



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

No. S ECP 2021 03645

Case S ECP 2021 03645  
Filed on: 08/11/2022 04:39 PM

**BETWEEN**

**JAKE THOMAS**

First Plaintiff

**YUE XIAO**

Second Plaintiff

-and-

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

Defendant

**DEFENCE**

Date of Document:	8 November 2022	Solicitor's Code:	420
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In answer to the allegations in the Consolidated Statement of Claim dated 20 July 2022 (CSOC), the Defendant says as follows.

**PRELIMINARY MATTERS**

1A. Unless the context requires otherwise, the Defendant adopts the defined terms and the headings used in the CSOC, but does not admit any factual assertions contained in, or in any way implied by, any defined term or heading used in the CSOC and repeated in this Defence.

**OUTLINE OF THE DEFENDANT'S CASE**

1B. The Defendant is a premium branded dairy nutritional company focused on products made with milk from cows that naturally produce milk containing only the A2 beta-casein protein type.

1C. The shares of the Defendant are publicly traded on the New Zealand's Exchange Main Board (NZSX) and the Australian Securities Exchange (ASX).

- 1D. The Defendant's range of products include liquid milk and infant milk formula. The Defendant sells its infant milk formula products primarily in New Zealand, Australia, and China. The Defendant launched its infant milk formula brands in New Zealand, Australia and China in 2013, and in the period from 2013 to 2020, the Defendant experienced significant growth, each year out-performing the previous year's revenue.
- 1E. The Defendant's infant milk formula products are sold by a number of different channels, including for infant milk formula sold to China, via "daigou" (or reseller channel) and cross border e-commerce channels (**CBEC**).
- 1F. Between February and April 2020, the level of demand for the Defendant's infant milk formula products, as a result of consumers panic-buying large quantities of products as the global COVID-19 pandemic worsened, was without precedent.
- 1G. On 19 August 2020, the Defendant gave guidance to the market to the effect that it anticipated strong revenue growth and an FY21 EBITDA margin in the order of 30-31%, which was consistent with its detailed budget process, prepared on a "bottom-up" basis with "top down" review by senior management and the Board. The guidance identified "the uncertainty resulting from COVID-19, and the potential for moderation of economic activity".
- 1H. As information became available and the Defendant undertook reviews of its outlook, it provided further updates to the market in which it revised its guidance on 28 September 2020, 18 December 2020, 25 February 2021 and 10 May 2021. Each of those revisions was based upon the Defendant's budget and reforecasting processes.

*The Plaintiffs' case*

- 1I. The Plaintiffs' case alleges that the Defendant made representations which are alleged to be misleading or deceptive, or likely to mislead or deceive and are alleged to have been made without a reasonable basis, and that the Defendant failed to make disclosures of information of which it is alleged to have been aware.
- 1J. The "Relevant Period" for the Plaintiffs' case is 19 August 2020 to 9 May 2021 inclusive.<sup>1</sup>
- 1K. There are five aspects to the Plaintiffs' case.

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<sup>1</sup> CSOC [2(a)].

- 1L. First, the Plaintiffs allege that by its announcements released to the ASX and NZSX on 19 August 2020, 28 September 2020, 18 December 2020, and 25 February 2021, the Defendant made implied representations that:<sup>2</sup>
- (a) the Defendant's "monitoring systems" were adequate to reliably monitor "levels of infant formula already held in supply chains directed at or within China";
  - (b) by reason of the Defendant's "monitoring systems" being adequate to reliably monitor "levels of infant formula already held in supply chains directed at or within China", the Defendant was able to assess with reasonable accuracy likely demand from sales to its various channels during FY21, and the risk that elevated levels of inventory within supply chains directed at or within China supplied during FY20 may need clearing before there would be demand for new product to be supplied to the Defendant's various channels;
  - (c) the Defendant's statements to the market and forecasts were prepared based on information derived from its "monitoring systems"; and
  - (d) the Defendant had reasonable grounds for making the express representations it had made to the markets.
- 1M. Secondly, the Plaintiffs allege that the Defendant made express and implied representations that were misleading or deceptive, or likely to mislead or deceive and are alleged to have been made without a reasonable basis. As a result, the Plaintiffs allege that the Defendant contravened Australian legislation (section 1041H of the *Corporations Act 2001* (Cth) (**Corporations Act**), section 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and/or section 18 of the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**CCA**))) and New Zealand legislation (section 19 of the *Financial Markets Conduct Act 2013* (NZ) (**FMC Act**) and section 9 of the *Fair Trading Act 1986* (NZ) (**FT Act**)).<sup>3</sup>
- 1N. Thirdly, the Plaintiffs allege that the Defendant was aware of information concerning the market for its infant milk formula products in China, underlying market conditions within China, the alleged "likely" impacts of those matters on sales of the Defendant's products, and that the Defendant's "monitoring systems" were not adequate to enable it to reliably monitor levels of "infant formula already held in supply chains directed at or within China".<sup>4</sup>

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<sup>2</sup> CSOC [47], [74], [100], [125].

<sup>3</sup> CSOC [54], [80], [106], [131].

<sup>4</sup> CSOC [55], [81], [107], [132].

- 1O. The Plaintiffs allege that, as a result of the Defendant having the information it is contended to have held, between August 2020 and May 2021 it was obliged to disclose that information to the ASX and NZSX, and by failing to do so breached the ASX Listing Rules, and Corporations Act, and the NZSX Listing Rules and FMC Act.<sup>5</sup>
- 1P. Fourthly, the Plaintiffs contend that the Defendant's alleged misleading or deceptive conduct, or disclosure contraventions caused the market price for the Defendant's securities to be overvalued,<sup>6</sup> or alternatively, that the Plaintiffs and Group Members relied upon the alleged representations in deciding whether to acquire the Defendant's securities,<sup>7</sup> and as a result they suffered loss.<sup>8</sup>
- 1Q. Fifthly, the Plaintiffs allege that certain Group Members (termed "Retention Claimants") who acquired the Defendant's securities prior to the Relevant Period and retained those securities until after the Defendant's announcement on 28 September 2020 retained those securities on the assumption that the price of the Defendant's securities was not overvalued, or alternatively in reliance upon alleged representations by the Defendant,<sup>9</sup> and as a result suffered loss and damage.<sup>10</sup>

*The Defendant's case*

- 1R. The Defendant responds to the Plaintiffs' Consolidated Statement of Claim below in paragraphs 1 to 166. In summary and in answer to the whole of the Plaintiffs' case the Defendant says as follows.
- 1S. First, certain of the express representations alleged by the Plaintiffs were not, as a matter of fact, made.
- 1T. Secondly, to the extent the Defendant admits making express representations, those were statements of opinion for which the Defendant had reasonable grounds.
- 1U. Thirdly, the Defendant denies making the implied representations concerning "monitoring systems" alleged by the Plaintiffs. Having regard to the terms of a2MC's releases of 19 August 2020, 28 September 2020, 18 December 2020, and 25 February 2021, including the statements contained within those releases concerning uncertainties arising by the COVID-19 pandemic, it is clear that these alleged statements of opinion conveyed through implied representations were not made.

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<sup>5</sup> CSOC [56]-[65], [82]-[91], [108]-[117], [133]-[142].

<sup>6</sup> CSOC [67], [93], [118], [143].

<sup>7</sup> CSOC [149].

<sup>8</sup> CSOC [150]-[153].

<sup>9</sup> CSOC [155]-[156].

<sup>10</sup> CSOC [157]-[160].

- 1V. Fourthly, alternatively, to the extent the Defendant made the representations alleged concerning “monitoring systems”, such representations were statements of opinion for which the Defendant had reasonable grounds.
- 1W. The reasonable grounds referred to in paragraphs 1T and 1V above included that: the Defendant undertook a budget preparation process for the FY21 budget between around April 2020 and late June 2020; it undertook reviews and testing of its budget and forecast, including reforecasts based upon actual sales performance; and had processes in place to make forecasts in relation to, and scrutinise and review sales of, its products, including infant milk formula products. These processes included: inventory reporting; monthly financial reporting; independent market share data and brand health reporting.
- 1X. In addition, whether the Defendant had reasonable grounds to make the representations alleged ought be assessed in light of the statements contained in the Defendant’s public announcements concerning uncertainty arising from the COVID-19 pandemic and consequential market and economic uncertainty.
- 1Y. Fifthly, the Defendant denies that it was aware of information that should have been but was not disclosed to the market.
- 1Z. In this regard, the Plaintiffs’ case is premised upon hindsight, and assumes that a2MC had disclosable information within its possession at earlier points in time when it did not.
- 1AA. The Plaintiffs’ case also proceeds upon a false premise concerning “monitoring systems”: that the only way in which the Defendant could make forecasts based on reasonable grounds was if it had systems in place to reliably monitor levels of infant formula already held in “supply chains” (that is, held by unrelated third parties) directed at or within China. In fact, the Defendant had a multi-faceted budget process, based on a broad range of input data, for the making of forecasts and related statements to the market, which underpinned the statements it made to the market during the Relevant Period.
- 1BB. Further, the First Plaintiff has admitted on behalf of himself and the Group Members, by way of a positive allegation, in his Statement of Claim dated 5 October 2021 at [50], [55] (in Case S ECI 2021 03645) that the Defendant in fact had systems and processes to track its sales and financial performance, capable of reliably determining the volume of stock of English Label Infant Formula Products available for sale in China.

- 1CC. Sixthly, as and when the Defendant obtained information that was sufficiently certain, it disclosed that information to the market. This is demonstrated by the revised guidance that the Defendant issued between September 2020 and May 2021, which reflected unprecedented events arising out of the COVID-19 pandemic, impacting demand for its products in China in ways that could not have been foreseen. The guidance that was given in September 2020 reflected the Defendant's genuine estimate of future sales in a disclosure in which it expressly emphasised significant uncertainty and volatility in market conditions. The Defendant continued to emphasise these conditions in each of the subsequent announcements to the market relied on by the Plaintiffs, and further statements to the market (to which the Plaintiffs do not refer, but are pleaded below).
- 1DD. Seventhly, in light of the full terms of the Defendant's releases of 19 August 2020, 28 September 2020, 18 December 2020, and 25 February 2021, as well as the further statements the Defendant made to the market in the Relevant Period, the Plaintiffs made any decision to purchase the Defendant's securities fully aware of what the Defendant had conveyed to the market about uncertainty in the market, and to the extent that the Plaintiffs purchased the Defendant's securities without regard to the full terms of its releases, the Plaintiffs and Group Members failed to take reasonable care, and any award of damages or compensation to the Plaintiffs and Group Members should be reduced by operation of section 1041I of the Corporations Act section, section 12GF of the ASIC Act, section 137B of the CCA, or in the exercise of discretion under sections 494 and 495 of the FMC Act and section 43 of the FT Act.
- 1EE. Eighthly, the Defendant should be excused from liability for any contravention of s 674(2) by operation of s 1317S of the Corporations Act, and the Court should decline to exercise relief in the exercise of discretion pursuant to sections 494 and 495 of the FMC Act and section 43 of the FT Act.
- 1FF. Finally, the Defendant denies the Plaintiffs' and Group Members' case based upon market based causation, and upon the premise that "Retention Claimants" have suffered any loss, or that "Retention Claimants" have any claim susceptible to any common question.

## **A THE PARTIES AND GROUP MEMBERS**

### **A.1 The Plaintiffs and Group Members**

1. It does not plead to paragraph 1 as it contains no allegations against it.
2. As to paragraph 2, it:

- (a) denies that any persons suffered loss or damage by or resulting from the conduct of the Defendant alleged in the CSOC;
- (b) says that it understands that the definition of “Acquisition Claimants” is intended to be those persons who acquired an interest in fully paid ordinary shares of the Defendant on the ASX or NZSX during the period from 19 August 2020 to 9 May 2021 (though paragraph 2(a)(i) of the CSOC does not plead this explicitly);
- (c) otherwise does not plead to paragraph 2 as it contains no allegations against it.

3. It repeats paragraph 2 and otherwise does not admit paragraph 3.

#### **A.2 The business of a2**

4. As to paragraph 4, it:

- (a) insofar as paragraph 4(i)(v) alleges that a2 Securities were and are a financial product within the meaning of s 763A(1)(a) and s 764(1)(a) of the Corporations Act, denies that and says a2 Securities were and are a financial product within the meaning of s 763A(1)(a) and s 764A(1)(a);
- (b) in relation to paragraph 4(i)(x):
  - (i) admits that the traded price may have been affected, in some circumstances, by the information available in respect of the Defendant as a result of announcements and publications made by the Defendant to either the ASX or NZSX;
  - (ii) says further that the traded price was also likely to have been affected by information available from sources other than the Defendant;
  - (iii) otherwise denies paragraph 4(i)(x);
- (c) insofar as paragraph 4(k)(iii)(F) alleges that the Defendant was and is a person within the meaning of s 18 of the Australian Consumer Law being Schedule 2 of the CCA, as applicable pursuant to s 16 of the *Australian Consumer Law (Tasmania) Act 2010* (Tas), it denies that and says the Defendant was and is a person within the meaning of s 18 of the Australian Consumer Law being Schedule 2 of the CCA, as applicable pursuant to s 6 of the *Australian Consumer Law (Tasmania) Act 2010* (Tas);
- (d) otherwise admits paragraph 4.

## **B a2's CONTINUOUS DISCLOSURE OBLIGATIONS**

### **B.1 Australian Continuous Disclosure Obligations**

5. It admits paragraph 5.
6. It admits paragraph 6.
7. It admits paragraph 7.
8. It admits paragraph 8.
9. It admits paragraph 9.
10. It admits paragraph 10.
11. As to paragraph 11, it:
  - (a) says that the Coronavirus Determinations had effect from the beginning of the Relevant Period until 23 March 2021;
  - (b) otherwise admits paragraph 11.
12. As to paragraph 12, it:
  - (a) says that the Coronavirus Determinations had effect from the beginning of the Relevant Period until 23 March 2021;
  - (b) otherwise admits paragraph 12.
13. As to paragraph 13, it:
  - (a) says that the Coronavirus Determinations had effect from the beginning of the Relevant Period until 23 March 2021;
  - (b) admits paragraph 13 insofar as Rule 3.1 of the ASX Listing Rules had the effect alleged from 24 March 2021 until the end of the Relevant Period.
14. As to paragraph 14, it:
  - (a) says that the Coronavirus Determinations had effect from the beginning of the Relevant Period until 23 March 2021;
  - (b) admits paragraph 14 insofar as s 677 of the Corporations Act had the effect alleged from 24 March 2021 until the end of the Relevant Period.

