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British Columbia Securities Commission
701 West Georgia Street
P.O. Box 10142, Pacific Centre
Vancouver, BC V7Y 1L2

Attn: The Commission
Hearing Office

Ontario Securities Commission
20 Queen Street West
20th Floor
Toronto ON, M5H 3S8

Attn: Registrar, Office of the Secretary

Dear Sirs and Mesdames:

Re: Tryp Therapeutics Inc. ("Tryp" or the "Company") - Shareholder Approval Required for Proposed Related Party Financing

Application for a hearing under sections 114 and 161 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "BC Act")

Application for a hearing under sections 104 and 127 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Ontario Act")

Overview

We are counsel for Fraser Macdougall and Chris Bogart, who represent a significant group of Tryp's shareholders holding approximately 40% of Tryp's issued and outstanding shares (the "**Applicant Shareholders**").

On February 17, 2022, Tryp announced that it intended to complete a related party financing for gross proceeds of $4 million with Dr. William Garner, a director of Tryp, as the sole investor (the "**Proposed Financing**"). Tryp claimed an exemption from Multilateral Instrument I 61 – 101 *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**") on the ground of financial hardship.

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

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

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

Despite Tryp being on notice of the Applicant Shareholders' 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".

The Applicant Shareholders therefore request:

1. that the hearing of this application proceed on an expedited basis;

2. given that it is unlikely that an expedited hearing can occur before March 1, 2022, that a temporary order be made to the effect of:

    a. restraining the second tranche of the Proposed Financing from closing; and

    b. restraining Dr. Garner from exercising voting rights associated with shares issued pursuant to the Proposed Financing;

    until the hearing can occur and the issues determined; and

3. that a hearing management meeting be held as soon as possible before March 1, 2022, to address scheduling issues and the request for the temporary order.

Part 1: ORDERS SOUGHT

The Applicant Shareholders seek the following relief:

1. An order under sections 114(1)(l) and 161(1)(b) of the BC Act, and/or sections 104(c-e) and sections 127(2), (2.1) and (3) of the Ontario Act, that the Company and Dr. Garner cease trading in, and are prohibited from purchasing, any securities or derivatives related to the Proposed Financing, or any other related party transaction, until such time as the approval of Tryp's shareholders is obtained;

2. If the Proposed Transaction, or another related party transaction, has been effected 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, retraining the purchaser(s) from exercising the voting rights associated with shares;

until the hearing can occur and the issues determined.

Part 2: FACTS

The board's defensive tactics should be stopped

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 Applicant Shareholders believe that a general meeting of shareholders would vote down the Proposed Financing and replace the current majority of the directors.

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

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 Friday, 18 February 2022, the share price reached its all-time low of $0.15.

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

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.

This is what happened at Tryp.

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 William 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

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.

Existing investors ride to the rescue

Much of Tryp's financing from inception has been provided by Chris Bogart and Fraser Macdougall and by investors whom they had identified (the "**BM investors**"). In January 2022 management – with the authority of the board - invited Bogart and Macdougall 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**").

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 Bogart and Macdougall had found and the expectation was that he would do so.

Management sent subscription agreements to Bogart and Macdougall, who then started to collect signatures from investors who had agreed to invest.

The impending AGM

Bogart and Macdougall succeeded in marshalling that $4 million 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 more than 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

Within hours of approving the BM Financing 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**").

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

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

2. The sole investor was to be Garner;

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

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

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

    c. 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.

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

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

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

3. 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).

4. The market has given its verdict. Since the announcement of McKee's dismissal (and the First Garner Financing), the market price of Tryp's shares has dropped by 20%.

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.

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.

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

On 8 February 2022 we wrote, on behalf of Bogart and Macdougall, 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.

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. 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. However, it appears that the board adhered to the dismissal of McKee: it was essential to stop him from voting. If McKee had been invited and had attended and voted against the transaction (which he would have), then the resolution to approve the Proposed Financing would have failed.

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 MI 61 – 101 is directed and meant to protect against.

On February 17, 2022, Tryp announced that it intended to complete the Proposed Financing. Tryp claimed an exemption from Multilateral Instrument I 61 – 101 *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**") on the ground of financial hardship.

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Part 4: LEGAL BASIS

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

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

1. 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,

2. Section 5.5(g) describes the following circumstances (note that the branches of the section are conjunctive – each element has to be present):
   i. the issuer is insolvent or in serious financial difficulty,
   ii. the transaction is designed to improve the financial position of the issuer,
   iii. paragraph (f) is not applicable,
   iv. the issuer has one or more independent directors in respect of the transaction, **and**
   v. 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

      (A) subparagraphs (i) and (ii) apply, **and**

      (B) the terms of the transaction are reasonable in the circumstances of the issuer,

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:

1. "no other requirement, corporate or otherwise"

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.[1]

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

2. "the issuer is insolvent or in serious financial difficulty"

[1] The older English cases would stop share issuances if they were to keep management in the saddle: *Hogg v. Cramphorn Ltd. et al.*, [1967] Ch. 254, [1966] 3 All E.R. 420; *Bamford v. Bamford,* [1968] 2 All E.R. 655. The more recent cases (*Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2010 BCSC 1547; *Teck Corporation Ltd. v. Millar* (1972), 1972 CanLII 950 (BSCS)) permit boards to justify the issuance by showing that they had a subjective belief that it was in the best interests of the company and that there was an objective basis for that belief. The Garner financings cannot possibly survive that test.

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.

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.

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

3. "the issuer has one or more independent directors in respect of the transaction"

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

4. 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

    (A) [Tryp is insolvent or in serious financial difficulty]…, and

    (B) the terms of the transaction are reasonable in the circumstances of the issuer,

There has been no such determination by Jim Kuo.

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

The Garner financings are defensive tactics and require shareholder approval

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

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

2. 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

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

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

- 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.

- 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.

- 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.

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.

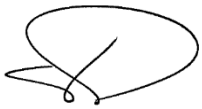
Part 5: Conclusion

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 in anticipation of the next AGM.

Accordingly, the Applicant Shareholders request that the Commissions grant the orders sought, as identified above.

Should you have any questions or require additional information, please do not hesitate to contact the undersigned.

Yours very truly,
Poulus Ensom LLP



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