

**IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
GROUP PROCEEDINGS LIST**

S ECI 2021 03645

**BETWEEN:**

JAKE THOMAS Plaintiff

- and -

THE A2 MILK COMPANY LTD (ARBN 158 331 965) Defendant

**ORDER**

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JUDGE OF THE COURT: The Honourable Justice Button

DATE MADE: 14 June 2022

ORIGINATING PROCESS: Writ filed 5 October 2021

HOW OBTAINED: On return of the plaintiff's application by summons dated 1 June 2022

ATTENDANCE: R Doyle SC with A Folie appeared for the plaintiff  
C Withers SC with B Cameron appeared for the defendant

OTHER MATTERS:

- A. The Court notes the undertakings, to be filed within seven (7) days after the date of these orders, given by:
  - i. the Plaintiff herein and the Plaintiff in the proceeding Yue Xiao v The a2 Milk Company Ltd (S ECI 2021 04403) (**Xiao Proceeding**), in the terms set out in Schedule A to these orders; and
  - ii. the Plaintiff's solicitors herein (**Slater and Gordon**), and the solicitors for the Plaintiff in the Xiao Proceeding (**Shine**), in the terms set out in Schedule B to these orders.
- B. The Court notes the agreement reached between the Plaintiffs concerning the

proposed consolidation of this proceeding and the Xiao Proceeding reflected in the following documents:

- a. the Cooperative Litigation Protocol, set out in Schedule C to these orders; and
  - b. the Consolidation Agreement, set out in Schedule D to these orders.
- C. This order is signed by the Judge pursuant to Rule 60.02(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2015*.
- D. The Court has made substantially similar orders in the Xiao Proceeding.

## THE COURT ORDERS THAT:

### Consolidation

1. Pursuant to rule 9.12 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**Rules**) and/or section 33ZF of the *Supreme Court Act 1986* (Vic) (**SCA**):
  - (a) this proceeding and the Xiao Proceeding be consolidated and the consolidated proceeding be identified as proceeding S ECI 2021 03645 (**Consolidated Proceeding**); and
  - (b) the Plaintiff in this proceeding and the Plaintiff in the Xiao Proceeding are to be joint representative Plaintiffs in the Consolidated Proceeding (the **Plaintiffs**).
2. Slater and Gordon and Shine Lawyers (together, the **Plaintiffs' Solicitors**) be granted leave to be jointly named as solicitors on the record for the Plaintiffs in the Consolidated Proceeding.
3. Order 2 is subject to the provision of:
  - (a) an undertaking by each of the Plaintiffs in this proceeding and the Xiao Proceeding in the form that appears in Schedule A; and
  - (b) an undertaking by each of Slater and Gordon and Shine, by their representatives, in the form that appears in Schedule B.
4. Other than costs in respect of the application by summons filed by the Plaintiff in this proceeding on 18 February 2022 (the **Thomas Carriage Motion Summons**) and the

application by summons filed by the Plaintiff in the Xiao Proceeding on 18 February 2022 (together, the **Carriage Motion Summonses**), the costs incurred to date in this proceeding and in the Xiao Proceeding be reserved costs in the Consolidated Proceeding.

5. The costs of any work performed in the Consolidated Proceeding on and after the date of these orders that is performed by reason of there being two firms jointly representing the Plaintiffs rather than one firm (**Duplicated Work**):
  - (a) not be recoverable against group members in the Consolidated Proceeding; and
  - (b) not be recoverable against the Defendant in the Consolidated Proceeding.

### **Costs Monitor**

6. Pursuant to section 33ZF of the SCA, Cate Dealehr of Australian Legal Costing Group is appointed by the Court as an independent costs monitor (**Costs Monitor**).
7. The Costs Monitor shall in each six-month period after the date of these orders:
  - (a) make such enquiries of the Plaintiffs' Solicitors as she may consider necessary or appropriate to make an informed assessment of:
    - (i) what work done and costs incurred by each firm have been necessary or reasonable for the purposes of recovery of costs on a solicitor-own client taxation;
    - (ii) whether in her opinion any, and if so what, work done and costs incurred by either firm have not been necessary or reasonable for the purposes of recovery of costs on a solicitor-own client taxation; and
    - (iii) whether in her opinion there has been any, and if so what, work has been performed by the Plaintiffs' Solicitors in the Consolidated Proceeding by reason of there being two firms jointly representing the Plaintiffs rather than one firm (ie, Duplicated Work); and
  - (b) provide to the Plaintiffs' Solicitors on a confidential basis a written report addressed to the Court (**Costs Reports**) as to each assessment in subparagraph (a) in sufficient detail to enable quantification of the costs approved, and costs disapproved or queried, by the Costs Monitor, and which includes the identification of any Duplicated Work, and associated costs thereof.

8. Subject to any further order, the Costs Reports shall be provided by the Costs Monitor to:
  - (a) the Chambers of the trial judge:
    - (i) at the direction of the Court, where given; and
    - (ii) at the time of any settlement approval; and
  - (b) any mediator at the time of any mediation.
9. The Plaintiffs' Solicitors must provide such information, access to personnel and access to documents as the Costs Monitor requires.
10. The reasonable fees of the Costs Monitor shall be borne equally by the Plaintiffs in the Consolidated Proceeding and shall not be recoverable against the Defendant in the Consolidated Proceeding.

### **Pleadings**

11. By 4:00pm on 1 July 2022, the Plaintiffs shall file and serve their consolidated statement of claim.
12. By 4:00pm on 4 October 2022, the Defendant shall file and serve its defence to the consolidated statement of claim.
13. By 4:00pm on 24 October 2022, the Plaintiffs shall file and serve their reply to the defence.

