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17 July 2007

Takeovers Panel's Decisions Regarding Pacific Challenge Holdings Limited

The SFC today publishes the Takeovers Panel's decision on whether certain parties were acting in concert in relation to certain transactions in shares of Pacific Challenge Holdings Limited.

The Takeovers Code provides that, subject to confidentiality considerations, it is the policy of the Panel to publish its decisions and the reasons for those decisions, so that its activities may be understood by the public.

Mr Brian Ho, SFC's Executive Director of Corporate Finance, said: "The Executive will continue to seek to ensure compliance with the Codes and will take disciplinary action when it considers it to be appropriate."

The SFC also publishes a series of decisions by the Panel on related matters. A copy of the Panel's decisions can be found in the "Prospectuses, Takeovers & Mergers" – "Takeovers and Mergers" – "Panel and Executive Decisions / Statements" section of the SFC Website at http://www.sfc.hk.

Ends

Page last updated: 17 July 2007

TAKEOVERS AND MERGERS PANEL

Explanatory note of the Panel's decisions in relation to

Pacific Challenge Holdings Limited

In September 2005 a Panel was convened to consider disciplinary proceedings commenced by the Executive in relation to allegations that certain parties were acting in concert in respect of Pacific Challenge Holdings Limited and that their failure to make a general offer was in breach of Rule 26.1 of the Takeovers Code. A series of meetings were held to consider various matters and the substantive issues. The last meeting took place on 12 July 2007. The Panel's decisions dated 16 July 2007 are attached as follows:

Appendix 1 **Panel Decision on Substantive Issues**

Decision on disciplinary proceedings in relation to allegations that certain parties were acting in concert and that their failure to make a general offer was in breach of Rule 26.1 of the Takeovers Code

Appendix 2 **First Preliminary Panel Decision**

Decision on adjournment and whether the Panel had jurisdiction to rehear the matter

Appendix 3 **Second Preliminary Panel Decision**

Decision on whether the Panel should dismiss the disciplinary proceedings on the basis that it was unfair and improper, and if the Panel decided that the proceedings should not be dismissed;

(i) the procedure for the conduct of the rehearing; and

(ii) what documents or other information should be provided to the Panel to facilitate its consideration of the substantive case

Appendix 4 **Third Preliminary Panel Decision**

Decision on whether the substantive hearing should be adjourned pending Dr Pau being fit to attend the hearing

Appendix 5 **Fourth Preliminary Panel Decision**

Decision on whether the substantive hearing should be adjourned until Dr Pau was medically fit to cope with a full, proper and fair hearing

Appendix 6 **Fifth Preliminary Panel Decision**

Decision on Dr Pau's current medical condition and in light of that, the basis on which the substantive hearing should proceed

Appendix 7 **Sixth Preliminary Panel Decision**

Decision on the standard of proof

Appendix 8 **Seventh Panel Decision**

Decision on publication of the Panel's decisions

16 July 2007

DEFINITIONS

Acting Chairman	Acting Chairman of the Takeovers and Mergers Panel
Cents.com	Cents.com Inc.
CHIL	Chen Hsong Investments Limited
Chen Hsong group	Companies within the Chen Hsong Investment Limited group of companies
Codes	The Codes on Takeovers and Mergers and Share Repurchases
Conflict Guidelines	Guidelines on conflict of interest of members of the Takeovers and Mergers Panel and the Takeovers Appeal Committee
Dr Chiang	Dr Lily Chiang
Dr Pau	Dr Pau Kwok Ping
Dr Shah	Dr Tahir Hussain Shah
E1	E1 Media Technology Limited
Eco-Tek	Eco-Tek Holdings Limited (Stock Code : 8169)
Executive	The Executive Director of the Corporate Finance Division of the SFC or any delegate of the Executive Director
Get Nice Investment	Get Nice Investment Limited
Guinness	Panel Statement (1989/13) issued by the UK Takeover Panel
Kandy Profits	Kandy Profits Limited
Kistefos	Kistefos Investment A.S.
Kong Tai	Takeovers and Mergers Panel Decision in relation to the disciplinary proceedings in Kong Tai International Holdings Company Limited - 24 June 2003

Koon Wing Yee	Judgment from the High Court of the HKSAR, Court of Appeal, Koon Wing Yee v Insider Dealing Tribunal - 30 May 2007
Legal Adviser	The legal adviser to Takeovers and Mergers Panel
Mr Cham	Mr Cham Wai Ho, Anthony
Mr Cheng	Mr Cheng Mo Chi, Moses
Mr Herberg	Mr Javan Herberg, a barrister in the United Kingdom
Mr Mui	Mr Mui Ho Cheung, Gary
Mr Shum	Mr Shum Kin Wai, Frankie
Mr Woo	Mr Woo Ping Tao, Pedro
Mr Yu	Mr Yu Shin Gay, Joseph
Ms Chan	Ms Chan Yim Fong, Teli
Ms Lin	Ms Lin Yi Chun, Anita
Ms Loh	Ms Loh Jiah Yee, Katherine
Ms Lui	Ms Lui Yee Man, Brenda
Ms Wong	Ms Wong Cheuk Ling, Elain
Panel	Takeovers and Mergers Panel
Panel Secretary / Panel Secretariat	Secretary to the Takeovers and Mergers Panel
Parties	Dr Chiang, Dr Pau, Mr Cham and Super Drive Inc.
PCC	Pacific Challenge Capital Limited
PCH	Pacific Challenge Holdings Limited (now known as New Times Group Holdings Limited) (Stock Code : 0166)
Peace City	Peace City Development Limited
SFC	Securities and Futures Commission

SFC Chairman	the then Chairman of the Securities and Futures Commission
Shine Asset	Shine Asset Limited
Shun Ho Resources	Takeovers and Mergers Panel Decision in relation to Shun Ho Resources Holdings Limited - 20 December 1993
Stock Exchange	The Stock Exchange of Hong Kong Limited
Takeovers Code	The Code on Takeovers and Mergers

Appendix 1

TAKEOVERS AND MERGERS PANEL

PANEL DECISION ON SUBSTANTIVE ISSUES

PACIFIC CHALLENGE HOLDINGS LIMITED

Decision on disciplinary proceedings in relation to allegations that certain parties were acting in concert and that their failure to make a general offer was in breach of Rule 26.1 of the Takeovers Code

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1. The Panel met on 3, 4, 5, 6 and 11 July 2007 to consider disciplinary proceedings commenced by the Executive against various parties in relation to PCH.[1]

Background

2. The events which are relevant to the present disciplinary proceedings took place between February 2000 and January 2001 and the material facts relating to those events are not in dispute between the parties and the Executive; the dispute arises as to the inferences to be drawn from those facts.

[1] These meetings were a continuation of previous meetings held on 11 and 13 January 2006; 16, 17 and 18 February 2006; 29 August 2006; 21 November 2006 and 27 February 2007 in which the Panel considered certain preliminary matters relating to these proceedings.

The salient facts are as follows:

(a) PCH was listed on the Stock Exchange in October 1998. Immediately after the listing Mr Yu and Ms Lui each held 14.2% of PCH. Kistefos, an overseas investor, held 23.6%.

(b) PCH announced on 19 February 2000 that, E1, a company controlled by Dr Chiang, had agreed to acquire 67,934,000 PCH shares from Mr Yu and Ms Lui at HK$2.79 per share. The acquisition price represented a premium of 16% over the closing price of HK$2.40 on 14 February 2000, the last trading day prior to the announcement.

(c) PCH announced the completion of E1's acquisition on 15 March 2000. At that point E1 held through its wholly owned subsidiary, Super Drive Inc., 71,664,000 shares, representing a 30% stake (Mr Yu and Ms Lui had arranged for employees of PCH to sell an additional 3,730,000 PCH shares to E1, also at HK$2.79 each). Dr Chiang became the chairman of PCH, and Mr Yu and Ms Lui resigned as directors. According to the announcement, E1 was engaged in the development and provision of internet, multimedia and e-commerce solutions. The issued shares of E1 were held as to 60% by Peace City (which was described as being majority owned by Dr Chiang), 20% by Hikari Tsushin Partners II, L.P, 16% by Cable & Wireless HKT IMS Limited, 2% by Online Credit International Limited and 2% by Pacific Challenge Technology Capital Limited, a subsidiary of PCH.

(d) On 29 March 2000, PCH announced the disposal of its securities and futures broking business to Steppington Holdings Limited for HK$29,300,000.

(e) On 27 April 2000, PCH announced a conditional agreement to acquire Cents.com from E1 for HK$170,000,000. This announcement also disclosed that Dr Chiang owned personally 706,000 PCH shares.

(f) The acquisition of Cents.com would have been a major and connected transaction for PCH, requiring the approval of independent shareholders under the Listing Rules of the Stock Exchange. On 16 June 2000, PCH issued a circular containing details of the acquisition and a proposal to change the corporate name of PCH to E1 Holdings Limited. On page 42 of the circular, Peace City, which held 60% of E1, was described as being wholly owned by Dr Chiang, rather than "majority owned by Dr Chiang", as stated in the 15 March 2000 announcement.

(g) On 10 July 2000, PCH announced that independent shareholders had voted against the acquisition of Cents.com and the proposed change of corporate name. The transaction was abandoned.

(h) On 27 July 2000, PCH announced an issue of 23,800,000 new PCH shares to Dr Pau at HK$0.67 each and 23,800,000 new PCH shares to Mr Cham also at HK$0.67 each, raising a total of HK$31,000,000. The issue price represented a discount of 2.9% to the closing price of HK$0.69 on 26 July 2000, the last trading day prior to the announcement. These 47,600,000

new shares accounted for 16.6% of the enlarged issued share capital of PCH. Interests in PCH held by Super Drive Inc. and Kistefos were diluted from 30.1% to 25.1% and from 26.1% to 21.8% respectively. Both Dr Pau and Mr Cham were described in the announcement as independent investors.

(i) Dr Pau's and Mr Cham's acquisitions both completed on 29 August 2000. Dr Pau settled payment with two personal cheques, a Hongkong Bank cheque for HK$2,446,000 and a Citibank cheque for HK$13,500,000. Mr Cham paid by a cashier order for HK$15,708,564.06.

(j) Mr Cham started selling his PCH shares through Get Nice Investment on 5 October 2000. The entire stake of 23,800,000 shares had been sold by 16 January 2001 at between HK$0.58 and HK$0.73 per share. During this period, Mr Cham also acquired and sold 130,000 PCH shares at between HK$0.55 and HK$0.60 per share through KMT Securities Limited.

(k) Super Drive Inc., Dr Chiang and Dr Pau respectively bought 23,522,000, 1,794,000 and 834,000 PCH shares (26,150,000 shares in total) between HK$0.58 and HK$0.73 per share in the same period.

(l) On 13 March 2001, PCH announced that it had received a petition issued in The Supreme Court of Bermuda by Kistefos alleging that PCH's affairs were being conducted in a manner which was oppressive or unfairly prejudicial to the interests of its members. Kistefos sought for, amongst other things, an order that PCH and/or a director purchase its shares in

PCH at a fair value or, alternatively, an order that PCH be wound up by the court. The litigation has since been settled.

(m) On 25 April 2002, Kandy Profits, wholly owned by Mr. Cheong Tin Yau, who was described in the offer announcement as having extensive experience in China trade and real estate investment in the PRC, announced a voluntary cash offer for PCH at HK$0.65 per share.

(n) On 30 April 2002, Kandy Profits announced a revision of the offer price for PCH from HK$0.65 to HK$0.67 per share. It also announced that it had received an irrevocable commitment to accept its offer from Super Drive Inc. for all 93,544,000 PCH shares (representing 32.65%) held by it.

(o) On 2 August 2002, Kandy Profits announced that it had received valid acceptances for 219,344,000 shares, representing 75.9% of the issued share capital of PCH. The offer then closed. Kistefos did not accept the offer for the 62,400,000 PCH shares, or 21.6% of PCH, held by it.

Substantive decision

3. The Panel carefully considered all the submissions by the parties and the Executive, and the materials placed before it, in relation to the breaches of Rule 26.1 of the Takeovers Code alleged in the Executive's paper commencing disciplinary proceedings dated 23 April 2004, namely that:

(a) Super Drive Inc., Dr Chiang, Dr Pau and Mr Cham were acting in concert with respect to the control of PCH, and the failure of Super Drive Inc., Dr

Chiang, Dr Pau and Mr Cham to make a general offer for PCH on 29 August 2000 was in breach of Rule 26.1(b) of the Takeovers Code; or

(b) alternatively, Super Drive Inc., Dr Chiang and Dr Pau were acting in concert with respect to the control of PCH, and the failure of Super Drive Inc., Dr Chiang and Dr Pau to make a general offer for the shares in PCH on 6 November 2000 was in breach of Rule 26.1(b) of the Takeovers Code.

