



**In the matter of Sirtex Medical Limited
[2003] ATP 22**

Catchwords:

Distribution agreement and share issue – pre-bid agreement – break fee – disclosure in bidder’s statement – requirement to obtain expert’s report – disclosure of success fee – minimum acceptance condition – withdrawal rights

Corporations Act 2001 (Cth), sections 640, 602(a) and (b), 636(1), 638(1), 657A(3) and 650E

Takeovers Panel Guidance Note 7 - “Lock-up Devices”

These are our reasons for declining to make a declaration of unacceptable circumstances in response to an application by Hunter Hall Investment Management Limited (Hunter Hall) in its capacity as responsible entity for the Australian Value Trust, the Value Growth Trust and the International Ethical Fund under section 657C of the Corporations Act 2001 (Cth) (Act) dated 17 April 2003 (Application). Hunter Hall had applied to the Takeovers Panel (Panel) for a declaration of unacceptable circumstances and interim and final orders in connection with a takeover bid by Cephalon Australia Pty Limited (Cephalon) for all the shares in Sirtex Medical Limited (Sirtex).

Preliminary

1. The sitting Panel was made up of Alison Lansley (sitting President), Scott Reid (sitting Deputy President) and Luise Elsing.

Summary

2. Hunter Hall, a shareholder in Sirtex, applied to the Panel on 17 April 2003 for a declaration of unacceptable circumstances in relation to an off-market cash takeover bid by Cephalon for all the shares in Sirtex (**Bid**).
3. First, Hunter Hall asserted that Sirtex shareholders had insufficient information to assess whether or not to accept the Bid. Hunter Hall alleged that there was deficient information regarding the possibility raised by Cephalon that if it achieved between 50% and 90% of the shares in Sirtex:
 - (a) Cephalon would consider entering into an agreement with Sirtex under which Sirtex licensed its principal product to Cephalon; and
 - (b) Cephalon may consider underwriting a capital raising by Sirtex, or taking a share placement in it, that could have a dilutive effect on other shareholders.
4. Hunter Hall argued that the lack of information, with the possibility of Cephalon waiving the 90% minimum acceptance condition to its Bid, may coerce shareholders into accepting the Bid.
5. Second, Hunter Hall was concerned about the relationship between Cephalon and its US parent, Cephalon, Inc, on the one hand, and Sirtex and its principal shareholder

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on the other hand. Specifically it asserted that a pre-bid agreement between Sirtex and Cephalon, Inc prevented the Sirtex board from reaching an independent view on the merits of Cephalon's offer.

6. It argued that an Independent Expert's Report should be prepared to assist shareholders make an informed decision on whether to accept the Bid.
7. Although it considered that the applicant had made out some of its concerns the Panel declined the Application on 14 May 2003. The Panel believed that most of those concerns were no longer relevant following a binding statement by Cephalon that it would not waive the 90% minimum acceptance condition in its Bid.
8. The Panel said that it would be willing to reconsider certain issues if the Success Fee was payable by Sirtex to its financial adviser if the Bid was not successful. The Panel would also have examined the Success Fee if it was payable in circumstances where the 90% Minimum Acceptance Condition was waived.
9. The Panel also noted that it was provided with no evidence that any aspect of the Bid prevented a rival bid from emerging.
10. After the Bid was extended, Cephalon told Sirtex shareholders who had accepted the Bid that some of them 'may' be able to withdraw acceptances under the Bid. The Panel considered that these statements did not sufficiently inform, and may confuse, shareholders. It would have been preferable for Cephalon to explain more fully that shareholders who accepted by a particular date had withdrawal rights. Nonetheless, the Panel did not believe this created unacceptable circumstances.

Relevant Parties

11. Sirtex is a public company whose shares are listed for quotation on the Australian Stock Exchange (**ASX**). Its principal activity is the research and commercial development of treatments for liver cancer. Its principal product is the SIR-Sphere®.
12. At the time the Application was made, the following persons had relevant interests in Sirtex:

Shareholder	Shareholding (%)
Dr Bruce Gray	36.9
Hunter Hall	14.6
Cancer Research Institute	8.9
Cephalon (option over 19.9% of Dr Gray's shares)	19.9

13. Cephalon, Inc is an international biopharmaceutical company headquartered in the United States. Cephalon, the Bid vehicle, is a 100% subsidiary of Cephalon, Inc.

