

**Report in terms of section 170 (1), read with sections 169 and 209, of the Companies Act, 2008 regarding complaints in respect of an affected transaction undertaken by Ascendis Health Limited**

**1 Introduction**

1.1 This report of the relates to the allegations that certain parties are acting in concert as defined in Part B or C of Chapter 5 of the Companies Act, and the Takeover Regulations (collectively the "Takeover Provisions"), during an affected transaction as defined in the Takeover Provisions.

1.2 The report is submitted to the Acting Executive Director as provided for in terms of section 170(1)(g)(ii) of the Act, for his consideration and decision ("Report").

**2. A brief background**

2.1 Ascendis Health issued a Circular dated 18 December 2023 ("the Circular") relating to an affected transaction in terms of section 117(c)(v) of the Companies Act ("Exit Offer") by a consortium of offerors (the "Consortium") led by ACN Capital IHC Proprietary Limited ("ACN Capital"),<sup>1</sup> to the shareholders ("Shareholders") of Ascendis Health, and the delisting of Ascendis Health from the JSE Limited (the "Delisting"). ACN Capital, The Circular includes the process to pass a Delisting Resolution as required by the JSE

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<sup>1</sup> As indicated in the definitions to the Circular, Mr Neethling is the beneficial shareholder of Jacton Proprietary Limited, a company that holds 92% of the issued shares in ACN Capital IHC Proprietary Limited, the lead company of the Consortium.

## Listings Requirements.

- 2.2 After the Circular was issued, certain shareholders raised several complaints relating to non-compliance with the Takeover Provisions, including allegations of non-disclosed concert parties to the Consortium.
- 2.3 Following that complaint, the Panel issued a ruling that resulted in a Supplementary Circular being published to the shareholders of Ascendis Health. The list of Consortium members was extended to include certain shareholders who were not initially identified in the earlier circular.
- 2.4 After the publication of the Supplementary Circular, the Panel received additional complaints. It was then considered necessary to appoint an Inspector in terms of section 209(1)(b) of the Companies Act No 71 of 2008, to consider the various complaints.
- 2.5 In terms of the Panel announcement interested parties were given 10 calendar days, commencing at 12 noon on 19 April 2024 and ending at 12 noon on 29 April 2024, to lodge any further complaints regarding the conduct of the Exit Offer.

## **3 The Parties**

### **3.1 The Company**

Ascendis Health Limited (“**Ascendis Health**”) is a company listed on the JSE Limited.

### **3.2 The Consortium**

- 3.2.1 ACN Capital is a company controlled by Carl Neethling (“Neethling”)

who is both the Chief Executive Officer and the Acting Financial Officer of Ascendis Health. The initial Consortium included Carl Andre Capital, Dendrobium Capital, Emfam, and Kingston Kapitaal and JVDM the (“Consortium”).

3.2.2 Following a number of Complaints, a Supplementary Circular was published. This disclosed the increased number of parties acting in concert.

3.2.3 The Exit Offer Circular indicates that ACN Capital leads the Consortium.

#### **4 The Complainants**

4.1 Mr Hennie Moll (“H Moll”)

4.2 Mr Jed Mowat (“J Mowat”)

4.3 Mr Albie Cilliers (“A Cilliers”)

4.4 Mr Mohammed Dhorat (“M Dhorat”)

#### **5 The alleged concert parties**

5.1 Calibre Investment Holdings (Pty) Limited, is a company associated to Theunis de Bruyn, who is a non-executive director of Ascendis Health. Calibre holds 114 367 267 Ascendis Health shares, equivalent to 20.78% of the issued shares (excluding the Excluded Shares and Shares held by concert),<sup>2</sup> as indicated in the Circular

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<sup>2</sup> See Ascendis Health Circular issued on 18 December 2023 at pages 33,34 and in Annexure 4 to the Exit Offer Circular. It should be noted that the number of shares held by Calibre has

dated 18 December 2023.

5.2 Theunis de Bruyn, is a non-executive director of Ascendis Health (“Theunis de Bruyn”)

5.3 Cresthold (Proprietary) Limited/Austell (“Cresthold”)

5.4 Alpvest Equities (Pty) Limited (“Alpvest”)

## **6 The process in brief**

6.1 In practice, the Panel relies on all parties to an affected transaction to assist in ensuring compliance with the takeover regulation. Its interaction in ensuring compliance during an affected transaction is through the company’s corporate advisor and sponsor (in this case, “Valeo Capital”, or its legal advisers (in this case, Solaris Law).

6.2 Following the Panel announcement, the Panel received four complaints as indicated above in paragraph 5.

6.3 The Complaints were then provided to Ascendis Health and the Consortium through Valeo Capital.

6.4 Ascendis Health responded to the various Complaints as requested, and the Complainants were then afforded an opportunity to provide a reply.

6.5 Finally, Ascendis and the Consortium were provided with the Complainant’s Replies.

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been updated to 126,493,990 <sup>[[[</sup> as reflected in the Supplementary Circular.

6.6 On 3 June 2024 I sent an Annexure with a list of documents and confirmations that may assist further in the investigation.

6.7 On 6 June 2024, under a covering letter from Solaris Law (“6 June 2024 Letter”), Ascendis Health Limited and the Consortium submitted a list of various documents and the confirmations.

6.8 This report is based on the information contained in the various documents submitted by the Complainants and the advisers to Ascendis Health and the Consortium.

