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Headnote

Mutual Reliance Review System for Exemptive Relief Applications - relief granted from the requirements to include historical financial information in an information circular regarding a significant probable acquisition

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, s. 119(2)(b)

**IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH
COLUMBIA, ALBERTA, SASKATCHEWAN, ONTARIO, QUEBEC AND
NEWFOUNDLAND AND LABRADOR**

AND

**IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM
FOR EXEMPTIVE RELIEF APPLICATIONS**

AND

IN THE MATTER OF HEMOSOL INC. AND MDS INC.

MRRS DECISION DOCUMENT

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of British Columbia, Alberta, Saskatchewan, Ontario, Québec and Newfoundland and Labrador (the “Jurisdictions”) has received an application from MDS Inc. (“MDS”) and Hemosol Inc. (“Hemosol”), for a decision under the securities legislation of the Jurisdictions (the “Legislation”) and in addition in Ontario, for an order under the *Business Corporations Act* (Ontario) (the “OBCA”), that MDS and Hemosol be exempt from the requirement of the Legislation and the OBCA to include certain historical financial information with respect to the Ontario Labs Business (as defined below) and certain pro forma financial information concerning Hemosol in an information circular to be prepared in connection with a special meeting of the shareholders of Hemosol in connection with a restructuring (the “Transaction”) of Hemosol to be effected by way of an arrangement (the “Arrangement”) under section 182 of the OBCA involving Hemosol, the securityholders of Hemosol and MDS.

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AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Ontario Securities Commission is the principal regulator for this Application.

AND WHEREAS, unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 Definitions or in Quebec Commission Notice 14-101.

AND WHEREAS MDS and Hemosol have represented to the Decision Makers that:

1. MDS is a corporation existing under the *Canada Business Corporations Act*. The registered and principal office of MDS is located at 100 International Blvd., Toronto, Ontario M9W 6J6. MDS has a financial year-end of October 31.
2. MDS is an international health and life sciences company engaged in a broad range of activities and operates in three business segments:
 - (a) the Life Sciences Segment, which includes three divisions that involve (i) the design, development and manufacture of analytical instruments, (ii) pharmaceutical research services and (iii) the production of isotopes;
 - (b) the Health Segment, which includes two divisions that involve (i) the provision of clinical laboratory testing and related services in Canada and managing hospital laboratories and directing business improvement and change processes at hospitals in the United States through joint venture partnerships (the “Diagnostics Division”) and (ii) distribution services for medical products in Canada; and
 - (c) the Proteomics Segment, which includes the discovery and development of new medicines for the treatment of disease.
3. Within the Diagnostics Division in Canada, MDS provides clinical laboratory testing and related services for physicians and non-hospital health care institutions in all provinces of Canada west of the Maritimes, with the vast majority of these services being provided in the provinces of British Columbia, Alberta and Ontario. Approximately 50% of this clinical laboratory services business is carried on in the province of Ontario (the “Ontario Labs Business”). For the fiscal year ended October 31, 2003, MDS had annual revenues from the Diagnostics Division of \$532 million and from the Canadian operations carried on within the Diagnostics Division of \$398 million. As part of the Transaction, MDS will indirectly transfer to Hemosol

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certain material operating assets that form the essential part of the Ontario Labs Business.

