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### Details of Filing

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| Document Lodged: | Submissions   |
| File Number:     | NSD1220/2020  |
| File Title:      | AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v<br>MELISSA LOUISE CADDICK & ANOR |
| Registry:        | NEW SOUTH WALES REGISTRY - FEDERAL COURT OF<br>AUSTRALIA                          |



*Sia Lagos*

Dated: 10/12/2020 3:17:28 PM AEDT

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.

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## Australian Securities and Investment Commission

v

Melissa Louise [REDACTED] Caddick & Maliver Pty Ltd

Federal Court of Australia

### ASIC's Submissions in Relation to Urgent Ex Parte Orders

#### A. INTRODUCTION

1. This is an urgent ex parte application by the Australian Securities and Investments Commission (**ASIC**) brought under s.1323 of the *Corporations Act 2001* (Cth) (**the Act**) and/or s.23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) for the making of interim asset preservation orders against each of the defendants; interim orders preventing the first defendant from leaving Australia and for the delivery up of passports; and orders for the provision of certain information from each of the defendants as to their financial circumstances (**interim orders**).
2. ASIC relies upon an affidavit by ASIC Investigator, Ms Isabella Lucy Allen, affirmed on 9 November 2020 (**Ms Allen's affidavit**). Ms Allen's affidavit evidence is extensive and detailed. It is indicative of serious misconduct on the part of the defendants and the very real possibility that there have been a number of contraventions of the Act and other laws in connection with the misappropriation of consumer funds. A large number of documents are exhibited to Ms Allen's affidavit in support of the findings and conclusions contained in Ms Allen's affidavit. Exhibit 1A-1 comprises a lever arch folder of documents ASIC has obtained in the course of the investigation. Exhibits 1A-2 and 1A-3 comprise three lever arch folders of bank statements and other account statements ASIC has obtained in the course the investigation.<sup>1</sup>
3. Additionally, on the basis of the matters set out in a second affidavit of Ms Isabella Lucy Allen affirmed on 9 November 2020 (**Ms Allen's Suppression Affidavit**) ASIC also seeks

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<sup>1</sup> Ms Allen's affidavit at [6]-[8] and the exhibits

interim non-disclosure/suppression orders pursuant to s.37AF of the FCA Act. These matters are briefly addressed below in the final part of these submissions.

4. This application is brought on an urgent ex parte basis without notice to the defendants because ASIC is concerned that if the defendants are advised of ASIC's investigation there may be further appropriation and dissipation of Australian consumer's funds by the defendants.<sup>2</sup>

## **B. THE RELIEF SOUGHT**

5. In its originating process ASIC essentially seeks the following substantive relief:
  - (a) preservation orders under ss1323(1) and (3) of the Act and/or s.23 FCA Act against each of the defendants;
  - (b) orders under s. 1323(1)(h) and (3) of the Act for the appointment of a receiver to the property of the defendants
  - (c) orders under ss1323(1)(j) and (3) of the Act for the delivery up of passports and any international travel tickets;
  - (d) orders under s.1323(1)(k) and 1323(3) of the Act prohibiting the first defendant from leaving Australia without the consent of the Court;
  - (e) orders under s 1323(1) and (3) of the Act and/or s.23 FCA Act for the provision of certain information from each of the defendants as to their financial circumstances.
6. The interim orders sought by ASIC essentially reflect the above relief, save that ASIC is not seeking orders for the appointment of a receiver as part of the interim ex parte application.
7. Before turning to the evidence, it is appropriate to briefly set out the relevant principles.

## **C. THE RELEVANT PRINCIPLES**

8. The application before the court is brought under s. 1323 of the Act. Preconditions for the making of an order under the section are satisfied when<sup>3</sup>:
  - (a) An investigation is being carried out under the ASIC Act or the Act in relation to an act or omission that constitutes or may constitute a contravention of the Act;
  - (b) There is an application made by ASIC or an aggrieved person for one or more of the orders that may be made under that section.

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<sup>2</sup> Ms Allen's affidavit at [11].