## **7. A summary of the relevant Takeover Provisions**

7.1 For the sake of completeness and to facilitate the reading of the report, I quote the applicable Takeover Provisions.

7.2 Section 117 of the Act provides:

““act in concert” means any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering or proposing an affected transaction or offer;”

7.3 Section 119 of the Act under Panel regulation of affected transactions, provides:

“(1) The Panel must regulate any affected transaction or offer in accordance with this Part, Part C, and the Takeover Regulations, but without regard to the commercial advantages or disadvantages of any transaction or proposed transaction, in order to—

(a) ...;

(b) ensure the provision of—(i) necessary information to holders of securities of regulated companies, to the extent required to facilitate the making of fair and informed decisions; and

(ii) adequate time for regulated companies and holders of their securities to obtain and provide advice with respect to offers; and

(c) prevent actions by a regulated company designed to impede, frustrate, or defeat an offer, or the making of fair and informed decisions by the holders of that company's securities.

(2) Subject to subsection (6), the Panel must regulate any affected transaction or offer, and the<sup>[SEP]</sup>conduct of the parties in respect of any such transaction or offer, in a manner that promotes the objects<sup>[SEP]</sup>set out in subsection (1) and, without limiting the generality of that subsection, ensures—

(a) ...

(b) that all holders of—

(i) any particular class of voting securities of an offeree regulated company are afforded equivalent treatment; and

(ii) voting securities of an offeree regulated company are afforded equitable treatment, having regard to the circumstances.

(c) that no relevant information is withheld from the holders of relevant securities; and

(d) that all holders of relevant securities—

(i) receive the same information from an offeror, potential offeror, or offeree regulated company during the course of an affected transaction, or when an affected transaction<sup>[1]</sup><sub>SEP</sub> is contemplated; and

(ii) are provided sufficient information, and permitted sufficient time, to enable them to<sup>[1]</sup><sub>SEP</sub> reach a properly informed decision;

(3) ...

(4) In carrying out its mandate, the Panel may—

(a) ...

(b) ... and

(c) initiate or receive complaints, conduct investigations, and issue compliance notices, with respect to any affected transaction or offer, in accordance with Chapter 7, and the Takeover Regulations.”

7.4 Section 127 of the Act provides as follows:

**“Prohibited dealings before and during an offer.—**

(1) During an offer, or when one is reasonably in contemplation, an offeror or a person acting in concert with that offeror, must not—

(a) make arrangements with any holders of the relevant securities;

(b) deal in, or enter into arrangements to deal in, securities of the offeree regulated company; or

(c) enter into arrangements which involve acceptance of an offer, if there are favourable conditions attached that are not being extended to all holders of the relevant securities.”

7.5 Under section 168(1)(a) of the Act, any person may file a complaint in writing with the Panel in respect of a matter contemplated in the Takeover Provisions, alleging that a person has acted in a manner inconsistent with the Companies Act, or that the complainant’s rights under the Companies Act or under the company’s memorandum of incorporation or rules have been infringed.

7.6 Section 196 on Establishment of the Takeover Regulation Panel states:

“(4) In carrying out its functions, the Panel may-

(a) have regard to international developments in the field of company law;”

7.7 Regulation 84 on Acting in concert provides:

“(1) In addition to the presumption set out in section 118 (5), the following persons are presumed to be acting in concert with one another:

(a) a company, with:

(i) any of its directors;

(ii) any company controlled by one or more of its directors;

(iii) any trust of which any one or more of its directors is a beneficiary or a trustee; and



- (b) ...
- (2) If the Panel is aware of persons coming into concert or coming out of concert, and those persons have not declared themselves as having come into concert or coming out of concert in accordance with this regulation, the Panel may presume those persons came into concert or came out of concert from a date determined by the Panel as being the date of coming into concert or coming out of concert.
- (3) ...
- (4) ...
- (5) Within five business days after coming into concert, or coming out of concert, each person involved must make a declaration, in Form TRP 84, and deliver it to the regulated company concerned, and to the Executive Director.”

7.8 Regulation 106 on Circulars, provides:

“(4) the offeror circular must contain:

(c) statements of direct and indirect beneficial interests in or of securities, or actions to be effected, or a negative statement if there are no such interests or holdings—

(i) by the offeror, including separate disclosure of concert party concert party holdings, in the offeree regulated company. “

## 8 **A brief analysis of the applicable principles when considering acting in concert**

8.1 Reference has been made to an article I wrote dealing with ‘acting in concert’ and ‘shareholder activism’ titled "Shareholder Activism and Acting in Concert during Takeovers under the Companies Act 71 of 2008" (2021). While I am not against the views expressed therein, I believe that the issues in this matter are distinct, and the article was for a general application. Accordingly, it may be applicable to a limited extent.

8.2 According to academic authors on this topic:

“Generally, the concept of ‘acting in concert’ involves the co-operation of two or more persons towards a common end or object, and thus entails an understanding between them as to their common purpose and pursuant to which they so co-operate.”<sup>3</sup>

8.3 Further, as indicated by Professor Delpont:

“The takeover provisions intend to make the category of parties who may act in concert to be broad.”<sup>4</sup>

8.4 Professor Delpont, further states that three or more persons will act in concert with one another even if one or more of them in fact, is/are not to co-operate with any of the others for the stated purposes. He provides an example indicating that where A, B, C and D agree with one another to propose an affected transaction, D will act in concert,

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<sup>3</sup> See Yeats, J, de la Harpe, RA, Jooste, RD, Stoop, H, Cassim, R, Seligmann, J, Kent, L, Bradstreet, RF, Williams, RC, Cassim, MF, Swanepoel, E, Cassim, FHI and Jarvis, KA *Commentary on the Companies Act of 2008* (2018), 5-46.

