

VITAL IMAGES INC
Form SC 14D9
May 11, 2011
Table of Contents

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

SCHEDULE 14D-9

**SOLICITATION/RECOMMENDATION STATEMENT UNDER
SECTION 14(d)(4) OF THE SECURITIES EXCHANGE ACT OF 1934**

Vital Images, Inc.

(Name of Subject Company)

Vital Images, Inc.

(Name of Person(s) Filing Statement)

Common Stock, par value \$0.01 per share

(Title of Class of Securities)

92846N104

(CUSIP Number of Class of Securities)

Michael H. Carrel
President and Chief Executive Officer
Vital Images, Inc.
5850 Opus Parkway, Suite 300
Minnetonka, Minnesota 55343-4414
(952) 487-9500

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

Copies To:

W. Morgan Burns
Jonathan L.H. Nygren
Faegre & Benson LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000

-
- Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

Table of Contents

TABLE OF CONTENTS

Item	Page
<u>Item 1. Subject Company Information</u>	1
<u>Item 2. Identity and Background of Filing Person</u>	1
<u>Item 3. Past Contacts, Transactions, Negotiations and Agreements</u>	2
<u>Item 4. The Solicitation or Recommendation</u>	9
<u>Item 5. Person/Assets, Retained, Employed, Compensated or Used</u>	23
<u>Item 6. Interest in Securities of the Subject Company</u>	23
<u>Item 7. Purposes of the Transaction and Plans or Proposals</u>	24
<u>Item 8. Additional Information</u>	25
<u>Item 9. Exhibits</u>	47

Table of Contents

Item 1. Subject Company Information

(a) Name and Address

The name of the subject company is Vital Images, Inc., a Minnesota corporation (the **Company**, **Vital Images**, or **we**, **our**, or **us**), and the address and telephone number of its principal executive offices are 5850 Opus Parkway, Suite 300, Minnetonka, Minnesota 55343-4414, (952) 487-9500.

(b) Securities

The title of the class of equity securities to which this Solicitation/Recommendation on Schedule 14D-9 (together with the exhibits and annexes hereto, as it may be amended or supplemented, this **Statement**) relates is the Company's Common Stock, par value \$0.01 per share (the **Shares**). As of the close of business on May 10, 2011, there were 14,069,369 Shares outstanding.

Item 2. Identity and Background of Filing Person

(a) Name and Address

Vital Images is the subject company and the person filing this Statement. The Company's name, address and business telephone number are set forth in **Item 1. Subject Company Information**, which information is incorporated herein by reference. The Company's website address is www.vitalimages.com. The information on the Company's website should not be considered a part of this Statement.

(b) Tender Offer and Merger

This Statement relates to the cash tender offer by Magenta Corporation, a Minnesota corporation (**Purchaser**), which is a wholly owned subsidiary of Toshiba Medical Systems Corporation, a company formed under the laws of Japan (**TMSC**), which is a wholly owned subsidiary of Toshiba Corporation (**Toshiba**), a company formed under the laws of Japan. Purchaser has made an offer to purchase all outstanding Shares at a purchase price of \$18.75 per Share in cash, net to the seller, without interest and subject to any required withholding of taxes (the **Offer Price**). The tender offer is disclosed in the Tender Offer Statement on Schedule TO (together with the exhibits thereto, as it may be amended or supplemented, the **Schedule TO**), filed by Purchaser, TMSC and Toshiba with the U.S. Securities and Exchange Commission (the **SEC**) on May 11, 2011, and is subject to the terms and conditions set forth in the Offer to Purchase dated May 11, 2011 (as it may be amended or supplemented, the **Offer to Purchase**), and in the related Letter of Transmittal (as it may be amended or supplemented, the **Letter of Transmittal**) and, together with the Offer to Purchase, the **Offer**). The Offer to Purchase and Letter of Transmittal are being mailed with this Statement and are filed as Exhibits (a)(1)(A) and (a)(1)(B) hereto, respectively, and are incorporated herein by reference.