<sup>3</sup> See *ASIC v Carey (No 3)* [2006] FCA 433 (*Carey (No 3)*) per French J at [21]

9. Those preconditions are satisfied in this case. There is an investigation being carried out in relation to a number of Suspected Contraventions of the Act and the relevant application has been made by ASIC.
10. Upon an application by ASIC, the Court can make the orders for which the section provides where<sup>4</sup>:
- (a) There is a relevant person who is or who may become liable to pay money whether in respect of a debt, by way of damages or compensation or otherwise, or to account for financial products or other property.
  - (b) The liability is to another person called ‘the aggrieved person’;
  - (c) The Court considers it necessary or desirable to make the orders ‘for the purpose of protecting the interests of the aggrieved person’.
11. Section 1323 contemplates the making of orders in circumstances including where (as here)<sup>5</sup> an investigation is being carried out. That is to say, they can be made before liability is established and indeed before the evidence necessary to establish liability has been collected, if it is necessary and desirable to do so to protect the interests of an aggrieved person. Moreover, there is no requirement on the part of ASIC to demonstrate a prima facie case of liability on the part of the relevant person or that the person’s assets have been or are about to be dissipated.
12. The following extract from French J’s judgment in *ASIC v Carey (No 3)* [2006] FCA 433 at [25]-[27] is instructive (underlining added):
- 25 The orders that can be made under the section are directed, inter alia, to the preservation of assets against which recovery may be sought in the event that liability to an ‘aggrieved person’ is established on the part of a ‘relevant person’. The orders are made in circumstances where ‘an investigation is being carried out’, ‘a prosecution has been begun’ or ‘a civil proceeding has been begun’. That is to say the orders can be made before liability is established and indeed before the evidence necessary to establish liability has been collected. While an application under the section is not interlocutory in an existing criminal or civil proceeding, it is interlocutory in a wider sense. It preserves the status quo and the assets of the relevant person pending the outcome of the investigation, prosecution or civil proceedings which are on foot – *CAC v Lone Star Exploration NL( No 2)* (1988) 14 ACLR 499 at 504. At the stage an order is sought the Court may not be in a position to identify with precision any particular liability owed by the person the subject of the proposed order. This consideration applies to final orders made under the section as well as to interim orders for which it expressly provides in s 1323(3). The final orders made under

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<sup>4</sup> *Carey (No 3)* at [22]

<sup>5</sup> See below submissions at para 29

the section are necessarily of a temporary or holding character rather than finally disposing of the rights and liabilities of the relevant persons affected by them.

26 The circumstances in which the Court may make orders under [s 1323\(1\)](#) are wide as indicated by the words ‘necessary or desirable ... for the purpose of protecting the interests of a person ...’. There is an element of risk assessment and risk management in the judgment the Court is called on to make. It follows, and has been accepted, that there is no requirement on the part of ASIC to demonstrate a prima facie case of liability on the part of the relevant person or that the person’s assets have been or are about to be dissipated – *Corporate Affairs Commission v ASC Timber Pty Ltd* (1989) 7 ACLC 467 at 476 (Powell J); *Australian Securities and Investment Commission v Adler* (2001) 38 ACSR 266 at [7] (Santow J).

27 The nature and duration of orders made under [s 1323\(1\)](#) can be fashioned by the Court to reflect its assessment of any risk of dissipation of the assets of a person under investigation. But their legitimate purposes can go further. The interests of aggrieved persons may be protected not only by orders designed to protect dissipation of assets, but also by orders which create an opportunity for the assets of the person under investigation to be ascertained.

13. Section 1323 does not provide an express indication of the nature of the evidence on which the Court may act in making orders under it. However, the authorities establish that the section does not require concluded findings of fact about liability or whether assets have been dissipated. As stated by French J in *Carey (No 3)* at [30]- [31] (underlining added):

[30] ... For the reasons already canvassed the Court, in making orders under [s 1323](#), engages in a risk assessment and management process. The logic of the section assumes that the Court will not always have before it evidence of the kind that would be necessary and admissible in proceedings to establish definitively the nature and extent of the assets of the persons under investigation and their liability to aggrieved persons. Nor will it necessarily have before it evidence of the kind that would establish definitively that dissipation of assets has occurred or is likely to occur or that flight is imminent.