4. As at January 30, 2004:
 - (a) MDS held 6,549,897 Hemosol Common Shares (as defined below), either directly or through a wholly-owned subsidiary, representing approximately 12% of the outstanding Hemosol Common Shares.
 - (b) MDS held 6,000,000 warrants to purchase Hemosol Common Shares (“Hemosol Warrants”) on certain terms and conditions. MDS also has the right to acquire an additional 4,000,000 Hemosol Warrants to be issued on certain terms and conditions on the extension of Hemosol’s existing bank loan (the “Loan”) for which MDS has given a guarantee.
 - (c) MDS held approximately 47% of the equity interest in MDS Capital Corp. (the balance of the equity interest is owned by institutional investors and management). MDS Capital Corp. and/or its affiliates provide management services to two entities which held an aggregate of 812,246 Hemosol Common Shares. The Hemosol Common Shares held by such entities are voted by such entities through authorized signing officers.
5. Of the 10 directors on the board of directors of Hemosol (the “Hemosol Board”), four are related to MDS by virtue of being directors, officers or employees of MDS or affiliates thereof.
6. MDS is a reporting issuer in the Province of Ontario and in each of the other provinces of Canada and to the best of its knowledge is not in default of its continuous disclosure obligations in the Jurisdictions.
7. The common shares of MDS are listed and posted for trading on the Toronto Stock Exchange (the “TSX”) and the New York Stock Exchange.
8. Hemosol is a corporation existing under the OBCA. The registered and principal office of Hemosol is located at 2585 Meadowpine Blvd., Mississauga, Ontario L5N 8H9. Hemosol has a financial year-end of December 31.
9. Hemosol is a biopharmaceutical company focused on the development and manufacturing of biologics, particularly blood-related proteins. Hemosol has a broad range of novel therapeutic products in development, including Hemolink, an oxygen therapeutic designed to improve oxygen delivery via the circulatory system. Hemosol is also developing additional oxygen

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therapeutics, a hemoglobin-based drug delivery platform to treat diseases such as hepatitis C and cancers of the liver, and a cell therapy program initially directed to the treatment of cancer. Hemosol intends to leverage its expertise in manufacturing blood proteins and its Meadowpine manufacturing facility to seek strategic growth opportunities.

10. Hemosol has no revenues as its products are in development and have not yet been marketed commercially. Hemosol's ability to continue as a going concern is dependent on its ability to secure financing or to generate revenues in order to be able to continue its development activities. Hemosol is currently exploring the use of its Meadowpine facility to manufacture biologic products for third parties as a way to generate revenues to fund development activities.
11. The authorized capital of Hemosol consists of an unlimited number of common shares ("Hemosol Common Shares"), an unlimited number of special shares issuable in series and 51,786 Series D special shares. As at January 30, 2004, 55,945,584 Hemosol Common Shares and no special shares were issued and outstanding.
12. Hemosol is a reporting issuer in the Province of Ontario and in each of the other provinces of Canada and to the best of its knowledge is not in default of its continuous disclosure obligations in the Jurisdictions.
13. The Hemosol Common Shares are listed and posted for trading on the TSX and the Nasdaq National Market.
14. On February 11, 2004, Hemosol and MDS executed an arrangement agreement (the "Arrangement Agreement") providing for the Transaction.
15. The essence of the Transaction consists of MDS transferring a new business to Hemosol to allow Hemosol to utilize its existing tax losses (the "Tax Losses"), New Hemosol (as defined below) acquiring the existing business of Hemosol (the "Blood Products Business") and a cash payment of \$16 million to New Hemosol from the MDS transferred business.
16. The Transaction will provide New Hemosol (as defined below) with financing that is vital to the continued development of the Blood Products Business and will improve the financial position of the Blood Products Business.
17. The steps in the Transaction must be as set out in an advance income tax ruling dated September 23, 2003, as amended by a supplementary tax ruling dated February 5, 2004, granted by Canada Customs and Revenue Agency to

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MDS in respect of the Transaction (the “Tax Ruling”) in order for MDS to rely on the Tax Ruling.

