravening Offers is identified in the Schedule to the Originating Process.

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. Open4Sale Global is an unlisted public company, which purports to be in the early stages of commercialisation of software developed to enable consumers and retail businesses to engage with each other over an 'online-to-offline' or 'O2O' platform (**O4Sale Software**).
2. Shareholder capital in Open4Sale Global was reported to be \$8.908 million as at 30 June 2022. As at 22 September 2023, its shareholder register recorded 452 investors. \$1,379,750 of capital raised during the Relevant Period related to the Contravening Offers. All capital raised by the Contravening Offers was deposited by Australian investors into a single Commonwealth Bank Account held by Open4Sale Global in Australia (**CBA Account**).
3. At no time during the Relevant Period, did ASIC receive notice of a lodgement of a disclosure document related to share offers in Open4Sale Global. No compliant disclosure

Filed on behalf of: Australian Securities & Investments Commission, Plaintiff

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document has been prepared for share offers made during the Relevant Period, including because no audited financial reports of Open4Sale Global were lodged with ASIC.

4. In December 2022, each of the Defendants and another director of Open4Sale Global provided a written signed undertaking to ASIC that they would not offer securities in Open4Sale Global, or distribute application forms for offers, where the offer required disclosure under Part 6D.2 of the Act (or involve themselves in such conduct), until 1 July 2023 or the 15th day after having lodged a disclosure document with ASIC. In the period 16 December 2022 to 30 June 2023 (inclusive), approximately \$628,500 was deposited into the CBA Account by new and existing investors in Open4Sale Global. Whereas the majority of the deposits are described in banking records as 'loans', there are several descriptions of the deposits as referable to 'convertible notes' or 'shares'.
5. The Second Defendant, Simeon Michael La Barrie (**Mr La Barrie**), is and was throughout the Relevant Period, a director of Open4Sale Global and based in the United States. During the Relevant Period, he:
 - 5.1. had the capacity to cause shares to be issued in Open4Sale Global and approved them being issued in connection with the Contravening Offers pursuant to s 700(3) of the Act. He set the price for the issue of shares and typically signed investor application forms and share certificates;
 - 5.2. authorised and directed the Third Defendant, Ewald Hafer (**Mr Hafer**), to undertake an ongoing fundraising effort (including by the distribution of application forms to investors) from investors, who were, in the great majority, unsophisticated 'mum and dad' investors;
 - 5.3. was responsible for ill-suited 'information memoranda' deployed by Mr Hafer when offers were being made to the Australian investors, but which 'information memoranda' were directed to the circumstances of Open4Sale Technology Corporation (incorporated in Delaware, United States) (**US-centric IMs**);
 - 5.4. knew that financial reports for Open4Sale Global had not been audited (despite Open4Sale Global being prosecuted in 2020 for failing to lodge a report for each of the financial years ending 30 June 2015, 2016, 2017 and 2018), and therefore must have known that investors were not being provided with audited financial reports of Open4Sale Global, nor proper information regarding the risks involved in investing in the shares in Open4Sale Global;
 - 5.5. retained unfettered control of the funds raised, and applied those funds without any proper account being made for the expenditure back to Open4Sale Global;
 - 5.6. was also an officer of both Open4Sale Technology Corporation, and a company established in Singapore known as 'Open4Sale International Pte Ltd'; and

- 5.7. typically transferred funds from the CBA Account (to which he had exclusive access) to a US bank account which he controlled, or to his own personal or family trust account held with CBA and then onto the US bank account.
6. No documentary evidence has been produced to ASIC to indicate that Open4Sale Global owns any shares in either the US 'Open4Sale' entity or the Singaporean 'Open4Sale' entity or that the shareholders of Open4Sale Global directly hold any shares in those entities (other than for Mr La Barrie holding the majority of issued shares in the Singaporean entity). Research and development in respect of the O4Sale Software is apparently carried out via the US entity with funds sourced from Australian investors in Open4Sale Global. The Singaporean entity is an assignee of all of the patents for the O4Sale Software. Mr La Barrie holds, and held during the Relevant Period, a majority of shares in that entity.
7. Mr Hafer (an Australian resident) is and was throughout the Relevant Period a director of Open4Sale Global. He was the main officer and representative of Open4Sale Global having primary responsibility for: (i) direct liaison with shareholders; (ii) fundraising from investors; and (iii) the day-to-day running of Open4Sale Global. During the Relevant Period, he:
- 7.1. caused the Contravening Offers in Open4Sale Global to be made to the 'mum and dad' investors, typically by providing (or causing to be provided) the US-Centric IMs and application forms to such investors at or after face-to-face meetings;
- 7.2. knew that the US-centric IMs did not include audited financial reports of Open4Sale Global or properly set out the risks involved in investing in the shares in Open4Sale Global; and
- 7.3. received commission payments for capital raised at a typical rate of about 10%, which Mr La Barrie arranged and paid from the CBA Account.

