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Form 40
UCPR 35.1

AFFIDAVIT OF Peter Salvatore Gandolfo - 15 Oct 2015

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Corporations Registrar's List
Registry	Supreme Court Sydney
Case number	2015/00237028

TITLE OF PROCEEDINGS

First Applicant	J Mazzetti Pty Ltd ATF J Mazetti Pty Limited Staff Superannuation Fund & ORS ACN 006705602
First Respondent	Stephen Ernest Vaughan and Ian Richard Hall in their capacity as Liquidators of BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777
Second Respondent	BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777

FILING DETAILS

Filed for	J Mazzetti Pty Ltd ATF J Mazetti Pty Limited Staff Superannuation Fund & ORS, Applicant 1
Legal representative	John Bamford
Legal representative reference	
Telephone	9241 7977
Your reference	350016

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Affidavit (General) (e-Services), along with any other documents listed below, were filed by the Court.

Affidavit (UCPR 40) (001 Aff (3) P Gandolfo 15.10.15.pdf)

[attach.]

IN THE SUPREME COURT OF NEW SOUTH WALES **No. 2015/00237028**
EQUITY DIVISION
SYDNEY REGISTRY
CORPORATIONS LIST

IN THE MATTER OF BBY LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN: 006 707 777

STEPHEN ERNEST VAUGHAN AND IAN RICHARD HALL in their capacity as liquidators of BBY LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 006 707 777
First Plaintiff

BBY LIMITED (RECEIVERS AND MANAGERS APPOINTED)(IN LIQUIDATION) ACN 006 707 777
Second Plaintiff

J MAZZETTI PTY LTD ACN 006 705 602 as Trustee for J MAZZETTI PTY LIMITED STAFF SUPERANNUATION FUND (and Others)
First Defendants

AFFIDAVIT

On 15 October 2015, I, **PETER SALVATORE GANDOLFO** of Level 13, 636 St Kilda Road, Melbourne 3004, Managing Partner of Partners Legal, Australian legal practitioner, **MAKE OATH AND SAY** as follows:

1. I act on behalf of the First Defendants and have the care and conduct of this matter.
2. I make this further affidavit (my third affidavit in this proceeding) in support of paragraphs 1 to 5 (inclusive) of the First Defendants' Interlocutory Process dated 17 September 2015 and in response to the affidavit of Stephen Ernest Vaughan dated 8 October 2015. I do so by reference to each of the directions proposed in those paragraphs, in turn.
3. Now produced and shown to me and marked "**Exhibit PG-1**" is a bundle of documents referred to by me in this affidavit, numbered consecutively ("**Bundle**").

Filed on behalf of: the First Defendants
Prepared by:
Partners Legal
of Level 13, 636 St Kilda Road
MELBOURNE VIC 3004
by their agents, Bamford Lawyers
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SYDNEY NSW 2000

Tel: (02) 9241 7977
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email: talktpus@bamfordlaw.com
Ref: JGB150061
Attention Mr. Bamford

Proposed Direction No 1

4. The First Defendants oppose the appointment of SEGC as a representative defendant for the persons referred to in my affidavit made on 1 October 2015 as Options Clients (also referred to by Mr Vaughan, and by me below, as ETO Clients) and for Equities Clients. The First Defendants do not oppose SEGC appearing in the proceeding at its own cost, to advance its own interests and/or to assist the Court. However the First Defendants do not regard SEGC's interests as being fully aligned with their own interests, for at least the following reasons.

5. The National Guarantee Fund ("**NGF**") administered by SEGC does not provide protection to clients who trade on ASX derivatives markets (such as Exchange Traded Options, or ETOs), save with certain limited exceptions which appear not to be engaged in the circumstances of this case.

6. The exclusion of derivatives (apart from ASX traded warrants) from the ambit of the NGF is set out in a publication of SEGC known as the NGF Information Handbook. A copy of the NGF Information handbook is at pages 1-10 of the Bundle. At page 5 of the Handbook (Bundle page 6), the following appears:

> ***Claims in relation to exchange traded derivatives***
>
> The provisions of Subdivision 4.3 referred to above in relation to ASX's securities markets do not apply to trading of individual derivatives contracts (other than ASX traded warrants). However, the Fund does provide the following protection to clients of Dealers who trade on the ASX derivatives market.
>
> First, if an Exchange traded option over quoted securities is exercised, the resulting purchase and sale will generally be covered by the contract completion provisions of Subdivision 4.3 discussed above.
>
> Second, if you have entrusted property to a Dealer in the course of dealing in exchange traded options, the Fund provides protection against loss of that property in accordance with the provisions of Subdivision 4.9, also discussed above.
>
> The NGF does not provide protection in relation to futures. The ASX Supplemental Compensation Fund covers claims in relation to money or property entrusted to a participant of ASX in respect of actual or proposed dealings in futures.