<sup>4</sup> See Delpont, PA & Vorster, O. *Henochsberg on the Companies Act 71 of 2008* Vol 1 (2012) 426(4).

with A,B and C even if he is to remain totally passive in respect of the actual proposed affected transaction or the entering of the affected transaction.

- 8.5 Accordingly, in interpreting and applying the Takeover Provisions dealing with acting in concert, the above considerations are important, as it appears that the legislation aimed at expanding parties that may be considered acting in concert. The Complaint claiming that parties are acting in concert must meet the above requirements.
- 8.6 In considering whether parties are acting in concert the Panel must not lose sight of the general principles of regulation of affected transactions. To ignore the fundamental principles and be fixated with exclusively with interpretations of acting in concert as defined would reduce the role of the Panel in protecting shareholders during an affected transaction. It may contribute to unfairness and inequitable treatment of shareholders, contrary to the Takeover Provisions.
- 8.7 The Panel when considering an affected transaction must always also consider the reasons for regulating such transactions as set out in the Takeover Provisions. Accordingly, when interpreting and applying the Takeover Provisions the Panel is obligated to adhere to those provisions.
- 8.8 In my view if one considers the transaction that led to the Complaints, then, the Panel should consider all the principles including: fairness and ability to make an informed decision.<sup>5</sup> Ensuring fairness and enabling shareholders to make an informed decision when regulating

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<sup>5</sup> See sections 119(1) and 119 (2) of the Act.

affected transactions is paramount. The information provided in the documents provided to shareholders is crucial in this regard.

8.9 Fairness does not only relate to the Exit Offer price, it also includes among others, the processes involved during the affected transaction, and even after the dust has settled and the affected transaction has been implemented.<sup>6</sup> In my view even if the offer is fair, the process may result in unfairness to some shareholders because of the conduct of some shareholders due to inadequate or complete lack of disclosures.

8.10 The Panel should be aware that there is rarely direct evidence of parties acting in concert. Therefore, it must use its experience and common sense of how affected transactions are structured and undertaken to establish if those parties involved in an affected transaction have some form of understanding or arrangement such that they may be considered to be acting in co-operation with each other for the purposes of the affected transaction.<sup>7</sup>

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<sup>6</sup> See section 127 dealing with prohibition of special arrangements after the offer has been completed. This is of particular relevance taking into consideration the correspondence between Mr Dhorat and Mr Neethling referred to in paragraph 9.4.2.6 below. The correspondence raise a concern that some shareholders may be offered some compensation after the Exit Offer is completed.

<sup>7</sup> The Panel must make reasonable inferences based on the circumstances. Paragraph 5 of the United Kingdom Takeovers Regulation Panel Statement 1989/13("Panel Statement 1989/13") indicates:

"The Panel in making its judgments on the facts is not acting as a court of law but is applying the combined experience of its members to evidence which is almost invariably circumstantial."

See also Australian Securities Investment Commission ("ASIC") Regulatory Guide 28 ("RG 28") on Collective Action by investors setout numerous circumstances that may attract its scrutiny. Available at Available at: <https://download.asic.gov.au/media/w45j5qwm/rg6-published-27-march-2024.pdf>. RG 28 indicates: "As finding associations often depends on inferences from circumstances, it is important to take into account the broader history of investors who may be acting collectively. If there is a long history of investors pursuing joint proposals, it is more likely that the particular issue where the views of these investors are aligned is not a common approach to one matter but part of a broader arrangement about controlling the entity. This kind of history

8.11 In consideration whether parties are acting in concert, the Panel must ask itself a number of questions, in addition to the relevant Takeover Provisions depending on the circumstances. This may include, the reasons an experienced shareholder who is represented on the board of a listed company would be willing to support a transaction that may affect the value of his shares, due to a delisting a company from the formal market. How would a shareholder holding a large parcel of shares be able to sell those shares in the absence of a formal listed public market. How would such a shareholder protect its interests in an informal unlisted environment. All these questions may point to the existence of some arrangements or agreement suggesting that some shareholder are co-operating to ensure successful implementation of an affected transition.<sup>8</sup>

8.12 The answers are not easy to find. But the Panel must use its experience, common sense and make a reasonable conclusion about the conduct of such a shareholder.

## **9 The Complaints in brief**

### **9.1 Mr Moll's Complaint**

9.1.1 Mr Moll's Complaints relate independence of some of the board members, the financial results of Ascendis Health, and the conflict of interest of Mr Neethling due to the fact that he is both Chief Executive Officer and Acting Financial Officer.

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may also mean that it is easier to imply to the entity that the voting influence of each will be combined." At page16..

<sup>8</sup> Paragraph 5 of the United Kingdom Takeovers Regulation Panel Statement 1989/13("Panel Statement 1989/13") indicating: "Since there is a variety of ways in which parties may act in concert, no one circumstance will necessarily be determinative."

