

AFFIDAVIT OF ANDREW SALLWAY 20 MAY 2021

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	General
Registry	Sydney
Case number	2019/377096

TITLE OF PROCEEDINGS

Plaintiff	Andrew Sallway and Helen Newman in their capacity as liquidators of MB Australia Pty Ltd (In Liquidation) ACN 115 512 993
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FILING DETAILS

Filed for	Andrew Sallway and Helen Newman in their capacity as liquidators of MB Australia Pty Ltd (In Liquidation) ACN 115 512 993, plaintiff
Legal representative	Scott Harris, Hogan Lovells
Legal representative reference	755814.000002
Contact name and telephone	Scott Harris, +61 2 9093 3500
Contact email	scott.harris@hoganlovells.com



AFFIDAVIT

Name Andrew Sallway
 Address Level 11, 1 Margaret Street, Sydney NSW 2000
 Occupation Liquidator
 Date 20 May 2021

I affirm:

1. I am a registered liquidator and a partner of BDO Business Restructuring Pty Ltd ("**BDO**"). I am a member of Chartered Accountants Australia & New Zealand, the Australian Restructuring Insolvency & Turnaround Association and INSOL International. I have more than 20 years' experience as an insolvency practitioner. In my time as a registered liquidator, I have acted on numerous voluntary administrations, receiverships and liquidations across several industries.
2. I am a joint and several liquidator of MBA Australia Pty Ltd (In Liquidation) ("**MBA**"), together with Helen Newman (together "**Liquidators**").
3. I make this affidavit in support of the interlocutory process filed by the Liquidators in this proceeding seeking a determination, pursuant to sections 60-5 and 60-10 of Schedule 2 (*Insolvency Practice Schedule (Corporations)* ("**IPS**")) of the *Corporations Act 2001* (Cth) ("**Corporations Act**"), for the remuneration that the Liquidators have incurred for necessary work properly performed in relation to the liquidation of MBA during the period from 1 July 2020 to 31 December 2020 (the "**Remuneration Claim Period**") in the sum of \$93,619.00 plus GST ("**Remuneration Claim Amount**").
4. I make this affidavit from my own knowledge except where otherwise stated. Where I refer to matters of information, I believe the information to be true.
5. Shown to me at the time of swearing this affidavit is a paginated bundle of documents marked "**Exhibit AS-2**" and a paginated bundle of documents marked "**Confidential Exhibit AS-3**". References by me to page numbers throughout this affidavit are references to pages in Exhibit AS-2, unless otherwise expressly referred to as references to pages in Confidential Exhibit AS-3.
6. I refer to Exhibit AS-2 and note:
 - (a) at pages **3 to 4** is an index of the documents comprising Exhibit AS-2; and



- (b) at pages 401 to 406 and pages 409 to 414 are two redacted documents, being the two documents defined in paragraphs 71(a) and 72 respectively of this affidavit as "Schedule A" and "Detailed Summary by Staff Member Spreadsheet" ("**Redacted Documents**"). The Redacted Documents have been redacted to remove information which refers to confidential and legally privileged communications and documents (I refer to the basis of the redactions at paragraph 74 of this affidavit).
7. Confidential Exhibit AS-3 comprises unredacted copies of the Redacted Documents, namely Schedule A (at pages 3 to 7 of Confidential Exhibit AS-3) and the Detailed Summary by Staff Member Spreadsheet (at pages 8 to 13 of Confidential Exhibit AS-3). To the extent that the documents in Confidential Exhibit AS-3 make reference to legal advice being sought and obtained by the Liquidators during the course of the Remuneration Claim Period, or documents created for the sole or dominant purpose of pending or existing litigation, I do not intend to waive the Liquidators' client legal privilege which attaches to those documents or references contained therein, which client legal privilege I continue to assert over those documents. I also do not waive any claim for confidentiality by disclosing the documents.
8. Further, in this affidavit generally, I make various references to legal advice being sought and obtained by the Liquidators during the course of the Remuneration Claim Period. This has been done to enable the Court to understand the nature, scope and extent of the work performed by the Liquidators during the Remuneration Claim Period. I do not intend to waive the Liquidators' client legal privilege which attaches to any relevant communications or documents, which client legal privilege I continue to assert over those communications. I also do not waive any claim for confidentiality by disclosing the documents.

MBA

Operations of the Company

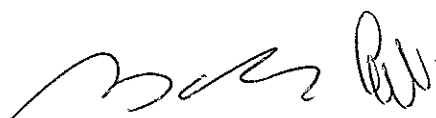
9. MBA operated chocolate cafés that traded as "Max Brenner" from leased premises across Australia pursuant to a license to use the "Max Brenner" brand given by Strauss Group Limited, a company registered in Israel, and subsequently by its assignee, Max Brenner Industries Ltd, a company registered in Israel. As at the date of the appointment of administrators to MBA (the details of which are included at paragraph 12 of this affidavit), MBA:
- (a) operated 37 Max Brenner stores; and



- (b) managed its operations from its head office located at 15-21 Doody Street Alexandria (the "**Doody Street Property**").
10. From 30 March 2012 to 5 December 2017, MBA was the registered proprietor of the Doody Street Property. On 5 December 2017, pursuant to the transactions referred to in paragraphs 26 to 33 of this affidavit, MBA transferred the Doody Street Property to Citadel Group Properties Pty Ltd as trustee for the Citadel Group Properties Unit Trust ("**Citadel**"). A historical search of the records maintained by NSW Land Registry Services in respect of the Doody Street Property is at pages **6 to 8**.
11. MBA was controlled and ultimately owned by Tamir Haikin and Lilach Haikin. In particular:
- (a) the directors of MBA are Tamir Haikin and Lilach Haikin ("**Directors**"). An extract of a search of the records maintained by the Australian Securities and Investments Commission ("**ASIC**") in respect of MBA dated 18 May 2021 is at pages **7 to 30** ("**ASIC Search**"); and
- (b) the sole shareholder of MBA is MB Australia 2000 Pty Ltd ("**MB Australia 2000**") (see the ASIC Search at pages **9**). The Directors each own 50% of the shares in MB Australia 2000. An extract of a search of the records maintained by ASIC in respect of MB Australia 2000 dated 18 May 2021 is at pages **31 to 42**.

