



1

Form 59
Rule 29.02(1)

Affidavit

No. NSD 681 of 2021

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

SMBC Leasing and Finance, Inc. Sydney Branch ARBN 602 309 366

Applicant

Forum Enviro (Aust) Pty Ltd ABN 78 607 484 364 and others

Respondents

Affidavit of: **Michael Timpany**
Address: Level 35, Chifley Tower, 2 Chifley Square NSW 2000
Occupation: Director, SMBC Leasing and Finance, Inc. Sydney Branch
Date: 4 July 2022

I, Michael Timpany, Director, Level 35, Chifley Tower, 2 Chifley Square NSW 2000, say on oath:

1. I am employed by the Applicant, SMBC Leasing and Finance, Inc. Sydney Branch (**SMBC L&F**), and my job title is "Director". I am authorised to make this affidavit on behalf of the Applicant.
2. This is the third affidavit I have made in this proceeding. I have previously sworn and in this affidavit make reference to:
 - (a) my first affidavit sworn on 13 July 2021 (**First Timpany Affidavit**) and the documents in the accompanying Exhibit MT1; and
 - (b) my second affidavit sworn on 4 February 2022 (**Second Timpany Affidavit**) and the documents in the accompanying Exhibit MT2.

Filed on behalf of: SMBC Leasing and Finance Inc. Sydney Branch, Applicant
Prepared by: Maria Yiasemides
Law firm (if applicable) Jones Day
Tel (02) 8272 0500 Fax (02) 8272 0599
Email myiasemides@jonesday.com
Address for service Level 41, 88 Phillip Street, Sydney 2000
(include state and postcode)

[Version 3 form approved 02/05/2019]

3. Capitalised terms in this affidavit are as defined in the First Timpany Affidavit and the Second Timpany Affidavit.
4. I have also read the affidavit of Roger Dobson sworn on 13 July 2021 (**Dobson Affidavit**) and its accompanying Exhibit RD1 and make reference to documents within Exhibit RD1 in this affidavit.
5. I swear this affidavit to be true and correct to the best of my own knowledge. Where indicated otherwise, I depose to matters on the basis of information contained in the books and records of SMBC L&F in the belief that the source of my information is true and correct.

The Security Deposit Amounts

6. I refer to the 2018 MRASA and related transactional documents referred to in the First Timpany Affidavit and the Second Timpany Affidavit (and referred to collectively in the Second Timpany Affidavit as the "**2018 Arrangement**").
7. Under the 2018 Arrangement, the 2018 Supplemental Deed (exhibited at ~~pages 166 to 179 of Exhibit RD1~~) sets out, at clause 2.2, a number of further conditions precedent before Flexirent Capital Pty Ltd could offer to sell any receivables to SMBC L&F under the 2018 Arrangement. One of those conditions precedent was the payment, by FEA, of an amount equal to three months of scheduled periodic payments under the Receivable Terms payable by the Lessee in respect of any Receivables purchased (**2018 Security Deposits**).
8. The 2018 Supplemental Deed provides, at clause 5, that if at any time FEA failed to comply with its collection obligations in the Agent Side Letter, then SMBC L&F could recover an amount equal to the difference between the amount of the Collections received by FEA and the amount that SMBC actually received on that account and could withdraw and apply any 2018 Security Deposits to the extent necessary to recover that amount.
9. I also refer to the 2020 MRASA and related transactional documents referred to in the First Timpany Affidavit and the Second Timpany Affidavit (and referred to collectively in the Second Timpany Affidavit as the "**2020 Arrangement**").
10. Under the 2020 Arrangement, the 2020 Supplemental Deed (exhibited at ~~pages 274 to 286 of Exhibit RD1~~) also sets out, at clause 2.2, a number of further conditions precedent before FEA could offer to sell any receivables to SMBC L&F under the 2020 Arrangement. One of those conditions precedent was the payment, by FEA, of an




amount equal to one month of scheduled periodic payments under the Receivable Terms in respect of any Receivables purchased (**2020 Security Deposits**).

11. Both the 2018 Security Deposits and the 2020 Security Deposits were to be made into an account nominated by SMBC L&F (**the Collections Account**).
12. Under the 2020 Supplemental Deed, at clause 4.1, FEA acknowledges that the 2020 Security Deposit Amount is not refundable in any circumstances other than when the Lessee Receivables in relation to which it was provided have been paid and performed in full.
13. Between 2 August 2018 and 21 May 2021, SMBC L&F received from FEA:

**Summarised at MIN
5000.0006.1743
Section 50
Summary of
payments received
from FEA
CBF.II.68 p.F.II.28**

- (a) for the 2018 Security Deposits, funds totalling \$1,503,810; and
- (b) for the 2020 Security Deposits, funds totalling \$1,518,800.