### **B.2 New Zealand Continuous Disclosure Obligations**

15. It admits paragraph 15.
16. It admits paragraph 16.

17. As to paragraph 17, it:
- (a) says that section 270 of the *Financial Markets Conduct Act 2013* (NZ) required the Defendant to notify information in accordance with the continuous disclosure provisions of the listing rules for the licensed market if, inter alia, the information is material information that is not generally available to the market;
  - (b) otherwise admits paragraph 17.

18. It admits paragraph 18.

## **C a2's BUSINESS**

### **C.1 a2's Directors, Officers and Senior Managers**

19. It admits paragraph 19.
20. It admits paragraph 20.
21. It admits paragraph 21.
22. As to paragraph 22, it:
- (a) says that during the Relevant Period, Peter Nathan was the Chief Executive Asia Pacific of the Defendant;
  - (b) otherwise denies paragraph 22.
23. It admits paragraph 23.
24. As to paragraph 24, it:
- (a) says that from the start of the Relevant Period to April 2021, Jaron McVicar was the Company Secretary and General Counsel of the Defendant;
  - (b) says that from April 2021 to the end of the Relevant Period, Jaron McVicar was the Chief Legal and Sustainability Officer and the Company Secretary of the Defendant;
  - (c) otherwise denies paragraph 24.
25. It admits paragraph 25.
26. As to paragraph 26, it:
- (a) says that from November 2018 to July 2020, Lisa Burquest was the Chief People Officer of the Defendant;

- (b) says that from July 2020 to 31 January 2021, Lisa Burquest was the Chief People, Safety and Sustainability Officer of the Defendant;
  - (c) otherwise denies paragraph 26.
- 27. It admits paragraph 27.
- 28. It admits paragraph 28.
- 29. As to paragraph 29, it:
  - (a) says that from the start of the Relevant Period to April 2021, David Akers was the Head of Investor Relations;
  - (b) says that from April 2021 to the end of the Relevant Period, David Akers was the Group Head of Investor Relations and Sustainability;
  - (c) otherwise denies paragraph 29.
- 30. It admits paragraph 30.
- 31. As to paragraph 31, it:
  - (a) says that Jesse Wu was an independent non-executive director of the Defendant from the beginning of the Relevant Period to 26 February 2021;
  - (b) otherwise admits paragraph 31.
- 32. As to paragraph 32, it repeats paragraph 9 and:
  - (a) admits Geoffrey Babidge, David Bortolussi, Race Strauss, Peter Nathan, Jaron McVicar, David Hearn, Julia Hoare, Jessie Wu, Pip Greenwood, Warwick Every-Burns and Bessie Lee were each an officer of the Defendant within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12 during the period in which they held their respective positions;
  - (b) denies that Shareef Khan, Susan Massasso, Lisa Burquest, David Akers and Li Xiao were each an officer of the Defendant within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12;
  - (c) otherwise denies paragraph 32.
- 33. As to paragraph 33, it repeats paragraph 16 and:
  - (a) says that David Bortolussi was a Managing Director of the Defendant so was not a senior manager of the Defendant within the meaning of the NZSX Listing Rules;

- (b) admits Geoffrey Babidge, Race Strauss and Peter Nathan were each a senior manager of the Defendant within the meaning of s 6 of the FMC Act;
- (c) denies that Shareef Khan, Jaron McVicar, Susan Massasso, Lisa Burquest, David Akers and Li Xiao were each a senior manager of the Defendant within the meaning of s 6 of the FMC Act;
- (d) admits that David Bortolussi and the Non-Executive Directors were each a director of the Defendant within the meaning of the NZSX Listing Rules;
- (e) otherwise denies paragraph 33.

## **C.2 a2's Business**

- 34. It admits paragraph 34.
- 35. It admits paragraph 35.
- 36. In respect of paragraph 36, it:
  - (a) says that a2 sold infant formula products with Chinese language labels (referred to as **"China Label"**);
  - (b) otherwise admits paragraph 36.
- 37. As to paragraph 37, it:
  - (a) says that on the basis that "majority" in paragraph 37 means "greater than 50%":
    - (i) it admits that the sales of infant formula products constituted the majority of revenue for the Defendant in FY20 and FY21;
    - (ii) it admits that the majority of sales of infant formula products was derived from sales of English Label Infant Formula Products in FY20 and FY21;
  - (b) otherwise denies paragraph 37.
- 38. As to paragraph 38, it:
  - (a) refers to and repeats the matters pleaded at paragraph 39 below;
  - (b) says as to paragraph 38(a), that the Defendant supplied English Label Infant Formula Products to:
    - (i) Australia and New Zealand retailers;
    - (ii) corporate daigou customers (resellers) based in Australia and New Zealand;

- (iii) CBEC distributors (who supplied a2 English Label Infant Formula Products to CBEC online retail platforms),  
(together, **a2MC's Direct EL Customers**);
  - (c) says as to paragraph 38(b) that:
    - (i) the Defendant supplied China Label Infant Formula Products to its master distributor, China State Farm (**CSF**);
    - (ii) CSF in turn sold China Label Infant Formula Products to sub-distributors, who sold to retail outlets in China and Chinese domestic e-commerce platforms for sale to end-consumers;
    - (iii) the movement of China Label Infant Formula Products from sub-distributors to retailers to end-consumers in China involved intermediaries and transactions outside of the control of the Defendant;
  - (d) otherwise denies paragraph 38.
39. As to paragraph 39, it:
- (a) refers to and repeats paragraph 38(b) above;
  - (b) says that English Label Infant Formula Products became available for purchase by customers and end-consumers in China by a variety of different channels (including both offline and online channels);
  - (c) the movement of English Label Infant Formula Products from the distribution channels listed in paragraph 38(b) above to end-consumers in China involved intermediaries and transactions outside of the control of the Defendant;
  - (d) otherwise denies paragraph 39.

## **D AUGUST 2020 ALLEGED CONTRAVENTIONS**

### **D.1 Alleged True Position at August 2020**

40. As to paragraph 40, it:
- (a) contains vague and sweeping generalities about the nature and characteristics of the market it purports to describe that are said to apply to all resellers and the entire distribution channel at all times and particulars have not been provided;

**Particulars**

Inter alia:

- (1) Paragraph 40(b) assumes that all retail and corporate daigou resellers sell the Defendant's English Label Infant Formula Products to end-consumers in China (and in that regard, the Defendant repeats paragraph 39);
- (2) Paragraph 40(b) assumes that profit is impacted only by the margin of price pleaded in paragraph 40(b), whereas profit is impacted by other inputs including expenses incurred by retail and corporate daigou resellers;
- (3) Paragraph 40(c) assumes that competitive pricing is the sole factor impacting resellers' ability to sell English Label Infant Formula Products into China, whereas this is impacted by other factors including the Defendant's brand health, purchasing preferences of consumers and freshness of stock held by those resellers relative to other distributors (including online platforms) and other resellers;
- (4) Paragraph 40(d) assumes that all stock supplied by the Defendant of English Label Infant Formula Products into China via CBEC was available for purchase by all end-consumers in China, whereas it was possible stock supplied via CBEC may then subsequently pass through other channels, and may not have been purchased by an end-consumer in China;
- (5) Paragraph 40(f) assumes that pricing is the sole factor impacting the volume of sales of the Defendant's English Label Infant Formula products to retail daigou resellers and corporate daigou resellers in the Aus NZ Segment (whereas this is impacted by other factors including the

Defendant's brand health, purchasing preferences of consumers and freshness of stock held by those resellers relative to other distributors (including online platforms) and other resellers);

(6) Further particulars may be provided following evidence.

- (b) says that all subsequent allegations in the CSOC made by reference to the "August 2020 a2 China Market Conditions" as pleaded in paragraphs 40 and 41 are vague and embarrassing;
- (c) says further that demand for, and supply of, the Defendant's English Label Infant Formula Products to end-consumers in China as at 19 August 2020 was impacted by the unique and unprecedented impacts of the worldwide COVID-19 pandemic, including:
  - (i) travel restrictions on incoming and outgoing international travel in Australia and China;
  - (ii) the imposition of orders restricting the movement of persons within and between the States and Territories of Australia; and
  - (iii) unexpected consumer behaviour and changing behaviours in purchasers of a2 English Label Infant Formula Products, including the impacts of pantry loading in 3Q20 and subsequent unwinding of pantry stocking from 4Q20;
- (d) otherwise denies paragraph 40.

41. As to paragraph 41, it:

- (a) says as to paragraph 41(a):
  - (i) throughout FY20 there was strong growth in sales of the Defendant's English Label Infant Formula Products;

#### **Particulars**

- (1) Sales of a2 Platinum English Label infant nutrition in the CBEC channel totalled \$341.1 million in FY20, which was an increase of 40.3% compared to FY19.

- (2) Sales of a2 Platinum English Label infant nutrition to ANZ retailers and resellers was \$745.1 million in FY20, which was an increase of 14% compared to FY19.
  - (3) Further particulars may be provided following evidence.
- (ii) there was an increase in the volume of English Label Infant Formula Products the Defendant supplied for sale through its distribution channels in the second half of FY20 as a result of a surge in demand for English Label Infant Formula Products resulting from consumer behaviour in response to the COVID-19 pandemic;
- (iii) it held total inventories (at the lower of cost and net realisable value) at the end of FY20 of \$147,332,000, compared to \$108,453,000 at the end of FY19;
- (iv) inventory at the end of FY20 was higher than at the end of FY19 due to:
  - (A) the growing business of the Defendant;
  - (B) the decision of the Defendant to carry higher levels of inventory as a safety buffer due to the uncertainties of the COVID-19 pandemic;
- (b) says as to paragraph 41(b):
  - (i) in FY20 across Asia Pacific, the Defendant had experienced 33.8% growth in infant nutrition revenue on FY19, with a 65.1% increase in China, reflecting strong growth in all channels;

#### **Particulars**

- (1) FY20 Annual Results Presentation, slide 13
  - (2) FY20 Annual Report, page 12
  - (3) Further particulars may be provided following evidence.
- (ii) China based channels accounted for 48% of total infant nutrition sales in FY20;

### Particulars

- (1) FY20 Annual Results Presentation, slide 15
  - (2) Further particulars may be provided following evidence.
- (iii) the COVID-19 pandemic presented ongoing risks to the business of the Defendant, including:
- (A) a weakened global economy;
  - (B) a possible unwinding of consumer pantry stocking for infant formula;
  - (C) disruptions to sale channels;
- (iv) there remained global uncertainty from the COVID-19 pandemic, including in economic activity which could impact consumer behaviour in the Defendant's core markets and participants in its supply chain, most notably in China;
- (c) says as to paragraph 41(c), the volume of sales and the sale price of English Label Infant Formula Products in China was subject to the uncertainty pleaded in paragraph 41(b)(iii)-(iv);
- (d) says further that as at 19 August 2020, the Defendant had made public announcements conveying the above matters;

### Particulars

- (1) Interim Report for the six months ended 31 December 2019, page 6: *"uncertainty around the potential impact to supply chains and consumer demand in China resulting from COVID-19"*.
- (2) Market release entitled "Delivered strong financial results; Strategy execution gaining momentum" dated 27 February 2020, page 9: *"uncertainty around the potential impact to supply chains and consumer demand in China resulting from COVID-19"*.

- (3) Half Year Interim Results Presentation FY20, page 32.
- (4) Market release entitled "Trading Update & FY20 Outlook" dated 22 April 2020, pages 1 and 2.
- (5) FY20 Annual Results Presentation, page 28.
- (6) FY20 Annual Report, pages 12 to 14, 21, 36 to 37, 78 to 79.
- (7) Further particulars may be provided following evidence.

(e) otherwise denies paragraph 41.

42. As to paragraph 42, it:

- (a) refers to and repeats paragraphs 40 and 41 above;
- (b) otherwise denies paragraph 42.

43. As to paragraph 43 it:

- (a) repeats paragraph 39 above;
- (b) says further that as at 19 August 2020 (and at all material times afterwards), the Defendant had in place systems and processes for monitoring the ongoing performance of the Defendant's business, and market conditions or trends likely to affect future performance;

#### **Particulars**

- (1) Those systems and processes included:
  - a. inventory reporting;
  - b. monthly financial reporting;
  - c. independent market share data;
  - d. brand health reporting;
- (2) Further particulars may be provided following evidence.

(c) says further that as at 19 August 2020 (and at all material times afterwards), the Defendant had in place systems and processes for monitoring its own

and a2MC's Direct EL Customers' stock on hand inventory levels of English Label Infant Formula Products;

**Particulars**

- (1) Those systems and processes included:
  - a. The Defendant used the supply chain management services of third party service providers for logistical operations such as warehousing and transportation of its English Label Infant Formula Products;
  - b. The Defendant had an enterprise resource planning system (**ERP**) that recorded stock on hand inventory data;
  - c. The Defendant received stock on hand inventory information from a2MC's EL Direct Customers;
  - d. The Defendant analysed inventory information received from a2MC's Direct EL Customers;
  - e. The Defendant held sales and operations planning executive review meetings as part of its sales and operations planning process to discuss inventory management matters such as the Defendant's demand forecasting, supply chain issues and supply plan;
  - f. Reporting to the Defendant's Board on sales, infant milk formula market demand, production schedules, inventory levels, inventory outlook and market share data.
- (2) Further particulars may be provided following evidence.

