

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 9/05/2022 12:48:02 PM 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:	Affidavit - Form 59 - Rule 29.02(1)
File Number:	WAD83/2022
File Title:	IN THE MATTER OF FOREX CAPITAL TRADING PTY LTD (IN LIQUIDATION) ACN 119 086 270
Registry:	WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 9/05/2022 1:31:05 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 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.



Form 59  
Rule 29.02(1)

## Affidavit

No. WAD of 2022

Federal Court of Australia  
District Registry: Western Australia  
Division: Commercial and Corporations

**In the matter of Forex Capital Trading Pty Ltd ACN 119 086 270 (in liquidation)**

**Daniel Hillston Woodhouse, Nathan Thomas Kirkham Stubing, and Ross Andrew Blakeley in their capacities as joint and several liquidators of Forex Capital Trading Pty Ltd ACN 119 086 270 (in liquidation)**

Plaintiffs

Affidavit of: **Daniel Hillston Woodhouse**  
Address: c/o FTI Consulting, Level 47, 152-158 St Georges Terrace, Perth, WA, 6000  
Occupation: Registered Liquidator  
Date: 9 May 2022

### Contents

Document number	Details	Paragraph	Page
	Affidavit of Daniel Hillston Woodhouse in support of application for orders pursuant to section 90-15 of the Insolvency Practice Schedule affirmed on 9 May 2022.	1 – 129	1 – 34
1	Annexure "DHW-1", being a true copy of the ASIC extract for the Company dated 7 May 2022.	9	35 – 47
2	Annexure "DHW-2", being a true copy of the Company's AFSL.	15	48 – 70
3	Annexure "DHW-3", being a true copy of the Restraint Proceeding Orders made between 12 March 2019 and 11 December 2020.	16	71 – 119
4	Annexure "DHW-4", being a true copy of the Cancellation Notice dated 9 June 2020.	17	120 – 121

Filed on behalf of (name & role of party) The Plaintiffs  
Prepared by (name of person/lawyer) Sam Dundas  
Law firm (if applicable) King & Wood Mallesons  
Tel 08 9269 7000 Fax 08 9269 7000  
Email sam.dundas@au.kwm.com  
Address for service Level 30, QV.1 Building, 250 St Georges Terrace  
(include state and postcode) Perth, Western Australia, 6000

[Version 3 form approved 02/05/2019]

*Adriano Costanzo*

Document number	Details	Paragraph	Page
5	Annexure "DHW-5", being a true copy of the Contravention Proceeding Orders dated 29 April 2021.	21	122 – 165
6	Annexure "DHW-6", being a true copy of the Reasons dated 28 May 2021.	23	166 – 257
7	Annexure "DHW-7", being a true copy of the Wind Down Report dated 9 June 2021	24	258 – 291
8	Annexure "DHW-8", being a true copy of the Declaration of Solvency dated 26 June 2021.	25	292 – 295
9	Annexure "DHW-9", being a true copy of the Appointment Documents dated 27 June 2021.	26	296 – 306
10	Annexure "DHW-10", being a true copy of correspondence between the Liquidators and Invesus between 20 September 2021 and 29 October 2021.	28	307 – 345
11	Annexure "DHW-11", being a true copy of the orders of Registrar Trott dated 7 December 2021.	30	346 – 348
12	Annexure "DHW-12", being a true copy of the Initial Circular dated 9 July 2021.	32	349 – 371
13	Annexure "DHW-13", being a true copy of the Statutory Report dated 24 September 2021.	33	372 – 389
14	Annexure "DHW-14", being a true copy of the Third Report to Creditors dated 28 February 2022.	35	390 – 418
15	Annexure "DHW-15", being a true copy of the Notice of Meeting to Creditors dated 28 February 2022.	36	419 – 423
16	Annexure "DHW-16" is a true copy of the Minutes of the Meeting of Creditors dated 16 March 2022.	37	424 – 437
17	Annexure "DHW-17" being a true copy of the Investigation Report dated 5 May 2022 (with certain annexed materials omitted).	63	438 – 554
18	Annexure "DHW-18" being a true copy of the Notice to Creditors dated 5 May 2022.	64	555 – 558
19	Annexure "DHW-19" being a true copy of the email and letter sent to Invesus on 5 May 2022.	65	559 – 562
20	Annexure "DHW-20" being a true copy of the Selected Former Customer data spreadsheet.	73	563 – 566
21	Annexure "DHW-21" being a redacted version of a true copy of a Former Customer's Account Statement.	81	567 – 569
22	Annexure "DHW-22" being a true copy of the Initial Notice dated 24 September 2021.	94	570 – 573
23	Annexure "DHW-23" being a true copy of the Creditor FAQ.	95	574 – 577
24	Annexure "DHW-24" being a true copy of the Letter of Comfort dated 17 March 2019.	104	578 – 579

*Adriana Costanzo*



Document number	Details	Paragraph	Page
25	Annexure "DHW-25" being a true copy of the Invesus Pre-IPO Presentation.	109	580 – 615
26	Annexure "DHW-26" being a true copy of the Company's audited general purpose financial statements for FY20 dated 24 December 2020.	123	616 – 648
27	Annexure "DHW-27" being a true copy of the notice to the Committee of Inspection convening a meeting dated 14 April 2022.	126	649 – 655
28	Annexure "DHW-28" being a true copy of the minutes of the meeting of the Committee of Inspection dated 19 April 2022.	127	655 – 663

I, Daniel Hillston Woodhouse, sincerely declare and affirm:

#### A. INTRODUCTION

1. I am a senior managing director at FTI Consulting (**FTI**). I am a registered liquidator, and I have been since 11 January 2018. I have over 18 years' experience in corporate restructuring and turnaround. I have worked on a number of appointments in relation to financial services.
2. Nathan Thomas Kirkham Stubing (**Mr Stubing**) is a managing director at FTI. He is a registered liquidator and has been since 6 March 2020. He has over 14 years' experience in corporate restructuring and turnaround.
3. Ross Andrew Blakeley (**Mr Blakeley**) is a senior managing director at FTI. He is a registered liquidator and has been since 8 February 2002. He has over 25 years' experience in corporate restructuring and turnaround.
4. On 27 June 2021, the sole member of the Company passed a resolution that the Company be wound up voluntarily. Mr Stubing and I were appointed joint and several liquidators of the Company on that date (**Initial Liquidators**),
5. On 7 December 2021 Registrar Trott made orders that Forex Capital Trading Pty Ltd ACN 119 085 270 (in liquidation) (**Company** or **Forex CT**) be wound up in insolvency pursuant to section 459A of the *Corporations Act 2001* (Cth) (**Act**), and Mr Stubing, Mr Blakeley and myself were appointed as joint and several court appointed liquidators of the Company (**Liquidators**).
6. I am one of the plaintiffs in this application, and I am authorised to make this affidavit on behalf of the plaintiffs, the Liquidators.
7. I make this affidavit, with the support of my fellow Liquidators, in support of the originating process dated 9 May 2022 seeking, among other things, orders to facilitate

Adrian Costanzo





an expedited regime to assist the Liquidators to assess the claims made against the Company.

8. Unless otherwise stated, the contents of this affidavit is based on my own knowledge, information and belief and is true to the best of my knowledge, information and belief. In preparing this affidavit I have had reference to the books and records which I have had access to in my capacity as a liquidator of the Company. Where I have relied on information other than my own knowledge, I have stated the source of that information and that I believe that information to be true to the best of my knowledge, information and belief.

## **B. BACKGROUND**

### ***B1. The business of the Company and the Contravention Proceedings***

9. The Company was incorporated on 3 April 2006. Annexed to this affidavit and marked "DHW-1" is a true copy of the current extract of the Australia Securities and Investments Commission (ASIC) company search for the Company dated 7 May 2022.
10. The Company provided members of the public with advice on over-the-counter (OTC) derivative products to retail customers, including contracts-for-difference (CFD) and foreign exchange contracts (together **Products**). The Products essentially allow a person to bet on whether the value of an underlying asset (such as a foreign currency or a commodity) or financial instrument will increase or decrease over a defined period.
11. As the Products were OTC, and therefore not traded on a public exchange or market, the prices offered by Forex were essentially private contracts between customers and Forex. Forex operated on a market-making model, which means that they were the counterparty to each of the transactions contained in the Products. When a customer closed a transaction and recorded a loss on that transaction, that was effectively recognised as profit by the Company. When a customer closed a transaction and recorded a profit on that transaction, that was paid to them by the Company, and the Company lost money on that transaction.
12. Customers were able to invest in Products with the Company through a bespoke platform called "PROfit". PROfit is operated by a related entity of the Company, NaXex Technological Development Ltd (domiciled in Bulgaria). The Company entered into a risk mitigation agreement with NaXex Belize Limited (domiciled in Belize) to pay fees to mitigate its exposure to certain financial risks associated with the Company's trading positions. A more detailed explanation of the business of the Company is set out below in part C of this affidavit.