9.1.2 In so far as the independence of the board members during an affected transaction, I have noted that the Supplementary Circular provided a new reconstituted independent board in line with Regulation 110, of the Takeover Regulation.

9.1.3 The balance of the Complaints relates to matters outside the Takeover Provisions. Accordingly, the Panel has no authority to consider such Complaints.

## **9.2 Mr Mowat's Complaint**

9.2.1 Mr Mowat's Complaints are substantially the same as those of Mr Moll. Accordingly, paragraphs 9.1.2 and 9.1.3 above applies to the Complaint.

## **9.3 Mr Cilliers's Complaint**

9.3.1 In summary, the essence of Mr Cilliers' Complaint is that Theunis de Bruyn and his associates, including Calibre Investment Holdings Proprietary Limited are undisclosed concert parties to the Exit Offer and the Delisting.

9.3.2 The Complaint is valid and has been substantiated, based on the documents available and an analysis, and application of the Takeover Provisions. The detailed reasons are discussed and incorporated in the various paragraphs of the Report, including paragraphs 7 to 12.

## **9.4 Mr Dhorat's Complaints**

### **9.4.1 An overview of Mr Dhorat's various Complaints**

9.4.1.1 Mr Dhorat's submitted numerous documents with his Complaint. I

believe a summary of the main essential issues will assist in considering the Complaint. As Mr Dhorat's Complaint includes many documents, there is a risk that one may miss the essential Complaints that fall squarely within the regulatory purview of the Takeover Provisions.

- 9.4.1.2 For this reason, it has been necessary to traverse Mr Dhorat's Complaints several times. It should also be noted that it appears that Mr Dhorat is not legally represented in this Complaint.
- 9.4.1.3 Mr Dhorat's Complaint dated 22 April 2024 also incorporates what appears to be correspondence between some of the Consortium members. And in some respect, some of the allegations are repeated in the same complaint. Mr Dhorat's Complaint also incorporate verbatim quotes of various statutes including Market Abuse Provisions, the JSE Listing Requirements and the Takeover Provisions.<sup>[1]</sup> In addition, the Complaint included previous court skirmishes between various parties relating to Ascendis Health.
- 9.4.1.4 In the court application, Mr Neethling appears to be authorised to act on behalf of Alpvest.<sup>9</sup> It appears that it was on this basis that Mr Dhorat concluded that there is a concert party relationship.
- 9.4.1.5 It is not clear from the Draft Affidavit that was submitted during the earlier court proceedings on what basis was Mr Neethling entitled to act on behalf of Alpvest. Accordingly, I choose not to rely on those documents, as submitted by Mr Dhorat.

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<sup>9</sup> Mr Dhorat submitted a Draft Answering Affidavit to be issued from the WCD High Court, prepared during 2022 in proceedings between Ascendis Health and Other Parties, including Mr Neethling. As indicated, I am of the view that this is not relevant for the Complaints.

9.4.1.6 Presumably, the Draft Affidavit points to some arrangement or agreement between Mr Neethling and Alpvest, even if it does not relate to the current transaction. I am of the view that this is too remote.

9.4.1.7 There is a suggestion in some of the documents submitted that Alpvest is a member of the Consortium. I could not find any substantiating information in this regard. Accordingly, I do not agree that there is a concert party relationship between Alpvest and the Consortium.

9.4.1.8 In various appendices, reference is also made to Austell Laboratories,<sup>10</sup> and in documents submitted to the Panel. In addition, reference is made about Cresthold as a concert party to the Consortium. From the documents available it is not clear how Austell and Cresthold are considered to be acting in concert with Consortium as contemplated under the Takeover Provisions. For this reason, this Complaint is not substantiated.

#### **9.4.2 Mr Dhorat's Complaint in respect of Mr Neethling and Theunis de Bruyn and Calibre**

9.4.2.1 Mr Dhorat's allegation against Calibre, Mr Neethling, and by implication, the Consortium<sup>11</sup> forms the heart of his sworn statement, yet the Consortium did not deal with the sworn statement, other than

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<sup>10</sup> As it appears from various documents submitted, it appears there are several companies operating within Ascendis Health using the name Austell. The name is also mentioned in Appendix 4. However, the Circular does not disclose any shareholdings by Austell or any of its variations that appear in the various documents submitted. Accordingly, it is difficult to ascertain Austell's role in the Exit Offer.

<sup>11</sup> As indicated in the definitions to the Circular, Mr Neethling is the beneficial shareholder of Jacton Proprietary Limited, a company that holds 92% of the issued shares in ACN Capital IHC Proprietary Limited, the lead company of the Consortium.



to merely refer to the definition of what constitutes acting in concert.<sup>[1][SEP]</sup>

- 9.4.2.2 These were provided to the Ascendis Health and the Consortium. Instead of assisting to dispel the allegations contained in the appendices submitted by Mr Dhorat; they chose not to do so.
- 9.4.2.3 As indicated above, Mr Dhorat's Complaint includes numerous attachments, I have considered these documents and concluded that the most relevant portions of the Complaint that falls within the Takeover Provisions are found in a document headed: "Portfolio of Evidence All Appendices" to his Complaint.
- 9.4.2.4 In the Portfolio of Evidence All Appendices, Mr Dhorat also includes Appendix 4 ("**Appendix 4**"). For ease of reference and due to its importance, I attach it as **Annexure 1**.
- 9.4.2.5 **Appendix 4**, includes an affidavit by Mr Dhorat, my view is that this document is important and should not be ignored. The affidavit is dated 17 January 2024, and appears duly attested and I have no reason to doubt its contents.
- 9.4.2.6 Paragraph 3 of the Affidavit indicates:
- "3. The purpose of this affidavit is to confirm that I was a recipient of certain correspondence from Carl Neethling on 19 September 2023."**
- 9.4.2.7 The correspondence referred to under paragraph **9.4.2.6** above was sent from a number that appears to be registered and is used by Carl Neethling, (see attachment "**MSID2**." to the Affidavit).