18. In order for Hemosol to utilize the Tax Losses, MDS will in effect transfer its Ontario Labs Business to a new limited partnership (the “Labs Partnership”) in which Hemosol will have a 99.99% interest. MDS will own 99.56% of the equity in Hemosol, with the remaining equity interest of 0.44% being held by the existing shareholders of Hemosol other than MDS or its subsidiaries (the “Public Shareholders”). MDS will not acquire voting control of Hemosol.
19. The existing Blood Products Business of Hemosol will also in effect be transferred to a new limited partnership (the “Blood Products Partnership”), which will be owned upon completion of the Arrangement as to 93% by a newly incorporated corporation under the OBCA (“New Hemosol”) and as to 7% by Hemosol. New Hemosol will be the general partner of the Blood Products Partnership and will control the Blood Products Business. The share ownership of New Hemosol will mirror Hemosol’s existing share ownership - that is, approximately 12% will be owned by MDS or its subsidiaries and approximately 88% will be owned by the Public Shareholders (based on current shareholdings). New Hemosol will also receive the \$16 million value attributed to the Tax Losses.
20. The result of the restructuring necessary to effect the Transaction is that Public Shareholders will have (i) a continuing equity interest in 93% of the Blood Products Business, the current business carried on by Hemosol (through their ownership of New Hemosol shares) and (ii) a 0.44% equity interest in the Labs Partnership transferred by MDS to Hemosol (through their ownership of a new class of shares of Hemosol).
21. The steps involved in completing the Transaction are as follows:
 - (a) MDS created a newly incorporated wholly-owned subsidiary (“MDS Sub”) and subscribed for one common share for nominal consideration and transferred the employees of the Ontario Labs Business (other than certain employees with national responsibilities) from MDS to MDS Sub.
 - (b) MDS and MDS Sub will form the Labs Partnership under the *Limited Partnerships Act* (Ontario) with MDS Sub acquiring a 0.01% general partnership interest in consideration for cash and MDS acquiring a 99.99% limited partnership interest in consideration for the transfer by MDS to the Labs Partnership of certain of the material operating assets of the Ontario Labs Business (collectively, the “Transferred Labs Assets”) including substantially all of the leases of the licensed specimen collection and

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laboratory locations (the “Licensed Locations”) of the Ontario Labs Business. For certain Licensed Locations, MDS will enter into licensing or other arrangements with the Labs Partnership.

- (c) The Labs Partnership will obtain new licenses from the Ministry of Health (Ontario), which are currently held by MDS, to operate the business at the Licensed Locations. These licenses are a fundamental requirement of the business as they enable the provision of the clinical laboratory services and are the mechanism through which fees for these services are allocated by the Ministry of Health (Ontario).
- (d) MDS will not be transferring certain assets of the Ontario Labs Business to the Labs Partnership, including accounts receivable and certain other assets not directly related to the conducting of clinical laboratory tests (collectively, the “Excluded Labs Assets”).
- (e) MDS will provide certain services to the Labs Partnership.
- (f) Hemosol and New Hemosol will form the Blood Products Partnership under the *Limited Partnerships Act* (Ontario) with New Hemosol as the general partner and Hemosol as the limited partner. New Hemosol will acquire a 0.01% partnership interest in consideration for cash and Hemosol will acquire a 99.99% partnership interest in consideration for the transfer by Hemosol to the Blood Products Partnership of the Blood Products Business. The Blood Products Partnership will assume all liabilities of Hemosol. Hemosol’s scientists and production and administrative employees will be transferred to the Blood Products Partnership and Hemosol management will be transferred to New Hemosol. The Blood Products Partnership will agree to provide all of its assets as collateral to the lender under the Loan which will be assumed by the Blood Products Partnership.
- (g) The existing stock options of Hemosol held by Hemosol employees will be cancelled. Subject to approval of the TSX, New Hemosol will adopt a stock option plan and issue options to acquire New Hemosol Common Shares to the holders of certain of such cancelled Hemosol options with an exercise price designed to maintain economic equivalence with the cancelled Hemosol stock options accounting for the fact that such options will not provide for any right to acquire Hemosol Class A Common Shares in addition to New Hemosol Common Shares.
- (h) MDS will surrender an aggregate of 2,500,000 of the 10,000,000 Hemosol Warrants that it currently holds or which may be issued to MDS in certain

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circumstances. The balance of the 7,500,000 Hemosol Warrants that it holds or which may be issued to it will be exchanged as part of the Arrangement by similar warrants or rights to purchase up to 7,500,000 New Hemosol common shares.