*Adriana Costanzo*



13. Profits were extracted from Australia to overseas jurisdictions by way of the risk mitigation agreement and other methods.
14. ForexCT's ultimate holding company, Invesus Group Limited (being a company incorporated in Gibraltar with company number 112180-69) (**Invesus**) is the ultimate holding company of the Company, NaXex Technological Development Ltd and NaXex Belize Limited. Based on records provided, Invesus is owned by IPZP Holdings Ltd (87%) (domiciled in Gibraltar) and other individuals (13%, with no individual owning more than 10%).
15. As explained below, until 30 July 2020, the business of the Company was carried out under Australian Financial Services Licence (**AFSL**) number 306400. Annexed to this affidavit and marked "**DHW-2**" is a true copy of the Company's AFSL.
16. In or around March 2019, ASIC commenced an investigation into the conduct of the business of the Company, and on 12 March 2019 was successful in seeking orders in this Court restraining ForexCT from removing assets from Australia (**Restraint Proceedings**) such that the Company was restrained from removing from Australia all or part of its property, including money standing to the credit of the Company in a number of bank accounts. Annexed to this affidavit and marked "**DHW-3**" is a bundle of true copies of the various orders made in the Restraint Proceedings (**Restraint Proceeding Orders**).
17. Notwithstanding the ASIC investigation and the Restraint Proceeding Orders, the Company continued to trade until its AFSL was cancelled by ASIC. On 9 June 2020, with effect from 30 July 2020, pursuant to section 915C of the Act, ASIC cancelled the Company's AFSL. Annexed to this affidavit and marked "**DHW-4**" is a copy of the cancellation notice of the Company's AFSL dated 9 June 2020 (**Cancellation Notice**).
18. Further, on 15 July 2020, ASIC commenced proceedings in this Court (VID 462 of 2020) against both the Company and Mr Shlomo Yoshai (the sole director of the Company) (**Mr Yoshai**), relating to alleged contraventions of the Act and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) (**Contravention Proceedings**).
19. In the Contravention Proceedings, ASIC alleged:
  - (a) the Company had contravened:
    - (i) sections 912A, 961K(2), 961L, 946A, 963F, 963J, 991A and 1041H of the Act; and
    - (ii) sections 12CB and 12DA of the ASIC Act; and

Adriana Costanzo



- (b) Mr Yoshai had aided, abetted, counselled or procured ForexCT's contravention of section 12CB of the ASIC Act and contravened s 180 of the Act.
20. On 28 April 2021, pursuant to s 191 of the *Evidence Act 1995* (Cth) (**Evidence Act**), ASIC, the Company and Mr Yoshai agreed to a statement of agreed facts and admissions for the purposes of the Contravention Proceedings (**SAFA**). The SAFA was only provided to the Liquidators by the Company's former solicitors on 1 July 2021, and we have subsequently reviewed the content of the SAFA for the admissions made by the Company in relation to its conduct.
21. Based on the SAFA, on 29 April 2021, Middleton J made orders regarding the Contravention Proceedings (**Contravention Proceeding Orders**). Annexed to this affidavit and marked "DHW-5" is a true copy of the Contravention Proceeding Orders dated 29 April 2021.
22. In the Contravention Proceeding Orders, the Court, among other things:
- (a) made declarations that the Company had contravened ss 912A, 961K(2), 961L, 946A, 963F, 963J, 991A and 1041H of the Act and ss 12CB and 12DA of the ASIC Act;
  - (b) made declarations that the Company had engaged in an unconscionable system of conduct and/or pattern of behaviour contrary to s 12CB of the ASIC Act;
  - (c) ordered the Company to pay a pecuniary penalty of \$20 million to the Commonwealth of Australia for the Company's contraventions of the Act and the ASIC Act; and
  - (d) ordered the Company to pay ASIC's costs of the Contravention Proceedings, fixed in the amount of \$1,180,000.
23. Justice Middleton published his Honour's reasons for the Contravention Proceeding Orders on 28 May 2021 in *Australian Securities and Investments Commission v Forex Capital Trading Pty Ltd & Anor* [2021] FCA 570 (**Reasons**). Annexed to this affidavit and marked "DHW-6" is a true copy of the Reasons in the Contravention Proceedings dated 28 May 2021.

**B2. Pre-appointment work**

24. On 10 May 2021, FTI was engaged by the Company to provide options relating to an orderly wind-down of the Company. On 9 June 2021, FTI provided its report to the Company to assist with the orderly wind down of the Company. The purpose of the report was to provide an estimated statement of position, based on the Company's balance sheet, to allow the Company to assess its restructuring alternatives (**Wind**

Adriana Costanzo



**Down Report**). Annexed to this affidavit and marked "**DHW-7**" is a true copy of the Wind Down Report dated 9 June 2021.

**B3. Commencement of members' voluntary winding up**

25. On 26 June 2021, Mr Yoshai made a declaration of solvency pursuant to section 494 of the Act, stating that the Company would be able to pay all of its debts within 12 months of the commencement of a winding up (**Declaration of Solvency**). I authenticated the Declaration of Solvency, and it was duly filed with ASIC by staff in the employ of FTI on 26 June 2021. Annexed to this affidavit and marked "**DHW-8**" is a true copy of the Declaration of Solvency dated 26 June 2021.
26. On 27 June 2021 (the **Appointment Date**), at a general meeting of the Company, the member of the Company (being Forex Capital Trading Limited, a company incorporated in Vanuatu), passed a resolution pursuant to s 495(1) of the Act that Mr Stubing and myself be appointed as joint and several liquidators of the Company for the purposes of winding up the affairs and distributing the property of the Company. Annexed to this affidavit and marked "**DHW-9**" is a true copy of a bundle of documents relevant to the appointment of the Initial Liquidators dated 25 to 27 June 2021 (**Appointment Documents**).

**B4. Transition to a court ordered winding up in insolvency**

27. Following their appointment, the Initial Liquidators commenced their investigations into the affairs of the Company, including assessing whether the Company was solvent. Based on my understanding of conversations that I had with the Director and representatives of Invesus following my appointment, it was my understanding that Invesus was funding the members' voluntary winding up of the Company pursuant to a letter of financial support.
28. As a result of these initial investigations, as well as receiving some claims from former customers who had traded with the Company between 1 January 2017 and 1 April 2019 (the **Relevant Period**) (**Former Customers**), I wrote to Invesus on 20 September 2021 seeking additional funding to allow the liquidation to continue as a members' voluntary winding up. Various emails and letters were exchanged between myself and Invesus regarding this issue, with the final correspondence, being an email from me to Invesus taking place on 29 October 2021. I did not receive any response to the final email dated 29 October 2021. Annexed to this affidavit and marked "**DHW-10**" is a true copy of the bundle of correspondence between the Liquidators and Invesus between 20 September 2021 and 29 October 2021.

*Adriana Costanzo*





29. As a result of the investigations undertaken by the Initial Liquidators, and the lack of response from Invesus to the funding requests described above, my fellow liquidators and I formed a view that the Company would not be able to pay or provide for the payment of its debts in full within the period stated in the Declaration of Solvency. Therefore, in accordance with my obligations under s 496 of the Act, on 12 November 2021, I, with the assistance of my solicitors, made an application pursuant to s 459P of the Act in the Federal Court of Australia that the Company be wound up in insolvency, in proceedings numbered WAD 254 of 2021.
30. On 7 December 2021, Registrar Trott ordered that the Company be wound up in insolvency pursuant to s 459A of the Act, and appointed the Liquidators as joint and several liquidators of the Company. Annexed to this affidavit and marked "DHW-11" is a true copy of the orders of Registrar Trott dated 7 December 2021.

