

# OUTCOME DETAILS

**Supreme Court - Civil  
at Supreme Court Sydney  
on 23 March 2020**

## **2017/00347082-001 / Summons: Nakali Pty Limited v SURFSTITCH GROUP LIMITED**

HH makes orders in terms of short minutes of order initialled and dated today's date.

Short Minutes of Order

1. Not made.
2. Pursuant to s.183 of the Civil Procedure Act 2005 (CPA), any group member that wishes to participate in the settlement of the proceeding who has not previously registered to do so must, by 17 April 2020 (Second Registration Date), deliver to Gadens or JWS a completed 'Group Member Registration and DOCA Authorisation' form (Further Registration Form) in the form set out in Annexure A to the further notice to group members (Further Registration Notice) which is Schedule 1 to these orders (Further Notice Regime).
3. Pursuant to s.183 of the CPA, if a person who formerly opted out of the proceeding (resumed group member) submits a Further Registration Form by the Second Registration Date, the opt out notice previously lodged by that resumed group member shall be set aside nunc pro tunc as from the time it was filed and the resumed group member shall be treated as having been a group member for all purposes in and during the proceeding.
4. Pursuant to ss. 176(1) of the CPA, the form and content of the Further Registration Notice in Schedule 1 to these Orders is approved.
5. Pursuant to s. 176(3) of the CPA, the Further Registration Notice be given to non-participating group members and persons who formerly opted out of the proceeding:
  - (a) by Gadens, within 3 business days after the date of this order:
    - (i) where Gadens has an email address for a potential group member – by sending the Further Registration Notice to the email address of the potential group member;
    - (ii) where Gadens does not have an email address but has a postal address for a potential group member – by sending the Further Registration Notice by ordinary pre-paid post to the postal address of the potential group member; and
    - (iii) causing the Further Registration Notice to be uploaded to the Gadens websites;
  - (b) by the Registrar of the Supreme Court of New South Wales, within 3 business days of the date of this order – by causing the Further Registration Notice to be:
    - (i) posted on the Court's website; and
    - (ii) not made.
6. By 4:00pm on 24 April 2020, Gadens shall file and serve:

(a) any supplementary affidavit and written submissions in respect of the Settlement Approval application, limited to any matters that arise out of the Further Notice Regime.

(b) an affidavit deposing to:

(i) its compliance with order 5(a) above; and

(ii) the responses (if any) received from the persons referred to in Order 5.

7. Order 4 of the orders of this Court made on 6 March 2020 is vacated and lieu thereof:

(a) by 29 April 2020, the defendants file and serve any affidavit and written submissions in respect of the settlement approval application listed on 22 May 2020; and

(b) by 1 May 2020, Contradictor (to the extent that he wishes to object to the proposed settlement or any term of the Settlement Distribution Scheme) file and serve any written submissions in support of his objection.

8. Pursuant to s. 183 of the CPA, any group member who has signed a funding agreement with International Litigation Partners No. 17 Pte Ltd in this proceeding, or Vannin Capital Operations Pty Ltd in proceeding number 2017/347082 is deemed to:

(a) have completed a CGM Form, as defined in the orders of the Court made on 12 November 2019 (November Orders);

(b) be:

(i) a CGM within the meaning of the November Orders; and

(ii) a 'Registrant' (Registrant) for the purposes of the Settlement Distribution Scheme (SDS).

9. The parties have liberty to apply on 48 hours' notice.

10. Costs reserved.

Justice M Ball

Signed

Date

**SCHEDULE 1**

**SUPREME COURT OF NEW SOUTH WALES PROCEEDINGS 2017/193375 &  
2017/347082**

**SurfStitch Shareholders' Class Actions  
PROPOSED SETTLEMENT OF CLASS ACTIONS  
SECOND REGISTRATION NOTICE**

**IMPORTANT: This notice contains important information that may affect your legal rights. You should read this notice carefully. If there is anything in it that you do not understand, you should seek legal advice immediately.**

