

**ENFORCEABLE UNDERTAKING**

Australian Securities and Investments Commission Act 2001

Section 93AA

The commitments in this undertaking are offered to the Australian Securities and Investments Commission (ASIC) by:

Rhinomed Ltd
ACN 107 903 159
Suite 1, 1233 High Street
Armadale, Victoria

1. Definitions

In addition to terms defined elsewhere in this undertaking, the following definitions are used:

ASIC means the Australian Securities and Investments Commission.

ASIC Act means the *Australian Securities and Investments Commission Act 2001* (Cth).

ASX means Australian Securities Exchange Limited, a licensed market operator within the terms of its Australian Markets license.

ASX Listing Rules means the listing rules of the ASX that deal with the admission and removal of entities from the ASX official list; and the activities and conduct of entities included on that list.

Corporations Act means the *Corporations Act 2001* (Cth).

Infringement Notice means the infringement notice issued under Part 9.4AA of the Corporations Act by ASIC to Rhinomed dated 8 June 2016.

Rhinomed means Rhinomed Ltd ACN 107 903 159.

2. Background**2.1 ASIC's role**

2.1.1 Under section 1 of the ASIC Act, ASIC is charged with a statutory responsibility to perform its functions and to exercise its powers so as to promote the confident and informed participation of investors and consumers in the financial system.

2.2 May 2015 infringement notice

2.2.1 In May 2015, ASIC issued an infringement notice to Rhinomed alleging a failure by the company to disclose to the ASX between 6 June 2014 and 9 July 2014 an agreement concerning a promotional campaign in which Fitness First was to promote Rhinomed's Turbine® respiratory technology device in some of its gyms and health clubs in Australia (**May 2015 Infringement Notice**). On 10 June 2010, Rhinomed paid a penalty of \$33,000 for allegedly failing to comply with its continuous disclosure obligations.

2.3 Details of Conduct

2.3.1 Between about late February to early May 2015, Rhinomed and ResMed were engaged in negotiations regarding a proposed agreement under which Rhinomed would sell its Mute product to ResMed for the purpose of distribution by ResMed to the UK market through an online e-commerce platform (**the Distribution Arrangement**).

2.3.2 By 12 May 2015, Rhinomed and ResMed had reached agreement on the following matters concerning the Distribution Arrangement:

2.3.2.1 Parameters for the pricing and quantity for ResMed's orders for Mute;

2.3.2.2 Rhinomed had been added as a supplier to ResMed in its business systems;

2.3.2.3 Rhinomed and ResMed had executed a non-disclosure agreement pertaining to their commercial relationship; and

2.3.2.4 on 12 May 2015, ResMed had issued a purchase order for an initial batch of Rhinomed's Mute devices (**ResMed Purchase Order**).

2.3.3 On 15 May 2015, Rhinomed issued an announcement to the ASX titled "Resmed Inc to sell Mute™ snoring & sleep technology", regarding the Distribution Arrangement, in which Rhinomed stated relevantly as follows:

- *"Rhinomed's Mute™ snoring and sleep technology to be sold online by ResMed Inc.*
- *UK sales to begin June 2015*

...

- *Rhinomed Ltd (...) has struck an important sales agreement with global sleep technology heavyweight ResMed Inc (...) selling the novel Mute snoring reduction and sleep technology in the key UK market.*

- *This is the company's third distribution deal since February.*

...

- *Terms of the ResMed UK deal are not being disclosed, but the product will be marketed as an online product through Resmed's online e-commerce platform. Rhinomed has received the opening order and will begin shipping stock to Resmed's distribution centre immediately..."*

(the 15 May Announcement).

2.3.4 Following discussions and email exchanges between Rhinomed and Resmed regarding the 15 May Announcement, on 9 June 2015 (AEST), ASIC alleges that Rhinomed were informed by Resmed that the Distribution Arrangement, as disclosed in the 15 May Announcement, had been terminated and the ResMed Purchase Order had been cancelled (**the Information**).