**B5. Steps taken by the Liquidators to date**

31. Since the Appointment Date, the Initial Liquidators and in turn, the Liquidators, and various staff of FTI under the supervision of the Initial Liquidators, and in turn, the Liquidators, have taken a number of steps in the winding-up of the Company to date, including:
- (a) reviewed the SAFA (which was only made available following the Appointment Date) and the Reasons to determine the extent of the misconduct identified;
  - (b) liaised with Mr Yoshai and Invesus about the Company, the events leading up to the Contravention Proceedings, the reasons for the liquidation and the funding to pay creditors;
  - (c) held two separate video calls with ASIC to determine the investigations undertaken, the extent of the misconduct identified, access to records in ASIC's possession and to outline the liquidation process;
  - (d) held a conference call with the Australian Financial Complaints Authority (**AFCA**) to discuss historical complaints from former customers and the costs associated with the adjudication process (provision for these complaints in the orderly winding up of the Company was made by FTI at pages 12 to 14 of the Wind Down Report);
  - (e) held numerous discussions with former customers and their advisors to understand claims and historical complaints;
  - (f) engaged King & Wood Mallesons (**KWM**), in relation to, among other things, potential claims of Former Customers;

Adriana Costanzo



- (g) reviewed the Company's financial records, to determine former customer information and assets and liabilities;
  - (h) engaged FTI's technology specialists to liaise with the Company's information technology team in Bulgaria;
  - (i) obtained physical records from the Company's financial controller, external records storage provider and leased storage unit;
  - (j) proactively tested whether the Company is solvent and able to continue as a members' voluntary liquidation or is required to be converted to a winding up in insolvency;
  - (k) conducted searches and undertook preliminary investigations into the affairs of the Company and possible breaches of the Act committed by the Company and the Director;
  - (l) attended to the necessary statutory lodgments and reporting, accounting and administrative matters;
  - (m) prepared three reports to creditors (see paragraphs 32 through 35 below);
  - (n) formed and appointed a Committee of Inspection (see paragraph 36 below); and
  - (o) attended to external enquiries concerning the status of the liquidation.
32. On 9 July 2021, I published an initial circular to creditors of the Company (**Initial Circular**). Annexed to this affidavit and marked "DHW-12" is a copy of the Initial Circular dated 9 July 2021.
33. On 24 September 2021, I published a report to creditors of the Company in accordance with s 70-40 of the *Insolvency Practice (Corporations) Rules 2015 (IPR)* (**Statutory Report**). Annexed to this affidavit and marked "DHW-13" is a copy of the Statutory Report to creditors dated 24 September 2021.
34. Since the appointment of the Liquidators on 7 December 2021, and as a result of the investigations undertaken regarding the insolvency of the Company, the Liquidators have also taken a number of additional steps, including actively engaging with litigation funders to seek funding that will allow the Liquidators to:
- (a) enforce the Letter of Comfort against Invesus (see paragraph 104 below); and
  - (b) consider potential claims that may be recoverable by the Liquidators pursuant to s 588FE of the Act.

Adriana Costanzo

35. On 28 February 2022, I published a further report to creditors of the Company (**Third Report to Creditors**). Annexed to this affidavit and marked "**DHW-14**" is a copy of the Third Report to Creditors dated 28 February 2022.
36. On 28 February 2022, I issued a further Notice of Meeting to Creditors, proposing that a Committee of Inspection be formed, and, if so, who should be the committee members. Annexed and marked "**DHW-15**" is a copy of the Notice of Meeting to Creditors.
37. On 16 March 2022, the further Meeting of Creditors was held, during which it was resolved that a Committee of Inspection be formed, and the members to comprise it were appointed. Annexed and marked "**DHW-16**" is a copy of the Minutes of the Meeting of Creditors dated 16 March 2022.

**C. THE COMPANY AND THE FORMER CUSTOMERS**

**C1. The Company's business model**

38. The Contravention Proceedings covered the conduct of the Company during the Relevant Period (1 January 2017 to 1 April 2019).
39. Based on my review of the books and records of the Company, I believe that during the Relevant Period, the business of the Company was conducted as follows:
  - (a) the Company's business was promoted to members of the public, including via a website ([www.forexcl.com](http://www.forexcl.com)), through which prospective customers were able to create either a "live" account (in which Former Customers would actively invest in the Products), or a "dummy" account (in which Former Customers could place simulated trades, but no money was deposited); and
  - (b) once a new customer had created an account, that customer was assigned to a representative and an employee of the Company would send an email to them, seeking to set up a time for a "welcome phone call", which was to occur within a week of the customer signing up.
40. The Company employed staff in a number of capacities, including acquisition agents, account managers, acquisition agent team leaders and account manager team leaders. In this affidavit, the staff who performed these roles are referred to collectively as **Representatives**. Representatives were primarily responsible for the day-to-day contact with Former Customers, as well as pursuing new customers and following up Former Customers who had ceased trading with the Company to encourage them back to trading.
41. During the welcome phone call, Former Customers were (among other things) asked a series of questions, and given information in relation to:

*Adriana Costanzo*



- (a) who ForexCT is and what to expect from their service;
  - (b) the Former Customer's trading history in CFDs and OTC products;
  - (c) how they were planning on trading; and
  - (d) what they wanted to achieve through trading.
42. The Company's "Employee Key Concepts Document" sets out various guidelines and expectations for the frequency of communications with customers. These expectations are summarised in the below tables:

Table 1: Assorted Activities

Assorted Activity	Action	Timeframe to Action
Liquidation	Call client for deposit	Immediate
Margin Call	Call client for deposit	Immediate
Login to PROfit with Zero Equity	Call client for deposit	Immediate
Withdrawal Request Created	Call to retain	Within the hour
Lead Assigned to Agent	Email Client	Before the first call
Lead Assigned to Agent	Call for on-board	AT REQUESTED TIME
On End User Online Deposit	Call and upsell	Within the hour
Highly Profiting position	Call client for deposit	That day

Table 2: New Client Management Schedule

Timeframe	Action
Lead Assigned	Email Welcome Email
REQUESTED TIME	Call client AT REQUESTED TIME and on-board
Week 1	Follow up every day
Week 2	Follow up 2-5 times. Plant VIP seed
Week 3-4	Follow up at least twice. Talk deposit.
Week 5-12	Touch base at least once a week and graduate to VIP
Post 3 months	Call as required. Most clients should be called each week.

43. The initial phone call with a Former Customer included various steps, including the Former Customer having to pass the client qualification assessment, and the Former Customer making an initial deposit into their trading account. The qualification assessment was a multiple-choice quiz that was designed to assess knowledge of the Products being offered by the Company. The qualification assessment had to be passed before a prospective customer was to be able to open an account with the Company and trade in the Products. This assessment was a requirement of ASIC, pursuant to ASIC Regulatory Guide 227. As set out in the Investigation Report (defined in paragraph 62 below), Representatives systemically engaged in conduct to effectively "coach" potential customers through this qualification assessment, meaning Former

*Adriana Costanzo*

Customers, who would have otherwise failed the qualification assessment, passed and were given an account, and an ability to trade in Products.

44. Once a customer had established an account with the Company, a customer would be able to place trades in Products with the Company either:
  - (a) through the Company's trading platform PROfit (as discussed above at paragraph 12); or
  - (b) through a telephone order by calling a Representative.
45. A customer was able to deposit funds with the Company by:
  - (a) a transaction on a debit or credit card entered by calling a Representative or through PROfit;
  - (b) BPAY transaction;
  - (c) direct electronic funds transfer; or
  - (d) international bank transfer.
46. Further, as discussed below, the Company engaged in high pressure sales tactics that resulted in Former Customers receiving phone calls from the Company on an almost daily basis. As a result of this process, it is clear every Former Customer of the Company would have had to have interacted with the Company and its Representatives. By opening an account, a Former Customer must have had some form of contact with the Representatives.
47. The Company also provided various scripts to Representatives to use when calling customers at each of the various stages. These scripts are discussed in more detail in the Investigation Report (as explained in paragraphs 60 to 63 below). As discussed in more detail below, and set out in the Investigation Report, these scripts focused on maximising pressure on customers to deposit further funds in their accounts, irrespective of the customer's financial position, and creating a sense of urgency in pressuring customers to make further deposits. As explained in the Investigation Report, these tactics were usually successful in causing Former Customers to make further deposits to the Company, even when the Former Customer could not afford to make the deposit. The overwhelming majority of deposits made by Former Customers resulted in the Former Customer placing a trade with the Company, which usually led to the Former Customer losing money.
48. As to withdrawals, the Company established a system whereby the Representatives were to make contact with customers within an hour of a withdrawal request being made, for the purpose of discouraging the Former Customer from making the

*Adriana Costanzo*





withdrawal. These tactics were usually successful in causing Former Customers to delay or cancel their withdrawal requests, even in circumstances where the Former Customer needed those funds for essential spending (such as rent, groceries or bills).

49. Representatives were eligible for bonuses based on a number of criteria, including:
- (a) 'Unique Net Depositor' or 'Unique Loader': Number of deposits received greater than \$1,000 per month;
  - (b) 'Active Traders': Number of Former Customers who placed at least one trade in a month; and
  - (c) 'Net Deposit Amount': Value of net deposits received in a month, calculated by total deposits less total withdrawals. This criterion had the largest weighting in calculating a representative's bonus.
50. In my view, this incentive scheme incentivised Representatives to encourage deposits and continue further trading by customers, regardless of their circumstances or financial capacity to continue to trade in the Products. This is discussed in more detail.

