

2007 BCSECCOM 47

January 17, 2007

Headnote

Mutual Reliance Review System for Exemptive Relief Applications

Securities Act – sections 48, 76 and 84 – Exemption from registration and prospectus requirements – Registration relief – A lender under an equity line of credit wants relief from the requirement to register as an underwriter – The lender will not solicit any offers to purchase the securities it acquires from the issuer and will resell any securities through an exchange, using a registered dealer unaffiliated with the issuer or the lender – Prospectus relief – An issuer and a lender under an equity line of credit want relief from the requirements to include an underwriter's certificate in the prospectus and provide statutory rights against the lender to purchasers from the lender in the secondary market; the lender also wants relief from the requirement to deliver the prospectus to purchasers in the secondary market – The issuer will provide statutory rights to first purchasers of its securities from the lender; the issuer will publicly disclose the first purchasers' rights and direct first purchasers to the prospectus on SEDAR

National Instrument 44-101 – Exemption from short form prospectus form requirements - An issuer wants relief from the requirement to determine the distribution price of securities under the short form prospectus form requirements – The material terms of the price of the common shares to be sold in a particular draw down under the equity line of credit will be determined at the time of the draw down; the price will be disclosed in a prospectus supplement

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 48, 76 and 84

Form 44-101F1 s. 5.3

In the Matter of
the Securities Legislation of
Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia,
Newfoundland and Labrador, Ontario, Prince Edward Island, Quebec and
Saskatchewan (the Jurisdictions)

and

In the Matter of
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of

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Neurochem Inc. and Cityplatz Limited

MRRS Decision Document

Background

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application (the Application) from Neurochem Inc. (Neurochem) and Cityplatz Limited (Cityplatz) (collectively, the Filers) in connection with sales by Cityplatz of common shares (Common Shares) of Neurochem to be purchased by Cityplatz pursuant to an equity drawdown facility for a decision under the securities legislation of the Jurisdictions (the Legislation) that:

1. the requirement that Cityplatz and its directors, officers and certain of its employees be registered to conduct underwriting activities (the Registration Requirement) shall not apply to Cityplatz or its directors, officers or employees with respect to the sale of Common Shares under the ELOC (as defined below);
2. that the requirement that the Prospectus include the disclosure specified by Item 5.3 – Determination of Price of Form 44-101F1 *Short Form Prospectus* (the Prospectus Form Requirement) shall not apply;
3. that the requirement that Cityplatz send or deliver to a purchaser of Common Shares within two (2) business days of a sale, the latest prospectus and any amendment (the Prospectus Delivery Requirement) shall not apply to Cityplatz or to dealers through which it sells Common Shares under the Prospectus; and
4. that the right of a purchaser under the legislation of the Jurisdictions to withdraw from a purchase of a security within two (2) business days after receipt by the purchaser of a prospectus or any amendment (the Withdrawal Right) does not apply to a purchaser in connection with a sale of Common Shares by Cityplatz under the Prospectus; (the relief described in paragraph 1 to 4 being collectively referred to as the Requested Relief);

Under the Mutual Reliance Review System for Exemptive Relief Applications

- a) the Autorité des marchés financiers is the principal regulator for this application; and
- b) this MRRS Decision Document evidences the decision of each Decision Maker.

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Interpretation

Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

Representations

This decision is based on the following facts represented by the Filers:

1. Neurochem makes the following representations to the Decision Makers:
 - 1.1 Neurochem is a bio-pharmaceutical company incorporated under the laws of Canada.
 - 1.2 Neurochem is a reporting issuer in each of the provinces of Canada and is a foreign private issuer under applicable United States securities legislation.
 - 1.3 The Common Shares are traded on the Toronto Stock Exchange and posted for trading on the NASDAQ Global Market.
 - 1.4 On August 9, 2006, Neurochem and Cityplatz entered into a Securities Purchase Agreement (the Agreement) establishing an equity line of credit (the ELOC) pursuant to which Neurochem may draw-down up to a maximum of U.S.\$60 million in return for the issuance of Common Shares to Cityplatz. The Agreement provides for an obligation for Neurochem to draw-down at least U.S.\$25 million during a two (2) year period, subject to certain conditions.
 - 1.5 Subject to the U.S.\$25 million minimum referred to above, Neurochem may, in its sole discretion, determine how many Common Shares to sell under the ELOC. The price at which Cityplatz will purchase Common Shares under a particular draw-down under the ELOC is determined by applying a predetermined percentage discount of three percent (3%) to the volume weighted average price for the Common Shares for the relevant draw-down pricing period, which period may range in respect of a particular draw-down from one (1) three (3) day period to seven (7) three (3) day periods.
 - 1.6 The Agreement provides that Neurochem may not make a draw-down under the ELOC to the extent that such draw-down exceeds 4.9% of the then issued and outstanding Common Shares and that at no time will Neurochem request a draw-down that would result in the issuance of an aggregate number of Common Shares pursuant to the Agreement

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exceeding 19.9% of the number of Common Shares issued and outstanding as at the date of the Agreement without first obtaining shareholder and any required regulatory approval.

- 1.7 Concurrently with the execution of the Agreement, Neurochem and Cityplatz entered into a Registration Rights Agreement providing for the registration, under Form F-10 (Form F-10) promulgated under the United States Securities Act of 1933 with respect to the resale of the Common Shares to be acquired by Cityplatz under the ELOC to the public. The registration statement to be filed pursuant to such agreement shall form part of the Prospectus.
- 1.8 Neurochem intends to file a Prospectus in Canada and the United States under the Multi-Jurisdictional Disclosure System with the securities commissions or securities regulatory authorities of each of the Jurisdictions and with the United States Securities and Exchange Commission under Form F-10 (the Prospectus). The Prospectus will qualify, among other potential offerings by Neurochem, the initial distribution of the Common Shares to Cityplatz under the ELOC for purposes of the legislation of the Jurisdictions as well as the secondary offering by Cityplatz of such Common Shares.
- 1.9 The Prospectus will be prepared in accordance with the requirements of National Instrument 44-102 – *Shelf Distributions*, as varied by the exemptions requested hereby.
- 1.10 The Prospectus will indicate that Cityplatz is considered to be an underwriter under applicable Canadian and United States securities legislation.
- 1.11 Supplements to the Prospectus shall be filed concurrently with the giving of a draw-down notice under the ELOC by Neurochem to Cityplatz.
- 1.12 The material terms of the ELOC will be disclosed in a combination of the Prospectus and one or more supplements thereto. Because the price at which Common Shares will be sold in a particular draw-down will not be fixed with certainty until the end of the applicable pricing period that pricing information will be disclosed in a prospectus supplement.
- 1.13 Rodman & Renshaw LLC, a registered broker dealer in the United States will act as placement agent in the United States with respect to the ELOC and receive a commission in connection with such services.

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2. Cityplatz makes the following representations to the Decision Makers:
 - 2.1 Cityplatz is a corporation organized and existing under the laws of the British Virgin Islands with its head and principal office in the Isle of Man.
 - 2.2 Cityplatz has been established to invest as principal and trade in securities of publicly traded entities.
 - 2.3 Cityplatz is not a reporting issuer or the equivalent under the securities legislation of any province or territory of Canada or a registrant under securities legislation of the United States.
3. Cityplatz seeks relief from the Registration Requirements in respect of the sale of Common Shares by it under the Prospectus because it will, in the context of public sales, sell the Common Shares acquired by it under the ELOC through the facilities of a stock exchange and have no direct contact with the purchasers of the Common Shares.
4. Cityplatz seeks relief from the Prospectus Delivery Requirement on its own behalf and on behalf of dealers through which it may sell the Common Shares in the United States pursuant to the registration statement forming part of the Prospectus because such parties will not know the identity of the ultimate purchaser of the Common Shares sold in open market transactions.
5. Neurochem and Cityplatz seek relief from the Prospectus Form Requirement as the price at which Cityplatz will sell Common Shares is presently unknown but will be determined by reference to then prevailing market conditions and prices or otherwise with purchasers of the Common Shares.
6. Neurochem and Cityplatz seek relief from the Withdrawal Right because purchasers under the Prospectus will not receive a copy of the Prospectus, rendering the right inapplicable in the circumstances.