**A. About this further notice**

1. In November 2019 you were sent a notice concerning the SurfStitch Shareholders' Class Actions which provided information relating to:
  - (a) your right to opt out or register to participate in a proposed settlement of the class actions;
  - (b) your rights under the related DoCAs; and
  - (c) the relationship between the DoCAs and the proposed settlement process,  
(the earlier notice is called the **First Notice**).
2. This further notice is to be read in conjunction with the First Notice and adopts the defined terms in that document.
3. This notice is directed to all potential group members, including those who:
  - (a) did not register to participate in the proposed Class Actions Settlement; or
  - (b) opted out of those proceedings in accordance with the directions provided in the First Notice,

(this subset of the group members are called the **Non-participating Group Members**).
4. The purpose of this second notice is:
  - (a) to provide Non-Participating Group Members with:
    - (i) updated information concerning the likely funding and legal costs in the proposed Class Actions Settlement; and

- (ii) a revised possible range for the value of the convertible notes claimable by group members as part of the DoCA process;
- (b) to inform Non-Participating Group Members that they have a further opportunity to participate in the proposed settlement of the proceedings; and
- (c) to inform **all** group members that the date for approval of the DoCA Settlement and the Class Actions Settlement has been changed from 16 December 2019 to **22 May 2020**.

**B. Funding costs update**

- 5. In the First Notice, group members were informed that, as part of the proposed Class Actions Settlement, the plaintiffs intended to apply for a 'common fund' order which, if made, would result in all registered group members paying a funding commission of between 20-30% directly to the funders, ILP and Vannin.
- 6. The plaintiffs no longer intend to seek a common fund order. Instead, the plaintiffs now propose to seek a "funding equalisation order" by which:
  - (a) the funders would be entitled to claim a funding commission from group members who signed a funding agreement in relation to the Class Actions (**Funded GMs**) at a rate a rate determined by applying the terms of the relevant funding agreement; and
  - (b) non-funded group members who register to participate in the proposed settlement (**Non-funded RGMs**) will be required to contribute to the funding costs of the Funded GMs in an amount not exceeding that required to ensure that all registered group members receive the same rate of return from the settlement.

**C. Update to estimated value of convertible notes**

- 7. In the First Notice, potential group members were informed that: (a) the plaintiff's best estimate of the cash available for distribution under the DoCA was \$2.7m to \$3m; and (b) the current projected value of the convertible notes available for distribution under the DoCA was in the range of \$6m-\$19.9m.
- 8. Due to developments, including a very difficult retail environment, it is now expected that the fair value of the convertible notes will be materially less than the estimate provided in the First Notice, and will be in the range of \$0 to \$4.25m.
- 9. The estimated cash available under the DoCA has changed from a range of \$2.7 to \$3m in the First Notice, to a new range of \$2.46 to 2.7m.

**D. What the updated information means to Non-Participating Group Members**

- 10. There are two consequences of the above developments.
- 11. First, as a result of the change in estimated value of the convertible notes, the returns of Non-Participating Group Members under the DoCA are likely to be significantly less than was indicated in the estimate provided in the First Notice (see in particular the

table at paragraph 15 of the First Notice) and in the Report to Creditors dated 16 March 2018.

12. Secondly, as discussed above, the funding equalisation order will result in registered group members paying less in funding costs to the funders under the proposed settlement of the class actions.
13. Nonetheless, whether Non-Participating Group Members will be better off participating in the proposed settlement (as opposed to claiming under the DoCA process only) will still depend on:
  - (a) the final total number of registrants in the settlement process, and the relative numbers of Funded GMs and Non-Funded GMs;
  - (b) the value of the convertible notes at the time of any distribution (which, despite the revised update above, remains uncertain); and
  - (c) the amount of the plaintiffs' legal costs approved by the Court as being reasonable and payable by group members participating in the Class Actions Settlement. A copy of the independent costs report that will be considered by the Court in deciding this can be accessed at [www.gadenssurfstitchclassactions.com.au](http://www.gadenssurfstitchclassactions.com.au)
14. As disclosed in the First Notice, the plaintiffs seek \$6 million in legal costs. If approved in full, the plaintiffs' costs together with any approved funding equalisation order could significantly reduce the amount of cash available to group members participating in the Class Actions Settlement. Alternatively, the Court may decide only to approve part of the plaintiffs' costs, in which case the reduction in cash available to registered group members will be smaller. Therefore it cannot be guaranteed that group members who participate in the Class Actions Settlement will be better off than Non-participating Group Members who lodge a proof of debt as part of the DoCA process only. That depends on the matters set out in [13] above.