## **C2. Qualifications of customers**

51. As mentioned in paragraphs 40 and 43 above, Former Customers had to provide certain information about themselves when opening an account. This formed part of the Company's purported compliance with ASIC Regulatory Guide 227. Although the Company's books and records available to me are incomplete for all Former Customers during the Relevant Period, I have set out below the various demographic and qualification data that is available in respect of Former Customers.
52. The books and records of the Company that are available to me show the following information regarding income levels in respect of 1,912 Former Customers:

**Table 3: Income Bands – Former Customers**

Range	# of customers	% of customers
<b>AUD ranges</b>		
Less than \$50,000	643	34%
\$50,000 to \$99,999	809	42%
\$100,000 to \$249,999	362	19%
\$250,000 and up	71	4%
<b>Euro ranges</b>		
From €20,000 To €50,000	1	0%
From €50,000 To €100,000	14	1%
From €100,000 To €250,000	8	0%
From €250,000 To €500,000	3	0%
From €500,000 To €1,000,000	1	0%
<b>Total</b>	<b>1912</b>	<b>100%</b>

*Adriano Costanzo*



53. I am not able to provide an explanation as to why some income statistics were measured in Euros rather than Australian dollars.
54. The books and records of the Company show the following information regarding the age of 1,786 Former Customers. Further, the youngest customer was 17 years and 11 months old, the eldest customer was 99 years, and the average customer age was 47.

**Table 4: Age Bands – Former Customers**

Range	# of customers	% of customers
17 to 30	260	14.6%
31 to 40	387	21.7%
41 to 50	427	23.9%
51 to 60	412	23.1%
61 to 70	215	12.0%
71 to 80	73	4.1%
81 to 90	10	0.6%
91 to 100	2	0.1%
Total	1786	100%

55. Former Customers were also asked various questions regarding their experience and qualifications in trading in OTC CFDs and foreign exchange (FX) products. The books and records of the Company show the following information in respect of Former Customers' qualifications and experience:

**Table 5.1: In the last 3 years, have you traded an over-the-counter (OTC) margin product (e.g. CFD or FX)?**

Response	# of customers	% of customers
Never	1,472	65.7%
Rarely	218	9.7%
Occasionally	312	13.9%
Regularly	238	10.6%
Total	2,240	100%

**Table 5.2: In the last 3 years, have you traded an exchange traded derivative (e.g. listed CFDs, warrants, futures or options)?**

Response	# of customers	% of customers
Never	1,490	66.5%
Rarely	245	10.9%
Occasionally	288	12.9%
Regularly	217	9.7%
Total	2,240	100%

*Adriana Costanzo*



**Table 5.3: In the last 2 years, have you attended an educational seminar or course (online or offline) on margin FX and/or CFDs which explained the concepts of leverage, margin, volatility and covered the other Qualification Criteria?**

Response	# of customers	% of customers
Yes	627	28.0%
No	1,609	72.0%
<b>Total</b>	<b>2,236</b>	<b>100%</b>

**Table 5.4: Do you have any relevant work experience during the past 10 years that gives you a good understanding of leverage, margin, volatility and the other Qualification Criteria?**

Response	# of customers	% of customers
Yes	401	17.9%
No, but have at least one year as self-directed investor where I had exposure to leveraged financial products and/or financial markets	435	19.4%
Neither	1,402	62.6%
<b>Total</b>	<b>2,238</b>	<b>100%</b>

**Table 5.5: Do you have a professional or academic qualification which gives you a good understanding of leverage, margin, volatility and the other Qualification Criteria?**

Response	# of customers	% of customers
I hold other professional or academic qualifications in a financial services related field	233	10.4%
I hold a diploma or higher level academic qualification in a relevant field	329	14.7%
Neither	1,675	74.9%
<b>Total</b>	<b>2,237</b>	<b>100%</b>

56. As a result of the above information, I have formed a view that the typical Former Customer:
- (a) was earning an average or below average income for an Australian full-time adult worker (by reference to Australian Bureau of Statics Data as at November 2018, full-time adult average weekly total earnings were \$1,166.20, or \$86,642.40 per annum);
  - (b) was aged between 40 and 60;
  - (c) had little to no experience in trading in OTC margin products, such as CFDs, or exchange traded derivatives; and
  - (d) had little to no training or relevant qualifications in fields relevant to assisting their understanding of the Products offered by the Company.
57. More information regarding the profile of Former Customers and is set out in Annexure 2 of the Investigation Report.
58. It should be noted that the Company sought to attract customers through online advertising campaigns using targeted key words such as "fast money", "online

*Adriana Costanzo*



gambling", "FX trading". Based on my review of the Company's books and records, I also believe the Company purchased customer information databases from online casinos, and pursued these potential customers through cold-calling. For these reasons, I believe the Company deliberately targeted customers who were unsophisticated and vulnerable to the Company's high-pressure sales tactics.

### C3. *Investment profile*

59. Notwithstanding the characteristics of the Former Customers set out above, before, during, and after the Relevant Period, the Company had 11,639 customers, with very different investor profiles in terms of how much they invested, when they invested and how often they invested. Based on information that has been provided by the Company's financial controller, and the books and records of the Company, I believe the profile of the former investors, their investments and their losses since 1 November 2015 is as set out in the following tables:

**Table 6.1: Trading History**

	Pre Relevant-Period 1/11/2015 to 31/12/2016	Relevant Period 1/01/2017 to 1/04/2019	Post Relevant Period 2/04/2019 to 31/08/2020
Amount deposited (\$m)	24.6 (15%)	128.5 (78%)	11.5 (7%)
Amount withdrawn (\$m)	8.2 (10%)	54.3 (70%)	15.5 (20%)
# transactions (deposits & withdrawals)	11,344 (15%)	55,534 (74%)	8,657 (11%)
Unique customers making deposits	2,290	9,070	990
Number of unique customers making a loss (note: does not account for cross period investments)	2,063	7,372	734

**Table 6.2: Periods in which customers invested**

Category	Pre-Relevant Period 1/11/2015 to 31/12/2016	Relevant Period 1/01/2017 to 1/04/2019	Post-Relevant Period 2/04/2019 to 31/08/2020
Pre only	1,107		
Pre and Relevant Period		1,066	
Relevant only		6,916	
Relevant and Post			1,355
Post only			469
Pre, Relevant and Post		183	
Pre and Post	78		

**Table 6.3: Number of customers by value of loss (across all periods)**

Value of loss (\$)	0 – 5,000	5,001 – 10,000	10,001 – 20,000	20,001 – 50,000	50,000+
Number of customers	5,923 (71%)	810 (10%)	658 (8%)	555 (7%)	412 (5%)

*Adriana Costanzo*



**D. INVESTGATIONS INTO THE COMPANY AND POTENTIAL CLAIMS OF FORMER CUSTOMERS**

**D1. *The Investigation Report***

60. As a result of the preliminary investigations into the affairs of the Company, as outlined in paragraph 31 above, I formed a view the conduct of the Company should be investigated in more detail to properly ascertain the extent of the Company's misconduct and the potential for all Former Customers to have claims against the Company as a result. I considered these further investigations to be in the interests of all creditors because, as is explained below in part E of this affidavit, Invesus has provided a Letter of Comfort under which it will meet requests by the Company to pay the Company's debts in relation to its customers. The Letter of Comfort is potentially responsive to the claims of Former Customers. The Letter of Comfort expires on 30 June 2022.
61. At the time the Company transitioned to a court ordered winding up in insolvency, there were insufficient assets of the Company to fund the Liquidators to undertake the necessary investigations. However, as is explained below in part G of this affidavit, the Liquidators have been able to obtain funding to allow the investigations to occur and a claim to be made against Invesus. This funding was not secured until 12 April 2022, and was not approved by the Committee of Inspection until 19 April 2022.
62. I caused various staff employed by the Liquidators to assist in reviewing the materials available to the Liquidators that allowed me to prepare a report into the conduct of the Company (**Investigation Report**). The purposes of the Investigation Report were to ascertain:
- (a) the extent to which the Company had engaged in conduct towards Former Customers giving rise to claims by Former Customers against the Company for loss and damage including pursuant to:
    - (i) section 1041I of the Act for loss and damage for contraventions of section 1041H of the Act; or
    - (ii) section 12GF of the ASIC Act for breaches of section 12DA of the ASIC Act (**Misleading or Deceptive Conduct Claims**);
  - (b) the extent to which the Company operated an unconscionable system regarding Former Customers giving rise to claims by Former Customers against the Company for loss and damage including pursuant to:
    - (i) section 991A(2) for contraventions of section 991A(1) of the Act; or
    - (ii) under section 12GF of the ASIC Act for breaches of section 12CB of the ASIC Act (**Unconscionable Conduct Claims**); and

*Adriana Costanzo*





- (c) whether all Former Customers would be able to prima facie establish Misleading or Deceptive Conduct Claims and / or Unconscionable Conduct Claims against the Company,

the Misleading or Deceptive Conduct Claims and Unconscionable Conduct Claims referred to together as **Former Customer Claims**.