[31] The logic of [s 1323](#) requires the Court to be able to act on evidence which might not be admissible in civil or criminal proceedings leading to a definitive determination of the rights and liabilities of the parties. Hearsay evidence may therefore be received and acted upon, not as proof of the truth of its content but as evidence of the existence of a risk or possibility that gives rise to the necessity for or desirability of a protective order. It is not necessary, in this context, to consider whether the proceedings are interlocutory for the purposes of the exception to the hearsay rule under [s 75](#) of the *Evidence Act 1995* (Cth) albeit that that exception is no doubt informed by similar considerations. Evidence may be received of the opinion of a suitably qualified person who has had the opportunity to review extensive documentation collected in the course of an investigation and to offer an overview of it for the benefit of the Court. In such a case the opinion or overview should be supported by reference to the relevant documentation and factual material. The opinion is received not for the determination of any ultimate issue of liability but as probative of the risk which the Court must assess in determining whether to make an order under the section.

#### *Asset Preservation/Freezing Orders*

14. The cases provide that orders in the nature of freezing orders can be made once the Court is satisfied that it is necessary or desirable that receivers be appointed to the property of

the relevant person with the purpose of protecting the interests of aggrieved persons against the property of the company or individual to which the receivers are to be appointed. Thus, the grounds for the appointment of a receiver under s.1323(1)(h) of the Act must be made out, and only if made out, then freezing orders restricting or prohibiting dealings with the relevant property may be made instead of the appointment of a receiver.<sup>6</sup>

15. In *ASIC v Ostrava Equities Pty Ltd* [2015] FCA 425 Davies J said at [11] (citing French J in *Carey (No 14)*):

[11] ... As French J in *Australian Securities and Investments Commission v Carey (No 14)* [2007] FCA 310; (2007) 158 FCR 92 explained at [29]-[33], the jurisdiction that the Court exercises when it entertains an application under s.1323 is a jurisdiction defined in part by the remedies available under that section so that the Court does not, under that Section, have the power to make freezing orders against the relevant person in respect of property held by that person. His Honour stated at [33]:

While s 1323 sets out the specific orders which may be made on an application brought under it, it does not, in my opinion, provide an exhaustive code of remedies to the extent that the power to appoint receivers excludes the lesser alternative of orders restricting or prohibiting dealings with the subject property.

Section 23 of the Federal Court of Australia Act does give the Court the power to make a freezing order in lieu of appointing a receiver but the making of the freezing order in lieu of appointing a receiver would be an exercise of power under s 23 of the Federal Court of Australia Act 1976 (Cth) in the exercise of the Court's jurisdiction under s.1323(1)(h) [authorities omitted].

16. In this case, ASIC does seek orders under s.1323(1)(h) in its originating process. Thus, the Court's jurisdiction to make the lesser freezing orders is enlivened.
17. The relevant question is whether grounds for the appointment of a receiver are made out. In *ASIC v Adler* (2001) 38 ACSR 266; [2001] NSWSC 451 (**Adler**), Santow J described such an order as "the most intrusive order that could be made" (at 7[b]). However, his Honour went to add that:

"Appointment of a receiver over a person's assets is in any circumstances an extraordinary step for the court to take, though it may be justified when associated with the allegation of misappropriation of property, particularly, though not necessarily exclusively, fraudulent."

#### *Travel Restriction Orders*

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<sup>6</sup> See *ASIC v Carey (No 14)* (2007) 158 FCR 92; [2007] FCA 310 at [33]-[34]; followed by McDougall J in *ASIC v Krecichwost* [2007] NSWSC 948 at [22]-[39] and by Black J in *In the matter of Courtenay House Capital Trading Group Pty Ltd* [2017] NSWSC 467 at [10]; by Reeves J in *ASIC v CFS Private Wealth Pty Ltd* [2018] FCA 1070. See also *ASIC v Ostrava Equities Pty Ltd* [2015] FCA 425.

