

Form 19
Rule 9.32

Originating application starting a representative proceeding under Part IVA of the Federal Court of Australia Act 1976

No. VSD

of 2018

Federal Court of Australia
District Registry: Victoria
Division: General

Davaria Pty Limited

Applicant

7-Eleven Stores Pty Ltd and others named in the Schedule

Respondents

To the Respondents

The Applicants apply for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Federal Court of Australia
Law Courts Building
305 William St, Melbourne

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of:	The Applicant
Prepared by:	Stewart A Levitt, Levitt Robinson Solicitors
Tel	02 9286 3133
Email	711@levittrobinson.com
Address for service	PO Box 850, Darlinghurst NSW 1300

Details of claim

Terms defined in the Statement of Claim carry the same meaning when used in this Originating Application.

On the grounds stated in the Statement of Claim, the Applicant claims:

1. Damages against the First Respondent (**Franchisor**):
 - (a) for breach of contract;
 - (b) pursuant to section 236 and/or section 243 of the *Australian Consumer Law* (Cth) set out in Schedule 2 of the *Competition and Consumer Act 2010* (**CCA**), as applicable pursuant to section 131 of the CCA, and/or its cognates as applicable, pursuant to legislation in the States and Territories of Australia (collectively, **ACL**), or alternatively section 82 and/or 87 of the *Trade Practices Act 1974* (Cth) (**TPA**) for misleading or deceptive conduct within the meaning of section 18 of the ACL or section 52 of the TPA respectively;
 - (c) pursuant to sections 82 and/or 87(1) and (2) of the CCA for contravention of an applicable industry code within the meaning of section 51ACB of the CCA;
 - (d) pursuant to section 236 and/or section 243 of the ACL for unconscionable conduct within the meaning of section 21 of the ACL.
2. Orders against the Third Respondent (**Bank**) pursuant to section 12GM of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) that the Bank Loan Contracts of the Applicant and/or some or all of the Bank Franchisees be varied or set aside.
3. Further or alternatively to 2 above, damages against the Bank:
 - (a) for breach of contract;
 - (b) pursuant to section 12GF and/or section 12GM of the ASIC Act for unconscionable conduct within the meaning of section 12CB of the ASIC Act.
4. Declarations as against the Franchisor and the Second Respondent (**Master Franchisor**), in respect of the Applicant and, to the extent applicable, following an initial trial of the Applicant's claims and particularisation of any claims by the Franchisees, the Franchisees:
 - (a) as to the proper construction of the material terms of the Franchise Agreements alleged in paragraphs 9 to 24 of the Statement of Claim;
 - (b) that the Relevant Terms of the Franchise Agreements referred to in paragraph 36 of the Statement of Claim are:

- (i) unfair terms within the meaning of section 24(1) of the ACL; and
 - (ii) void by reason of section 23(1) of the ACL.
5. Declarations as against the Franchisor, in respect of the Applicant and, to the extent applicable, following an initial trial of the Applicant's claims and particularisation of any claims by the Franchisees, the Franchisees:
 - (a) that the Franchisor breached section 18 of the ACL, or alternatively section 52 of the TPA, by reason of the matters pleaded in paragraphs 41 to 105 of the Statement of Claim;
 - (b) that the Franchisor contravened section 51ACB of the CCA by reason of the matters pleaded in paragraphs 64 to 67 of the Statement of Claim;
 - (c) that the Franchisor breached section 21 of the ACL by reason of the matters pleaded in paragraphs 106 to 121 of the Statement of Claim.
 6. Declarations as against the Bank, in respect of the Applicant and, to the extent applicable, following an initial trial of the Applicant's claims and particularisation of any claims by the Franchisees, the Franchisees:
 - (a) as to the proper construction of the material terms of the Bank Loan Contracts between the Bank and each of the Franchisees alleged in paragraphs 130 to 135 of the Statement of Claim.
 7. Interest.
 8. Costs.
 9. Such further order as this Honourable Court deems fit or the nature of the case requires.