4. The Panel determined that, on the basis of the evidence provided to it in the written submissions and at the substantive hearing, there was insufficient evidence to conclude that either (i) Super Drive Inc., Dr Chiang, Dr Pau and Mr Cham or (ii) Super Drive Inc., Dr Chiang and Dr Pau were parties acting in concert as defined in the Takeovers Code at the times alleged by the Executive in their paper commencing disciplinary proceedings. Accordingly, the Panel did not find any breaches of Rule 26 of the Takeovers Code and the disciplinary proceedings were dismissed. The Panel drew attention to the fact that it did not – and did not believe it was asked to – draw a substantive distinction between Dr Chiang and Super Drive Inc. for the purpose of this matter.

5. In reaching its decision, the Panel took into account the following considerations and its decision was based on the following reasoning.

Standard of proof

6. There was no direct substantive evidence provided by the Executive in relation to the alleged breaches; accordingly, the Panel was invited to reach a decision that there had been breaches of Rule 26 of the Takeovers Code on the basis of

inference and circumstantial evidence. Whilst the Panel accepted that it was entirely possible to reach such a conclusion without direct evidence on the basis of inference and circumstantial evidence – and that often concert party allegations are, by their nature, not supported by direct evidence – such inference and circumstantial evidence must nevertheless satisfy the standard of proof established by the Panel in the Sixth Preliminary Panel Decision in relation to this matter (Appendix 7). In this case, the alleged breaches were serious, as were the sanctions sought by the Executive. Accordingly, the evidence needed to be commensurate with the seriousness of the allegations and the potential consequences in order for the allegations to be proved to the civil standard of "on the balance of probabilities". In this case, the Panel was not satisfied that the evidence presented to it met this standard.

Definition of "acting in concert"

7. In reviewing the facts of this case, the Panel had regard to the definition of "acting in concert" as set out in the Takeovers Code and to the manner in which that had been interpreted. In particular, the Panel had regard to the decision of the UK Takeover Panel in the Guinness case and to the subsequent decisions of the Hong Kong Takeovers Panel in the cases of Shun Ho Resources and Kong Tai; and also to a recent ruling of the Executive in relation to PCCW Limited (issued by the Executive on 17 May 2007). In that regard the Panel made the following points:

(a) In the Guinness case, the UK Takeover Panel made it clear that the definition of "acting in concert" was drawn in deliberately wide terms. It further noted that there was rarely direct evidence of acting in concert, and

the Panel must draw on its experience and commonsense to determine whether those involved in any dealings have some form of understanding and are acting in cooperation with each other; it later stated that the evidence in such cases is almost always circumstantial. The Panel went on to say that, since there are a variety of ways in which parties may act in concert, no one circumstance will necessarily be determinative. The Panel endorsed these statements of the UK Takeover Panel.

(b) In the Guinness case, the UK Takeover Panel then went on to identify "relevant factors"; there was no suggestion by the UK Takeover Panel that the list was exhaustive and the Panel did not suggest that the list should be so regarded. The factors listed were:

(i) whether the offeror himself makes direct contact with the proposed purchaser and, if so, why;

(ii) whether there is any pre-existing relationship between the offeror and the purchaser and, if so, its nature;

(iii) what is the relationship, in working and personal terms, between persons on the offeror side and the potential purchaser; and

(iv) whether there is any form of inducement, or assistance, or hint of future benefits, other than by way of shareholder benefits if the bid succeeds or fails, which might contribute to the decision to purchase.

(c) Whilst accepting that the above list was not exhaustive or determinative, the Panel did review the above factors in the context of the current proceedings. In relation to Mr Cham – and as explained further in this ruling – it did not find any of the relevant factors proven to the requisite standard. In relation to Dr Pau, there was certainly evidence of factors (ii) and (iii), and the Executive invited the Panel to make inferences in relation to factors (i) and (iv) (i.e. that Dr Chiang had approached Dr Pau and that there was evidence of inducements, assistance or hints of future benefits). Of these two factors (i) and (iv), the Panel regarded (iv) as the more important in the present case but, for the reasons set out further in this ruling, the Panel declined to draw the necessary inference on the basis of the evidence presented to it so as to conclude those was a concert party arrangement between Super Drive Inc., Dr Chiang and Dr Pau.

(d) The Panel also reviewed the facts of the Shun Ho Resources case and Kong Tai case as reported in the relevant Panel decisions, and the reasoning of the Panel in those cases. Those cases were, of course, very much decided on their own facts but the Panel was influenced by the fact that, in those cases, there was, at a minimum, serious doubt as to the source of funds relating to the relevant purchases. In this case, there was no such doubt and there was no allegation that Dr Pau or Mr Cham had not funded their own purchases of shares in PCH or that they did not have the financial wherewithal to do so.

(e) The Panel also reviewed the recent ruling of the Executive dated 17 May 2007 in relation to PCCW Limited. This was a somewhat different situation in that the ruling was not the result of disciplinary proceedings but was rather the result of the application by an interested party, Mr Francis Leung. The Executive ruled that there was insufficient evidence to conclude that there was a concert party in that case. Again, the ruling was particular to its own facts but the Executive, in that ruling, did comment on the evidence of contact between relevant parties, and the nature of that contact. Although, in that case, there was clear evidence to suggest meetings had taken place, there was no evidence to suggest those meetings involved any discussion or the entering into of any understanding or agreement to co-operate actively to obtain control of PCCW Limited. In the present case, there was clear evidence of contact and of a close business relationship between Dr Pau and Dr Chiang. However, there was no clear evidence to suggest that any of those meetings involved a discussion which would lead to a conclusion that they should be regarded as acting in concert.

(f) Finally, the Executive also raised an argument of a presumed concert party between Dr Chiang, Dr Pau and CHIL. This arose under presumption (2) of the definition of "acting in concert" in the Takeovers Code by reason of the fact that, at the relevant time, Dr Chiang and Dr Pau were both directors of CHIL. The Panel accepted that the presumption operated to place CHIL and its directors, including Dr Pau and Dr Chiang, in concert

in relation to shareholdings and dealings in PCH. It was accepted by the Executive, however, that the aggregate holdings of the alleged concert party group of Super Drive Inc., Dr Chiang, Dr Pau and CHIL did not cross over the relevant 35% threshold at any stage prior to 31 October 2000, the date when Dr Chiang and Dr Pau resigned as directors of CHIL and, therefore, the date on which the presumption ceased to operate. Instead, the Executive primarily relied on this presumption as a further factor to argue that the statement of "independence" of Dr Pau contained in the Stock Exchange announcement concerning the subscription and placing was, at best, misleading. The Panel considered this statement. The statement, which appeared in a regulatory press announcement, was made by reference to the Listing Rules of the Stock Exchange – which the Panel did not seek to interpret - rather than any specific matter under the Takeovers Code. The Panel did not conclude, on the evidence before it, that the statement was deliberately misleading, and, although it could be argued that a fuller description of the relationship between Dr Pau and Dr Chiang should have been included, the Panel did not conclude that it should attach much weight to this as an indication of a concealment of, or misleading statement about, a presumed concert party relationship. It was also noted that, in their interviews with the SFC in August 2000, Dr Pau and Dr Chiang did not seek to hide their pre-existing relationship or their common involvement with the Chen Hsong group.

Rationale behind the placing and subscription

8. One of the factors which the Executive asked the Panel to consider carefully was the commercial rationale, or need, for the placement and subscription in July 2000. The Executive's basic contention was that, given the cash position of PCH at that time, the fact that there were no imminent projects for which additional cash was necessary and that, further, the amount of cash raised from Dr Pau and Mr Cham was relatively insignificant, the Panel should conclude that there was a different purpose behind the subscription and placement. The Executive contended that, following the failure of the Cents.com acquisition, Dr Chiang needed to introduce "friendly" new investors into PCH so that she could dilute the interests of the current shareholders (particularly, Kistefos) so as to be better able to secure shareholder approval for future projects including, perhaps, a plan to re-propose the Cents.com transaction.

9. Evidence was provided by Dr Chiang as to the projects which PCH was considering at the relevant time and as to the perceived benefits of attracting investors, such as Dr Pau, into PCH at that time. Written affirmations were provided by Mr Woo (an independent non-executive director of PCH since the company was publicly listed in 1998), together with Dr Shah and Ms Chan (both directors of the company at the relevant time); those persons also appeared as witnesses during the hearing.

10. Having reviewed the evidence, and considered the evidence of the aforementioned witnesses, the Panel concluded:

(a) It was difficult to second guess the commercial rationale put forward by Dr Chiang and others as to the reasons why the placing and subscription was desirable at the time. It was clear that there were a number of projects under consideration at that time which would have required considerable funding.

(b) Mr Woo, Dr Shah and Ms Chan provided consistent accounts of the financial situation of PCH at the relevant time and the projects it was considering. The Executive drew attention to the fact that the PCH board meeting to approve the placing and subscription was convened at extremely short notice and that neither Mr Woo nor Dr Shah (nor indeed the remaining independent non-executive director, Mr Cheng) were able to attend or participate by phone. Whilst there may be a question as to whether this was good corporate governance, it was not evident to the Panel that the timing had been chosen so as to ensure that those directors would not be present in an attempt to avoid any opposition to the placing and subscription. Indeed, the testimony of Mr Woo and Mr Shah was that they were entirely supportive of the placing and subscription and would have voted in favour of it had they attended the relevant board meeting. Indeed, the Executive conceded that they were not arguing that the board decision would have been different had a longer notice period been given and more directors had been able to attend.

(c) As a matter of fact, the Cents.com proposal was never re-introduced to the shareholders of PCH and there was no evidence provided to the Panel to

suggest that it was re-considered by the directors of PCH. Nor were any other acquisition proposals - involving assets of E1 or otherwise – put to shareholders in circumstances where it could be tested whether the votes held by Dr Pau and Mr Cham were determinative of success. The effect of the subscription and placement on the Kistefos shareholding in PCH was to reduce it from 26.1% to 21.8%; the Kistefos shareholding therefore remained significant in the context of an ordinary resolution, and particularly so in the context of any future proposed connected transaction with E1, in respect of which neither Super Drive Inc. nor Dr Chiang would have been able to vote.

(d) The commercial rationale behind the Cents.com proposal and the sale of the brokerage businesses by PCH were also highlighted by the Executive, primarily as being indicative of Dr Chiang's intention to refocus PCH's business. It was accepted by the Panel that the Cents.com proposal was indicative of this. It was, however, alleged by the Executive that the Cents.com transaction was intended to recoup the cost of E1's investment in PCH; and when it failed, this was a major disappointment to Dr Chiang. This was disputed by Dr Chiang and others, including Ms Chan who explained that the Cents.com acquisition had commercial merit in its own right and had been supported by Mr Woo and Mr Cheng, the independent non-executive directors of PCH on 19 April 2000 although the Executive raised some legitimate questions about the valuation used in assessing this acquisition. The Panel understood the inference which it was asked to

draw in relation to the connection between the original investment by E1 in PCH and the subsequent proposed (but unsuccessful) sale to PCH of Cents.com, and considered it plausible. However, even if the Executive's allegation was correct, this was no more than suggestive of a motive for the subscription and placement; it did not establish a direct link.

Letter dated 18 August 2000 from the Executive

11. On 18 August 2000, the Executive issued a letter to all relevant parties, including Dr Chiang and shareholders of E1, expressing serious concerns about the independence of Dr Pau and Mr Cham. This followed enquiries by the Executive, including interviews with the relevant parties. In that letter, the Executive stated that it had not formed *"any definitive view as to whether Mr Cham and Dr Pau form part of the [alleged] concert group";* and the Executive reserved its position so that should future circumstances or evidence lead to the conclusion that a concert group comprising the said parties had been in place at the time of the completion of the placement and subscription, the relevant parties would be required to make a general offer for the shares in PCH. The Executive stated that it would continuously monitor the situation and might take the following factors (amongst others) into consideration in the future: (i) the manner of voting of Mr Cham and Dr Pau (or any persons acting in concert with them) with respect to future resolutions in relation to connected transactions between PCH and Dr Chiang, her family, E1 or their respective concert parties; and (ii) all future dealings in the shares in PCH by Dr Chiang, her family, E1, Mr Cham and Dr Pau or any persons acting in concert with any of them.

12. The Panel carefully considered the Executive's letter of 18 August 2000 and concluded as follows:

(a) The Panel was prepared to accept that, as contended by the Executive, the effect of that letter would be to put Dr Chiang on notice that any intention she might have to reintroduce the Cents.com proposal (or any similar connected transaction) would attract considerable scrutiny from the Executive and, therefore, perhaps, should not be contemplated. However, there was no evidence presented that such transactions or proposals were being considered. Indeed, Dr Chiang contended that she interpreted the letter as a "green light" for her to proceed with the placement and subscription and took comfort from the fact that the Executive, despite their investigations, had not concluded there was a concert party.

(b) Although he had been expressly put on notice through the 18 August 2000 letter, Mr Cham did decide to dispose of his PCH shares within a short period after the placing and subscription, and Super Drive Inc., Dr Chiang and, in two transactions in a single day, Dr Pau acquired those shares. The Panel deals with the disposals by Mr Cham later in this ruling.

