OSC FILE NO.: 2022-4

IN THE MATTER OF
FRASER MACDOUGALL and CHRIS BOGART

- and -

IN THE MATTER OF
TRYP THERAPEUTICS INC.

APPLICATION
OF FRASER MACDOUGALL and CHRIS BOGART

(Under sections 114 and 161 of the *Securities Act*, R.S.B.C. 1996, c. 418 [the "**BC Act**"]; and under section 127 of the *Securities Act*, R.S.O. 1990, c. S.5 [the "**Ontario Act**"])

A. ORDERS SOUGHT

The Applicants, Fraser MacDougall and Chris Bogart, request that the British Columbia Securities Commission and/or the Ontario Securities Commission make the following orders:

1. An order under sections 114(1)(l) and 161(1)(b) of the BC Act, and/or sections 127(2), (2.1) and (3) of the Ontario Act, that Tryp Therapeutics Inc. ("**Tryp**" or the "**Company**") and Dr. William Garner cease trading in, and are prohibited from purchasing, any securities or derivatives related to the related party financing with Garner that Tryp announced on February 17, 2022 (the "**Proposed Transaction**"), or any other related party transaction, until such time as the approval of Tryp's shareholders other than Mr. Garner is obtained with respect to such transaction;

2. If the Proposed Transaction, or another related party transaction, has been effected in whole or in part without shareholder approval, an order under section 114(1)(h) of the BC Act rescinding that transaction; and

3. A temporary order under section 161(2) and (3) of the BC Act and/or section 127(5) of the Ontario Act:

    a. restraining the second tranche of the Proposed Financing, or any other related party transaction, from closing; and

    b. if shares have been issued pursuant to the Proposed Financing, or any other related party transaction, restraining the purchaser(s) from exercising the voting rights associated with those shares;

    until the hearing can occur and the issues determined.

B. GROUNDS

The grounds for the request are:

Part 1: FACTUAL BASIS

Tryp and the Applicants

4. Tryp is corporation formed pursuant to the laws of British Columbia. Tryp is a pharmaceutical company focused on developing psilocybin-based compounds for diseases with unmet medical needs.

5. Tryp is a reporting issuer in British Columbia, Alberta and Ontario. Its principal regulator is the British Columbia Securities Commission.

6. Tryp's shares trade on the Canadian Stock Exchange under the symbol TRYP.

7. The Applicants are significant minority shareholders of Tryp. Between them they own or control 2,859,000 shares, representing 4.2% of the issued and outstanding shares (calculated prior to the issuance of any shares pursuant to the Proposed Financing).

8. Much of Tryp's financing from inception has been provided by the Applicants and by investors whom they had identified (the "**BM investors**"). The BM Investors own or control approximately 40% of the issued and outstanding Tryp shares (calculated prior to the issuance of any shares pursuant to the Proposed Financing).

The board's defensive tactics should be stopped

9. Tryp is due for a general meeting (it has not had one since March 2021 and its last fiscal year end was August 31, 2021). The Applicants believe that a general meeting of shareholders would vote down the Proposed Financing and replace the current majority of the directors.

10. The Proposed Financing must be assessed in that context. It is a classic example of an inappropriate defensive tactic, contrary to the public interest, intended to keep the majority of the incumbent board in office.

The causes of the crisis

11. Tryp was created to develop novel therapeutic applications for psilocybin, a psychedelic drug. It went public by way of an IPO in December 2020. Within weeks of the IPO the share price reached its all-time high of $1.20. Then the price began a long slide (see the chart below). On Wednesday, March 3, 2022, the share price reached its all-time low of $0.15.

12. The price slide reflected a general market softening, which exacerbated the effect of a growing market perception that the board was mismanaging Tryp badly.

13. Companies like Tryp have to spend significant amounts of capital to attain milestones that permit them to raise the additional capital to continue the journey. Failure to raise capital on a timely basis destroys the opportunity to attain milestones. When the market perceives a diminishing chance that the company will attain its milestones, that perception will erode the market price, sometimes dramatically.