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14. Hunter Hall acquired approximately 10% of its holding after the Bid was announced. Hunter Hall lodged its first substantial shareholding notice on 25 February which indicated that it commenced buying shares in Sirtex in October 2002.

Background

Option Agreement

15. On 12 February 2003, Dr Bruce Gray, Sirtex's founder, chief executive officer, chairman and largest shareholder, granted Cephalon an option over 19.9% of Sirtex's issued shares at \$4.85 per share. Dr Gray did not commit to accept the Bid for the remainder of his shares.

Bid announcement

16. On 12 February 2003, Cephalon announced its intention to make a cash off-market takeover bid for all the shares in Sirtex. The offer price was \$4.85 cash per share.

Pre-Bid Agreement

17. Also on 12 February 2003, Sirtex and Cephalon, Inc entered into an agreement (**Pre-Bid Agreement**) under which, amongst other things:
 - (a) Sirtex's directors agreed to recommend the Bid, subject to the absence of a competing bid or 'other qualification consistent with the directors' reasonable exercise of their fiduciary duties' (**Directors' Recommendation Agreement**);
 - (b) Sirtex agreed to pay Cephalon a break fee of \$2,642,533 if any Sirtex director recommended a competing bid, withdrew his recommendation of the Bid or if a competing bidder acquired more than 50% of Sirtex (**Break Fee**)¹; and
 - (c) Sirtex agreed not to solicit a competing bid, participate in any discussions or provide any information to assist anyone in making a competing bid (**No-Talk Agreement**). This prohibition was subject to the Sirtex directors' fiduciary duties and expired on 13 April 2003.

90% Condition

18. The Bid was subject, amongst other things, to a 90% minimum acceptance condition (**Minimum Acceptance Condition**).
19. Cephalon's bidder's statement (**Bidder's Statement**) dated 25 February 2003 set out its intentions if Sirtex became a partly-owned subsidiary of Cephalon. In this case, Cephalon's intention was to pursue the integration of both companies "to the extent possible and appropriate". Cephalon further stated its intention to maintain Sirtex's ASX listing "but only while it meets the requirements of the ASX Listing Rules for

¹ The Break Fee Arrangement was subject to a profit offset clause, further information of which is set out in paragraph 61. The Break Fee was also subject to the Panel or Court finding that it was unlawful, involved a breach of directors' duties or created unacceptable circumstances.

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maintaining a listing", and to seek the appointment of nominees to the Sirtex board at least in proportion to Cephalon's shareholding interest in the company.

20. On 14 April 2003 Cephalon issued its first supplementary Bidder's Statement. This informed Sirtex shareholders that Cephalon had given further consideration to the prospect of owning less than 90% of Sirtex, and its intentions for Sirtex were this to eventuate.

Distribution Agreement

21. Cephalon stated in its first supplementary Bidder's Statement that if it obtained between 50% and 90% of the voting power in Sirtex, it would consider the possibility of Sirtex entering into a non-exclusive distribution agreement with Cephalon for the SIR-Spheres® for all territories other than Australia and New Zealand (**Distribution Agreement**). The first supplementary Bidder's Statement did not contain details of the commercial terms of the proposed Distribution Agreement. In particular, there was little information provided in respect of what royalty would be payable by Cephalon under the agreement, beyond stating that Sirtex would receive a 'market-based royalty stream and based on the revenue derived from SIR-Spheres'.
22. Cephalon did not formally present Sirtex with any proposal regarding the Distribution Agreement. When the issue was raised with Dr Gray by Cephalon's chief financial officer in March 2003, Dr Gray indicated that Sirtex was not interested in pursuing such discussions at the time. This information was not disclosed by Cephalon in its Bidder's Statements.