- (d) says further that as at 19 August 2020 (and at all material times afterwards), the Defendant had in place systems and processes to monitor and assess inventory levels of English Label Infant Formula Products inventory supplied by a2MC's Direct EL Customers to other traders in the supply and distribution chain;

**Particulars**

- (1) Those systems and processes included:
- a. The Defendant compared its ex-factory sales volume data against stock on hand inventory data reported to it by a2MC's Direct EL Customers, and against end-consumer offtake data obtained from a2MC's monitoring of CBEC platforms;
  - b. The Defendant obtained data from Kantar and Smart Path on sales volumes, market share and pricing;
  - c. The Defendant analysed the data from the sources described in particular 1.b above, to consider the level of English Label Infant Formula Product inventory which was held by other traders in the supply chain.
- (2) Further particulars may be provided following evidence.

- (e) says further that as at 19 August 2020 (and at all material times afterwards), the Defendant had in place systems and processes for monitoring its own stock on hand inventory levels and the stock on hand inventory levels of China Label Infant Formula Products held by CSF;

**Particulars**

- (1) Those systems and processes included:
- a. The Defendant had an ERP system for its inventory management. The Defendant's ERP system provided

product movement data including ex-factory supply data, being the total of the Defendant's China Label Infant Formula Products supplied to CSF;

- b. CSF provided the Defendant with stock on hand inventory data in relation to the total volume of the Defendant's China Label Infant Formula Products it was holding in its warehouse;
- c. The Defendant engaged an independent external auditor to audit on a quarterly basis the stock on hand inventory of China Label Infant Formula Products held by CSF.

(2) Further particulars may be provided following evidence.

- (f) says further that as at 19 August 2020 (and at all material times afterwards), the Defendant had in place systems and processes to assess the levels of the Defendant's China Label Infant Formula Product inventory supplied by CSF to other traders in the supply and distribution chain;

### **Particulars**

- (1) Those systems and processes included:
  - a. Analysis of the following information:
    - i. The Defendant received inventory management information from CSF such as product movement data, and purchase and sales history data of the Defendant's China Label Infant Formula Products which were sold by CSF to sub-distributors;
    - ii. the Defendant obtained Nielsen MBS and Smart Path data which provided information in relation to

the total sales volumes, sales values, retail pricing and market share data for China Label Infant Formula Products to end-consumers for the MBS and DOL channel;

iii. The Defendant obtained Kantar World Panel data which provided information on market share for end-consumer offtake;

iv. The Defendant obtained consumer offtake data for some offline key accounts as well as major online DOL platforms;

b. Comparing data sources and the analysis of data, including from Nielsen MBS data, Smart Path data, Kantar World Panel data, internal product movement data such as ex-factory supply data, distributor inventory data and price tracking data to assess the quantity of the Defendant's China Label Infant Formula Product inventory within the supply and distribution channel.

(2) Further particulars may be provided following evidence.

(g) repeats paragraph 39 above;

(h) says that the First Plaintiff admitted on 5 October 2021 that the Defendant had the following "systems and processes" to track its sales and financial performance:

(i) "tracking the sales in the cross-border e-commerce channel using Smarthpath data";

(ii) "tracking the sales in the mother and baby store channel using Nielsen scan data";

- (iii) “monitoring the operating results of its business units and operating Segments”;
- (iv) “monitoring receivables balances on an ongoing basis”; and
- (v) “assessing the financial position of a2 for the purpose of facilitating compliance with relevant financial reporting and accounting standards”.

**Particulars**

- (1) Statement of Claim dated 5 October 2021 in Case S ECI 2021 03645 at paragraph 55.
  - (2) Proper Basis Certification dated 5 October 2021 in Case S ECI 2021 03645.
- (i) says further that the First Plaintiff admitted that the systems and processes pleaded in paragraph 43(h) enabled it to determine:
- (i) the rate at which the level of “underlying consumer demand for a2’s English Label Infant Formula Products in China” was growing as at 19 August 2020; and
  - (ii) the supply level of English Label Infant Formula Products in China

**Particulars**

- (1) Statement of Claim dated 5 October 2021 in Case S ECI 2021 03645 at paragraphs 50 and 55.
  - (2) Proper Basis Certification dated 5 October 2021 in Case S ECI 2021 03645.
- (j) will rely on the First Plaintiff’s admission as to the existence and capabilities of Defendant’s systems and processes at trial;
- (k) relies as against the First Plaintiff and the Group Members represented by the First Plaintiff on the admission made as to the existence and capabilities of the Defendant’s systems and processes at trial; and
- (l) otherwise denies paragraph 43.

**D.2 August Representations and Alleged Representations**

44. As to paragraph 44 it:

- (a) admits paragraphs 44(a) to (g);

- (b) says as to paragraph 44(h) it:
  - (i) says that in its FY20 Annual Report it stated *"Our performance was robust throughout the year and we demonstrated significant resilience in the second half managing the business in the face of the COVID-19 global pandemic"*
  - (ii) relies on the statements made in its FY20 Annual Report for their full terms and effect;

#### **Particulars**

FY20 Annual Report, page 13.

- (c) otherwise denies paragraph 44.

45. As to paragraph 45, it:

- (a) admits that its reported results for FY20 included total revenue of \$1.73 billion, an increase of 32.8%; EBITDA of \$549.7 million, an increase of 32.9%; NPAT of \$385.8 million, an increase of 34.1%; and EBITDA to sales margin of 31.7%;
- (b) otherwise denies paragraph 45.

#### **Particulars**

- (1) FY20 Annual Report, page 12.
- (2) Further particulars may be provided following evidence.

46. As to paragraph 46, it:

- (a) relies on the full terms and effect of the documents particularised at paragraph 46;
- (b) says further as to paragraph 46(b):
  - (i) the Defendant stated that there remained global uncertainty from the COVID-19 pandemic, including in economic activity which could impact consumer behaviour in its core markets and participants in its supply chain, and that it had identified China as the most notable to potentially be impacted;

**Particulars**

- (1) FY20 Annual Report, page 21.
  - (2) a2 ASX and NZSX announcement dated 19 August 2020 entitled "Results Commentary FY20: Strong financial results and execution continuing", page 9.
  - (3) a2 ASX and NZSX announcement dated 19 August 2020 entitled "2020 Annual Results Presentation", page 28.
- (c) says as to paragraph 46(c) that the Defendant stated that it anticipated its FY21 EBITDA for the full year to be in the order of 30% to 31%;

**Particulars**

- (1) FY20 Annual Report, page 21: "FY21 EBITDA margin is expected to be in order of 30% to 31% reflecting:
    - *Higher raw and packaging material costs partially offset by price increases*
    - *Increase of marketing investment*
    - *FX benefit of prior year not expected to be replicated*
    - *3Q20 Covid-19 benefits not replicated*

*Medium term target: As previously announced, the Board considers it appropriate that the Company target an EBITDA margin in the order of 30% in the medium term. This assumes the market performance and mix of our products remains broadly consistent and the competitive environment evolves as anticipated...*".
- (d) denies that the representation pleaded in paragraph 46(d) was made and says further that:

**Particulars**

- (1) The question and answer exchange between Shaun Cousins (JP Morgan, Analyst) and Peter Nathan was in terms directed to “inventory levels”, namely, that inventory held by the Defendant and a2MC’s Direct EL Customers, did not refer to its “comfort levels” “in supply chains” or “down to pantry stocks”, and did not expressly or impliedly convey “comfort” with respect to stock of Infant Formula Products held by third parties, unrelated to the Defendant in China (Refinitiv transcript of FY20 Results Call on 19 August 2020 at 09:00 AEST, page 6, question from Richard Barwick (CLSA, Analyst) answered by Peter Nathan).
- (i) the Defendant communicated to the market that it remained difficult to precisely forecast and track inventory supplied by a2MC’s Direct EL Customers to other traders in the supply and distribution chain;

**Particulars**

- (1) Refinitiv transcript of FY20 Results Call on 19 August 2020 at 09:00 AEST, page 9, question from Richard Barwick (CLSA, Analyst) answered by Peter Nathan.
  - (2) Refinitiv transcript of FY20 Analyst Q&A call at 15:00 AEST on 19 August 2020 with analysts and investors, page 1, question from Nick Mar (Macquarie, Analyst) answered by Peter Nathan.
  - (3) Further particulars may be provided following the service of evidence.
- (ii) the Defendant stated to the market that there was some unwinding of pantry stocking in Q420 and in July 2020 and August 2020, which was taken into account in its budget for FY21;

**Particulars**

- (1) Refinitiv transcript of FY20 Analyst Q&A call at 15:00 AEST on 19 August 2020 with analysts and investors, page 7, question from David Errington (Bank of America, Analyst) answered by Geoff Babidge and Peter Nathan.
- (iii) the Defendant stated to the market that it held inventory of \$147.3 million the end of the FY20 full year which was higher than prior years, reflecting its growing business and a decision to carry higher inventory as a safety buffer given the uncertainties of the COVID-19 pandemic;

**Particulars**

- (1) FY20 Annual Report, page 14: *"We finished the year with inventory of \$147.3 million. This was higher than prior years, in part reflecting our growing business, as well as the decision to carry a higher level of inventory as a safety buffer given the uncertainties of COVID-19."*
- (e) denies that the representation pleaded in 46(e) was made, and repeats paragraphs 43(d)(i)-(iii) above;

**Particulars**

- (1) The question and answer exchange between Shaun Cousins (JP Morgan, Analyst) and Peter Nathan was in terms directed to "inventory levels", namely, that inventory held by the Defendant and a2MC's Direct EL Customers, and did not refer either expressly or impliedly to levels of "inventory" held in "Chinese supply chains", being held by third parties unrelated to the Defendant, in China. (Refinitiv transcript of FY20 Results Call on 19 August 2020 at 09:00 AEST, page 5, question from Shaun Cousins (JP Morgan, Analyst) answered by Peter Nathan).

- (2) The particulars to paragraphs 53(d)(i)-(ii) are repeated.

- (f) says further that the Defendant included in its 2020 Annual Results Presentation the express disclaimer that the forward looking statements contained in the Presentation involve known and unknown risks, uncertainties and assumptions, many of which are beyond the control of the Defendant and which may cause actual results, performance or achievements to differ materially from those expressed or implied by such statements;

#### Particulars

- (1) The Defendant's ASX and NZSX announcement dated 19 August 2020 entitled "2020 Annual Results Presentation".

- (g) otherwise denies paragraph 46.

47. As to paragraph 47, it:

- (a) refers to and repeats paragraphs 40, 41, 43 and 46 above;
- (b) denies that the implied representations pleaded in paragraph 47(a)-(c) were made;
- (c) says further that the matters stated in the documents particularised at paragraph 46 of the CSOC were made subject to the terms of those documents, including as pleaded at paragraph 46 above;
- (d) admits that the implied representation in paragraph 47(d) was made in respect of the express statements which the Defendant has admitted were made in paragraph 46 above;
- (e) says further that in respect of the express statements pleaded in paragraphs 46(b) and (c) above (**the August Statements**), the statements were statements of opinion for which the Defendant had reasonable grounds:
- (i) the Defendant made the August Statements after its budget for FY21 (**2021 Budget**) was finalised in or around June 2020;
- (ii) the Defendant undertook its 2021 Budget process between around April 2020 and June 2020 (**the 2021 Budget Process**);

- (iii) the 2021 Budget was prepared as a result of the 2021 Budget Process;

**Particulars**

- (1) Board pack dated 24 June 2020, pages 44 to 164.
  - (2) Minutes of Board Meeting on 24 June 2020, pages 2 to 3.
- (f) further and alternatively, says that if (which is denied) the Defendant made the implied representations pleaded at paragraph 47(a)-(c) of the CSOC, those implied representations were statements of opinion for which the Defendant had reasonable grounds;

**Particulars**

- (1) The Defendant refers to and repeats the matters pleaded at paragraphs 43 and 47(e) above.
  - (2) Further particulars may be provided following the service of evidence.
- (g) otherwise denies paragraph 47.

48. It denies paragraph 48.

*9 September Announcement*

49. As to paragraph 49, it:

- (a) admits that the Defendant published the 9 September Release to the ASX and NZSX;
- (b) relies on the 9 September Release for its full terms and effects;
- (c) says further that the Defendant stated in the 9 September Release that:
  - (i) the COVID-19 pandemic had disrupted and changed consumer behaviour, including a shift from offline to online and pantry stocking in 3Q20;

**Particulars**

- (1) CLSA Investors' Forum Presentation, page 9: *"Covid-19 caused disruptions and changing consumer behaviour including:*

- *Shift from offline to online, in particular China in 3Q20*
- *Pantry stocking of infant nutrition in 3Q20 across online and resellers, a proportion of which unwound in 4Q20, unable to estimate the full extent...*

- (ii) there remained global uncertainty from the COVID-19 pandemic, including in economic activity which could impact consumer behaviour in its core markets and participants in its supply chain and it had identified China as the most notable to potentially be impacted;

### **Particulars**

- (1) CLSA Investors' Forum Presentation, page 18:  
*"Globally, there continues to be uncertainty resulting from COVID-19, and the potential for moderation of economic activity. This could impact consumer behaviour in our core markets, as well as participants within the supply chain, most notably in China.*

*Notwithstanding these uncertainties, overall for FY21, we anticipate continued strong revenue growth supported by our continued investment in marketing and organisational capability."*

- (d) as to paragraph 49(d):

- (i) says that the paragraph is vague and embarrassing in failing to identify the representations said to constitute the affirmation pleaded;
- (ii) denies that the August Express Representations as pleaded in paragraph 46 were made, and refers to and repeats paragraph 46 above;
- (iii) says further that insofar as the August Express Representations were not made, they could not be affirmed;

- (e) says further that the statements made in the 9 September Release were statements of opinion for which the Defendant had reasonable grounds;

**Particulars**

- (1) The Defendant refers to and repeats the matters pleaded at paragraph 47(e) above.
- (2) Further particulars may be provided following the service of evidence.
- (f) otherwise denies paragraph 49.