### **Security for Costs**

14. By 4:00pm on 1 July 2022, the Plaintiffs shall provide the Defendant with their proposal in relation to security for costs.
15. By 4:00pm on 22 July 2022, the Defendant shall indicate to the Plaintiffs whether the proposal in relation to security for costs is acceptable to it.
16. In the event that the Plaintiffs' proposal in relation to security for costs is not accepted by the Defendant:
  - (a) by 4:00pm on 22 July 2022, the Defendant shall file and serve an application for security for costs and any affidavit material on which it proposes to rely in support of the application;

- (b) by 4:00pm on 5 August 2022, the Plaintiffs shall file and serve any affidavit material on which they propose to rely in opposition to the application;
- (c) by 4:00pm on 19 August 2022, the parties shall file and exchange submissions in respect of the application; and
- (d) the application be listed for hearing at 10:30am on 25 August 2022.

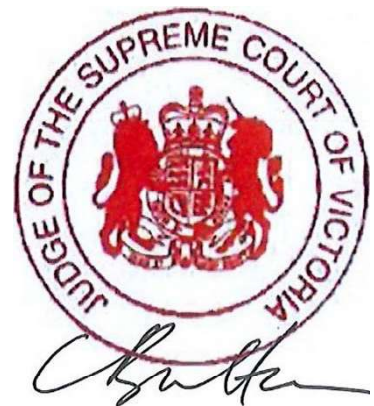
**Carriage Motion Summonses**

- 17. The Thomas Carriage Motion Summons is dismissed.
- 18. The Plaintiff is to bear his own costs of the Carriage Motion Summonses incurred prior to 6 April 2022.
- 19. The costs of the Carriage Motion Summonses of the Defendant, and of the Plaintiff on and after 6 April 2022, are reserved costs in the Consolidated Proceeding.

**Other matters**

- 20. The proceeding be listed for a case management conference on 24 August 2022.
- 21. Liberty to each party to apply upon not less than three (3) clear business days' notice to each other party.

DATE AUTHENTICATED:           **14 June 2022**



.....  
**The Honourable Justice Button**

### **SCHEDULE A – PLAINTIFFS’ UNDERTAKINGS**

[Jake Thomas / Yue Xiao] undertakes to the Court to enter into the Cooperative Litigation Protocol annexed to the orders of the Court dated 14 June 2022 and undertakes to instruct his solicitors [Slater and Gordon / Shine Lawyers] to comply with the Cooperative Litigation Protocol being Schedule C to the Orders made 14 June 2022 and the Consolidation Agreement being Schedule D to the Orders made 14 June 2022 in conducting the consolidated proceeding.

### **SCHEDULE B – FIRMS’ UNDERTAKINGS**

[Slater and Gordon Limited / Shine Lawyers Pty Ltd] undertakes to the Court to conduct the consolidated proceeding in accordance with the Cooperative Litigation Protocol being Schedule C to the Orders made 14 June 2022 and the Consolidation Agreement being Schedule D to the Orders made 14 June 2022.

# Schedule C

## **a2 Milk Company Class Action**

### **Cooperative Litigation Protocol**

**Jake Thomas**

**Slater and Gordon Ltd**

**Yue Xiao**

**Shine Lawyers Pty Ltd**

June 2022

**a2 Milk Company Class Action  
Cooperative Litigation Protocol  
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## PARTIES

- 1 **Jake Thomas**, c/o Slater & Gordon Ltd of Level 12, 485 La Trobe St, Melbourne VIC 3000
  - 2 Slater & Gordon Ltd of Level 12, 485 La Trobe St, Melbourne VIC 3000 (**SG**)
  - 3 **Yue Xiao**, c/o Shine Lawyers of Level 6, 299 Elizabeth St, Sydney NSW 2000
  - 4 Shine Lawyers Pty Ltd of Level 6, 299 Elizabeth St, Sydney NSW 2000 (**Shine**)
- (collectively, the '**Parties**').

## RECITALS

- A On 5 October 2021, Jake Thomas (**Mr Thomas**) commenced proceeding S ECI 2021 03645 (**Thomas Proceeding**) in the Supreme Court of Victoria (**Supreme Court**) against The a2 Milk Company Ltd (**A2M**) pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) (**Supreme Court Act**). The Thomas Proceeding was issued by SG, the solicitors for Mr Thomas.
- B On 23 November 2021, Yue Xiao (**Mr Xiao**) commenced proceeding S ECI 2021 04403 (**Xiao Proceeding**) against A2M in the Supreme Court pursuant to Part 4A of the Supreme Court Act. The Xiao Proceeding was issued by Shine, the solicitors for Mr Xiao.
- C On 10 December 2021, the Honourable Justice Button ordered that the parties to the Thomas Proceeding and Xiao Proceeding file carriage motions with respect to the resolution of the competing proceedings.
- D The Parties acknowledge that SG and Mr Thomas have raised concerns in relation to the appropriateness of one firm advancing the claims of both the Acquisition Claimants and the Retention Claimants (as defined in the Xiao Proceeding), but agree that this Protocol prescribes appropriate steps to manage the risk of any such conflict.
- E In the interests of facilitating the just, efficient, timely and cost-effective resolution of the carriage motions, and in accordance with the practice of the Court in relation to the resolution of carriage motions, the Parties have reached agreement as to the terms of consolidation of the Thomas Proceeding and Xiao Proceeding.
- F This Protocol documents the manner in which the Parties are to conduct the Consolidated Proceeding.