(c) The letter of 18 August 2000 was written after enquiries had been conducted by the Executive and at a time when the acquisition of PCH shares by Dr Pau and Mr Cham had not yet been completed; those acquisitions did not complete until 29 August 2000. At that time, the Executive concluded that it had not formed any definitive view as to whether Mr Cham and Dr Pau formed part of the relevant concert party.

The Executive had clearly changed its mind by 23 April 2004 when it decided to commence the disciplinary proceedings which have led to the current hearings. In that regard, the Panel noted as follows:

(i) The close connection between Dr Pau and Dr Chiang, the Chen Hsong group and the Chiang family was known from the outset and was one of the points highlighted in the Executive's letter of 18 August; yet at that time, the Executive was not able to determine whether Dr Pau was a concert party.

(ii) In the view of the Panel, the only new material factors that came to light during the intervening period subsequent to the 18 August letter, were: (i) evidence in relation to Eco-Tek, Shine Asset and Cottingham Inc. to suggest benefits or inducements may have been offered to Dr Pau by Dr Chiang; (ii) the fact that Dr Pau and Dr Chiang were common directors of CHIL and therefore that a presumed concerted party relationship existed; and (iii) the dealing in the shares of PCH by Mr Cham, Super Drive Inc., Dr Chiang and Dr Pau in the period from October 2000 to January 2001. These matters are dealt with further in this ruling but, in summary, the Panel concluded that, on the evidence provided to it, none of these factors, either individually or collectively, were determinative of the concert parties alleged by the Executive although it accepted that the emergence of these factors provided sufficient grounds for further investigation by the Executive.

Concert party between Super Drive Inc., Dr Chiang, Dr Pau and Mr Cham

13. The Panel dealt first with Mr Cham and the allegation by the Executive that Mr Cham became a member of the concert group with Dr Chiang, Super Drive Inc. and Dr Pau on completion of the placing to him of 23,800,000 new PCH shares on 29 August 2000, at the same time as the same amount of new PCH shares were subscribed for by Dr Pau. In support of this allegation, the Executive relied heavily on (i) the subsequent disposal of his PCH shares by Mr Cham between 5 October 2000 and 16 January 2001; (ii) the pattern of those disposals and; (iii) the fact that, although those disposals took place "on market", Super Drive Inc., Dr Chiang and Dr Pau purchased substantially all of those shares; this, the Executive alleged, was evidence of concertedness and of an orchestrated disposal program which could only have been set up in advance. To prove this case, the Executive had to establish that this arrangement was in place no later than the time of the completion of the original placing to Mr Cham.

14. With regard to Mr Cham and the allegations of concertedness made against him, the Panel commented as follows:

(a) There was no evidence to suggest that Mr Cham had any pre-existing relationship with Dr Chiang, Super Drive Inc. or Dr Pau; and indeed none was asserted by the Executive. Indeed, there was no evidence that Mr Cham met with, or spoke to, Dr Chiang or Dr Pau during the relevant period. Further, there was no evidence to suggest that he ever met Dr Pau (save during the course of the hearing) or that he had had other than very

limited contact with Dr Chiang in a social context at a time much later than the relevant time for the purpose of these proceedings.

(b) Mr Cham presented himself as an independent and private investor in securities with considerable experience in similar placements and considerable financial standing. He contended that he was introduced to the potential investment in PCH by Mr Shum, a business colleague of Mr Cham's. Mr Shum was the managing director of Get Nice Investment which was engaged by PCH to handle the share placement. Mr Shum confirmed this version of events in his written affirmation and in his oral testimony during the hearing. Mr Cham contended that he made his own commercial assessment of the potential investment in PCH and formed the view that this was a good opportunity to make an investment in a cash rich company associated with the Chiang family, a well known Hong Kong family.

(c) Dr Chiang's evidence was that she had briefly met Mr Shum once, in the company of Ms Lui, one of the founding shareholders in PCH. Dr Chiang had previously discussed the proposed investment by Dr Pau with PCH's other executive directors and with its corporate finance advisers (PCC) and, in that context, it was decided that another investor or investors should be invited in as there was still room under PCH's 20% general mandate. Dr Chiang stated that she initiated contact with Mr Shum and that Mr Shum found Mr Cham; Dr Chiang contended that she did not

know the identity of Mr Cham until, at the earliest, after the placing had been agreed.

(d) The Executive drew attention to the friendship which existed at that time between Mr Cham with Ms Loh and Mr Mui. At the relevant time, Mr Mui was registered as an investment representative at PCC; and Ms Loh was a registered investment adviser director of PCC. Ms Loh's name – but not her signature – appeared on a number of items of correspondence with the Stock Exchange in relation to the subscription by, and placement to, Dr Pau and Mr Cham (in addition to that of a colleague, Ms Wong). It was acknowledged by Mr Cham that he and Ms Loh were good friends at that time and that, from time to time, Mr Cham had done personal favours for Ms Loh such as making jewellery and wine purchases on her behalf; cheques in reimbursement of such expenses were presented by the Executive in evidence. The Executive invited the Panel to draw an inference that, given these close connections, particularly with Ms Loh, it was highly likely that it was Ms Loh, having been approached by Dr Chiang, who suggested the name of Mr Cham as a potential "friendly" investor and that this ultimately led to Mr Cham investing in PCH and joining the alleged concert party. Mr Cham strongly denied this. He also denied consulting Ms Loh or Mr Mui on his proposed investment in PCH although he knew both worked there; he said he did not want to put them in an embarrassing situation.

(e) Against this background, the Panel reviewed the circumstances surrounding the investment by Mr Cham and concluded as follows:

(i) There was no evidence presented to indicate that Dr Chiang was aware of Mr Cham's identity before the placement was agreed.

(ii) There was no evidence linking Dr Pau and Mr Cham.

(iii) There was no evidence presented that led the Panel to conclude that Ms Loh had been involved in the selection of Mr Cham as an investor in PCH or, even further, that there had been discussions between Ms Loh and Dr Chiang in relation to the type of investor Dr Chiang was seeking. Ms Loh was not called by any party or by the Executive to give evidence. Accordingly, the Panel relied solely on the evidence put before it in relation to the role of Ms Loh. That evidence contained assertions from Dr Chiang, Mr Cham and others that Ms Loh was in the process of leaving PCC during the relevant period, was in dispute with Dr Chiang over bonus payments and was rarely in the office. The clear inference was that, although Ms Loh's name appeared in correspondence with the Stock Exchange in relation to the placement and subscription, it was in fact a colleague of hers (Ms Wong) who was much more closely involved in the corporate finance aspects of the transaction. There was no evidence adduced by the Executive to cast serious doubt on this factual position in relation to Ms Loh.

There was no evidence produced and no allegation made of any relationship between Ms Wong and Mr Cham.

(iv) Neither the rationale for the investment by Mr Cham, given his investment history and financial means, nor the manner and speed in which he made his decision to invest in PCH shares, seemed so unreasonable to the Panel such as to cast substantive doubt on his explanation. He appeared to have done little research but was aware of Dr Chiang's reputation in the business community and her association with PCH. He also considered that the placement offer price of HK$0.67 per share was significantly lower than the trading high during the previous six months. The placing price was also at a discount to net assets and approximately equal to net cash per share.

(f) The Panel also considered in this context the circumstances of the disposal by Mr Cham of his PCH shares between 5 October 2000 and 16 January 2001. As mentioned earlier, the Executive asserted that the timing, manner and pattern of these disposals led to an inference that these events were orchestrated between Super Drive Inc. and Dr Chiang (and possibly Dr Pau) and Mr Cham. The Executive's contention was that this must have been part of the arrangements when Mr Cham decided to make his investment in PCH in July 2000. The Executive provided considerable evidence in relation to the matching of buy and sell orders by the alleged concert party and pointed to the number of coincidences that arose from

the matching of those orders; however, no evidence was put before the Panel from any of the brokers to the relevant trades. The Panel examined closely the trading and concluded as follows:

(i) There was a very clear correlation between the sales of PCH shares by Mr Cham and the purchases by Super Drive Inc., Dr Chiang and Dr Pau; 98% of the PCH shares sold by Mr Cham were bought by these purchasers. However, in the Panel's view, this was not entirely surprising in a thinly traded stock such as PCH where during the period there was, in effect, only one large seller and one large buyer.

(ii) There was evidence of unmatched orders from Mr Cham and some (albeit small) sales to unconnected parties. The Executive invited the Panel to see these in the context of the overwhelming sales to the alleged concert party members. In this regard, the Panel was not convinced that the seller (Mr Cham) was unaware (as he claimed) of the identity of the buyer. Mr Cham stated that the computer on his desk was programmed to alert him to bids for PCH shares and information on the identifying number of the buying broker (usually Pacific Challenge) would have been available to him. It seemed to the Panel most unlikely that an experienced market trader who occasionally, as he explained, put in buy orders as well as sell orders in relation to PCH shares during the relevant period, would not have had a reasonable idea as to the

identity of the buyer of his PCH shares. The Panel did consider that there were grounds to infer that the sales by Mr Cham were part of an orchestrated, pre-arranged or in some way co-ordinated disposal strategy but there was no clear evidence as to when such an agreement or arrangement might have been reached. This was important for reasons mentioned later in this ruling.

(iii) Part of the rationale put forward by Dr Chiang / Super Drive Inc. for the further purchases - in particular, averaging down the cost of the initial investment in PCH - was considered by the Panel to be plausible and reasonable. Similarly, the rationale put forward by Mr Cham to support his decision to sell his entire holding at the time he did so was also considered by the Panel to be reasonable. In his stated view, PCH was continuing to receive negative publicity in the media and he did not think that the PCH share price would improve in the short term. He therefore decided to limit the loss of his investment.

(iv) The Panel found the timing of the purchases by Super Drive Inc. and Dr Chiang - starting as they did when Mr Cham started selling and finishing exactly when he finished selling, down to the last share - suspicious. The averaging down strategy mentioned previously equally applied, in the view of the Panel, both earlier and later in the year and the bad publicity did not seem to have worsened significantly after the purchases ceased. However, there

was no direct evidence to suggest that Mr Cham talked to Dr Chiang, Dr Pau or any other person associated with PCH in relation to his decision to sell or as to the manner and timing of those disposals. Accordingly, although the Panel had suspicions and did not find the inference which it was invited to draw by the Executive to be an unreasonable one, it concluded that the trading pattern, given the explanations provided for it, was not determinative of a concert party arrangement at the relevant time.

(v) As stated, it was acknowledged by the Panel that the manner and timing of the disposals - being shortly after the placement and to alleged concert party members - was sufficient to raise questions about the relationship between the members of the alleged concert party, and whether any agreement or understanding existed between Mr Cham and the other alleged concert party members. The Panel was sceptical, as previously mentioned, as to whether it was true that Mr Cham did not know that Super Drive Inc. was the buyer in the market; or that Super Drive Inc. / Dr Chiang did not know or suspect that Mr Cham was the seller. Nevertheless, this was not, in the Panel's view, sufficient to sustain the allegation of concertedness. In addition, and importantly, the Executive acknowledged that any agreement or understanding would have needed to have been established <u>at the time</u> of the placing to Mr Cham in July/August 2000 and <u>not</u> subsequently (i.e. at a later

stage when Mr Cham decided he wished to exit his investment in PCH). For the reasons already mentioned, the Panel did not consider that this was established.

(vi) Finally, it was not contested that Mr Cham suffered an apparent loss of approximately HK$1.5 million in relation to his investment in PCH shares. No evidence was put before the Panel to support an inference that Mr Cham had in any way been reimbursed for all or part of that loss by any other members of the alleged concert party. Furthermore, the Executive's contention that the trading arrangements may have been designed to save Mr Cham from incurring greater losses, was never substantiated or proven.

(g) Accordingly, on the basis and for the reasons stated, the Panel determined that there was insufficient evidence to conclude that Super Drive Inc., Dr Chiang, Dr Pau and Mr Cham were acting in concert at the relevant time.

Dr Chiang, Super Drive Inc. and Dr Pau

15. The Panel then turned to the alleged concert party between Dr Chiang, Super Drive Inc. and Dr Pau. In this context, and as previously noted, the Panel was of the view that Super Drive Inc. was a concert party with Dr Chiang and no distinction between the two should be made for the purposes of the consideration of the concert party allegation involving Dr Pau (or, indeed, Mr Cham); nothing was made of such a distinction in arguments before the Panel (save in the context of noting that the shares purchased from Mr Cham in the period from October

2000 to January 2001 were largely purchased by Super Drive Inc. rather than Dr Chiang herself).

16. The basis of the allegation of concertedness in relation to Dr Chiang and Dr Pau was (i) the close business and personal relationship between Dr Pau and Dr Chiang – Dr Pau had known Dr Chiang since she was 10 years old and they had been colleagues for a number of years, and Dr Pau was in a senior position in Chen Hsong, a group controlled by the Chiang family; (ii) the speed with which Dr Pau made his investment decision and his apparent lack of research into that company before he made his investment decision (for example, he had seemingly not been aware that the brokerage business had been sold); (iii) in January 2001, his appointment as the managing director of Eco-Tek , together with his acquisition of a 3% shareholding in that company for only HK$9,360 and his receipt of a salary from Eco-Tek of HK$120,000 per month; and (iv) the timing and manner of his subsequent purchase of PCH shares in January 2001.