- (i) New Hemosol will assume the obligations of Hemosol under other convertible securities of Hemosol as if such convertible securities were a right to acquire New Hemosol Shares (other than an adjustment to the exercise price to maintain economic equivalence accounting for the fact that such convertible securities of New Hemosol will not provide any right to acquire Hemosol Class A Common Shares in addition to New Hemosol Common Shares).
- (j) The articles of Hemosol will be amended to create three new classes of shares:
 - (i) another class of voting common shares in addition to the Hemosol Common Shares (“Hemosol Class A Common Shares”) entitled to one vote per share;
 - (ii) non-voting shares (“Hemosol Class B Non-Voting Shares”); and
 - (iii) non-voting redeemable preferred shares (“Hemosol Class C Preferred Shares”).
- (k) The articles of Hemosol will be amended to provide that (i) the business of Hemosol will be restricted to holding the limited partnership interests in the Blood Products Partnership and the Labs Partnership, to performing its obligations under the Arrangement, and to certain incidental corporate powers and (ii) Hemosol’s available cash, after providing for the redemption of Hemosol Class C Preferred Shares, will be distributed to the holders of the Hemosol Class A Common Shares and the Hemosol Class B Non-Voting Shares.
- (l) Shareholders of Hemosol (including MDS and its subsidiaries) will exchange their Hemosol Common Shares with Hemosol on the basis of one Hemosol Class A Common Share and one Hemosol Class C Preferred Share for each Hemosol Common Share. Hemosol will cancel all Hemosol Common Shares acquired as a result of such exchange and the authorized capital will be limited to the three classes of shares described in paragraph (j) above.

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- (m) Shareholders of Hemosol (including MDS and its subsidiaries) will exchange their Hemosol Class C Preferred Shares with New Hemosol on the basis of one common share of New Hemosol (“New Hemosol Common Shares”) for each Hemosol Class C Preferred Share.
 - (n) Hemosol will redeem all of the Hemosol Class C Preferred Shares held by New Hemosol on the effective date of the Arrangement in exchange for the transfer by Hemosol to New Hemosol of a 91.12% partnership interest in the Blood Products Partnership, \$16 million in cash and the assumption by New Hemosol of Hemosol’s obligations under its convertible securities. Hemosol will borrow such \$16 million from the Labs Partnership.
 - (o) New Hemosol will invest \$15 million of the cash proceeds of the redemption of Hemosol Class C Preferred Shares in the Blood Products Partnership in exchange for additional partnership units of the Blood Products Partnership, such that New Hemosol’s former 91.13% general partnership interest will increase to 93% and Hemosol’s former 8.87% limited partnership interest will decrease to 7%.
 - (p) \$1 million of the cash proceeds of the redemption of Hemosol Class C Preferred Shares will be held in escrow for one year and may be released to Hemosol in respect of losses suffered by Hemosol relating to pre-closing liabilities. At the end of the escrow period, the balance of the escrowed funds will be released to New Hemosol, provided that certain amounts may be retained pending settlement of any claims made by Hemosol.
 - (q) MDS will transfer its 99.99% limited partnership interest in the Labs Partnership (the “Labs Limited Partnership Interest”) to Hemosol in consideration for the issuance by Hemosol to MDS of additional Hemosol Class A Common Shares (such that on completion of the Arrangement MDS will hold approximately 47.5% of the outstanding Hemosol Class A Common Shares) and such number of Hemosol Class B Non-Voting Shares that will result in MDS holding approximately 99.56% of the equity of Hemosol (through a combination of Hemosol Class A Common Shares and Hemosol Class B Non-Voting Shares) and the Public Shareholders holding 0.44% of the equity of Hemosol (through Hemosol Class A Common Shares).
22. It is intended that New Hemosol will apply to list the New Hemosol Common Shares on the Toronto Stock Exchange and, subject to obtaining confirmation from the Securities and Exchange Commission with regard to certain U.S. securities matters, will apply to transfer Hemosol's current listing on the