#### **E. What do I need to do?**

##### *Option 1 - Register to participate in the Class Actions Settlement*

15. If you signed a Funding Agreement with either of the funders, or you earlier registered to participate in the Class Actions Settlement, then there is nothing you need to do. You are already a Participating Group Member.
16. If you are a Non-participating Group Member, however, and you now wish to participate in the Class Actions Settlement, you must complete the '*Group Member Registration and DOCA Authorisation*'. You can complete that form electronically by visiting the web address and following the process set out in Part F below. Alternatively, you can register by completing the form that is Annexure A attached to this Notice and returning it to Gadens or JWS at one of the addresses in Part F below by 4:00pm AEDT on **17 April 2020**.
17. The Annexure A form includes the directions to the DoCA Administrators explained in Part D of the First Notice.

18. If you earlier opted out of the Class Actions, you can still register to participate in the settlement. However, if you do so, your earlier Notice of Opt-out will be deemed to have had no effect, and you will be bound by the releases in the Settlement Deed and associated Court orders.

*Option 2 – Do nothing*

19. If you are currently a Non-participating Group Member (who has not opted out) and you do nothing, you:
- (a) will remain a group member in the SurfStitch Class Actions; **but**
  - (b) will not be entitled to make a claim in the Class Actions Settlement. You may, however, still lodge a proof of debt with the DoCA Administrators for assessment under the DoCAs. Whether or not you lodge such a proof, you will be bound by the releases provided by the DoCAs (this is a consequence of the terms of the DoCAs and the operation of the Corporations Act 2001 (Cth)); **and**
  - (c) if the Court approves the Class Actions Settlement, will be bound by the releases in the Settlement Deed and associated Court orders. If you signed a funding agreement with one of the Funders, you may also still have contractual obligations to make payments to the Funders.
20. The Class Actions Settlement approval hearing has listed before Justice Ball for **22 May 2020**.

**F. How to register**

21. The plaintiffs' solicitors respective contact details are as follows:

**Register Online**

You can register electronically at [www.gadenssurfstitchclassaction.com.au](http://www.gadenssurfstitchclassaction.com.au) by following the prompts. We encourage all Non-participating Group Members to use this option. When you do so, you will be asked to choose an option, fill in all your relevant details, and sign your form by electronic signature, or upload your completed form electronically.

The online registration system will be operational from about 27 March 2020.

Alternatively, you can register by contacting the plaintiffs' solicitors using the details below.

Glenn McGowan QC  
Partner and Chief Counsel  
Gadens Lawyers  
by email to [vic-surfstitch@gadens.com](mailto:vic-surfstitch@gadens.com)  
By phone 03 9252 2555

Joseph Scarcella

Partner  
Johnson Winter & Slattery  
by email to [surfstitch@jws.com.au](mailto:surfstitch@jws.com.au)  
By phone 03 8611 1333

**G. How to get more information**

22. If you are unclear about whether you are a group member, or have any questions about this Notice, you may contact:
  - (a) Gadens on 03 9252 2555 or by email at [vic-surfstich@gadens.com](mailto:vic-surfstich@gadens.com); or
  - (b) JWS on 02 8274 9555 or by email at [surfstitch@jws.com.au](mailto:surfstitch@jws.com.au). Alternatively, you can seek independent legal advice.
23. The Court cannot answer questions about the process or provide legal advice.