17. The Panel dealt with each of these in turn:

(a) It was acknowledged that Dr Pau had a close and long-standing business and personal relationship with Dr Chiang, and her father, which had existed over many years. However, whilst a pre-existing relationship of a personal or business nature is a factor to be taken into account in establishing whether a concert party relationship exists, it is not in itself determinative. Dr Pau gave evidence before the Panel and the Panel saw him as a self-made man with independent financial means; there was no

indication from the evidence that he gave or from that given by Dr Chiang, that he was "under her thumb" or otherwise liable or prone to act in accordance with her instructions or wishes. Dr Pau had built up a considerable fortune, part of which he invested in shares. It was not contested that he used his own funds to make the investment in PCH or that he held that investment until the takeover of PCH by Kandy Profits in 2002.

(b) Dr Pau's and Dr Chiang's contention was that Dr Pau raised with Dr Chiang his interest in a potential investment in PCH during a casual conversation with Dr Chiang in June 2000 whilst Dr Chiang was still in hospital after delivering her first child. Dr Pau's stated rationale for the investment was that he had considerable faith in Dr Chiang's business acumen and wished to invest in PCH as an alternative investment to E1, an opportunity which he felt he had missed out on at the time and which had proved to be a great success. It was a fact - and much was made of this by the Executive – that the subscription by Dr Pau was arranged very quickly following the decision by Dr Pau to invest and that the relevant board meeting of PCH was convened on short notice and without the attendance of the non-executive directors of PCH; this was discussed earlier in this ruling. Dr Pau contended that his decision to invest was based on his belief in Dr Chiang's business acumen (as referred to previously), together with his awareness in general terms of PCH's business as a result of the investment made by the Chen Hsong group in PCH, and, in his evidence

before the Panel, he contended that he wanted the investment to proceed quickly in case PCH changed its mind. Dr Chiang contended that she wished to move quickly because she believed Dr Pau would help restore confidence in the company and because he was a capable person who would help bring a good image to the company; accordingly, she wished to respond to his request that PCH move quickly with his proposed investment. The Panel was somewhat surprised by this explanation in relation to the speed of the investment given the close relationship between Dr Pau and Dr Chiang; and was also surprised by Dr Pau's apparent lack of knowledge of the sale of the brokerage business by PCH. However, in the round, the Panel concluded that the submissions by Dr Chiang and Dr Pau in this regard relating to the rationale for the investment and its speed were sufficiently plausible.

(c) In support of its allegations of concertedness between Dr Chiang, Super Drive Inc. and Dr Pau, the Executive referred to arrangements that were put in place with Dr Pau regarding Eco-Tek, a company set up by Dr Chiang; and argued that the circumstances surrounding the allocation of shares in Eco-Tek to Dr Pau in January 2001 (and the later transfer of a patent in a sound barrier technology by Dr Pau to Eco-Tek) together with his appointment as managing director of Eco-Tek (with consequent receipt of a monthly salary) were evidence of an inducement to (and understanding with) Dr Pau at the time he subscribed for shares in PCH in July 2000 such as to give rise to a clear inference of concertedness.

Further weight was given to the Executive's argument in this regard by reason of the fact that such events took place on 16 January 2001, the date on which Dr Pau purchased a further 834,000 PCH shares (sold by Mr Cham). The Panel examined these events closely since it accepted that they could well support the inference suggested by the Executive but ultimately concluded that this was not established in the light of the explanations given by Dr Chiang and Dr Pau. In particular:

(i) Eco-Tek was a start up company with little revenue or profits and no guarantee of success, financial or otherwise. Dr Pau was already a consultant to Eco-Tek and had a stated interest in environmental projects. The Panel was informed that three other employees were also allotted shares in Eco-Tek at the same time (and at the same price) although not to the same extent as Dr Pau. The fact that the company was ultimately successful and became an entity listed on the Growth Enterprise Market in due course could not have been foreseen with any degree of certainty in January 2001. Therefore, the Panel did not see any grounds on which to challenge the price at which the shares had been allotted to Dr Pau.

(ii) It was not clear to the Panel exactly what the arrangements were in relation to the transfer to Eco-Tek of the patent in relation to a particular sound barrier technology development by Dr Pau and whether that transfer was in part consideration for the issue of shares in Eco-Tek to Dr Pau; or whether, if it was, any

understanding had been reached in relation to that at the time of the issue of shares in Eco-Tek to Dr Pau. However, in light of its earlier finding regarding the consideration paid for the shares, the Panel did not consider this essential to its reasoning.

(iii) The Panel did not consider that the salary of HK$120,000 would constitute an inducement – or part of an inducement – for Dr Pau's decision to make an investment of HK$16 million in PCH, particularly in light of his apparent financial standing and the fact that he had been paid substantially more in his final years of employment by the Chen Hsong group.

(d) The Executive also referred to Dr Pau's arrangements (i) with Cottingham Inc. (which appeared to be a tax avoidance arrangement in relation to overseas services provided by directors of CHIL and in which Dr Pau participated) and (ii) with Shine Asset (which was owned by a Ms Lin, a long-standing friend of Dr Pau's and which had a consultancy agreement with PCH). In relation to Cottingham Inc., little was made of this at the hearing and the Panel attached no weight to it. In relation to Shine Asset, the Executive referred to the fact that Shine Asset used Dr Pau's home address as its address and to certain financial transactions conducted through Shine Asset. Although none of this was disputed, and there was a connection between Shine Asset and PCH through the consultancy arrangement, the Executive failed to establish through its evidence any

link between Dr Pau's investment in PCH and his relationship with Ms Lin (and, through her, Shine Asset).

(e) Finally, the Executive drew attention to, and sought to rely on, the timing and manner of further purchases of PCH shares by Dr Pau on 16 January 2001 particularly in light of the afore-mentioned arrangements with Eco-Tek on the same date. These purchases – which amounted to 834,000 shares for approximately HK$500,000 – were made from Mr Cham. Dr Pau contended that these purchases were made on that particular date because it was his Chinese birthday and he had a practice of making investments on that date for good luck as it was an auspicious date for him. He did so believing the shares in PCH at that time represented good value. Again, there was no evidence presented to suggest that Dr Pau and Mr Cham knew each other and that this sale and purchase had been arranged between them. However, it was pointed out by the Executive that further shares in PCH were available at a lower price later that day from an unconnected third party which Dr Pau did not purchase. Dr Pau explained that his reason for not making that subsequent purchase was that he had already spent his proposed budget of HK$500,000. Whilst the timing and manner of his purchase may be questionable, the Panel concluded that it was not determinative of a concert party.

(f) The Panel accepted that the Executive was required – as is often the case in concert party cases – to review the facts and identify suspicious activities. It was acknowledged by the Panel that there were a number of

activities identified in relation to Dr Pau which, in the round, could give rise to a suspicion that a concert party had indeed been formed between Dr Chiang, Super Drive Inc. and Dr Pau. However, having analysed these activities in considerable detail, both individually and collectively, the Panel concluded, on the basis of the evidence provided to it, that a concert party relationship was not established.

(g) Accordingly, on the basis and for the reasons stated, the Panel determined that there was insufficient evidence to conclude that Super Drive Inc., Dr Chiang and Dr Pau were acting in concert at the relevant time.

Bringing of disciplinary proceedings by the Executive

18. Before dealing with the issue of publication of the Panel's rulings in this matter, the Panel commented on the commencement of disciplinary proceedings by the Executive in this case. It was acknowledged by the Panel that this was a difficult case where suspicions were reasonably aroused and, in the view of the Panel, a case in which the Executive had grounds to conduct an appropriate investigation and to commence disciplinary proceedings. The Panel fully understood the basis of the inferences that the Executive was asking it to draw from the identified facts and was not by its decision, questioning the correctness of the Executive's actions.

Publication

19. The Panel then turned to the question of publication of the Panel's decisions in this matter, not only of this decision but also of the preceding six decisions of this Panel in relation to this matter.

20. It is stated, in section 16.1 of the Introduction to the Codes, that, subject to confidentiality considerations, it is the policy of the Panel to publish its rulings, and the reasons for its rulings so that its activities may be understood by the public.

21. The Executive stated that it had no objection to publication but several of the parties objected to publication. In view of this, the Panel decided to hear submissions on this matter at 11.00 a.m. the next day. The Panel's written decision on publication is attached as the Seventh Panel Decision (Appendix 8).

22. The Panel reminded the parties of their obligation of confidentiality under section 13.6 of the Introduction to the Codes.

16 July 2007

Appendix 2

TAKEOVERS AND MERGERS PANEL

FIRST PRELIMINARY PANEL DECISION

PACIFIC CHALLENGE HOLDINGS LIMITED

In relation to certain preliminary matters in connection with proposed disciplinary proceedings

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1. The Panel met on Wednesday 11 January 2006 to consider certain preliminary matters concerning disciplinary proceedings initiated against certain parties by the Executive under section 12.1 of the Introduction to the Codes in relation to trading in shares of PCH between 2000 and 2002.

Background

2. On 23 April 2004, the Executive instituted disciplinary proceedings against Dr Chiang, Dr Pau, Mr Cham and Super Drive Inc.. The Executive considered that these parties had breached Rule 26.1 of the Takeovers Code.

3. A Panel was appointed to hear the proceedings and to make a determination in accordance with section 13 of the Introduction to the Codes. The Chairman of the Panel had a conflict of interest and, therefore, in accordance with the Conflict Guidelines, the Chairman stood down and a Deputy Chairman was appointed as

Acting Chairman. By letter dated 3 May 2004, the Panel Secretary informed the parties of the identity of the Acting Chairman of the Panel; and by letter dated 11 June 2004, the Panel Secretary informed the parties of the identity of the other Panel members.

4. Following various submissions by the parties, and meetings in June and September 2004 to deal with preliminary issues, a disciplinary hearing took place on 8-10 December 2004 and on 21 February 2005, under the chairmanship of the Acting Chairman. At the conclusion of the hearing of 21 February 2005, the Panel adjourned to deliberate; the meeting reconvened later that day and the Acting Chairman announced the Panel's decision. On 4 April 2005, the Panel circulated written reasons for its decision. The decision at that stage only addressed the issue of breach of the Takeovers Code; it did not address the question of what (if any) sanctions were appropriate. A further hearing was contemplated to address the question of sanctions.

5. On 26 May 2005, Clifford Chance (on behalf of Dr Chiang) wrote to the Panel Secretary asserting that the Acting Chairman of the Panel had a conflict of interest which he ought to have disclosed at the outset of the proceedings and which should have prevented him from sitting on the Panel. This conflict related to the Acting Chairman's shareholding and directorship in the parent company of one of Dr Chiang's key competitors which Clifford Chance asserted amounted to a presumed conflict under paragraph 3 of the Conflict Guidelines. They stated that Dr Chiang only became aware of the conflict after delivery of the Panel's decision on 4 April 2005.

6. In accordance with the Conflict Guidelines, the Acting Chairman referred the matter to the SFC Chairman. On 20 June 2005, the Panel Secretary wrote to the parties (including the Executive), stating that, in accordance with the Conflict Guidelines, the SFC Chairman had considered the conflict issue raised by Clifford Chance ("SFC Chairman Letter"). The Panel Secretary advised that the SFC Chairman considered that no presumed conflict of interest arose and that it was arguable whether or not an apparent conflict of interest arose. However, it was then stated that:

"As a matter of prudence, the Chairman has:-

1. decided that the hearing before the present Panel should be discontinued and decisions made by it treated as being of no effect; and

2. indicated that if the Executive wishes, it may institute new proceedings in which event a differently constituted Panel should be convened to hear the case afresh."

7. On 13 July 2005, the Executive wrote to the Panel Secretary and expressed the view that the practical approach would not be for the Executive to commence new proceedings but rather for a new Panel to be convened for the purposes of rehearing the matter on the basis of the Executive paper dated 23 April 2004 by which the initial disciplinary proceedings had been instituted; and, on 14 July 2005, the Panel Secretary wrote to confirm that the Secretariat had begun convening a new Panel. This course of action was objected to by the other parties to the proceedings, who indicated, amongst other matters, that the Panel Secretary had acted contrary to the decision of the SFC Chairman outlined in the SFC Chairman Letter (see paragraph 6 above).

8. On 19 August 2005, the Panel Secretary wrote to advise that the SFC Chairman had looked again at his earlier decision and wished to clarify that:

"what he intended was that the proceedings before the particular Panel chaired by [Acting Chairman] should be set aside. However, he did not consider whether the steps taken by the Executive on 23 April 2004 instituting proceedings before the Takeovers and Mergers Panel should also be set aside."

The letter further stated that it was for the Executive to decide whether or not to discontinue the proceedings commenced on 23 April 2004 or to recommence new proceedings. The Executive confirmed its position on 22 August 2005.

