OSC FILE NO.: 2022-4

IN THE MATTER OF

FRASER MACDOUGALL and CHRIS BOGART

- and -

IN THE MATTER OF

TRYP THERAPEUTICS INC.

MOTION

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**"]; and pursuant to OSC Rule 30 - *Joint Hearings*)

A. ORDER SOUGHT

The Moving Parties, the Applicants Fraser MacDougall and Chris Bogart, request with notice, that the British Columbia Securities Commission ("**BCSC**") and/or the Ontario Securities Commission ("**OSC**") make the following order:

1. That the hearing of this matter be held jointly before the BCSC and the OSC.

B. GROUNDS

The grounds for the request are:

Facts

1. Tryp Therapeutics Inc. ("**Tryp**" or the "**Company**") 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.

2. Tryp is a reporting issuer in British Columbia, Alberta and Ontario. Its principal regulator is the BCSC.

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

2. 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, as defined below).

4. Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101")** has been implemented in Ontario but not in British Columbia.

5. Section 5.6 of MI 61-101 provides that "An issuer shall not carry out a related party transaction unless the issuer has obtained minority approval for the transaction under Part 8." The requirement for obtaining minority shareholder approval is subject to the exemptions in section 5.7.

6. On February 4, 2022, Tryp announced a non-brokered private placement with director Dr. William Garner as the sole investor (the "**Proposed Financing**"). Tryp correctly stated in its news release that the private placement was a "related party transaction" as defined under MI 61-101. Tryp further stated that it relied on the exemption for minority shareholder approval set out in section 5.7(1)(b) – *Fair Market Value Not More $2,500,000.*

7. On February 8, 2022, the Applicants sent a letter to Tryp objecting to the private placement and demanding that the Tryp Board agree to convene a meeting of the shareholders to vote on whether or not to accept the financing.

8. On February 17, 2022, Tryp announced an amendment to the terms of the Proposed Financing. Tryp again correctly stated in its news release that the private placement was a "related party transaction" as defined under MI 61-101. However, as the amount of the Proposed Financing was now in excess of $2,500,000, Tryp claimed to rely on a different exemption for minority shareholder approval, set out in section 5.7(1)(e) – *Financial Hardship.*

9. Tryp had not previously claimed reliance on the financial hardship exemption.

10. 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 permitted to close 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.

11. 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".

12. On February 24, 2022, the Applicants made the underlying Application to the BCSC and the OSC.

13. On February 25, 2022, a joint BCSC hearing management meeting / OSC Hearing was held. During that proceeding, Tryp undertook not to proceed with a second tranche of the Proposed Financing pending the hearing of this matter. It was a condition of Tryp's undertaking that the hearing of this matter proceed on an expedited basis.

Law and Argument

14. Both the BCSC and the OSC have jurisdiction to consider the issues raised in this matter: Tryp's principal regulator is the BCSC, and Tryp is a reporting issuer in Ontario.

15. Both the BCSC and the OSC have the ability to hold a joint hearing with another securities regulatory authority and consult with that authority in the court of the hearing.

Ontario Act, s. 3.5(2); Rule 30 of the Rules.

BCP 15-601, s. 2.10.

16. In *Mangrove Partners (Re)*, 2019 ONSEC 18, the OSC reviewed the law applicable to a motion for a joint hearing:

> *[31] This rule regarding joint hearings came into effect in its present form on October 31, 2017. The prior rule referred to such hearings as "simultaneous hearings" and enumerated factors to be considered including whether: (1) the issues and arguments are substantially the same in the jurisdictions; (2) there are urgent business reasons; and (3) the issue is novel, such that the public interest favours a simultaneous hearing to promote consistency across jurisdictions.[4]*
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> *[32] The factors relevant to holding a joint hearing must also be evaluated in light of the principle set out in s. 2.1 of the Act that "[t]he integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes."*
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> *[…]*
>
> *[38] In deciding not to assert jurisdiction by way of a joint hearing, the OSC stated the following in AbitibiBowater Inc (Resolute Forest Products) (Re):[7]*
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> > *In our view, a simultaneous hearing should only be held in compelling circumstances. Such hearings may not advance the harmonization and co-ordination of securities regulatory regimes and they may create added costs and complexity for the parties …. The issues raised by the Application are not so fundamentally important to Ontario investors or Ontario capital markets, or so notorious, as to outweigh the considerations referred to [elsewhere in our reasons]. Our decision with respect to this question may have been different if the applicable Ontario securities laws were not substantially the same as the securities laws of the Province of Québec or if Ontario investors or capital markets were being affected in a fundamentally different or unique way.*
>
> *[…]*
>
> *[40] Joint hearings may not promote harmonization and co-ordination since the possibility exists for conflicting decisions with equal legal authority such that the jurisdiction with the less compelling regulatory interest could nonetheless issue a decision that may affect a transaction in a decisive manner. This possibility can materialize in our present system of provincial and territorial securities regulation, whether through joint or separate hearings. However, the OSC should not thrust itself into a dispute that is being addressed by another*