63. Annexed to this affidavit and marked "**DHW-17**" is a true copy of the Investigation Report dated 5 May 2022. Due to the size of some of the annexures to the Investigation Report, the version annexed to this affidavit does not include the bundle of documents that were annexed to Annexure 4 of the Investigation Report. A copy of these materials can be provided to the Court should it be necessary.
64. The Investigation Report was provided to Former Customers on 5 May 2022. Annexed to this affidavit and marked "**DHW-18**" is a true copy of the Notice to Creditors dated 5 May 2022.
65. A copy of the Investigation Report was also provided to Invesus on 5 May 2022. Annexed to this affidavit and marked "**DHW-19**" is a copy of the email and letter to Invesus dated 5 May 2022.

***D2. Scope of investigation and Selected Former Customers***

66. The Liquidators have had to conduct their investigations and prepare the Investigation Report in a very short amount of time due to the expiry of the Letter of Comfort on 30 June 2022.
67. As such, in the limited time available, the Liquidators were not, and have not been able to comprehensively review all materials available to them, which included approximately 6 TB of telephone records, and approximately 2 TB worth of other electronic records which represents approximately 4 million documents. For the purposes of the Investigation Report, I therefore considered it appropriate to only consider the Company's conduct toward a randomised representative sample of the Former Customers, (**Selected Former Customers**), as well as the eight Former Customers that were the subject of the Contravention Proceedings.
68. Given the characteristics of the Selected Former Customers sampled, and the egregious nature of the conduct identified in the Investigation Report my fellow Liquidators and I have formed a view that each of the Former Customers would be able to satisfy the Liquidators, exercising their quasi-judicial function in adjudicating proofs of debt, that they have both Misleading or Deceptive Conduct Claims and Unconscionable Conduct Claims, should they choose to submit a proof of debt in the liquidation of the Company based on those claims.

*Adrian Costanzo*



69. I have formed this view in reliance of the materials that have been reviewed, and also the methodology adopted, which gives me confidence to extrapolate the findings in respect of Selected Former Customers to all Former Customers.
70. The methodology used to select the Selected Former Customers so that they were a representative sample involved identifying the following certain objective characteristics of the Former Customers, such as:
- (a) the amount of money or "Net Loss" the Former Customer had invested and subsequently lost (the concept of "Net Loss" is explained later in this affidavit at paragraphs 81 to 86):
    - (i) less than \$5,000;
    - (ii) \$5,001 to \$20,000;
    - (iii) \$20,001 to \$100,000; and
    - (iv) over \$100,000;
  - (b) the time period over which the Former Customer was trading with the Company:
    - (i) between 1 January 2017 to 30 September 2017;
    - (ii) between 1 October 2017 to 30 June 2018;
    - (iii) between 1 July 2018 and 1 April 2019; or
    - (iv) across the entire Relevant Period; and
  - (c) the Former Customers' trading frequency, being selected from each quartile of the total number of trades made by the Former Customer.
71. Staff in my employ then applied these criteria to the pool of Former Customers, and I am informed by Renae Stirling, a senior director at FTI, a random number generator was used to randomly identify a unique Former Customer for each of the above characteristics. Out of a possible 64 unique combinations of these three criteria, this process was able to identify random Former Customers in 58 of the combinations.
72. The process was not able to find examples of the following combinations of characteristics:
- (a) the amount invested was between \$20,000 to \$100,000, traded solely in the first period and was in the bottom quartile for trade volume;
  - (b) the amount invested was greater than \$100,000, traded solely in the first period and was in either the bottom or middle-lower quartile for trade volume;

Adriana Costanzo



- (c) the amount invested was greater than \$100,000, traded solely in the middle period and was in the bottom quartile for trade volume;
  - (d) the amount invested was greater than \$100,000, traded solely in the last period and was in the bottom quartile for trade volume; and
  - (e) the amount invested was greater than \$100,000, traded across the entire period and was in the bottom quartile for trade volume.
73. Annexed to this affidavit and marked "DHW-20" is a spreadsheet setting out these characteristics regarding the Selected Former Customers (with personal identifying information removed).
74. In summary, the Selected Former Customers have the following characteristics:

**Table 7: Selected Former Customer Characteristics**

Characteristic	Minimum	Maximum	Mean	Median
Net Loss	\$375	\$908,130	\$78,549	\$18,750
Number of active months	1	24	5	3
Number of trades	1	5,144	462	137

75. A more detailed explanation of the methodology and breakdown of the Selected Former Customers is contained in section 4 and annexure 2 of the Investigation Report. For the reasons set out therein, I believe the Selected Former Customers represent a fair cross-section and sample of the total pool of Former Customers.

**D3. Investigations into the Company's conduct**

76. Having identified the Selected Former Customers, I have, with the assistance of my solicitors, KWM, caused staff in my employ to undertake investigations into the Company and the Selected Former Customers. These investigations can be summarised into two key workstreams:
- (a) reviewing books and records of the Company generally, to identify documents that would support a finding of the Misleading or Deceptive Conduct Claims or Unconscionable Conduct Claims, including the following documents (**Document Review**):
    - (i) scripts or training documents setting out sales tactics to be adopted by Representatives;
    - (ii) bonus or remuneration policies of Representatives;
    - (iii) emails demonstrating pressure being placed on Representatives to improve the level of deposits;

*Adriana Costanzo*



- (iv) policies setting out communicating misleading or deceptive information to Former Customers; and
    - (v) policies regarding delaying, deferring or discouraging withdrawals being made;
  - (b) undertaking targeted reviews of the telephone calls between Representatives and the Selected Former Customers and entries in the Company's CRM system, with a view to identifying (among other things) (**Targeted Telephone Review**):
    - (i) examples of Representatives misrepresenting the level of risk associated with the Products;
    - (ii) examples of Representatives misrepresenting their interests being aligned with Selected Former Customers;
    - (iii) examples of Representatives delaying, deferring or discouraging withdrawals being made; and
    - (iv) examples of Representatives encouraging further investments in Products when it was clearly inappropriate to be doing so.
77. Reports setting out the findings of the Document Review and the Targeted Telephone Review (together the **Investigations**) as set out in sections 5 and 6 of the Investigation Report, and in annexures 3 and 4 of the Investigation Report. I have summarised these findings below.
78. Based on the Investigations, I am satisfied each of the Selected Former Customers would be able to establish the Misleading or Deceptive Conduct Claims, and the Unconscionable Conduct Claims against the Company should those claims be advanced in a proof of debt. I have formed this view for several reasons, including:
- (a) the Company's records, and the targeted review of phone calls between Representatives and the Selected Former Customers, demonstrate the Company engaged and its Representatives engaged in conduct that would give rise to the Misleading or Deceptive Conduct Claims, by (among other things) making the following Misrepresentations to Former Customers, namely that:
    - (i) the interests of Forex CT or its Representatives were aligned with the interests of the customer;
    - (ii) a Representative did not benefit from the customer's deposit of funds into the customer's trading account with Forex CT;
    - (iii) the risk of trading losses would be reduced if further funds were deposited in the customer's trading account with Forex CT;

*Adriana Costanzo*



- (iv) the Former Customer was likely to or might reasonably expect to generate profits by trading in margin FX or CFDs in the order of magnitude indicated by the Representative and in some instances by reference to a particular trading position or strategies identified by the Representative; and / or
  - (v) it was in the best interests of the customer to make a particular trade or to deposit additional funds;
- (b) the Company's records, and the targeted review of phone calls between Representatives and the Selected Former Customers, demonstrate the Company engaged in conduct that would give rise to the Unconscionable Conduct Claims through (among other things):
- (i) engaging in the misrepresentations set out above, and providing training and scripts to Representatives that would lead to them misrepresenting the level of risk associated with trading in the Products;
  - (ii) engaging in conduct intended to delay, defer or discourage Former Customers from withdrawing their funds; and
  - (iii) engaging in high-pressure sales tactics, including deliberately manufacturing a sense of urgency in order to pressure Former Customers into making further deposits with the Company
- (c) the Company's records, and the targeted review of phone calls between Representatives and the Selected Former Customers, demonstrate the Company carried on an unconscionable system through (among other things):
- (i) not taking adequate steps to ensure Former Customers had sufficient knowledge and understanding of the high-risk financial products offered by the Company;
  - (ii) encouraging Representatives to engage in conduct intended to delay, defer or discourage Former Customers from making withdrawals;
  - (iii) encouraging Representatives to engage in the high-pressure tactics described in the Investigation Report;
  - (iv) failing to implement a proper framework to ensure its Representatives complied with the relevant legal obligations imposed on the Company as a holder of an AFSL;
  - (v) implementing a conflicted remuneration policy which incentivised Representatives to maximise deposits from Former Customers, irrespective of the financial position of those customers; and

Adriana Costanzo





- (vi) failing to disclose the remuneration structure and the conflicted remuneration of Representatives.