Capital Raising

23. The first supplementary Bidder's Statement also referred to Cephalon's intention to 'review Sirtex's capital requirements which may result in [Sirtex] raising additional capital in the future to fund its operations'. Cephalon stated that it may act as underwriter to a future rights issue or take a placement of shares in Sirtex (**Capital Raising**).

Independent's Expert Report

24. On 7 March 2003 Sirtex issued a target's statement (**Target's Statement**). It informed shareholders that Sirtex together with its financial adviser, Three Oaks Group, Inc had since July 2002 been exploring a number of strategic alternatives, including general marketing and distribution agreements, joint ventures and mergers. Although the Sirtex board considered that Sirtex was viable as a stand-alone entity, the board considered that to capitalise on all opportunities Sirtex would likely require additional resources.
25. In the Target's Statement Sirtex directors said they intended to accept in respect of their own shareholdings, in the absence of a higher offer.
26. The Sirtex directors did not commission an Independent Expert's Report but recommended the Bid in the absence of a higher offer.

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27. In its submissions, Sirtex stated that its Target's Statement was not accompanied by an Independent Expert's Report for a number of reasons, including the following:
- (a) as a result of the process which Sirtex had carried out with its financial adviser described in **paragraph 24** above, the Sirtex board considered that it was well informed on the price that a buyer would be prepared to pay for the company;
 - (b) Sirtex doubted whether an expert would have been able to prepare an Independent Expert's Report, as it would be difficult to apply common valuation techniques to Sirtex's business; and
 - (c) section 640(1) of the Act did not require such a report to be obtained.

No Increase, No waiver Statement

28. The third supplementary Bidder's Statement lodged on 8 May 2003 stated that Cephalon would not:
- waive the 90% Minimum Acceptance Condition (**No-waiver Statement**);
 - increase the price offered under the Bid; or
 - further extend its Bid, unless it had relevant interests in 80% of Sirtex by 5pm on 19 May 2003.
29. Cephalon advised that it would be bound by the statements in accordance with the Australian Securities and Investments Commission's 'Truth in Takeovers' policy (Policy Statement 25).

Withdrawal Statement

30. The third supplementary Bidder's Statement also contained the following statement about the right to withdraw acceptances under the Bid (**Withdrawal Statement**):

As a result of the extension of the offer period, some Sirtex shareholders may have the right to withdraw their acceptance under section 650E of the Corporations Act 2001.

Success Fee

31. During the course of proceedings, Cephalon disclosed that Sirtex had committed to pay its financial adviser, Three Oaks Group, Inc, a success fee of 2% of the consideration paid by the bidder (which, if Cephalon acquired 100% of the Sirtex shares would have amounted to approximately US\$3.4 million or A\$5.7 million) (**Success Fee**). The Success Fee was not disclosed in the Target's Statement. It was unclear whether the Success Fee would be paid in any circumstances where the Bid closed with any defeating conditions unfulfilled.

Application

Interim orders sought

32. Hunter Hall sought interim orders that Cephalon be:

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- (a) restrained from declaring its offer free of the 90% Minimum Acceptance Condition until it had provided full information about the Distribution Agreement and proposed Capital Raising, should it acquire control of the company;
- (b) restrained from processing any acceptances of its Bid until that information had been provided; and
- (c) directed to extend its Bid until 31 May 2003.

Declaration sought

33. Hunter Hall sought a declaration that there were unacceptable circumstances under section 657A(2) of the Act in relation to the affairs of Sirtex.

Final orders sought

34. Hunter Hall sought final orders that:
- (a) the Pre-Bid Agreement (or, alternatively, the Break Fee component of the agreement) be deemed void;
 - (b) Sirtex be directed to issue an Independent Expert's Report stating whether, in the expert's opinion, the Bid was fair and reasonable;
 - (c) Cephalon be required to enter into an enforceable undertaking to use its best endeavours to maintain Sirtex's ASX listing in the event that it waived its 90% Minimum Acceptance Condition and did not exercise its compulsory acquisition power; and
 - (d) Cephalon be required to enter into an enforceable undertaking to support the appointment and continuance in office of an 'appropriate' number of independent directors, consistent with its statement set out in paragraph 19 above.
35. Hunter Hall's Application raised various issues in relation to the affairs of Sirtex.