Canadian securities commission unless the connecting factors with Ontario, or differences in rules or public policy, provide non-routine, compelling reasons for doing so.

[emphases added]

17. In *Re Hecla Mining*, 2016 BCSECCOM 359, the BCSC took into account practical considerations related to efficiency, the urgency of the matter, and also the fact that there would be common or overlapping evidence, as relevant factors in deciding to proceed jointly:

> *[12] As a preliminary matter, the OSC and BCSC Panels determined to hold simultaneous hearings on the Hecla Applications on the basis that the consideration of the issues raised in the Hecla Applications, in light of the recent amendments to the take-over bid regime in Canada, involved matters for which it was in the public interest for "securities administrators [to] strive to achieve consistency in … decision-making", as set out in subparagraph (c) of OSC Rule 13.1(4). In addition, the urgency in making decisions affecting a live bid and the overlapping evidence required in order to provide a complete narrative of events leading up to the Hecla Applications favoured a simultaneous hearing. This determination was then extended to the DV Applications as well, on the basis of the urgency in making decisions affecting Hecla's bid and the efficiency in presenting common evidence.*
>
> [emphasis added]

18. The present case is one of the unusual cases where there are compelling reasons for a joint hearing, on two bases:

    a. First, there are differences in the rules between Provinces – specifically, MI 61-101 is implemented in Ontario but not in BC; and

    b. Second, it would be inefficient and impractical to proceed with separate hearings in BC and Ontario due to the urgency of the matter, as well as the common issues, evidence and relief sought in the two proceedings.

Difference in the Rules

19. As a reporting issuer in Ontario, Tryp is subject to MI 61-101, including the requirements to obtain minority shareholder approval for a related party transaction. This is an important protection for minority shareholders, to which the Applicants (and Tryp's other shareholders) are entitled.

20. However, since MI 61-101 has not been implemented in BC, the Applicants understand that the BCSC, despite being Tryp's principal regulator, is not in a position to enforce it.

21. Accordingly, a hearing before the OSC is necessary for the limited purpose of considering and deciding the arguments regarding the application of MI 61-101 to the Proposed Financing.

Urgency, Overlapping Evidence and Relief Sought

22. Tryp's undertaking not to proceed with closing the second tranche of the Proposed Financing was conditional on this proceeding being conducted on an expedited basis, with a hearing commencing on April 11, 2022. There is therefore significant urgency to this matter.

23. The evidence that the Applicant will lead in the proceedings before the BCSC and the OSC will be substantially the same. Proceeding without a joint hearing will require significant duplication of efforts and multiple hearings within the same timeframe.

24. Similarly, the relief sought by the Applicants with respect to the Proposed Financing is the same between the two Commissions.

Conclusion

25. The circumstances of this proceeding are such that there are compelling reasons to proceed jointly. Substantive differences between the applicable regulatory rules in BC and Ontario require applications in both Commissions in order to protect the Applicant's rights and the public interest. However, the nature of the evidence and issues is such that it would be inefficient and duplicative to hold separate hearings at different times.

26. In the circumstances, a joint hearing would be the most fair, practical and efficient manner of proceedings. It would in addition promote the public interest by ensuring the sound and responsible harmonization and co-ordination of securities regulation regimes.

C. EVIDENCE

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

27. Affidavit #1 of Kayleigh Hansen, made March 4, 2022.

DATED this 4th day of March, 2022.

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