2.3.5 Rhinomed did not immediately disclose the Information to the ASX.

2.3.6 On 21 August 2015, Rhinomed issued an announcement to the ASX titled "UK pharmacy distribution secured for Mute" in which it stated that the "Mute technology will be sold exclusively in the United Kingdom by Boots UK" and that

this "exclusive deal supersedes previous UK distribution deals for Mute" (the 21 August Announcement).

2.4 ASIC's Investigation and Analysis

2.4.1 In December 2015 ASIC commenced an investigation pursuant to section 13(1) of the ASIC Act into suspected contraventions of the Corporations Act by Rhinomed, including suspected contraventions of sections 1041H and 674(2) of the Corporations Act (the Investigation).

2.4.2 Section 674(2) of the Corporations Act establishes an obligation on listed disclosing entities to provide certain information to market operators.

2.4.3 A listed disclosing entity is subject to this obligation if provisions of the ASX Listing Rules apply to the entity and require it to notify the market operator of information about specified matters or events as they arise for the purpose of the operator making that information available to participants in the market.

2.4.4 Subject to exceptions, ASX listing rule 3.1 requires a company to immediately notify the ASX of any information concerning it, of which it is or becomes aware, that a reasonable person would expect to have a material effect on the price or value of the entity's securities.

2.4.5 A reasonable person would expect the Information to have a material effect on the price or value of the Rhinomed securities because the 15 May Announcement, regarding the Distribution Arrangement and ResMed Purchase Order, had had a material effect on the price or value of the Rhinomed ordinary shares (RNO):

- (a) On 13 May 2015, the closing price of RNO was 2.7 cents. RNO were in trading halt on 14 May 2015, pending the release of an announcement.
- (b) Following the release of the 15 May Announcement:
 - (1) the price of RNO opened at 3.6 cents on 15 May 2015 and reached a high of 5.5 cents before closing at 5.2 cents; and
 - (2) the volume of trading in RNO increased significantly.

2.4.6 Following its Investigation:

2.4.6.1 ASIC has reasonable grounds to believe that Rhinomed contravened subsection 674(2) of the Corporations Act; and

2.4.6.2 ASIC has issued and Rhinomed has complied with the Infringement Notice. Details of the alleged contravention are contained in the Infringement Notice.

2.5 ASIC's views concerning the conduct:

2.5.1 In addition to having reasonable grounds to believe that Rhinomed contravened section 674(2) of the Corporations Act, ASIC is concerned that:

2.5.1.1 Rhinomed's continuous disclosure practices, policies, procedures and resources did not operate to ensure that Rhinomed was able to meet its continuous disclosure obligations; and

2.5.1.2 the board of Rhinomed at the relevant times did not adequately understand Rhinomed's continuous disclosure obligations.

2.6 Acknowledgement of concerns

- 2.6.1 Rhinomed acknowledges that both the views expressed by ASIC in relation to the alleged facts and ASIC's concerns in relation to the alleged facts are reasonably held and has offered an enforceable undertaking in the terms of part 3 below.
- 2.6.2 ASIC acknowledges the cooperation and assistance of Rhinomed and its directors in relation to this enforceable undertaking.

3. Undertakings

- 3.1 Under section 93AA of the ASIC Act, Rhinomed has offered, and ASIC has agreed to accept, the undertakings set out in paragraphs 3.2 to 3.26 below.

Engagement of Independent Expert

- 3.2 Rhinomed undertakes to request ASIC to approve, within 15 business days of the date of ASIC's acceptance of this enforceable undertaking or within such longer period as may be agreed by ASIC and Rhinomed:

3.2.1 the appointment of an independent expert from a list of at least three independent experts provided to ASIC by Rhinomed that meet the criteria in paragraph 3.5 below, and

3.2.2 draft terms of engagement for each nominated independent expert that meet the requirements of this enforceable undertaking.