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Nasdaq Stock Market. The Hemosol Class A Common Shares will not be listed on any U.S. exchange or quoted on an inter-dealer quotation system of a registered national securities association in the United States. The Hemosol Class A Common Shares will not be listed on any stock exchange in Canada, but Hemosol intends to remain a reporting issuer in the Province of Ontario and in each of the other provinces of Canada.

23. In connection with the Arrangement, Hemosol will prepare and mail to all Hemosol shareholders and warrant holders a notice of special meeting, letter of transmittal and proxy and a management information circular describing the Transaction and attaching, among other things, the fairness opinion of KPMG Corporate Finance Inc. ("KPMG") (collectively, the "Meeting Materials"). Prior to distributing the Meeting Materials, Hemosol will seek an interim order from the Court:
 - (a) approving the calling of and providing for procedural matters in connection with the special meeting of Hemosol shareholders and warrant holders (the "Meeting") to consider and pass a special resolution to approve the Arrangement; and
 - (b) requiring that the vote to pass the aforesaid resolution at the Meeting be the affirmative vote of at least (i) two-thirds of the votes cast at the Meeting by shareholders and warrant holders and (ii) a majority of the votes cast at the Meeting by shareholders excluding the votes cast by MDS and other persons whose votes cannot be included for the purposes of minority approval (as such term is defined in subsection 1.1(1) of OSC Rule 61-501).
24. Subject to the approval of the Arrangement at the Meeting, Hemosol will apply to the Court for a final order approving the Arrangement and other procedural matters. Assuming the aforesaid final order is granted and the other conditions to closing in the Arrangement Agreement are satisfied or waived, Hemosol will file Articles of Arrangement with the Director under the OBCA to give effect to the Arrangement.
25. On September 17, 2003, the Hemosol Board formed an independent committee (the "Independent Committee") composed of three directors who are not related to MDS to evaluate any transaction with MDS involving the Tax Losses and, if required, to oversee the negotiation of the definitive terms of such transaction and to make a recommendation to the Hemosol Board as to whether such transaction is in the best interests of Hemosol.

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26. The Independent Committee engaged KPMG to provide financial advisory services to the Independent Committee and to provide an opinion to the Hemosol Board as to the fairness of the Proposed Transaction, from a financial point of view, to the shareholders of Hemosol excluding MDS and its affiliates and associates.
27. Hemosol is required to include in the Circular the disclosure that would be required in a prospectus as if the Circular were a prospectus of each of Hemosol and New Hemosol, with necessary modifications, as Hemosol Class A Common Shares, Hemosol Class C Preferred Shares and Newco Common Shares are being distributed to Public Shareholders in connection with the Transaction.
28. The disclosure required to be included in the Circular concerning an issuer whose securities are being distributed includes the financial statements and other disclosure, if any, of a business acquired or to be acquired by the issuer prescribed by the applicable prospectus rules.
29. The form of information circular in the Jurisdictions provides that the substance of the Transaction should be briefly described in the Circular in sufficient detail to permit shareholders to form a reasoned judgement concerning the matter and reference should be made to a prospectus form or issuer bid form for guidance as to what is material.
30. Items 31 and 32 of section 30 of the Regulations under the OBCA provide that the substance of the Transaction should be described in the Circular in sufficient detail to permit shareholders to form a reasoned judgement concerning the matter and reference should be made to a prospectus form or other appropriate form under the Act, including requirements with respect to financial statements, for guidance as to what is material.
31. The proposed acquisition by Hemosol from MDS of the Labs Limited Partnership Interest (the “Acquisition”), which is effectively an indirect acquisition of the Transferred Labs Assets by Hemosol, constitutes a “significant probable acquisition” by Hemosol as defined in subsection 2.4(2) of Rule 41-501 or subsection 1.4(2) of NI 44-101 as the significance tests provided in subsection 2.2(2) of Rule 41-501 or subsection 1.2(2) of NI 44-101 are satisfied at a level of greater than 100%.
32. Absent an exemption, the Circular must include the following financial information concerning the Ontario Labs Business and Hemosol as a result of the Acquisition (collectively, the “Historical Financial Information”):