14. This is what happened at Tryp.

15. In September 2021, immediately following Tryp's fiscal year end, the Tryp board approved a 12-month budget of about $18 million. Tryp had $3 – 4 million in cash on the balance sheet. So Tryp needed to raise capital, and it needed to start doing so quickly. Management pressed the board for authority to raise the necessary capital. Capital was available at prices reflecting the then trading range of the shares, between $0.35 and $0.50. A clique of directors led by Garner (the other two are Gage Jull and Peter Molloy) refused to permit it. Garner, who owns approximately 20% of the shares, believed that delay would permit Tryp to raise capital at higher prices, thereby reducing the dilution to his own share ownership. His clique continued to cling to that position as the price declined from $0.50 to $0.40 to $0.20.

The budget

16. As both the market price and Tryp's cash declined, the board pressed to cut back Tryp's budget. The last budget it contemplated called for spending, over the next 12 months, of $4 million. The dramatic cuts to the budget diminished Tryp's chances of attaining market success, however, management continued to believe that success was attainable.

The BM Financing

17. In January 2022 management – with the authority of the board - invited the Applicants to try to raise the approximately $4 million required to fund Tryp's latest budget. They agreed to do so and succeeded in assembling a financing (the "**BM Financing**").

18. On 2 February 2022 the Tryp board met and approved the BM Financing. It was clear that Garner was welcome to invest along with the investors whom the Applicants had found and the expectation was that he would do so.

19. Management sent subscription agreements to the Applicants, who then started to collect signatures from investors who had agreed to invest.

The impending AGM

20. The Applicants succeeded in marshalling the $4 million BM Financing in the teeth of great investor unhappiness. Most investors had lost the majority of their investment in the long price slide. The BM investors together owned approximately 40% of the shares. They clearly had the capacity to replace the board and it was entirely foreseeable that they would do so at the next AGM.

The Garner clique proposes a financing that would keep them in the saddle

21. Within hours of approving the BM Financing and sending subscription agreements to the Applicants, the Tryp board met again, cancelled the BM Financing and for it substituted a transaction between Garner – a related party – and Tryp that was designed to keep the incumbents in the saddle (the "**First Garner Financing**").

22. The First Garner Financing was plainly inferior to the BM Financing that had already been agreed:

    a. It was limited to $2 million, only half of what was needed to fund the cut-down budget that the board had contemplated;

    b. The sole investor was to be Garner;

    c. It included additional terms that were collateral benefits to Garner and that were to the detriment of the Company and the other shareholders, including:

        i. The power to appoint 3 directors to the board;

        ii. Anti-dilution rights on all future financings to maintain Garner's pro rata ownership in the Company;

    iii. The payment, to Garner, of $50,000 for unidentified "expenses incurred in connection with the private placement"; and

d. It was a term of the financing that Tryp immediately dismiss Greg McKee as CEO.

23. The dismissal of Mr. McKee was plainly contrary to the interests of Tryp:

    a. There was no business reason to dismiss McKee and, until this time, no director had suggested that he should be dismissed.

    b. There was no legal basis to dismiss McKee. It follows that the dismissal exposed Tryp to a substantial severance claim.

    c. McKee was central to a number of Tryp's business development efforts. His abrupt dismissal, without any business reason, was bound to seriously undermine those efforts (and has).

24. The market has given its verdict. The day before the announcement of McKee's dismissal (and the First Garner Financing), the market price of Tryp's shares was $0.20. The day of the announcement it dropped to $0.165. Since then it has dropped to $0.13 This represents a total decline, from an already depressed price, of 35%.

25. The true reason for the term requiring McKee's dismissal as CEO had nothing to do with his performance in that role. The true reason was that there was no other way to obtain board approval. McKee opposed the First Garner Financing, as did one other director (out of five directors). Garner, of course, could not vote as he was conflicted. If McKee voted against the financing – as he would have, as Garner knew - then the First Garner Financing would fail. The term requiring that McKee be dismissed was included solely for a tactical reason: to place McKee in a position of conflict in order to disable him from opposing the financing. As a result of the use of that device, the resolution passed by a vote of 2:1.

26. The First Garner Financing was an abuse of the directors' powers:

    a. It was designed to keep Garner's clique in power and to prevent that power from being diluted. This was a violation of the duties of the directors to exercise their power to issue shares solely for the benefit of the Company; and

    b. It was also oppressive to the other shareholders of the Company.