7. The exclusion of derivatives is further made clear in another SEGC publication known as the NGF Information Booklet. A copy of the NGF Information Booklet is at pages 1-10 of the Bundle. At page 3 of the NGF Information Booklet (Bundle page 6), reference is made to extracts of the Corporations Regulations which bear upon the claims that can be made on the Fund, in the following terms:

Client Information Booklet

WHAT CLAIMS CAN BE MADE ?

There are four subdivisions of Division 4 of Part 7.5 of the Corporations Regulations which set out the types of claims which you may make on SEGC. In general terms:

Subdivision 4.3	provides for the completion of sales and purchases (and cash compensation for purchases in certain circumstances) of securities transactions entered into by a Dealer on ASX's equities and debt markets where those transactions are required to be reported to ASX by the Dealer.
Subdivision 4.7	provides for compensation for loss that results if a Dealer transfers securities without authority.
Subdivision 4.8	provides for compensation for loss that results if a Dealer wrongly cancels or fails to cancel a certificate of title to securities (though this basis for claiming is unlikely to arise because all securities quoted on ASX have since February 1999 been required by the ASX Listing Rules to be held in uncertificated form).
Subdivision 4.9	provides for compensation for loss that results if a Dealer becomes insolvent and fails to meet its obligations to a person who had previously entrusted property to it.

8. The First Defendants also apprehend that any claim which they (or other clients of BBY) may seek to make on the fund is likely to be met by reliance upon Regulation 7.5.69 of the Corporations regulations, which is in the following terms:

CORPORATIONS REGULATIONS 2001 - REG 7.5.69

No claim in certain other cases

This Subdivision does not, because of a dealer having become insolvent on a particular day, entitle a person to make a claim in respect of property if:

(a) before that day the property had, in due course of the administration of a trust, ceased to be under the sole control of the dealer; or

(b) the SEGC, or the Court, is satisfied that circumstances that materially contributed to the dealer becoming insolvent on that day were due to, or caused directly or indirectly by, an act or omission of the person.

9. By reason of that regulation, any BBY client which would otherwise have a valid claim on the Fund, may be met by an assertion by SEGC that Re. 7.5.59 is engaged. The possibility that Reg.7.5.69 may be engaged is evident from KPMG's report to Creditors of 12 June 2015. At page 50 of that Report (Bundle page 11), KPMG makes preliminary observations about the timing and causes of BBY's insolvency, in the following terms:

Conclusion

We have not sought extensive legal advice on these points, although we have had some discussions with our legal advisors. Our preliminary view is that the events of June 2014 appear highly relevant to the question of whether BBY, and other of the BBY companies as a result, became insolvent at that time or subsequently.

Based on the books, records and other information available to date, our preliminary view is that BBY, and other of the BBY Companies as a result, became insolvent on or around 11 or 12 June 2014 when BBY executed the AQA trade noted above.

If BBY is wound-up by resolution of creditors, a key focus of the liquidators would be further investigating those matters and seeking to commence recovery proceedings against directors and potentially other related parties. Any actions would only be answered if:

- We received legal advice that the claims had a reasonable prospect of success;
- We were satisfied that there was sufficient prospects of recovering funds to make the action a value accretive exercise for creditors (i.e. that the relevant directors or related parties had sufficient means to satisfy a judgement or settlement, including the legal and court costs we would incur in pursuing the action); and
- The committee of inspection was supportive, having had the circumstances (if appointed) disclosed fully to them.

In the event that creditors resolve to place the BBY Companies, or part thereof into liquidation further investigation is required including possibility of lodging a report with ASIC pursuant to s438D.

10. In the event that SEGC was to assert that Reg.7.5.69 is engaged, and that any such assertion was contested by one or more of BBY's former clients (and in particular, any ETO clients), those clients and SEGC would have conflicting interests. It is difficult to predict with confidence whether or not those conflicting interests may explicitly arise in the context of any application to "pool" funds in the Client Segregated Accounts (or CSAs). In my assessment of the issues which are likely to arise on that application, the possibility of such conflict arising cannot be excluded. That is because judicial determination of whether pooling of trust funds should be ordered will require careful examination of the circumstances in which there came to be a deficiency in some of the CSAs. Given that those deficiencies have come to light at a time when BBY has been found to be insolvent, the possibility of a connection between the cause or causes of insolvency, and the cause or causes of deficiency in some CSAs, is evident.

