



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP24/37

Tuesday, 18 June 2024

Pacific Smiles Group Limited – Declaration of Unacceptable Circumstances

The Panel has made a declaration of unacceptable circumstances (Annexure A) in relation to an application dated 17 May 2024 by NDC BidCo Pty Ltd in relation to the affairs of Pacific Smiles Group Limited (**Pacific Smiles**) (see [TP24/24](#)).

Background

Pacific Smiles is an ASX-listed company (ASX: PSQ).

Beam Investment Co Pty Limited (**Beam**) is a wholly owned subsidiary of Genesis Capital Ultimate GP Pty Ltd (**Genesis Ultimate**).

Between 6 and 8 December 2023, Beam entered into a loan deed for advances to fund “the purchase of shares in Project Beam” and a put option deed in relation to Pacific Smiles shares with a related party of Beam (which also entered into a put option deed with another related party).

On 15 December 2023, Beam entered into a loan deed for advances to fund “the purchase of shares in Project Beam” and a put option deed in relation to Pacific Smiles shares with GFT 2 Co Pty Ltd as trustee for the GFT 2 Trust (**GFT 2**).

Also on 15 December 2023, Beam entered into a co-investment agreement with GFT 2, Genesis Ultimate¹ and Genesis Capital Manager I Pty Ltd (**Genesis Manager**).

On 18 December 2023, Beam gave a notice under the Panel’s Guidance Note 20 disclosing an economic interest of 18.75% in Pacific Smiles through a cash settled total return swap (**Equity Derivative**). The notice listed Beam, Genesis Manager, Genesis Ultimate² and GFT 2 as associates (but not the nature of the association) and did not attach the agreements entered between Beam, its related entities and GFT 2 between 6 and 15 December 2023 (**Acquisition Agreements**).

¹ In its capacity as the general partner of Genesis Capital Management Partnership I, LP, the general partner of Genesis Capital Fund I, LP

² See footnote 1

The Equity Derivative was fully hedged by Jarden Scientific Trading Limited.

Also on 18 December 2023, Genesis Manager made a non-binding indicative proposal to acquire all of the shares in Pacific Smiles via a scheme of arrangement which was later rejected by Pacific Smiles.

On 24 January 2024, Beam gave an updated Guidance Note 20 notice disclosing a 19.90% economic interest in Pacific Smiles shares through the Equity Derivative.

On 19 March 2024, Pacific Smiles announced that it had received a revised non-binding indicative proposal from Genesis Manager and that Pacific Smiles and Genesis Manager had entered into a process deed.

On 28 April 2024, Pacific Smiles entered into a scheme implementation deed with NDC BidCo Pty Ltd³ under which Pacific Smiles has agreed to implement a scheme of arrangement that is recommended by the board of Pacific Smiles (subject to a positive independent expert's report and no superior proposal emerging).

On 7 May 2024, Beam gave a substantial holder notice stating (among other things) that its cash settled total return swap had been amended on 3 May 2024 to "*provide for physical settlement*" and that Beam had exercised its right for physical settlement on 7 May 2024 and became the legal and beneficial owner of approximately 19.90% of Pacific Smiles shares.

The Panel considered that:

- at the time Beam issued its first Guidance Note 20 notice on 18 December 2023 and made its indicative proposal to acquire Pacific Smiles it was reasonably foreseeable that other proposals by third parties to acquire Pacific Smiles may have been forthcoming
- the Acquisition Agreements provide information that goes to the potential intention of Beam in obtaining a 19.90% interest in Pacific Smiles and the nature of the association and
- Beam's failure to disclose the Acquisition Agreements in its Guidance Note 20 notices meant that the market did not understand fully the nature of Beam's long position and was contrary to an efficient, competitive and informed market for control of Pacific Smiles.

Declaration

The Panel considered that the circumstances were unacceptable:

³ NDC is a wholly owned subsidiary of NDC HoldCo Pty Ltd which operates the National Dental Care network and is a portfolio company of funds managed or advised by Crescent Capital Partners Management Pty Ltd

1. having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (a) the control, or potential control, of Pacific Smiles or
 - (b) the acquisition, or proposed acquisition, by a person of a substantial interest in Pacific Smiles
2. in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the Corporations Act 2001 (Cth).

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

Orders

The Panel is still considering the application in relation to orders.

The sitting Panel is Rory Moriarty, Karen Phin (sitting President) and Erin Tinker.