Liquidation of MBA

12. Helen Newman, Nicholas Martin and I were appointed as liquidators of MBA by orders made on 17 October 2018 ("**Liquidators' Date of Appointment**") by the Honourable Justice Dalton in the Supreme Court of Queensland ("**Orders**"). A copy of the Orders is at page **43** and a copy of her Honour's judgment is at pages **45 to 50** ("**Judgment**").
13. Prior to the appointment of the Liquidators, on 30 September 2018, the directors of MBA resolved that Barry Kogan, Kathy Sozou and Jason Preston of McGrath Nicol be appointed as voluntary administrators of MBA ("**Administrators**") (I refer to the ASIC Search at pages **14** and **28**). The appointment of the Administrators ceased on 17 October 2018 when the Supreme Court of Queensland dismissed an application by the Administrators to adjourn a winding up application in respect of MBA and made the Orders (I refer to the Orders at page **43**).
14. On 4 August 2020, Nicholas Martin ceased to act as liquidator of MBA (I refer to the ASIC Search at page 10 and the ASIC Form 505 dated 10 August 2020 at page 51).



15. On 19 October 2018, Peter Gothard and Stephen Parbery were appointed as receivers and managers of certain assets of MBA by Wentworth Capital Group Pty Ltd ("**Wentworth**") (I refer to the ASIC Search at page **14**).
16. On 17 April 2020, Peter Gothard and Stephen Parbery ceased to act as receivers and managers of those assets of MBA (I refer to the ASIC Search at page **10**).

Liquidators' ongoing investigations and recovery action

Background Investigations

17. As referred to in paragraph 10 of this affidavit and pursuant to the transactions referred to in more detail in paragraphs 26 to 33 of this affidavit, MBA transferred its interest in the Doody Street Property to Citadel on 5 November 2017 for consideration of \$40,000,000 ("**Doody Street Property Transfer**").
18. In the Judgment, the Honourable Justice Dalton indicated that a reason for denying the Administrators' application to adjourn the winding up application and making the Orders was the need for the circumstances giving rise to the Doody Street Property Transfer, at a potential undervalue of \$20,000,000, to be properly investigated by a liquidator. I refer to paragraph 50 of the Judgment at page **48**.
19. During the course of the liquidation to date (and including during the Remuneration Claim Period), I have therefore spent a significant amount of time reviewing and investigating the transactions that gave rise to the Doody Street Property Transfer, and considering and seeking legal advice in respect of the courses of action that may be available to the Liquidators and/or MBA in respect of the relevant transactions.
20. Based on my investigations, I also formed the view that the Liquidators should undertake investigations in relation to at least the following affairs of MBA:
 - (a) potential claims for insolvent trading against the Directors;
 - (b) the rights of action available to the Liquidators for the benefit of creditors, such as, for instance, those in relation to potential voidable transactions for unfair preference payments, uncommercial transactions and unreasonable director related transactions, including (without limitation) in relation to the Doody Street Property Transfer; and
 - (c) the conduct of the Directors in the context of their director duties.
21. On 28 November 2019, the Liquidators made an application to this Court for:



- (a) orders for production of documents pursuant to section 68 of the *Civil Procedure Act 2005* (NSW) ("**Orders for Production**"); and
 - (b) orders for the issue of summonses for public examinations pursuant to ss 596A and 596B of the Corporations Act ("**Summonses for Examination**").
22. On 5 December 2019, this Court made orders issuing the Orders for Production and Summonses for Examination.
23. The Orders for Production and Summonses for Examination in this proceeding were necessary in order to assist the Liquidators conduct these investigations. Public examinations were conducted in March and April of 2020 ("**Public Examinations**") pursuant to the Summonses for Examination.
24. Certain parties were still producing documents pursuant to the Orders for Production in late May 2020, nearly six months after the Orders for Production were issued.

Doody Street Property

25. As noted in paragraph 19 above, a significant aspect of my investigations to date has been the transfer by MBA of its most valuable asset, the Doody Street Property, to Citadel for consideration of \$40,000,000. I summarise the circumstances in which the Doody Street Property Transfer occurred according to my investigations to date in paragraphs 26 to 33 of this affidavit.
26. In or about July 2016, MBA borrowed \$3,000,000 ("**RSFH \$3m Loan**") from RS Family Holdings Pty Ltd as trustee for the Ruth Simon Family Trust ("**RSFH**"). The RSFH \$3m Loan was repayable in full on 3 January 2017.
27. As at March 2017:
- (a) the Doody Street Property was valued at \$62,000,000 by Urbis on the instructions of Mr Haikin, one of the directors of MBA. I refer to an extract of this valuation at pages **53 to 64**; and
 - (b) National Australia Bank Limited had from time to time advanced in excess of \$40,000,000 to MBA (which was secured by a mortgage registered on the title to the Doody Street Property).
28. On or about 6 March 2017:
- (a) MBA, Mr Haikin and Ms Haikin borrowed \$800,000 ("**Wentworth \$800K Loan**") from Wentworth;



- (b) MBA granted a call option to Zajasam Pty Ltd as trustee for The Take Two Trust ("**Zajasam**") and RSFH or their nominees, to purchase the Doody Street Property for \$40,000,000 ("**March 2017 Call Option**"). The March 2017 Call Option included an undertaking that, if the March 2017 Call Option was exercised, the parties would enter into a further put and call option for MBA to repurchase the Doody Street Property or the purchaser to put the Doody Street Property to MBA; and
 - (c) MBA and other related parties granted a general security deed in favour of Wentworth ("**Wentworth GSD**"), which secured, inter alia, all moneys and amounts that MBA or certain related parties of MBA might become liable for at any time to Wentworth or Citadel Group Holdings Pty Ltd as trustee for Citadel Group Holdings Unit Trust (which is the sole shareholder of Citadel) ("**Citadel Holdings**").
29. On 23 March 2017, MBA and other related parties granted a further general security deed in favour of RSFH and Zajasam, which secured, inter alia, all moneys and amounts that MBA or certain related parties of MBA might become liable for at any time to Zajasam or RSFH, and the performance of the obligations of those parties under the March 2017 Call Option and any sale and put and call option exercised pursuant to the terms of the March 2017 Call Option.
30. In the period from 6 March 2017 to 24 November 2017:
- (a) there were multiple documented amendments and extensions to the March 2017 Call Option; and
 - (b) Urbis prepared two further valuation reports on the instructions of Mr Haikin which valued the Doody Street Property for mortgage purposes at \$60,000,000 as at 27 June 2017 and at \$60,000,000 again as at 28 September 2017. Extracts of the 27 June 2017 and 28 September 2017 valuations are at pages 65 and 77 respectively.
31. On or shortly after 24 November 2017:
- (a) the March 2017 Call Option was exercised, and Citadel purchased the Doody Street Property for consideration of \$40,000,000 by a contract for sale of land dated 24 November 2017 ("**Land Sale Agreement**"), notwithstanding the earlier valuations at or over \$60,000,000;