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- (a) audited statements of income, retained earnings and cash flows for the Ontario Labs Business for each of the three most recently completed financial years ended more than 90 days before the date of the Circular;
- (b) unaudited statements of income, retained earnings and cash flows for the Ontario Labs Business for the most recently completed interim period that ended more than 60 days before the date of the Circular (the “Interim Period”) and the comparable period in the preceding financial year;
- (c) audited balance sheet for the Ontario Labs Business as at the end of the two most recently completed financial years ended more than 90 days before the date of the Circular;
- (d) unaudited balance sheet for the Ontario Labs Business as at the end of the Interim Period; and
- (e) the following pro forma financial statements:
 - (i) a pro forma balance sheet of Hemosol as at the date of Hemosol’s most recent balance sheet included in the Circular to give effect to the Acquisition as if it had taken place as at the date of the pro forma balance sheet;
 - (ii) a pro forma income statement of Hemosol to give effect to the Acquisition for each of:
 - (A) the most recently completed financial year for which audited financial statements of Hemosol are included in the Circular; and
 - (B) the most recently completed interim period for which financial statements of Hemosol are included in the Circular,in each case, as if the acquisition had taken place at the beginning of such financial year; and
 - (iii) pro forma earnings per share based on the foregoing pro forma financial statements.

AND WHEREAS under the System this Decision Document evidences the decision of each Decision Maker (collectively, the “Decision”);

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AND WHEREAS each Decision Maker 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 MDS and Hemosol are exempt from the requirement to include the Historical Financial Information in the Circular, provided that the Circular:

- (a) includes a summary of the revenues and operating income generated by the Ontario Labs Business for the financial years ending October 31, 2003, 2002 and 2001, which has been derived from financial records of MDS that were used to prepare the audited consolidated financial statements of MDS for such periods;
- (b) includes a balance sheet as at October 31, 2003 to reflect the Transferred Labs Assets (all of the disclosure required in paragraphs (a) and (b) will be referred to as the "Summary Financial Information");
- (c) describes Hemosol's proportionate interest in the Labs Partnership (through its ownership of the Labs Limited Partnership Interest); and
- (d) identifies the audited consolidated financial statements of MDS that were prepared using the financial records from which the Summary Financial Information was prepared and discloses that the audit opinion with respect to such MDS audited consolidated financial statements was issued without a reservation of opinion, provided that the Circular will disclose the fact that the auditors of MDS do not express any opinion on the Summary Financial Information.

IN ONTARIO, IT IS ORDERED THAT MDS and Hemosol are exempt under section 113 of the OBCA from the requirements of the OBCA to include the Historical Financial Information in the Circular as required by paragraph 112(1)(a) of the OBCA and Items 31 and 32 of the Regulations under the OBCA, provided that the Circular:

- (a) includes the Summary Financial Information;
- (b) describes Hemosol's proportionate interest in the Labs Partnership (through its ownership of the Labs Limited Partnership Interest); and
- (c) identifies the audited consolidated financial statements of MDS that were prepared using the financial records from which the Summary Financial Information was prepared and discloses that the audit opinion with respect

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to such MDS audited consolidated financial statements was issued without a reservation of opinion, provided that the Circular will disclose the fact that the auditors of MDS do not express any opinion on the Summary Financial Information.

DATED at Toronto, Ontario the 12th day of March, 2004.

Margo Paul
Director, Corporate Finance