

**ALBERTA SECURITIES COMMISSION**

**DECISION**

**Citation: Afexa Life Sciences Inc., Re, 2011 ABASC 532**

**Date: 20111014**

**Afexa Life Sciences Inc.  
Application by Paladin Labs Inc.**

**Panel:** Kenneth Potter, QC  
Stephen Murison  
Richard Shaw, QC

**Appearing:** Daniel McDonald, QC and Andrew Sunter  
for Paladin Labs Inc.

James Rooney, QC, Brian Foster, QC and William  
Jenkins  
for Afexa Life Sciences Inc.

Colin Feasby and Noralee Bradley  
for the independent committee of directors  
of Afexa Life Sciences Inc.

Peter Howard and Sidney Horn  
for Valeant Pharmaceuticals International,  
Inc. and 1625907 Alberta Ltd.

Blaine Young, Alex Poole and Tracy Clark  
for Commission Staff

**Hearing:** 23 September 2011

**Oral Decision:** 26 September 2011

**Written Decision:** 14 October 2011

## **I. INTRODUCTION**

[1] This proceeding arose out of two competing offers for the shares of Afexa Life Sciences Inc ("Afexa") – an unsolicited offer by Paladin Labs Inc. ("Paladin"; the offer is the "Paladin Offer"), which Afexa opposed, and a later, higher bid by Valeant Pharmaceuticals International, Inc. through its wholly-owned subsidiary 1625907 Alberta Ltd. (together "Valeant"; the offer is the "Valeant Offer"). Afexa's board of directors (the "Afexa Board") recommended that Afexa shareholders accept the Valeant Offer and, under an agreement with Valeant (the "Support Agreement"), Afexa agreed to waive the application of Afexa's two shareholder rights plans dated 25 January 2010 (the "First Rights Plan") and 12 August 2011 (the "Second Rights Plan" and, together with the First Rights Plan, the "Rights Plans") in respect of the offer by Valeant, but not any other offer.

[2] Paladin applied on 14 September 2011 (the "Application") to the Alberta Securities Commission (the "Commission") for:

- an order under sections 198(1)(a) and (b) of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act"), that trading cease permanently in respect of any securities issued or to be issued in connection with the Rights Plans, including rights issued under the Rights Plan (the "Rights") and any securities of Afexa to be issued upon exercise of Rights; and
- an order under section 198(1)(c) permanently removing prospectus exemptions in respect of any trade in securities pursuant to, or in connection with, the Rights Plans, including the distribution of the Rights on the occurrence of the "Separation Time" (as defined in the respective Rights Plans) and in respect of the exercise of Rights.

[3] In an application heard and decided on 19 September 2011, the Commission granted Valeant status as a party to the hearing of the Application.

[4] A hearing into the Application itself was held on 23 September 2011.

[5] For the hearing we received affidavit evidence from representatives of Paladin, Afexa and their respective financial advisers and written submissions from counsel for Paladin, Afexa, Valeant and Staff ("Staff") of the Commission. We also heard the testimony of the representatives of Paladin, Afexa and their respective financial advisers and additional submissions from counsel for Paladin, Afexa, Valeant and Staff. The submissions were thorough and helpful.

[6] In view of the urgent nature of the Application, we issued our decision orally on 26 September 2011, indicating at the time that our written decision would be issued in due course. This is that written decision.

## **II. BACKGROUND**

[7] We derived the facts material to this Application from the submissions and the evidence.

## **A. Afexa, Paladin and Valeant**

[8] Afexa is an Alberta corporation based in Edmonton. It sells "COLD-FX", a cold-remedy product, and also works to develop other health products. The common shares of Afexa ("Afexa Shares") are listed and trade on the Toronto Stock Exchange. Afexa Board chair William White ("White") stated that the directors and officers of Afexa were unaware of any person or company other than Paladin having direct or indirect beneficial ownership of (or exercising control or direction over) 10% or more of the Afexa Shares. White testified that Afexa is thinly-traded and has "a pretty big retail base of small shareholders", with approximately 30% who actively participate in shareholder meetings. Afexa Shares traded, at the date of the hearing, in the \$0.75 to \$0.76 range.

[9] Paladin is a Canadian pharmaceutical corporation with its head office in Montréal, Québec.

[10] Valeant is also a pharmaceutical corporation, continued in Canada with its principal office in Ontario.

## **B. The Rights Plans and the Paladin and Valeant Offers**

### **1. First Rights Plan**

[11] The Afexa Board enacted the First Rights Plan on 25 January 2010. It was approved by Afexa shareholders on 18 March 2010 by a 98.5% majority of the shares voted at the meeting, although a modest turnout meant that those favourable votes represented only 18.46% of the then-outstanding Afexa Shares.