79. I am also satisfied on the basis of the Investigations undertaken that the Company's misleading or deceptive conduct and/or unconscionable conduct identified above caused Former Customers to (among other things) make deposits with the Company, to make particular trades with the Company, or to cancel withdrawal requests. That is to say, the wrongful conduct of the Company caused the Former Customers to lose money.

80. Further, given:

- (a) the methodology chosen to select the Selected Former Customers;
- (b) the egregious conduct of the Company and its Representatives towards the Selected Former Customers identified in the Targeted Telephone Review; and
- (c) the extensive documents identified in the Document Review,

I verily believe each of the Former Customers would be able to satisfy me they had a valid Misleading or Deceptive Conduct Claim and/or Unconscionable Conduct Claim for loss or damage against the Company as at the Appointment Date, should the Former Customer choose to submit a proof of debt.

81. It is possible to ascertain the net loss of each Former Customer based on the books and records of the Company, using Former Customers' Account Statements. Annexed to this affidavit and marked "**DHW-21**" is a sample of a Former Customer's Account Statement (with personal information redacted). A Former Customer's net loss can be calculated by deducting a Former Customer's "Total Withdrawals" from their "Total Deposits" (**Net Loss**).

82. In the context of an Account Statement, staff in my employ, with the assistance of the former Financial Controller of the Company, have prepared the following table that accurately summarises each of the different line entries contained in the Account Statement:

**Table 8: Terms used in Account Statements**

Term used	Liquidators' Explanation
<b>Deposits</b>	This line entry reflects the total amounts received from the Former Customer into Forex CT's customer trust account (i.e. cash paid from the Former Customer to Forex CT to fund the Former Customer's trading account)
<b>Withdrawals</b>	This line entry reflects the total amounts withdrawn by the Former Customer (i.e. cash paid from Forex CT to the Former Customer)
<b>Closed Trade P&amp;L</b>	This line entry reflects the Former Customer's net gains or losses made on closed trades during the period of the statement
<b>Rollover</b>	This line entry reflects the interest charged to the Former Customer as an Overnight Financing Fee (paragraph 9.2 of the Product Disclosure Statement). This fee was applied to positions that remained open overnight.

*Adriana Costanzo*



	<p>At appointment, the fee was 0.015% of the US dollar exposure of all open positions.</p> <p>Any cash impact of this line entry will be reflected in the withdrawal line as the fee would reduce the Former Customer's withdrawable equity.</p>
<b>Bonus</b>	<p>This line entry reflects the amounts added to the Former Customer's account under specific promotions or offers, which was withdrawable as cash by the Former Customer in certain instances (section 5.5.9 of the Product Disclosure Statement).</p> <p>Any cash impact of a bonus is reflected in the withdrawal line of the statement as the bonus increased the amount of cash Former Customer could withdraw from their account.</p>
<b>Manual Adjustment</b>	<p>This line entry reflects manual adjustments to a Former Customer's account balance. These entries have been described by the Company as typically being applied where a Former Customer closed their account with a negative balance and Forex CT covered the loss, so that the balance is returned to zero (i.e. Forex CT would not chase the customer for the loss).</p> <p>While we have seen examples of this, our review does not support that this is the typical use of manual adjustments.</p> <p>Manual adjustments were used for a variety of reasons and, from our review of the records, were often used to credit Former Customers' accounts to resolve a complaint. Examples of these complaints include refunding account inactivity fees, adjusting for the failure of Representatives to add promotions to accounts, correcting stop loss slippage, and compensation/remediation payments made following a complaint.</p> <p>Notwithstanding this, any cash impact of manual adjustments is reflected in the withdrawals line. Where a manual adjustment resulted in a refund to a Former Customer, the Former Customer was then able to withdraw those funds from their account. This withdrawal runs through the withdrawal line of the statement.</p>
<b>Credit</b>	<p>This line reflects amounts added to a Former Customer's account, generally after a deposit is made. Credit was not withdrawable as cash, unless specific conditions are met (typically meeting certain trade volumes within six months of deposit). Credit was often used to incentivise further deposits.</p> <p>Any cash impact of a credit will be seen in the withdrawals line as, if the specific conditions are met, the credit will become part of a customer's withdrawable equity.</p>
<b>Transfer</b>	<p>This line reflects amounts carried over from Forex CT's previous trading platform (MetaTrader). This will only apply to a small number of Former Customers who had accounts from the previous trading platform.</p>

83. Applying this methodology, to the sample Account Statement set out in DHW-21, the Former Customer's Net Loss is \$5,251.52, being the difference between the total "Deposit" of \$5,500 less the total amount withdrawn reflected in the final "Running Balance" of \$248.48. This is calculated by taking the Total Withdrawals from the Total Deposits. The full workings are shown below:

Table 9: Example Net Loss Calculation

Description	Calculation (\$)	Running balance (\$)
Deposit	5,500.00	5,500.00
Plus bonus (withdrawable as cash)	5,500.00 + 261.23	5,761.23
Less trading loss	5,761.23 – 8,257.44	(2,496.21)
Less rollover fees	(2,496.21) – 2,410.55	(4,906.76)
Add back manual adjustments	(4,906.76) + 5,155.24	248.48
Less withdrawals	248.48 – 248.48	0

Adriana Costanzo



NET LOSS (Deposit less withdrawals)	5,500 – 248.48	(5,251.52)
-------------------------------------	----------------	------------

84. This amount is the "Net Loss" amount referred to by Middleton J in the Reasons. Over the Relevant Period, the total Net Loss of Former Customers referred to by Middleton J was in excess of \$77 million. Based on my own investigations into the Company, I believe the value of Former Customer Claims is at least \$77 million, and may be in the order of \$85 million.
85. The books and records of the Company allow me to determine each Former Customer's Net Loss suffered during the Relevant Period. I have had conversations with staff in the FTI Forensic Litigation Consulting Team and I believe it is possible to pre-populate the Former Customer Claim Form with this information, as is envisaged by the orders sought in the originating process.
86. Further, the Company's books and records on which Account Statements are based have been audited and therefore I believe they are a proper basis on which to calculate the Former Customers' Net Losses.
87. It is apparent that the Company does not have sufficient assets available to allow the Company to meet the claims of Former Customers should those claims be calculated on a Net Loss basis. The claims of Former Customer will have to be met by Invesus under the Letter of Comfort, as is explained later in this affidavit.

**D4. Registered Former Customers and Unregistered Former Customers**

88. I have reviewed the Reasons in the Contravention Proceedings, and understand that during the Relevant Period the total value of all Former Customers' realised losses were \$141,886,180 and all realised profits were \$64,266,266, and therefore, the total Former Customer Net Losses during the Relevant Period were \$77,619,914. Based on my review of the books and records of the Company available to me, consistent with the reasons, I consider, the potential loss or damage that may have been recoverable from the Company by Former Customers had they pursued one or more of the Former Customer Claims prior to the Appointment Date could be \$77,619,914, but potentially in the order of \$85 million.
89. Given the broad nature of the declarations by the Court and the scale of misconduct that was admitted by the Company in the SAFA, I also verily believe that former customers of the Company who invested with the Company outside the Relevant Period may also have Former Customer Claims (**Additional Former Customers**), subject to any limitation period applicable to those claims. As such, Additional Former Customers as far back as 27 June 2015 may also have Former Customer Claims against the Company as at the Appointment Date (noting that claims prior to this time would likely be statute barred).

*Adriana Costanzo*



90. Since the Appointment Date, without taking positive steps to notify Former Customers or Additional Former Customers, the Liquidators have received 7 claims against the Company from Former Customers to the value of \$910,885. Following an informal review and assessment of these claims, they appear to be valid claims of at least \$584,477 against the Company. These claims are based essentially on the wrongful conduct of the Company that was the focus of the Investigation Report.
91. Given the potential for Former Customers and Additional Former Customers to have Former Customer Claims against the Company, the Liquidators have been liaising with ASIC and Invesus to establish the identities, records and contact details of both the Former Customers and Additional Former Customers.
92. As set out above, all Former Customers invested with the Company through a bespoke platform called PROfit. Invesus has allowed the Liquidators access to PROfit. However, PROfit does not, at least on the access rights granted, allow us to extract all trade data in a single report. Rather, we can only generate reports for individual Former Customers. I am informed by the FTI Technology Team, and I verily believe, that they are unable to source the database which sits behind PROfit. Invesus is yet to provide full access to the PROfit database, as it is intermingled with other global investor data. As at the date of this affidavit, Invesus has also not communicated with the Liquidators since 29 October 2021.
93. To date, based on the information available to us (including from ASIC and through PROfit), we have identified 8,873 Former Customers. We have also identified 3,015 Additional Former Customers, but we do not have contact details for all of these Additional Former Customers. We have made numerous attempts to engage with Invesus and ASIC regarding the contact details of these Additional Former Customers, but we have not been able to obtain this information. On 13 October 2021, staff of FTI under the instruction of the Liquidators attempted to access the PROfit system, but received a notification of an error with their credentials. On this basis, I believe Invesus has revoked FTI's access to the PROfit system.
94. Consistent with our duties as liquidators to identify all debts and liabilities of the Company, and in the circumstances outlined above regarding the potential Former Customer Claims of Former Customer and Additional Former Customers, on 24 September 2021, in addition to the Statutory Report, I also caused a notice to be sent to 8,624 Former Customers for whom the Liquidators had the contact details for (**Initial Notice**). The purpose of the Initial Notice was to invite Former Customers to register as potential creditors of the Company on an online portal (**Creditor Portal**), and to give them access to a central location for the Liquidators to provide further updates to the body of creditors of the Company more generally regarding the progress of the

*Adriana Costanzo*



liquidation. Annexed to this affidavit and marked "**DHW-22**", is a true copy of the Initial Notice dated 24 September 2021.