9.4.2.8 **MSID2** shows a Vodacom SA Mobile Number, and Carl Neethling, suggesting that Carl Neethling is the registered owner.

9.4.2.9. Another important statement is in a document labeled “**MSID1**” where it is stated:

“If you want to sell, Calibre and Austell willing to buy IMMEDIATELY after take-private at 10% premium to take private price...<sup>[L]</sup><sub>[SEP]</sub>They can’t be part of the offering party because we won’t get enough votes”<sup>12</sup> (My underlining)

9.4.2.10 A question that may arise to the reader is how Mr Neethling knew that Calibre and Austell are willing buyers of the Ascendis Shares, unless there is some sort of agreement or arrangement relating to the current transaction, which is aimed at delisting from the JSE Limited and taking private Ascendis Health, hence a reference to: “**...after take private...**”<sup>13</sup>

9.4.2.11 The above is a confirmation that there is an agreement or arrangement between Theunis de Bruyn and Calibre and the Consortium.

9.4.2.12 It can only refer to the current affected transaction in respect of the Delisting of Ascendis Health.

9.4.2.13 A further confirmation of acting in concert between Theunis de Bruyn, Calibre and the Consortium, is clear from the follow up statement:

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<sup>12</sup> See Appendix 4.

<sup>13</sup> See Appendix 4.

“They can’t be part of the offering party because we won’t get enough votes”<sup>14</sup> (My underlining).

- 9.4.2.14 The above statement attributed to Mr Neethling in the correspondence to Mr Dhorat speaks for itself. Nothing needs to be added to explain its implications.
- 9.4.3 While Mr Dhorat’s representations did not quote legalese such as ‘acting in concert’, ‘agreements or arrangements,’ the document attached in particular, **Appendix 4**, point to some type of agreement or arrangement that may reasonably lead to a conclusion that Theunis Bruyn and Calibre and the Consortium are acting in concert for the purposes of the Exit Offer.
- 9.4.4 It is notable that in their response to Mr Dhorat’s Complaint, the Consortium did not deal with this issue, except a mere unsubstantiated denial, and reference to the confirmation letter sent by Mr Theunis de Bruyn, **Annexure 2**.
- 9.4.5 The Consortium could not offer an explanation for the allegations contained in the correspondence referred to above in paragraph **9.4.2.6**. This leads me to an inevitable conclusion that indeed there is indeed an agreement or arrangement between Theunis de Bruyn, Calibre and the Consortium, constituting acting in concert as contemplated in the Takeover Provisions.
- 9.4.6 Accordingly, I conclude that Theunis de Bruyn, Calibre on the one side and the Consortium through Mr Neethling are concert parties. Accordingly, this should have been disclosed in the Circular.

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<sup>14</sup> See Appendix 4.

9.4.7 Based on the analysis above, the shareholding of Calibre as at the last practicable date should have been disclosed in the Exit Offer Circular as part of parties acting in concert as required by the Takeover Provisions.

## **10 Analysis of a chain of events leading to the Exit Offer**

10.1 On 5 August 2022, Ascendis Health published a Rights Offer Circular to its shareholders (“the Rights Offers”).

10.2 The Rights Offers were non-renounceable.<sup>15</sup>

10.3 Where Rights Offers are non-renounceable, it may be less likely that entitlements are taken up.<sup>16</sup>

10.4 Non-renounceable Rights Offers do not allow dispersion, as shareholders who do not follow their rights cannot sell or pass those rights to new investors. Consequently, the underwriter may acquire more shares. This may have an impact on change of control of the company by passing control of the company to the underwriter.<sup>17</sup>

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<sup>15</sup> Guidance Note 17 issued by the Australian Takeovers Panel indicates a number of circumstances they may consider as an unacceptable circumstance when considering rights offers. See Guidance Note 17 on Rights Issues published by the Australian Takeovers Panel . Available on <https://takeovers.gov.au/guidance-notes/gn17>. These include this type of rights offers. Under the Guidance Note 17, such rights may lead to a declaration of unacceptable circumstances in respect of rights offers. Such a declaration under Panel rules is serious and a very important one.

<sup>16</sup> See ASIC Regulatory Guide 6 (“RG 6”), at page 28. Available at: <https://download.asic.gov.au/media/w45j5qwm/rg6-published-27-march-2024.pdf>.

<sup>17</sup> It is notable that ASIC will examine a rights issues closely where they are structured so that control of a company would pass to an underwriter or sub-underwriter of a rights issue without a takeover bid, *ibid* at page 25.