9. Accordingly, the Panel Secretary proceeded to constitute a new Panel and, on 1 September 2005, wrote to the parties indicating the identity of the new Acting Chairman of the newly constituted Panel. As that stage, the Panel Secretary indicated that the Secretariat was in the process of finalizing the membership of this Panel and would provide a list of the other members to the parties once it was finalized. This letter also indicated that the new Acting Chairman had been shown specified correspondence that had been exchanged between the Panel Secretary, the Executive and the parties and had formed the preliminary view that the matters raised were procedural matters that should be adjudicated upon by the Panel. The new Acting Chairman, therefore, invited all parties to make written submissions in relation to:

(a) what documentary or other information should be provided to the Panel to facilitate its consideration of the case; and

(b) any other preliminary matters that the parties or the Executive wished to raise.

10. In its letter of 9 September 2005, the Panel Secretary clarified, on behalf of the new Acting Chairman, that item (b) in paragraph 9 above was intended to give the parties and the Executive an opportunity to address any preliminary issues that they considered relevant, and that this should include any arguments concerning jurisdiction and procedure and the question of whether or not a reconstituted Panel should hear this matter. The letter also confirmed that, in view of the exceptional circumstances of this case, the new Acting Chairman had decided that the parties and the Executive could be represented by lawyers of their choice (whether solicitors or barristers in this case).

11. Subsequently, a preliminary hearing was convened for 4 November 2005 to consider the following:

(a) whether the Panel had jurisdiction to hear the disciplinary proceedings against Dr Chiang, Dr Pau, Mr Cham and Super Drive Inc.;

(b) subject to the Panel finding that it had jurisdiction to hear the matter, (i) the procedure for the conduct of the rehearing; and (ii) what documents or other information should be provided to the Panel to facilitate its consideration of the substantive case; and

(c) any other preliminary matters that might be considered at the preliminary meeting of which prior written notice had been given.

Subsequently, due to the unavailability of Dr Chiang and the main partner handling this case at Clifford Chance, the date of the hearing was re-scheduled for 11 January 2006.

12. On 19 December 2005, the Panel Secretary wrote to the parties enclosing a copy of an advice ("Advice") received from Mr Herberg, a barrister in the United Kingdom. The letter stated that the Panel Secretary had been asked by the Legal Adviser to inform the parties and the Executive that he had been asked by the new Acting Chairman to give his provisional views on the issues which the new Acting Chairman had directed to be considered by the Panel at the preliminary hearing scheduled for 11 January 2006. The letter went on to state that the Legal Adviser had instructed Mr Herberg to advise on these issues, in the light of the submissions received from the parties and the Executive, and had now received the Advice. The letter further stated that the Legal Adviser concurred with the views expressed in the Advice and had provisionally adopted the Advice as his own. It was emphasized that the views (and therefore the advice to the Panel from the Legal Adviser) were provisional and might change in the light of the further submissions from the parties. It was further emphasized that these issues were matters for the Panel to decide and that the Panel had to make its determination at or following the preliminary meeting on 11 January 2006 after considering the submissions from all of the parties. The letter finished by stating that the Legal Adviser had further advised the new Acting Chairman that the Advice should be circulated to the parties and the Executive in advance of the preliminary meeting so that they would be afforded an opportunity of making representations on it.

13. Following receipt of the Advice by the parties, various submissions were made by, or on behalf of, the parties as to (a) the appropriateness (or otherwise) of the Legal

Adviser seeking the Advice; (b) whether the Advice went beyond advice on strictly legal matters and strayed into matters of fact which were entirely for the Panel to decide; (c) the fact that only the Advice and not the related instructions to Counsel ("Instructions") or any other communications between the Legal Adviser and the new Acting Chairman (on the one hand) and between the Legal Adviser and Mr Herberg (on the other hand) had been disclosed to the parties; and (d) the fact that the Advice had only been circulated on 19 December 2005, leaving little time for it to be considered (and for submissions to be made on it) before the scheduled hearing date of 11 January 2006 (given the intervening holiday period).

14. Formal requests for an adjournment of the 11 January 2006 hearing were received on 6 January, and objected to by the Executive on 9 January 2006. The new Acting Chairman considered this matter in the light of the various submissions received and, on 9 January 2006, the Panel Secretary wrote to the parties indicating that the new Acting Chairman was not prepared to grant an adjournment at that stage but that, at the hearing on 11 January 2006, the Panel would hear submissions at the outset on whether the proceedings should be adjourned and would re-consider the matter at that stage. Subsequent to that date, and prior to the 11 January 2006 hearing, further submissions were received from various of the parties on this issue and the Legal Adviser sought to address a number of the issues raised in correspondence with the parties through the Panel Secretary.

Adjournment

15. At the outset of the Panel hearing on 11 January 2006, the Panel heard submissions from the parties as to whether the proceedings should be adjourned. The principal grounds focused on at the hearing for this request related to (a) the nature of the legal advice sought; and (b) and the lack of full disclosure of correspondence between (i) the Legal Adviser and the new Acting Chairman or the Panel; and (ii) the Legal Adviser and Mr Herberg. Clifford Chance (on behalf of Dr Chiang) submitted that the Advice, in that it considered issues of "fairness" as to whether the proceedings should be heard by the Panel (i.e. whether, even if the Panel had jurisdiction to hear the matter, the Panel should dismiss the proceedings because it would be manifestly unfair and improper for them to continue), went beyond "legal advice" and amounted to advice on pure factual questions on which it was not appropriate for the Panel to have sought the advice of the Legal Adviser (and for the Legal Adviser to have sought the advice of Mr Herberg). Clifford Chance further submitted that the parties were entitled to have sight of all communications by and from the Legal Adviser referred to above in order to have a fuller understanding of the nature of those communications and so as to be able to address the Panel fully in that regard. In particular, in its submission dated 11 January 2006, Clifford Chance requested answers from the Legal Adviser in relation to certain specified questions as to the manner in which the Advice was sought (under whose instruction; the nature of those Instructions and whether they extended to the "fairness" issue referred to above; the purpose for which the Advice was sought; whether the Advice was to be regarded as

"final" and why the Legal Adviser decided to provide the Advice to the Panel rather than simply put forward his own views).

16. The Panel carefully considered all of the submissions by the parties and the Executive, and the materials placed before the Panel both at the hearing on 11 January 2006 and prior to that meeting, and determined that it would not adjourn the hearing at that stage but would proceed to hear the proposed second phase of the hearing in relation to jurisdiction. The basis for that decision was that the Panel felt that the questions raised by Clifford Chance in their submission of 11 January 2006 had either been adequately addressed by the Legal Adviser in correspondence prior to the hearing or in his comments at the hearing on 11 January 2006; or, so far as they related to whether the Advice was "final" or why the Legal Adviser had decided to provide the Advice rather than simply state his own views, were not pertinent to the issue of the adjournment at that stage.

17. In relation to the question by Clifford Chance as to whether the Panel had requested that advice be given to it by the Legal Adviser on the "fairness" issue, the new Acting Chairman confirmed that, whilst the Panel did not specify the specific issues in respect of which legal advice should be sought, it had requested advice in relation to the key legal issues. This was done orally and the new Acting Chairman had not seen or reviewed the Instructions sent to Mr Herberg although he had been aware that Mr Herberg was to be instructed by the Legal Adviser.

In light of these answers, the Panel did not consider that there needed to be an adjournment in order for Clifford Chance or other parties to make further submissions or to refine their earlier submissions on these points.

18. On the related point of provision of further documentation relating to communications with the Legal Adviser and between the Legal Adviser and Mr Herberg, the Panel was not persuaded that provision of this documentation was appropriate. The parties had been provided with the Advice and, on 4 January 2006, had been provided with copies of the written Instructions sent by the Legal Adviser to Mr Herberg. The Panel considered this provided the parties with sufficient information on which to make their submissions on the point being considered by the Panel at that stage and that the parties had had sufficient time to consider that information and to prepare appropriate submissions and representations on it.

19. With regard to the further ground raised by Clifford Chance, namely that the hearing should be adjourned to give the Panel more time to consider its position in the light of Clifford Chance's submission of 11 January 2006 as to the appropriateness (or otherwise) of the Advice extending to the issue of "fairness", the Panel believed that it had had adequate time to consider its position (both prior to and at the hearing) and considered that it did not require any further legal advice on this point at that stage.

20. It was further recognized that, if they so wished, the parties would have had a further opportunity to raise any relevant points (as referred in paragraphs 15 to 19

above) if, in due course, the Panel were to hear arguments on the substantive issue of whether, in the circumstances, it should dismiss the proceedings at that stage because it would be manifestly unfair and improper for them to continue, as this was one of the preliminary issues set down for discussion at the 11 January 2006 hearing.

Accordingly, the Panel decided to proceed to hear the question of jurisdiction.

Jurisdiction

21. In relation to the question of jurisdiction of the Panel to rehear the matter, various submissions were received from the parties involving the citation of a considerable number of administrative law cases from various jurisdictions around the world, and quotations from various leading textbooks on the subject of administrative law. The submissions made on behalf of the parties contained a number of detailed arguments based primarily on (a) the nature of the Panel; (b) the lack of an express procedure in the Takeovers Code to deal with the current circumstance; (c) the import of the SFC Chairman Letter referred to in paragraph 6 above; and (d) the fact that the issue which led to the setting aside of the first Panel hearing was one of apparent bias (due to the possible apparent conflict of the previous Acting Chairman). Counsel for the Executive and the other parties made detailed legal arguments (both in writing prior to the hearing and at the hearing itself) with respect to these issues and there was a considerable divergence of view between the parties, on the one hand, and the Executive, on the other hand, as to the propositions for which the cases cited were authority and the relevance of those cases to the Panel and the present proceedings. Having

heard the various submissions, the Legal Adviser was asked by the new Acting Chairman to confirm his provisional view on the question of jurisdiction which he duly did.

22. It should be noted that the Panel is not a court of law and its members are not qualified judges. Although a number of the Panel members (including the new Acting Chairman) were lawyers by background or were then in practice, they were not sitting as lawyers and, in particular, were not experts in the area of administrative law. It was for this reason that the new Acting Chairman, having reviewed the initial submissions of the parties, decided that it was appropriate for the Panel to have the benefit of advice from the Legal Adviser on the key legal issues raised, recognizing, however, that, ultimately all matters of decision, on law as well as on fact, were for the Panel and were not to be delegated to the Legal Adviser. Accordingly, although the Acting Chairman, on behalf of the Panel, had sought advice from the Legal Adviser on such matters in order to assist the Panel in its deliberations (which Advice had been shared with the parties as indicated in paragraph 12 above), it should be recognized that the Panel is essentially a "lay" tribunal, and is intentionally constituted as such. The Takeovers Code itself is specifically stated not to have the force of law and is "non-statutory" in nature.

23. Against this background, the Panel carefully considered all of the submissions by the parties and the Executive, the materials placed before the Panel for the purposes of the hearing on 11 January 2006, and the issues surrounding the proper characterization of the previous Panel hearing in terms of the matters raised and,

in particular, (a) the completeness of the proceedings before the previous Panel; (b) the unavailability of an appeal against the decision of the previous Panel on liability (i.e. on the question of whether there had been a breach of the Takeovers Code); and (c) the characterization of the decisions made by the previous Panel by the SFC Chairman as being of no effect (as referred to in paragraph 6 above). The Panel also considered the absence of an express reference in the Codes to a rehearing by a new Panel, the arguments made by the parties in that regard, and the nature of the Panel in the light of the matters under consideration. In all the circumstances, the Panel concluded that:

(a) the previous Panel had not fully concluded hearing the matters before it in that no hearing had yet occurred in relation to appropriate sanctions and accordingly, the decision on sanctions had yet to be taken;

(b) the decision of the previous Panel was set aside by the SFC Chairman and was to be treated by all parties as being of no effect;

(c) the ruling by the SFC Chairman left it to the discretion of the Executive to decide whether or not to discontinue the proceedings that were commenced on 23 April 2004; and

(d) given the nature of the Panel and the matters with which it deals, the Executive's decision to seek to constitute a new Panel, and to seek a re-hearing of the substantive issues, was, in the circumstances, appropriate. The Panel considered that the absence of an express authority in the Codes to constitute a new Panel did not preclude it from reaching this conclusion.

24. In reaching its conclusion in points (a) to (c) in paragraph 23 above, the Panel took note of the arguments in relation to the application of the doctrine of *functus officio*. In the Panel's view, this was not an appropriate case for the application of that doctrine. The original matter had not been concluded because the sanctions hearing had not yet taken place. The Panel was not persuaded that the absence of an appeal from the decision on liability should cause the Panel to regard the proceedings as three separate matters (jurisdiction, liability, penalty), two of which were concluded, as opposed to one matter which was not finally resolved. Moreover, the SFC Chairman had decided that the original decision should be of "no effect" and it was so treated by all the parties. The Panel believed that the SFC Chairman was correct in that decision and he was also correct to leave it to the Executive to decide whether to constitute a new Panel. Accordingly, the Panel did not consider that the previous Panel had dealt with the case fully such that the doctrine of *functus officio* should apply.