18. Section 1323 (j) and (k) provide respectively for orders for the delivery up of passports and other travel documents, and prohibiting the leaving of the jurisdiction without the Court's consent. Section 1323 orders cannot restrict a person's travel within a jurisdiction, although they may prevent a person from leaving the jurisdiction.<sup>7</sup>
19. In *ASIC v Johnston* [2009] FCA 1276<sup>8</sup> Siopis at [10]-[12] identified the following factors as being relevant to an order restricting travel:
- (a) First, the fact that an investigation being carried out cannot be properly or effectively conducted in the absence of a person;
  - (b) Secondly, the importance of the person in the ongoing investigation, the character of the potential offences, the fact that the person has a base overseas and the stage at which the investigation is at;
  - (c) Thirdly, whether there is evidence that by examination of the person (which may be thwarted if the person flees Australia) ASIC is likely to improve the chances of the aggrieved persons retrieving their moneys.

*Provision of Information Orders*

20. When making freezing orders, the Court may make ancillary orders. The most common example of an ancillary order is an order for disclosure of assets.<sup>9</sup>
21. In *ASIC v Kreicichwost* (2007) NSWSC 948, McDougall J said at [49]-[53]:

"49 ASIC sought an order that Mr Byers disclose details of all his assets and liabilities. That order was to be subject to the right to claim privilege against self-incrimination or exposure to a penalty.

50 Mr Ashhurst raised two objections. The first was that such an order is not justified by s1323. I do not accept that submission. If the Court is satisfied that the appointment of a receiver is justified, a disclosure order would be ancillary to, and in aid of the effective implementation of, that appointment. For the reasons that I have given as to the powers that are available through subs(7) once the court decides to make an order under subs(1), the Court could make a disclosure order.

51 The second objection was based on what Mr Ashhurst said was the inadequacy of the protection against self-incrimination: particularly in circumstances where, if that privilege is claimed, ASIC seeks an order that Mr Byers provide full details of the claim in a second, confidential affidavit.

52 Giles JA (with whom Spigelman CJ and McColl JA agreed) pointed to the problems with

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<sup>7</sup> *ASIC v Banovec (No 2)* [2007] NSWSC 961.

<sup>8</sup> See also *ASIC v Ostrava Equities Pty Ltd* [2015] FCA 425 at [18] per Davies J

<sup>9</sup> Freezing Orders Practice Note (GPN-FRZG) at [2.14].

such an order in *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436 at 450 [99] to 452 [104]. In my view, the same considerations apply in this case.

53 The Court has recognised the problem. See Practice Note SC Gen 14 at para 14, and see in particular the provisions of paras 8 and 9 as the draft ex parte freezing order referred to in para 14. In my view, if a disclosure order is to be made, it should reflect the wording of paras 8 and 9."

#### *Urgent Ex Parte Relief*

22. It is accepted that good reasons must be demonstrated for an ex parte order. In dealing with an ex parte application under s.1323 in *ASIC v Suleman Enterprises Pty Ltd* [2001] NSWSC 1079, Young J said at [2]-[3] that there must be good reasons for making an ex parte order such as where:

- (a) " a scam is first discovered and it is necessary to prevent the money that has been received by the defendants from being dissipated immediately"; and
- (b) "to alert the defendants that the axe is about to fall may mean that they have time to disperse."

23. Ex parte orders were recently made in *In the Matter of Courtenay House Group* [2017] NSWSC 467 and *ASIC v Dawson* [2020] FCA 114.

24. In the light of the foregoing principles, it is appropriate to set out the evidence in support of ASIC's application for ex parte interim orders.