The Offer is being made pursuant to the Agreement and Plan of Merger, dated as of April 27, 2011 (as amended from time to time, the **Merger Agreement**), by and among TMSC, Purchaser and the Company. A copy of the Merger Agreement is filed as Exhibit (e)(1) to this Statement and is incorporated herein by reference. The Merger Agreement is summarized in Section 13 of the Offer to Purchase. The Merger Agreement provides, among other things, for the making of the Offer and further provides that, following the successful completion of the Offer, upon the terms and subject to the conditions contained in the Merger Agreement, Purchaser will consummate a merger (the **Merger**) under the Minnesota Business Corporation Act (the **MBCA**) in which any remaining Shares of the Company not validly tendered pursuant to the Offer (other than Shares owned by Purchaser, TMSC or any of its subsidiaries (including Purchaser) and other than Shares for which the holder thereof has properly exercised dissenters' rights) will be cancelled and converted in the Merger into the right to receive cash in an amount equal to the Offer Price. Upon consummation of the Merger, Purchaser will merge with and into the Company and will cease to exist, with the Company continuing as the surviving corporation (the **Surviving Corporation**).

Table of Contents

The Merger Agreement has been included as an exhibit to this Statement to provide information regarding its terms. It is not intended to modify or supplement any factual disclosures about the Company, TMSC or Purchaser in any public reports filed with the SEC by the Company, TMSC or Purchaser. In particular, the assertions embodied in the representations, warranties, and covenants contained in the Merger Agreement were made only for purposes of the Merger Agreement and as of specified dates, were solely for the benefit of the parties to the Merger Agreement, and are subject to limitations agreed upon by the parties to the Merger Agreement, including being qualified by confidential disclosure schedules provided by the Company to TMSC and Purchaser in connection with the execution of the Merger Agreement. These disclosure schedules contain information that modifies, qualifies and creates exceptions to the representations and warranties set forth in the Merger Agreement. Moreover, certain representations and warranties in the Merger Agreement have been made for the purposes of allocating risk between the parties to the Merger Agreement instead of establishing matters of fact. Accordingly, the representations and warranties in the Merger Agreement may not constitute the actual state of facts about the Company, TMSC or Purchaser. The representations and warranties set forth in the Merger Agreement may also be subject to a contractual standard of materiality different from that generally applicable under federal securities laws. Investors are not third-party beneficiaries under the Merger Agreement and should not rely on the representations, warranties, or covenants or any descriptions thereof as characterizations of the actual state of facts or the actual condition of the Company, TMSC, or Purchaser or any of their respective subsidiaries or affiliates. Moreover, information concerning the subject matter of the representations and warranties may change after the date of the Merger Agreement, which subsequent information may or may not be fully reflected in the Company's public disclosures.

TMSC formed Purchaser solely for the purpose of acquiring all outstanding Shares of the Company, and Purchaser has not engaged in any activities to date other than those incidental to its formation, entry into the Merger Agreement and commencement of the Offer. According to the Offer to Purchase, the business address and telephone number of Toshiba, TMSC and Purchaser are as follows:

Toshiba: 1-1, Shibaura 1-chome, Minato-ku, Tokyo 105-8001, Japan, 81-3-3457-4511.

TMSC: 1385, Shimoishigami, Otawara-shi Tochigi-ken, 324-8550, Japan, 81-287-26-6211.

Purchaser: c/o Toshiba America Medical Systems, Inc., 2441 Michelle Drive, Tustin, CA 92780, 714-669-5000.

Item 3. Past Contacts, Transactions, Negotiations and Agreements

Except as otherwise described in this Statement, including in the Information Statement included as Annex I hereto, which is incorporated herein by reference, as of the date hereof, there are no material agreements, arrangements or understandings, and no potential or actual conflicts of interest, between the Company or its affiliates and (i) the Company's executive officers, directors or affiliates or (ii) TMSC, Purchaser or their respective executive officers, directors or affiliates.

The Information Statement is being furnished to the Company's shareholders pursuant to Section 14(f) of the Securities Exchange Act of 1934, as amended (the **Exchange Act**), and Rule 14f-1 thereunder, in connection with TMSC's right to designate persons to the Company's Board of Directors other than at a meeting of the shareholders after TMSC and its wholly owned subsidiaries, including Purchaser, acquire a majority of the Shares on a fully diluted basis pursuant to the Offer.