A handwritten signature in black ink, appearing to be 'MBA' followed by a flourish and the initials 'RW'.

- (b) Citadel, MBA and other related parties entered into a put and call option for MBA to acquire the shares in Citadel (which would own the Doody Street Property on completion of the Land Sale Agreement) or for Citadel Holdings to put the shares in Citadel to MBA ("**November 2017 Put and Call Option**");
 - (c) MBA and other related parties granted a general security deed in favour of Citadel and Citadel Holdings, which secured, inter alia, all moneys and amounts that MBA or certain related parties of MBA might become liable for at any time to Citadel or Citadel Holdings, and the performance of the obligations of those parties under the March 2017 Call Option, the Land Sale Agreement, the November 2017 Put and Call Option, and any sale agreement entered into pursuant to the terms of the November 2017 Put and Call Option; and
 - (d) Wentworth lent a further \$8,000,000 to MBA, Mr Haikin and Ms Haikin pursuant to an amendment and restatement of the Wentworth \$800K Loan.
32. MBA did not exercise the call option under the November 2017 Put and Call Option, and I believe that the November 2017 Put and Call Option terminated immediately upon entry into the deed based on the terms of the deed.
33. Completion of the transaction contemplated by the Land Sale Agreement completed on or around 5 December 2017 when MBA transferred the Doody Street Property to Citadel for consideration of \$40,000,000.

Caveat and Lapsing Notice

34. On 29 November 2019, in order to protect the interests that the creditors of MBA may have in the Doody Street Property as a result of the potential claims I have identified through my investigations to date, I caused a caveat to be lodged on the title of the Doody Street Property ("**Caveat**") pursuant to the *Real Property Act 1900* (NSW) ("**RPA**"). A copy of the Caveat is at page **89**.
35. Between 16 December 2019 and 14 September 2020, I (through my solicitors, Hogan Lovells) engaged in communications with Citadel (through its solicitors, Arnold Bloch Leibler, ("**ABL**") in relation to Citadel's request to remove the Caveat and certain issues attaching to its registration against the title to the Doody Street Property.
36. On 2 November 2020, the Liquidators were served with a lapsing notice ("**Lapsing Notice**") in relation to the Caveat by Citadel pursuant to section 74J of the RPA. A copy of the Lapsing Notice is at page **93 to 94**.



37. On 18 November 2020, the Liquidators commenced proceeding 328334 of 2020 in the Supreme Court of NSW to seek orders extending the operation of the Caveat pursuant to section 74K of the RPA ("**Doody Street Property Proceeding**").
38. On 20 November 2020 and 2 December 2020, the Court granted orders extending the operation of the Caveat ("**Interim Extension Orders**") until 8 December 2020 and 14 December 2020 respectively. The Interim Extension Orders were subsequently lodged with the Registrar General. Copies of the Interim Extension Orders are at page **96** and **99**.
39. Following service of the Lapsing Notice, I (through Hogan Lovells) continued to engage in communications with Citadel (through ABL). As a result of those further discussions, the Liquidators agreed to allow the Caveat to lapse on the basis that Citadel made certain undertakings to the Supreme Court of NSW in relation to a transfer/sale or refinance of the Doody Street Property and dealing with any proceeds of any transfer/sale. Citadel gave those undertakings on 14 December 2020 ("**Undertakings**"), a copy of which is at page **101**.
40. On 14 December 2020, the Supreme Court of NSW also ordered, by consent, that the Doody Street Property Proceeding be transferred to the Commercial List and that the Liquidators file and serve a commercial list statement in relation to the final relief sought with respect to the Doody Street Property. A copy of those orders is at page **101 to 103**. Since 31 December 2021, the Doody Street Property Proceeding has progressed.

Key focus during the Remuneration Claim Period

41. Further to the issues referred to above, the key focusses of the liquidation during the Remuneration Claim Period have been as follows:
- (a) continuing the Liquidators' investigations into the transactions giving rise to the Doody Street Property Transfer, which has included:
- (i) continuing to review MBA's books and records;
 - (ii) reviewing the documents produced pursuant to the Orders for Production;
 - (iii) reviewing the information obtained pursuant to the Public Examinations;
 - (iv) considering documents relevant to the valuation of the Doody Street Property; and



- (v) seeking detailed legal advice in relation to the potential causes of action available to the Liquidators and/or MBA in relation to the Doody Street Property Transfer;
 - (b) seeking to preserve the interests that creditors of MBA may have in the Doody Street Property as a result of the potential claims I have identified through my investigations to date, which has included:
 - (i) engaging in extensive correspondence with Citadel's advisers regarding the Caveat;
 - (ii) considering and taking detailed legal advice in relation to the Lapsing Notice, the consequences and effect of the same, and the options available to the Liquidators in responding to and dealing with the Lapsing Notice; and
 - (iii) considering and taking detailed legal advice in relation to an application to extend of the operation of the Caveat and commencing the Doody Street Property Proceeding;
 - (c) engaging in extensive correspondence with Citadel's advisers regarding a negotiated consensual lapsing of the Caveat, including negotiating and agreeing the terms of the Undertakings;
 - (d) further to orders made by the Court on 14 December 2020, considering and seeking advice in relation to filing a commercial list statement in the Doody Street Property Proceeding; and
 - (e) engaging with the Commonwealth of Australia (acting through the Attorney-General's Department) ("**Attorney-General's Department**") pursuant to an agreement between the Attorney-General's Department, MBA and the Liquidators to indemnify the Liquidators and MBA for certain agreed work in the liquidation ("**Funding Agreement**") in relation to all such issues (as referred to further in paragraph 66 of this affidavit) and preparing monthly progress reports for the Attorney-General's Department.
42. Additional, more general issues that have been addressed in the liquidation during the Remuneration Claim Period include:
- (a) attending to on-going creditor, employee and third party enquiries;