A. Distribution Agreement and Capital Raising

36. Hunter Hall was concerned that Cephalon's Bidder's Statements did not contain all information known to Cephalon which was material to the making of a decision by a Sirtex shareholders about whether to accept the Bid, particularly if Cephalon only received acceptances for between 50% and 90% of the company.
37. Hunter Hall submitted that Sirtex shareholders had insufficient information about the proposed Distribution Agreement and Capital Raising to make an informed decision about whether to accept the Bid or remain as shareholders of Sirtex.
38. Hunter Hall stated that Cephalon should disclose that the Distribution Agreement was likely to require the approval of Sirtex's non-Cephalon associated shareholders under ASX Listing Rule 11.2 ('Change involving main undertaking'), irrespective of whether the "related party transaction" provisions of Chapter 2E of the Act applied,

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as the arrangements envisaged by Cephalon appeared to involve the disposal of Sirtex's "main undertaking".

39. Hunter Hall submitted that, without such disclosure, shareholders may be coerced into accepting the Bid if Cephalon acquired more than 50% of Sirtex and declared the Bid unconditional. Shareholders may fear that by not accepting the Bid they would be locked-in as minority shareholders in a company which had changed its main undertaking, in which they had a diluted holding and/or which was engaging in significant transactions with its controlling shareholder.

B. Relationship between Bidder and Target

40. Second, Hunter Hall expressed concern about the relationship between Cephalon and Cephalon, Inc on the one hand, and Sirtex and Dr Gray on the other hand.
41. Specifically it asserted that the Pre-Bid Agreement prevented the Sirtex board from reaching an independent view on the merits of Cephalon's offer because the Break Fee would be payable if any director altered his recommendation.

C. Pre Bid Agreement

42. Hunter Hall stated that the size and nature of the break fee placed undue pressure on Sirtex shareholders to accept the Bid. Hunter Hall noted that in percentage terms the Break Fee was less than the recommended guideline of 1% of bid value set out in the Panel's Guidance Note². However, Hunter Hall noted that the Break Fee represented almost 30% of Sirtex's available cash reserves as at 31 March 2003.
43. Further Hunter Hall alleged that the potential liability to pay that fee placed pressure on the Sirtex directors not to change their recommendation in favour of the Bid.
44. Hunter Hall asserted that the size and nature of the break fee unacceptably inhibited competition for control of Sirtex by deterring rival bids.
45. In Hunter Hall's view, the market would benefit from the Panel setting aside all or some aspects of the Pre-Bid Agreement as this could encourage a rival bidder to come forward.

D. Independent Expert's Report

46. Section 640 of the Act requires an Independent Expert's Report if a bidder has over 30% voting power in the target, or if the bidder and target have a common director at the time the target's statement is given to target shareholders. At the time the Bidder's Statement was sent to Sirtex, Cephalon had a relevant interest in 19.9% of Sirtex's voting shares, and as there were no common directors between Cephalon and Sirtex, there was no requirement under section 640 of the Act for the Target's Statement to be accompanied by an Independent Expert's Report.

² See: 'Lock-up Devices' Guidance Note.

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47. Hunter Hall submitted that the circumstances before the Panel were analogous to those where section 640 of the Act would require Sirtex to provide shareholders with an Independent Expert's Report.
48. Hunter Hall submitted that the circumstances were analogous because a director, who was also a 37% shareholder, company founder, chief executive officer and chairman had given Cephalon an option over the majority of his holding and indicated he would accept for his remaining 17%, in the absence of a higher offer. Cephalon had also stated that it intended to retain Dr Gray as a consultant for six months after taking over Sirtex.
49. Hunter Hall alleged that Sirtex's failure to provide an Independent Expert's Report made it impossible for Sirtex shareholders to reach an informed view on the merits of the Bid or the likely value of their investment in Sirtex should they choose not to accept it.