**D.3 Alleged August 2020 Misleading or Deceptive Conduct**

50. It refers to and repeats paragraphs 40 and 41 above and denies paragraph 50.
51. As to paragraph 51, it:
- (a) refers to and repeats paragraph 43 above;
- (b) otherwise denies paragraph 51.
52. It denies paragraph 52, and:
- (a) says further that to the extent (which is denied) that the August Representations were made, and were representations as to future matters, the Defendant had reasonable grounds for making those representations;
- (b) says that the Defendant had reasonable grounds for making the August Statements, and refers to and repeats paragraph 47(e) above.
53. As to paragraph 53, it:
- (a) refers to and repeats paragraphs 44 to 48 above;
- (b) admits that to the extent the conduct alleged in paragraphs 44 to 48 is established by the Plaintiffs (which is denied), that conduct was engaged in by it:
- (i) in trade or commerce, and in relation to financial services (being a2 Securities), within the meaning of s 12DA of the ASIC Act;
- (ii) in relation to a financial product or financial service (being a2 Securities), within the meaning of s 1041H of the Corporations Act;
- (iii) in trade or commerce within the meaning of s 18 of the Australian Consumer Law;

- (iv) in trade or commerce within the meaning of s 9 of the FT Act;
- (v) in relation to dealing in a quoted financial product (being a2 Securities) within the meaning of s 19(2) of the FMC Act;
- (c) otherwise denies paragraph 53.

54. As to paragraph 54, it:

- (a) refers to and repeats paragraphs 40 to 53 above;
- (b) otherwise denies paragraph 54.

#### **D.4 Alleged August 2020 Continuous Disclosure Contravention**

55. As to paragraph 55, it:

- (a) refers to and repeats paragraphs 41, 42 and 51 above;
- (b) otherwise denies paragraph 55;
- (c) says further that:
  - (i) the August 2020 a2 China Market Conditions, the August 2020 a2 China Market Information and the Inadequate Monitoring Systems Information (the existence of which is denied) was not information (collectively or individually) of which it was aware within the meaning of:
    - (A) Rule 19.12 of the ASX Listing Rules (and hence it was not required to be disclosed under s 674(2) of the Corporations Act or Rule 3.1 of the ASX Listing Rules);
    - (B) Part A – Definitions of the NZSX Listing Rules (and hence it was not required to be disclosed under s 270 of the FMC Act or Rule 3.1.1 of the NZSX Listing Rules);
  - (ii) if the August 2020 a2 China Market Conditions, August 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was information of which it was aware (which is denied):
    - (A) it denies that such August 2020 a2 China Market Conditions, August 2020 a2 China Market Information and Inadequate Monitoring Systems Information (collectively or individually) was information that a reasonable person would expect to have a material effect on the price or value

of the a2 Securities within the meaning of Rule 3.1 of the ASX Listing Rules;

- (B) it denies that the August 2020 a2 China Market Conditions, August 2020 a2 China Market Information and Inadequate Monitoring Systems Information (collectively or individually) was information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of the a2 Securities within the meaning of the term Material Information as defined in s 231(1) of the FMC Act and therefore for the purposes of the NZSX Listing Rules;

- (iii) if the August 2020 a2 China Market Conditions, August 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was information (collectively or individually) of which it was aware (which is denied) and if the August 2020 a2 China Market Conditions, August 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was information (collectively or separately) that a reasonable person would expect to have a material effect on the price or value of the a2 Securities (which is also denied), then the August 2020 a2 China Market Conditions, August 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was within an exception to ASX Listing Rule 3.1 provided by ASX Listing Rule 3.1A and NZSX Listing Rule 3.1.1 provided by NZSX Listing Rule 3.1.2 because:

- (A) the information as pleaded:
  - (1) comprises matters of supposition or was insufficiently definite to warrant disclosure; and/or
  - (2) was generated for its internal management purposes;
- (B) the information was confidential, its confidentiality was maintained and the ASX had not formed the view that the information had ceased to be confidential; and

(C) a reasonable person would not have expected it to disclose that information,

and accordingly, by virtue of ASX Listing Rules 3.1A, ASX Listing Rule 3.1 did not apply to that information and by virtue of NZSX Listing Rule 3.1.2, NZSX Listing Rule 3.1.1 did not apply to that information.

*Alleged ASX Contraventions*

56. As to paragraph 56, it:

- (a) refers to and repeats paragraphs 41, 42, 51 and 55 above;
- (b) otherwise denies paragraph 56.

57. As to paragraph 57, it:

- (a) refers to and repeats paragraphs 41, 42, 51, 55 and 56 above;
- (b) otherwise denies paragraph 57.

58. As to paragraph 58, it:

- (a) refers to and repeats paragraphs 41, 42, 51, and 55 to 57 above;
- (b) otherwise denies paragraph 58.

59. As to paragraph 59, it:

- (a) refers to and repeats paragraphs 41, 42, 51, and 55 to 58 above;
- (b) otherwise denies paragraph 59.

60. As to paragraph 60, it:

- (a) refers to and repeats paragraphs 41, 42, 51, and 55 to 59 above;
- (b) otherwise denies paragraph 60.

61. As to paragraph 61, it:

- (a) refers to and repeats paragraphs 55 to 60 above;
- (b) otherwise denies paragraph 61.

*Alleged NZSX Contraventions*

62. As to paragraph 62, it:

- (a) refers to and repeats paragraphs 41, 42, 51 and 55 above;
- (b) otherwise denies paragraph 62.

63. As to paragraph 63, it:

- (a) refers to and repeats paragraphs 41, 42, 51, 55 and 62 above;
- (b) otherwise denies paragraph 63.

64. As to paragraph 64, it:

- (a) refers to and repeats paragraphs 41, 42, 51, 55, 62 and 63 above;
- (b) otherwise denies paragraph 64.

65. As to paragraph 65 it:

- (a) refers to and repeats paragraphs 41, 42, 51, 55 and 62 to 64 above;
- (b) otherwise denies paragraph 65.

#### **D.5 Alleged Market Effects of August Contraventions**

66. It denies paragraph 66.

67. It denies paragraph 67.

#### **D.6 Alleged September 2020 Partial Disclosure**

68. As to paragraph 68, it:

- (a) admits that on 28 September 2020 a2MC published to the ASX and NZSX respectively a document titled "Updated FY21 Outlook";

##### **Particulars**

- (1) Updated FY21 Outlook dated 28 September 2020
- (b) says that on page 2 of the Update FY21 Outlook it stated "Notwithstanding the significant uncertainty and volatility in market conditions as a result of COVID-19 we have determined it appropriate to provide an update to our outlook to include our view of Group revenue...";

##### **Particulars**

- (1) Updated FY21 Outlook dated 28 September 2020, page 2
- (c) says that it provided an update to its outlook as follows:
  - (i) Group revenue for 1H21 of \$725 million to \$775 million;
  - (ii) Group revenue for FY21 of \$1.80 billion to \$1.90 billion;
  - (iii) Group EBITDA margin for FY21 in the order of 31%;

### Particulars

- (1) Updated FY21 Outlook dated 28 September 2020, page 2
- (d) says at trial that it will refer to and rely upon the full terms and effect of the Updated FY21 Outlook dated 28 September 2020 and transcript of the analyst call on 28 September 2020;
- (e) refers to and repeats paragraph 74(e) below;
- (f) otherwise admits paragraph 68.
69. As to paragraph 69, it refers to and repeats paragraphs 40, 41, 42, 68,70 and 71 above and below and says further that:
- (a) the August 2020 Information and September 2020 a2 China Market Conditions (the existence of which is denied) was not information which it was aware (within the meaning of the ASX and NZSX Listing Rules) and hence it was not required to be disclosed under s 674(2) of the Corporations Act, Rule 19.12 of the ASX Listing Rules, s 270 of the FMC Act or Rule 3.1.1 of the NZSX Listing Rules;
- (b) if the August 2020 Information and September 2020 a2 China Market Conditions was information of which it was aware (which is denied), it denies that such August 2020 Information or September 2020 a2 China Market Conditions was information that a reasonable person would expect to have a material effect on the price or value of the a2 Securities;
- (c) if the August 2020 Information or September 2020 a2 China Market Conditions was information of which it was aware (which is denied) and if the August 2020 Information or September 2020 a2 China Market Conditions was information that a reasonable person would expect to have a material effect on the price or value of the a2 Securities (which is also denied), then the August 2020 Information or September 2020 a2 China Market Conditions was within an exception to ASX Listing Rule 3.1 provided by ASX Listing Rule 3.1A and NZSX Listing Rule 3.1.1 provided by NZSX Listing Rule 3.1.2 because:
- (i) the information as pleaded:
- (A) comprises matters of supposition or was insufficiently definite to warrant disclosure; and/or

- (B) was generated for its internal management purposes;
  - (ii) the information was confidential, its confidentiality was maintained and the ASX had not formed the view that the information had ceased to be confidential; and
  - (iii) a reasonable person would not have expected it to disclose that information,
- and accordingly, by virtue of ASX Listing Rules 3.1A, ASX Listing Rule 3.1 did not apply to that information and by virtue of NZSX Listing Rule 3.1.2, NZSX Listing Rule 3.1.1 did not apply to that information;
- (d) it otherwise denies paragraph 69.

## **E ALLEGED SEPTEMBER 2020 CONTRAVENTIONS**

### **E.1 Alleged True Position at September 2020**

70. As to paragraph 70:

- (a) it refers to and repeats paragraphs 40 and 41 above;
- (b) it says in relation to paragraph 70(a) that as at 28 September 2020:
  - (i) the Defendant planned for sales in the CBEC channel to represent an increasing proportion of the Defendant's infant nutrition business over time, but there was not an increase in volume of English Label Infant Formula Products it supplied for sale through CBEC channels compared to the previous year;

#### **Particulars**

- (1) Group Operating and Financial Review, Board pack dated 19 October 2020, pages 2 to 3:  
 "Revenue of \$98.8m was a substantial (\$78.09m) behind budget, ANZ (\$52.5m), China (\$25.7m). These shortfalls are driven primarily by a 2.5m unit shortfall in IMF Sales – the result of a major contraction in demand through corporation daigou (77% behind budget) and cross border e-commerce channels (43% behind budget), the majority of which is due to a delayed shipment

and the shortfall in Other Nutritional product volumes (78% behind budget).”

“The CBEC channel continues to experience soft offtake and higher than expected inventory due to weakened retail pricing and consumer destocking. Additionally, EL in lower tier cities is suffering diminished “word of mouth” pull from recent daigou challenges. This has combined with negative impacts from the recent Hong Kong PR campaign and consumer concerns (provoked by local competitors) of COVID-19 surface contamination of IMF tins related to the Victorian lockdown.”

- (ii) there were continued uncertainties affecting the Defendant’s business as a result of the COVID-19 pandemic;

**Particulars**

- (1) Pantry destocking following strong sales in 3Q20.
- (2) Limited numbers of retail daigou sales due to the restriction on international travel into and from Australia.
- (3) The extended lockdown in Victoria resulting in the closure of gift shops and Master Daigou shop fronts, and the partial closure of the corporate daigou’s operations in Melbourne.
- (4) The potential for the COVID-19 pandemic, and its geopolitical impacts, to cause Chinese consumers to have a negative perception of Australian products.
- (5) The border closure between Hong Kong and China impacting the daigou channel.
- (6) Further particulars may be provided following evidence.

- (c) as to paragraph 70(b):

- (i) the August 2020 results showed inventory on hand of \$205.9 million, representing around 80 days of sales;

**Particulars**

- (1) Group Operating and Financial Review, Board pack dated 21 September 2020, page 4:

*"Inventory on hand of \$205.9m represents ~80 days sales in inventory [Days sales in inventory (DSI) = average inventory / annualised COGS) x 365 days], in line with the prior month. This elevated level of inventory reflects the decline in APAC IMF sales volumes. Managing inventory levels to more normalized levels remains a key focus of the operations team."*

- (ii) the Defendant was engaged in actions aimed at reducing channel inventory;

**Particulars**

- (1) These actions included cash back promotions for daigou operators to generate sales volumes, a profit margin guarantee program, a bonus stock arrangement program.
- (2) Further particulars may be provided following evidence.

- (d) as to paragraph 70(c), the Defendant:

- (i) had strong continued growth in its China Label Infant Formula Product brand health metrics, and was continuing to see strong consumer demand for its brand in China;

**Particulars**

- (1) Updated FY21 Outlook dated 28 September 2020, page 1
- (ii) for the month of August 2020, net sales of China Label units had grown by 97% on the previous year;

**Particulars**

- (1) Board Report, August 2020, Board pack dated 21 September 2020, page 136:

*"Monthly product mix: China label (CL) units of 947K tins (97% growth vs LY in net sales) and EL 622K tins -89 tins lower than budget (-28% growth vs LY) due to consumer pantry fill from COVID impact & inventory from the 6.18 promotion."*

- (iii) investments in its local China business had been in place for 18-24 months prior to September 2020 and were supporting increasingly strong underlying brand health metrics in its China business;

**Particulars**

- (1) Updated FY21 Outlook dated 28 September 2020, pages 1 to 2:

*"Performance in all other areas of our business is strong, including our liquid milk businesses in Australia and the USA. Importantly, our local China business is performing strongly, notably in Mother & Baby Stores (MBS), which we anticipate will continue. We also continue to see a positive impact from the marketing investment in activation and brand building activities from 4Q20. This strong performance continues to be well supported by the on the ground capability investments we have made over the past 18-24 months."*

*The increasingly strong underlying brand health metrics we are achieving in China IMF, including market share and brand awareness for example, confirm the effectiveness of our continued significant investment in marketing to drive future growth."*

- (e) otherwise denies paragraph 70.

71. As to paragraph 71, it:

- (a) refers to and repeats paragraph 70 above;
- (b) otherwise denies paragraph 71.

72. As to paragraph 72, it:

- (a) refers to and repeats paragraphs 43 and 51 above;
- (b) otherwise denies paragraph 72.

## **E.2 September Representations and Alleged Representations**

73. As to paragraph 73, it admits that on 28 September 2020, it published to the ASX and NZSX respectively a document entitled, "Updated FY21 Outlook" (**September 2020 Update Announcement**), and:

- (a) as to paragraph 73(a), it:
  - (i) admits that it stated the words pleaded in paragraph 73(a);
  - (ii) says that page 2 of the September 2020 Update Announcement stated that "Notwithstanding the significant uncertainty and volatility in market conditions as a result of COVID-19 we have determined it appropriate to provide an update to our outlook to include our view of Group revenue as follows";
  - (iii) says that page 1 of the September 2020 Update Announcement stated that it anticipated the impact to the daigou channel to be temporary, and thus the impact on its performance to be temporary, "assuming stabilisation of COVID-19 related issues in Australia";
  - (iv) otherwise denies paragraph 73(a);
- (b) denies that it made the representation pleaded in paragraph 73(b) and repeats paragraph 73(a)(iii) above;
- (c) denies that it made the representation pleaded in paragraph 73(c);
- (d) says further that at trial it will refer to and rely upon the full terms and effect of the September 2020 Update Announcement.