- (b) liaising with MBA's pre-appointment superannuation fund in relation to reconciliation of employer contributions;
- (c) reviewing and attending to proofs of debt, including sending invitations to, and receiving and reviewing proofs of debt;
- (d) preparing update reports to creditors, including reports dated:
 - (i) 26 August 2020, by which I updated creditors on investigations, payments to employees and other developments in the liquidation (a copy of which is at pages **105 to 140**);
 - (ii) 23 December 2020, by which I updated creditors on investigations, the Caveat, the Lapsing Notice, the Undertakings, the funding of those additional work items by the Attorney-General's Department pursuant to amendments to the Funding Agreement and other developments and work undertaken in the liquidation (a copy of which is at pages **141 to 143**); and
 - (iii) 14 January 2021, by which I updated creditors on investigations and other developments in the liquidation, and gave notice to creditors of a meeting (see paragraph 49 of this affidavit) (a copy of which is at pages **145 to 191**). The preparation of this report largely took place during the Remuneration Claim Period; and
- (e) other reporting to ASIC and the ATO.

43. A detailed narrative of the work undertaken during the Remuneration Claim Period is set out in paragraph 68 of this affidavit.

Previous remuneration determinations by creditors

44. The Liquidators have previously sought the approval of creditors to the Liquidators' remuneration at various meetings of creditors convened throughout the liquidation. In particular, in respect of the period up to 30 June 2020:

- (a) on 14 November 2018 the Liquidators issued a report to creditors (a copy of which is at pages **193 to 243**) in which we gave notice of a meeting to be held on 30 November 2018, at which creditors would be asked to consider resolutions approving the Liquidators' remuneration:



- (i) for the period from 17 October 2018 to 11 November 2018 in the amount of \$226,741.25 (excluding GST and disbursements); and
 - (ii) for the period from 12 November 2018 to 17 January 2019 in the amount of \$75,000 (excluding GST and disbursements);
- (b) On 17 January 2019 the Liquidators issued a report to creditors (a copy of which is at pages **245 to 304**) in which we gave notice of a meeting to be held on 4 February 2019, at which creditors would be asked to consider resolutions approving the Liquidators' remuneration:
- (i) for the period from 12 November 2018 to 17 January 2019 in an additional amount of \$40,343 (excluding GST and disbursements) (in addition to the remuneration referred to in subparagraph (a)(ii) above); and
 - (ii) for the period from 18 January 2019 to 30 June 2019 in the amount of \$50,000 (excluding GST and disbursements);
- (c) On 4 September 2019, the Liquidators issued a report to creditors (a copy of which is at pages **305 to 389**) in which we gave notice of a meeting to be held on 19 September 2019, at which creditors would be asked to consider resolutions approving the Liquidators' remuneration:
- (i) for the period 17 January 2019 to 30 June 2019 in the amount of \$115,920.50 (excluding GST and disbursements) (in addition to the remuneration referred to in subparagraph (b)(ii) above);
 - (ii) for the period 1 July 2019 to 31 July 2019 in the amount of \$9,297.50 (excluding GST and disbursements); and
 - (iii) for the period 1 August 2019 to 30 June 2020 in the amount of \$250,000 (excluding GST and disbursements).
45. Each of those resolutions was approved by creditors at the relevant meeting of creditors.
46. To date, creditors have approved the Liquidators' total remuneration during the period from the Liquidators' Date of Appointment to 30 June 2020 in the amount of \$767,302.25 plus GST. As referred to in paragraph 7 of the January 2021 Report to Creditors (defined in paragraph 49 of this affidavit, and which appears at pages **145 to 191**), an amount of \$331,119.75 (excluding GST) out of the Liquidators' total remuneration was paid pursuant to an indemnity given to the Liquidators by Max




Brenner Australia Pty Limited (formerly known as Opera Developments Pty Ltd, formerly known as MB Chocolate Pty Ltd) ("**Opera**") in connection with the on-going trading of the Max Brenner business during the liquidation.

47. Creditors of MBA approved the entry into of the Funding Agreement for the purposes of section 477(2B) of the Corporations Act at the meeting of creditors held on 19 September 2019 (as referred to in the creditors' report dated 4 September 2019 at pages **305 and 389**).

Remuneration determination sought in relation to the Remuneration Claim Period

48. Pursuant to section 60-10(c) of the IPS, I respectfully seek a determination of the Court approving the costs incurred in respect of necessary work properly performed by BDO (the Liquidators' firm) during the Remuneration Claim Period for the Remuneration Claim Amount.
49. On 14 January 2021, the Liquidators issued a report to the creditors of MBA ("**January 2021 Report to Creditors**"). The January 2021 Report to Creditors provided notice that the Liquidators would be seeking approval of their remuneration during an upcoming meeting of creditors on 29 January 2021. The January 2021 Report to Creditors attached a copy of a remuneration request approval report ("**Remuneration Request Approval Report**") for the consideration of the creditors in the sum of \$94,866.50 (exclusive of GST and disbursements). At pages **145 to 191** is a copy of the January 2021 Report to Creditors and at pages **176 to 188** is a copy of the Remuneration Request Approval Report enclosed within it.
50. On 29 January 2021, the Liquidators held a meeting of the creditors of MBA ("**January Meeting of Creditors**"). A copy of the minutes of meeting of the January Meeting of Creditors is at pages **379 to 389**.
51. During the January Meeting of Creditors, I tabled resolutions for the approval of the Liquidators' remuneration as follows:
- (a) the remuneration of the Liquidators for the Remuneration Claim Period on a time basis, fixed in the amount of \$94,886.50 and exclusive of disbursements ("**Resolution 1**"); and
 - (b) the anticipated future remuneration of the Liquidators for the period from 1 January 2021 to 31 December 2021, on a time basis in the amount of \$250,000 exclusive of GST and disbursements calculated in accordance with the hourly



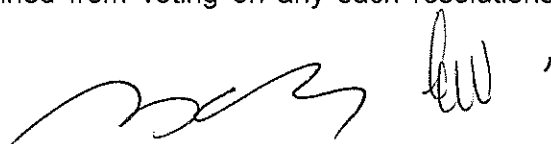
rates prescribed by BDO as at 1 July 2020 and that may be increased at 1 July each year ("**Resolution 2**").