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

Allan Bulman
Chief Executive, Takeovers Panel
Level 16, 530 Collins Street
Melbourne VIC 3000
Ph: +61 3 9655 3500
takeovers@takeovers.gov.au



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Takeovers Panel

ANNEXURE A

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

PACIFIC SMILES GROUP LIMITED

CIRCUMSTANCES

1. Pacific Smiles Group Limited (**Pacific Smiles**) is an ASX listed company (ASX: PSQ).
2. Beam Investment Co Pty Limited (**Beam**) is a wholly owned subsidiary of Genesis Capital Ultimate GP Pty Ltd (**Genesis Ultimate**).
3. On 6 December 2023, Beam entered into a loan deed with Genesis Capital Fund I, LP (**Genesis Capital**).
4. Genesis Ultimate is the general partner of Genesis Capital Management Partnership I, LP, the general partner of Genesis Capital (where referred to in this capacity, **Genesis Ultimate Partner**).
5. On 7 December 2023, Beam entered into a put option deed with Genesis Ultimate Partner.
6. On 8 December 2023, Genesis Ultimate entered into a put option deed with Genesis Ultimate Partner.
7. On 15 December 2023, Beam entered into a loan deed and a put option deed with GFT 2 Co Pty Ltd¹ as trustee for the GFT 2 Trust (**GFT 2**).
8. Also on 15 December 2023, Beam entered into a co-investment agreement with GFT 2, Genesis Ultimate Partner and Genesis Capital Manager I Pty Ltd (**Genesis Manager**).²
9. On 18 December 2023, Beam gave a notice (**First Notice**) under the Panel's Guidance Note 20 which included disclosure of a 18.75% economic interest in

¹ GFT 2 Co Pty Ltd is an entity wholly owned by Glenn Haifer

² Genesis Ultimate and Genesis Manager are entities jointly held by Lucolifia Pty Ltd as trustee for the Lucolifia Family Trust and Plum Willow Pty Ltd as trustee for The Plum Willow Family Trust

Pacific Smiles shares through a cash settled total return swap (**Equity Derivative**).

10. The First Notice listed Beam, Genesis Manager, Genesis Ultimate Partner and GFT 2 as associates (but not the nature of the association). The agreements referred to in paragraphs 3 and 5 to 8 (**Acquisition Agreements**) were not attached to the First Notice.
11. Also on 18 December 2023, Jarden Scientific Trading Limited (**Jarden**) filed an initial substantial holder notice disclosing that it had voting power of 18.75% in Pacific Smiles.
12. Also on 18 December 2023, Genesis Manager made a non-binding indicative proposal to acquire all of the shares in Pacific Smiles via a scheme of arrangement. On 21 December 2023, Pacific Smiles announced that it had rejected Genesis Manager's proposal.
13. On 24 January 2024, Beam gave a second notice (**Second Notice**) under the Panel's Guidance Note 20 which included disclosure of a 19.90% economic interest in Pacific Smiles shares through the Equity Derivative and Jarden lodged a substantial holder notice disclosing that it had voting power of 19.90% in Pacific Smiles. The Second Notice also listed Beam, Genesis Manager, Genesis Ultimate Partner and GFT 2 as associates (but not the nature of the association). The Acquisition Agreements were not attached to the Second Notice.
14. On 19 March 2024, Pacific Smiles announced that it had received a revised non-binding indicative proposal from Genesis Manager and that Pacific Smiles and Genesis Manager had entered into a process deed.
15. On 28 April 2024, Pacific Smiles entered into a scheme implementation deed with NDC BidCo Pty Ltd³ under which Pacific Smiles agreed to implement a scheme of arrangement that is recommended by the board of Pacific Smiles (subject to a positive independent expert's report and no superior proposal emerging).
16. On 7 May 2024, Beam filed an initial substantial holder notice stating (among other things) that its Equity Derivative had been amended on 3 May 2024 to "*provide for physical settlement*" and that Beam had exercised its right for physical settlement on 7 May 2024 and became the legal and beneficial owner of approximately 19.90% of Pacific Smiles shares.⁴ Beam's initial substantial holder notice attached the Acquisition Agreements.

³ NDC BidCo Pty Ltd is a wholly owned subsidiary of NDC HoldCo Pty Ltd

⁴ On 8 May 2024, Jarden lodged a corresponding ceasing to be a substantial holder notice in relation to Pacific Smiles

EFFECT

17. The Panel considers that:
- (a) at the time Beam issued the First Notice and made its indicative proposal to acquire Pacific Smiles it was reasonably foreseeable that other proposals by third parties to acquire Pacific Smiles may have been forthcoming
 - (b) the Acquisition Agreements provide information that goes to the potential intention of Beam in obtaining a 19.90% interest in Pacific Smiles and the nature of the association and
 - (c) Beam's failure to disclose the Acquisition Agreements in the First Notice and the Second Notice meant that the market did not understand fully the nature of Beam's long position and was contrary to an efficient, competitive and informed market for control of Pacific Smiles.

CONCLUSION

18. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Pacific Smiles or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Pacific Smiles
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the Corporations Act 2001 (Cth).
19. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

20. The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Pacific Smiles.

Tania Mattei
General Counsel
with authority of Karen Phin
President of the sitting Panel
Dated 17 June 2024