95. In addition to the Initial Notice, on 24 September 2021, I also caused to be published on the Creditor Portal a "frequently asked questions" document to assist Former Customers to understand the liquidation process to date. This FAQ document was subsequently updated and was uploaded to the Creditor Portal on 1 October 2021 (**Creditor FAQ**). Annexed to this affidavit and marked "**DHW-23**" is a true copy of the Creditor FAQ.
96. Since the distribution of the Initial Notice on 24 September 2021 to the date of this affidavit, there have been over 1,527 Former Customers register as potential creditors on the Creditor Portal (**Registered Former Customers**). Those Former Customers who are not Registered Former Customers are the "**Unregistered Former Customers**".
97. It is proposed to send slightly different versions of the notices to Registered Former Customers as opposed to Unregistered Former Customers. This is to reflect that Unregistered Customers may need additional explanation of the steps they are required to take as they have not yet engaged with the process.

**D5. Payments received as a result of AFCA complaints**

98. Based on my review of the books and records of the Company, as well as the information contained on the AFCA "Datacube" website it is clear there were a number of complaints made to AFCA by Former Customers. There were a number of AFCA determinations in favour of Former Customers, or situations where Former Customers otherwise entered into deeds of settlement and release with the Company as a result of their AFCA complaint.
99. Where a Former Customer has reached the stage of either an AFCA determination, or a deed of settlement, this is conclusive of a debt the Company owes that Former Customer. These debts were incurred by the Company in relation to the wrongful conduct of the Company during the Relevant Period, and are therefore likely to overlap significantly with the Former Customer Claims subject of the Investigation Report.
100. As such, where a Former Customer has already received a payment from the Company as a result of an AFCA complaint, those Former Customers will be excluded from the proposed expedited adjudication process. This is because these Former Customers have no longer suffered any "loss or damage" as they have been made whole by the Company by paying them under an AFCA determination, or under a deed of release. It is also likely these Former Customers have also released the Company from any further claims arising out of the Company's wrongful conduct, but this will be assessed on a case-by-case basis.

Adriana Costanza



101. I have received, as at the date of this affidavit, correspondence from five Former Customers regarding payment arising from their AFCA complaints. To the extent these Former Customers have not yet been paid, I intend to admit these claims in full.
102. Where a Former Customer has received a determination from AFCA, but the Company did not pay these amounts prior to the Appointment Date, the Former Customer will be invited to submit a proof of debt for the value of the determination or deed of release. Subject to adjudication, these amounts will also be included in the demand to be made under the Letter of Comfort (as explained below).

**E. THE LETTER OF COMFORT AND CLAIM AGAINST INVESUS**

***E1. Assets of the Company***

103. For the reasons set out above, the Liquidators are of the view that the Company is insolvent. The Company does not presently have the financial capacity to repay the Former Customers' Net Loss. Although the Former Customers' Net Loss flowed to the Company, due to the risk mitigation agreement in place, operating expenses and other profit shifting that occurred within the Company's broader group of companies, during FY17 to FY19, the Company only recorded a total net profit of \$461,564.

***E2. Letter of Comfort***

104. On 17 March 2019, Invesus provided the Company with a letter of comfort pursuant to which Invesus irrevocably undertook to provide to the Company, or procure from external sources, financial support to the extent the Company required it to meet any debts, including judgment debts, incurred by the Company or its director prior to or after the date of the letter (**Letter of Comfort**). The Letter of Comfort expires on 30 June 2022. Annexed to this affidavit and marked "**DHW-24**" is a true copy of the Letter of Comfort dated 17 March 2019.
105. I have obtained legal advice from my solicitors, and senior counsel, regarding the Letter of Comfort, and without in any way waiving legal professional privilege, I verily believe that the Letter of Comfort will be enforceable against Invesus. However, in order for the claims of Former Customers to become debts payable by the Company to Former Customers, and therefore becoming capable of being subject of a demand of Invesus under the Letter of Comfort, these claims will need to be adjudicated by the Liquidators. That is to say, a general "ambit claim" against Invesus for the value of the Net Loss of the Former Customers is unlikely to be sufficient to enliven the obligations of Invesus under the Letter of Comfort.
106. It is this need for claims to be adjudicated to ensure the claims of Former Customers are recognised as debts of the Company, and to bring them within the ambit of the Letter of

*Adriana Costanzo*



Comfort, that the Liquidators resolved to bring this application to allow the Liquidators to adjudicate the claims of Former Creditors, and make a corresponding demand of Invesus before the Letter of Comfort expires on 30 June 2022.

**E3. Assets of Invesus**

107. In assessing the viability of a recovery against Invesus under the Letter of Comfort, I have undertaken some preliminary investigations into the financial position of Invesus in Gibraltar, and whether there are sufficient assets held by Invesus to meet a demand under the Letter of Comfort.
108. My preliminary investigations into Invesus show that, based on an investor presentation prepared in, or around 2018, that Invesus, globally, had:
- (a) actual adjusted EBITDA of \$23m, \$32.4m and \$34m in 2014, 2015 and 2016 respectively;
  - (b) forecast EBITDA of \$40.6m and \$49.1m for 2017 and 2018 respectively; and
  - (c) forecast revenue of \$162.2m in 2018, of which Australia represented 11%.
109. Annexed to this affidavit and marked "DHW-25" is a true copy of a pre-IPO presentation prepared by Invesus.
110. I also note Invesus was able to procure the funds required for the Company to pay the \$21.18 million in pecuniary penalties referred to in paragraph 22 above.
111. As such, I believe Invesus has access to sufficient assets available to it in Gibraltar to allow it to meet a significant request made under the Letter of Comfort.

**F. ADJUDICATION OF FORMER CUSTOMER CLAIMS AND RELIEF SOUGHT**

112. Consistent with our duties as liquidators to identify all debts and liabilities of the Company, we are required to adjudicate each potential proof of debt of Former Customers in a quasi-judicial manner. Our investigations thus far indicate:
- (a) there are more than 8,600 proofs of debt capable of being lodged by Former Customers; and
  - (b) the majority of proofs of debt are, or will be, less than \$5,000.
113. Ordinarily, to adjudicate each proof of debt that may be received from a Former Customer, I would as a minimum have to instruct my staff to have regard to:
- (a) the sufficiency of substantiation in the proof of debt form, including;
    - (i) the adequacy of documentation demonstrating a 'Net Loss', inclusive of all deposits and withdrawals from the Former Customers' trading account;

*Adriana Cortez*



- (ii) dates of transactions, demonstrating the Net Loss occurred during the Relevant Period for the purpose of satisfying 'causation';
  - (b) in instances where insufficient substantiation is provided by the Former Customer, respond formally pursuant to rr 5.6.53 and 5.6.54 of the *Corporations Regulations 2001* (Cth) , detailing the further and better particulars required to be submitted;
  - (c) identifying any 'bonus credits' claimed by Former Customer, which does not represent a Former Customer deposit and is not claimable in the liquidation; and
  - (d) general enquiries received from Former Customers during the adjudication process.
- 114. In my experience, I anticipate adjudicating each claim in the manner outlined at paragraph 113 would take approximately between the range of 10 to 15 minutes per claim on average. On this basis I anticipate, and verily believe, that adjudicating on potentially over 8,600 individual Former Customer claims would take approximately 1,433 to 2,150 hours to complete. With 12 staff working full time on this process (8.5 hours per day), this process can be completed in approximately 3 to 4 weeks.
- 115. The adjudication process outlined above at paragraph 113 would cost in the range of \$573,200 to \$860,000 (excluding GST) based on an average blended hourly rate of the Liquidators' staff of \$400 per hour (excluding GST), as set out in the Liquidators' hourly rates dated 1 July 2021 and provided to creditors.
- 116. In addition to the steps set out in paragraph 113 above in the event that the Liquidators were required to determine causation for each Former Customer Claim on a case-by-case basis (because there was insufficient substantiation provided by the Former Customers), based on my experience as a registered liquidator, my staff would have to undertake the following additional steps:
  - (a) identify and listen to the relevant audio and telephone recordings for each Former Customer;
  - (b) invite the Former Customers to provide proof substantiating their claim and causation of the loss and damage; and
  - (c) review the substantiating materials and invite further information if necessary.
- 117. Based on the investigations undertaken to prepare the Investigation Report, approximately 10 phone calls for each Selected Former Customer were listened to in order to substantiate these claims. Therefore, in a best case scenario, I consider my staff would have to review, at a minimum, 10 phone calls per Former Customer. These phone calls are (excluding phone calls of less than 1 minute), on average, 9.9 minutes

Adriana Costanza





long. Therefore, to review this many phone calls for an estimated 8,600 Former Customers, in a best-case scenario, I estimate would take an additional 14,300 hours, in addition to the above. Using FTI's average blended rate of \$400 (as described above), this would cost an additional \$5.72 million. Using 12 staff working full time (8.5 hours a day, 5 days a week), this additional work would take an additional 28 weeks to perform.