52. Given that the January Meeting of Creditors was held virtually due to restrictions imposed by the COVID-19 pandemic, I advised creditors that all resolutions would be conducted by way of poll.
53. With respect to Resolution 1:
- (a) sixteen creditors with debts admitted for voting purposes in the aggregate sum of \$17,491,179 voted in favour;
 - (b) six creditors with debts admitted for voting purposes in the aggregate sum of \$32,917,368 voted against; and
 - (c) one creditor with a debt admitted for voting purposes in the sum of \$31,562 abstained from voting.
54. Resolution 1, therefore, did not pass in accordance with section 75-115(4) of the *Insolvency Practice Rules (Corporations) 2016* (Cth) ("**Rules**").
55. With respect to Resolution 2:
- (a) thirteen creditors with debts admitted for voting purposes in the aggregate sum of \$4,442,518 voted in favour;
 - (b) six creditors with debts admitted for voting purposes in the aggregate sum of \$32,917,368 voted against; and
 - (c) four creditors with debts admitted for voting purposes in the aggregate sum of \$13,080,223 abstained from voting.
56. Resolution 2, therefore, did not pass in accordance with section 75-115(4) of the Rules.
57. I am not, at the present time, seeking a determination from the Court in respect of any of the prospective remuneration referred to in Resolution 2.
58. The January 2021 Report to Creditors also provided notice that the Liquidators would be seeking approval of creditors pursuant to section 477(2B) of the *Corporations Act* to the entry into of an amendment to the Funding Agreement with the Attorney-General's Department to increase the scope of agreed work and the amount to be funded ("**Funding Agreement Resolution**") The increased scope of work referred to in the



amended Funding Agreement includes the work undertaken in the Remuneration Claim Period. With respect to the Funding Agreement Resolution:

- (a) fifteen creditors with debts admitted for voting purposes in the aggregate sum of \$15,840,419 voted in favour;
 - (b) six creditors with debts admitted for voting purposes in the aggregate sum of \$32,917,368 voted against; and
 - (c) two creditors with debts admitted for voting purposes in the aggregate sum of \$1,682,592 abstained from voting.
59. The Funding Agreement Resolution was passed upon the exercise of my casting vote pursuant to section 75-115(3) of the Rules.
60. A detailed summary of the outcome of the polls held in respect of Resolution 1, Resolution 2 and the Funding Agreement Resolution appear in the minutes of the meeting at pages **386** and **388**.
61. Each of the six creditors who voted against Resolution 1, Resolution 2 and the Funding Agreement Resolution are, along with MBA, parties to the relevant transactions that gave effect to the Doody Street Property Transfer, and relief is sought against these parties in the Doody Street Property Proceeding. They comprise:
- (a) Citadel;
 - (b) Citadel Holdings;
 - (c) Wentworth;
 - (d) RSFH; and
 - (e) the Directors (Tamir Haikin and Lilach Haikin) (although their vote was being exercised by Wentworth pursuant to a power of attorney granted by the Directors in favour of Wentworth in the Wentworth GSD. I refer to the minutes at pages **379**, **381** and **388**).
62. Each of Citadel, Citadel Holdings, Wentworth and RFSH had not previously voted against any resolutions approving the remuneration of the Liquidators for periods prior to the Remuneration Claim Period put to creditors at meetings held earlier in the liquidation (including at meetings held on 30 November 2018, 4 February 2019 and 19 September 2019), and had abstained from voting on any such resolutions at such meetings.

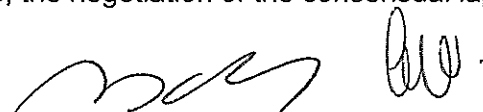


63. At the date of this affidavit, no profit-making disbursements have been charged in this matter for the Remuneration Claim Period.
64. The actual Liquidators' remuneration for the Remuneration Claim Period was in the amount of \$94,886.50 (being the amount referred to in the January 2021 Report to Creditors and Resolution 1) (excluding GST).
65. Although the Liquidators' actual remuneration recorded for the Remuneration Claim Period was \$94,886.50, I only now seek a remuneration determination in the amount of the Remuneration Claim Amount. The difference of \$1,267.50 represents an amount of remuneration which is not claimed because I now regard it as appropriate to write-off this amount having regard to the nature of the work performed, the complexity of the work performed, and the time taken to complete the relevant work, further to the review process described in paragraph 70 of this affidavit.
66. Pursuant to the Funding Agreement, the amount for which the Attorney-General's Department has agreed to indemnify the Liquidators for the agreed work undertaken by the Liquidators during the Remuneration Claim Period is in the sum of \$13,537.50 (excluding GST) ("**Indemnity Amount**").
67. The Indemnity Amount is included in the Remuneration Claim Amount.