E. Success Fee

50. Hunter Hall alleged that the Success Fee should have been disclosed in the Target's Statement.
51. It also suggested the Success Fee was unsatisfactory as it meant that shareholders received a lower price under the Bid and were likely to have to fund the fee if it were payable in circumstances where Hunter Hall did not attain 100% of Sirtex.

Panel considerations

A. Distribution Agreement

52. The Panel considered that the disclosure of the Distribution Agreement was deficient and that shareholders had insufficient information to make an informed decision about the merits of accepting the Bid or remaining as shareholder of Sirtex.
53. Generally this would have been merely a disclosure issue. However, Cephalon's announcement that it may waive the 90% Minimum Acceptance Condition and enter into the Distribution Agreement and Capital Raising had a material tendency to be coercive on shareholders.
54. The coercive effects described above were caused by the lack of disclosure regarding:
 - (a) the content of the Distribution Agreement;
 - (b) the process for implementing the Distribution Agreement, i.e. whether it would be subject to shareholder approval, in particular by non-Cephalon associated shareholders of Sirtex; and
 - (c) whether the Sirtex board would commission an Independent Expert's Report confirming that the terms of the Distribution Agreement were fair to non-Cephalon associated shareholders.
55. Had Cephalon not made the No-waiver Statement, the Panel considered that Cephalon should have been required to provide reasonably detailed information

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about the Distribution Agreement to shareholders. This would have enabled them to have a sufficient understanding of the contents, terms and operation of the Distribution Agreement to be able to compare the merits of accepting the Bid or remaining shareholders of Sirtex in the event that Cephalon waived the 90% Minimum Acceptance Condition.

56. Alternatively in those circumstances, shareholders must have been provided with sufficient detailed information about the process of negotiating and implementing the Distribution Agreement to allow them similarly to compare the merits of accepting the Bid or remaining shareholders of Sirtex. The Panel considered that the lack of detailed information about the terms of the Distribution Agreement prior to the close of the Bid meant that appropriate protection of non-Cephalon associated shareholders would have been required, and those arrangements should have been disclosed prior to the close of the Bid.

B. Capital Raising

57. The Panel's views on the Capital Raising were similar to its analysis of the Distribution Agreement.
58. Had Cephalon not made the No-waiver Statement the Panel would have considered it desirable that Cephalon disclose to Sirtex shareholders:
- (a) the reasons that it considered that Sirtex may require more capital;
 - (b) an approximation of the anticipated capital sum required and the dilution factor likely to be involved for shareholders who did not take up their rights;
 - (c) an explanation of the possible form of the capital raising (i.e. placement vs rights issue, discount or premium to the market price or to the Bid price, proposals for underwriting);
 - (d) an explanation of its uses; and
 - (e) the reasons why the capital was required in view of the possibility that Sirtex will be entering into a Distribution Agreement which may cover the majority of its future operations.
59. The Panel considered that a statement by Cephalon that it had conducted "lengthy due diligence" of Sirtex meant that it would be likely to be able to provide estimates of the amount of money it considered was likely to be required.
60. The disclosure was required as there was a prospect that such capital raising may dilute non-accepting Sirtex shareholders interests in the company. It was therefore a material issue for shareholders deciding whether or not to accept the Bid.

C. Pre-Bid Agreement

61. The Panel considered that the Pre-Bid Agreement did not give rise to unacceptable circumstances for the following reasons:

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- (a) the Break Fee was less than 1% of the total value of the Bid consideration and had a "fiduciary carve out" if directors considered that their directors' duties required them to change their recommendation of the Cephalon Bid;
 - (b) the Break Fee had a profit offset clause (such that the profit that Cephalon made by selling the shares in which it had a relevant interest into a rival offer would offset the Break Fee if the bid price was 5% or higher above Cephalon's Bid price);
 - (c) the No-Talk period was not excessive;
 - (d) the Directors Recommendation Agreement had an appropriate "fiduciary carve out"; and
 - (e) the Break Fee was not payable merely because Sirtex shareholders did not accept the Cephalon Bid.
62. The Panel was concerned that the Break Fee might be payable if Sirtex shareholders rejected the Bid and one or more directors altered their recommendation, in circumstances where no rival bid emerged, in which case Sirtex shareholders would bear the cost of the Break Fee. The Panel advised Sirtex that it assumed this would only occur in circumstances where it appeared clearly to be in the company's, and the shareholders', best interests for that director to change his opinion and trigger the Break Fee. The Panel informed the parties that, if an application were made to it in these circumstances, it would be likely to review the facts closely to ensure that unacceptable circumstances had not occurred.
63. The Directors may have believed that the Bid subject to the 90% Minimum Acceptance Condition, was clearly in the best interests of the Sirtex shareholders, and that therefore the Break Fee Agreement was also in their best interests. However, the Panel was concerned that issues arising as a result of the proposed Distribution Agreement and Capital Raising may change that analysis. On that basis, the Panel was concerned that provisions in the Pre-Bid Agreement allowed Cephalon to waive any condition in its Bid, and in particular the 90% Minimum Acceptance Condition, and that this may have placed Sirtex directors in an invidious position.
64. However, the two concerns noted in paragraphs 62 and 63 above were not sufficient for the Panel to consider that the Pre-Bid Agreement created unacceptable circumstances.

D. Independent Expert's Report

65. The purpose of Section 640 of the Act is to address the risk or perceived risk that target directors will not provide a properly independent and critical target's statement, in certain cases where there are facts which are a danger to their independence, and to require an alternative assessment.
66. If there was evidence to suggest that a target board to whom section 640 of the Act did not apply was too beholden to a bidder to be relied upon to provide an independent and critical assessment in their target's statement, it would be consistent with the policy of the legislation for the Panel to require the production of an Independent Expert's Report. The policy in sections 602(b) of the Act that

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shareholders receive sufficient information to make an informed decision on a bid and section 657A(3)(a)(ii) of the Act would, in these hypothetical circumstances, support making that order. The Panel initially considered that an Independent Expert's Report would be a valuable protection for Sirtex shareholders, either in relation to the current Bid, in the event that Cephalon waived the 90% Minimum Acceptance Condition, or in relation to any non-Cephalon associated shareholder vote on the proposed Distribution Agreement. The Panel believed that an experienced valuer would have been able to apply established valuation techniques to value Sirtex.

67. Bearing in mind that Cephalon's Bid was a solicited, friendly bid made in circumstances where Dr Gray had granted Cephalon an option over 19.9% of his shareholding, the Panel noted that there was no evidence presented to it to suggest that the Sirtex board was so close to Cephalon as to compromise its ability to advise its own shareholders.
68. The Panel further noted in this regard that it was not until 14 May 2003 that Dr Gray accepted the Bid for the remainder of his shares.
69. Two well-informed shareholders in Sirtex, Hunter Hall and the Cancer Research Institute, had what amounted to blocking stakes in Sirtex i.e. they had the ability to defeat the Bid (given Cephalon's No-waiver Statement) if they believed that the offer price for Sirtex shares was too low. This may have provided further protection to other shareholders.
70. The Panel considered that it was not necessary to require the Sirtex board to commission an Independent Expert's Report in the current circumstances.

E. Success Fee

71. The Panel considered that the terms of the Success Fee should be fully disclosed to shareholders if Cephalon were to waive the 90% Minimum Acceptance Condition and the Success Fee was still payable if Cephalon acquired less than 100% of Sirtex.
72. Some Sirtex shareholders may have preferred to remain as shareholders of Sirtex rather than accept the Bid. If the Success Fee were payable where Cephalon acquired more than 50%, and less than 90% of Sirtex, those shareholders who remained would have borne the cost of the Success Fee in proportion to their shareholding. Therefore, the information was material to the decision which shareholders faced in deciding whether or not to accept the Bid. Further, as the Success Fee was higher than the Panel's recommended maximum break fee payment, this may raise cause for concern.
73. If the 90% Minimum Acceptance Condition had been waived, at the very least the terms of the Success Fee, and its effect on any shareholders who remained as shareholders of Sirtex, would have required immediate disclosure. In addition, the existence of a success fee of that nature payable in such circumstances may create unacceptable circumstances.