Decision

Each of the Decision Makers is satisfied that the tests contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted, provided that:

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1. the number of Common Shares distributed by Neurochem under one or more equity lines, including the ELOC, in any 24-month period does not exceed 19.9% of the number of Common Shares issued and outstanding as at the start of such period;
2. the obligations under the Agreement referred to in paragraph 1.6 are complied with and the representation in paragraph 1.10 remains true;
3. any material change by Neurochem and Cityplatz to the pricing provisions of the Agreement is forthwith announced by way of press release announcing that change;
4. Neurochem delivers to the TSX and, on request, each Decision Maker, a copy of each draw-down notice;
5. forthwith upon issuing a draw-down notice under the ELOC, Neurochem issues a news release (a Draw-down News Release): (i) disclosing the issuance of the particular draw-down notice to Cityplatz; (ii) stating that the Prospectus (amended, restated or supplemented, as the case may be, in respect of the draw-down in question) has been or will be filed and is or will be available on the *System for Electronic Document Analysis and Retrieval* (SEDAR) and the EDGAR website of the US Securities and Exchange Commission (SEC); and (iii) describing the rights of action provided in accordance with paragraph 8;
6. immediately following the closing of a draw-down under the Agreement, Neurochem issues a news release (a Closing News Release) (i) announcing the closing of the draw-down; (ii) stating that the Prospectus is available on the *System for Electronic Document Analysis and Retrieval* (SEDAR) and the EDGAR website of the US Securities and Exchange Commission (SEC); (iii) specifying the relevant Distribution Period (as defined below); and (iv) describing the rights of action described in paragraph 8;
7. if Cityplatz, within 40 days of settlement of a draw-down (the Distribution Period):
 - 7.1 resells, through the TSX or otherwise into the secondary market in Canada, any of the Common Shares acquired by it pursuant to any drawdown under the ELOC; or
 - 7.2 directly or indirectly hedges the investment risk associated with its acquisition of any Common Shares by means of short sales or similar strategies involving the sale of Common Shares (or securities convertible

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into, exchangeable for or economically equivalent to Common Shares) through the TSX or otherwise into the secondary market in Canada;

Neurochem recognizes the first purchasers (the First Purchasers) of such securities as having purchased pursuant to a distribution under the Prospectus and as having received constructive delivery of the Prospectus through a combination of Neurochem's filing of the Prospectus in accordance with paragraphs 1.8 and 1.9 and the issuance of the Draw-down News Release and the Closing News Release in connection with the particular draw-down;

8. in the event that there is a misrepresentation in the Prospectus, each First Purchaser is entitled to rights (i) for damages, and/or (ii) for rescission, the whole as described in the Prospectus.
9. Cityplatz does not solicit offers to purchase the Common Shares and effects all sales of Common Shares through a dealer unaffiliated with Cityplatz and Neurochem and registered under the applicable legislation;
10. the pricing period in respect of a particular draw-down commences within five trading days after the issuance of the related draw-down notice;
11. no extraordinary commission or consideration is paid by Cityplatz in respect of the distribution of Common Shares; and
12. upon request of a Decision Maker, Cityplatz provides full particulars of trading and hedging activities, by Cityplatz and any of its affiliates relating to securities of Neurochem during the term of the Agreement.

Louis Morisset
Executive Director, Securities Markets

Nancy Chamberland
Executive Director, Distribution

Autorité des marchés financier