Necessary work properly performed during the Remuneration Claim Period

Nature of work performed


68. I have undertaken an assessment of the work performed during the Remuneration Claim Period as summarised at paragraph 69 to 70 of this affidavit. During the Remuneration Claim Period, the Liquidators, together with our staff acting under my direct instruction and supervision, undertook tasks in relation to the liquidation of MBA which included the following:
- (a) reviewing MBA's books and records in relation to the Doody Street Property Transfer;
 - (b) seeking detailed ongoing legal advice in relation to the potential causes of action available to the Liquidators and/or MBA in relation to the Doody Street Property Transfer;
 - (c) seeking detailed ongoing legal advice in relation to the Lapsing Notice, the consequences and effect of the same, the Liquidators' options in responding to and dealing with the Lapsing Notice, the negotiation of the consensual lapsing of




- the Caveat and the terms of the Undertakings (the work referred to in subparagraphs (b) and (c) included reviewing at least five separate legal advices provided by my solicitors, Hogan Lovells and/or Counsel, engaging in at least eight conference calls with Hogan Lovells to discuss their advice, and (during the period from 2 November 2020 to 14 December 2020) engaging in email correspondence with Hogan Lovells in relation to those issues on at least three occasions per week);
- (d) engaging in extensive correspondence (through our solicitors, Hogan Lovells) with Citadel's advisers regarding the Caveat, including in relation to:
- (i) responding to requests for consent to register certain interests on the title to the Doody Street Property (including, upon requests from Citadel dated 20 August 2020 and 10 September 2020, providing consent (as caveator) to the registration of leases and an easement on title); and
 - (ii) concerns regarding the on-going operation of the Caveat, and a negotiated consensual lapsing of the Caveat (including negotiating and agreeing the terms of the Undertakings and consent orders for the lapsing of the Caveat), (which included exchanging at least seven letters during the period 3 November 2020 to 11 December);
- (e) instructing our solicitors in relation to the commencement of preparation of the Doody Street Property Proceeding; instructing our solicitors in relation to the preparation of, and reviewing and affirming two affidavits in relation to the application to extend the operation of the Caveat in the Doody Street Property Relief Proceeding, in respect of which:
- (i) the first affidavit was particularly detailed (comprising 16 pages with an exhibit comprising 1762 pages); and
 - (ii) the second affidavit comprised 3 pages with an annexure comprising 10 pages;
- (f) preparing for and attending hearings (conducted virtually) on 20 November 2020 and 14 December 2020 in the Doody Street Property Proceeding;
- (g) considering documents relating to the valuation of the Doody Street Property;
- (h) preparing updated estimated outcome statements in relation to the liquidation, including two for provision to creditors and one for provision to the Attorney-General's Department;

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- (i) negotiating amendments to the Funding Agreement, through our solicitors, with the Attorney-General's Department to reflect additional work undertaken in relation to the Caveat and the Lapsing Notice;
- (j) engaging in discussions with the Attorney-General's Department in relation to the Caveat, the Lapsing Notice, the Doody Street Property Proceeding and the progress of the liquidation;
- (k) preparing a total of six (one per month) reports to the Attorney-General's Department for the purposes of the Funding Agreement;
- (l) instructing our solicitors in relation to communications with ABL in relation to a dispute concerning the costs incurred by their clients for complying with the Orders for Production (which included exchanging at least seven letters during the period from 25 September 2020 to 23 December 2020);
- (m) seeking legal advice in relation to the Orders for Production addressed to Tamir Haikin and including information in the Liquidators' report to creditors dated 26 August 2020 in relation to the Orders for Production;
- (n) reviewing the status of the Public Examinations and instructing our solicitors, Hogan Lovells, with regard to extending the date for the expiry of the time for which the Public Examinations of Mr Arie Haikin and Ms Marion Richmond were to be restored (from October 2020 to April 2021);
- (o) preparing, arranging and lodging statutory forms, including ASIC Form 5602 (External Administrators' Annual Return to 16 October 2020) (a copy of which is at pages **391 to 400**) and ASIC Form 505 to retire Nicholas Martin as a liquidator of the Company 2020 (a copy of which is at pages **51 to 52**);
- (p) preparing a draft statutory investigation report pursuant to section 533 of the Act, which is currently estimated to comprise a short ASIC standard form report of approximately six pages, and a supporting memorandum and bundle of documents in excess of 100 pages (not yet completed or lodged);
- (q) completing and lodging a total of six (one per month) business activity statements ("**BAS**") with the Australian Taxation Office ("**ATO**");
- (r) reviewing, preparing and attending to creditor enquiries by way of telephone conversations, emails and post, including:

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- (i) corresponding with various creditors with regards to their claims in the liquidation;
 - (ii) reviewing demands for payment received from certain creditors and responding; and
 - (iii) providing various general updates in relation to progress of the liquidation on request from certain creditors;
- (s) processing of proofs of debt, including:
- (i) preparing correspondence to all creditors of MBA (over 1,500 in total) to invite lodgement of proofs of debt (where not already lodged) or to invite lodgment of updated proofs of debt (where existing claims may have changed since proofs were first lodged);
 - (ii) receiving and reviewing two proofs of debt, and corresponding with certain creditors in relation to queries arising from the proofs of debt;
 - (iii) updating creditor claims on the matter file and within MYOB; and
 - (iv) corresponding with the ATO regarding proofs of debt;
- (t) preparing reports to creditors, including:
- (i) a report to creditors dated 26 August 2020, a copy of which is at pages **105 to 143**;
 - (ii) an update report to creditors dated 23 December 2020, a copy of which is at pages **141 to 143**; and
 - (iii) the January 2021 Report to Creditors (including the Remuneration Request Approval Report dated 14 January 2021) (the bulk of the preparation of which took place during the Remuneration Claim Period even though it was issued after the Remuneration Claim Period) (a copy of which is at pages **145 to 191**);
- (u) responding to ongoing employee enquiries, including enquiries related to employee entitlements and superannuation (including attending at least 17 telephone calls with former employees and/or the ATO and engaging in at least 12 email exchanges with former employees, including ongoing updates to Ms Yael Kaminiski Weiller, the representative of certain former employees);

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- (v) attending to superannuation guarantee matters, including:
 - (i) liaising with MBA's pre-appointment superannuation fund, REST Industry Super ("REST"), for reconciliations of employer contributions;
 - (ii) reviewing and summarising REST super contributions data;
 - (iii) reconciling ATO proof of debt with pre-appointment super guarantee charge; and
 - (iv) updating the Attorney-General's Department on superannuation guarantee details;
- (w) banking related activities, including:
 - (i) bank account reconciliations;
 - (ii) making payments to third parties, including the Administrators, Hogan Lovells and NAB;
- (x) planning and reviewing, including in relation to:
 - (i) attending to statutory requirements, such as ASIC filing requirements and monthly BAS returns;
 - (ii) liaising with solicitors on progress of liquidation; and
 - (iii) internal meetings in relation to the status of the liquidation; and
- (y) document maintenance, including:
 - (i) filing of documents;
 - (ii) conducting file reviews; and
 - (iii) updating checklists, including the internal checklists maintained by the Liquidators to ensure all lodgements are up to date and lodged.