- G This Protocol is to be read in conjunction with the agreement between the Parties dated [#date] (**Consolidation Agreement**) which sets out with further specificity the division of legal work, responsibility for disbursements and security for costs, liability for adverse costs, and entitlements to costs recovery between SG and Shine.
- H On [#date], Justice Button, by reference *inter alia* to the proposed agreement now reflected in the operative provisions of this agreement set out below, made orders consolidating the Thomas Proceeding and the Xiao Proceeding (**Consolidated Proceeding**).

**IT IS AGREED AND THE PLAINTIFFS INSTRUCT** as follows:

**1 Commencement Date**

- 1.1 The term of this Protocol shall begin from the date on which it is executed (**Commencement Date**).
- 1.2 The term of this Protocol shall continue until terminated pursuant to clause 16.

**2 Plaintiffs and Group Members**

- 2.1 Mr Thomas and Mr Xiao have each given their instructions to be joint representative plaintiffs in the Consolidated Proceeding.
- 2.2 SG is and will be instructed by Mr Thomas.
- 2.3 Shine is and will be instructed by Mr Xiao.
- 2.4 Mr Thomas and Mr Xiao agree to file and serve a Consolidated Statement of Claim encompassing, *inter alia*:
  - a) the claims of Acquisition Claimants, as defined in the Xiao Proceeding;
  - b) the claims of the Retention Claimants, as defined in the Xiao Proceeding;  
and
  - c) the claims of Group Members who purchased a2 shares on the NZSX Main Board in the terms advanced in the Thomas Proceeding, provided however that the Plaintiffs will, at the earliest opportunity, make an application to the Court for determination, as a separate question or otherwise, whether it has the power to:
    - i determine the common question set out at paragraph 139(h) of the statement of claim filed in the Thomas Proceeding (**Thomas SoC**);
    - ii make the declarations sought in paragraph A of the Plaintiff and Group Member claims set out in the Thomas SoC, insofar as that paragraph relates to the FT Act and FMC Act (as defined in the Thomas SoC); and
    - iii award the loss and damage sought in paragraph C of the Plaintiff and Group Member claims set out in the Thomas SoC, insofar as those paragraphs relate to the FT Act, FMC Act and NZSX Listing Rules (as defined in the Thomas SoC), the *Supreme Court Act 1986* (Vic) and the *Constitution Act 1975* (Vic).

- 2.5 In the event that either of Mr Thomas and/or Mr Xiao does not become or ceases to be a representative plaintiff in the Consolidated Proceeding (**Former Representative Plaintiff**), then:
- a) the Former Representative Plaintiff will no longer be bound by the terms of this Protocol other than clause 12;
  - b) in the event that any other person who is a group member in the Consolidated Proceeding (**Group Member**) instructs the lawyers for the Former Representative Plaintiff that the said person will act as a representative plaintiff (**Replacement Representative Plaintiff**) and those instructions are accepted by the said lawyers then:
    - i as soon as reasonably practicable, the said lawyers will require the Former Representative Plaintiff to enter into an accession deed poll with the Replacement Representative Plaintiff by which the Replacement Representative Plaintiff undertakes to step into the shoes of the Former Representative Plaintiff in respect of his or her rights, obligations and liabilities in respect of the Consolidated Proceeding, and to become bound by the terms of this Protocol, as if they were named as a representative plaintiff (in respect of the proceeding associated with the Former Representative Plaintiff) under the terms of this Protocol; and
    - ii as soon as reasonably practicable, an application will be made to the Court seeking orders for the proposed substitution of the Former Representative Plaintiff with the Replacement Representative Plaintiff/s;
    - iii SG and Shine shall take all necessary steps to secure the appointment of the Replacement Representative Plaintiff as a representative plaintiff in the Consolidated Proceeding;
  - c) in the event that there is no proposed Replacement Representative Plaintiff pursuant to clause 2.5(b), then the remaining plaintiff will use reasonable endeavours to enter into a Protocol replacing this Protocol to govern the further conduct of the Consolidated Proceeding as soon as is reasonably practicable.
- 2.6 Shine will not be required, and it is agreed that Shine is not intending, to enter into a retainer with any SG client for the purpose of the Consolidated Proceeding.
- 2.7 SG will not be required, and it is agreed that SG is not intending, to enter into a retainer with any Shine client for the purpose of the Consolidated Proceeding.

### **3 Consolidation Agreement**

3.1 The Parties agree that the terms of the Consolidation Agreement shall bind them in respect of their conduct of the Consolidated Proceeding and may be enforced upon their own terms and as terms of this Cooperation Protocol.

3.2 The Parties agree that the claims of the Retention Claimants shall continue as part of the Consolidated Proceeding unless and until the Parties agree otherwise (and the Court so approves), and so far as reasonably practicable:

- a) Shine be responsible for work undertaken advancing the claims of the Retention Claimants; and
- b) in the event that the claims of the Retention Claimants are ultimately to be prosecuted at trial of the Consolidated Proceeding, Shine will be responsible for advancing those claims (and the parties note that decisions as to the briefing of counsel are subject to the Cooperative Litigation Protocol including the dispute resolution procedure);
- c) the legal work in relation to the Acquisition Claimants will be undertaken by both SG and Shine on a shared basis.

3.3 In recognition of the intended division of legal work in advancing the Consolidated Proceeding in accordance with clause 3.2, the Parties intend that SG and Shine will each undertake work equivalent to, and incur, 50% of the professional fees in the Consolidated Proceeding.

3.4 For the purposes of the intended division of legal work in clause 3.2, the Parties have entered into the Consolidation Agreement addressing:

- a) responsibility for certain elements of the litigation;
- b) responsibility for payment of disbursements;
- c) responsibility for the provision of security for costs;
- d) liability for any potential adverse costs orders;
- e) entitlements to recoveries pursuant to any Group Costs Order (if made).

