



Australian Government

Takeovers Panel

**Reasons for Decision
Factor Therapeutics Limited
[2019] ATP 5**

Catchwords:

Decline to conduct proceedings – requisitioned meeting – placement – frustrating action

Corporations Act 2001 (Cth), sections 249D, 657A(3)

Guidance Note 12: Frustrating action

MMA Offshore Limited [2017] ATP 21, Perilya Limited 02 [2009] ATP 1

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	NO

INTRODUCTION

1. The Panel, Christian Johnston, Denise McComish (sitting President) and Rory Moriarty declined to conduct proceedings on an application by Pura Vida Energy NL in relation to the affairs of Factor Therapeutics Limited. The application concerned a placement made by Factor Therapeutics shortly after the applicant and another shareholder gave a s249D¹ notice to the company. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable and Pura Vida had not provided a sufficient body of material to justify the Panel making further enquiries as to the placement.

2. In these reasons, the following definitions apply.

- Factor Factor Therapeutics Limited
- Placement The placement referred to in paragraph 7
- Pura Vida Pura Vida Energy NL

FACTS

- 3. Factor is a clinical-stage ASX listed biotechnology company developing therapeutics for advanced wound care (ASX code: FTT).
- 4. On 14 November 2018, Factor announced its Phase 2 trial had “failed to meet all endpoints” with the analysis demonstrating “no clinically meaningful or statistically significant difference in measures of wound healing, compared with placebo”. Factor stated that further activity would be limited to maintaining its existing intellectual property portfolio.

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

Takeovers Panel

Reasons - Factor Therapeutics Limited [2019] ATP 5

5. On 31 January 2019, Factor released its Appendix 4C quarterly report for the December 2018 quarter, which disclosed (among other things):
 - (a) It held cash reserves at the end of the quarter of \$2.598 million.
 - (b) Projected spending for the next quarter was \$2.057 million, with the majority comprising contractual commitments with respect to the Phase 2 trial.
 - (c) Its *“future cash position may also be impacted by receipt of a payment in April/May 2019 of approximately \$1.2 million under the federal government’s Research and Development (R&D) Tax Incentive Scheme”*.
6. Pura Vida is a substantial holder of Factor. On 1 February 2019, Pura Vida and another shareholder (Freshero Pty Ltd) gave a s249D notice to Factor requesting a general meeting be held to consider resolutions removing three of the four current directors from the board and appointing two new directors nominated by the requisitioning shareholders.
7. On 5 February 2019, Factor announced it had completed a placement of 208,500,000 shares, representing 19.99% of the enlarged share capital of the company, at a price of \$0.002 per share to existing and new sophisticated investors to raise \$417,000 (**Placement**).² Taylor Collison acted as lead manager to the placement. Factor stated in the announcement that it was:

...in the process of assessing new healthcare and biotechnology opportunities following the scaling down of its previous research and development activities at the end of 2018. The funds raised through this Placement will ensure the Company is in a position of strength throughout this process, with the increased working capital and runway to source, investigate, negotiate and execute a potential transaction.

APPLICATION

Declaration sought

8. By application dated 6 February 2019, Pura Vida sought a declaration of unacceptable circumstances. Pura Vida submitted that (among other things):
 - (a) The Placement *“represents a clear frustrating action directly analogous to the actions the subject of”* Guidance Note 12: Frustrating Action. The board announced the Placement after receiving the s249D notice. The Placement represented 19.99% of the expanded share capital of Factor and was issued to undisclosed places at a 50% discount to the last traded share price in circumstances where the company *“has no disclosed or discernible need to raise funds”*.
 - (b) Existing Factor shareholders who did not participate in the Placement have suffered a significant dilution of their voting power without the opportunity to participate in the capital raising, which is likely to have a significant effect on the control of Factor and in particular the composition of its board after the upcoming general meeting.

² The placement was made within the company’s placement capacity under ASX Listing Rule 7.1 and 7.1A

Interim order sought

9. Pura Vida sought an interim order restraining the recipients of the private placement from disposing of any of their shares prior to the determination of the application. The President considered this request but did not make an interim order, noting that the identities of the placees were unknown, the Placement was made in the context of a s249D shareholder meeting and the number of shares to be issued was less than 20% of the enlarged share capital of Factor.

Final orders

10. Pura Vida sought final orders that the Placement be unwound or, in the alternative, that the shares the subject of the Placement not be voted at the s249D shareholder meeting.

DISCUSSION

11. Factor made a preliminary submission, submitting (among other things):
- (a) Factor's board had been formulating plans for raising additional funds for "*a number of months*". The Placement was "*first broached by the Board in December 2018 and was discussed again immediately following the release of*" the December 2018 Appendix 4C.
 - (b) Factor's cash position as at 31 March 2019 is expected to be \$0.541 million. The final amount of the R&D rebate is uncertain (and could conceivably be assessed as nil) and, in any event, will not be received until April/May 2019. As a result, "*the financial position of Factor therefore required that it raise further funds in the near term and a placement structure allowed that to be achieved expeditiously and with certainty*".
 - (c) "*Guidance Note 12 applies to an action by a target, whether taken or proposed, by reason of which a bid may be withdrawn or lapse or a potential bid does not proceed*". The Applicant does not develop a basis on which it applies to the Placement. In any event the Placement "*was required to be conducted by the Company to avoid a materially adverse financial consequence*"³ and "*was conducted for a proper purpose in the ordinary course of Factor's existing business*".
 - (d) None of the placees will become substantial holders as a result of the Placement.
12. While Guidance Note 12: Frustrating Action does not apply to a s249D meeting to consider changes to a company's board, a placement made prior to such a meeting may have an effect on control and impact on voting at the meeting in an unacceptable way.⁴
13. In this case, Factor appeared to have a genuine need for funds. Pura Vida has not provided sufficient material to suggest that the placement had not been in contemplation prior to the lodgement of the s249D request. It also has not provided

³ Referring to *Perilya Limited 02* [2009] ATP 1

⁴ See *MMA Offshore Limited* [2017] ATP 21, at [13]

Takeovers Panel

Reasons - Factor Therapeutics Limited [2019] ATP 5

sufficient material to suggest that any of the placees would become substantial holders as a result of the placement and no material to suggest any association between them.

DECISION

14. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth). Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Denise McComish

President of the sitting Panel

Decision dated 18 February 2019

Reasons given to parties 26 February 2019

Reasons published 28 February 2019

Takeovers Panel

Reasons - Factor Therapeutics Limited
[2019] ATP 5

Advisers

Party	Advisers
Factor	McCullough Robertson
Pura Vida	Bennett + Co