



Surfstitch Class Action – Settlement Distribution Payment

IMPORTANT NOTICE TO GROUP MEMBERS

Proceedings 2017/193375 & 2017/347082

14 September 2021

Dear SurfStitch Group Member,

I am the Administrator of the SurfStitch Settlement Scheme for the two class actions

- McConnell (2017/193375); and
- Nakali (2017/347082).

I therefore am responsible for distributing to group members (**GMs**) the settlement funds recovered in the class actions in accordance with the settlement deed and settlement distribution scheme (**SDS**).

Thank you for confirming your banking details with us.

YOUR DISTRIBUTION

Your settlement distribution payment is a pro-rated portion which your loss bears to the total Group Member loss admitted under the SurfStitch Deed of Company Arrangement.

You will shortly receive your settlement distribution payment from Gadens (Glenn McGowan) as the SDS Administrator into your nominated bank account. Your loss has been assessed, admitted, and calculated by FTI Consulting, the SurfStitch Deed of Company Arrangement administrators (**FTI**) who have paid your distributions to us, in accordance with the calculation in the email accompanying this notice.

BACKGROUND TO DISTRIBUTIONS RECEIVED

You will recall that directors of FTI consulting are the Deed Administrators of the SurfStitch Deed of Company Arrangement (**DoCA**) from when it went into voluntary administration. FTI thus control the funds of the SurfStitch DoCA fund.

Please see enclosed FTI circular to creditors dated 12 May 2021¹. The second section of the circular advises Alceon (the Ezibuy entity which bought SurfStitch in the administration) completed a Trade Sale of its subsidiaries to one of its related entities for the market value of \$1,018,712. Alceon elected to pay that cash from the Trade Sale to the SurfStitch Deed Administrators, rather than issue convertible note shares in Alceon. It was entitled to do this under the terms of the DoCA. The related entity purchaser is not identified in FTI's circular.

Accordingly, the convertible notes converted to money just before their third anniversary by reason of the Trade Sale by Alceon. FTI accepted the valuation of them from that sale at \$1,018,712.00 as fair and reasonable. A portion (**about one third**) of that has been assigned to us for distribution to the Group Members.

¹ *this is the last circular given to us by FTI.*

PAYMENTS TO GADENS AS SDS ADMINISTRATOR

Out of the total Funds available (\$3,575,198.53), our office has received a total of \$1,234,378.92 in settlement proceeds (36% approx.), \$910,683.77 of which has been assigned to Group Members, and an additional \$323,695.15 for those Group Members who are also Subordinate creditors (\$290,312.48) or were existing shareholders (\$33,382.67) in accordance with the DoCA. It seems this 36% portion received for GMs is explained by the "Other Creditors" claims almost doubling the Group Members losses (see *Proofs of debt admitted* in Table 1 below).

You will note that because other creditors proved large losses in the administration, the loss of the Group Members amounted to only 36% of total losses (see *Proofs of debt admitted in Table* below). It is this proportion which operates to calculate Group Members' share of the total pool to be distributed from the DoCA funds. Thus, 36% x the total SGL DoCA pool of \$2.556m equals \$910,683.77 approx. In addition, a number of Group Members are also subordinated creditors who, as a group, are entitled to 80% of the Trade Sale of shares (\$1.018m). And finally, some group members are entitled to a proportion of the remaining 20% of the Trade Sale on the basis they were shareholders of SurfStitch at the date of administration. All the proceeds due to Group Members have been calculated by FTI and remitted to Gadens for me to distribute to Group Members.

We had no control over the DoCA proof of loss process conducted by FTI, which operated separately under the DoCA and the *Corporations Act 2001*, and had no idea that so many non-Group Member claims would be admitted by FTI. Nor could we have any oversight over the value of the convertible notes accepted by FTI. We were only able to work in the calculations as they were advised to us by FTI at the time we sought Settlement Approval from the Court.

Table 1 – Available Settlement Proceeds

<i>Proofs of debt admitted</i>			<i>Funds available for distribution</i>		<i>Shares</i>	
SDS Creditors (Group Members)	52,098,187.71	36%	SGL	2,556,486.53	On Issue	279,056,288
Other Creditors	94,152,706.57	64%	Trade Sale	1,018,712.00	Payment per 1000 per shares	0.73
Total admitted	146,250,894.28	100%	Subordinate creditors	(814,970.00)	80%	Number
				(\$203,742.00)	20%	1,000
			Total Funds available	3,575,198.53		
<i>Payments</i>						
Capacity as SDS Administrator	910,683.77					
Capacity as Solicitor						
For Subordinate creditors	290,312.48					
For Existing shareholders	33,382.67					
	323,695.15					
Total	1,234,378.92					

FACTORS IMPACTING FINAL DISTRIBUTIONS

Please note that we did not expect and could not know:

1. the defendants' insurance cover would be so low - we only learned cover after issuing the proceeding;
2. the competing class action would steal our case plan and be so tenacious and almost double legal fees;
3. Cameron to be so devious as to successfully hide his assets from our grasp;
4. the Court would refuse so many early attempts to bring the proceeding to a conclusion, which caused more costs to be incurred which were ultimately ordered to be deducted from the Chubb portion of the settlement, nor did we expect the contradictor appointed for Group Members to be so aggressive;
5. the impact COVID-19 would have on the class actions and settlement registration process, for which we were dealing with unprecedented issues;
6. the Deed Administrators (FTI) would accept without a fight the value of the sale of the convertible notes. We were not privy to and had no control over the Trade Sale process by Alceon of its subsidiaries to a related entity under the DoCA;
7. the extent to which the estimates of the available cash and convertible notes would change between the date the DoCA was signed, and the final Judgment for Settlement Approval – these were all FTI estimates;
8. the extent of the deed administrators (FTI) costs and fees, given the proof of debt process required under the DoCA;
9. the deed administrators (FTI) would receive substantial proofs of loss by other subordinated creditors under the DoCA outside the class action group, thus diluting the Group Members' share of the pool. We had no control over this process, which was governed by the DoCA and the Deed Administrators' requirements to comply with the applicable processes under the *Corporations Act 2001*;
10. the deed administrators (FTI) final loss calculations of Group Members' loss would be so diluted, after the proof of loss process was completed under the DoCA; and
11. so many other large shareholders (i.e institutional shareholders not part of the class action group) would lodge proofs under the DoCA.

There was no other way to recover anything, other than perhaps the shareholders voting to put SurfStitch into liquidation at the time the DoCA was voted for, which would have been a much more costly and lengthy process. The SurfStitch administrators (FTI) always maintained the DoCA would be a better option than liquidation. At least something, rather than nothing, was recovered. In any event, there would be no more shares in SurfStitch if it were placed into Liquidation. Further, shareholders could not continue to hold their shares, unless in accordance with the DoCA, or some other DoCA adopted. The DoCA adopted was the best DoCA available at the time on the advice from FTI to all creditors.

Finally, once the class action settlement process started, there was no way to challenge the DoCA within the ambit of the class actions.

We thank you for your patience, and confirm that this brings the SurfStitch class actions to a close.

Should you have any queries, please do not hesitate to contact our office via email at vic-surfstitch@gadens.com.

Glenn McGowan QC
SDS Administrator

This update is strictly private and confidential, and does not constitute legal advice and should not be relied upon as such. It is intended only to provide a summary and general overview on matters of interest and it is not intended to be comprehensive. You should seek legal or other professional advice before acting or relying on any of the content.