

# 2009 BCSECCOM 590

October 13, 2009

## Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Takeover Bids - Exemption from the proportionate take-up requirements sections 2.26 and 6.1 of MI 62-104 and section 97.2(1) of the *Securities Act* (Ontario) - Dutch auction - 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 and the associated disclosure requirement - The issuer is disclosing the maximum number of shares it will acquire under the bid, and the minimum and maximum amount it will pay for shares tendered; as a result, the potential for confusion is minimal

## Applicable British Columbia Provisions

Multilateral Instrument 62-104, ss. 2.26 and 6.1  
Form 62-102F2, Items 2 and 8

In the Matter of  
the Securities Legislation of  
British Columbia and Ontario  
(the Jurisdictions)

and

In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of  
Cardiome Pharma Corp.  
(the Filer)

Decision

## Background

The securities regulatory authority or regulator in each of the Jurisdictions (collectively, the Decision Makers) 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 (Common Shares) pursuant to an issuer bid (the Offer), the Filer be exempt from the requirements in the Legislation:

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- (a) to take up and pay for all the securities tendered to the Offer proportionately according to the number of securities deposited by each security holder (the Proportionate Take Up Requirements);
  - (b) to provide disclosure in the issuer bid circular of the Filer dated September 1, 2009 (the Circular) of such proportionate take up and payment; and
  - (c) that the Offer not be extended if all the terms and conditions of the Offer have been complied with or waived unless the Filer first takes up all Common Shares deposited under the Offer and not withdrawn (the Extension Take Up Requirements)
- (collectively, the Exemptions Sought).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for dual application):

- (a) the British Columbia Securities Commission is the principal regulator for this application;
- (b) the Filer has provided notice that Section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in the Yukon Territory and the Provinces of Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island; and
- (c) this decision (the Decision) is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario pursuant to Section 104(2)(c) of the *Securities Act* (Ontario).

### **Interpretation**

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this Decision, unless otherwise defined.

### **Representations**

This Decision is based on the following facts represented by the Filer:

1. the Filer is validly existing under the *Business Corporations Act* (Canada) and has its head office in Vancouver, British Columbia;
2. as of October 5, 2009, the authorized capital of the Filer consists of an unlimited number of Common Shares and an unlimited number of preferred shares without par value, issuable in series, of which 63,762,296 Common

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Shares (the Outstanding Common Shares) and 2,272,727 Series A Preferred Shares were issued and outstanding;

3. the Common Shares are listed and posted for trading on the Toronto Stock Exchange (the TSX) under the symbol “COM” and quoted on the NASDAQ Global Market (NASDAQ) under the symbol “CRME”; on August 25, 2009 (the day on which the Offer was announced), the closing price of the Common Shares was US\$4.24 on NASDAQ and Cdn\$4.59 on the TSX;
4. the Filer is a reporting issuer in the Yukon Territory and each of the Provinces of Canada and, to its knowledge, is not in default of any requirement of the securities legislation of any of the jurisdictions in which it is a reporting issuer;
5. the Offer is subject to Rule 13e-4 adopted under the *U.S. Securities Exchange Act of 1934*, as amended (the Exchange Act), and is not exempt therefrom;
6. as of October 5, 2009, Adage Capital Partners, L.P. (Adage) owns approximately 12.3% of the Outstanding Common Shares; to the knowledge of the Filer, based on publicly available information, no other shareholder of the Filer holds, or exercises control and direction over, more than 10% of the Outstanding Common Shares; Adage has informed the Filer that it does not currently intend on tendering any of its Common Shares to the Offer;
7. under the proposed terms of the Offer, a tendering shareholder will be permitted to select a price between US\$4.25 per share and US\$5.10 per share (the Price Range) at which the shareholder is willing to sell his, her or its Common Shares; the Filer proposes to purchase up to US\$27.5 million of Common Shares; the Filer proposes to use cash on hand to acquire Common Shares tendered to the Offer; if the Offer is fully subscribed at the low end of the Price Range (US\$4.25), the Filer will purchase 6,470,588 Common Shares (representing 10.1% of the Outstanding Common Shares); if the Offer is fully subscribed at the high end of the Price Range (US\$5.10), the Filer will purchase 5,392,157 Common Shares (representing 8.4% of the Outstanding Common Shares);
8. the Offer will be made pursuant to a modified “Dutch Auction” procedure as follows:
  - (a) the Circular specifies that the Filer intends to purchase up to US\$27.5 million of Common Shares;