27. On 8 February 2022 the Applicants wrote to the Tryp board demanding that a shareholders' meeting be convened to consider whether Tryp should enter into the First Garner Financing. Calling a shareholders' meeting would have been timely: Tryp gave notice of its 2021 meeting on 22 January 2021 and held the meeting on 24 March 2021 and, as such, a shareholders' meeting is now due to be held not later than 24 June 2022.

28. Even though the Act requires that an annual general meeting be held soon and notice of the last such meeting was given more than a year ago, the Garner clique did not call a

shareholders' meeting. Instead, they convened a board meeting – to which they did not invite McKee – that purported to approve another transaction with Garner, the Proposed Financing. Due to the failure to give notice of the board meeting to McKee, who would have voted against the Proposed Financing, the resolution approving the Proposed Financing is invalid.

29. From the February 17, 2022 news release by which it was announced, it appears that some of the most egregious of the collateral benefits to Garner were removed from the Proposed Financing. Accordingly, the Proposed Financing is less blatantly objectionable than the first. But it is still plainly a maneuver to keep the Garner clique in office. This is precisely the type of transaction to which Multilateral Instrument 61 – 101 *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**") is directed and that it is meant to protect against.

30. On February 17, 2022, Tryp announced that it intended to complete the Proposed Financing. Tryp claimed an exemption to MI 61-101 from on the ground of financial hardship.

31. On February 21, 2022, the Applicants made a complaint to the BCSC, the OSC and the CSE, with a copy to Tryp's counsel, advising that the Proposed Financing must not be closed without shareholder approval, on the grounds, inter alia, that:

    a. The claimed exemption from MI 61-101 was not available; and

    b. The Proposed Financing is an inappropriate defensive tactic intended to keep the majority of the incumbent board of directors in office.

32. Despite Tryp being on notice of the Applicants' position, on February 22, 2022, Tryp announced that the first tranche of the Proposed Financing, in the amount of $1 million, had closed. Tryp further announced that the second tranche of $3 million "is expected to close on or about March 1, 2022".

<u>Part 2: LEGAL BASIS</u>

Standing

33. The Applicants are both substantial shareholders of Tryp.

34. Tryp's securities are the subject of a related party transaction, and, therefore, the Applicants are "interested persons" and have standing to make an application for relief under section 114 and section 161 of the BC Act.

35. As shareholders who will be directly affected by the Proposed Financing, the Applicants further have standing to seek an order under section 127 of the Ontario Act, for the same reasons stated by the OSC in *MI Developments Inc.*, 2009 ONSEC 47:

> *[108] In our view, however, the Commission has discretion to permit an application to be brought by persons other than Staff under section 127. The question then, is in what circumstances the Commission should exercise that discretion?*

> *[109] The Applications are not, at their core, brought merely for the purpose of imposing sanctions for past breaches of the Act or past misconduct. While the past conduct of MID is a central focus of the Applications, the order sought is future looking and prophylactic and not in the nature of simply an enforcement sanction. Rather, the Applications are brought for the purpose of preventing MID from completing the Amended DIP Financing and from entering into other future related party transactions with MEC, without obtaining Minority Approval. We note in this respect that MID has indicated that it may consider entering into future related party transactions with MEC in connection with the possible purchase of assets of MEC.*
>
> *[110] We believe that the Applicants should be permitted to bring the Applications under section 127 for the following reasons:*
>
> > *(i) the Applications involve or relate to past and possible future related party transactions between MID and MEC, transactions regulated under MI 61-101;*
> >
> > *(ii) the Applications involve alleged breaches by MID of MI 61-101, but are not purely enforcement in nature;*
> >
> > *(iii) the relief sought is future looking in that it is intended to prevent completion of the Amended DIP Financing and other possible future related party transactions between MID and MEC, without Minority Approval;*
> >
> > *(iv) the Commission appears to have the authority to impose an appropriate remedy in the circumstances (subject to addressing the arguments in this matter related to the Commission's authority to issue the requested order);*
> >
> > *(v) the Applicants, as substantial shareholders of MID, were directly affected by the past conduct of MID and will be directly affected by the Amended DIP Financing and any future related party transactions; accordingly, the Applicants have a sufficiently direct interest in the outcome of the Applications; and*
> >
> > *(vi)) we are satisfied that it is in the public interest in the circumstances to hear the Applications.*
>
> *[111] Accordingly, we concluded that the Applicants should be permitted to bring the Applications under section 127 of the Act in these circumstances.*