### **4 Avoidance of duplication of work and costs**

4.1 The Parties agree and instruct that SG and Shine will take all reasonable steps to avoid duplicated work.

4.2 For the purpose of this Protocol, **duplicated work** is work that is performed by reason of there being two firms representing the Plaintiffs, rather than one firm.

## **5 Litigation Committee**

5.1 Shine and SG are instructed to convene a Litigation Committee comprising one lawyer appointed by Shine and one lawyer appointed by SG. The identity of the lawyers so appointed will be, initially:

- a) Craig Allsopp, Practice Leader of Shine, and if Craig Allsopp is unavailable, Atanaan Ilango, Senior Associate of Shine; and
- b) Kaitlin Ferris, Practice Group Leader of SG, and if Kaitlin Ferris is unavailable, Claire Pirie, Associate of SG;

but may be amended at the discretion of the appointing firm.

5.2 The Litigation Committee shall be responsible for:

- a) making major decisions, in accordance with clause 6;
- b) management of the litigation;
- c) determining the distribution and coordination of work between Shine and SG in accordance with clause 5.7; and
- d) overseeing the process referred to in clause 10.2 for the sharing of disbursements which are incurred for the joint benefit of the Plaintiffs and the Consolidated Proceeding.

5.3 The Litigation Committee will:

- a) communicate by whatever means and at whatever frequency is necessary for the efficient and effective conduct of the Consolidated Proceeding;
- b) provide written or verbal reports to the Plaintiffs on the progress of the litigation upon request or otherwise as reasonably required; and
- c) subject to clause 5.5, operate by unanimous agreement.

5.4 Each member of the Litigation Committee will act on the basis of utmost good faith in accordance with their obligations to the Court and such further or other obligations as arise under this Protocol or the Consolidation Agreement.

5.5 Upon agreement by the Litigation Committee member from each of Shine and SG, the Litigation Committee may delegate, to either Shine or SG (and their legal staff) sole carriage and responsibility for decision-making (including sending

correspondence without the approval of the other firm) in relation to any aspect of the Consolidated Proceeding, so as to promote efficiency and reduce duplication in the conduct of the Consolidated Proceeding.

5.6 If the Litigation Committee is not able to reach unanimous agreement on any decision relating to the Consolidated Proceeding, then the dispute resolution procedure set out at clause 13 will apply.

5.7 For the purposes of reducing duplication of costs and effort, work in respect of all matters except for matters individual to Mr Thomas or Mr Xiao is to be distributed between the personnel of Shine and SG in a manner which so far as possible ensures the number and seniority of legal personnel conducting a task will be no more than if there was only a single representative proceeding conducted by a single firm. The primary determinant of the allocation of work shall however be the interests of group members having regard to:

- i. the skills and experience of the Lawyers and their respective staff;
- ii. the objective of ensuring that the total legal costs are reasonable and proportionate;
- iii. the objective of minimising, to the greatest extent possible, the legal costs incurred through overlapping or duplicated work; and
- iv. adherence to the division of legal work as set out in the Consolidation Agreement and in accordance with clause 3.2 with respect to the separate advancement of the claims of the Retention Claimants by Shine.

5.8 Each month Shine and SG shall exchange itemised lists or detailed invoices of time recorded on the matter in a given period.

## **6 Major Decisions**

6.1 Any major decision in the litigation will be:

- a) made in accordance with clauses 5.5, 5.6 and 5.7;
- b) subject to the operation of, and compliance with retainers, legal costs agreements and any orders of the Court; and
- c) if applicable, made following and taking into account any advice from Joint Counsel.

6.2 Subject to clause 6.3, 'major decisions' shall include the following in respect of the Consolidated Proceeding:

- a) any matters which are of significant importance to the conduct of the Consolidated Proceeding;
- b) a decision requiring the Plaintiffs to seek approval from the Supreme Court;
- c) the making of any interlocutory applications or the response to any interlocutory applications filed by another party;
- d) the claims made in, and parties to, the pleadings in the Consolidated Proceeding (**Consolidated Pleadings**);
- e) a decision to add, remove or substantially amend claims made;
- f) a decision to amend the relevant claim period;
- g) a decision to amend the definition of “group member”;
- h) a decision to open or close the class;
- i) the making, acceptance or rejection of a settlement offer and any terms of settlement;
- j) discovery to be sought from, provided to or negotiated with another party;
- k) a decision to accept or amend the loss methodology used to calculate the damages claimed by (or otherwise assessed on behalf of) the Plaintiffs and Group Members;
- l) a decision to issue any notices or respond to any notices under the Supreme Court Act (including any issued by the Court under its own motion);
- m) a decision to appeal or not appeal any order, judgment or decision of the Court (including a decision to defend or not defend any appeal by another party);
- n) a decision to retain or change counsel;
- o) a decision to retain, brief or instruct an independent expert witness or consulting experts (together, **Experts or Consultants**);
- p) a decision to terminate any retainers with Experts or Consultants;
- q) the filing of any evidence from Experts or Consultants including responding to any responsive evidence filed by another party;
- r) the filing of any lay evidence;
- s) the approval of the fee structure of any contracts or fee agreements with Experts or Consultants;



- t) a decision to undertake a piece of work likely to cost \$20,000 or more;
- u) a decision to terminate this Protocol pursuant to clause 16; and
- v) a decision to discontinue the Consolidated Proceeding.