11. I am instructed that, at this stage, none of the First Defendants have made a claim on the Fund.

Proposed Direction No 3

12. The BBY audit packs, referred to in paragraph 23 of Mr Vaughan's affidavit made 8 October 2015, are bundles of documents relating to BBY's daily procedures to ensure its compliance with ASX Clear Rule 4.23. That Rule relates to reconciliation of clients' moneys held in CSAs.

13. At pages 12-13 of the Bundle is a copy of a document obtained by Mr Forte from the records of BBY acquired by APP on the sale of BBY's business (as explained in paragraph 16 of my previous affidavit made on 1 October 2015). That document is described as "Task List: ETO

Clearing". It refers to a "Daily Work Pack" detailing the audit requirements of ASX Rule 4.23, and identifies 42 tasks to be performed each day in order to meet those requirements. Mr Forte informs me and I believe that these "Daily Work Packs" were referred to within BBY as "audit packs". It is these documents which are referred to in Proposed Direction No. 3.

14. Mr Forte further informs me, and I believe, that whilst he was employed at BBY these audit packs were assembled and stored, each working day, in the following way. At the end of each day the documentation comprising the 42 tasks were bundled together with 2 elastic bands and stored in a storage box. I am further informed by Mr Forte that as a contractor of APP, he was permitted by APP to take custody of and inspect those storage boxes (amongst others) in late August 2015, which had been located at the warehouse premises of Grace Information & Records Management at 9 Ashley St, West Footscray 3012. APP holds either the originals or copies of the audit packs for the period 1 May 2015 to 28 June 2015, but with the important exception of Monday, 18 May 2015.

15. I refer to the "Equities/ETO Ledger" identified in paragraph 20 of Mr Vaughan's affidavit made 8 October 2015. He describes that ledger as containing "consolidated details of Equities Clients and ETO Clients who had an entitlement against CSAs as at 15 May 2015". Mr Vaughan does not refer to, or offer to make available, any ledger recording the transactions of ETO clients after 15 May 2015. As a result, the First Defendants do not have access to a ledger (or any other document or information) recording the transactions undertaken by ASX Clear, after the appointment of the present liquidators as administrators of BBY and with their consent, to close out the ETO Clients' then remaining open option positions. I am informed by Mr Forte and believe that those positions were closed out, by transactions undertaken in that manner, on or about 21 and 22 May 2015, and that in many cases this involved ASX Clear making use of some or all of the collateral held by ASX Clear on behalf of ETO Clients. Absent information about those transactions, including information as to the extent to which ASX Clear had resort to ETO Clients' collateral to complete them, ETO Clients are unable to reconcile their individual accounts, and in particular, are unable to determine how much of their collateral should be returned to them.

Proposed Direction No 4

16. In KPMG Report to Creditors 12 June 2015, at section 4.3 (Bundle, page 14) a confirmed amount of $3.4 million was identified as having been received from ASX Clear, following the close out of the open option positions as at 21 and 22 May 2015. The KPMG Report refers to this sum as "the net amount of cash margin held in respect of BBY's client-related derivatives accounts". I am informed by Mr Forte and

believe that this description is consistent with the normal process of returning excess collateral following the closeout of a position for which collateral was held. What is said on this subject by KPMG in the 12 June 2015 report is in the following terms:

> ### 4.3 Estimated position of client pools
>
> The table below shows a summary of client trust obligations and indicated net surpluses or shortfalls in funds based on a comparison between bank balances and respective Dealer Reports for each product.
>
> We understand there are also additional funds from counterparties which are likely to flow to client accounts at some point in the future, however the quantum and allocation of these funds is yet to be determined. These funds relate to:
>
> i) The payment of the net amount of cash margin held in respect of BBY's client-related derivatives accounts which the ASX have confirmed to be $3.4 million (the distribution of these funds however will be subject to the comments made below in relation to "Calculation of entitlements")
>
> ii) Counter party balances of $1.8 million with ABN Clearing House and $1.8 million with ADM Clearing House
>
> It is important to note that, due to the poor state of the financial records, in order to establish a more accurate view of any surplus or shortfall of client monies, further detailed work will be required, potentially including a full reconstruction of the financial accounts.

