

X RITE INC
Form SC TO-T/A
May 08, 2012

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

SCHEDULE TO
TENDER OFFER STATEMENT UNDER SECTION 14(D)(1) OR 13(E)(1)
OF THE SECURITIES EXCHANGE ACT OF 1934

Amendment No. 4

X-RITE, INCORPORATED

(Name of Subject Company (Issuer))

TERMESSOS ACQUISITION CORP.

A Wholly-Owned Subsidiary of

DANAHER CORPORATION

(Names of Filing Persons (Offerors))

COMMON STOCK, \$0.10 PAR VALUE

(Title of Class of Securities)

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983857103

(CUSIP Number of Class of Securities)

Jonathan P. Graham

Senior Vice President General Counsel

James F. O Reilly

Associate General Counsel and Secretary

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(202) 828-0850

(Name, address, and telephone number of person authorized to receive notices and communications on behalf of filing persons)

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CALCULATION OF FILING FEE

**Transaction Valuation(1)
\$495,507,055**

**Amount of Filing Fee(2)
\$56,786**

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- (1) Calculated solely for purposes of determining the filing fee. The calculation assumes the purchase of 86,281,412 shares of voting common stock, par value \$0.10 per share. The transaction value also includes the aggregate offer price for (i) 5,434,529 shares issuable pursuant to outstanding options with an exercise price less than \$5.55 per share, which is calculated by multiplying the number of shares underlying such outstanding options at each exercise price therefor by an amount equal to \$5.55 minus such exercise price and (ii) 382,898 shares issuable pursuant to the vesting of restricted stock units.

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(2) Calculated in accordance with Exchange Act Rule 0-11 by multiplying the transaction value by 0.00011460.

x Check the box if any part of the fee is offset as provided by Rule 0-11(a)(2) and identify the filing with which the offsetting fee was previously paid. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

Amount Previously Paid: \$56,786
Form or Registration No.: Schedule TO

Filing Party: Danaher Corporation
Date Filed: April 17, 2012

.. Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.
Check the appropriate boxes below to designate any transactions to which the statement relates:

x Third-party tender offer subject to Rule 14d-1.

.. Issuer tender offer subject to Rule 13e-4.

.. Going-private transaction subject to Rule 13e-3.

.. Amendment to Schedule 13D under Rule 13d-2.

Check the following box if the filing is a final amendment reporting the results of the tender offer. ..

If applicable, check the appropriate box(es) below to designate the appropriate rule provision(s) relied upon:

.. Rule 13e-4(i) (Cross-Border Issuer Tender Offer)

.. Rule 14d-1(d) (Cross-Border Third-Party Tender Offer)

This Amendment No. 4 (this Amendment) to the Tender Offer Statement on Schedule TO (the Schedule TO) amends and supplements the Schedule TO relating to the tender offer by Termessos Acquisition Corp., a Michigan corporation (Purchaser) and a wholly-owned subsidiary of Danaher Corporation, a Delaware corporation (Parent), for all of the outstanding common stock, par value \$0.10 per share (the Shares), of X-Rite, Incorporated, a Michigan corporation (the Company), at a price of \$5.55 per Share, net to the seller thereof in cash, without interest, less any applicable withholding taxes, upon the terms and subject to the conditions set forth in the Offer to Purchase, dated April 17, 2012 (the Offer to Purchase), a copy of which is attached as Exhibit (a)(1)(A), and in the related letter of transmittal (the Letter of Transmittal), a copy of which is attached as Exhibit (a)(1)(B), which, together with any amendments or supplements thereto, collectively constitute the Offer. Except as specifically provided herein, this Amendment does not modify any of the information previously reported on the Schedule TO.

All the information set forth in the Offer to Purchase, including all schedules and annexes thereto, is incorporated herein by reference in response to Items 1 through 9 and Item 11 in this Schedule TO, and is supplemented by the information specifically provided in this Schedule TO.

This Amendment No. 4 is being filed to amend and supplement Items 1 through 9, 11 and 12 as reflected below.

Items 1 through 9 and 11

Item 1 through 9 and Item 11 of the Schedule TO, which incorporate by reference the information contained in the Offer to Purchase, are hereby amended as follows:

The information set forth in Section 11 The Merger Agreement of the Offer to Purchase is hereby amended and supplemented by inserting the following after the third sentence of the subsection captioned Top-Up Option :

The Company has 150,000,000 authorized Shares. As of April 10, 2012, there were 86,281,412 Shares issued and outstanding, 6,670,186 Shares reserved for issuance upon the exercise of Company Stock Options, 382,898 Shares reserved for issuance upon the vesting of Company restricted stock units, 5,252,202 Shares reserved for future issuance under the Company's stock option plans and 674,638 Shares reserved for issuance under the Company's employee stock purchase plan. Based on the foregoing, approximately eighty-four percent (84%) of the Shares outstanding as of April 10, 2012 would have to be tendered in the Offer to allow Purchaser to exercise the Top-Up Option.