Shareholder Approval is Required by MI 61-101 / financing hardship exemption unavailable

36. The financial hardship exemption to the requirement for shareholder approval in MI 61-101 comes in two parts:

37. Section 5.7 provides:

> *…section 5.6 [which requires a vote by the minority] does not apply to an issuer carrying out a related party transaction in any of the following circumstances….:*
>
> > *the circumstances described in paragraph (g) of section 5.5, if there is no other requirement, corporate or otherwise, to hold a meeting to obtain any approval of the holders of any class of affected securities,*

38. Section 5.5(g) describes the following circumstances (note that the branches of the section are conjunctive – each element has to be present):

    a. the issuer is insolvent or in serious financial difficulty,
    b. the transaction is designed to improve the financial position of the issuer,
    c. paragraph (f) is not applicable,
    d. the issuer has one or more independent directors in respect of the transaction, and
    e. the issuer's board of directors, acting in good faith, determines, and at least two-thirds of the issuer's independent directors, acting in good faith, determine that

        i. subparagraphs (i) and (ii) apply, **<u>and</u>**

        ii. the terms of the transaction are reasonable in the circumstances of the issuer,…

39. Section 5.7 is not available to Tryp. Each of the five elements of s. 5.5(g) has to be present. At least three of the five are not:

<u>"no other requirement, corporate or otherwise"</u>

40. It is well established as a matter of corporate law that directors may not use their power to issue shares for the purpose of keeping themselves in office. If they try to do so, the court will order that a general meeting be convened to decide the issue, with the new shares barred from voting.

41. This is the first reason that the exemption is not available.

<u>"the issuer is insolvent or in serious financial difficulty"</u>

42. Tryp has been managed badly by its board. But it is not insolvent or in serious financial difficulty. It has approximately $900,000 cash in the bank and has financing available from multiple sources, beginning with the financing that the BM investors offered it.

43. Moreover, if it were insolvent or in serious financial difficulty, that would have been a material change that the board would have been bound to disclose promptly. There has been no such disclosure.

44. This is the second reason that the exemption is not available.

<u>"the issuer has one or more independent directors in respect of the transaction"</u>

45. In respect of this transaction Tryp has only one independent director, Jim Kuo.

> <u>"the issuer's board of directors, acting in good faith, determines, and at least two-thirds of the issuer's independent directors, acting in good faith, determine that</u>
>
> <u>(A) [Tryp is insolvent or in serious financial difficulty]…, and</u>
>
> <u>(B) the terms of the transaction are reasonable in the circumstances of the issuer,"</u>

46. There has been no such determination by Jim Kuo.

47. This is the third reason that the exemption is not available.

The Garner financings are defensive tactics and require shareholder approval

48. The Garner financings are clearly defensive tactics and require shareholder approval as a matter of public interest:

    a. the First Garner Financing included strong measures to keep the Garner clique in office;

    b. the Garner clique voted for the First Garner Financing in preference to a financing that was twice as large and lacked the Garner-protective measures; and

    c. both Garner financings obtained board approval only by the Garner clique excluding McKee from voting.

49. The Commissions have taken a hard line with defensive tactics of this sort:

    a. In *Bradstone Equity Partners Inc*. [1998] 23 BCSCWS 15, the BC Securities Commission overturned a TSX Exchange decision and held that shareholder approval of a transaction was required. In the context of a takeover bid, the BCSC found that, because the transaction would have an enormous impact on the rights and interests of shareholders and because the directors lacked independence in negotiating and approving the transaction, it was in the public interest that shares not be distributed until the shareholders had been given adequate disclosure and the opportunity to approve the transaction. This was so despite the directors obtaining an independent fairness opinion of the transaction. Because the transaction was not arm's length, the BCSC determined that additional shareholder protection was required.

    b. In *Re Mercury Partners & Company Inc*., 2002 BCSECCOM 173, the BCSC required the issuer to obtain shareholder approval of a private placement. The BCSC ordered terms to maintain the status quo to the greatest extent possible until the required shareholder meeting.

c. In *Eco Oro Minerals*, 2017 ONSEC 23, the OSC set aside a TSX Exchange decision approving a share issuance in the context of a proxy fight on the basis that it was in the public interest to make an order requiring shareholder approval.

