

MEDIA RELEASE

5 OCTOBER 2021 – MELBOURNE, AUSTRALIA

Penalty Hearing Gives Mayfair 101 an Opportunity to Respond

The Penalty hearing in which the Australian Securities and Investments Commission is seeking \$12 million fines against three defendant entities owned by Mayfair 101, has allowed the investment company an opportunity to be heard.

Managing Director of Mayfair 101 Group, Mr James Mawhinney, said the hearing which ended today [5 October] would decide if the Federal Court fines Mayfair 101 entities \$12 million – as asked for by ASIC – or nil, as claimed by Mayfair.

“This hearing was notable for the fact that after almost two years of investigation, ASIC cross-examined me on 30 September – the first time the regulator has interviewed me in any capacity about the operations and investment strategy of the Mayfair Group,” said Mr Mawhinney.

ASIC is seeking \$12 million in penalty from **MAYFAIR WEALTH PARTNERS PTY LTD, M101 HOLDINGS PTY LTD, M101 NOMINEES PTY LTD (IN LIQUIDATION)**, and **ONLINE INVESTMENTS PTY LTD** – for ‘misleading and deceptive’ conduct in relation to Mayfair’s advertising of its fixed-interest investment products, the M Core Notes and the M+ Notes. The notes funded a range of investments locally and abroad including the purchase of tourism properties at Mission Beach and Dunk Island in Far North Queensland.

ASIC initiated the proceedings on 6 April 2020. On 16 April 2020 ASIC was granted an interim injunction against the defendants marketing or advertising the M+ and M Core notes. ASIC’s first interviews with noteholders did not occur until after the regulator had obtained its injunction.

On 23 March, 2021 the ‘misleading and deceptive’ case was decided in ASIC’s favour and since 29 September ASIC has been arguing for the Federal Court of Australia – under His Honour Justice Stewart Anderson – to fine the defendants \$12 million.

“Due to a range of ASIC’s actions, we have been unable to fund a legal defence until this Penalty hearing,” said Mr Mawhinney. “ASIC even challenged our ability to obtain funding to pay for legal representation. We are now fighting back against the limitless resources of this government department to ensure our assets are protected and noteholders can be made whole.”

Mr Mawhinney said the Penalty hearing had been a difficult exercise because some of the ‘facts’ relied upon in deciding liability were incorrect.

The errors included a mistake in the findings of the court-appointed provisional liquidator on the ‘Eleuthera facility’, which mis-read an 8-page agreement. It misstated the agreement as a single 10-year loan rather than a facility agreement made up of multiple short-term advances. This led the provisional liquidator to assess the issuer of the M Core notes to be insolvent, its

business unsustainable and the court ultimately winding-up the entity that issued the M Core notes to 126 noteholders.

The expert witness engaged by ASIC to report on the security of the M Core notes admitted that a comma erroneously omitted by ASIC in its instructions to the expert did make a difference. ASIC had run a case to suggest it made no difference and the expert tendered a supplementary report to confirm the same.

ASIC's Senior Counsel suggested there was no value in the security offered to M Core noteholders, a submission previously accepted by the court in imposing a 20-year ban on Mr Mawhinney. However, in cross-examination ASIC's expert witness acknowledged that the security had value. ASIC then sought to change its position after the expert evidence was obtained by Mayfair's Senior Counsel Michael Pearce to confirm that there was real value underpinning the M Core notes.

Michael Pearce SC posed a challenge to ASIC to provide reliable evidence to the Federal Court that demonstrated Mr Mawhinney had transferred investor funds to the British Virgin Islands, an allegation that ASIC raised in previous proceedings. To date ASIC has been unable to prove such funds transfers occurred despite telling the Federal Court in written and oral submissions that it occurred.

Mr Mawhinney pointed out in cross-examination that the onus was on ASIC to prove its case, not for Mayfair 101 to defend allegations.

Mayfair 101's Senior Counsel made submissions at the Penalty hearing including:

- Amendments to the 'ASIC Act' would have to be specifically retrospective to apply to proceedings commenced between 13 March 2019 and 23 June 2020;
- ASIC failed to establish the total value of contraventions and the causal connections between the contraventions and the benefit obtained or detriment avoided;
- ASIC was not entitled to rely upon Regulatory Guides as having the effect of law, particularly where those guides only applied to products offered to retail investors;
- The evidence does not infer that a significant number of investors were induced to invest or a benefit obtained by the defendants;
- The contraventions were not serious and no pecuniary penalty should be imposed;
- Mayfair extensive sought legal advice on its promotional materials and this should be considered a mitigating factor;
- ASIC can show no losses to investors deriving from contravening conduct, and ASIC relied on out-of-date provisional financial opinions formed in 2020;
- Investors did in fact hold first-ranking unencumbered security over assets in line with representations made to investors, and mistakes made by ASIC in its instructions to an expert witness (a missing comma) caused his findings to be incorrect; and
- No legal review was undertaken by ASIC or its expert witness in assessing the security structure, and if one had been undertaken, the integrity of the security structure would have been confirmed.

--- ENDS ---

MEDIA ENQUIRIES

Mark Abernethy: +61 414 310 924