- 3.3 If at any time ASIC declines to approve any of the experts nominated by Rhinomed under either paragraph 3.2 or 3.3.1, ASIC may, in its absolute discretion, direct Rhinomed:

3.3.1 to, within a specified time, provide to ASIC for its approval a new list of at least three independent experts that:

- (a) have not previously been nominated by Rhinomed; and
- (b) meet the criteria in paragraph 3.5;

together with draft terms of engagement for each nominated independent expert that meets the criteria in paragraph 3.6; or

3.3.2 to appoint an independent expert of ASIC's choice on terms of engagement specified by ASIC.

- 3.4 If ASIC:

3.4.1 approves the draft terms of engagement and independent expert following a request by Rhinomed under paragraph 3.2 or a direction under paragraph 3.3.1; or

3.4.2 directs that an independent expert chosen by ASIC be appointed on terms specified under paragraph 3.3.2;

Rhinomed undertakes to appoint the approved or chosen independent expert (the **Independent Expert**) on the terms approved or specified by ASIC within 10 business days of receiving ASIC's approval or direction or within such longer period as may be agreed by ASIC and Rhinomed.

- 3.5 Rhinomed undertakes to nominate, under paragraph 3.2.1 and 3.3.1 above, independent experts who, in Rhinomed's opinion:

- 3.5.1 have the necessary expertise, experience and operational capacity to perform the role contemplated by this enforceable undertaking; and
 - 3.5.2 are independent of Rhinomed, its related bodies corporate and its officers at the time of the appointment, and who will at all material times be capable of exercising objective and impartial judgement.
- 3.6 Rhinomed undertakes to ensure that the draft terms of each independent expert's engagement provided to ASIC for approval under paragraphs 3.2.2 or 3.3.1:
- 3.6.1 require the independent expert to carry out the role and functions specified in paragraphs 3.8 to 3.22 and are otherwise consistent with this enforceable undertaking;
 - 3.6.2 include a statement to the effect that the work of the independent expert is being carried out for Rhinomed and ASIC and acknowledging that ASIC is relying on the work of the independent expert;
 - 3.6.3 include a statement that upon request by ASIC, ASIC is to be copied into all or some communications between Rhinomed and the independent expert;
 - 3.6.4 require the independent expert to notify ASIC where a conflict of interest arises during the engagement or when the independent expert becomes aware of information that adversely affects its ability to exercise objective and impartial judgement;
 - 3.6.5 include an acknowledgement that in relation to the written reports to be provided to ASIC and Rhinomed as described in paragraphs 3.10.2 to 3.10.3, ASIC may from time to time publicly refer to the content of the report, and may make a summary of the content of the reports, or a statement that refers to the content of the reports, public.
- 3.7 Rhinomed undertakes to provide ASIC with any information, explanation or documents it requests for the purposes of determining whether to approve the appointment and terms of engagement of the Independent Expert.

Role of Independent Expert

- 3.8 The Independent Expert is to:
- 3.8.1 review Rhinomed's practices, policies, procedures and resources for dealing with its continuous disclosure obligations under ASX Listing Rule 3.1 and section 674 of the Corporations Act (**Disclosure Obligations**), including its practices, policies, procedures and resources designed and available to ensure compliance with and prevent possible breaches of the Disclosure Obligations (**Disclosure Practices, Policies, Procedures and Resources**);
 - 3.8.2 identify any deficiencies in:
 - (a) Rhinomed's contract negotiation and related management systems;
 - (b) Rhinomed's Disclosure Practices, Policies, Procedures and Resources (including, but not limited to, its internal accountability, risk management and remuneration frameworks and the compliance training, skills and expertise of its directors, executives and other staff); and
 - (c) any other aspect of Rhinomed's structure and operations that may impact on Rhinomed's ability to comply with the Disclosure Obligations; and
 - 3.8.3 recommend amendments (the **Recommendations**) to address any of the deficiencies identified in accordance with paragraph 3.8.2 which are:

- (a) consistent with industry best practice for a company of the size and kind of Rhinomed; and
 - (b) reasonably required to ensure that Rhinomed meets the Disclosure Obligations.
- 3.9 The Recommendations may include (but are not limited to) any recommendations concerning:
- 3.9.1 enhancements or changes to contract negotiation and management and related reporting systems;
 - 3.9.2 procurement as consultants or otherwise, additional legal and compliance team resources, as necessary, to assist Rhinomed in meeting its obligations as outlined in the Recommendations;
 - 3.9.3 appropriate compliance training to be provided to its directors and executives; and
 - 3.9.4 continuous disclosure practices, policies and procedures.
- 3.10 Rhinomed undertakes to ensure the terms of the Independent Expert's engagement:
- 3.10.1 require the Independent Expert, within three months of engagement, to provide an interim report (**First Report**) to Rhinomed setting out any deficiencies identified with Rhinomed's Disclosure Practices, Policies, Procedures and Resources, and containing the Recommendations and a timeframe within which it would be reasonable for Rhinomed to implement the Recommendations;
 - 3.10.2 require the Independent Expert to:
 - (a) test whether the Recommendations identified in the First Report have been implemented 9 months after the date of the First Report (or such other date as may be agreed between Rhinomed and ASIC); and
 - (b) provide to Rhinomed and ASIC, as soon as practicable and in any event no later than 3 months after that testing, a report (**Second Report**) detailing the outcome of the testing and setting out any Recommendations that, in the opinion of the Independent Expert, have not been sufficiently addressed or implemented and any further Recommendations that the Independent Expert considers it necessary or appropriate for Rhinomed to implement in order to rectify any continuing deficiencies
 - 3.10.3 subject to clause 3.17, require the Independent Expert to conduct further testing to ascertain whether the Recommendations identified in the First and Second Reports have been implemented 9 months after the date of the Second Report (or such other date as may be agreed between Rhinomed and ASIC), and to provide a further report (**Third Report**) on the outcome of such testing to Rhinomed and ASIC as soon as practicable after that testing, and in any event no later than 3 months after that testing.

Rhinomed Remediation Plans

- 3.11 Within 60 days of receipt of the First Report, Rhinomed must provide to the Independent Expert a plan to implement the Recommendations arising out of the First Report (**First Remediation Plan**) which:
 - 3.11.1 sets out the actions Rhinomed proposes to take to implement any Recommendations identified in the First Report;
 - 3.11.2 ensure that sufficiently qualified and skilled staff are employed to discharge the First Remediation Plan; and

- 3.11.3 specifies the date by which each action will be taken.
- 3.12 The Independent Expert will inform Rhinomed within 14 days of receiving the First Remediation Plan whether in the opinion of the Independent Expert the First Remediation Plan requires any modification to ensure it addresses the Recommendations made in the First Report.
- 3.13 Rhinomed undertakes to:
- 3.13.1 make all reasonable modifications to the First Remediation Plan requested by the Independent Expert within 14 days of receiving the relevant request;
 - 3.13.2 implement the First Remediation Plan in full, and within the timeframes specified in the Plan; and
 - 3.13.3 within seven days of full implementation of the First Remediation Plan provide ASIC with a statement regarding whether all undertakings which Rhinomed was required to comply with under this Enforceable Undertaking as at the date of the statement have in fact been complied with.
- 3.14 Within 60 days (or such later date as agreed between ASIC and Rhinomed) of receipt of the Second Report, Rhinomed must provide to the Independent Expert and, upon ASIC's request, to ASIC a plan to implement any Recommendations arising out of the Second Report (**Second Remediation Plan**) which:
- 3.14.1 sets out the actions Rhinomed proposes to take to implement any Recommendations identified in the Second Report;
 - 3.14.2 ensure that sufficiently qualified and skilled staff are employed to discharge the Second Remediation Plan; and
 - 3.14.3 specifies the date by which each action will be taken.
- 3.15 The Independent Expert will inform Rhinomed and, if ASIC has requested a copy of the Second Remediation Plan, ASIC within 14 days of receiving the Second Remediation Plan whether in the opinion of Independent Expert the Second Remediation Plan requires any modification to ensure it addresses the Recommendations made in the Second Report.
- 3.16 Rhinomed undertakes to:
- 3.16.1 make all reasonable modifications to the Second Remediation Plan requested by the Independent Expert or ASIC within 14 days of receiving the relevant request;
 - 3.16.2 implement the Second Remediation Plan in full, and within the timeframes specified in the Plan;
 - 3.16.3 if ASIC has requested to be provided with the Second Remediation Plan, notify ASIC within seven days of full implementation of the Second Remediation Plan that the Plan has been fully implemented; and
 - 3.16.4 within seven days of full implementation of the Second Remediation Plan, provide ASIC with a statement regarding whether all undertakings which Rhinomed was required to comply with under this Enforceable Undertaking as at the date of the statement have in fact been complied with.