- 10.5 The Rights Offers were fully underwritten by Calibre. Theunis de Bruyn is indicated as the only director of Calibre in Annexure 3 of the Rights Offer Circular. Ascendis Health has also confirmed this, as well as the Consortium in their letter dated 6 June 2024. Theunis de Bruyn is still the sole director of Calibre.
- 10.6 Prior to the Rights Offers, Calibre held 10,053,973 <sup>[L]</sup><sub>[SEP]</sub> number of Ascendis Health shares. At the conclusion of the Rights Offers, following the underwriting Calibre held 78,424,412 of Ascendis Health Shares. Calibre has acquired additional in Ascendis Health shares such that at the last practicable date as defined in the Supplementary Circular, it held 126,493,990 Ascendis Shares as confirmed by Solaris Law in their letter dated 6 June 2024.
- 10.7 Dealings by Calibre in the shares of Ascendis Health before or during the Rights Offer, may suggest that Calibre was seeking control.<sup>18</sup> More so, in my view, considering that the Rights Offers were non-renouneable.
- 10.8 While it may be correct that the 2022 Rights Offers were not an affected transaction, in practice, Rights Offers are maybe used, and in some cases are used as a starting point towards an affected transaction,<sup>19</sup> as they allow an investor or underwriter to acquire a significant number of shares of the company, often at a discounted price.<sup>20</sup>

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According to an article published in Insight Sydney 15 March 2024, authored by N Pedler & C Blackmore (“N Pedler & C Blackmore”), ASIC noted in its Corporate Finance Report published in September 2023 that it had intervened in pro rata rights issues undertaken by listed companies that may have resulted in control in the company passing to the underwriter. Available at: <https://www.herbertsmithfreehills.com./insights/2024-03/under-control>.

<sup>18</sup> See RG 6 at page 29.

<sup>19</sup> It for this reason that ASIC will examine the Rights Offers closely. Some rights offers may transfer control by stealth.

<sup>20</sup> See MF Cassim ‘An Analysis of Rights Offers: Their Advantages and Drawbacks’ *OBITER* 2023,

- 10.9 Accordingly, a view that the 2022 Rights Offers were not affected transaction, is not sufficient to dispel a conclusion that the underwriting of the Rights Offers by Theunis de Bruyn was a starting point to the current Exit Offer.
- 10.10 It is also notable that Calibre continued to accumulate shares in Ascendis Health, and Theunis de Bruyn was also appointed a non-executive director of Ascendis after the implementation of the Rights Offers during August 2022. The appointment to the board of Theunis de Bruyn may suggests that Calibre was seeking control of Ascendis as early as after the Rights Offers.<sup>21</sup>
- 10.11 This supports a conclusion that the underwriting of the Rights Offer by Calibre led to a continuing relationship between Mr Neethling, and that this is one of the circumstances that should be considered to determine whether Calibre is acting in concert with the Consortium in respect of the current affected transaction by Ascendis Health. While this is not conclusive, it should not be merely glossed over.<sup>22</sup>
- 10.12 In consideration whether parties are acting in concert, the Panel must ask itself a number of questions, in addition to considering the relevant Takeover Provisions. This may include the reason an experienced shareholder who is represented on the board of a listed company would be willing to support a transaction that may affect the value of his shares, due to a delisting of the company from a listed

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at page 688, and at page 702.

<sup>21</sup> In their article, N Pedler & C Blackmore further indicates that: “In the Tempus Resources Decision a rights issue which coincided with a shareholder requisitioned meeting to replace the board was scrutinised to assess whether there were unacceptable control issues with the rights issue and if frustrating action against Takeovers Panel guidance had occurred.”

exchange to a private market. How would such a shareholder holding a large parcel of shares be able to sell those shares in the absence of a formal listed public market. How would such a shareholder protect its interests in an informal unlisted environment. The answers are not easy to find. But the Panel must use its experience, common sense and make a reasonable conclusion about the conduct of such a shareholder.<sup>23</sup>

- 11.13 Arrangements or agreements of this nature are not easy to establish taking into consideration that such agreement or arrangements may have negative impact on the parties who enter into such agreements in terms of the Takeover Provisions and in terms of the JSE Listings Requirements. They may be disqualified from voting.
- 11.14 This fact was recognised by Mr Neethling,<sup>24</sup> the leader of the Consortium, acting through ACN Capital.<sup>25</sup>
- 11.15 Accordingly, it is not in the interest of such parties to put into writing such agreements or arrangements. The Panel must rely on their experience and question the conduct of parties where it appears that they act contrary to common business practices.

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<sup>23</sup> ASIC in its Regulatory Guide 28 (“RG 28”) on Collective Action by investors set out numerous circumstances that may attract its scrutiny. Available at Available at: <https://download.asic.gov.au/media/w45j5qwm/rg6-published-27-march-2024.pdf>. RG 28 indicates: “As finding associations often depends on inferences from circumstances, it is important to take into account the broader history of investors who may be acting collectively. If there is a long history of investors pursuing joint proposals, it is more likely that the particular issue where the views of these investors are aligned is not a common approach to one matter but part of a broader arrangement about controlling the entity. This kind of history may also mean that it is easier to imply to the entity that the voting influence of each will be combined.” At page 16..

<sup>24</sup> See **Appendix 4**, Screenshots of Carl Neethling also marked MSID1, where it appears that Mr Neethling is concerned about not being able to pass the required resolutions if Calibre is part of the “...offering party”.

<sup>25</sup> As indicated in the definitions to the Circular, Mr Neethling is the beneficial shareholder of Jacton Proprietary Limited, a company that holds 92% of the issued shares in ACN Capital IHC Proprietary Limited, the lead company of the Consortium.