6.3 For the avoidance of doubt, the following matters do not comprise a 'major decision' and are excluded from this section:

- a) any security for costs to be provided by the Plaintiffs, with all matters in respect of security to remain at the sole discretion of each Plaintiff;
- b) any other matters that the Litigation Committee has deemed not to comprise a 'major decision', or any matters falling within the delegation described at clause 5.5.

## **7 Counsel**

7.1 One set of counsel (**Joint Counsel**) will be briefed to represent the Plaintiffs and group members in the Consolidated Proceeding.

7.2 Rachel Doyle SC, Lachlan Armstrong QC, Alexandra Folie and Anna Batrouney are presently briefed by the Plaintiffs, and upon consolidation the Litigation Committee:

- a) will rationalise the composition of the Joint Counsel team for the purpose of the conduct of the Consolidated Proceeding; and
- b) on an ongoing basis will make decisions as to the briefing of counsel as needed in order to prosecute the Consolidated Proceeding.

7.3 In circumstances where counsel is to be briefed with respect to any future contest or dispute between the Plaintiffs, each of the Plaintiffs must brief counsel other than Joint Counsel for the purposes of the said dispute unless agreed otherwise by the Plaintiffs. For the avoidance of doubt, this clause shall not affect the appointment of any Joint Counsel for the purposes of clause 13.

7.4 Any or all of Joint Counsel may be replaced by alternative counsel to be chosen by the Litigation Committee in accordance with clause 6.1 of this Protocol.

## **8 Joint conduct of the Consolidated Proceeding**

8.1 The Plaintiffs will jointly:

- a) make any interlocutory applications that are necessary in the Consolidated Proceeding, save for any application in respect of non-common issues;

- b) respond to any interlocutory applications filed by the Defendant in the Consolidated Proceeding;
- c) retain, brief and instruct expert witnesses in the Consolidated Proceeding;
- d) rely on only one set of expert evidence between them to the extent that expert evidence in a field of specialised knowledge is allowed;
- e) conduct the cross examination of the Defendant's witnesses and experts;  
and
- f) conduct the discovery process as set out in clause 11.

## **9 Correspondence**

9.1 All correspondence to the Defendant or to the Court shall be jointly sent on behalf of the Plaintiffs and, subject to clause 5.5, will be approved by the Litigation Committee.

9.2 Correspondence to:

- a) Group Members as a group will be jointly sent in accordance with, and relying on the procedure identified in, clause 9.1.
- b) Group Members who are clients only of one firm shall be sent by that firm at the firm's own discretion.

9.3 The Plaintiffs will nominate one email address for service on the Plaintiffs, and to this end SG will create and host an email account in order to allow correspondence to be sent to, or received from, the Court and the solicitors for other parties to the litigation (**Joint Service E-mail Address**). The Joint Service E-mail Address will be configured so that:

- a) emails can be prepared and sent by Shine as well as by SG; and
- b) any e-mail sent to it is immediately forwarded to each member of the Litigation Committee and any other employees of Shine and SG as either firm may direct.

9.4 Further common email addresses may be established as necessary and configured as agreed by the Litigation Committee.

9.5 The Plaintiffs will nominate a physical address for service of the Plaintiffs for the purpose of the Consolidated Proceeding.

## **10 Out of Pocket Expenses & Disbursements**

- 10.1 After the Commencement Date, disbursements incurred for the benefit of the Consolidated Proceeding will be paid in the following proportions as far as practicable:
- a) Mr Thomas shall be responsible for 50% of disbursements; and
  - b) Mr Xiao shall be responsible for 50% of disbursements.
- 10.2 It is agreed that the most efficient way of managing this arrangement is for:
- a) Shine and SG to periodically confer and exchange any information necessary for allocating the incurring and payment of expenses so as to promote equal sharing; and
  - b) at the conclusion of the Consolidated Proceeding (whether by Court determination, award or settlement) Shine and SG are to conduct a final reconciliation of disbursements incurred after the Commencement Date, whereupon a single invoice will be raised for a balancing payment from one party to the other, with the effect that after the said payment each of the Plaintiffs will have borne a percentage of the total disbursements for the Consolidated Proceeding which is consistent with clause 10.1.
- 10.3 Unless agreed otherwise, where a disbursement is likely to exceed \$5,000 then both Shine and SG must approve the expenditure before it is incurred.
- 10.4 Where possible and appropriate, Shine and SG will seek to jointly engage third party providers and receive joint tax invoices payable in the proportions set out at clause 10.1.

## **11 Discovery**

- 11.1 The Parties agree, and will seek orders to the effect, that the Defendant need only produce one set of discovered documents to the Plaintiffs in the Consolidated Proceeding.
- 11.2 Unless otherwise agreed by the Plaintiffs:
- a) discovery will be processed using the Relativity electronic discovery software to be managed by SG; and
  - b) SKY Discovery will host documentary evidence in the proceeding.
- 11.3 A Relativity usage protocol will be developed (and shall be updated from time to time if necessary) and approved by the Litigation Committee to ensure a consistent

approach is adopted in respect of the management and usage of the document database and approach to discovery review.

- 11.4 If SKY Discovery becomes unsuitable for hosting the document database, the Litigation Committee may decide to migrate the document database to another external provider.

## **12 Privilege & Confidentiality**

- 12.1 The Plaintiffs acknowledge that all information passed or in future passing between the Parties:

- a) is strictly confidential and subject to legal professional and common interest privilege (as is relevant), unless otherwise agreed by the Litigation Committee; and
- b) will only be used for the purposes of the Consolidated Proceeding, the Thomas Proceeding and/or the Xiao Proceeding.