Item 11

(a) **Agreements, Regulatory Requirements and Legal Proceedings.** Item 11(a) of the Schedule TO is hereby amended and supplemented as follows:

The information set forth in Section 16 Certain Legal Matters; Regulatory Approvals of the Offer to Purchase is hereby amended and supplemented by inserting the following paragraph as the sixth paragraph of the subsection captioned General :

On May 7, 2012, the parties to the consolidated action captioned *Johnson v. Vacchiano, et. al.*, No. 12-03659, pending in the Circuit Court of Kent County, Michigan (the State Action), and the action captioned *In Re X-Rite Shareholder Litigation*, C.A. No. 1:12-CV-00386, pending in the United States District Court for the Western District of Michigan, Southern Division (the Federal Action, together with the State Action, the Actions), entered into a Memorandum of Understanding (the MOU) to settle all claims asserted therein. In connection with the MOU, the Company agreed, among other things, to amend the Schedule 14D-9 to include certain supplemental disclosures (the Supplemental Disclosures). The settlement is subject to, among other things, the execution of a stipulation of settlement and court approval from the Circuit Court of Kent County, Michigan. Based upon the MOU, if the settlement is approved by the court, defendants will be released by plaintiffs and all members of the relevant class of the Company's shareholders from all claims alleged in the Actions, all claims concerning or otherwise relating to the transactions contemplated by the Merger Agreement, and all claims concerning, arising from, or otherwise related to the disclosures contained in the Schedule 14D-9 and the Supplemental Disclosures. The foregoing description of the MOU is qualified in its entirety by reference to a copy of the MOU attached hereto as exhibit (a)(5)(G), which is incorporated herein by reference. As a result of the settlement, the argument on plaintiffs' preliminary injunction motion previously scheduled for May 9, 2012 has been cancelled.

The information set forth in Section 16 Certain Legal Matters; Regulatory Approvals of the Offer to Purchase is hereby amended and supplement by inserting the following paragraph as the third paragraph of the subsection captioned United States Antitrust Compliance :

At 11:59 p.m., New York City time, on Monday, May 7, 2012, the waiting period applicable to the Offer and the Merger under the HSR Act expired. Accordingly, the condition of the Offer relating to the expiration or termination of the HSR Act waiting period has been satisfied.

The information set forth in Section 16 Certain Legal Matters; Regulatory Approvals of the Offer to Purchase is hereby amended and supplement by inserting the following paragraph as the third paragraph of the subsection captioned Foreign Antitrust Laws :

On May 7, 2012, the Germany Federal Cartel Office cleared the purchase of Shares pursuant to the Offer without conditions. Accordingly, the condition of the Offer relating to the expiration or termination of the antitrust laws of Germany has been satisfied.

Item 12. Exhibits.

Item 12 of the Schedule TO is hereby amended and supplemented by adding the following exhibits:

| Exhibit No. | Description |
|--------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (a)(5)(G) | Memorandum of Understanding, dated as of May 7, 2012 (incorporated by reference to Exhibit (a)(5)(7) to Amendment No. 4 to the Schedule 14D-9 filed by X-Rite, Incorporated with the Securities and Exchange Commission on May 8, 2012). |

SIGNATURES

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

Dated: May 8, 2012

TERMESSOS ACQUISITION CORP.

By: /s/ Daniel L. Comas
Name: Daniel L. Comas
Title: President

DANAHER CORPORATION

By: /s/ Daniel L. Comas
Name: Daniel L. Comas
Title: Executive Vice President and