Arrangements among the Company, Purchaser and TMSC

Merger Agreement

The summary of the Merger Agreement contained in the Offer to Purchase is incorporated herein by this reference, but is qualified in its entirety by reference to the Merger Agreement. A copy of the Merger Agreement is filed as Exhibit (e)(1) to this Statement and is incorporated herein by this reference.

Table of Contents

Confidentiality Agreement

The following summary description of the Confidentiality Agreement is qualified in its entirety by reference to the Confidentiality Agreement, a copy of which is filed as Exhibit (e)(2) to this Statement and is incorporated herein by reference.

The Company and TMSC entered into a confidentiality agreement, dated January 28, 2011 (the **Confidentiality Agreement**). Pursuant to the Confidentiality Agreement, subject to certain exceptions, TMSC agreed to keep confidential all written, electronic or oral data, reports, interpretations, forecasts, records, statements, documents and information of any kind concerning the Company and its subsidiaries that the Company provided to TMSC.

TMSC agreed under the Confidentiality Agreement not to solicit for hire certain Company employees, including the Company's officers, for 18 months after the date of the Confidentiality Agreement. In addition, TMSC agreed, subject to certain exceptions, to a standstill provision pursuant to which TMSC agreed not to take certain acquisition-related actions for 18 months after the date of the Confidentiality Agreement, without being invited by the Company to do so.

Exclusivity Agreement

The following summary description of the Exclusivity Agreement is qualified in its entirety by reference to the Exclusivity Agreement, a copy of which is filed as Exhibit (e)(3) to this Statement and is incorporated herein by reference.

On February 28, 2011, the Company and TMSC entered into an exclusivity agreement (the **Exclusivity Agreement**) whereby, in consideration of the time, effort and money that TMSC will be required to expend, the Company agreed that, for a period beginning as of the execution of the Exclusivity Agreement and ending on 11:59 p.m. Central Time on April 29, 2011, the Company would cease any negotiations with respect to transactional alternatives to the Merger, not solicit or facilitate the submission of constitute a competing transaction, participate in any discussions or negotiations with any third party with respect to any competing transaction, enter into any agreement, arrangement or understanding with any third party with respect to a competing transaction or otherwise cooperate in any way with, or assist or participate in, encourage or facilitate any effort or attempt by any third party to do or seek to do any of the foregoing.

Marketing and Distribution Agreement

The following summary description of the Distribution Agreement is qualified in its entirety by reference to the Distribution Agreement, a copy of which is filed as Exhibit (e)(4) to this Statement and is incorporated herein by reference.

Edgar Filing: VITAL IMAGES INC - Form SC 14D9

The Company and TMSC entered into a marketing and distribution agreement, dated November 21, 2008 (the **Distribution Agreement**), whereby the Company appointed TMSC and certain TMSC distributors as nonexclusive resellers of certain Company products in connection with sales of TMSC's own scanner equipment to its customers. In connection with the Distribution Agreement, the Company's sales team provides assistance to TMSC in its sales efforts in a similar manner to how the Company's sales team provides assistance to its other resellers, and the Company provides back-up technical support for problems that TMSC cannot resolve.

The Distribution Agreement was amended on February 26, 2010 and July 27, 2010 to, among other things, update the products subject to the Distribution Agreement and update the pricing schedule. From time to time, the Company has entered into related agreements with certain TMSC distributors to, among other things, amend the products and pricing schedules with respect to such distributors.

TMSC is entitled to appoint a nonvoting observer to meetings of the Company's Board of Directors, subject to certain constraints. The TMSC observer attended four board meetings in 2009 and one in 2010, and has not attended a board meeting since February 4, 2010.

Under the Distribution Agreement, TMSC committed to purchase at least a certain minimum amount of the Company's products each year. TMSC is obligated to pay for the Company's maintenance and support services and each Vital Images product in accordance with an agreed price list. Notwithstanding the price list, under certain conditions, the Company must offer TMSC the lowest price it offers other purchasers of certain specified products.

The Distribution Agreement expires on December 31, 2013, subject to TMSC's right, in its sole discretion after December 31, 2010, to terminate the Distribution Agreement earlier on certain dates by providing the Company prior written notice.