## **Particulars**

- (1) Updated FY21 Outlook, 28 September 2020

- (e) says further that the Defendant communicated to the market that it remained difficult to precisely forecast and track inventory supplied by a2MC's Direct EL Customers to other traders in the supply and distribution chain;

**Particulars**

- (1) Open Briefing Transcript of The a2 milk Company Limited Conference Call on 28 September 2020 at 9:00 AM AEST (page 7).
  - (2) Further particulars may be provided following the service of evidence.
- (f) says further that the September 2020 Update Announcement must be read in the context of the other statements made by the Defendant to the market on 28 September 2020.

**Particulars**

- (1) Open Briefing Transcript of The a2 milk Company Limited Conference Call on 28 September 2020 at 9:00 AM AEST.
74. As to paragraph 74, it:
- (a) refers to and repeats paragraphs 40, 41, 43 and 73 above;
  - (b) denies that the implied representations pleaded in paragraph 74(a)-(c) were made;
  - (c) says further that the matters stated in the documents particularised at paragraph 73 of the CSOC were made subject to the terms of those documents, including as pleaded at paragraph 73 above;
  - (d) admits that the implied representation in paragraph 74(d) was made in respect of the express statements that the Defendant has admitted were made in paragraph 73(a) above;
  - (e) says further that in respect of the express statements pleaded in paragraph 73(a) above (**the September Statements**), the statements were statements of opinion for which the Defendant had reasonable grounds;

**Particulars**

- (1) The Defendant refers to and repeats paragraph 47(e) above.
  - (2) The Defendant undertook a preliminary accelerated, Q1 FY21 reforecast process prior to the making of the September Statements.
  - (3) Board pack dated 26 September 2020.
  - (4) Minutes of Board Meeting on 26 September 2020.
  - (5) Further particulars may be provided following evidence.
- (f) further and alternatively, says that if (which is denied) the Defendant made the implied representations pleaded at paragraph 74(a)-(c) of the CSOC those implied representations were statements of opinion for which the Defendant had reasonable grounds.

**Particulars**

- (1) The Defendant refers to and repeats the matters pleaded at paragraphs 43 and 74(e) above.
  - (2) Further particulars may be provided following the service of evidence.
- (g) otherwise denies paragraph 74.
75. It denies paragraph 75.
- E.3 Alleged September 2020 Misleading or Deceptive Conduct**
76. It refers to and repeats paragraph 70 above and denies paragraph 76.
77. As to paragraph 77, it:
- (a) refers to and repeats paragraphs 51 and 72 above;
  - (b) otherwise denies paragraph 77.
78. It denies paragraph 78, and:
- (a) says further that to the extent (which is denied) that the September Representations were made, and were representations as to future matters, the Defendant had reasonable grounds for making those representations;

- (b) says that the Defendant had reasonable grounds for making the September Statements, and refers to and repeats paragraph 74(e) above.

79. As to paragraph 79, it:

- (a) refers to and repeats paragraphs 73 to 75 above;
- (b) admits that to the extent the conduct alleged in paragraphs 73 to 75 is established by the Plaintiffs (which is denied), that conduct was engaged in by it:
  - (i) in trade or commerce, and in relation to financial services (being a2 Securities), within the meaning of s 12DA of the ASIC Act;
  - (ii) in relation to a financial product or financial service (being a2 Securities), within the meaning of s 1041H of the Corporations Act;
  - (iii) in trade or commerce within the meaning of s 18 of the Australian Consumer Law;
  - (iv) in trade or commerce within the meaning of s 9 of the FT Act; and/or
  - (v) in relation to dealing in a quoted financial product (being a2 Securities) within the meaning of s 19(2) of the FMC Act;
- (c) otherwise denies paragraph 79.

80. As to paragraph 80, it:

- (a) refers to and repeats paragraphs 70 to 79 above;
- (b) otherwise denies paragraph 80.

#### **E.4 Alleged September 2020 Continuous Disclosure Contravention**

81. As to paragraph 81, it:

- (a) refers to and repeats paragraphs 51, 70,71 and 77 above;
- (b) otherwise denies paragraph 81;
- (c) says further that:
  - (i) the September 2020 a2 China Market Conditions, the September 2020 a2 China Market Information and the Inadequate Monitoring Systems Information (the existence of which is denied) was not information (collectively or individually) of which it was aware within the meaning of:

- (A) Rule 19.12 of the ASX Listing Rules (and hence it was not required to be disclosed under s 674(2) of the Corporations Act or Rule 3.1 of the ASX Listing Rules);
  - (B) Part A – Definitions of the NZSX Listing Rules (and hence it was not required to be disclosed under s 270 of the FMC Act or Rule 3.1.1 of the NZSX Listing Rules);
- (ii) if the September 2020 a2 China Market Conditions, the September 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was information of which it was aware (which is denied):
  - (A) it denies that the September 2020 a2 China Market Conditions, the September 2020 a2 China Market Information and Inadequate Monitoring Systems Information (collectively or individually) was information that a reasonable person would expect to have a material effect on the price or value of the a2 Securities within the meaning of Rule 3.1 of the ASX Listing Rules;
  - (B) it denies that the September 2020 a2 China Market Conditions, the September 2020 a2 China Market Information and Inadequate Monitoring Systems Information (collectively or individually) was information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of the a2 Securities, within the meaning of the term Material Information for the purposes of the NZSX Listing Rules and as defined in s 231(1) of the FMC Act;
- (iii) if the September 2020 a2 China Market Conditions, the September 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was information (collectively or individually) of which it was aware (which is denied) and if the September 2020 a2 China Market Conditions, the September 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was information (collectively or separately) that a reasonable person would expect to have a material effect on the price or value of the a2 Securities (which is also denied), then the September

2020 a2 China Market Conditions, the September 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was within an exception to ASX Listing Rule 3.1 provided by ASX Listing Rule 3.1A and NZSX Listing Rule 3.1.1 provided by NZSX Listing Rule 3.1.2 because:

- (A) the information as pleaded:
  - (1) comprises matters of supposition or was insufficiently definite to warrant disclosure; and/or
  - (2) was information generated for its internal management purposes;
- (B) the information was confidential, its confidentiality was maintained and the ASX had not formed the view that the information had ceased to be confidential; and
- (C) a reasonable person would not have expected it to disclose that information,

and accordingly, by virtue of ASX Listing Rules 3.1A, ASX Listing Rule 3.1 did not apply to that information and by virtue of NZSX Listing Rule 3.1.2, NZSX Listing Rule 3.1.1 did not apply to that information.

*Alleged ASX Contraventions*

82. As to paragraph 82, it:

- (a) refers to and repeats paragraphs 51, 70, 71, 77 and 81 above;
- (b) otherwise denies paragraph 82.

83. As to paragraph 83, it:

- (a) refers to and repeats paragraphs 51, 70, 71, 77, 81 and 82 above;
- (b) otherwise denies paragraph 83.

84. As to paragraph 84, it:

- (a) refers to and repeats paragraphs 51, 70, 71, 77 and 81 to 83 above;
- (b) otherwise denies paragraph 84.

85. As to paragraph 85, it:

- (a) refers to and repeats paragraphs 51, 70, 71, 77 and 81 to 84 above;

(b) otherwise denies paragraph 85.

86. As to paragraph 86, it:

(a) refers to and repeats paragraphs 51, 70, 71, 77 and 81 to 85 above;

(b) otherwise denies paragraph 86.

87. As to paragraph 87, it:

(a) refers to and repeats paragraphs 51, 70, 71, 77 and 81 to 86 above;

(b) otherwise denies paragraph 87.

#### *Alleged NZSX Contraventions*

88. As to paragraph 88, it:

(a) refers to and repeats paragraphs 51, 70, 71, 77 and 81 above;

(b) otherwise denies paragraph 88.

89. As to paragraph 89, it:

(a) refers to and repeats paragraphs 51, 70, 71, 77, 81 and 88 above;

(b) otherwise denies paragraph 89.

90. As to paragraph 90, it:

(a) refers to and repeats paragraphs 51, 70, 71, 77, 81, 88 and 89 above;

(b) otherwise denies paragraph 90.

91. As to paragraph 91, it:

(a) refers to and repeats paragraphs 51, 70, 71, 77, 81 and 88 to 90 above;

(b) otherwise denies paragraph 91.

#### **E.5 Alleged Market Effects of September Contraventions**

92. It denies paragraph 92.

93. It denies paragraph 93.

#### **E.6 Alleged December 2020 Partial Disclosure**

94. As to paragraph 94, it:

(a) admits that on 18 December 2020 it published and lodged with the ASX and NZSX a document titled "Updated 1H21 and FY21 guidance" dated 18 December 2020 and a conference call was also held on that date with Geoffrey Babidge, Peter Nathan and Race Strauss attending;

**Particulars**

- (1) Updated 1H21 and FY21 guidance, 18 December 2020.
  - (2) Refinitiv Streetevents Edited Transcript of a2 Milk Company Ltd 1H and FY21 Outlook call (**December 2020 Call**), 18 December 2020.
- (b) says as to paragraph 94(a), it provided updated 1H21 and FY21 guidance that it now expected:
- (i) Group revenue for 1H21 in the order of \$670 million, noting that 2Q21 will be higher than 1Q21;
  - (ii) Group EBITDA margin for 1H21 in the order of 27 per cent;
  - (iii) Group revenue for FY21 of \$1.40 billion to \$1.55 billion;
  - (iv) Group EBITDA margin for FY21 of between 26 per cent and 29 per cent.

**Particulars**

- (1) Updated 1H21 and FY21 guidance, 18 December 2020, pages 2 to 3.
- (c) says as to paragraph 94(b), the Updated 1H21 and FY21 guidance stated that “Notwithstanding our recent focus on activating the CBEC channel in a manner which complements our daigou business, the disruption we are experiencing in the daigou channel is now having a more significant impact in CBEC. As previously noted, the diagou channel plays an important role in stimulating demand across multiple sales channels, including CBEC. While our performance in CBEC in the competitive 11/11 online sales event showed year on year growth, sales in the CBEC channel in the period following that event have been below expectation.”

**Particulars**

- (1) Updated 1H21 and FY21 guidance, 18 December 2020, pages 1 to 2.
- (d) says as to paragraph 94(c), the Updated 1H21 and FY21 guidance included a comment that “*Our internal sales forecasts for both the daigou and the CBEC channels for the remainder of FY21 are now materially lower.*”

**Particulars**

- (1) Updated 1H21 and FY21 guidance, 18 December 2020, page 2.
- (e) says as to paragraph 94(d), the Updated 1H21 and FY21 guidance included a comment that *"Notwithstanding the interdependency between these channels, given the strategically important role of the daigou channel, including in new user recruitment, we intend to strengthen our focus on reactivating the daigou channel in the second half."*

**Particulars**

- (1) Updated 1H21 and FY21 guidance, 18 December 2020, page 2.
- (f) says at trial it will refer to and rely upon the full terms and effect of the Updated 1H21 and FY21 guidance dated 18 December 2020 and the full terms and effect of the December 2020 Call dated 18 December 2020;
- (g) otherwise admits paragraph 94.
95. As to paragraph 95, it refers to and repeats paragraphs 40, 41, 42, 70, 71, 94, 96 and 97 above and below and says further that:
- (a) the August to September 2020 Information and December 2020 a2 China Market Conditions (the existence of which is denied) was not information of which it was aware (within the meaning of the ASX and NZSX Listing Rules) and hence it was not required to be disclosed under s 674(2) of the Corporations Act Rule 19.12 of the ASX Listing Rules, s 270 of the FMC Act or Rule 3.1.1 of the NZSX Listing Rules;
- (b) if the August to September 2020 Information and December 2020 a2 China Market Conditions was information of which it was aware (which is denied), it denies that such August to September 2020 Information or December 2020 a2 China Market Conditions was information that a reasonable person would expect to have a material effect on the price or value of the a2 Securities;
- (c) if the August to September 2020 Information or December 2020 a2 China Market Conditions was information of which it was aware (which is denied) and if the August to September 2020 Information or December 2020 a2 China Market Conditions was information that a reasonable person would

expect to have a material effect on the price or value of the a2 Securities (which is also denied), then the August to September 2020 Information or December 2020 a2 China Market Conditions was within an exception to ASX Listing Rule 3.1 provided by ASX Listing Rule 3.1A and within an exception to NZSX Listing Rule 3.1.1 provided by NZSX Listing Rule 3.1.2 because:

- (i) the information as pleaded:
  - (A) comprises matters of supposition or was insufficiently definite to warrant disclosure; and/or
  - (B) was generated for its internal management purposes;
- (ii) the information was confidential, its confidentiality was maintained and the ASX had not formed the view that the information had ceased to be confidential; and
- (iii) a reasonable person would not have expected it to disclose that information,

and accordingly, by virtue of ASX Listing Rules 3.1A, ASX Listing Rule 3.1 did not apply to that information and by virtue of NZSX Listing Rule 3.1.2, NZSX Listing Rule 3.1.1 did not apply to that information;

- (d) it otherwise denies paragraph 95.

## **F ALLEGED DECEMBER 2020 CONTRAVENTIONS**

### **F.1 Alleged True Position at December 2020**

96. As to paragraph 96, it repeats paragraphs 40, 41 and 70 and says further that:

- (a) as to paragraph 96(a), it:
  - (i) repeats paragraph 70(b)(i) above and says that the Defendant continued its focus on activating the CBEC channel but there was not an increase in volume of English Label Infant Formula Products it supplied for sale through CBEC channels compared to the previous year; and

#### **Particulars**

- (1) Group Operating and Financial Review, Board pack dated 29 January 2021, page 2:

“Group Revenue of \$141m was \$1.9m ahead of forecast and broadly reflects \$3.3m upside from

ANZ IMF volume (led by Daigou) and \$1.6m upside from CBEC IMF volume; partially offset by shortfalls in CL IMF of (\$1.7m) or 51k units.”