Classification and summary of remuneration

69. The work performed by BDO during the Remuneration Claim Period can be classified as relating to one of the following identified milestones:

- (a) **Administration**, which captured work directly related to document maintenance/checklists, bank accounts, administration not falling within one of

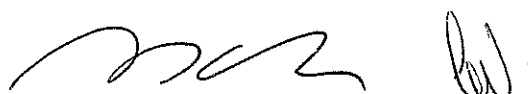


the other milestones, attending to insurance matters, planning and reviews, and certain statutory reporting including to the ATO.

- (b) **Assets**, which captured work directly related to the preservation and realisation of assets of MBA (other than work relating to the Doody Street Property).
- (c) **Creditors**, which captured work directly related to general creditor enquiries, creditors meetings, preparation of all necessary reports to creditors and processing proofs of debt.
- (d) **Employees**, which captured work directly related to employee enquiries and employee entitlements.
- (e) **Investigation**, which captured work directly related to liaison with ASIC, preparing ASIC investigation reports, conducting investigations and work relating to the Caveat, Lapsing Notice and the Doody Street Property Proceeding.

70. The work was performed by BDO staff members, and time was recorded against each of those milestones in the following way:

- (a) each staff member, including myself and my partners, are required to maintain a computerised time sheet on a daily basis. Time spent on various matters is recorded in that time sheet, in the usual course of business, in six-minute units;
- (b) in accordance with firm policy, all professional staff are required to record time against a matter and one of the milestones coded to the matter, manually adding a narrative that provides a short description of the work undertaken in respect of that time entry;
- (c) some of the milestones also have sub-categories or coded "tasks" to which work in respect of that milestone could be attributed and in that case a time entry;
- (d) once the time sheets are entered into the computer, I and/or one of my managers responsible for the file determine whether the time recorded against a certain matter is reasonably commensurate to the nature of the work performed. If the time billed for a certain task is not reasonable then the computerised time entry is amended accordingly based on our expertise and experience in the industry;
- (e) in some cases, where the senior staff on the file considered that it was appropriate to provide further breakdown of the task for the purposes of the remuneration reports prepared for the engagement, this was done manually by senior staff with reference to the narratives used for each time entry; and



- (f) prior to finalisation of each remuneration report, the detailed time narrations are extracted into an excel spreadsheet and I and/or a manager responsible for the file review the entries made and make adjustments for incorrect entries by way of coding work done, and where necessary re-allocating time to tasks as and where required, using our knowledge and experience gained through the liquidation of MBA.

71. In order to demonstrate, in an efficient and cost-effective way, the work performed by the Liquidators in the Remuneration Claim Period, I have caused to have prepared remuneration schedules for the Remuneration Claim Period ("**Remuneration Schedules**"), which comprises:

- (a) a description of the work completed in the Remuneration Claim Period by reference to the staff member performing the work, the number of hours and remuneration charged for each milestone and each sub-category within each milestone ("**Schedule A**"); and
- (b) a summary of the work completed in the Remuneration Claim Period by reference to the number of hours and remuneration charged by each staff member for each milestone ("**Schedule B**").

A redacted copy of Schedule A is at pages **401 to 405**. A copy of Schedule B is at page **407**.

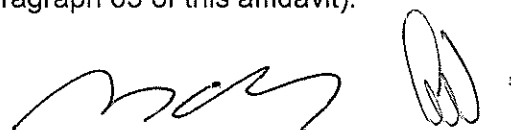
72. I also caused to be created a spreadsheet which contains an expanded version of Schedule B ("**Detailed Summary by Staff Member Spreadsheet**"). The Detailed Summary by Staff Member Spreadsheet contains a summary of the work completed by reference to the number of hours and remuneration charged by each staff member for each sub-category within each milestone. A redacted copy of the Detailed Summary by Staff Member Spreadsheet is at page **409 to 414**.

73. Unredacted copies of Schedule A and the Detailed Summary by Staff Member Spreadsheet appear at pages **3 to 7** and **8 to 13** respectively of Confidential Exhibit AS-3.

74. The redacted copies of Schedule A and the Detailed Summary by Staff Member Spreadsheet appearing at pages **401 to 405** and pages **409 to 414** respectively have been redacted to remove narrations which refer to confidential communications and documents brought into existence for the dominant, if not sole, purpose of either:



- (a) enabling the Liquidators to obtain, or our lawyers and Counsel to give, legal advice or provide legal services; or
 - (b) for use in the then contemplated, and now commenced, Doody Street Property Proceedings.
75. The Remuneration Schedules and the Detailed Summary by Staff Member Spreadsheet were created in the following ways:
- (a) First, the detailed time narrations in the BDO computerised time entry system were extracted into excel. The extraction extended to approximately 358 rows. The narrations were sorted into milestones and into sub-categories or tasks in the way described in paragraphs 69 to 70 above. This was done by BDO partners and staff, specifically prepared by Ben Gan, reviewed by Tom Whitmarsh and approved by me. Those staff members then drafted and reviewed the description of the work relating to each milestone and sub-category, based on a review of the detailed time narrations.
 - (b) Secondly, each of the milestones and sub-categories within those milestones was separated so as to identify the amount of hours spent and remuneration charged for each milestone and sub-category within that milestone. From there, the Remuneration Schedules and Detailed Summary by Staff Member Spreadsheet were generated. This work was prepared by Ben Gan, reviewed by Tom Whitmarsh and approved by me.
76. Remuneration schedules in a similar form to those included as Schedule A and Schedule B appeared in the Liquidators' remuneration report included with the January 2021 Report to Creditors. However, the versions of Schedule A and Schedule B appearing at pages **401** and **407** respectively have different subtotals for the remuneration allocated to each milestone from those appearing in the January 2021 Report to Creditors. This is because after the January Meeting of Creditors, and in preparation for this application, the Liquidators undertook a further line by line analysis of the time entries during the Remuneration Claim Period in the manner described in paragraph 70 of this affidavit, and identified certain time entries which were more appropriately allocated to different milestones from those to which they were allocated in the January 2021 Report to Creditors. I note that this exercise has not affected the calculation of the total Remuneration Claim Amount (and the total Remuneration Claim Amount has reduced from that referred to in the January 2021 Report to Creditors as a result of the write-downs referred to in paragraph 65 of this affidavit).