- 12.2 To the extent that such information is passed to any third parties then it will be subject to a confidentiality agreement unless:

- a) required by law, by a Court or by a regulatory authority of competent jurisdiction (in which case if only one party is subject to that requirement, notice of the disclosure will be provided where lawful to the other party as soon as reasonably practicable after the first party becomes aware of the requirement including providing that notice before the disclosure if that is possible and lawful);
- b) the third party is subject to a professional obligation of confidence to the disclosing party; or
- c) otherwise agreed by the Litigation Committee.

- 12.3 This clause 12 survives any termination of this Protocol.

## **13 Dispute Resolution**

### *Litigation Committee*

- 13.1 Subject to clause 13.2, any dispute arising within the Litigation Committee that cannot be resolved by the Litigation Committee will be referred to the most senior counsel referred to in clause 7.1 for decision, and:

- a) senior counsel shall be instructed that counsel is to determine the dispute by reference solely to the best interests of the Plaintiffs and group members considered as a whole and not by reference to the interests of any Party to this agreement; and
- b) senior counsel's decision on the dispute shall be binding on the Parties.

13.2 If a dispute arises which would be referred to the most senior counsel pursuant to clause 13.1, and any member of the Litigation Committee or counsel considers that it is not appropriate for such counsel to determine the dispute, the Litigation Committee may refer the dispute to an independent adjudicator appointed by the Litigation Committee, provided however that absent agreement within a reasonable time by the Litigation Committee as to such independent adjudicator, the Litigation Committee must refer the dispute to an independent adjudicator to be appointed by the President of the Law Institute of Victoria for a final decision, and clause 13.1 shall apply mutatis mutandis in respect of any such appointment.

*Implementation of the Protocol or other dispute*

13.3 In the event that any Party considers that co-operation between the Plaintiffs or between SG and Shine in the conduct of the Consolidated Proceeding is not functioning in accordance with this Protocol, or if any other dispute arises in relation to this Protocol:

- a) the concerned party, or any party in dispute with another party (**the complainant**), shall communicate its concerns to the other party or parties in writing (**recipients**);
- b) the complainant and recipients shall confer within 7 days of receipt of such notice, with a view to resolving the concern or the dispute (**conferral**);
- c) in the event that the concern or the dispute is not resolved to the satisfaction of all or both parties, the Litigation Committee must, within 14 days of the conferral, refer the concern or dispute to an independent adjudicator as under clause 13.2 above.

13.4 The Parties will use their utmost good faith to attempt to resolve any dispute and in giving effect to the outcome of any dispute resolution process conducted in accordance with this clause 13.

13.5 The Plaintiffs will not seek to recover from the Defendant the costs of any referral(s) pursuant to this clause 13.

## **14 Best Interests of Group Members**

- 14.1 The Plaintiffs consider that this Protocol serves to benefit Group Members.
- 14.2 The Plaintiffs shall instruct Shine and SG to interpret and give effect to this Protocol in a manner whereby the primary consideration shall be the interests of Group Members.

## **15 Costs Referee**

- 15.1 The Plaintiffs seek orders appointing an independent costs consultant (**Costs Consultant**) for the purpose of conducting six-monthly inquiries and preparing confidential written reports as to whether in their opinion:
- a) the work done and costs incurred by each firm have been necessary or reasonable for the purposes of recovery of costs on a solicitor-own client taxation; and
  - b) there has been any duplicated work as defined in clause 4.
- 15.2 In the event that a Costs Consultant is appointed by the Court, SG and Shine must assist the Costs Consultant in undertaking their inquiries by:
- a) providing the Costs Consultant with reasonable access to costs invoices and addressing the Costs Consultant's queries as reasonably required; and
  - b) otherwise cooperating and providing such information, access to personnel and access to documents as the Costs Consultant may reasonably require.

## **16 Termination**

- 16.1 Subject to this clause 16, the Protocol may only be terminated by an order of the Court, and the Parties agree that no application for such order will be made other than upon five (5) clear business days' notice to each other Party.
- 16.2 If there is a purported or attempted termination of this Protocol which is not provided for in this clause 16, the Parties will attempt to agree on the appropriate course, and if they cannot agree, the dispute will be resolved in accordance with the dispute resolution provision in clause 13.
- 16.3 This Protocol (except those clauses which are expressly stated to survive termination) will terminate when the Court delivers a final judgment and any appeal period expires or any appeal is determined, or in the event of a settlement following settlement approval and dismissal of the proceeding.

**17 General**

- 17.1 The Parties each agree to take all steps necessary to achieve the objectives and purposes of this Protocol, including (subject to clause 16.2), the entry into any further agreement necessary to implement this Protocol.
- 17.2 This Protocol may only be amended in any material respect by order of the Court.
- 17.3 Any non-material amendments may be made by a document duly executed by each of the Parties, and such amended Protocol is to be filed with the Court within 2 business days after execution by all Parties.
- 17.4 Any principal lawyer of SG or principal lawyer of Shine (or their equivalent) may issue a press release or media statement or respond to a journalist's request for comment relating to the Consolidated Proceeding, but must take all reasonable care to ensure that such communication is consistent with any decision made, and does not preempt any decision yet to be made, by the Litigation Committee. The firm that makes the communication should inform the other firm of the communication before making it where possible, otherwise as soon as practicable after making the communication.
- 17.5 This Protocol is governed by the law applicable in Victoria and the Parties irrevocably and unconditionally submit to the exclusive jurisdiction of the Courts of Victoria.
- 17.6 If a provision in this Protocol is held to be invalid, illegal or unenforceable, that provision is severable without affecting the validity or enforceability of the remaining part of that provision or other provisions.
- 17.7 This Protocol may be executed in counterparts.