- (ii) says that there were continued uncertainties affecting the Defendant’s business as a result of the COVID-19 pandemic;

**Particulars**

- (1) Pantry destocking following strong sales in 3Q20.
- (2) Limited numbers of retail daigou sales due to the restriction on international travel into and from Australia and the closure of gift shops and Master Daigou shop fronts in Melbourne.
- (3) The potential for the COVID-19 pandemic, and its geopolitical impacts, to cause Chinese consumers to have a negative perception of Australian products.
- (4) The border closure between Hong Kong and China impacting the daigou channel.
- (5) Further particulars may be provided following evidence.

- (b) says as to paragraph 96(b), it:

- (i) admits that it had introduced initiatives to reactivate the corporate daigou and retail daigou reseller channel;

**Particulars**

- (1) It continued to focus on each of the principal channels as part of its integrated multi-channel strategy into China (CEO Address, 18 November 2020).
- (2) It had strengthened its focus on reactivating the daigou channel in the 2H of FY21 (Updated 1H21 and FY21 guidance, 18 December 2020, page 2).
- (3) It had taken actions to restore prices throughout the daigou channel including requiring inventory

levels to be further reduced and commencing initiatives to re-invigorate the daigou channel by offering cash back promotions to generate volumes throughout the channel (Board pack dated 19 October 2020, page 1).

- (ii) says further that it recognised the importance of the daigou channel in stimulating demand for English Label Infant Formula Product in the CBEC channel;

#### **Particulars**

- (1) Demand was stimulated through brand activation and building awareness in China by the daigou channel (Board meeting minutes on 17 November 2020, page 3)
- (iii) otherwise denies paragraph 96(b).
- (c) as to paragraph 96(c), it:
  - (i) says that as at November 2020, it had made the decision to reduce infant formula canning by around 1.5 million cans, taking effect from February 2021 canning onwards;
  - (ii) says that the existing level of inventory in the CBEC channel is a factor that may affect the Defendant's control of sales in the CBEC channel, the price at which CBEC vendors offer the Defendant's products, and consequentially the price at which consumers in China may buy English Label Infant Formula Products including from the daigou channels;
- (d) as to paragraph 96(d) it refers to and repeats paragraph 99(a) below;
- (e) otherwise denies paragraph 96.
- 97. As to paragraph 97, it:
  - (a) refers to and repeats paragraph 96 above;
  - (b) otherwise denies paragraph 97.
- 98. As to paragraph 98, it:
  - (a) refers to and repeats paragraph 43 above;
  - (b) otherwise denies paragraph 98.

## F.2 December Representations and Alleged Representations

99. As to paragraph 99, it:

- (a) says as to paragraph 99(a) it:
  - (i) says that in its December 2020 Update Announcement it stated *“Notwithstanding the channel disruption noted above, we continue to record strong underlying brand health metrics in China”*;
  - (ii) says that in the December 2020 Call it stated that there was a minor or slight increase in its outlook for its China Label Infant Formula Products which it was focused on increasing as a component of its infant formula business over time;

### Particulars

- (1) December 2020 Call dated 18 December 2020, page 4:

*“Geoffrey Babidge: And in addition, let’s be very clear, a very key initiative of the business, particularly the last couple of years, has been the substantial resources being thrown at growing our China label direct business. I mean that’s an absolute key, and we all acknowledge that we’ve got a pretty modest [share], and that’s growing very strongly. We’ve got a strong team in place. We’ve got very strong brand metrics. So clearly, we’re very focused on that proportion of our business also increasing as a component of our infant formula business over time.”*

Page 15: *“Geoffrey Babidge: Our outlook for China label has actually minor [sic] increased. Not significant, but it has slightly increased.”*

- (iii) otherwise denies paragraph 99(a);
- (b) says as to paragraph 99(b), it admits that it provided an update to its FY21 guidance as set out in paragraphs 99(b)(i) and 99(b)(ii);
- (c) says as to paragraph 99(c), it:

- (i) admits that on 18 December 2020, it said to the market that it believed its inventory was not “excessive”;

**Particulars**

- (1) December 2020 Call dated 18 December 2020, page 3.

- (ii) says further that it also said to the market on 18 December 2020 that it was carrying inventory above what it would have liked and was on a program to reduce inventory progressively during the balance of FY21;

**Particulars**

- (1) December 2020 Call dated 18 December 2020, page 9:

Geoffrey Babidge: *“And we are -- as I’ve commented recently and at the annual meeting, again, we are carrying inventory above what we would like, and we are on a program to reduce that progressively during the balance of fiscal ‘21. ...”*

- (iii) says further that the Defendant communicated to the market that it remained difficult to precisely forecast and track inventory supplied by a2MC’s Direct EL Customers to other traders in the supply and distribution chain;

**Particulars**

- (1) December 2020 Call dated 18 December 2020, page 7:

*And the reality is that it is very difficult in a channel, which we all acknowledge, does not have the transparency through the various tiers, and we can go [sic]. And one of the things that we’re talking about is how can we source additional information through the tiers and into the market to be more timely from that perspective.*

...

*Conversely, we are relied [sic] on this important channel. It has these unusual factors in respect of transparency."*

(2) December 2020 Call dated 18 December 2020:

*Now the difficulty with daigou, of course, is that there's no data point that can accurately measure what your daigou share is.*

(3) Further particulars may be provided following the service of evidence.

(iv) otherwise denies paragraph 99(c);

(d) says further that at trial it will refer to the full terms and effect of the December 2020 Update Announcement and transcript of the December 2020 Call; and

(e) says further that the Defendant stated to the market in November 2020 that the COVID-19 pandemic continued to present significant uncertainties for its business which gave rise to difficulties for the making of forecasts;

#### **Particulars**

(1) 2020 Annual Meeting presentation on 18 November 2020, page 24.

(2) 2020 Annual Meeting CEO Address dated 18 November 2020, page 5.

(3) 2020 Annual Meeting, Chair's address, page 3.

(f) says further that the December 2020 Update Announcement and the December 2020 Call are to be read in the context of the statements made to the market in November 2020 (which were continuing statements) pleaded in paragraph 99(e) above.

100. As to paragraph 100, it:

(a) refers to and repeats paragraphs 40, 41, 43 and 99 above;

(b) denies that the implied representations pleaded in paragraph 100(a)-(c) were made;

- (c) says further that the matters stated in the documents particularised at paragraph 99 of the CSOC were made subject to the terms of those documents, including as pleaded at paragraph 99 above;
- (d) admits that the implied representation in paragraph 100(d) was made in respect of the express statements that the Defendant has admitted were made in paragraph 99 above;
- (e) says further that in respect of the express statements pleaded in paragraph 99 above (**the December Statements**), the statements were statements of opinion for which the Defendant had reasonable grounds;

#### **Particulars**

- (1) The Defendant refers to and repeats paragraphs 47(e) and the particulars to paragraph 74(e) above.
  - (2) The Defendant undertook an urgent review of its forecast for 1H21 on or around 15 to 17 December 2020 prior to the making of the December Statements.
  - (3) Minutes of Board Meeting on 18 December 2020.
  - (4) Further particulars may be provided following evidence.
- (f) further and alternatively, says that if (which is denied) the Defendant made the implied representations pleaded at paragraph 100(a)-(c) of the CSOC those implied representations were statements of opinion for which the Defendant had reasonable grounds;

#### **Particulars**

- (1) The Defendant refers to and repeats the matters pleaded at paragraphs 43 and 100(e) above.
  - (2) Further particulars may be provided following the service of evidence.
- (g) otherwise denies paragraph 100.

101. As to paragraph 101, it:

- (a) refers to and repeats paragraphs 99 and 100 above;

- (b) otherwise denies paragraph 101.

### **F.3 Alleged December 2020 Misleading or Deceptive Conduct**

102. It refers to and repeats paragraph 86 above and denies paragraph 102.

103. As to paragraph 103, it:

- (a) refers to and repeats paragraphs 51 and 98 above;
- (b) otherwise denies paragraph 103.

104. It denies paragraph 104 and:

- (a) says further that to the extent (which is denied) that the December Representations were made, and were representations as to future matters, the Defendant had reasonable grounds for making those representations;
- (b) says that the Defendant had reasonable grounds for making the December Statements, and refers to and repeats paragraph 100(e) above.

105. As to paragraph 105, it:

- (a) refers to and repeats paragraphs 99 to 101 above;
- (b) admits that to the extent the conduct alleged in paragraphs 99 to 101 above was made or failed to be corrected (which is denied), that conduct was engaged in by it:
  - (i) in trade or commerce, and in relation to financial services (being a2 Securities), within the meaning of s 12DA of the ASIC Act;
  - (ii) in relation to a financial product or financial service (being a2 Securities), within the meaning of s 1041H of the Corporations Act;
  - (iii) in trade or commerce within the meaning of s 18 of the Australian Consumer Law;
  - (iv) in trade within the meaning of s 9 of the FT Act;
- (c) otherwise denies paragraph 105.

106. As to paragraph 106, it:

- (a) refers to and repeats paragraphs 96 to 105 above;
- (b) otherwise denies paragraph 106.

### **F.4 Alleged December 2020 Continuous Disclosure Contravention**

107. As to paragraph 107, it:

- (a) refers to and repeats paragraphs 51, 96, 97 and 103 above;
- (b) otherwise denies paragraph 107; and
- (c) says further that:
  - (i) the December 2020 a2 China Market Conditions, the December 2020 a2 China Market Information and the Inadequate Monitoring Systems Information (the existence of which is denied) was not information (collectively or individually) which it was aware within the meaning of:
    - (A) Rule 19.12 of the ASX Listing Rules (and hence it was not required to be disclosed under s 674(2) of the Corporations Act or Rule 3.1 of the ASX Listing Rules);
    - (B) Part A – Definitions of the NZSX Listing Rules (and hence it was not required to be disclosed under s 270 of the FMC Act or Rule 3.1 of the NZSX Listing Rules);
  - (ii) if the December 2020 a2 China Market Conditions, the December 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was information of which it was aware (which is denied):
    - (A) it denies that such December 2020 a2 China Market Conditions, the December 2020 a2 China Market Information and the Inadequate Monitoring Systems Information (collectively or individually) was information that a reasonable person would expect to have a material effect on the price or value of the a2 Securities within the meaning of Rule 3.1 of the ASX Listing Rules;
    - (B) it denies that the December 2020 a2 China Market Conditions, the December 2020 a2 China Market Information and the Inadequate Monitoring Systems Information (collectively or individually) was information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of the a2 Securities within the meaning of the term Material Information for the purposes of the NZSX Listing Rules and as defined in s 231(1) of the FMC Act;

- (iii) if the December 2020 a2 China Market Conditions, the December 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was information (collectively or individually), and if the December 2020 a2 China Market Conditions, the December 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was information (collectively or separately) that a reasonable person would expect to have a material effect on the price or value of the a2 Securities (which is denied), then the December 2020 a2 China Market Conditions, the December 2020 a2 China Market Information and the Inadequate Monitoring Systems Information was within the exception to ASX Listing Rule 3.1 provided by ASX Listing Rule 3.1A and NZSX Listing Rule 3.1.1 provided by NZSX Listing Rule 3.1.2 because:

- (A) the information as pleaded:
- (1) comprises matters of supposition or was insufficiently definite to warrant disclosure; and/or
  - (2) was generated for its internal management purposes;
- (B) the information was confidential, its confidentiality was maintained and the ASX had not formed the view that the information had ceased to be confidential; and
- (C) a reasonable person would not have expected it to disclose that information,

and accordingly, by virtue of ASX Listing Rules 3.1A, ASX Listing Rule 3.1 did not apply to that information and by virtue of NZSX Listing Rule 3.1.2, NZSX Listing Rule 3.1.1 did not apply to that information.

*Alleged ASX Contraventions*

108. As to paragraph 108, it:

- (a) refers to and repeats paragraphs 51, 96, 97, 103 and 107 above;
- (b) otherwise denies paragraph 108.

109. As to paragraph 109, it:

- (a) refers to and repeats paragraphs 51, 96, 97, 103, 107 and 108 above;

- (b) otherwise denies paragraph 109.
- 110. As to paragraph 110, it:
  - (a) refers to and repeats paragraphs 51, 96, 97, 103, 107 to 109 above;
  - (b) otherwise denies paragraph 110.
- 111. As to paragraph 111, it:
  - (a) refers to and repeats paragraphs 51, 96, 97, 103, 107 to 110 above;
  - (b) otherwise denies paragraph 111.
- 112. As to paragraph 112, it:
  - (a) refers to and repeats paragraphs 51, 96, 97, 103, 107 to 111 above;
  - (b) otherwise denies paragraph 112.
- 113. As to paragraph 113, it:
  - (a) refers to and repeats paragraphs 51, 96, 97, 103, 107 to 112 above;
  - (b) otherwise denies paragraph 113.

*Alleged NZSX Contraventions*

- 114. As to paragraph 114, it:
  - (a) refers to and repeats paragraphs 51, 96, 97, 103 and 107 above;
  - (b) otherwise denies paragraph 114.
- 115. As to paragraph 115, it:
  - (a) refers to and repeats paragraphs 51, 96, 97, 103, 107 and 114 above;
  - (b) otherwise denies paragraph 115.
- 116. As to paragraph 116, it:
  - (a) refers to and repeats paragraphs 51, 96, 97, 103, 107, 114 and 115 above;
  - (b) otherwise denies paragraph 116.
- 117. As to paragraph 117, it:
  - (a) refers to and repeats paragraphs 51, 96, 97, 103, 107 and 114 to 116 above;
  - (b) otherwise denies paragraph 117.

**F.5 Alleged Market Effects of December Contraventions**

- 118. It denies paragraph 118.