B. SUMMARY OF RELIEF SOUGHT FROM THE COURT

8. ASIC seeks the relief set out in the accompanying Originating Process.

C. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

9. The Contravening Offers were not made in circumstances where any of the exemptions described in ss 708 or 708AA of the Act applied. In particular, no such offer was a small scale offer pursuant to s 708(1) of the Act or made to a sophisticated or professional investor in terms of ss 708(8) and 708(11) of the Act.
10. By reason of s 706 of the Act and the matters set out in paragraph 9 above, the Contravening Offers required disclosure pursuant to Part 6D.2 of the Act, by way of provision to investors of a disclosure document lodged with ASIC under Part 6D.2.
11. On each occasion of a Contravening Offer, Open4Sale Global made an offer and distributed an application form to an Australian investor for the issue of shares in Open4Sale Global in circumstances where:

- 11.1. section 727(1) was contravened because the Contravening Offer (i) needed disclosure to investors under Part 6D.2 of the Act; and (ii) was made without a disclosure document for the offer being lodged with ASIC; and
 - 11.2. section 727(2) was contravened because the Contravening Offer was not included in or accompanied by a disclosure document satisfying Part 6D.2 of the Act (being an 'offer information statement' satisfying the requirements of s 715 of the Act).
12. The contraventions of ss 727(1) and (2) by Open4Sale Global are also contraventions of s 727(6) of the Act, which is a civil penalty provision.
13. Mr La Barrie contravened ss 727(1), (2) and (6) of the Act by making, or causing to be made, the offers and distributions of application forms in circumstances described in paragraph 11.
14. Mr Hafer contravened ss 727(1), (2) and (6) of the Act by distributing or causing the distribution of application forms in circumstances described in paragraph 11.
15. Mr La Barrie was also involved in the contraventions of ss 727(1), (2) and (6) of the Act by Open4Sale Global and Mr Hafer, because, in respect of the Contravening Offers, he approved and directed the making of those offers, and the distribution of application forms for those offers by Mr Hafer, on an ongoing and unrestricted basis during the Relevant Period, knowing that:
 - 15.1. offers for the issue of shares in Open4Sale Global were made and application forms were distributed for such offers;
 - 15.2. no disclosure document had been lodged with ASIC; and
 - 15.3. the offers were not being confined to investors of a kind who satisfied any of the criteria in ss 708 or 708AA of the Act.
16. Mr Hafer was also involved in the contraventions of ss 727(1), (2) and (6) of the Act by Open4Sale Global and Mr La Barrie because, in respect of the Contravening Offers, he was actively involved in the making of those offers and the distribution of application forms for those offers during the Relevant Period, knowing the same matters identified in paragraphs 15.1 to 15.3 above.
17. For the purposes of s 206E of the Act, Mr La Barrie was a director of Open4Sale Global when it on at least two occasions contravened ss 727(1), (2) and (6) of the Act during the Relevant Period, and on each occasion of Open4Sale Global's contraventions Mr La Barrie failed to take reasonable steps to prevent the contraventions by his capacity and conduct as described in paragraph 5 above.
18. For the purposes of s 206E of the Act, Mr Hafer was a director of Open4Sale Global when it on at least two occasions contravened ss 727(1), (2) and (6) of the Act during the Relevant

Period, and on each occasion of Open4Sale Global's contraventions Mr Hafer failed to take reasonable steps to prevent the contraventions by his capacity and conduct as described in paragraph 7 above.

19. For the purposes of s 1324(1) of the Act, each of the Defendants engaged in conduct in contravention of the Act, and Mr La Barrie and Mr Hafer also each aided, abetted, counselled or procured contraventions by Open4Sale Global and each other, and was each knowingly concerned in, or a party to, those contraventions.

D. ALLEGED HARM

20. Sections 727(1) and (2) are lynchpin provisions of Chapter 6D of the Act related to fundraising. They are directed at protecting certain classes of Australian investors who do not have adequate investment expertise to make their own enquiries, or who do not already have sufficient information about the company or shares on offer. The Act permits certain small-scale offerings without disclosures, but that relief is expressly cast in restrictive terms, and does not apply here.
21. Each of the contraventions of ss 727(1), (2) and (6) by the Defendants was serious and exposed 'mum and dad' investors to a risk of loss because: (i) the investors were not given material information to enable them to make an informed decision about whether to invest in Open4Sale Global; and (ii) there was no opportunity for ASIC to scrutinise the offers. There is no evidence that Open4Sale Global has secured any assets of value (or any assets at all) by the deployment of capital raised from Australian investors by the Contravening Offers.
22. Having given the undertakings to ASIC described in paragraph 4, the Defendants continued to raise funds from existing shareholders (sometimes purportedly by way of shareholder loans). This increased the financial exposure of those shareholders to Open4Sale Global in circumstances where they might reasonably be considered as not adequately informed about Open4Sale Global because the shareholders had not earlier been provided with disclosures required by the Act.

Date: 19 December 2023



Lawyer, ASIC

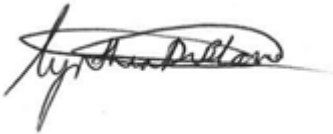
For and on behalf of the Australian Securities and Investments Commission

This Concise Statement was prepared by Suzanne Mackenzie and Stephen Phillips of Counsel and Cynthia Di Blasio, Lawyer.

Certificate of lawyer

I, Cynthia Di Blasio, 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 pleading.

Date: 19 December 2023

A handwritten signature in black ink, appearing to read 'Cynthia Di Blasio', written over a horizontal dotted line.

Signed by Cynthia Di Blasio

Lawyer for the Plaintiff

SCHEDULE OF PARTIES

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

OPEN4SALE GLOBAL LTD (ACN 159 248 067)

First Defendant

SIMEON MICHAEL LA BARRIE

Second Defendant

EWALD HAFER

Third Defendant