## **D. THE EVIDENCE**

### **Evidence as to Background**

25. The following factual background is evident from Ms Allen's affidavit.

26. On 8 September 2020, ASIC commenced an investigation (**the investigation**) pursuant to s.13 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) into suspected contraventions during the period 6 May 2009 and ongoing by Melissa Louise [REDACTED] Caddick (**Ms Caddick** or **first defendant**) and Maliver Pty Ltd Ltd (**Maliver** or **second defendant**).<sup>10</sup> The suspected contraventions, including a number of breaches under the Act, are identified in [13] to [14] of Ms Allen's affidavit (**Suspected Contraventions**) and arise from concerns that Ms Caddick, the sole director and shareholder of Maliver, is falsely holding out that Maliver holds an AFSL and persuading

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<sup>10</sup> Ms Allen's affidavit at [13]



consumers to deposit funds with Maliver for the purposes of investing in shares on their behalf and misappropriating at least some of those funds.

27. As part of the investigation, ASIC has made a number of enquiries including examinations of various ASIC registers, interviewing and obtaining documents from a number of investors, issuing statutory notices, conducting analysis of various bank accounts, obtaining statements from Australian Border Force and the Department of Foreign Affairs, and conducting searches to determine the assets of the defendants.<sup>11</sup>
28. ASIC has not yet made any inquiries of the defendants directly because of the risk of further dissipation of assets of consumer funds if the defendants are alerted to ASIC's investigation. Nor has it made further inquiries of other investors because of concerns that they might alert the defendants to the investigation.<sup>12</sup>
29. Ms Allen has formed the opinion that in order to complete the investigation, ASIC will be required to undertake a number of further tasks, which she identifies in her affidavit<sup>13</sup> and that the time required to do so is 20 weeks.<sup>14</sup>

### **Evidence as to ASIC'S Findings and Concerns**

30. The following findings and concerns from ASIC's investigation are evident from Ms Allen's affidavit.
31. On the basis of ASIC's findings to date in the investigation, Ms Allen is concerned that<sup>15</sup>:
- (a) Maliver is providing unlicensed financial services;
  - (b) Maliver is using the Australian financial services license (AFSL) of [REDACTED] [REDACTED] without authorisation in order to represent to consumers that Maliver is licensed to provide financial services;
  - (c) Maliver and Caddick are representing to consumers that:
    - (i) Maliver opens trading accounts in the names of consumers with Commonwealth Securities Limited (**Commsec**) and other financial services providers;

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<sup>11</sup> Ms Allen's affidavit at [16]

<sup>12</sup> Ms Allen's affidavit at [12]

<sup>13</sup> Ms Allen's affidavit at [253]

<sup>14</sup> Ms Allen's affidavit at [254]

<sup>15</sup> Ms Allen's affidavit at [18]

- (ii) Maliver invests consumer funds via these accounts in shares;
- (iii) Profits are generated through capital growth in shares, together with dividends payments; and
- (iv) Maliver is remunerated for this service by an annual fee calculated at 0.75% of a consumer's total funds under management;

(d) When in fact:

- (i) Consumer monies are co-mingled in bank accounts held in the name of Ms Caddick and Maliver and are not transferred to trading accounts held in the name of individual consumers;
- (ii) Of the money deposited by consumers, not all is ultimately invested in shares. In excess of 0.75%, is being used for Ms Caddick's own benefit or the benefit of other persons, including to make mortgage repayments, payments to other consumers and to purchase jewellery and luxury goods from brands including Canturi, Christian Dior and Chanel;
- (iii) Ms Caddick has provided falsified documents to investors (namely [REDACTED] and [REDACTED]) purporting to be from Commsec (and in the case of [REDACTED] stock transfer administration companies such as Link Market Services Pty Ltd (**Link Market Services**) detailing account numbers which do not in fact exist (for example, a Commsec account in a consumer's name) and transactions that did not occur<sup>16</sup>; and
- (iv) Of those funds that are ultimately invested in shares, it appears that very little profit is generated by either capital growth or dividend payments<sup>17</sup>.