Notification that Second Remediation Plan and Third Report are not required

- 3.17 Within 14 days of receipt of the Second Report (or such later date as agreed between ASIC and Rhinomed) ASIC may, at its discretion, give notice to Rhinomed that the Second Remediation Plan and the Third Report are not required.

Final Statement by Rhinomed

- 3.18 Rhinomed undertakes to provide ASIC with a statement by Rhinomed about whether it has complied with all of the undertakings in this Part 3 of the Enforceable Undertaking within 7 days of either of the following:
- 3.18.1 being notified by ASIC under 3.17 that the Second Remediation Plan and Third Report are not required; or
- 3.18.2 the provision by the Independent Expert of the Third Report.

Assistance to the Independent Expert and provision of Reports to ASIC

- 3.19 Rhinomed undertakes to:
- 3.19.1 permit the Independent Expert, to the extent that it is reasonable having regard to the requirements of this enforceable undertaking, to have access to its books and to interview current employees;
- 3.19.2 give the Independent Expert any information or explanation reasonably requested by the Independent Expert of any matter in any way connected with a report required to be prepared by the Independent Expert under this enforceable undertaking; and
- 3.19.3 otherwise reasonably assist the Independent Expert in carrying out the terms of its engagement and producing the reports required to be prepared by the Independent Expert under this enforceable undertaking.
- 3.20 Rhinomed will ensure that ASIC is provided with a copy of the reports required to be prepared by the Independent Expert under 3.10.2 and 3.10.3 at the same time Rhinomed is provided with these reports.

Appointment of new Independent Expert

- 3.21 If the Independent Expert advises Rhinomed and ASIC in writing that it is unable to continue its appointment, Rhinomed will seek ASIC's approval for the appointment of a new Independent Expert, within 15 business days of receiving that written notice from the appointed Independent Expert.

Engagement of External Training Provider

- 3.22 Rhinomed will conduct training provided by either the Independent Expert or a suitably qualified external training provider (**External Training Provider**) nominated by the Independent Expert in relation to its continuous disclosure obligations for all of its directors and senior managers within 6 months of the date of this enforceable undertaking. This training will incorporate and address matters identified by the Independent Expert and Recommendations made by the Independent Expert in its First Report.

Restrictions on fundraising

- 3.23 Rhinomed will not:
- 3.23.1 give a notice under paragraph 708A(5)(e) of the Corporations Act in relation to any securities of Rhinomed;
- 3.23.2 give a notice under paragraph 708A(12C)(e) of the Corporations Act (as notionally inserted into the Corporations Act by ASIC Class Order [10/322] *On-sale for convertible notes issued to wholesale investors*) in relation to any securities of Rhinomed;