**Signed:** \_\_\_\_\_  
**Jake Thomas**

**Date:** \_\_\_\_\_

**Signed:** \_\_\_\_\_  
**Yue Xiao**

**Date:** \_\_\_\_\_

**Signed:** \_\_\_\_\_  
**[Name]**  
**for Slater & Gordon Ltd**

**Date:** \_\_\_\_\_

**Signed:** \_\_\_\_\_  
**[Name]**  
**for Shine Lawyers Pty Ltd**

**Date:** \_\_\_\_\_



# Schedule D

## **CONSOLIDATION AGREEMENT**

### **a2 Milk Company Class Action**

**June 2022**

## PARTIES

Jake Thomas c/o Slater & Gordon Ltd of Level 12, 485 La Trobe St, Melbourne VIC 3000 (**Mr Thomas**).

Yue Xiao c/o Shine Lawyers of Level 6, 299 Elizabeth St, Sydney NSW 2000, (**Mr Xiao**).

Slater and Gordon Ltd of Level 12, 485 La Trobe St, Melbourne VIC 3000, (**SG**).

Shine Lawyers Pty Ltd of Level 6, 299 Elizabeth St, Sydney NSW 2000, (**Shine**).

## RECITALS

- A. On 5 October 2021, Mr Thomas commenced proceeding S ECI 2021 03645 (**Thomas Proceeding**) in the Supreme Court of Victoria (**Supreme Court**) against The a2 Milk Company Ltd (**A2M**) pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) (**Supreme Court Act**). The Thomas Proceeding was issued by Slater and Gordon Ltd, the solicitors for Mr Thomas.
- B. On 23 November 2021, Mr Xiao commenced proceeding S ECI 2021 04403 (**Xiao Proceeding**) against A2M in the Supreme Court pursuant to Part 4A of the Supreme Court Act. The Xiao Proceeding was issued by Shine Lawyers Pty Ltd, the solicitors for Mr Xiao.
- C. On 10 December 2021, the Honourable Justice Button ordered that the parties to the Thomas Proceeding and Xiao Proceeding file carriage motions with respect to the resolution of the competing proceedings.
- D. On [#date] Mr Thomas and Mr Xiao reached agreement as to the terms of consolidation of the Thomas Proceeding and Xiao Proceeding. This agreement sets out the terms of a joint venture between SG and Shine to conduct the consolidated proceeding.
- E. On [#date], her Honour made orders consolidating the Thomas Proceeding and the Xiao Proceeding (**Consolidated Proceeding**).
- F. On [#date] the Parties executed a Cooperative Litigation Protocol.
- G. This agreement is to be read in conjunction with the Cooperative Litigation Protocol.

## **OPERATIVE PROVISIONS**

### **1. Commencement Date**

**1.1** The term of this agreement shall begin from the date on which it is executed by all Parties.

### **2. Division of legal work**

**2.1** In recognition of Mr Thomas and SG's concerns in relation to the appropriateness of one firm advancing the claims of both Acquisition Claimants and Retention Claimants (as defined in the Xiao Proceeding), and to mitigate that risk to the satisfaction of the Parties, the Parties agree to the division of legal work between SG and Shine in accordance with this clause.

**2.2** Insofar as reasonably practicable:

- (a) SG and Shine will jointly undertake legal work advancing the claims of the Acquisition Claimants, avoiding duplication of work but endeavouring to share the total burden of the work equally between the firms;
- (b) Shine alone will be responsible for work undertaken advancing the claims of the Retention Claimants;
- (c) in the event that the claims of the Retention Claimants are ultimately to be prosecuted at trial of the Consolidated Proceeding, Shine will be responsible for advancing those claims (and the parties note that decisions as to the briefing of counsel are subject to the Cooperative Litigation Protocol including the dispute resolution procedure);
- (d) SG and Shine will use their best endeavours to ensure an even division of work between SG and Shine, having regard to a) and b) above.

**2.3** The Litigation Committee referred to in the Cooperative Litigation Protocol will determine which firm will be responsible for administrative tasks, such as sending emails and other correspondence, filing and service of documents etc.

**2.4** The Parties agree that:

- (a) NZ Law Claims
  - (i) At the earliest opportunity, the Plaintiffs will make an application to the Court for determination, as a separate question or otherwise, whether it has the power to:

- (A) determine the common question set out at paragraph 139(h) of the statement of claim filed in the Thomas Proceeding (**Thomas SoC**);
- (B) make the declarations sought in paragraph A of the Plaintiff and Group Member claims set out in the Thomas SoC, insofar as that paragraph relates to the FT Act and FMC Act (as defined in the Thomas SoC); and
- (C) award the loss and damage sought in paragraph C of the Plaintiff and Group Member claims set out in the Thomas SoC, insofar as those paragraphs relate to the FT Act, FMC Act and NZSX Listing Rules (as defined in the Thomas SoC), the *Supreme Court Act 1986* (Vic) and the *Constitution Act 1975* (Vic);

**(NZ Law Claims);**

(b) Expert Evidence

- (i) SG and Shine will exercise best endeavours to agree on topics and questions for expert evidence, and will work together to identify potential experts who possess the requisite expertise within six months following the receipt of the Defence.
- (ii) Where either of SG or Shine request that a potential expert be interviewed prior to receiving a brief, such interview will be arranged.
- (iii) A representative from each of SG and Shine will attend all interviews with potential expert witnesses.
- (iv) SG and Shine will exchange a list of preferred experts following the completion of the steps contemplated above.
- (v) In the event that SG and Shine are unable to reach agreement in relation to the selection of an expert witness, the matter will be referred to Rachel Doyle SC or Lachlan Armstrong QC or such other senior counsel as is briefed in the matter, for a final decision which the parties agree shall be determinative.