- 11.16 The Consortium had an opportunity to deal with the allegations levelled against Mr Neethling and Calibre in **Appendix 4** of Mr Dhorat's Complaint. They chose not to do so.
- 11.17 As indicated earlier, **Appendix 4**, forming part of Mr Dhorat's allegations was sent under cover of email dated 2 June 2024 to Valeo Capital.
- 11.18 Based on the analysis of the chain of events I am of the view that Theunis de Bruyn and Calibre are acting in concert with the Consortium, on the basis that the chain of events reasonably support a view that circumstances exists showing an agreement or arrangement between Mr Neethling , Theunis de Bryun and Calibre.<sup>26</sup>
- 11.17 For these reasons, the Consortium, Theunis de Bryun and Calibre as concert parties should have disclosed this status in line with the Takeover Provisions.
- 12. The letter from Mr Theunis de Bruyn confirming that Calibre is not acting in concert with the Consortium**
- 12.1 Mr Theunis de Bruyn provided a copy of a letter confirming that Calibre does not act in concert with the Consortium, or any member of the Consortium, in relation to the transaction.
- 12.2 It appears that the Ascendis Health and the Consortium place much reliance on this confirmation in asserting that Theunis de Bryun and

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<sup>26</sup> See Panel Statement 1989/13 in paragraph 4. Refer also to paragraph 8, on some of the principles that the Panel should consider in interpreting and applying the acting in concert provisions.



Calibre are not acting in concert with the Consortium. For this reason, it is attached as **Annexure 2**.

- 12.3 The denial of acting in concert with the Consortium is not surprising because an admission that Theunis de Bruyn and Calibre are acting in concert with the Consortium will prevent them from voting on the Delisting Resolution. Neethling also indicates this concern in his correspondence to Mr Dhorat.<sup>27</sup>
- 12.4 There a number of observations about the letter: First, it appears to be informal, as it is not even written on Calibre company letterheads; Second, it is not dated; Third, while it appears to have been forwarded to someone at Ascendis Health, it is not clear to whom, as there are no names or contact details of the person who was copied. In my view, this must be questioned.
- 12.5 While these minor details may seem to be inconsequential, letters submitted to the Panel for purposes of confirming an important legal requirement that has serious legal implications to both the Panel and Calibre, should be beyond reproach. The Panel must be able to confidently rely on such a confirmation to ensure compliance with the Takeover Provisions.
- 12.6 The omission of such basic details in such an important regulatory confirmation must be questioned.
- 12.7 It's doubtful that a party being questioned by a regulator would admit to a conduct that would negatively impact its interests, as the confirmation of acting in concert would have prevented Calibre's

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<sup>27</sup> See **Appendix 4** Screenshots of Carl Neethling in Mr Dhorat's document labelled –Portfolio of Evidence All Appendices. This document was also forwarded to Valeo Capital under cover of an email on 2 May 2024.

20,78% shareholding from voting on the delisting of Ascendis Health, as pointed out earlier. Mr Neethling, the leader of the Consortium was alive to this danger.<sup>28</sup> My view is that the letter of confirmation should not be accepted.

### **13 Applicability of section 127 of the Act to the Exit Offer**

13.1 This part is added for the sake of completeness, and to inform the Panel about possible contraventions.<sup>29</sup>

13.2 The correspondence referred to in paragraph **9.4.2.6** above suggest arrangements or agreements that may be contrary to section 127 of the Act, dealing with inducements or special arrangements.

13.3 The correspondence suggests that after “**the take private**” or the Delisting, some shareholders may be bought out at different prices than currently offered.

13.4 Should this be true, these shareholders would then have been induced to support the current Exit Offer, knowing well that they would be compensated after the Exit Offer.

13.4 In addition, to being contrary to section 127 of the Act, this would be contrary to sections 119(1) and 119(2) of the Act, relating to fairness and equality of treatment among shareholders.

### **14. The letter from Ascendis Health and the Consortium dated 6 June 2024**

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<sup>28</sup> See **Appendix 4** Screenshots of Carl Neethling in Mr Dhorat’s document labelled –Portfolio of Evidence All Appendices.

<sup>29</sup> See section 4 (c) of the Act relating to initiation of complaints.

- 14.1 The response herein is not intended to deal with all the issues raised in the above letter. It is intended to clarify some of the issues relating to the Takeover Provisions raised in the letter.
- 14.2 While I agree with the submissions of Ascendis Health and the Consortium that the current transaction is not a fundamental transaction, and accordingly, the Panel has no authority to restrict the voting of the alleged concert, it does not follow that the Panel should not enforce the disclosure of concert parties as this is in line with ensuring that shareholders have the relevant information to make an informed decision as provided for under the Takeover Provisions.<sup>30</sup>
- 14.3 In paragraph 1.3, of the letter, it is suggested that there is a connection between the Complainants' Replies and the request for additional documentation and confirmations sent to the Consortium and Ascendis Health. This is incorrect. The request for additional documents and confirmations is independent from the Complainants' Replies, and is meant to assist in considering the various allegations.
- 14.4 Further, the concern in respect of the delay in completion of the Exit Offer is noted. There is no intention to delay the implementation of the Exit Offer.
- 14.5 It should be noted that allegations of acting in concert are notoriously difficult to substantiate as indicated in various parts of the Report. Accordingly, the Panel or the Inspector must not rush through the documents submitted, and merely gloss them over. Failure to uncover a concert party relationship may result in prejudice to

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<sup>30</sup> See section 119(1) and 119(2) of the Act.