32. On the basis of ASIC's enquiries with Commsec and share registries<sup>18</sup>, Ms Allen believes<sup>19</sup>:

- (a) Ms Caddick did not in fact open CommSec accounts in the names of [REDACTED] or [REDACTED], given CommSec held no records of accounts open in the names of and with details matching [REDACTED];
- (b) The Link Market Services, computershare and BoardRoom documents that Ms Caddick provided to [REDACTED]<sup>20</sup> were falsified, given neither the registries, nor

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<sup>16</sup> As detailed in Ms Allen's affidavit at [48] to [78]

<sup>17</sup> As detailed in Ms Allen's affidavit at [200] to [205]

<sup>18</sup> As detailed in Ms Allen's affidavit at [46] to [77]

<sup>19</sup> Ms Allen's affidavit at [78]

<sup>20</sup> As detailed in Ms Allen's affidavit at [39(n) and 39(o)]

CommSec had any records of holdings at the relevant time in the name of and with details matching [REDACTED];

- (c) The CommSec documents provided to [REDACTED]<sup>21</sup> and [REDACTED]<sup>22</sup> were falsified, given Commsec had no record of holdings at the relevant time in the nature of either [REDACTED] or [REDACTED].

33. ASIC's analysis of various bank accounts<sup>23</sup> indicates that<sup>24</sup>:

- (a) the funds paid by the consumers [REDACTED] and [REDACTED] into the Maliver account were mingled with funds of Maliver and Caddick;
- (b) An analysis of the Maliver NAB Primary Account suggests that around 36 potential consumers deposited in excess of \$3,900,000 into the Maliver NAB Primary Account between 2 January 2018 and 30 June 2020. During the same time \$691,275.49 was transferred to an Amex account in the name of Caddick, \$50,000 into a loan account in the name of Caddick in respect of a property at Edgecliff and further amounts were transferred to other accounts in the name of Caddick. The Caddick Amex account and Caddick Qantas accounts were used to purchase luxury goods and travel;
- (c) Consumer funds were used for purposes unrelated to investment, such as the purchase of luxury goods and payment of Caddick's personal expenses.

34. On the basis of Ms Allen's review of<sup>25</sup>:

- (a) the documentation Ms Caddick provided to the consumers [REDACTED] and [REDACTED]<sup>28</sup>;
- (b) ASIC's inquiries with Computershare, BoardRoom, Link Market Services and CommSec<sup>29</sup>;
- (c) ASIC's interviews with consumers [REDACTED]; and
- (d) ASIC's analysis of Ms Caddick's CommSec trading history;

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<sup>21</sup> As detailed in Ms Allen's affidavit at [39(m), 39(o), 39(q), 40(e), and 40(g)]

<sup>22</sup> As detailed in Ms Allen's affidavit at [42(b) to 42(d)]

<sup>23</sup> Ms Allen's affidavit at [124] to [199]

<sup>24</sup> Ms Allen's affidavit at [255]

<sup>25</sup> Ms Allen's affidavit at [256]

<sup>26</sup> Ms Allen's affidavit at [36]

<sup>27</sup> Ms Allen's affidavit at [39]-[40]

<sup>28</sup> Ms Allen's affidavit at [42]

<sup>29</sup> Ms Allen's affidavit at [48] to [77] and conclusions at [78]

Ms Allen is concerned that Ms Caddick may have sent similarly falsified documentation to other consumers so as to mislead them as to the true position concerning the money they invested with Maliver.<sup>30</sup>

35. Ms Allen is also concerned that other consumers that ASIC has not been able to identify may have future claims against Maliver and Ms Caddick.<sup>31</sup>
36. On the basis of information obtained from the Department of Foreign Affairs and Trade indicating that Ms Caddick holds a current Australian passport with an expiry of 23 May 2028<sup>32</sup> together with information from Australian Border showing that Ms Caddick travelled overseas 25 times between 26 August 2009 and 6 October 2020<sup>33</sup>, together with the fact that Ms Caddick holds a US dollar account<sup>34</sup>, Ms Allen is concerned that Ms Caddick has the capacity and means to travel overseas at short notice.<sup>35</sup> If this was to occur, it will have a serious impact upon the efficiency of the investigation because Ms Allen wishes to examine Ms Caddick pursuant to s.19 of the ASIC Act and Ms Caddick's continued presence during the short to medium terms is essential for the timely and effective execution of the Investigation.<sup>36</sup>
37. Ms Allen has expressed the opinion that the orders sought by ASIC under s. 1323 of the Act are necessary or desirable to protect the interests of current or future consumers (being aggrieved persons within the meaning of s. 1323 of the Act) to whom Caddick and Maliver are liable, or may become liable, to refund money and pay damages or compensation or otherwise arising from the Suspected Contraventions.<sup>37</sup>