25. In relation to the question of whether the Panel should rehear the matter in the absence of an express power to do so in the Codes, the Panel believed that the appropriate issue to consider in this regard was the nature of the Panel, the wording of the Introduction to the Codes and the nature of the matter before it. Clearly, the Panel's function encompasses significant matters and the Panel has an important role to play in ensuring that the Hong Kong financial markets are transparent and orderly. The Panel believed that it is important that the Panel should not be lightly disenfranchised from exercising its regulatory function and that, in matters of this nature, it is important that the Panel be able to regulate the

market and conduct disciplinary hearings unless there were some overwhelming argument against jurisdiction (which it did not see here). Whilst it is true that the Codes do not expressly mention the creation of a "new" Panel, or set out a specified procedure for a rehearing in these circumstances, the Codes are just that - the Codes - which are intentionally brief, general and not drafted with the precision of legislation. Accordingly, in the absence of an express prohibition in the Codes on reconstituting a new Panel in such circumstances, the Panel believed that it was open to the Executive to request, and for the Panel Secretary to convene, a new Panel to rehear the matter in the circumstances of the present case.

26. On that basis, and having taken until noon on 13 January to consider fully and reach its decision, the Panel ruled that it had jurisdiction in this matter and that it then wanted to proceed to hear the remaining matters identified for consideration at the hearing on 11 January 2006. It was agreed that such further matters would be set down for further hearings and the Panel Secretary was instructed to find the earliest convenient dates for such further hearings. All parties were asked to be flexible and co-operative in this regard.

16 July 2007

Appendix 3

TAKEOVERS AND MERGERS PANEL

SECOND PRELIMINARY PANEL DECISION

PACIFIC CHALLENGE HOLDINGS LIMITED

In relation to certain further preliminary matters in connection with proposed disciplinary proceedings

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1. The Panel met on 16, 17 and 18 February 2006 to consider certain further preliminary matters concerning disciplinary proceedings initiated against certain parties by the Executive under section 12.1 of the Introduction to the Codes in relation to trading in the shares of PCH between 2000 and 2002.[1]

2. The purpose of these meetings was to consider the following:

   (a) whether the Panel should dismiss the disciplinary proceedings against Dr Chiang, Dr Pau, Mr Cham and Super Drive Inc. because it would be unfair or improper for them to proceed; and

   (b) subject to the Panel finding that it was not unfair or improper to proceed; (i) the procedure for the conduct of the rehearing; and (ii) what documents

[1] These meetings were a continuation of the previous meetings held on 11 and 13 January 2006 and were held so that the Panel could consider the remaining preliminary matters which were outstanding from those meetings.

or other information should be provided to the Panel to facilitate its consideration of the substantive case.

Fairness

Introduction

3. The Panel acknowledged that issues surrounding the fairness and properness of its proceedings and procedures are of considerable importance and go to the integrity of the Panel system. The Panel therefore spent a considerable period of time deliberating the various issues raised.

Role of the Panel

4. As noted in the First Preliminary Decision in this matter (Appendix 2), the Panel's function encompasses significant matters and the Panel has an important role to play in ensuring that the Hong Kong financial markets are transparent and orderly. In particular, the Panel is charged with ensuring that the Codes are correctly interpreted and enforced and that those who have breached those Codes are appropriately sanctioned. Therefore, in the context of disciplinary proceedings, the Panel should not lightly decide that proceedings initiated by the Executive should be dismissed prior to a full hearing of the merits. Equally, however, it is important in terms of the integrity of the Panel system, that its procedures and processes are - and are seen to be - fair and proper and that, in the circumstances of any particular case, there is - and will be perceived to have been - a fair hearing for all parties of the allegations put forward by the Executive.

Appropriate Test

5. Against this background, the Panel carefully considered the test which it should apply in deciding whether it should exercise its discretion to dismiss the current disciplinary proceedings because it would be unfair or improper for them to proceed.

6. Various formulations were suggested by the parties and by the Executive as to what should be the appropriate test, accompanied by citations of relevant judicial authorities. In that regard, the Panel did not agree with the submissions made by the Executive that, in considering the exercise of its discretion in these circumstances, the Panel should proceed to hear the case unless there was an "overwhelming" reason not to do so. In the Panel's view, the exercise was much more a judgment based on common sense having weighed and balanced the various factors. Often, this would require the Panel to balance the *public interest* in its proceeding against the current, and prospective, impact of proceeding on the *private interests* of the parties in the particular case. The onus was not on either the Executive or on the parties to do this weighing exercise but rather on the Panel in the light of the submissions of the various parties as to the factors to be taken into account, and the weight to be attached to those factors.

Factors

7. The Panel carefully considered all the factors raised on behalf of the Executive and the other parties in this case. The factors raised covered a number of areas including the seriousness of the allegations and of the proposed sanctions; the nature of disciplinary proceedings; the time period which had elapsed from the

date of the alleged breaches of the Codes, and the further delay occasioned by the decision of the SFC Chairman to set aside the original proceedings; costs and the lack of a regime within the Panel system to compensate for such costs; the procedure whereby the Executive chose to recommence the proceedings before this Panel; the nature of the advice received from Mr Herberg and adopted by the Legal Adviser to the Panel; certain matters in relation to the conduct of the initial hearing (in terms of evidence) and their relevance to any subsequent hearings; and the apparent lack of an aggrieved third party at this stage.

8. Having considered and weighed all these factors, the Panel considered that the following factors were of most importance:

(a) *Seriousness of the alleged breaches put forward by the Executive and the proposed sanctions:* The Executive's paper of 23 April 2004 alleged significant breaches of Rule 26 of the Takeovers Code, and proposed extremely serious sanctions for those breaches. Rule 26 reflects a fundamental principle of the Takeovers Code, and is a cornerstone in the regulation of takeovers in Hong Kong. Any breach - which by its very nature is likely to affect minority shareholders - is to be taken extremely seriously. In this case, the Executive was also seeking significant, and far-reaching, sanctions in relation to those involved in the alleged breaches. Of course, none of the breaches, the involvement of the various parties or the appropriateness of the sanctions had yet been proved but the Panel considered that it was right, at that stage, to take account of the alleged nature of the breaches and the proposed level of sanction. In that regard,

the Panel further commented that, first, it was not convinced by the argument that there was no prejudice to other shareholders of PCH arising out of the alleged breaches of the Takeovers Code (as put forward on behalf of some of the parties) and, second, that in the Panel's view, the absence of an aggrieved third party who has complained to the Executive was not a relevant factor to be taken into consideration.

(b) *Costs:* It is the case – and the Panel had been so advised – that the Panel has no power to order costs in relation to disciplinary proceedings; this is well known to the market, and to the parties. Nevertheless, it was right that the Panel did consider the financial consequences for the parties in deciding whether to exercise its discretion and, in this case, the Panel acknowledged that the parties were represented by counsel and that, of necessity, a further rehearing would result in additional costs.

(c) *Effect on the parties:* It was recognized by the Panel that a rehearing would place stress on the parties and on the witnesses that they would wish to have attend at any rehearing. The Panel acknowledged that any rehearing would be an ordeal and that the parties should not be put through this ordeal unless public interest required it.

(d) *Time since alleged offences and subsequent delay occasioned by dismissal of first proceedings:* There is no "statute of limitations" in relation to the bringing of disciplinary proceedings for alleged breaches of the Codes; nor is there any guidance provided in the Codes, or any established practice. Clearly, it is in the public interest that alleged breaches are pursued as

quickly and as efficiently as possible and there was no evidence before the Panel at that stage to suggest that the Executive had not investigated, or pursued, this matter with appropriate diligence and within an appropriate timeframe. Nevertheless, it remained the fact that the events which gave rise to the current disciplinary proceedings happened in 2000 – 2001, over five years ago. It was also the case that the dismissal of the earlier proceedings would result in a further delay of more than one year if the matter proceeded to a rehearing.

(e) *Procedural matters:* The parties' representatives made much of certain procedural issues connected with (i) the dismissal of the earlier proceedings, (ii) the method by which the Executive chose to pursue the rehearing (through reliance on its original Executive's paper of 23 April 2004) with the consequent result that this Panel became aware of the previous proceedings and the result of those proceedings (although not the reasons for that result), and (iii) the manner in which the Legal Adviser to the Panel sought legal advice and provided that advice to this Panel.

(i) In relation to the dismissal of the original proceedings, the Panel acknowledged that it was an unfortunate event which had given rise to delay, costs and stress for the parties.

(ii) In relation to the procedure to be adopted in relation to a rehearing, there were no express provisions in the Codes to deal with this, and the Panel understood no Panel precedent on which the Panel or the Executive could rely. This process had given rise to some issues in

relation to knowledge of the previous hearing and in relation to the documentation to be placed before this Panel but, in all the circumstances, the Panel considered that it was not inappropriate for the Executive to seek to restart the proceedings in the manner in which they did rather than issuing a completely new Executive paper which would (potentially, at least) have allowed the hearing before a new Panel to proceed without any knowledge of the fact, or decision, of any previous Panel.

(iii) The advice provided by the Legal Adviser, and in particular the advice given to him by Mr Herberg, had been the source of much submission and discussion. The parties commented critically on both the substance of the advice given by Mr Herberg and on the process by which it was sought and then adopted as the advice of the Legal Adviser to the Panel. It was acknowledged by the Panel, in the hearing on 11 January 2006, that the role of the Legal Adviser is to provide legal advice. There had been much argument as to whether Mr Herberg's advice strayed into the area of "fact" and that, on that basis, it was inappropriate for the Legal Adviser to adopt that advice and provide it to the Panel. Necessarily, it was submitted, the Panel would be influenced by Mr Herberg's views in relation to matters which, it was argued, went beyond legal advice and were entirely within the Panel's discretion. The Panel considered these arguments carefully in the context of the question

before it. It was firmly of the view that the Legal Adviser intended to give legal advice and in no other way to seek to influence the exercise of discretion by the Panel. The Panel was also firmly of the view that it would be reasonable to interpret Mr Herberg's advice as being that there was no legal principle or impediment which required the Panel to make a decision either to proceed with, or to dismiss, the proceedings. The Panel did not believe it had been influenced by any matters canvassed in Mr Herberg's advice beyond that issue. Ample opportunity was afforded to the parties and to the Executive to comment on the legal advice provided and to make relevant submissions on the extent of that advice. Nevertheless, the Panel did accept that certain sentences in Mr Herberg's opinion - as adopted provisionally by the Legal Adviser - could be misinterpreted. The Legal Adviser, at the hearing, sought to excise these sentences in finalizing his advice and the Panel had paid no regard to those sentences.

Decision

9. Having considered all the factors, and undertaken the balancing exercise referred to earlier in this statement, the Panel concluded that it should not dismiss the proceedings on the basis that it would be unfair or improper for them to continue. Stress, cost and delay are an inevitable consequence of any rehearing and the Panel did not regard the additional stress, cost and delay in this case as being such as to make it unfair or improper to continue with this hearing when balanced

against the seriousness of the issues before the Panel and the importance of enforcing the Codes. The Panel accordingly proceeded to hear submissions in relation to the further matters that were scheduled for the hearing, namely (i) the procedure for the conduct of the rehearing; and (ii) what documents or other information should be provided to the Panel to facilitate their consideration of the substantive case.

Procedure and documents

10. In this regard, the primary focus of the Panel was to ensure a fair rehearing for all parties of the allegations made by the Executive without taint - or perception of taint - from the previous dismissed proceedings.

11. The Panel carefully considered the submissions by the parties and the Executive and the materials placed before the Panel. The Panel determined the following in relation to (i) the procedure for the conduct of the rehearing and (ii) what documents and other information should be provided to the Panel to facilitate its consideration of the substantive case:

    (a) It would not be appropriate for the Panel at that stage or prior to the rehearing of the substantive disciplinary proceedings to receive copies (redacted or otherwise) of the transcripts of the previous hearings or copies of submissions or statements dated after the date of the first substantive hearing in relation to the previous proceedings (being 8 December 2004). If, during the course of the rehearing, any party wished

to make an application for all or part of such documentation to be made available, the Panel would consider the applications at that stage.

Copies of the submissions and witness statements provided to the previous Panel prior to 8 December 2004 were to be provided to the current Panel forthwith.

(b) The Panel was keen that the rehearing took place as soon as possible and understood from comments made by the parties at the hearing on 11 January 2006 that this was shared by all parties. Accordingly the Panel stated that it would use reasonable efforts to accommodate the schedules of the counsel for the various parties but it should be understood that the Panel expected all parties to be flexible and accommodating. The Panel asked that, at that stage, the parties continued to keep free the previously scheduled dates of 26 and 27 April whilst the Panel Secretariat attempted to identify other convenient dates most likely in May or June.