## **F.6 Alleged February 2021 Partial Disclosure**

119. As to paragraph 119, it:

- (a) says as to paragraph 119(a) it:
  - (i) admits paragraph 119(a)(i);
  - (ii) says that it stated in its announcements on the ASX and NZSX on 25 February 2021 that the FY21 outlook was for Group EBITDA margin of 24% to 26% (excluding Mataura Valley Milk (**MVM**) acquisition costs);
  - (iii) says that it stated in its announcements on the ASX and NZSX on 25 February 2021 that the outlook for FY21 assumes the actions being taken to re-activate the daigou/reseller channel deliver a significant improvement in quarter-on-quarter growth from 3Q21 to 4Q21;
  - (iv) otherwise denies paragraph 119(a)(ii);
- (b) denies paragraph 119(b);
- (c) admits paragraph 119(c);
- (d) as to paragraph 119(d) it:
  - (i) says that it stated in its announcements on the ASX and NZSX on 25 February 2021 that subdued online pricing and channel inventory unwinding had resulted in daigou resellers being slower to fully re-enter the market;
  - (ii) otherwise denies paragraph 119(d);
- (e) says as to paragraph 119(e) it:
  - (i) says that it stated in its announcements on the ASX and NZSX on 25 February 2021 that it intended to provide temporary support to daigou/resellers;
  - (ii) otherwise denies paragraph 119(e);
- (f) says at trial it will refer to and rely upon the full terms and effect of the announcements made on the ASX and NZSX on 25 February 2021 and the February 2021 Call.

### Particulars

- (1) February 2021 Update Announcement.
- (2) ASX and NZSX announcement entitled "Interim Report for the six months ended 31 December 2020".
- (3) February Results Presentation.
- (4) February 2021 Call.

120. As to paragraph 120, it refers to and repeats paragraphs 40, 41, 42, 70, 71, 96, 97, 119, 121 and 122 above and below and says further that:

- (a) the August to December 2020 Information and February 2021 a2 China Market Conditions (the existence of which is denied) was not information which it was aware (within the meaning of the ASX and NZSX Listing Rules) and hence it was not required to be disclosed under s 674(2) of the Corporations Act Rule 19.12 of the ASX Listing Rules, s 270 of the FMC Act or Rule 3.1.1 of the NZSX Listing Rules;
- (b) if the August to December 2020 Information and February 2021 a2 China Market Conditions was information of which it was aware (which is denied), it denies that such August to December 2020 Information or February 2021 a2 China Market Conditions was information that a reasonable person would expect to have a material effect on the price or value of the a2 Securities;
- (c) if the August to December 2020 Information or February 2021 a2 China Market Conditions was information of which it was aware (which is denied) and if the August to December 2020 Information or February 2021 a2 China Market Conditions was information that a reasonable person would expect to have a material effect on the price or value of the a2 Securities (which is also denied), then the August to December 2020 Information or February 2021 a2 China Market Conditions was within an exception to ASX Listing Rule 3.1 provided by ASX Listing Rule 3.1A and within an exception to NZSX Listing Rule 3.1.1 provided by NZSX Listing Rule 3.1.2 because:
  - (i) the information as pleaded:
    - (A) comprises matters of supposition or was insufficiently definite to warrant disclosure; and/or
    - (B) was generated for its internal management purposes;

- (ii) the information was confidential, its confidentiality was maintained and the ASX had not formed the view that the information had ceased to be confidential; and
- (iii) a reasonable person would not have expected it to disclose that information,

and accordingly, by virtue of ASX Listing Rules 3.1A, ASX Listing Rule 3.1 did not apply to that information and by virtue of NZSX Listing Rule 3.1.2, NZSX Listing Rule 3.1.1 did not apply to that information;

- (d) it otherwise denies paragraph 120.

## **G ALLEGED FEBRUARY 2021 CONTRAVENTIONS**

### **G.1 Alleged True Position at February 2021**

121. As to paragraph 121, it repeats paragraphs 40, 41, 70 and 96 and:

- (a) says that as at February 2021, globally there continued to be unprecedented levels of uncertainty and volatility due to the COVID-19 pandemic;
- (b) says that as at February 2021, challenges resulting from the COVID-19 pandemic disruption had an impact on the daigou/reseller channel as well as the CBEC channel;
- (c) says that as at February 2021, there was a higher level of inventory as a consequence of managing the uncertainties and complexities of the COVID-19 pandemic impacting supply chains but a return to more normalised stock levels was anticipated in 2H21;
- (d) says that as at February 2021, revenue for English Label Infant Formula Products had declined in 1H21 due to multiple factors including:
  - (i) pantry destocking following strong sales in 3Q20;
  - (ii) reduced tourism from China and international student numbers as a consequence of the COVID-19 pandemic travel restrictions;
  - (iii) subdued online pricing and channel inventory unwinding results in daigou/resellers being slower to fully re-enter the market to promote the brand;
  - (iv) declining birth rates in China;
- (e) says that as at February 2021, the Defendant continued its focus on re-activating the daigou/reseller channel;

### Particulars

- (1) rebalancing inventory levels;
  - (2) providing temporary support to the daigou/resellers;
  - (3) working with corporate daigou to drive innovation in distribution;
- (f) otherwise denies paragraph 121.
122. It repeats paragraphs 42, 71, 97 and 121 and otherwise denies paragraph 122.
123. It repeats paragraphs 43, 72 and 98 and otherwise denies paragraph 123.

### G.2 February Representations and Alleged Representations

124. As to paragraph 124, it:
- (a) says as to paragraph 124(a) it:
    - (i) admits paragraph 124(a)(i);
    - (ii) says that it represented in its announcements on the ASX and NZSX on 25 February 2021 that the FY21 outlook was for Group EBITDA margin of 24% to 26% (excluding MVM acquisition costs);
    - (iii) otherwise denies paragraph 124(a)(ii);
  - (b) says as to paragraph 124(b) it:
    - (i) says that it represented in its announcements on the ASX and NZSX on 25 February 2021 that it had achieved growth in Chinese Label Infant Formula Product sales in 1H21 compared to the prior corresponding period in 1H20;
    - (ii) otherwise denies paragraph 124(b);
  - (c) says further that the Defendant communicated to the market that it remained difficult to precisely forecast and track inventory supplied by a2MC's Direct EL Customers to other traders in the supply and distribution chain;

### Particulars

- (1) February 2021 Call, page 6: Peter Nathan: *"In distributor inventory, we have got a good hand on [sic]. All of the customers that we ship to, we have a very good handle on*

*inventory. It's the noncustomers which get leakage, which is more difficult to trace..."*

- (2) Further particulars may be provided following the service of evidence.
- (d) says further at trial it will refer to and rely upon the full terms and effect of its announcements on the ASX and NZSX on 25 February 2021.

#### **Particulars**

- (1) February 2021 Update Announcement.
- (2) February 2021 Results Presentation.
- (3) Interim Report For The Six Months Ended 31 December 2020.
- (4) ASX Appendix 4D – Half Yearly Report.

125. As to paragraph 125 it repeats paragraph 124 above and:

- (a) refers to and repeats paragraphs 40, 41, and 43 above;
- (b) denies that the implied representations pleaded in paragraph 125(a)-(c) were made;
- (c) says further that the matters stated in the documents particularised at paragraph 124 of the CSOC were made subject to the terms of those documents, including as pleaded at paragraph 124 above;
- (d) admits that the implied representation in paragraph 125(d) was made in respect of the express statements that the Defendant has admitted were made in paragraph 124 above;
- (e) says further that in respect of the express statements pleaded in paragraph 125 above (the **February Statements**), the statements were statements of opinion for which the Defendant had reasonable grounds;

#### **Particulars**

- (1) The Defendant refers to and repeats paragraphs 47(e), the particulars to paragraph 74(e), and the particulars to paragraph 100(e) above.
- (2) The Defendant undertook:

- (ii) a group operating and financial review;
- (iii) a detailed FY21 Q2 reforecast process;
- (iv) a review of the financial results for January 2021 (which were ahead of forecast);

prior to making the February Statements.

- (3) Board pack dated 24 February 2021, pages 26 to 121.
  - (4) Minutes of Board Meeting on 24 February 2021.
  - (5) Further particulars may be provided following evidence.
- (f) further and alternatively, says that if (which is denied) the Defendant made the implied representations pleaded at paragraph 125(a)-(c) of the CSOC, those implied representations were statements of opinion for which the Defendant had reasonable grounds.

#### **Particulars**

- (1) The Defendant refers to and repeats the matters pleaded at paragraphs 43 and 125(e) above.
  - (2) Further particulars may be provided following the service of evidence.
- (g) otherwise denies the paragraph.
126. It denies paragraph 126.
- G.3 Alleged February 2021 Misleading or Deceptive Conduct**
127. It refers to and repeats paragraph 121 above and denies paragraph 127.
128. As to paragraph 128, it
- (a) refers to and repeats paragraphs 51 and 123 above;
  - (b) otherwise denies paragraph 128.
129. It denies paragraph 129 and:

- (a) says further that to the extent (which is denied) that the February Representations were made, and were representations as to future matters, the Defendant had reasonable grounds for making those representations;
- (b) says that the Defendant had reasonable grounds for making the February Statements, and refers to and repeats paragraph 125(e) above.

130. As to paragraph 130, it:

- (a) refers to and repeats paragraphs 124 to 126 above;
- (b) admits that to the extent the conduct alleged in paragraphs 124 to 126 is established by the Plaintiffs (which is denied), that conduct was engaged in by it:
  - (i) in trade or commerce, and in relation to financial services (being a2 Securities), within the meaning of s 12DA of the ASIC Act;
  - (ii) in relation to a financial product or financial service (being a2 Securities), within the meaning of s 1041H of the Corporations Act;
  - (iii) in trade or commerce within the meaning of s 18 of the Australian Consumer Law;
  - (iv) in trade or commerce within the meaning of s 9 of the FT Act; and/or
  - (v) in relation to dealing in a quoted financial product (being a2 Securities) within the meaning of s 19(2) of the FMC Act;
- (c) otherwise denies paragraph 130.

131. As to paragraph 131, it:

- (a) refers to and repeats paragraphs 121 to 130 above;
- (b) otherwise denies paragraph 131.

#### **G.4 Alleged February 2021 Continuous Disclosure Contravention**

132. As to paragraph 132, it:

- (a) refers to and repeats paragraphs 51, 121, 122 and 128 above;
- (b) otherwise denies paragraph 132;
- (c) says further that:
  - (i) the February 2021 a2 China Market Conditions, February 2021 a2 China Market Information and Inadequate Monitoring Systems Information (the existence of which is denied) was not information

(collectively or individually) which it was aware within the meaning of:

- (A) Rule 19.12 of the ASX Listing Rules (and hence it was not required to be disclosed under s 674(2) of the Corporations Act or Rule 3.1 of the ASX Listing Rules);
- (B) Part A – Definitions of the NZSX Listing Rules (and hence it was not required to be disclosed under s 270 of the FMC Act or Rule 3.1.1 of the NZSX Listing Rules).

(ii) if the February 2021 a2 China Market Conditions, February 2021 a2 China Market Information and Inadequate Monitoring Systems Information was information of which it was aware (which is denied):

- (A) it denies that the February 2021 a2 China Market Conditions, February 2021 a2 China Market Information and Inadequate Monitoring Systems Information (collectively or individually) was information that a reasonable person would expect to have a material effect on the price or value of the a2 Securities within the meaning of Rule 3.1 of the ASX Listing Rules;
- (B) it denies that the February 2021 a2 China Market Conditions, February 2021 a2 China Market Information and Inadequate Monitoring Systems Information (collectively or individually) was information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of the a2 Securities, within the meaning of the term Material Information for the purposes of the NZSX Listing Rules and as defined in s 231(1) of the FMC Act;

(iii) if the February 2021 a2 China Market Conditions, February 2021 a2 China Market Information and Inadequate Monitoring Systems Information was information (collectively or individually) of which it was aware (which is denied) and if the February 2021 a2 China Market Conditions, February 2021 a2 China Market Information and Inadequate Monitoring Systems Information was information (collectively or separately) that a reasonable person would expect

to have a material effect on the price or value of the a2 Securities (which is also denied), then the February 2021 a2 China Market Conditions, February 2021 a2 China Market Information and Inadequate Monitoring Systems Information was within an exception to ASX Listing Rule 3.1 provided by ASX Listing Rule 3.1A and NZSX Listing Rule 3.1.1 provided by NZSX Listing Rule 3.1.2 because:

- (A) the information as pleaded:
  - (1) comprises matters of supposition or was insufficiently definite to warrant disclosure; and/or
  - (2) was information generated for its internal management purposes;
- (B) the information was confidential, its confidentiality was maintained and the ASX had not formed the view that the information had ceased to be confidential; and
- (C) a reasonable person would not have expected it to disclose that information,

and accordingly, by virtue of ASX Listing Rules 3.1A, ASX Listing Rule 3.1 did not apply to that information and by virtue of NZSX Listing Rule 3.1.2, NZSX Listing Rule 3.1.1 did not apply to that information.

*Alleged ASX Contraventions*

133. As to paragraph 133, it:

- (a) refers to and repeats paragraphs 51, 121, 122, 128 and 132 above;
- (b) otherwise denies paragraph 133.

134. As to paragraph 134, it:

- (a) refers to and repeats paragraphs 51, 121, 122, 128, 132 and 133 above;
- (b) otherwise denies paragraph 134.

135. As to paragraph 135, it:

- (a) refers to and repeats paragraphs 51, 121, 122, 128 and 132 to 134 above;
- (b) otherwise denies paragraph 135.

136. As to paragraph 136, it:
- (a) refers to and repeats paragraphs 51, 121, 122, 128 and 132 to 135 above;
  - (b) otherwise denies paragraph 136.
137. As to paragraph 137, it:
- (a) refers to and repeats paragraphs 51, 121, 122, 128 and 132 to 136 above;
  - (b) otherwise denies paragraph 137.
138. As to paragraph 138, it:
- (a) refers to and repeats paragraphs 51, 121, 122, 128 and 132 to 137 above;
  - (b) otherwise denies paragraph 138.