## ANNEXURE A

### SUPREME COURT OF NEW SOUTH WALES PROCEEDINGS 2017/193375 & 2017/347082

#### SURFSTITCH SHAREHOLDERS' CLASS ACTIONS

#### GROUP MEMBER REGISTRATION AND DOCA AUTHORISATION

The group member named below:

- (a) registers as a group member in proceeding 2017/193375 (being the **McConnell** proceeding) and/or proceeding 2017/347082 (being the **Nakali** proceeding) (**CGM**);
- (b) in the case of any cash to which the CGM becomes entitled pursuant to the terms of the SGL DoCA (**CGM DoCA Cash**) – authorises and directs the Deed Administrators to pay their CGM DoCA Cash to the SDS Administrator (or as he directs) and the CGM DoCA Cash will form part of the CAS Pool;
- (c) in the case of any Convertible Notes to which the CGM becomes entitled pursuant to the terms of the SHPL DoCA because the CGM is admitted as a SGL Admitted Subordinated Claimant (**CGM Notes**) – authorises and directs the Deed Administrators to allocate the CGM Notes to the SDS Administrator (or as he directs) and the CGM Notes will form part of the CAS Pool;
- (d) if the CGM has signed a funding agreement with International Litigation Partners No. 17 Pte Ltd (**ILP**), or Vannin Capital Operations Limited (**Vannin**), in the case of the Convertible Notes to which the CGM becomes entitled pursuant to the terms of the SHPL DoCA because the CGM was a SGL Shareholder within the meaning of the SHPL DoCA (**CGM Shareholder Notes**) – authorises and directs the Deed Administrators to allocate to the solicitors for the plaintiff so many of the CGM Shareholder Notes that represent:
  - a. the funders' share as determined by the Court;
  - b. in the event that the Court declines to make the orders sought in paragraph 21 of the Plaintiff's motion filed 23 October 2019, the entitlement of ILP or Vannin under the agreement signed by the group member with the relevant funder;
- (e) in the case of any cash to which the CGM becomes entitled and which is sourced from the Chubb Payment (**CGM Chubb Cash**) – authorises and directs the SDS Administrator to pay the funders' share of the CGM Chubb Cash to the funders (to be shared equally between the funders);
- (f) in the case of the CGM DoCA Cash – authorises and directs the SDS Administrator to pay the funders' share of the CGM DoCA Cash to the funders (to be shared equally between the funders); and



- (g) in the case of the CGM Notes – authorises and directs the SDS Administrator to allocate the funders’ share of the CGM Notes to the funders or as they direct (to be shared equally between the funders).

The above directions take effect upon approval of the settlement of the McConnell Proceeding and Nakali Proceeding by the Court. Unless otherwise defined, terms used in this notice have the same meaning as in the Orders of the Court dated 12 November 2019 and 12 November 2019, copies of which are **attached**.

Name of group member: .....

Name of person completing form (print) .....

If the group member is a company, partnership, trust or business name, state the title/authority of the person to act for the group member (eg., *director, partner*): .....

Contact tel: .....

Contact email: .....

Contact address: .....

*Signed:* .....

Date: ..... 2020

If you wish to register to participate in any distribution of compensation from the settlement proceeds from the class action (being the CAS Pool), you must complete and return this form to:

1. Gadens Lawyers at [vic-surfstitch@gadens.com](mailto:vic-surfstitch@gadens.com) or via [www.gadenssurfstitchclassaction.com.au](http://www.gadenssurfstitchclassaction.com.au);  
or
2. Johnson Winter & Slattery at [surfstitch@jws.com.au](mailto:surfstitch@jws.com.au),

and ensure that it is received **by 4:00pm on AEDT 17 April 2020**.

Failure to complete this form will **not** affect your rights (if any) under the Surfstitch Group Limited Deed of Company Arrangement (SGL DoCA) or the Surfstitch Holdings Pty Limited Deed of Company Arrangement (SHPL DoCA).