(c) Once the dates for the rehearing had been established, the parties would be notified of the dates together with a schedule for the provision of further submissions and documentary evidence including witness statements. The Panel envisaged that it would require such further documentation to be provided to it and to the other parties such that they would have a three week period to consider such further evidence and to make further submissions in response to such evidence not later than three weeks prior to the date of the hearings (i.e. the further submissions and documentary

evidence would be received not later than six weeks prior to the date of the rehearing).

(d) The Panel did not consider that it needed to give any further directions at that stage. In accordance with section 13.1 of the Introduction to the Codes, on the application of any party, the Acting Chairman may give such procedural directions as he considers appropriate for the determination of the case.

12. Finally the Panel reminded the parties of their obligations of confidentiality under section 13.6 of the Introduction to the Codes.

16 July 2007

Appendix 4

TAKEOVERS AND MERGERS PANEL

THIRD PRELIMINARY PANEL DECISION

PACIFIC CHALLENGE HOLDINGS LIMITED

To determine whether the substantive hearing should be adjourned pending Dr Pau being fit to attend the hearing

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1. The Panel met on 29 August 2006 to consider an application to adjourn disciplinary proceedings initiated against certain parties by the Executive under section 12.1 of the Introduction to the Codes on the basis that one of the parties, Dr Pau, was medically unfit to attend the hearing.[1]

2. A hearing (to commence on 29 August 2006) had been convened by the Panel to consider (i) submissions concerning the standard of proof that should apply to the disciplinary proceedings; and (ii) following the Panel's determination in relation to the standard of proof, the substantive matter relating to allegations of breaches of the Takeovers Code against Dr Chiang, Dr Pau, Mr Cham and Super Drive Inc..

3. On 28 August 2006, Robertsons, solicitors acting for Dr Pau, informed the Panel that Dr Pau had been admitted to hospital on 24 August 2006 where he had had an

[1] This meeting was a continuation of previous meetings held on 11 and 13 January 2006 and 16, 17 and 18 February 2006 in which the Panel considered certain preliminary matters relating to the disciplinary proceedings.

operation to remove a tumour growth from his head on 26 August 2006. Given that Dr Pau was required to remain in hospital for further treatment, Robertsons applied for an adjournment of the hearing to a time when Dr Pau was fit to attend.

4. In view of Robertsons' application, the issues to be considered at the meeting on 29 August 2006 were whether or not the substantive hearing of the disciplinary proceedings should be adjourned pending Dr Pau being fit to attend the hearing; and whether, in any event, the Panel should hear arguments from the Executive and the parties in the absence of Dr Pau on the issue concerning the standard of proof and reach a decision on that point.

5. Shortly before the meeting on 29 August 2006, Robertsons provided a copy of a medical certificate to substantiate Dr Pau's condition and this was circulated at the meeting.

Decision

6. The Panel carefully considered the submissions by the parties and the Executive and the materials placed before the Panel, and determined that the substantive hearing should be adjourned pending Dr Pau being fit to attend the hearing, and that the Panel should not proceed to hear arguments in the absence of Dr Pau from the Executive and the parties on the issue concerning the standard of proof.

7. In relation to the substantive hearing, the Panel was persuaded that it would be unfair to proceed to the substantive hearing in Dr Pau's absence. Although the precise circumstances of the surgery and the decision on the timing of that surgery were unclear and although Dr Pau's decision on the timing of the surgery had

proved unfortunate, the Panel considered that there was no evidence to suggest that this was undertaken with the purpose of impeding the hearing, or that the post-operational complications which gave rise to Dr Pau's inability to attend the hearing were foreseen.

8. In relation to the hearing on the standard of proof, the Panel considered that Dr Pau would not be prejudiced by the Panel proceeding to hear arguments and to reach a decision in his absence. However, it noted Dr Pau's strong preference to be in attendance and the fact that he had attended all other hearings on this matter. In addition, the Panel considered that the issue concerning the standard of proof should only take (at most) half a day to dispense with. Accordingly, although it would have been convenient to proceed to hear arguments and reach a decision at the then convened hearing, the Panel did not consider that the balance of convenience of so proceeding should outweigh Dr Pau's request.

9. The Panel expressed its concern about the continued delay in this matter and the fact that new dates would now need to be found on which to proceed. It asked all parties to cooperate with the Panel Secretariat in finding those dates and asked everyone to be as flexible as possible. If it was not possible to find consecutive dates shortly after Dr Pau was available, the Panel stated that it would consider hearing this matter on individual (non-consecutive) dates and might request the parties to make themselves available over weekends if it was determined that that was the most appropriate way forward; the parties co-operation in that regard was expected.

10. Finally the Panel reminded the parties of their obligations of confidentiality under section 13.6 of the Introduction to the Codes.

16 July 2007

Appendix 5

TAKEOVERS AND MERGERS PANEL

FOURTH PRELIMINARY PANEL DECISION

PACIFIC CHALLENGE HOLDINGS LIMITED

To determine whether the substantive hearing should be adjourned until Dr Pau is able to cope with a full, proper and fair hearing

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1. The Panel met on 21 November 2006 to consider an application to adjourn disciplinary proceedings initiated against certain parties by the Executive under section 12.1 of the Introduction to the Codes on the basis that one of the parties, Dr Pau, was medically unfit to attend the hearing.[1]

2. A hearing (to commence on 29 August 2006) had been convened by the Panel to consider (i) submissions concerning the standard of proof that should apply to the disciplinary proceedings; and (ii) following the Panel's determination in relation to the standard of proof, the substantive matter relating to allegations of breaches of the Takeovers Code against Dr Chiang, Dr Pau, Mr Cham and Super Drive Inc..

3. On 28 August 2006, Robertsons, solicitors acting for Dr Pau, informed the Panel that Dr Pau had been admitted to hospital on 24 August 2006 where he had had an

[1] This meeting was a continuation of previous meetings held on 11 and 13 January 2006 and 16, 17 and 18 February 2006 and 29 August 2006 in which the Panel considered certain preliminary matters relating to the disciplinary proceedings.

operation to remove a tumour growth from his head on 26 August 2006. Given that Dr Pau was required to remain in hospital for further treatment, Robertsons applied for an adjournment of the hearing to a time when Dr Pau was fit to attend and the adjournment was granted. A further hearing (to commence on 21 November 2006) was subsequently convened by the Panel to consider the matters that had been originally scheduled to be considered at the 29 August 2006 hearing.

4. Since the hearing on 29 August 2006, Robertsons had provided the Panel with a number of medical reports concerning Dr Pau. On 15 November 2006, Robertsons submitted a medical report from Dr Pau's specialist in relation to Dr Pau's medical condition and applied for an adjournment of the Panel hearing (scheduled to commence on 21 November 2006) until such time as Dr Pau was fit to attend a full, proper and fair hearing.

5. In view of Robertsons' application, the Panel met to consider whether or not the hearing should be adjourned until Dr Pau was so able.

6. Robertson's application for an adjournment was supported by the other parties to the hearing, both in their written submissions and at the hearing itself. The Executive referred to the Third Preliminary Panel Decision in relation to this matter (Appendix 4) and, in the light of that decision, did not seek to challenge the adjournment application but reserved its position to revisit the issue of whether the substantive hearing should proceed in the absence of Dr Pau in the event that the period of delay caused by Dr Pau's current medical condition extended beyond that currently anticipated.

Decision

7. The Panel considered the submissions by the parties and the Executive, and the materials placed before the Panel and determined that, in the light of Dr Pau's inability to attend the substantive hearing scheduled to commence on 21 November 2006, the substantive hearing should be adjourned. In light of the potential delay in reconvening the substantive hearing, the Panel decided that it would not proceed, on this occasion, to hear arguments from the Executive and the parties on the issue concerning the standard of proof.

8. The Panel noted that Dr Pau's counsel had sought to keep the Panel informed of Dr Pau's medical condition as it developed. The Panel also acknowledged that Dr Pau arranged for a full medical report to be produced and that this report concluded that he was medically unfit to attend the hearing. The report went on to recommend that the hearing be postponed for at least four months.

9. The Panel referred to the Third Preliminary Panel Decision, and, in particular, to paragraph 7 thereof. The Panel wished it to be noted that the decision that "it would be unfair to proceed to the substantive hearing in Dr Pau's absence" had been taken against the background of the facts and circumstances presented at the time of that decision. The issue before the Panel at that time was a request for an adjournment arising out of Dr Pau's admission to hospital to remove a tumor growth which had led to unexpected post-operational complications. The expectation, at that time, was that Dr Pau would be fit to attend the hearing within (at most) several weeks thereafter and, although it was expected that further delay would be occasioned by the likely difficulty in reconvening the Panel meetings at

a mutually convenient time, it was nevertheless contemplated that any adjournment would be for a three month period at most. In addition, although an additional medical problem suffered by Dr Pau was referred to in one of the medical certificates produced to the Panel, it was not the subject of the hearing or of the submissions by Dr Pau's counsel or other parties.

10. Accordingly, it should be noted that the Panel had not ruled out that, if Dr Pau's condition continued to render him unfit to attend the hearing over an extended period of time, the Panel would consider that it was in the interests of justice for the hearing to proceed in Dr Pau's absence given the overall delay and the importance of bringing finality to this matter. However, such a decision would only have been taken after further submissions by the parties and the Executive against the facts and circumstances at that time.

11. As previously noted, the Panel continued to be concerned about the delay in this matter. In light of the above findings, the Panel set the following timetable:

    (a) Dr Pau be required to provide to the Panel, the other parties and the Executive a further medical report not later than 15 January 2007 on Dr Pau's medical condition and prognosis, including an estimate of when he would be fit to attend the substantive hearing.

    (b) In the event that the medical report continued to indicate that Dr Pau was unfit to attend the hearing, and was unable to provide a conclusive date shortly thereafter by which Dr Pau would be so available, the Executive be provided with the opportunity to have Dr Pau examined by its own

appropriately qualified specialist, and for the report of that specialist to be circulated to the Panel and the other parties within one month after the circulation of the report by Dr Pau's specialist. Whilst the Panel had no reason to dispute the veracity of the report produced by Dr Pau's specialist, it considered it to be appropriate that the Executive be given an opportunity to seek its own medical report; and, indeed, the Executive had indicated in its submission that it would have done so prior to the hearing on 21 November 2006 if time had permitted.

(c) The Panel instructed the Panel Secretary to find a date for a one day hearing around the end of February 2007 for the Panel to consider the then current position regarding Dr Pau and, in light of that, the basis on which the substantive hearing should proceed. The Panel did not seek to schedule provisional dates for the substantive hearing at that stage but reserved the right to do so following receipt of the further medical report from Dr Pau's specialist in mid January or at any other time it considered it appropriate to do so. The Panel stated that all parties would be expected to co-operate in making themselves available at such time.

(d) The Panel requested that Dr Pau's counsel continue to update the Panel as to Dr Pau's recovery on a regular basis.

12. Finally the Panel reminded the parties of their obligations of confidentiality under section 13.6 of the Introduction to the Codes.

16 July 2007

Appendix 6

TAKEOVERS AND MERGERS PANEL

FIFTH PRELIMINARY PANEL DECISION

PACIFIC CHALLENGE HOLDINGS LIMITED

To consider Dr Pau's current medical condition and, in light of that, the basis on which the substantive hearing should proceed

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1. The Panel met on 27 February 2007 to consider Dr Pau's then current medical condition and, in light of that, the basis on which the substantive hearing should proceed.[1]

2. A hearing (to commence on 29 August 2006) was convened by the Panel to consider (i) submissions concerning the standard of proof that should apply to the disciplinary proceedings; and (ii) following the Panel's determination in relation to the standard of proof, the substantive matter relating to allegations of breaches of the Takeovers Code against Dr Chiang, Dr Pau, Mr Cham and Super Drive Inc..

3. At the hearing on 29 August 2006, the Panel considered the application by Robertsons, solicitors acting for Dr Pau, for an adjournment because Dr Pau had had an operation to remove a tumour growth from his head on 26 August 2006

[1] This meeting was a continuation of previous meetings held on 11 and 13 January 2006; 16, 17 and 18 February 2006; 29 August 2006 and 21 November 2006 in which the Panel considered certain preliminary matters relating to these proceedings.

and was required to remain in hospital for further treatment. The adjournment was granted and a further hearing (to commence on 21 November 2006) was subsequently convened by the Panel to consider the matters that had been originally scheduled to be considered at the 29 August 2006 hearing.

4. On 15 November 2006, Robertsons submitted a medical report which stated that Dr Pau was suffering from an illness and applied for a further adjournment of the Panel hearing scheduled to commence on 21 November 2006 until such time as Dr Pau was able to cope with a full, proper and fair hearing. The adjournment was granted. A further hearing was convened by the Panel on 27 February 2007 to consider Dr Pau's medical condition and in light of that, the basis on which the substantive hearing should proceed.

5. Since the hearing on 21 November 2006, Robertsons provided the Panel with an updated medical report on Dr Pau. The Executive also arranged for Dr Pau to see a specialist of its own choice and provided the Panel with a medical report prepared by that specialist.