Difficulties during the Remuneration Claim Period

77. During the Remuneration Claim Period, there were difficulties in the liquidation of MBA which added significantly to its complexity and cost. Specifically, difficulties arising during the Remuneration Claim Period included:
- (a) as a result of Citadel raising certain concerns in relation to the Caveat, the Liquidators were required to engage solicitors to procure legal advice and exchange extensive correspondence with Citadel's solicitors, ABL, including in relation to requests for:
 - (i) removal of the Caveat;
 - (ii) undertakings as to damages; and
 - (iii) consent to the registration of certain transactions on the title of the Doody Street Property, such as certain leases;
 - (b) as a result of Citadel issuing the Lapsing Notice, the Liquidators were required to:
 - (i) engage solicitors to provide further legal advice concerning the effect of the Lapsing Notice and options available to the Liquidators; and
 - (ii) instruct solicitors in relation to the commencement of the Doody Street Property Proceeding to preserve the Liquidators/MBA's interests in the Doody Street Property as a result of the potential causes of action identified in our investigations to date, which proceedings were required to be commenced on an expedited basis so as not to allow the Caveat to lapse;
 - (c) review, consider and instruct solicitors in relation to negotiations with Citadel in relation to the terms on which the Caveat may be consensually extended or on which the Caveat may consensually be allowed to lapse, including by ultimately negotiating and agreeing the terms of the Undertakings; in order to attend to the matters listed in subparagraph (a) and (b) above, the Liquidators required further funding, and as such, were required to confer with the Attorney-General's Department in order to seek further funding and widen the scope of the agreed work to be funded; and



- (d) the Liquidators were required to instruct solicitors in relation to a dispute between the Citadel Parties and the Liquidators with regards to the costs incurred by the Citadel Parties for compliance with the Orders for Production.

Recoveries and proceeds during the Remuneration Claim Period

Recoveries during the liquidation

78. During the liquidation of MBA, the following realisations and recoveries have been made. All realisations and recoveries were made prior to the Remuneration Claim Period, except for the dividend in the amount of \$13,878.37 from the liquidation of Elite Luxury International Pty Ltd (In Liquidation) which was realised on 6 October 2020 and during the Remuneration Claim Period:

Cash at bank	\$0.00
Debtors	\$0.00
Plant and equipment	\$1.00
Motor Vehicles	\$1.00
Stock	\$270,360.44
Dividend Received (Elite)	\$13,878.37
Return of Bank Guarantee	\$16,365.53
Recoveries (Preferences)	<u>\$1,100,000.00</u>
Total assets and recoveries:	\$1,400,606.34

79. At page **415 to 419** is a summary of receipts taken and payments made by MBA during the entire liquidation up to 18 April 2021.
80. At page **419** is a summary of receipts taken and payments made by MBA during the Remuneration Claim Period only.

Reasonableness of the remuneration sought

81. A summary of the work done in the Remuneration Claim Period, and a summary of the fees incurred in respect of Remuneration Claim Period, is set out in paragraph 68 of this affidavit.



82. The standard rates charged by BDO partners and staff during the Remuneration Claim Period are disclosed in Schedule B under the column headed "Hourly Rate" at page 407. There was no rate increase during the Remuneration Claim Period.
83. I believe that the rates are reasonable, based on:
- (a) the experience of each staff member;
 - (b) the work actually performed in relation to the appointment;
 - (c) the complexity of the work performed by each staff member;
 - (d) the responsibility of each staff member in relation to the work performed by them;
 - (e) the costs incurred by our firm in performing the work in relation to our appointments;
 - (f) the risks undertaken by our firm in allowing us to accept the appointments and conducting the work in relation to our appointments; and
 - (g) the rates charged are generally comparable to or lower than other insolvency specialist firms in Sydney.
84. During the course of the liquidation, I structured the team of staff assisting in the liquidation in what I regarded, from experience, to be the most cost-effective manner. Where possible, less senior (and cheaper) staff were used to undertake particular streams of work with a view to saving costs. However, a great deal of the work that was required to be undertaken could only be undertaken by staff of a particular seniority and skill-set, particularly due to factors such as the complexities surrounding the various court proceedings (which are set out at paragraph 77 of this affidavit).
85. I have undertaken a review of the claimed remuneration, including the nature of the work performed and the time spent in performing those tasks and based on my experience I believe that the amounts claimed are reasonable and properly reflect the substantial amount of work undertaken during the Remuneration Claim Period. This is particularly the case given that:
- (a) a portion of the total remuneration incurred during the Remuneration Claim Period is not being claimed (in respect of which see paragraph 65 of this affidavit); and
 - (b) a portion of the Remuneration Claim Amount is being indemnified by the Commonwealth of Australia (in respect of which see paragraph 66 of this affidavit).



86. In the circumstances, and based on all of the matters set out in this affidavit, I believe that the Remuneration Claim Amount for the liquidation remuneration incurred during the Remuneration Claim Period is fair and reasonable and was necessarily incurred in the discharge of the Liquidators' duties.

Form 16 Notice

87. In accordance with Rule 9.2 of the *Supreme Court (Corporations) Rules 1999* (NSW), I intend to serve a Form 16 notice of my intention to apply for the orders sought in the proposed amended application, together with a copy of this affidavit on each of the creditors of MBA and each member of MBA whose shareholding represents at least 10% of the issued capital of MBA.

Affirmed at Sydney

on 20 May 2021

Signature of deponent



Name of witness Evy Wiggins

Address of witness Level 17, 20 Martin Place, Sydney NSW 2000

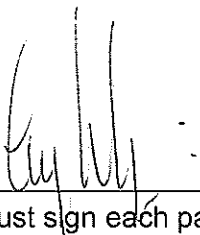
Capacity of witness Solicitor

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 at least 12 months

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.