Ascendis Health shareholders who would have already been prejudiced by the existence of such a relationship.

- 14.6 In addition, a conclusion that a concert party relationship exists should not be lightly made. A proper basis should be laid. This can only be done by carefully considering all the relevant circumstances as reflected in the various documents, including submissions, responses and replies.
- 14.7 The Panel should not shy away from declaring that parties are acting in concert where circumstances reasonably indicate. The Panel may not declare that parties are acting in concert unless there are reasonable grounds for such a conclusion. I am of the view that there is a reasonable conclusion that Theunis de Bryun and Calibre are acting in concert with the Consortium.
- 14.8 For the sake of completeness, it should be recorded that in the letter, Ascendis Health and the Consortium seem to suggest that they should have been invited to make further responses to the allegations raised by the Complainants.<sup>31</sup> This is incorrect.
- 14.9 The final replies from the Complaints were forwarded to Valeo Capital in the format they were received from the Complainants. They chose not to respond to the final replies submitted by the Complainants. As indicated in the Panel announcement relating to the Complaints, interested parties were entitled to make submission to the Panel. Accordingly, Ascendis Health and the Consortium did not need an invitation to deal with the final replies by the Complainants. They had copies of those documents and chose not to make further responses.

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<sup>31</sup> See paragraph 1.2 of Solaris Law dated 6 June 2024.

14.10 As provided under the Takeover Provisions, parties to affected transactions are obliged to comply with all the reporting or approval requirements unless exempted.<sup>32</sup> Accordingly, Ascendis Health and the Consortium were obliged to respond to the various allegations regarding any allegations of non-compliance with the Takeover Provisions, including that of acting in concert. They did not need an invitation to make further responses.

## **15.4 Participation of affected parties**

15.4.1 I wish to thank all shareholders who made representations to the Panel and the Advisers. Their representations were invaluable. The role of shareholders in promoting the provision of the relevant information during an affected transaction is important. Shareholders are in a much better position to know the inner workings of their investee companies, rather than regulators who often come to investigate after a complaint has been lodged. This is too late in my view.

15.4.2 The Responses to the Complaints provided by the advisers assisted in narrowing the main issues, and eliminating those Complaints that did not fall within the Takeover Provisions.

## **16. Conclusions**

### **16.1 The Delisting**

16.1.1 For avoidance of doubt, it is important to provide the confirmation

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<sup>32</sup> See among others, section 121 of the Act.

due to the fact that some of the Complainants seem to believe that the Panel should prevent the Delisting of Ascendis Health.

16.1.2 The proposed Exit Offer is a voluntary general offer in terms of section 117(c)(v) of the Companies Act in terms of which Shareholders are entitled to accept the Exit Offer, or, not to accept the Exit Offer, and remain invested in Ascendis Health. The Exit Offer is an affected transaction and is regulated by the Panel in compliance with the Takeover Provisions.

16.1.3 The Exit Offer does not require the approval of Shareholders in terms of the Takeover Provisions, and the provisions regulating fundamental transactions in terms of section 115 of the Companies Act do not apply to the Exit Offer.

16.1.4. The Takeover Provisions do not apply to the Delisting that was proposed by Ascendis Health in terms of sections 1.14 to 1.16 of the JSE Listings Requirements, and accordingly, the Panel has no authority to investigate complaints relating to the Delisting, including the Proposed Delisting Resolution.

## 16.2 **The Complaints**

16.2.1. Based on the documentation available, the allegation that Cresthold/Austell are acting in concert with the Consortium within the meaning of the Takeover Provisions, is not substantiated.

16.2.2. Based on the documentation available, the allegations that Alpvest Equities (Pty) Limited is acting in concert with the Consortium within the meaning of the Takeover Provisions, is not substantiated.

16.2.3. Based on the documentation available, the allegations that Theunis de Bruyn and the associated company Calibre, are acting in concert with the Consortium as contemplated in terms of the Takeover Provisions, are substantiated. The reasons are detailed and incorporated in various paragraphs of the Report, including paragraphs 7 to 12 above.

### **16.3 Deeming provisions under the Takeover Provisions**

Submissions relating to the deeming provisions applicable to acting in concert under the Takeover Provisions made by all parties have been considered. Taking into consideration the conclusions made above in paragraph 16.2, as supported by the reasons in incorporated in paragraphs 7 to 12 above, it is not necessary to pronounce on the deeming provisions.

## **17. Recommendations**


17.1. The Consortium, Calibre and Theunis de Bruyn are required to disclose their concert party relationship in an appropriate announcement to ensure compliance with the Takeover Provisions.

17.2 The Consortium, Calibre and Theunis de Bruyn are also required to complete Form TRP 84 as required by the Takeover Regulations.

17.3 Ascendis and the Consortium are required to make the relevant announcement and provide a Supplementary Circular to the shareholders of Ascendis Health.

17.4 The Acting Executive Director should consider whether the Consortium contravened the provisions of section 127 of the Act.

Dated on this 10<sup>th</sup> June 2024

  
**Dr Madimetja Phakeng**  
**Inspector**