Questions common to claims of group members

10. The questions of law or fact common between the claims of the Applicant and the Franchisees as against the Franchisor and the Master Franchisor are:
 - (a) whether the Franchise Agreements contained the implied terms pleaded in paragraphs 23 to 24 of the Statement of Claim;
 - (b) whether the Relevant Terms of the Franchise Agreements referred to in paragraph 36 of the Statement of Claim are unfair within the meaning of section 24 of the ACL.
11. The questions of law or fact common between the claims of the Applicant and the Franchisees as against the Franchisor are:

- (a) whether at all times during the Relevant Period, the Franchisor engaged in the C-Store Practices described in paragraph 25 of the Statement of Claim;
 - (b) whether at all times during the Relevant Period, the Franchisor engaged in the Inventory Practices described in paragraph 28 of the Statement of Claim;
 - (c) whether at all material times during the Relevant Period, the C-Store Prices agreed by the Franchisor with C-Store, and payable by or charged to the Franchisee Applicant and each of the Franchisees for stock ordered by them from C-Store exceeded the Independent Fair Wholesale Price and/or the Best Endeavours Wholesale Price for all, or alternatively a substantial number of, stock items;
 - (d) whether, at all times during the Relevant Period, by reason of the Wholesale Pricing Conduct, the Franchisor acted in breach of the Franchise Agreement as alleged in paragraphs 29 and 30 of the Statement of Claim;
 - (e) whether the Franchisor contravened section 18 of the ACL, or alternatively section 52 of the TPA, as referred to in paragraphs 41 to 105 of the Statement of Claim;
 - (f) whether the Franchisor contravened section 51ACB of the CCA as referred to in paragraphs 64 to 67 of the Statement of Claim;
 - (g) whether the conduct of the Franchisor was unconscionable in contravention of s.21 of the ACL by reason of any one or more, or all of, paragraphs 106 to 121 of the Statement of Claim;
 - (h) whether compensation or damages are recoverable in respect of any of the breaches of contract or breaches of duty set out in the Statement of Claim.
12. The questions of law or fact common between the claims of the Applicant and the Bank Franchisees as against the Bank are:
- (a) Whether the Bank Agreements contained the terms pleaded in paragraphs 130 to 135;
 - (b) Whether the Bank, in advancing loan funds to the Applicant and each of the Bank Franchisees, breached one or more of the terms in (a) above;
 - (c) Whether the conduct of the Bank was unconscionable in contravention of s 21 of the ACL by reason of any one or more, or all of, paragraphs 122 to 170 of the Statement of Claim.

Claim for interlocutory relief

The Applicant also claims interlocutory relief.

1. Upon the Applicant giving the usual undertaking as to damages, an order that the First Respondent, until further order, be restrained from terminating a Franchise Agreement with the Applicant or Group Members, without leave of the Court.

Representative action

The Applicant brings this application as a representative party pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth)

The group members to whom this proceeding relates are **Franchisees**:

- a. who entered into one or more franchise agreements with the Franchisor each in the form of a standard form of franchise agreement (**Franchise Agreement**) as issued by the Franchisor from time to time; and
- b. who entered into a Franchise Agreement prior to the date of the commencement of this proceeding, and who are not statute-barred (**Relevant Period**);
- c. who have suffered loss and damage as a result of the conduct of either or both of the Franchisor and the Bank, alleged in the Statement of Claim; and
- d. who have not entered into a binding and enforceable release of all of their claims against both the Franchisor and the Bank, which are the subject of this proceeding.

Applicant's address

The Applicant's address for service is

Stewart A Levitt, Levitt Robinson Solicitors

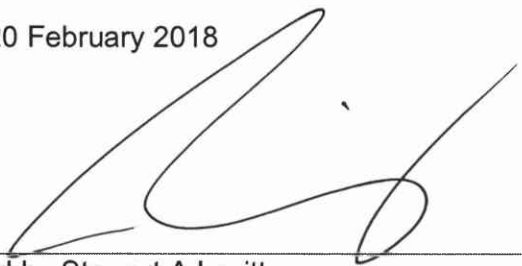
PO Box 850, Darlinghurst NSW 1300

711@levittrobinson.com

Service on the Respondent

It is intended to serve this application on the Respondents.

Date: 20 February 2018

A handwritten signature in black ink, appearing to be 'S. Levitt', written over a horizontal line.

Signed by Stewart A Levitt
Solicitor for the Applicant

Schedule

No. VSD

of 2018

Federal Court of Australia
District Registry: Victoria
Division: General

Second Respondent: 7-Eleven Inc (a Texas Corporation)

Third Respondent: ANZ Banking Group Limited (ABN 11 005 357 522)

Date: 20 February 2018