*Alleged NZSX Contraventions*

139. As to paragraph 139, it:
- (a) refers to and repeats paragraphs 51, 121, 122, 128 and 132 above;
  - (b) otherwise denies paragraph 139.
140. As to paragraph 140, it:
- (a) refers to and repeats paragraphs 51, 121, 122, 128, 132 and 139 above;
  - (b) otherwise denies paragraph 140.
141. As to paragraph 141, it:
- (a) refers to and repeats paragraphs 51, 121, 132, 122, 128 and 139 to 140 above;
  - (b) otherwise denies paragraph 141.
142. As to paragraph 142, it:
- (a) refers to and repeats paragraph 51, 121, 132, 122, 128 and 139 to 141 above;
  - (b) otherwise denies paragraph 142.

**G.5 Alleged Market Effects of February Contraventions**

143. It denies paragraph 143.

**G.6 Alleged May 2021 Corrective Disclosure**

144. As to paragraph 144, it admits that on 10 May 2021 it published and lodged a trading update with the ASX and NZSX (**May 2021 Trading Update**), and:

- (a) as to paragraph 144(a) it:
  - (i) says that the May 2021 Trading Update stated that the Defendant *"is now targeting revenue for FY21 in the order of \$1.20 billion to \$1.25 billion"*; and
  - (ii) says that the May 2021 Trading Update stated that the Defendant was *"expecting an earnings before interest, depreciation and amortisation (EBITDA) to sales margin for FY21 in the order of 11% to 12% (excluding MVM transaction costs)"*; and
  - (iii) otherwise denies paragraph 144(a);
- (b) it admits paragraph 144(b);
- (c) as to paragraph 144(c) it:
  - (i) says that the May 2021 Trading Update stated that: *"As a result of the inventory review, it is clear that the challenges in the daigou/reseller and CBEC channels have been exacerbated by excess inventory and difficulties with visibility"*; and
  - (ii) otherwise admits paragraph 144(c);
- (d) as to paragraph 144(d) it:
  - (i) says that the May 2021 Trading Update stated that English Label infant nutrition sales in the ANZ Segment and in the CBEC channel had a *"11% and 57% respective decline on 2Q21 and a 56% and 77% respective decline on 3Q20, which was in line with the revised plan for the period. It should be noted that these declines compared to 3Q20 reflect the extraordinary uplift in sales last year as the initial effects of the pandemic were beginning to be felt"*; and
  - (ii) otherwise denies paragraph 144(d);
- (e) as to paragraph 144(e) it:
  - (i) says that the May 2021 Trading Update stated that China Label infant nutrition sales had *"5% growth on 3Q20 and 18% decline on 2Q21. The reduced rate of growth relative to 3Q20 is reflective of the substantial uplift in the prior period due to COVID-related pantry stocking. The rate of decline relative to 2Q21 was mainly due to increasing distributor inventory to mitigate the risk of the potential second wave of COVID-19 in China in 1H21"*; and

- (ii) otherwise denies paragraph 144(e);
- (f) it admits paragraph 144(f);
- (g) it admits paragraph 144(g);
- (h) it refers and relies on the May 2021 Trading Update for its full terms and effect.

### **Particulars**

- (1) May 2021 Trading Update.

145. As to paragraph 145, it refers to and repeats paragraphs 40, 41, 42, 43, 70, 71, 72, 96, 97, 98 121, 122, 123 and 144 above and says further that:
- (a) the August 2020 to February 2021 Information (the existence of which is denied) was not information which it was aware (within the meaning of the ASX and NZSX Listing Rules) and hence it was not required to be disclosed under s 674(2) of the Corporations Act Rule 19.12 of the ASX Listing Rules, s 270 of the FMC Act or Rule 3.1.1 of the NZSX Listing Rules;
  - (b) if the August 2020 to February 2021 Information was information of which it was aware (which is denied), it denies that such August 2020 to February 2021 Information was information that a reasonable person would expect to have a material effect on the price or value of the a2 Securities;
  - (c) if the August 2020 to February 2021 Information was information of which it was aware (which is denied) and if the August 2020 to February 2021 Information was information that a reasonable person would expect to have a material effect on the price or value of the a2 Securities (which is also denied), then the August 2020 to February 2021 Information was within an exception to ASX Listing Rule 3.1 provided by ASX Listing Rule 3.1A and within an exception to NZSX Listing Rule 3.1.1 provided by NZSX Listing Rule 3.1.2 because:
    - (i) the information as pleaded:
      - (A) comprises matters of supposition or was insufficiently definite to warrant disclosure; and/or
      - (B) was generated for its internal management purposes;

(ii) the information was confidential, its confidentiality was maintained and the ASX had not formed the view that the information had ceased to be confidential; and

(iii) a reasonable person would not have expected it to disclose that information,

and accordingly, by virtue of ASX Listing Rules 3.1A, ASX Listing Rule 3.1 did not apply to that information and by virtue of NZSX Listing Rule 3.1.2, NZSX Listing Rule 3.1.1 did not apply to that information;

(d) it otherwise denies paragraph 145.

## **H ALLEGED MARKET EFFECTS**

### **H.1 Acquisition Claimants**

146. As to paragraph 146, it:

- (a) admits paragraph 146(a);
- (b) admits paragraph 146(b);
- (c) says that the price at which a2 Securities traded on the ASX closely tracked the price at which a2 Securities traded on the NZSX adjusted for the impact of the AUD-NZD exchange rate but this was not invariably the case.

147. It denies paragraph 147.

148. The Defendant does not know and therefore cannot admit paragraph 148.

149. As to paragraph 149, it:

- (a) refers to and repeats paragraphs 44 to 48, 73 to 75, 99 to 101 and 124 to 126;
- (b) otherwise does not know and cannot admit the allegations in paragraph 149.

150. As to paragraph 150, it:

- (a) refers to and repeats paragraphs 54, 61, 66 to 69, 80, 87, 92 to 95, 106, 113, 118 to 120, 131, 138, 143 to 145;
- (b) otherwise denies paragraph 150.

151. As to paragraph 151, it:

- (a) refers to and repeats paragraphs 54, 61, 66 to 69, 80, 87, 92 to 95, 106, 113, 118 to 120, 131, 138, 143 to 145 and 150;

(b) otherwise denies paragraph 151.

152. As to paragraph 152, it:

(a) refers to and repeats paragraphs 54, 65, 66 to 69, 80, 91, 92 to 95, 106, 117, 118 to 120, 131, 142, 143 to 145;

(b) otherwise denies paragraph 152.

153. As to paragraph 153, it:

(a) refers to and repeats paragraphs 54, 65, 66 to 69, 80, 91, 92 to 95, 106, 117, 118 to 120, 131, 142, 143 to 145 and 152;

(b) otherwise denies paragraph 153.

## **H.2 Retention Claimants**

154. As to paragraph 154, it:

(a) says that the group proceeding is brought on behalf of Retention Claimants as defined in paragraph 2 of the CSOC;

(b) otherwise does not know and cannot admit the allegations in paragraph 154.

155. It does not know and cannot admit paragraph 155.

156. As to paragraph 156, it:

(a) refers to and repeats paragraphs 44 to 48, 73 to 75, 99 to 101 and 124 to 126;

(b) otherwise does not know and cannot admit the allegations in paragraph 156.

157. As to paragraph 157, it:

(a) refers to and repeats paragraphs 54, 61, 80, 87, 106, 113, 131 and 138;

(b) otherwise denies paragraph 157.

158. As to paragraph 158, it:

(a) refers to and repeats paragraphs 40 to 61, 66 to 87, 92 to 113, 118 to 138, 143 to 145 and 157;

(b) otherwise denies paragraph 158.

159. As to paragraph 159, it:

(a) refers to and repeats paragraphs 40 to 55, 62 to 69, 70 to 81, 88 to 95, 96 to 107, 114 to 132 and 139 to 145;

(b) otherwise denies paragraph 159.

160. As to paragraph 160, it:

(a) refers to and repeats paragraphs 40 to 55, 62 to 69, 70 to 81, 88 to 95, 96 to 107, 114 to 132, 139 to 145 and 159;

(b) otherwise denies paragraph 160.

## **I ENTITLEMENT TO RELIEF**

161. As to paragraph 161, it:

(a) refers to and repeats paragraphs 146 to 158;

(b) otherwise denies paragraph 161.

162. As to paragraph 162, it:

(a) refers to and repeats paragraphs 146 to 158;

(b) otherwise denies paragraph 162.

163. As to paragraph 163, it:

(a) refers to and repeats paragraphs 146 to 160;

(b) otherwise denies paragraph 163.

164. As to paragraph 164, it:

(a) refers to and repeats paragraphs 146 to 160;

(b) otherwise denies paragraph 164.

164A. In further answer to the allegations pleaded in paragraphs 161 to 164, insofar as:

(a) the Plaintiffs and Group Members make claims pursuant to:

(i) section 1041I(1) of the Corporations Act in relation to economic loss allegedly caused by the conduct of the Defendant that was allegedly done in contravention of section 1041H of the Corporations Act;

(ii) section 12GF(1) of the ASIC Act in relation to economic loss allegedly caused by conduct of the Defendant that was allegedly done in contravention of section 12DA of the ASIC Act;

(iii) section 236 of the Australian Consumer Law in relation to economic loss caused by conduct of the Defendant that was allegedly done in contravention of section 18 of the Australian Consumer law;

- (iv) sections 494 and 495 of the FMC Act in relation to loss or damage caused by the conduct of the Defendant that was allegedly done in contravention of sections 19 or 270 of the FMC Act or Rule 3.1.1 of the NZSX Listing Rules;
- (v) section 43 of the FT Act in relation to loss or damage caused by the conduct of the Defendant that was allegedly done in contravention of section 9 of the FT Act,

the Defendant pleads as follows:

- (b) if and to the extent that the Plaintiffs or any Group Member failed to have adequate regard to any of the 2020 Annual Report, the August 2020 call, the 2020 Annual Results Presentation, the Defendant's ASX and NZSX announcements on 19 August 2020, the 9 September Release, the Defendant's ASX and NZSX announcements on 28 September 2020, the Defendant's ASX and NZSX announcements on 18 November 2020, the Defendant's ASX and NZSX announcements on 18 December 2020, the December 2020 call, the Defendant's ASX and NZSX announcements on 25 February 2021 (including the Defendant's ASX and NZSX announcement entitled 1H21 Results Presentation), and the February 2021 Call, the February Results Presentation, in full then, if the Plaintiffs or Group Member suffered the loss claimed or any loss at all (which is denied), the Plaintiffs or Group Member did so as a result wholly or partly of the Plaintiffs' or Group Member's failure to take reasonable care;
- (c) the Defendant did not intend to cause the loss claimed by the Plaintiffs or any Group Member or any loss at all and, if the Defendant caused that loss (which is denied) it did not do so fraudulently;
- (d) in the premises, if the Plaintiffs or any Group Member suffered the loss claimed or any loss at all (which is denied), the damages which the Plaintiff or Group Member may recover in relation to the loss are to be reduced to the extent to which the Court thinks is just and equitable having regard to the Plaintiffs' or Group Member's share in the responsibility for the loss.

#### **Particulars**

- (1) The Defendant relies on section 1041I(1B) of the Corporations Act, section 12GF(1B) of the ASIC

Act, section 137B of the CCA, sections 494 and 495 of the FMC Act and section 43 of the FT Act.

164B. In further answer to the allegations pleaded in paragraphs 161 to 162, insofar as:

- (a) the Plaintiffs and Group Members make claims to compensation pursuant to section 1317HA(1) of the Corporations Act for damage resulting from one or more of the Defendant's alleged contraventions of section 674(2) of the Corporations Act;
- (b) it appears to the Court that the Defendant has, or may have, contravened section 674(2) of the Corporations Act (which is denied);

then the Defendant pleads as follows:

- (c) the Defendant has acted honestly;
- (d) having regard to all the circumstances of the case, the Defendant ought fairly to be excused for any contravention of section 674(2) of the Corporations Act;

#### **Particulars**

- (1) The Relevant Period pleaded in the CSOC coincided with the global COVID-19 pandemic, which presented an unprecedented level of uncertainty in the global economy (and the particulars at paragraphs 41(b)(iv), 46(b)(i), 49(c)(ii) are referred to and repeated).
- (2) Further particulars may be provided following evidence.
- (e) in the premises, the Court should relieve the Defendant wholly or partly from the liability to which it would otherwise be subject, or which might otherwise be imposed on it, because of any contravention of section 674(2) of the Corporations Act.

#### **Particulars**

- (1) The Defendant relies on section 1317S of the Corporations Act.

164C. In further answer to the allegations pleaded in paragraphs 163 to 164, insofar as:

- (a) the Plaintiffs and Group Members make claims pursuant to:

- (i) sections 494 and 495 of the FMC Act in relation to loss or damage caused by the conduct of the Defendant that was allegedly done in contravention of sections 19 or 270 of the FMC Act or Rule 3.1.1 of the NZSX Listing Rules;
  - (ii) section 43 of the FT Act in relation to loss or damage caused by the conduct of the Defendant that was allegedly done in contravention of section 9 of the FT Act;
- (b) it appears to the Court that the Defendant has contravened ss 19 or 270 of the FMC Act, Rule 3.1.1 of the NZSX Listing Rules, or section 9 of the FT Act (which is denied);

then the Defendant pleads as follows:

- (c) it repeats paragraphs 164B(c)-(d) above;
- (d) in the premises, the Court should decline to grant relief in the exercise of its discretion pursuant to sections 494 and 495 of the FMC Act and section 9 of the FT Act.

164D. In further answer to paragraphs 66(b), 69(d)(v), 92(b), 95(d)(v), 120(d)(v), 145(d)(v), 150, 151, 152, 153 and 156 of the CSOC, the Defendant says that the presence of multiple and overlapping contingencies within each of these paragraphs have the effect that the whole of the allegations within those paragraphs are incoherent and embarrassing and liable to be struck out.

## **J COMMON QUESTIONS OF FACT OR LAW**


165. As to paragraph 165, it:

- (a) says that the identification of the common questions for determination at the initial trial is a matter to be determined by the Court (and not the Plaintiffs);
- (b) otherwise does not plead to paragraph 165 as there are no allegations pleaded against it.

166. The Defendant also denies that the Plaintiffs are entitled to the relief claimed in prayers A to F, or any relief.

**C WITHERS  
B CAMERON  
N WOOTTON**

Dated 8 November 2022



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**Herbert Smith Freehills**  
Solicitors for the defendant