



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP23/02

Thursday, 5 January 2023

Nitro Software Limited – Panel Receives Application

The Panel has received an application from Technology Growth Capital LLC, a special purpose vehicle managed by Potentia Capital Management Pty Ltd (**Potentia**), in relation to the affairs of Nitro Software Limited (ASX: NTO) (**Nitro**). Nitro is the subject of competing control proposals made by Potentia and Cascade Parent Limited¹ (**Alludo**).

Details of the application, as submitted by the applicant, are below.

A sitting Panel has not been appointed at this stage and no decision has been made whether to conduct proceedings. The Panel makes no comment on the merits of the application.

Details

On 28 October 2022, Potentia announced an off-market takeover bid for Nitro at \$1.80 cash per share (**Potentia Offer**).

On 31 October 2022, Nitro announced to ASX that:

- the Nitro board unanimously rejected the Potentia Offer and
- it had entered into a Process Deed with Alludo after receiving a non-binding proposal from Alludo to acquire 100% of Nitro by way of scheme of arrangement at \$2.00 cash per share (**Alludo Scheme**) or, in the alternative, via an off-market takeover bid with a 50.1% minimum acceptance condition at \$2.00 cash per share (**Alludo Bid**) (together with the Alludo Scheme, **Alludo Offer**).

On 15 November 2022, Nitro entered into an Implementation Deed with Alludo to give effect to the Alludo Offer.

¹ trading as Alludo and controlled by KKR Americas Fund XII L.P.

On 8 December 2022, Potentia increased its offer price to \$2.00 per share and announced that access to due diligence materials may allow it to further increase the cash offer price beyond \$2.00 per share (**Revised Potentia Offer**).

On 12 December 2022, Nitro announced that:

- Alludo increased the Alludo Offer to \$2.15 cash per share (**Revised Alludo Offer**) and
- the Nitro board unanimously rejected the Revised Potentia Offer.

On 23 December 2022, Potentia varied the consideration under the Revised Potentia Offer to include a scrip alternative and noted that Potentia would consider increasing the offer price if granted due diligence access.

On 28 December 2022, Nitro confirmed that it did not consider the Revised Potentia Offer, including the scrip alternative, to be superior to the Revised Alludo Offer.

Potentia submits (among other things) that:

- concurrently seeking acceptances for the Alludo Bid and votes in favour of the Alludo Scheme is contradictory and confusing for Nitro shareholders
- institutional investors have *“been provided with an Institutional Acceptance Facility that allows them to withdraw their acceptance while the Alludo [Bid] remains conditional. That is not available to retail shareholders. They are encouraged to lodge a proxy “ahead” or “in advance” of the scheme meeting and to accept the Alludo [Bid] at the same time.”*
- the scheme/bid structure under the Alludo Offer *“is likely to discourage opposition to the scheme by encouraging shareholders to believe that defeating the scheme will only delay control passing and delay their receipt of consideration”*
- denying Potentia due diligence access is contrary to the interests of Nitro shareholders
- certain conditions to the Alludo Offer², in particular the Scheme Fails Condition³, are void under s629(1)⁴ and contrary to s631(1) and
- Nitro may have caused a breach of prescribed occurrences under the Potentia Offer by issuing restricted share awards and performance rights.

² in section 5.8 of the transaction booklet dated 21 December 2022 (**Transaction Booklet**)

³ as defined in the Transaction Booklet

⁴ all references are to the *Corporations Act 2001* (Cth) unless otherwise indicated

Potentia submits that Nitro's failure to run a competitive process to secure the best outcome for Nitro shareholders including by taking the actions above (in association with Alludo) is inconsistent with the principles set out in s602.

Potentia does not seek any interim orders. Potentia seeks final orders to the effect that:

- Nitro and Alludo take all necessary action to effect the withdrawal of the Alludo Bid and that no similar takeover bid be made by Alludo unless Nitro and Alludo first confirm that the Alludo Scheme will not proceed and no similar scheme will be proposed to occur concurrently with a takeover bid for Nitro
- alternatively, that Nitro and Alludo take all necessary action to effect the withdrawal of the Alludo Scheme and that no similar transaction be made by Alludo unless Nitro and Alludo first confirm that the Alludo Bid will be withdrawn and no similar takeover bid will be proposed to occur concurrently with a scheme to acquire Nitro
- Nitro provides due diligence access to Potentia.

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