Chief Financial Officer

EXHIBIT INDEX

| Exhibit No. | Description |
|--------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (a)(1)(A) | Offer to Purchase, dated April 17, 2012.* |
| (a)(1)(B) | Letter of Transmittal (including Internal Revenue Service Form W-9).* |
| (a)(1)(C) | Notice of Guaranteed Delivery.* |
| (a)(1)(D) | Letter from the Information Agent to Brokers, Dealers, Commercial Banks, Trust Companies and Other Nominees.* |
| (a)(1)(E) | Letter to Clients for Use by Brokers, Dealers, Commercial Banks, Trust Companies and Other Nominees.* |
| (a)(1)(F) | Press Release of Danaher Corporation, dated as of April 10, 2012 (incorporated by reference to Exhibit 99.1 to the Schedule TO-C filed by Danaher Corporation with the Securities and Exchange Commission on April 10, 2012).* |
| (a)(1)(G) | Summary Advertisement as published on April 17, 2012.* |
| (a)(5)(A) | Excerpt from Transcript of Danaher Corporation s First Quarter 2012 Earnings Call on April 19, 2012.* |
| (a)(5)(B) | Excerpt from Earnings Press Release of Danaher Corporation, dated as of April 19, 2012.* |
| (a)(5)(C) | Complaint filed in the United States District Court for the Western District of Michigan, Southern Division, captioned <i>Smith v. X-Rite, Inc., et al.</i> , Case No. 1:12-cv-00386 (incorporated by reference to Exhibit (a)(5)(2) to Amendment No. 1 to the Schedule 14D-9 filed by X-Rite, Incorporated with the Securities and Exchange Commission on April 25, 2012).* |
| (a)(5)(D) | Complaint filed in the Circuit Court of State of Michigan in the county of Kent, captioned <i>Balanced Beta Fund v. Utley, et al.</i> , Case No. 12-03719-CBB (incorporated by reference to Exhibit (a)(5)(3) to Amendment No. 1 to the Schedule 14D-9 filed by X-Rite, Incorporated with the Securities and Exchange Commission on April 25, 2012).* |
| (a)(5)(E) | Complaint filed in the Circuit Court of State of Michigan in the county of Kent, captioned <i>Johnson v. Vacchiano, et al.</i> , Case No. 12-03659-CZB (incorporated by reference to Exhibit (a)(5)(4) to Amendment No. 1 to the Schedule 14D-9 filed by X-Rite, Incorporated with the Securities and Exchange Commission on April 25, 2012).* |
| (a)(5)(F) | Complaint filed in the United States District Court for the Western District of Michigan, Southern Division, captioned <i>Storm v. X-Rite, Inc. et al.</i> , Case No. 1:12-CV-00414 (incorporated by reference to Exhibit (a)(5)(5) to Amendment No. 2 to the Schedule 14D-9 filed by X-Rite, Incorporated with the Securities and Exchange Commission on April 27, 2012).* |
| (a)(5)(G) | Memorandum of Understanding, dated as of May 7, 2012 (incorporated by reference to Exhibit (a)(5)(7) to Amendment No. 4 to the Schedule 14D-9 filed by X-Rite, Incorporated with the Securities and Exchange Commission on May 8, 2012). |
| (b) | Not Applicable. |
| (c) | Not applicable. |
| (d)(1) | Agreement and Plan of Merger, dated as of April 10, 2012, by and among X-Rite, Incorporated, Danaher Corporation, and Termessos Acquisition Corp. (incorporated by reference to Exhibit 2.1 to the Form 8-K filed by X-Rite, Incorporated with the Securities and Exchange Commission on April 11, 2012).* |
| (d)(2) | Tender and Support Agreement, dated as of April 10, 2012, by and among Danaher Corporation, Termessos Acquisition Corp. and Sagard Capital Partners, L.P. (incorporated by reference to Exhibit 99.1 to the Form 8-K filed by X-Rite, Incorporated with the Securities and Exchange Commission on April 11, 2012).* |

- (d)(3) Tender and Support Agreement, dated as of April 10, 2012, by and among Danaher Corporation, Termessos Acquisition Corp. and Tincum Capital Partners II, L.P., Tincum Capital Partners II Parallel Fund, L.P. and Tincum Capital Partners II Executive Fund L.L.C. (incorporated by reference to Exhibit 99.2 to the Form 8-K filed by X-Rite, Incorporated with the Securities and Exchange Commission on April 11, 2012).*
- (d)(4) Tender and Support Agreement, dated as of April 10, 2012, by and among Danaher Corporation, Termessos Acquisition Corp. and OEPX, LLC (incorporated by reference to Exhibit 99.3 to the Form 8-K filed by X-Rite, Incorporated with the Securities and Exchange Commission on April 11, 2012).*
- (d)(5) Confidentiality Agreement, dated as of January 29, 2012, by and between Danaher Corporation and X-Rite, Incorporated.*
- (e) Not applicable.
- (f) Not applicable.
- (g) Not applicable.
- (h) Not applicable.

* Previously filed.