Decision

6. The Panel considered the submissions by the parties and the Executive and the materials placed before the Panel, both at and before the hearing, and determined that dates for a substantive hearing should now be set. The Panel instructed the Panel Secretariat to find dates for the hearing, which dates should not be earlier than the beginning of July 2007.

7. The Panel acknowledged that this was a difficult matter in which it needed to make a judgment as to the health of one of the parties and to balance a number of different and conflicting interests. The first interest was the interest of Dr Pau himself. In that regard, the Panel paid particular attention to the recent medical report provided by Robertsons on behalf of Dr Pau and to the medical report provided by the Executive. Both specialists agreed that Dr Pau was suffering from an illness of modest severity.

8. The second interest was the interest of the other parties in the hearing, namely Dr Chiang, Super Drive Inc. and Mr Cham. In this regard, the Panel noted the submissions on behalf of those parties to the effect that their respective cases would potentially be materially adversely affected if Dr Pau was not available at the hearing or was otherwise unable effectively to give evidence or answer questions. Those submissions focused on the fact that the claims against the parties were not discrete, given the central allegation of concertedness, the fact that the matters were complex and the fact that the events referred to occurred approximately seven years ago.

9. The third interest was the interest of justice in moving this matter to a conclusion, one way or another, given the already substantial delay which had arisen in this case. The Panel acknowledged that this delay had been occasioned by several different factors, of which Dr Pau's illness was only the most recent factor. Nevertheless the delay was substantial and needed to be taken into account in the overall assessment.

10. The Panel also noted that the decision which it was asked to make, based on the submissions before it, was whether the dates for the substantive hearing be set now and within what time frame, or to delay the setting of those dates for a further period of one or two months with or without a further hearing on the preliminary matter of Dr Pau's medical condition.

11. Having weighed the above-mentioned interests, and having taken into account the various medical reports and the submissions on behalf of the parties at the hearing, the Panel concluded that the appropriate course was to proceed to set new dates now for the substantive hearing, including the preliminary issue concerning the standard of proof, but nevertheless requested Dr Pau's counsel to keep the Panel and other parties informed as to Dr Pau's condition.

12. As always, the Panel asked all parties to co-operate with the Panel Secretariat in finding those dates and asked everyone to be as flexible as possible. Recently it had proved impossible to find dates mutually convenient to everyone within a reasonable time frame and, if that again proved to be the case, the Acting Chairman stated that he would determine the most appropriate dates and would notify the parties and the Executive accordingly.

13. Finally the Panel reminded the parties of their obligations of confidentiality under section 13.6 of the Introduction to the Codes.

16 July 2007

Appendix 7

TAKEOVERS AND MERGERS PANEL

SIXTH PRELIMINARY PANEL DECISION

PACIFIC CHALLENGE HOLDINGS LIMITED

To consider the standard of proof

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1. The Panel met on 3 July 2007 to consider the standard of proof that is applicable to the substantive hearing that is scheduled to take place immediately following the Panel's determination of the standard of proof.[1]

Decision

2. The Panel carefully considered all the submissions by the parties and the Executive, and the materials placed before it, and determined that the appropriate standard of proof to apply in this case was the civil standard of proof.

3. Submissions on behalf of Dr Chiang and Dr Pau argued strongly that, on the basis of the recent Koon Wing Yee case - an unreported decision of the Hong Kong Court of Appeal dated 30 May 2007 - the appropriate standard of proof in these

[1] This meeting was a continuation of previous meetings held on 11 and 13 January 2006; 16, 17 and 18 February 2006; 29 August 2006; 21 November 2006 and 27 February 2007 in which the Panel considered certain preliminary matters relating to these proceedings.

proceedings should be the criminal standard of proof. The Panel carefully considered the decision in that case and made the following observations:

(a) It was suggested that the nature of the allegations in this case made by the Executive against the various parties amounted to allegations of "criminality", in that those allegations involved elements of deceit, fraud or fraudulent conduct. It was certainly true that the allegations - and the sanctions sought - were serious; but it was also the case that an allegation of "concertedness" is not, of itself, an allegation of criminal misconduct or conspiracy to defraud. A breach of Rule 26 of the Takeovers Code only arises if the concertedness results in an acquisition of voting rights above a certain trigger threshold followed by a failure to make the required mandatory offer.

(b) The Court of Appeal expressly stated in the Koon Wing Yee case that the feature that persuaded the Court that proceedings before the Insider Dealing Tribunal were criminal in nature was the power to order the payment of a penalty. The Court went on to draw a distinction between the Insider Dealing Tribunal and the Market Misconduct Tribunal. Unlike the Insider Dealing Tribunal, the Market Misconduct Tribunal has no power to impose payment of a financial penalty and the Court did not question that the appropriate standard proof was the civil standard. The Panel, like the Market Misconduct Tribunal, has no power to order payment of a financial penalty; indeed neither the Takeovers Code nor the sanctions imposed under it, of themselves, have the force of law.

(c) The Court in the Koon Wing Yee case concluded that the characteristic of a "penalty" was that it be "punitive and deterrent" in nature and not compensatory. It went on to state that the power to disqualify was not designed to punish but to protect the investing public. In that context, it is to be noted that the powers of the Market Misconduct Tribunal include the ability to disqualify a person from acting as director of a listed corporation and the banning of a person from dealing in securities or other types of financial instruments for a period of time. These powers are, in the view of the Panel, akin to the cold shoulder orders available to the Panel and being requested in this case.

4. Having considered the Koon Wing Yee case and having regard to the nature of the alleged breach of the Takeovers Code and the nature and degree of the severity of the potential sanctions, the Panel concluded that:

(a) the Koon Wing Yee case does not require it to form the view that the criminal standard of proof is the appropriate standard; and

(b) on the basis of previous authority and Panel precedent, that the appropriate standard of proof was the civil standard.

5. Having, therefore, determined that the appropriate standard of proof was the civil standard of proof, the Panel went on to consider what this meant in the context of the present proceedings. Although it was accepted that the civil standard of proof is "on the balance of probabilities" or "preponderance of probability", there was a considerable amount of argument put before the Panel in relation to what this

meant, in practice, in relation to the current proceedings, and how the Panel should seek to apply this standard in the current case given the nature of the allegations and of the sanctions being sought by the Executive.

6. Having regard to those submissions and to the views expressed in previous Panel statements, the Panel reached the following conclusions:

(a) The civil standard of proof is a single standard of proof; it does not, of itself, change depending on the seriousness of the allegation or the consequences of the allegation, if proved. In that respect, the Panel disagreed with any implications of statements by the Panel in the Kong Tai case which may be taken to suggest otherwise.

(b) However, although the standard itself is fixed, it is flexible in its application; the more serious the allegation, or the more serious the consequences if the allegation is proved, the stronger must be the evidence in order for the Panel to find the allegation proved on the balance of probabilities. In other words, the strength of the evidence must be commensurate with the gravity of the allegation and the seriousness of the consequences. The Panel believed that this position is well supported by relevant judicial authorities, many of which were quoted to the Panel in the various submissions made.

(c) The drawing of inferences, or the weight to be attached to circumstantial evidence, was to be considered by the Panel in these proceedings against

the background of this stated flexibility in the application of the civil standard of proof.

(d) The burden of proof in this case was on the Executive. The allegations were serious and the sanctions requested by the Executive in the event that the allegations were proven will have serious consequences for the individuals concerned. The Panel stated that it would have regard to this in its examination of the evidence in these proceedings.

7. Finally the Panel reminded the parties of their obligations of confidentiality under section 13.6 of the Introduction to the Codes.

16 July 2007

Appendix 8

TAKEOVERS AND MERGERS PANEL

SEVENTH PANEL DECISION

PACIFIC CHALLENGE HOLDINGS LIMITED

To consider publication of the Panel's decisions

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1. The Panel met on 12 July 2007 to consider whether the Panel's decisions in relation to this matter should be published.[1]

Decision

2. The Panel carefully considered all the submissions by the parties, and the materials placed before it, and determined that it would proceed to publish all the rulings of this Panel (but not of any preceding Panel) in relation to this matter. This comprised the ruling in relation to the substantive decision delivered on 11 July 2007 together with all preceding rulings on preliminary matters dating back to the first ruling on 13 January 2006 (which was provided to the Executive and the parties in written form on 20 January 2006), together with this ruling on the question of publication.

[1] This meeting was a continuation of previous meetings held on 11 and 13 January 2006; 16, 17 and 18 February 2006; 29 August 2006; 21 November 2006; 27 February 2007 and 3, 4, 5, 6, 11 July 2007 in which the Panel considered certain preliminary matters and the substantive issue.

The reasons for the Panel's decision are as follows:

(a) Section 16.1 of the Introduction to the Codes states:

"Subject to confidentiality considerations, it is the policy of the Panel and the Takeovers Appeal Committee to publish their rulings, and the reasons for those rulings, so that their activities may be understood by the public."

A "ruling" is defined in the Definitions section of the Codes to include:

"any ruling, waiver, consent, decision, confirmation or other determination in writing under the Codes by the Executive, the Panel or the Takeovers Appeal Committee".

It was, therefore, clear that the decisions made by the Panel in this case (both the substantive decision and the decisions on preliminary and procedural matters), were "rulings" for the purposes of section 16.1 of the Introduction to the Codes.

It was not for this Panel to change the stated policy of the Panel as set out in the Introduction to the Codes; if that policy is to be changed, it should be changed by the SFC in consultation with the full Panel and an appropriate amendment made to section 16.1.

(b) There was no express provision in section 16.1 of the Introduction to the Codes – or indeed elsewhere in the Introduction to the Codes – which provided the Panel with a discretion not to publish its rulings in relation to disciplinary proceedings where those disciplinary proceedings have been dismissed. It would clearly have been possible for such a provision to be included if this was intended and indeed an analogous provision in connection with the limited circumstances of the Takeovers Appeal

Committee was included in section 15.3 of the Introduction to the Codes; but no such provision was included with respect to rulings of the Panel. Accordingly, in the Panel's view, the issue to be considered was whether the caveat as to "confidentiality considerations" which appears at the beginning of section 16.1 could, or should, apply in this case.

(c) There was no further interpretation given to what is meant by "confidentiality considerations" in the context of section 16.1. There was reference to evidence of a "confidential commercial nature" in section 13.3 of the Introduction to the Codes and to "confidential information" in Rule 1.4 of the Takeovers Code. Those provisions were, in the Panel's view, more concerned with confidential information of a commercial nature (including price sensitive information) than the confidentiality of actual proceedings before the Panel. The Panel did not consider that commercial considerations of the nature contemplated by the aforementioned provisions in the Codes were relevant to the current situation.

(d) Disciplinary proceedings are, under the Panel procedures, intended to be confidential until such time as a ruling is made on the substantive issues. In addition, it is likely that, in such cases and where a ruling is made in favour of the parties rather than the Executive and the disciplinary proceedings are dismissed, the parties would prefer that the existence and details of those proceedings are not made public. The Panel understood that the fact that these proceedings were commenced by the Executive

could have a negative impact on the reputation of the parties. Nevertheless, that is likely to be the case in many, if not all, such disciplinary proceedings and the Panel did not believe that this was a factor which required the Panel to depart from its stated policy. At the end of the day, the proceedings were dismissed by the Panel and this would be evident on the face of the statement.

(e) The Panel also had to look at its position in the regulatory framework in Hong Kong. The Panel is a committee of the SFC. It is important, for the reputation of the Hong Kong market and for the standing of the SFC in general, that there is transparency as to the Panel's decisions and procedures. The decisions made in relation to preliminary matters in this case are of some precedential value and are important in educating the market as to the approach of the Panel in relation to such matters; this is particularly true of the Panel's ruling in relation to the standard of proof. Whilst the decision in relation to the substantive issue on "acting in concert" is very fact specific, it is inevitable that this would be the situation in relation to such cases. Nevertheless, the decision was important in articulating the Panel's approach to the evidence in such cases and, in that respect, needed to be understood by the market.

3. The Panel, therefore, proposed to publish its substantive ruling in this case. The ruling would be reconstituted as a written announcement (as contemplated in section 16.1 of the Introduction to the Codes) and would be published as soon as possible. A short summary of the key facts and dates in this case would be added

so that the events which gave rise to the proceedings could be better understood by the market.

4. In relation to the rulings on preliminary matters, and this matter before the Panel, the Panel equally considered that these should be published since they contain important information in relation to Panel procedures. Accordingly, they would be similarly reconstituted and published as a package with the substantive ruling. In that regard, however, the Panel did review the preliminary rulings in relation to Dr Pau to see if it would be practical to remove some of the details regarding the nature of Dr Pau's illness and to make the description of that more generic so as not to refer specifically to the detailed opinions of the various medical experts.

5. Until such time as the written statements were published, the parties were reminded of their obligations of confidentiality under section 13.6 of the Introduction to the Codes. Following publication, the Panel reminded the parties of the application of section 16.2 of the Introduction to the Codes and stated that it expected all parties to comply with such obligations.

16 July 2007