17. The KPMG Report dated 12 June 2015 suggests (at Bundle, page 15) that, consistently with what was done on the *MF Global* case by the Honourable Justice Black, clients' entitlements should be valued as of the last business day at the time the Administrators were appointed, i.e., 15 May 2015. KPMG made that suggestion in the following terms:

> Calculation of entitlements
>
> The calculation of client entitlements will not be straightforward. Many clients held open derivatives positions at the point in time when administrators were appointed, which have subsequently been closed out or are in the process of being closed out. In the ordinary course, had BBY remained solvent, the entitlement of its clients to funds in CMAs would be affected by the close out of open positions. For example, if a client's position was closed out at a loss, this would generally reduce that client's claim on trust funds by the amount of that loss.
>
> However, in the context of the appointment of administrators, there is an argument to the effect that the entitlement of all clients should be valued as at the time the administrators were appointed, with open positions valued on a mark-to-market basis at that time. Such an approach would disregard the price at which positions may have subsequently been closed out.
>
> We note that many clients have already expressed their opposition to such an approach. However, we note that this was the approach taken in the MFGA Decision, and if clients of BBY wish to propose alternate methods of valuing client entitlements this may ultimately need to be determined by a court.

18. The First Defendants are inclined to agree with that suggestion. However they do not presently hold all of the information which would enable them to calculate their entitlements, as ETO Clients, as at that date. Proposed Direction No. 4 is intended to remedy that situation.

19. In order to calculate the actual monetary entitlement of each of the ETO Clients, it is necessary to have both:

    (a) a list of collateral held by ETO Clients on 15 May 2015; and

    (b) a list of market value of open ETO positions as at 15 May 2015.

    The value of excess collateral should be able to be determined as the difference between the 2 figures above, after adjustment for any position which was closed out on or after 18 May 2015. Only then will the ETO Clients be able to reconcile their entitlements, collectively and individually, against the amount of $3,400,115 received by BBY from ASX Clear as returned collateral (as referred to in paragraph 36(b) of Mr Vaughan's affidavit made 8 October 2015).

20. According to BBY records as of 15 May 2015, now held by APP and provided to me by Mr Forte:

    (a) of BBY's clients, only ETO Clients had collateral (totalling $22,051,208.01) with ASX Clear, as shown in the Daily Financial Statement (Bundle, page 16);

    (b) that collateral was broken down individually in the Client Ledger Trial Balance (Bundle pages 17-25), which contains a reconciliation showing that all collateral is held individually at the client level.

21. There is no reference in Mr Vaughan's affidavit to the close out date or costs involved in the close out of the options, or any other fees and charges incurred. I believe that this information is available to KPMG, by reason of the statement issued by the ASX on 5 June 2015 (Bundle pages 34-35) which said, amongst other things, that:

> "*ASX provided the external administrators with a complete reconciliation of the default close out* [i.e. a close out initiated by ASX] *of BBY positions. The provision of this information to the external administrators will assist them in finalising the books and records of BBY including client account records.*"

22. On 5 June 2015 ASX Clear further announced (Bundle, pages 34-35) that ASX Clear is "*ready to transfer surplus funds*" because it is "*accountable for the surplus funds*". The announcement relevantly stated:

"The information provided by ASX Clear today includes details of the surplus funds held by ASX Clear in respect of BBY's client-related derivative accounts, and associated collateral for those accounts, at the completion of ASX Clear's close-out and reconciliation processes.

Those surplus funds comprise:

1. remaining cash margin in respect of each client-related derivative account taking into account payments and receipts resulting from close-out of the open positions in the account;
2. unutilised proceeds of ASX Clear's realisation of collateral lodged as security for BBY's obligations in respect of each client-related derivative account.

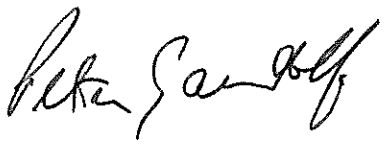
ASX Clear is ready to transfer surplus funds described in 1 above to BBY's client trust account and intends to do so on Tuesday, 9 June 2015.

ASX Clear is accountable for the surplus funds described in 2 above directly to the persons who were the registered holders of the collateral. ASX Clear does not hold bank account details for those persons and has initiated discussions with the Administrators regarding the process for return of those funds. Further information on this process will be provided as soon as it is available.