**2.5** It is acknowledged and intended that, in respect of particular tasks which may have a significant bearing on the course or conduct of the litigation, where possible, a representative from each of SG and Shine will be involved.

**2.6** SG and Shine will work together and coordinate tasks actively in order to:

- (a) reduce any duplication in legal costs to the maximum extent possible;

- (b) ensure that each has sufficient oversight over work being undertaken by the other, so as to be able to discharge the obligations of each to ensure that the proceeding is conducted efficiently and competently in the interests of their respective clients;
- (c) ensure that the work is conducted in a timely manner and the plaintiffs meet Court deadlines; and
- (d) mitigate the risk of tension, which may otherwise arise in the simultaneous prosecution of the claims of the Acquisition Claimants and Retention Claimants.

**2.7** To the extent that it is necessary and appropriate, SG and Shine will cooperatively share work product with each other, subject to the following:

- (a) each Party maintains the intellectual property in its own work product, precedents and systems;
- (b) the sharing of work product, precedents and systems does not entitle one Party to access the entire file of the other Party.

### **3. Costs control**

**3.1** Each month SG and Shine will exchange a professional fee summary which lists each fee earner and the total amount of 6-minute units performed by each fee earner during the previous month.

**3.2** If a Party has any concerns regarding the division of legal work after receiving the professional fee summary, the Party must raise those concerns within 30 days of receipt of the professional fee summary. A failure to do so will disentitle the Party from later disputing the division of legal work undertaken within the relevant month.

**3.3** In recognition of the estimated division of legal work in advancing the Consolidated Proceeding, it is estimated and intended that SG and Shine will each undertake work equivalent to, and thereby incur, 50% of the professional fees in the Consolidated Proceeding.

### **4. Disbursements**

**4.1** In relation to the payment of disbursements:

- (a) SG is responsible for payment of 50% of disbursements incurred; and
- (b) Shine is responsible for payment of 50% of disbursements incurred.

**4.2** For the avoidance of doubt, clause 4.1 above applies in respect of any disbursements incurred in advancing the claims of the Retention Claimants and the NZ Law Claims.

**4.3** Clause 10 of the Cooperative Litigation Protocol provides the terms upon which the payment of disbursements is to be managed by the Parties.

## **5. Security for Costs**

**5.1** Subject to orders of the Court, any Court order or agreement for security for costs shall be met by:

- (a) SG bearing responsibility for 50% of security for costs; and
- (b) Shine bearing responsibility for 50% of security for costs.

**5.2** If either firm defaults in compliance with clause 5.1 then:

- (a) until the default is remedied any new tasks to be undertaken by either firm shall be allocated to the firm not in default, and shall not thereafter be counted for the purposes of equal allocation of work between firms;
- (b) any payment of uplift fees or commission to the firm shall be discounted by the proportion which the period of default (measured in months or parts thereof) bears to the duration of the proceeding measured in months or parts thereof from the date of commencement of the Thomas Proceeding, and for this purpose any incomplete part of a month shall count as one month.

## **6. Adverse Costs Orders**

**6.1** Subject to orders of the Court, in the event that the Court orders that adverse costs be paid to the Defendant:

- (a) If a Group Costs Order is made, then:
  - (i) SG is liable for payment of 50% of the adverse costs ordered; and
  - (ii) Shine is liable for payment of 50% of the adverse costs ordered.
- (b) If a Group Costs Order is not made, then:
  - (i) SG is, in proportions subject to relevant funding agreements, liable for payment of 50% of the adverse costs ordered; and
  - (ii) Shine is, in proportions subject to relevant funding agreements, liable for payment of 50% of the adverse costs ordered.

**6.2** Further to clause 6.1, if SG and Shine have jointly procured ATE insurance to cover the costs of any adverse costs orders:

- (a) SG is liable for payment of 50% of the premium payable pursuant to the ATE policy;  
and
- (b) Shine is liable for payment of 50% of the premium payable pursuant to the ATE policy.

**6.3** Further to clause 6.1, if only one of SG or Shine have procured ATE insurance to cover the costs of any adverse costs orders, the firm procuring the ATE insurance shall be solely liable for the premium payable pursuant to the ATE policy.

**7. Application for Group Costs Order**

**7.1** The Parties will apply for a Group Costs Order pursuant to s33ZDA of the Supreme Court Act as soon as practicable.

**7.2** The application for a Group Costs Order under this clause will seek that the legal costs payable to SG and Shine be calculated as no more than 24% of the amount of any award or settlement that may be recovered in the Consolidated Proceeding, or as the Court may otherwise order.

**8. Legal Costs Recoverability under Group Costs Order**

**8.1** In the event that a Group Costs Order is made by the Court:

- (a) SG will be entitled to 50% of the legal costs recovered under the Group Costs Order;
- (b) Shine will be entitled to 50% of the legal costs recovered under the Group Costs Order.

**9. Funding if Group Costs Order not made**

**9.1** In the event that the Court declines to make a Group Costs Order in the Consolidated Proceeding, the Parties agree to use their best endeavours to negotiate joint third-party litigation funding.

**Signed:** \_\_\_\_\_

**Jake Thomas**

**Date:** \_\_\_\_\_

**Signed:** \_\_\_\_\_

**Yue Xiao**

**Date:** \_\_\_\_\_

**Signed:** \_\_\_\_\_

**Kaitlin Ferris**  
**for Slater & Gordon Ltd**

**Date:** \_\_\_\_\_

**Signed:** \_\_\_\_\_

**Craig Allsopp**  
**for Shine Lawyers Pty Ltd**

**Date:** \_\_\_\_\_