Development Agreement

The following summary description of the Development Agreement is qualified in its entirety by reference to the Development Agreement, a copy of which is filed as Exhibit (e)(5) to this Statement and is incorporated herein by reference.

The Company and TMSC entered into a development agreement, dated January 8, 2009 (the **Development Agreement**), whereby the Company may develop software products pursuant to development plans that are later agreed to by the Company and TMSC. TMSC is entitled to sell the developed software products, subject to the terms and conditions of the Distribution Agreement, and is granted certain exclusive reseller rights with respect to the developed software products. As of May 10, 2011, the Company and TMSC have agreed to three development plans.

Under the Development Agreement, to facilitate the development of software products, the Company contributes personnel and TMSC contributes funds. For software products that are completed and that TMSC desires to sell under the Distribution Agreement, TMSC must pay an agreed-upon price to sell the products. Pursuant to two amendments to the Development Agreement, dated November 25, 2009 and October 25, 2010, the Company agreed to pay royalties to TMSC, subject to a cap, in the event the Company licenses to third parties certain software developed pursuant to the Development Agreement.

Arrangements with the Company's Current Executive Officers and Directors

Edgar Filing: VITAL IMAGES INC - Form SC 14D9

In considering the recommendation of the Company's Board of Directors to tender the Shares in the Offer, shareholders should be aware that the Company's executive officers and directors have agreements or arrangements that may provide them with interests that differ from, or are in addition to, those of the Company's shareholders generally. The Board of Directors was aware of these interests and considered them, among other matters, in approving the Merger Agreement and the transactions contemplated thereby.

Table of Contents

Consideration Payable Pursuant to the Offer

If each of the Company's directors and executive officers were to tender any Shares each owns for purchase pursuant to the Offer, each would receive the same cash consideration on the same terms and conditions as the Company's other shareholders. As of May 10, 2011, the Company's directors and executive officers (and persons and entities affiliated with them) owned in the aggregate 340,222 Shares. If the Company's directors and executive officers (and persons and entities affiliated with them) were to tender all of their Shares for purchase pursuant to the Offer and those Shares were accepted for payment and paid for by Purchaser, the directors and executive officers would receive an aggregate of approximately \$6,379,163 in cash, subject to any withholding required by applicable tax laws. The beneficial ownership of the Company's directors and executive officers is further described in the Information Statement under the heading Security Ownership of Principal Shareholders and Management.

Effect of the Merger Agreement on Restricted Stock

Pursuant to the Merger Agreement, each Share of restricted stock that is outstanding immediately prior to the date that Purchaser accepts for payment Shares validly tendered and not properly withdrawn pursuant to the Offer (the **Acceptance Time**) will vest at the Acceptance Time and will be converted into the right to receive a cash amount equal to the Offer Price at the effective time of the Merger (the **Effective Time**). As of May 10, 2011, the Company's directors and executive officers owned in the aggregate 18,750 Shares of restricted stock and would receive an aggregate of approximately \$351,563 in cash, subject to any withholding required by applicable tax laws, in connection with the consummation of the Merger.

Table of Contents

Effect of the Offer and the Merger Agreement on Stock Options

Our 1997 Stock Option and Incentive Plan (as amended, the **1997 Plan**) and 1997 Director Stock Option Plan (the **1997 Director Plan**) provide that, if a change in control occurs, then all options to purchase Shares under each plan will become immediately exercisable in full. Purchaser's acquisition of a majority of the Shares on a fully diluted basis pursuant to the Offer will constitute a change in control under the 1997 Plan and the 1997 Director Plan. The Merger Agreement provides that, with respect to each stock option (a **1997 Option**) issued under either the 1997 Plan or the 1997 Director Plan, if the exercise price of the 1997 Option is less than the Offer Price, then the 1997 Option will be cancelled as of immediately after the Acceptance Time in exchange for the right to receive a lump sum cash payment for each Share subject to the 1997 Option in an amount equal to (a) the Offer Price less (b) the exercise price payable in respect of each Share issuable under the 1997 Option. The Company must pay the amount so calculated, net of applicable taxes, as soon as practicable following the Acceptance Time, but in any event not later than three business days thereafter. If the exercise price of any 1997 Option is equal to or greater than the Offer Price, such 1997 Option will be cancelled as of immediately after the Acceptance Time, without any consideration being payable in respect thereof, and have no further force or effect.