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74. The Panel noted in passing, that submissions that a success fee will only be borne by a successful bidder, not by the shareholders of the target, are only correct where the bidder is wholly unaware of the existence of the success fee.
75. For example, if a bidder had valued a target company to be worth, say \$277 million, and the target then advised that it had agreed to pay \$5.7 million in cash to its investment adviser, a rational bidder would reduce the price it was prepared to pay to the shareholders, by that amount. In this scenario, the target shareholders in reality would have paid the \$5.7 million. Nonetheless, a success fee may induce a financial adviser to search harder for potential bidders; this effect can outweigh the cost to shareholders of the success fee if the adviser secures a higher bid price than the directors would have been able to secure by themselves³.
76. In this particular case Cephalon appeared to be well informed about the Success Fee. Therefore, it did not seem accurate to suggest that Cephalon was bearing the cost of the Success Fee, which must have been also borne by Sirtex shareholders by receiving a lower Bid price.

F. Commitment not to waive 90% Minimum Acceptance Condition

77. In view of Cephalon's No-waiver Statement, the Panel considered that disclosure to Sirtex shareholders of:
- (i) the Success Fee; and
 - (ii) the Distribution Agreement and Capital Raising,
- would not be required (subject to certain qualifications set out below).
78. The Panel noted that disclosure of the Success Fee may have been required if it became payable in the event that the Bid was not successful (i.e. Cephalon did not acquire any Sirtex shares under the off-market bid). Disclosure would also be required under Sirtex's continuous disclosure obligations if Sirtex's directors considered it to be price sensitive information.
79. The Panel would have been willing to reconsider these issues if the Success Fee was payable by Sirtex to its financial adviser if the Bid was not successful at 90%.

Withdrawal rights

80. The Panel considered that the Withdrawal Statement set out in paragraph 30 above, in particular the use of the words 'some' and 'may' in this context, did not adequately inform shareholders of their withdrawal rights under the Bid. This

³ In this sense, a success fee is somewhat analogous to a break fee. Before a company has decided to make a bid, a success fee may benefit target shareholders to the extent it increases the likelihood of bids being made for a company. After a particular company has decided to make a bid, a success fee may harm shareholders to the extent it reduces the price that bidder is prepared to pay for the company. The 'ex post' effect of a break fee is slightly different in that it may prevent an auction developing for a target once a bid has been made, as it reduces the price that a rival bidder is prepared to make for the target. At this stage the Panel has not reached a definitive view on success fees, and will examine the terms of each success fee before it on a case by case basis.

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tended to frustrate the principle set out in section 602(a) of the Act and the policy of section 650E of the Act.

81. The Panel considered that it would have been preferable if Cephalon had set out more clearly which shareholders (i.e. shareholders that had accepted the Bid by a particular date) had withdrawal rights under section 650E of the Act and the circumstances in which those withdrawal rights operated. However, the Panel noted that the fifth supplementary bidder's statement issued by Cephalon dated 15 May 2003 provided an explanation by Cephalon of the operation of section 650E of the Act, and included information on those shareholders who had withdrawal rights and the circumstances in which those withdrawal rights operated.

Course of Bid

82. On 15 May 2003 Sirtex announced that Hunter Hall had decided to accept the Bid, which resulted in Cephalon's relevant interest increasing to 58%. Cephalon did not further extend its Bid as it had relevant interests in approximately 75% of Sirtex on 19 May 2003; its third supplementary Bidder's Statement had announced that it would only extend its Bid if it acquired relevant interests in at least 80% of Sirtex by 19 May 2003. The Bid was ultimately unsuccessful as Cephalon had acquired relevant interests in 88.1% of Sirtex, and fell approximately 2% short of the 90% Minimum Acceptance Condition.

Decision

83. On 14 May 2003 the Panel declined Hunter Hall's Application. It consented to the parties being represented by their commercial solicitors and did not make any costs orders.

Dated 2 July 2003

Alison Lansley
President of the Sitting Panel
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