

# 2005 BCSECCOM 73

January 10, 2005

## **Headnote**

### **Mutual Reliance Review System for Exemptive Relief Applications**

Securities Act s. 114(2) Issuer Bids - Exemption from the formal issuer bid requirements in Part 13 of the Act - An issuer conducting an issuer bid under a modified dutch auction procedure requires relief from the requirement to take up and pay for securities deposited on a pro rata basis - Under the modified dutch auction procedure all shares deposited at prices above the clearing price will be returned to the shareholder instead of being taken up and paid for on a pro rata basis; shareholders who tender above the clearing price are not prepared to sell at the clearing price and therefore they suffer no prejudice if their shares are not taken up and paid for; returning their shares respects their intentions; shareholders who are prepared to sell at the clearing price are treated equally as their shares are taken up pro rata

Securities Rules s. 162(3) - Exemption from the Valuation Requirements - An issuer wants relief from the requirement to obtain a formal valuation in connection with an issuer bid for its outstanding securities - A liquid market for the issuer's securities exists prior to the bid; subsequent to the bid, there will be a market for the issuer's securities that is not materially less liquid than prior to the bid

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 105(g), 114(2)

*Securities Rules*, B.C. Reg. 194/97, ss. 162(2) and 162(3)

Form 62-903F, Item 9

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

and

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

and

In the Matter of Stratos Global Corporation (the Filer)

MRRS Decision Document

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### **Background**

The local securities regulatory authority or regulator (the “Decision Maker”) in each of the Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the “Legislation”) that, in connection with the proposed purchase by the Filer of a portion of its outstanding common shares (“Shares”) by way of an issuer bid (the “Offer”), the Filer be exempt from the following:

- (i) the requirements in the Legislation to:
    - (a) take up and pay for securities on a pro rata basis according to the number of securities deposited by each security holder;
    - (b) provide disclosure in the issuer bid circular (the “Circular”) of such proportionate take up and payment; and
  - (ii) the requirement in the Legislation of each of the Jurisdictions, except for Ontario and Quebec, to obtain a formal valuation of the Shares (the “Valuation Requirement”);
- (collectively, the “Requested Relief”).

Under the Mutual Reliance Review System for Exemptive Relief Applications

- (a) the Securities Commission of Newfoundland and Labrador is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **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 presented by the Filer:

1. The Filer is a corporation continued under the *Canada Business Corporations Act* on May 28, 1996.
2. The Filer is authorized to issue an unlimited number of Shares. As of November 30, 2004, the Filer had 49,376,603 issued and outstanding Shares.

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3. The Filer is a reporting issuer under the Act and its Shares are listed and posted for trading on the Toronto Stock Exchange (the “TSX”) under the trading symbol “SGB”.
4. The Filer is a reporting issuer in all Provinces of Canada, is not in default of any requirement of the securities legislation of the Jurisdictions, and is not on the list of defaulting reporting issuers maintained pursuant to such Legislation, where applicable.
5. To the knowledge of the Filer, the only Shareholders that currently hold greater than 10% of the Shares are: (a) I.G. Investment Management, Ltd., which owns 5,231,979 Shares as of June 30, 2004, representing up to approximately 10.6% of the issued and outstanding Shares; and (b) Van Berkomp and Associates Inc., whose clients hold through managed accounts an aggregate of 5,379,100 Shares as of December 31, 2003, representing up to approximately 10.9% of the issued and outstanding Shares.
6. The Filer intends to acquire up to 9,900,000 Shares representing approximately 20% of the outstanding Shares, or up to such other number of Shares not to exceed 9,900,000 Shares as will be specified in the Circular (the “Specified Number”).
7. The Offer will be made pursuant to a modified dutch auction procedure as follows:
  - (a) the Filer will offer to purchase up to the Specified Number of Shares;
  - (b) the price per Share to be paid to holders will be anywhere between a range of two prices to be determined by the Filer (the “Price Range”) which will be specified in the Circular;
  - (c) Shareholders wishing to tender to the Offer will be able to specify the lowest price within the Price Range at which they are willing to sell all or a portion of their Shares (an “Auction Tender”);
  - (d) Shareholders willing to tender to the Offer but who do not wish to make an Auction Tender may elect to tender such Shares at the Clearance Price determined in accordance with paragraph (e) below (a “Purchase Price Tender”);
  - (e) The Filer will select a purchase price (the “Clearance Price”) that will be the lowest price that will enable it to purchase up to the Specified Number of Shares. The Clearance Price will be determined based on the number of

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Shares deposited pursuant to the Auction Tenders and Purchase Price Tenders, the prices specified by shareholders making Auction Tenders, and the price at which the Shares deposited pursuant to the Purchase Price Tenders are considered to have been deposited;