50. The language of the OSC in Eco Oro is instructive:

[125] In our view, the public interest requires an evaluation of whether an issuance of shares by a listed issuer is for the purpose of entrenching management in the face of a proxy contest, thwarting the justified expectations of shareholders trusting in a system that appropriately promotes shareholder democracy and board accountability.
…
[154] Whether management is pursuing the best course of action for Eco Oro or whether the Eco Oro Board should be reconstituted is for the shareholders to decide without management's ability to manipulate the vote. Allowing such conduct would directly affect the integrity of Ontario capital markets contrary to the Commission's mandate and the public interest.
…
[246] Considered more broadly, the jurisdiction asserted in the present case, which involves a contest for control of a public company by way of a proxy contest, can be analogized to the jurisdiction of the Commission over change of control transactions effected by way of a takeover bid. Proxy contests and takeover bids provide alternative means of effecting a change of control of a public company that have very material consequences for shareholders. Issuances of shares as a defensive measure in the face of a contest for control of a public company to influence the outcome in management's favour are subject to review by the Commission. Private placements with this tactical motivation have more typically arisen in the context of takeover bids and may constitute defensive tactics contrary to the public interest and to National Policy 62-202 - Take-Over Bids - Defensive Tactics (National Policy 62-202),

[247] Where a party wishes to contest such an issuance under Ontario securities law, they may seek to persuade the TSX to require shareholder approval, and if shareholder approval is not required by the TSX, to have that decision reviewed by the Commission. The Commission reviews the TSX's decision in the same manner as in this proceeding. Whether or not there is an exchange decision, a person may also seek to invoke the Commission's public interest jurisdiction under section 127 of the Act based on the underlying policies in National Policy 62-202, as the Applicants did here.

[248] If the share issuance is challenged as a defensive tactic in relation to a take-over bid, the Commission must necessarily delve into the purpose of the issuance. In Re Hecla Mining Co. (2016), 39 OSCB 8927, the Commission and the BC Securities Commission provided a framework for considering these matters where the first inquiry is whether the issuance is clearly not for a defensive purpose and the onus is initially on the target company in that context.

[249] When the Commission considers the public interest, whether under subsection 8(3) or section 127 of the Act, fairness to shareholders and therefore the integrity of the markets may well yield the same result in assessing a private placement designed to thwart a bid as it does in the case of an issuance designed to tip the balance in a proxy contest.

[250] Although National Policy 62-202 addresses takeover bids, the public interest in promoting fairness to shareholders clearly extends to ensuring fair contests for control whether pursued through the proxy solicitation process for contested shareholder meetings or by way of a takeover bid. In considering whether to exercise our discretion to require shareholder approval based on our view of the public interest, control transactions, regardless of form, may involve similar public interest concerns.

[251] The policy considerations underlying the fair treatment of shareholders in the Act and as reflected in National Policy 62-202 applicable to takeover bids are also applicable to proxy contests. The ability to craft terms and conditions to address inappropriate defensive tactics is necessary to fulfill the Commission's mandate to provide investor protection and to foster confidence in capital markets in connection with change of *control transactions implemented through a bid or a vote.*

Conclusion

51. Contrary to applicable securities law and the public interest Tryp and the majority of its directors, as led by Garner, have refused to allow Tryp's shareholders the opportunity to vote on the Proposed Financing, a clear defensive tactic employed to prevent the current shareholders from replacing them at the next AGM.

52. Accordingly, the Applicants request that the Commissions grant the orders sought.

C. EVIDENCE

The Applicants intend to rely on the following evidence at the hearing:

53. Affidavit and documentary evidence to be identified and delivered pursuant to the pre-hearing schedule agreed between the parties and Staff.

DATED this 4th day of March, 2022.

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