- 3.23.3 offer or issue securities in reliance on subsection 708AA(2) of the Corporations Act;
- 3.23.4 offer or issue securities in reliance on section 713 of the Corporations Act;
- 3.23.5 offer or issue securities in reliance on subsection 713(1A) of the Corporations Act (as notionally inserted into the Corporations Act by ASIC Class Order [CO 10/321] *Offers of vanilla bonds*);
- 3.23.6 offer or issue securities in reliance on ASIC Class Order [CO 00/195] *Offer of convertible securities under s713*;
- 3.23.7 offer or issue securities in reliance on ASIC Class Order [CO 09/425] *Share and interest purchase plans*; or
- 3.23.8 offer or issue securities in reliance on any other class order made by ASIC that Rhinomed would not be *entitled* to rely on if ASIC had made determinations under subsections 708AA(3), s708A(2) and s713(6) of the Corporations Act in relation to Rhinomed,

until all of the following has occurred:

- 3.23.9 ASIC has been provided with a copy of the Second Report; and
 - 3.23.10 the Independent Expert has given an opinion that the Recommendations have been effectively implemented.
- 3.24 Rhinomed has offered, and ASIC has agreed to accept, the undertakings set out in paragraphs 3.23 above as an alternative to determinations pursuant to sections 708AA(3), 708A(2) and 713(6) of the Corporations Act.

Costs

- 3.25 Rhinomed will pay the costs of its compliance with this enforceable undertaking, including all remunerations and costs associated with the Independent Expert and the External Training Provider.

Provision of documents and information to ASIC



- 3.26 Rhinomed will provide all documents and information requested by ASIC from time to time for the purpose of assessing Rhinomed's compliance with the terms of this enforceable undertaking.

4. Acknowledgements

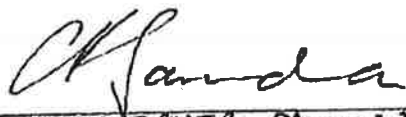
- 4.1 Rhinomed acknowledges that ASIC:
 - 4.1.1 may issue a media release on execution of this undertaking referring to its terms and to the concerns of ASIC which led to its execution;
 - 4.1.2 may from time to time publicly refer to this undertaking;
 - 4.1.3 will from time to time publicly report about compliance with this undertaking;
 - 4.1.4 will make this undertaking available for public inspection;
 - 4.1.5 may issue a media release referring to the content of the statements required to be made by Rhinomed to ASIC, and the Second Report and Third Report;
 - 4.1.6 may from time to time publicly refer to the content of the statements required to be made by Rhinomed to ASIC, and the Second Report and Third Report; and

- 4.1.7 will make available for public inspection a summary of the content of the Second Report and Third Report, or a statement that refers to the content of those expert reports.
- 4.2 ASIC acknowledges that it will not refer to any information from an expert report that:
- 4.2.1 consists of personal information of an identified natural person whose acts or omissions are not the subject of, or a concern mentioned in, the enforceable undertaking;
- 4.2.2 ASIC is satisfied would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of Rhinomed or a third party otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking;
- 4.2.3 ASIC is satisfied should not be released because it would be against the public interest to do so; or
- 4.2.4 Rhinomed has asked not to be released if ASIC is satisfied that:
- i. it would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of Rhinomed otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking; or
 - ii. it should not be released because it would be against the public interest to do so.
- 4.3 Further Rhinomed acknowledges that:
- 4.3.1 ASIC's acceptance of this undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of ASIC's concerns in this enforceable undertaking or arising from future conduct;
- 4.3.2 this undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this undertaking or arising from future conduct.
- 4.4 While the entry into this enforceable undertaking does not constitute an admission by Rhinomed of a contravention of section 674(2), Rhinomed makes the acknowledgement set out at paragraph 2.6.1 above and has offered an enforceable undertaking in the terms of part 3 above.
- 4.5 Rhinomed acknowledges that this undertaking has no operative force until accepted by ASIC, and Rhinomed and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.

EXECUTED BY Rhinomed Ltd ACN 107 903
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 Director MICHAEL JOHNSON

 Director/Secretary

Accepted by the Australian Securities and Investments Commission under s93AA of the
ASIC Act by its duly authorised delegate:



Name: CHRISTOPHER SAVUNDRA
Delegate of Australian Securities and Investments
Commission

Dated: 9 JUNE 2016