- (f) all Shares tendered at or below the Clearance Price pursuant to an Auction Tender and all Shares tendered pursuant to a Purchase Price Tender will be taken up and paid for at the Clearance Price (calculated to the nearest whole Share, so as to avoid the creation of fractional Shares), subject to proration as described herein to enable the Filer to purchase up to the Specified Number of Shares;
- (g) all Shares tendered at prices above the Clearance Price will be returned to the appropriate Shareholders;
- (h) the aggregate amount that the Filer will expend pursuant to the Offer will not be ascertained until the Clearance Price is determined;
- (i) the Filer will first accept for purchase Shares properly deposited by any shareholder who beneficially holds fewer than 100 Shares and who deposits all such Shares pursuant to an Auction Tender at or below the Clearance Price or pursuant to a Purchase Price Tender and who checks the “Odd Lots” box in the Letter of Transmittal. These purchases shall not be subject to proration.
- (j) subject to paragraph (i) above, if more than the Specified Number of Shares are tendered for purchase at or below the Clearance Price the Filer will purchase such tendered Shares on a *pro rata* basis;
- (k) in the event that the Offer is under-subscribed by the expiration date but all the terms and conditions thereof have been complied with, with the exception of those waived by the Filer, the Filer may wish to extend the Offer for at least 10 days, in which case the Filer must first take up and pay for all Shares deposited thereunder and not withdrawn. In the event that the Offer is under-subscribed at the expiration date, there would be no proration among the tendered Shares taken up and paid for at such time. However, by the time any extension is over, the Offer may be over-subscribed in which case the Filer intends to pro-rate only among tendered Shares received during the extension and after the original expiration date (and subject to the exception relating to “Odd Lots” described in (i) above);

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- (l) all Shares tendered by Shareholders who specify a tender price that falls outside the Price Range will be considered to have been improperly tendered, will be excluded from the determination of the Clearance Price, will not be purchased by the Filer and will be returned to the tendering Shareholders;
  - (m) all Shares tendered by Shareholders who fail to specify any tender price for such tendered Shares and fail to indicate that they have tendered their Shares pursuant to a Purchase Price Tender will be deemed to have been tendered pursuant to a Purchase Price Tender; and
  - (n) tendering Shareholders who make either an Auction Tender or a Purchase Price Tender but fail to specify the number of Shares that they wish to tender will be considered to have tendered all Shares held by such Shareholder.
8. During the period of 12 months before December 20, 2004:
- (a) the number of outstanding Shares was at all times at least 5,000,000, excluding Shares beneficially owned, directly or indirectly, or over which control or direction was exercised, by related parties of the Filer and Shares that were not freely tradeable;
  - (b) the aggregate trading volume of the Shares on the TSX was at least 1,000,000;
  - (c) there were at least 1,000 trades in Shares on the TSX; and
  - (d) the aggregate trading value based on the price of the trades referred to in clause (c) above was at least \$15,000,000.
9. The market value of the Shares on the TSX was at least \$75,000,000 for the calendar month of November 2004.
10. Prior to the expiry of the Offer, all information regarding the number of Shares tendered and the prices at which such Shares are tendered will be kept confidential, and the Filer's selected depositary for the Offer will be directed by the Filer to maintain such confidentiality until the Clearance Price has been determined.
11. Since the Offer will be for fewer than all the Shares, if the number of Shares tendered to the Offer at or below the Clearance Price exceeds the Specified Number of Shares, the Legislation would require the Filer to take up and pay

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for deposited Shares proportionately, according to the number of Shares deposited by each Shareholder. In addition, the Legislation would require disclosure in the Circular that the Filer would, if Shares tendered to the Offer exceeded the Specified Number of Shares, take up such Shares proportionately according to the number of Shares tendered by each Shareholder to the Offer.

12. The Filer has determined it is reasonable to conclude that, following completion of the Offer, there will be a market for the beneficial owners of Shares who do not tender to the Offer that is not materially less liquid than the market that exists at the time the Offer is made and the Filer intends to rely upon the exemptions from the Valuation Requirement contained in sections 3.4(3) of Ontario Securities Commission Rule 61-501 and Quebec Local Policy Statement Q-27 (the "Presumption of Liquid Market Exemptions").
13. The Circular will:
  - (a) specify that the aggregate number of Shares that the Filer intends to purchase under the Offer will be up to the Specified Number of Shares;
  - (b) disclose the mechanics for the take up of and payment for, or the return of, Shares as described in paragraph 7 above;
  - (c) explain that, by tendering the Shares at the lowest price in the Price Range or pursuant to a Purchase Price Tender, a Shareholder can reasonably expect that Shares so tendered will be purchased at the Clearance Price, subject to pro ration as described above;
  - (d) disclose the facts supporting the Filer's reliance on the Presumption of Liquid Market Exemptions as updated to the date of the announcement of the Offer; and
  - (e) contains the disclosure prescribed by Legislation for issuer bids, except to the extent exemptive relief is granted by this decision.

### **Decision**

Each of the Decision Makers is satisfied that the test 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 Shares deposited under the Offer and not withdrawn are taken up and paid for, or returned to shareholders, in the manner described herein.

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DATED at St. John's, Newfoundland and Labrador this 10<sup>th</sup> day of January, 2005

Douglas Connolly, C.G.A.  
Director of Securities  
Securities Commission of Newfoundland and Labrador