Pursuant to the Company's 2006 Long-Term Incentive Plan (the **2006 Plan**), each stock option issued under the 2006 Plan (a **2006 Option**) that is outstanding immediately prior to the Acceptance Time will, if unvested, become vested in full as of immediately after the Acceptance Time. Following the Acceptance Time or an expiration of a subsequent offering period (including all extensions thereof) pursuant to the SEC's tender offer rules, if Purchaser (or TMSC on its behalf) exercises the Top-Up Option (as defined below under the heading "Top-Up Option" in **Item 8. Additional Information**), then Purchaser or TMSC may, pursuant to the Merger Agreement, require the Company to cause each 2006 Option that is then outstanding to be cancelled promptly (the time of cancellation, the **2006 Option Cancellation Time**). If the exercise price of any 2006 Option is less than the Offer Price, then the 2006 Option will be cancelled as of the 2006 Option Cancellation Time in exchange for the right to receive a lump sum cash payment for each Share subject to the 2006 Option in an amount equal to (a) the Offer Price less (b) the exercise price payable in respect of each Share issuable under the 2006 Option. The Company must pay the amount so calculated, net of applicable taxes, as soon as practicable following the 2006 Option Cancellation Time, but in any event not later than three business days thereafter. If the exercise price of any 2006 Option is equal to or greater than the Offer Price, such 2006 Option will be cancelled as of immediately after the 2006 Option Cancellation Time, without any consideration being payable in respect thereof, and have no further force or effect.

With respect to each of the Company's stock options (if any) that is outstanding immediately prior to the Effective Time of the Merger, the stock option, if unvested, shall become vested as of immediately after the Effective Time. If the exercise price of any stock option is less than the Offer Price, then the option will be cancelled as of immediately after the Effective Time in exchange for the right to a lump sum cash payment for each Share subject to the option in an amount equal to (a) the Offer Price less (b) the exercise price payable in respect of each Share issuable under the option. The Company must pay the amount so calculated, net of applicable taxes, as soon as practicable following the Effective Time, but in any event not later than three business days thereafter. If the exercise price of any option is equal to or greater than the Offer Price, such options will be cancelled as of immediately after the Effective Time, without any consideration being payable in respect thereof, and have no further force or effect.

The 1997 Plan and the 1997 Director Plan will terminate effective as of immediately after the Acceptance Time, and the 2006 Plan will terminate effective as of immediately after the first to occur of the 2006 Option Cancellation Time and the Effective Time.

The table below sets forth information regarding the vested and unvested stock options held by the Company's directors and executive officers as of May 10, 2011 with an exercise price per share less than the Offer Price.

Edgar Filing: VITAL IMAGES INC - Form SC 14D9

Name	Number of Shares Underlying Option	Exercise Price/ Share (\$)	Aggregate Payment for Option Cancellation (\$)	Total (\$)
Aaron (Erkan) Akyuz	125,000	12.02	841,250	
	30,000	14.79	118,800	
	7,200	15.99	19,872	979,922

Table of Contents

Name	Number of Shares Underlying Option	Exercise Price/Share (\$)	Aggregate Payment for Option Cancellation (\$)	Total (\$)
Stephen Andersen	23,000	15.99	63,480	
	12,500	14.79	49,500	
	11,700	8.79	116,532	
	10,290	15.11	37,456	
	10,000	15.40	33,500	
	10,000	12.02	67,300	
	6,938	12.599	42,676	
	3,262	12.599	20,065	430,508
Steven Canakes	7,038	12.599	43,291	
	5,462	12.599	33,597	
	3,000	15.40	10,050	
	30,000	15.11	109,200	
	17,600	8.79	175,296	
	15,000	15.99	41,400	
	12,500	14.79	49,500	462,334
Michael Carrel	150,000	15.25	525,000	
	147,500	16.57	321,550	
	51,400	8.79	511,944	
	42,700	15.99	117,852	
	15,000	15.11	54,600	
	50,000	14.79		