## **E. CONSIDERATION OF THE EVIDENCE**

38. At this stage it is necessary for the Court to be satisfied that there is evidence of sufficient weight to justify making the interim orders in the absence of the defendants. The foregoing analysis demonstrates that the evidence discloses the very real possibility that there have

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<sup>30</sup> Ms Allen's affidavit at [256]

<sup>31</sup> Ms Allen's affidavit at [259]

<sup>32</sup> Ms Allen's affidavit at [262]

<sup>33</sup> Ms Allen's affidavit at [263]

<sup>34</sup> Ms Allen's affidavit at [264]

<sup>35</sup> Ms Allen's affidavit at [265]

<sup>36</sup> Ms Allen's affidavit at [265]

<sup>37</sup> Ms Allen's affidavit at [260]

been a number of contraventions by the defendants in connection with the misappropriation of consumer funds.

39. It is respectfully submitted that the Court ought to be satisfied on the evidence as it presently stands that ASIC has demonstrated in conformity with the applicable principles that it is necessary and desirable, within the meaning of s. 1323 of the Act, that the Court make ex parte orders to protect potential consumer claimants (i.e. aggrieved persons) against the defendants in respect of liabilities (including damages and compensation) which may be imposed upon them for contraventions of the Act and other statutes.

#### **F. SUPPRESSION ORDERS**

40. It is appropriate to briefly address the two suppression orders that are sought pursuant to s.37AF of the FCA Act.

41. The first, which is found at prayer 6 of the originating process, seeks an order that is directed to ensuring that ASIC's execution of search warrants on the defendants, which is due to take effect on the morning of Wednesday 11 November 2020<sup>38</sup>, is not undermined. ASIC is concerned that if the defendants were to find out about the search warrants, or any orders obtained by ASIC under s 1323 of the Act prior to the execution of the search warrants, that evidence might be destroyed or assets might be dissipated.<sup>39</sup>

42. In the circumstances, the Court ought to be satisfied that the above suppression order is necessary to prevent prejudice to the proper administration of justice within the terms of s.37AG(1)(a) of the FCA Act.

43. The second suppression order, which is found at prayer 7 of the originating process, is directed to protecting the identities of person who have invested or might have invested with the defendants and their personal information (including bank account details, addresses, dates of birth, which are contained in the exhibits).

44. Ms Allen has provided evidence that she is concerned that unless a suppression order is made in these terms, the investors or potential investors will have their personal financial dealings with the defendants and personal information made public at this early stage of

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<sup>38</sup> Ms Allen's Suppression Affidavit at [10]

<sup>39</sup> Ms Allen's Suppression Affidavit at [12]

ASIC's investigation when many of them have not been spoken with. This may cause them undue embarrassment and distress and would thus prejudice the interests of justice.<sup>40</sup>

45. It is respectfully submitted that it is necessary to make the order to prevent prejudice to the proper administration of justice. Furthermore, there is no interest of justice that would be served by allowing general access to this information at this stage of the investigation.

46. If the Court makes the suppression order sought in paragraph 7 of the originating process, ASIC will provide a redacted copy of the Ms Allen's affidavit and a redacted copy of these submissions to the Court in due course.

### **G. CONCLUSION**

47. It is respectfully submitted that for the foregoing reasons the Court ought to make the ex parte orders set out in ASIC's short minute of order.

Date: 10 November 2020

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<sup>40</sup> Ms Allen's Suppression Affidavit at [8]