ASX Clear also intends to release from its control collateral lodged as security for BBY's obligations on its client-related derivative accounts which was not realised by ASX Clear following BBY's default, on Tuesday, 9 June 2015.

23. As there has not yet been any accounting to the ETO Clients of the information contained in BBY's records and/or provided to the liquidators by ASX and ASX Clear, a direction by the Court to that effect is now sought.

24. The ETO Clients require this information in order to seek detailed substantive orders from the Court for the return of their individual collateral. The statements by ASX and ASX Clear referred to above are consistent with Rule 10.3.4(b) of ASX Clear Rules), which requires these sums to be paid to the ETO Clients. I am informed by Mr Forte and I believe that for the money to have been released by ASX Clear to the Liquidators, the Liquidators must have supplied ASX Clear a letter confirming that they would adhere to both parts (a) and (b) of that Rule. The Rule is in the following terms:



10.3.4	Insolvency of Participant

If a Participant becomes insolvent, ASX Clear will not apply or set off any amount of Cash Cover recorded under Rule 10.2.2 in respect of a Client Account or Excess Cash recorded in respect of Client Accounts under Rule 10.2.4 in or towards payment or satisfaction of the Participant's obligations to ASX Clear in respect of Derivatives CCP Contracts registered in any House Account or Cash CCP Transaction registered in any Cash Market Account provided that (and only to the extent that) the liquidator confirms in writing to ASX Clear that:

(a) the liquidator will deposit that amount in the account maintained by the Participant under Rule 4.1.1(c)(ii) for the holding of Client money, if ASX Clear pays that amount to the Participant; and

(b) the liquidator will either distribute that amount to Clients of the Participant or apply that amount to discharge liabilities of the same amount that Clients owe to the Participant.

Nothing in this Rule 10.3.4 affects the operation of Rule 10.3.1 or creates any proprietary right or interest in any Cash Cover or Excess Cash in favour of the Participant or its Clients.

Introduced 11/03/04 Origin OCH 4.2.4 Amended 07/06/13

Proposed Direction No 5

25. It is acknowledged by Mr Vaughan in his affidavit made 8 October 2015 that moneys in the amount of $2,410,066.47 were withdrawn from the bank accounts of ETO clients (albeit that he deposes that this occurred automatically, and not by any action instigated the Liquidators). However, even though Mr Vaughan deposes that this "*occurred under the control of the receivers*", the funds are now in the hands of the Liquidators, as appears from paragraph 30 of the same affidavit.

26. Whilst this automatic process occurred on 19 May 2015, it did not re-occur thereafter. The stopping of the automatic process indicates, the ETO Clients will contend, that the withdrawals were an error which has yet to be rectified by the Liquidators. This is consistent with the request made by the Receivers to ASIC in their letter dated 7 August 2015 (Bundle pages 40-41) whereby they request return of these funds to the ETO Clients, which request was declined by Mr Vaughan in his letter to the Receivers dated 13 August 2015 (Bundle pages 42-43).

27. Pursuant to Corporations Regulations 2001, Reg 7.8.03(6) (being the regulation being relied upon by Mr Vaughan in his affidavit dated 2 October 2015 at paragraph 9 to resist returning these payments), the ETO Clients contend that the Liquidators are obliged to summarily pay the sum of $2,410,066.47 to the ETO Clients as it was paid

into the BBY segregated account in error.

> **"Reg. 7.8.03(6):**
>
> Money in the account of the financial services licensee maintained for section 981B of the Act is to be paid as follows:
>
> (a) the first payment is of money that has been paid into the account in error;"

28. The ETO Clients require information as to these erroneous withdrawals in order to seek detailed substantive orders from the Court for their return to each affected client. Mr Vaughan has identified a report showing the amounts withdrawn from the ETO clients' bank accounts making up the $2,410,066.47. However he does not say (and in order to seek detailed orders for the disgorgement of these funds the ETO clients need to know) where those amounts were deposited. Specifically, the ETO Clients seek information as to the bank, branch, account number and name of the account into which those funds were transferred (and similar details of the account in which they are now held, if different), as well as information as to whether those funds were paid into a separate account or whether they are mixed with any other (and if so, what) funds.

Signature of deponent 

Name of witness

Address of witness CHRISTIAN LANGTRY CHENU
636 St. Kilda Road, Melbourne 3004
An Australian Legal Practitioner
within the meaning of the Legal
Profession Uniform Law (Victoria).

Capacity of witness

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

1. I saw the face of the deponent.

2. I have known the deponent for over five years.

Signature of witness