



Friday, 6 October 2006

Vision Systems Limited 02 - Panel Declines to Commence Proceedings

The Takeovers Panel (**Panel**) advises that it has declined to commence proceedings in response to an application (**Application**) received from Cytyc Victoria LLC (**Cytyc**) dated 4 October 2006 in relation to the affairs of Vision Systems Limited (**Vision**) ([TP06/99](#)).

Cytyc's complaint concerned Ventana's acquisition of 12% of Vision on 27 September 2006 (**Ventana Acquisition**) when considered in light of:

- (a) certain provisions of the Merger Implementation Agreement (**MIA**) between Vision and Ventana Medical Systems, Inc. (**Ventana**) in relation to Ventana's proposed merger with Vision (**Merger**); and
- (b) Ventana's statement on 17 September 2006 that it would not increase the \$2.13 proposed to be offered under the Merger.

The MIA contained provisions which prevented Vision from soliciting a rival bid (**No-shop Agreement**) and required Vision to inform Ventana of any competing proposal and to provide Ventana with all material details in relation to such competing proposal (**Vision Disclosure Obligation**). Cytyc submitted that unacceptable circumstances existed because the Ventana Acquisition took place in circumstances where (according to Cytyc):

- (a) the MIA was effectively redundant as a consequence of Ventana's announcement on 17 September 2006;
- (b) due to the Vision Disclosure Obligation remaining on foot, Ventana had obtained confidential information regarding a proposal by Danaher Corporation (**Danaher**) at an indicative price believed to be \$2.50;
- (c) as a result, Ventana had a distinct "head-start" advantage over the rest of the market resulting in the Ventana Acquisition taking place in a market that was not efficient, competitive and informed; and
- (d) Ventana had not subsequently launched a takeover bid for the rest of Vision shares.

The Panel noted that (on the facts as described in the Application):

- (a) rumours that Danaher Corporation (**Danaher**) was considering a bid at an indicative price of \$2.50 had appeared in online news services *The Wall Street Journal Online* and *Reuters* at 3:25 pm on 26 September 2006 resulting

in the price of Vision shares on the market of Australian Stock Exchange (ASX) closing at \$2.54 on that day;

- (b) Vision had published a market release on the evening of 26 September 2006 (at 6:58 p.m.) in which, amongst other items concerning possible control of Vision, Vision had confirmed that it had allowed Danaher to conduct due diligence in relation to a possible competing proposal. However, Vision did not disclose the indicative price advised by Danaher;
- (c) Ventana did not conclude the Ventana Acquisition until 2.30 p.m. on 27 September 2006; and
- (d) on 27 September, Caliburn Partnership Pty Limited (which acted for Ventana) confirmed to Morgan Stanley that Vision had previously provided Ventana with details of the Danaher proposal pursuant to the Vision Disclosure Obligation.

The Panel considered that this indicated that the market was likely to have been sufficiently aware of the substance of any information that may have been provided to Ventana under the Vision Disclosure Obligation, for over 19 hours before any transaction was effected. The Panel also noted that the Ventana Acquisitions were made in the context of the original Merger announcement of 14 August 2006, Ventana's 17 September 2006 announcement, and Cytyc's 14 September 2006 announcement of its intention to make a takeover offer for all of Vision. Accordingly, the Panel considered that the market was adequately informed, and the No-shop Agreement and Vision Disclosure Obligation had not had a substantial anti-competitive effect.

The Panel did not find it necessary to consider whether the terms and operation of the No-shop Agreement was consistent with the Panel's Guidance Note 7: Lock-up Devices.

The Panel did not consider that the submissions in the Application and the material before it provided a sufficient basis for the Panel to commence proceedings in relation to the Application.

The sitting Panel which considered this application was Robert Johanson, Andrew Lumsden (sitting President) and Jennifer Seabrook.

The Panel will publish the reasons for its decision on its website at www.takeovers.gov.au.

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