14. ~~Annexed to this affidavit and marked "MT3"~~ are redacted copies of SMBC L&F's bank statements for the Collections Account which identify:

**CBF.II.68 p.F.II.28 Lns 1, 2,
3, 4, 5, 8**

- (a) the amounts received into the Collections Account which SMBC L&F treated to be in respect of the 2018 Security Deposits, highlighted in green, (subject to the matters discussed at paragraphs 16 to 19 below); and

**CBF.II.68 p.F.II.29-31 Lns 30,
32, 35, 41, 43, 48, 52, 54, 56**

- (b) the amounts received into the Collections Account which SMBC L&F treated to be in respect of the 2020 Security Deposits, highlighted in yellow.

15. The 2018 Security Deposits and the 2020 Security Deposits were received into SMBC L&F's Collections Account prior to SMBC L&F authorising each drawdown under either the 2018 Arrangement or the 2020 Arrangement.

16. In each case, with two exceptions, the amounts received into SMBC L&F's Collections Account between 2 August 2018 and 21 May 2021, which are now ~~highlighted in green or yellow in the bank statements at Annexure MT3~~, were comprised entirely funds which SMBC L&F received from FEA and treated as the 2018 Security Deposits (highlighted in green) or the 2020 Security Deposits (highlighted in yellow).

**summarised at
CBF.II.68 p.F.II.28**

17. The exceptions are the two deposits received by SMBC L&F from FEA on 31 August 2018 (see ~~page 2 of MT3~~) of \$153,912.00 and \$177,870.00. With respect to those two deposits from FEA, a proportion of those funds were in respect of receivable payments (or "usage charges") for the two Technology Licence Agreements (purportedly entered into between FEA and Veolia Environmental Services (Australia) Pty Ltd (**Veolia**))

CBF.II.68 p.F.II.28 Lns 3-4

MIN.5000.0006.1727

**Summary of
Fraudulent
Documents**

**CB F.II.66 p.F.II.12 Lns
2-3**

provided to SMBC L&F by Flexirent Capital Pty Ltd on 6 August 2018 (both exhibited to the ~~Dobson Affidavit at pages 195 to 2015 of Exhibit RD1).~~

18. The first Technology Licence Agreement commencing 5 July 2018 required a monthly usage charge from Veolia of \$139,920.00 (see ~~Exhibit RD1 at page 196~~). When SMBC L&F received the payment of \$153,912.00 from FEA on 31 August 2018 (see ~~Annexure MT3 on page 2, Reference Number: DIR116397~~) it treated \$139,920.00 of those funds as attributable to the usage charges due from Veolia under the Technology Licence Agreement commencing 5 July 2018 and the balance, \$13,992.00, as a payment towards the 2018 Security Deposits for the next drawdown under the 2018 Arrangement.

**CB F.II.66 p.F.II.12
Ln 2**

MIN.5000.0006.1743

**Summary of payments
received from FEA**

CB F.II.68 p.F.II.28 Ln 3

The second Technology Licence Agreement commencing 5 August 2018 required a monthly usage charge from Veolia of \$161,700.00 (see ~~Exhibit RD1 at page 206~~). When SMBC L&F received the payment of \$177,870.00 from FEA on 31 August 2018 (see ~~Annexure MT3 on page 2, Reference Number: DIR116398~~) it treated \$161,700.00 of those funds as attributable to the usage charges due from Veolia under the Technology Licence Agreement commencing 5 August 2018 and the balance, \$16,170.00, as a payment towards the 2018 Security Deposits for the next drawdown under the 2018 Arrangement.

MIN.5000.0006.1727

**Section 50 Summary
of Fraudulent
Documents**

CB F.II.66 p.F.II.12 Ln 3

MIN.5000.0006.1743


**Section 50 Summary of
payments received
from FEA**

**CB F.II.68
p.F.II.28 Ln 4**

20. Since the July 2021 discovery of the fraud which it is now alleged was perpetrated by, amongst others, Bill Papas and FEA, SMBC L&F has retained the 2018 Security Deposits and the 2020 Security Deposits.

Sworn by the deponent
at Sydney
in New South Wales
on 4 July 2022
Before me:


Signature of deponent


Signature of witness

Name: Thomas Anthony Haystead

Qualification: Solicitor

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 4/07/2022 2:25:07 PM AEST 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: NSD681/2021
File Title: SMBC LEASING AND FINANCE, INC. ARBN 602 309 366 v FORUM
ENVIRO (AUST) PTY LTD (VOLUNTARY ADMINISTRATORS
APPOINTED) ACN 607 484 364 & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 4/07/2022 2:34:54 PM AEST

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.