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- (b) the Circular specifies that the Price Range will be US\$4.25 per share to US\$5.10 per share;
- (c) a shareholder may elect to tender Common Shares to the Offer pursuant to either an auction tender (an Auction Tender) or a purchase price tender (a Purchase Price Tender); a shareholder tendering Common Shares to the Offer pursuant to an Auction Tender may specify a price within the Price Range at which he, she or it is willing to sell all or a portion of such Common Shares; a shareholder tendering Common Shares pursuant to a Purchase Price Tender will be deemed to have tendered such Common Shares to the Offer at the Purchase Price (as calculated in accordance with subparagraph 8(f) below);
- (d) all Common Shares tendered by a shareholder who (A) fails to indicate whether the tendered Common Shares have been tendered pursuant to an Auction Tender or a Purchase Price Tender, (B) tenders Common Shares pursuant to an Auction Tender but fails to specify a purchase price for such Common Shares or (C) indicates that the tendered Common Shares have been tendered pursuant to both an Auction Tender and a Purchase Price Tender, will be deemed to have tendered to the Offer pursuant to a Purchase Price Tender;
- (e) a shareholder may tender Common Shares to the Offer subject to the condition that a specified minimum number of the tendered Common Shares must be purchased in order for any of such Common Shares to be purchased; the Filer is making this alternative available to shareholders in order to accommodate shareholders who wish to have the transaction treated as a sale of Common Shares, rather than the payment of dividends, under U.S. federal income tax rules;
- (f) promptly following the expiry of the Offer, the Filer will determine a single price per share (the Purchase Price) that it will pay for Common Shares properly tendered to the Offer; the Purchase Price will be the lowest price in the Price Range that will enable the Filer to purchase US\$27.5 million of Common Shares (unless the Offer is undersubscribed, in which case the Purchase Price will be the price that enables the Filer to purchase all Common Shares properly tendered to the Offer); the Purchase Price, which will not be less than US\$4.25 per share or more than US\$5.10 per share, will be determined on the basis of the number of Common Shares tendered to the Offer and, in the case of Auction Tenders, the prices specified by the tendering shareholders; Common Shares that are tendered by shareholders at a price that is outside the Price Range, or which are otherwise not properly deposited to the Offer, will be considered to have

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been improperly tendered, will be excluded from the determination of the Purchase Price and will be returned to shareholders in accordance with subparagraph (i);

- (g) the Purchase Price and the aggregate number of Common Shares that the Filer will purchase under the Offer will not be determined until after the Offer expires, provided that the aggregate amount that the Filer will pay for Common Shares under the Offer will not exceed US\$27.5 million;
- (h) subject to the conditions of the Offer, including the conditions relating to conditional tenders described in subparagraph 8(e) above and conditions relating to pro-ration described in subparagraph 8(k) below, the Filer will purchase at the Purchase Price all Common Shares properly deposited or deemed to be deposited (and not withdrawn) at or below the Purchase Price;
- (i) promptly after the Offer expires, the Filer will return all Common Shares that were (A) not properly tendered to the Offer or (B) properly tendered to the Offer but not taken up and paid for, including Common Shares deposited pursuant to Auction Tenders at prices greater than the Purchase Price and Common Shares not purchased because of pro-ration or because the tendering shareholder's minimum conditional tender conditions were not met;
- (j) if the number of Common Shares properly tendered to the Offer (and not withdrawn) would result in an aggregate purchase price equal to or less than US\$27.5 million, the Filer will purchase at the Purchase Price all Common Shares properly tendered to the Offer and not withdrawn;
- (k) if the number of Common Shares properly deposited or deemed to be deposited for purchase at or below the Purchase Price (and not withdrawn) would result in an aggregate purchase price of more than US\$27.5 million, the Filer will purchase Common Shares properly deposited and not withdrawn in the following priority:
  - (i) without pro-ration, all Common Shares deposited or deemed to be deposited for purchase at or below the Purchase Price by holders of "odd lots" of less than 100 Common Shares who have tendered all of their Common Shares to the Offer;
  - (ii) on a pro rata basis, all other Common Shares deposited or deemed to be deposited for purchase at or below the Purchase Price (subject to the conditional tender provisions described in subparagraph 8(e)

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above and adjustments to avoid the purchase of fractional shares);  
and

(iii) if necessary to ensure that the Common Shares purchased under the Offer have an aggregate purchase price of more than US\$27.5 million, by random lot, but only to the extent feasible, all Common Shares deposited or deemed to be deposited for purchase at or below the Purchase Price subject to the condition that a specified minimum number of such Common Shares be purchased (and for whom such condition was not initially satisfied); and

(l) if the number of Common Shares properly deposited or deemed to be deposited for purchase at or below the Purchase Price (and not withdrawn) would result in an aggregate purchase price of more than US\$27.5 million, the Filer may extend the Offer;

9. under the Legislation, the Proportionate Take Up Requirements:

(a) do not apply so as to prohibit an issuer from acquiring securities under the terms of an issuer bid that, if not acquired, would constitute less than a standard trading unit (i.e. an odd lot); and

(b) do not apply to securities deposited by security holders who (A) are entitled to elect a minimum price per security within a range of prices at which they are willing to sell their securities to an issuer bid and (B) elect a minimum price which is higher than the price that the issuer pays for the securities under the issuer bid;

10. if the effect of pro-rata as described in subparagraph 8(k) would be to reduce the number of Common Shares deposited pursuant to a conditional tender to a number which is less than the minimum number of Common Shares specified by the tendering shareholder, the conditional tender will automatically be regarded as withdrawn; it is therefore possible, under the proposed terms of the Offer, that a shareholder could deposit or be deemed to deposit Common Shares at or below the Purchase Price and not have such Common Shares purchased under the Offer; the Legislation does not contain an exemption from the Proportionate Take Up Requirements in such circumstances; as noted in subparagraph 8(e), the Filer is structuring the Offer in this manner in order to accommodate shareholders who wish to have the transaction treated as a sale of Common Shares, rather than the payment of dividends, under U.S. federal income tax rules;

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11. under the Legislation, an issuer may not extend an issuer bid if all the terms and conditions of the issuer bid have been complied with or waived unless the issuer first takes up all the securities deposited under the issuer bid and not withdrawn; Rule 13e-4 of the Exchange Act requires an issuer to take up all securities deposited under an issuer bid concurrently and, as a consequence, prohibits an issuer from taking up securities prior to the expiry of an issuer bid;
12. there is a “liquid market” in the Common Shares, as such term is defined in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (MI 61-101), because:
  - (a) there is a published market for the Common Shares (the TSX and NASDAQ);
  - (b) during the 12 months before September 1, 2009:
    - (i) the number of outstanding Common Shares was at all times at least 5,000,000 (excluding Common Shares beneficially owned, or over which control and direction was exercised, by related parties and securities that were not freely tradeable);
    - (ii) the aggregate trading volume of Common Shares on NASDAQ (being the published market on which the Common Shares are principally traded) was at least 1,000,000 Common Shares;
    - (iii) there were at least 1,000 trades in the Common Shares on NASDAQ; and
    - (iv) the aggregate value of the trades in the Common Shares on NASDAQ was at least Cdn\$15,000,000; and
  - (c) the market value of the Common Shares on NASDAQ was at least Cdn\$75,000,000 for August 2008;
13. based on the facts set forth in paragraph 12 and the maximum number of Common Shares that may be purchased under the Offer, the Filer has determined that there is a liquid market for the Common Shares and that it is reasonable to conclude that, following the completion of the Offer, there will be a market for holders of Common Shares who do not tender all of their Common Shares to the Offer that is not materially less liquid than the market that existed at the time the Offer was announced;

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14. based on the facts set forth in paragraphs 12 and 13, the Filer relied upon the “liquid market” exemption (the Liquid Market Exemption) from the formal valuation requirements otherwise applicable to issuer bids under MI 61-101;
15. the Circular:
  - (a) discloses the mechanics for the take up of and payment for or, where applicable, the return of Common Shares tendered to the Offer as described in paragraph 8 above;
  - (b) explains that, by tendering Common Shares at the lowest price in the Price Range, shareholders can reasonably expect that the Common Shares so tendered will be purchased at the Purchase Price (subject to pro-ration and the conditional tender procedures);
  - (c) discloses the fact that the Filer has filed for an exemption from the Proportionate Take Up Requirements and Extension Take Up Requirements;
  - (d) discloses the facts supporting the Filer’s reliance on the Liquid Market Exemption; and
  - (e) except to the extent exemptive relief is granted by this Decision, contains the disclosure prescribed by the Legislation for issuer bids;
16. prior to the expiry of the Offer, all information regarding the number of Common Shares tendered and the prices at which such Common Shares are tendered shall be kept confidential, and the Filer’s depository for the Offer will be directed by the Filer to maintain such confidentiality until the Purchase Price has been determined.

### **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 this Decision has been met.

The decision of the Decision Makers under the Legislation is that the Exemptions Sought are granted provided that:

- (a) Common Shares deposited under the Offer and not withdrawn are taken up and paid for or, where applicable, returned to shareholders in the manner described in paragraph 8 of this Decision;



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- (b) the Filer is eligible to rely on the Liquid Market Exemption and complies with the representations contained in paragraph 12 of this Decision; and
- (c) the Filer complies with the requirements of the Exchange Act in respect of the conduct of the Offer.

Martin Eady, CA  
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British Columbia Securities Commission