118. Therefore, if Former Customer Claims had to be adjudicated in the ordinary process (and without the benefit of the orders sought in this application), I estimate this would cost approximately \$6.29 million to \$6.58 million, and take between 31 and 32 weeks to perform (utilising 12 staff). To try and perform this work before 30 June (i.e. performed in 7 weeks), it would require approximately 53 staff working on the matter (8.5 hours per day for 5 days) for 7 weeks. Even if the Liquidators had funding to perform this work, it would be extremely challenging (if possible, at all) to provide that level of resourcing, and so, in my view, it would be impossible for the Liquidators to adjudicate the Former Customer Claims in the usual process prior to 30 June 2022. In these circumstances, I believe it is necessary and appropriate for the Court to sanction the Liquidators to:

- (a) pre-populate the Former Customer Claim Forms with each Former Customers' Net Loss, based upon the information in the Company's books and records; and thereafter
- (b) request the Former Customers to decide whether they want to participate by claiming their Net Loss (with an appropriate discount per paragraphs 121-125) by accepting the Net Loss amount in the pre-populated Former Customer Claim Form,

which will have the effect of establishing a process that can reasonably be completed in the limited time available before 30 June 2022, through:

- (c) streamlining the steps outlined in paragraph 113 – for example, by minimising the need for the Liquidators to review substantial documentation from Former Customers and to request substantial further and better particulars from Former Customers; and
  - (d) avoiding the need for the Liquidators to individually determine causation for each Former Customer Claim on a case-by-case basis per the steps outlined in paragraph 114 – for example, by avoiding the need for the Liquidators to identify and listen to the relevant audio and telephone recordings for each Former Customer.
119. As set out in paragraph 59 above, approximately 70% of the claims of Former Customers are likely to be for amounts of less than \$5,000. Given the complexity of the claims, it would be inefficient to fulsomely adjudicate these claims, as I believe it would

*Adriane Costanzo*



cost more to adjudicate these claims than they would be worth. However, the orders sought by the Liquidators in this application will allow these relatively *de minimus* claims to be adjudicated efficiently, and have these claims included in the aggregate demand that the Liquidators intend to make of Invesus under the Letter of Comfort. Without these orders, we would not be able to adjudicate these claims efficiently and in a cost-effective manner.

120. As raised at paragraph 104, the Letter of Comfort provided by Invesus expires on 30 June 2022. Any request of Invesus demanding payment under the Letter of Comfort must therefore be made prior to 30 June 2022. As at the date of this affidavit, my investigations indicate that upon expiry of the Letter of Comfort, creditors of the Company (including Former Customers) will recover approximately zero cents in the dollar. Investigations into other recovery actions that may be available to the Company are ongoing, and, in any event, will require external funding.
121. The Liquidators therefore seek the orders outlined in this Application, and to the effect that the proofs of debt of the Former Customers be admitted at 85% of their value, on the basis that the Liquidators have had to make inferences from a representative sample of Former Customers, rather than by considering each and every claim individually, and because the proof of debt regime proposed will mean that each Former Customer need not submit evidence of causation of their respective losses. I believe the proposed approach of an agreed reduction in the value of claims set out in Former Customers' proofs of debt is fair in these circumstances, as this will address any concerns with the sampling process used and avoid the Former Customers, who are largely unsophisticated, from having to substantiate the causal link between the Net Loss they have suffered and the wrongdoing of the Company.
122. The allowance proposed by the Liquidators is not to reflect that Former Customers may not have good claims. As previously stated, I believe that all Former Customers who traded with the Company during the Relevant Period have good claims against the Company for Misleading or Deceptive Conduct Claims, or Unconscionable Conduct Claims. The allowance is merely a concession to reflect the nature of the expedited adjudication process the Liquidators intend to follow, and sampling process followed by the Liquidators.
123. I also believe that the Company's books and records are accurate, and provide a sufficient basis to allow the Liquidators to pre-populate the proofs of debt set out in the originating process with each Former Customers' Net Loss, using the methodology described above. The books and records of the Company were most recently audited by William Buck to 30 June 2020. Annexed to this affidavit and marked "DHW-26" is a

Adriana Costanzo



true copy of the Company's audited general purpose financial statements for FY20 dated 24 December 2020.

124. Former Customers who choose to submit a proof of debt seeking 100% of their Net Loss (or any other loss) are entitled to do so, however, these claims will not be able to be adjudicated in time to be included in any demand made of Invesus.
125. Therefore, notwithstanding the allowance to be applied that will reduce each Former Customers' claims, I consider the orders sought are in the best interests of all creditors of the Company, and in the best interests of the Former Customers. Without these orders, there will be no means by which the claims of Former Customers can be adjudicated in an efficient manner that will allow the Company to make a claim of Invesus, and maximise the value of the Letter of Comfort, which is the most significant asset available to meet the claims of creditors of the Company. The opportunity to use this asset to generate some return for Former Customers will be lost should these orders not be made. The prospect of a discount being applied to the claims of Former Customers was raised with the Committee of Inspection at the meeting on 19 April 2022, and no objections were raised.

#### **G. THIRD PARTY FUNDING**

126. The Liquidators have secured funding from a third-party litigation funder (**Funder**) in order to provide the Liquidators with sufficient funds to bring this application. In order to comply with s 477(2B) of the Act, I convened a meeting of the Committee of Inspection in order to approve the Liquidators entering into the litigation funding agreement (**LFA**). Annexed to this affidavit and marked "**DHW-27**" is a true copy of the notice of meeting dated 14 April 2022.
127. The entry into the LFA was approved by the Committee of Inspection at a meeting held on 19 April 2022. Annexed to this affidavit and marked "**DHW-28**" is a true copy of the minutes of the meeting of the Committee of Inspection held on 19 April 2022.
128. As part of the commercial position agreed between the Liquidators and the Funder in order to procure the offer of funding contained in the LFA, there are three salient points:
  - (a) the Funder is willing to provide funding for advertising to ensure the proposed notices are distributed in newspapers;
  - (b) the Funder may withdraw funding for the claims against Invesus should the responses of Former Customers not provide a sufficient quantum of claims that make the funding commercially viable for the Funder – the present position of the Funder is that the total quantum of claims needs to be at least \$40m to make the funding commercially viable for the Funder; and

*Adriano Costanzo*



- (c) should the Company be successful in obtaining a pay-out from Invesus under the Letter of Comfort (whether voluntarily or by enforcement of a court order), the Funder is entitled to a percentage share of the proceeds realised, which will be paid in priority to any distribution to the Former Customers and creditors.

129. Notwithstanding the priority payment to the Funder (which will ultimately diminish the funds available to be distributed to creditors and the Former Customers), third party funding was the only means available to the Liquidators to ensure they have sufficient funds available to bring this application, adjudicate claims, make the demand of Invesus, and ultimately take necessary steps to enforce the Letter of Comfort if Invesus do not comply with the demand. Although the Funder is taking a portion of the funds realised, without reaching this commercial position, in my view the Liquidators would not have been able to make any claim under the Letter of Comfort and the creditors and Former Customers would not receive any dividend. Without this process, at present, I estimate Former Customers may not receive any dividend from the liquidation of the Company.

Affirmed by the deponent  
at Perth  
in Western Australia  
on 9 May 2022  
Before me:

)  
)  
)  
)  
)



Signature of deponent

Adriana Costanzo  
Signature of witness

Adriana Bianca Costanzo, a solicitor of the Supreme Court of Western Australia

*who has held a practicing certificate for  
at least two years and who holds  
a current practicing certificate.*