[12] The stated purposes of the First Rights Plan were to:

(a) ensure, to the extent possible, that the securityholders of [Afexa] and the [Afexa Board] have adequate time to consider and evaluate any unsolicited bid for [Afexa's] securities, (b) provide the [Afexa Board] with adequate time to identify, develop and negotiate value-enhancing alternatives, if considered appropriate, to any such unsolicited bid, and (c) encourage the fair treatment of shareholders in connection with any take-over offer for [Afexa's] securities.

[13] The First Rights Plan would be triggered by the acquisition of 20% or more of the outstanding Afexa Shares, other than by a "Permitted Bid" (a bid that, among other terms, is open for at least 60 days and contained an irrevocable "minimum tender" condition of more than 50% of the Afexa Shares).

### **2. The Paladin Offer**

[14] Paladin became interested in Afexa some time before making a formal take-over bid. Paladin acquired Afexa Shares in the open market, accumulating a shareholding of 14.95% by 15 July 2011. On learning of that accumulation, Afexa retained financial advisers.

[15] After some failed discussions with Afexa with respect to a negotiated transaction, Paladin made the unsolicited Paladin Offer on 10 August 2011 to acquire "any and all" of the outstanding Afexa Shares. The consideration offered for each Afexa Share was, at the election of the holder, \$0.55 or 0.013 common shares of Paladin. By notice of extension dated 14 September 2011 the Paladin Offer was extended to 28 September 2011. The Paladin Offer did not have a minimum

tender condition and was open for less than 60 days; it therefore was not a Permitted Bid under the First Rights Plan. The Paladin Offer was conditional on the First Rights Plan being waived or set aside.

[16] The Afexa Board established a special committee (chaired by White). The Afexa Board issued a directors' circular on 22 August 2011 in which it characterized the Paladin Offer as "coercive" and urged Afexa shareholders not to tender to the Paladin Offer.

### **3. The Second Rights Plan**

[17] Two days after the Paladin Offer was made – on 12 August 2011 – the Afexa Board implemented the Second Rights Plan. While apparently in most respects similar to the First Rights Plan (which remained in effect), there were two notable differences:

- the percentage ownership of outstanding Afexa Shares that would trigger the Second Rights Plan was 15%, a reduction from the 20% threshold under the First Rights Plan; and
- the stated purposes of the Second Rights Plan were expanded from the purposes of the First Rights Plan to include to "limit, to the extent possible, the ability of any investor to obtain effective control of [Afexa] through coercive and opportunistic methods without making an offer to all shareholders of [Afexa] which a majority of the shareholders find acceptable".

[18] White explained the rationale for the reduction in the Permitted Bid definition as "good judgment . . . to bring the threshold down to 15 percent in order to help us ensure we didn't get into a blocking position that prevented us from getting superior bids. We knew we were in play, and our job was going to be to get superior bids."

[19] The Second Rights Plan was not presented for approval by Afexa shareholders. As under the First Rights Plan, the Paladin Offer was not a Permitted Bid under the Second Rights Plan. Given that, and the reduced threshold that was clearly implemented with Paladin in mind, the Second Rights Plan effectively barred Paladin from acquiring any additional Afexa Shares, including purchases in the market that it would otherwise be fully entitled to make under securities laws of Alberta and other provinces.

### **4. The Valeant Offer**

[20] The Afexa Board special committee launched a search for alternatives to the Paladin Offer. In the course of that process, discussions began with Valeant.

[21] On 30 August 2011 Afexa announced that it had entered into the Support Agreement of that date with Valeant, pursuant to which Valeant agreed to make an offer to acquire all of the Afexa Shares for \$0.71 per share.

[22] The Valeant Offer was formally launched by a circular dated 6 September 2011. Valeant offered \$0.71 per Afexa Share. Set to expire on 17 October 2011, the Valeant Offer was conditional on 66 2/3% of the Afexa Shares being tendered to Valeant. The Afexa Board issued

a directors' circular also dated 6 September 2011, recommending that Afexa shareholders accept the Valeant Offer.

[23] Significant terms of the Support Agreement included the following:

- Afexa had a 30 day "go-shop" period ending 29 September 2011 (the "Go-Shop Period") during which it could solicit and engage in discussions and negotiations regarding potential competing acquisition proposals;
- after the Go-Shop Period Afexa would become subject to a "no-shop" covenant pursuant to which it could not solicit competing offers or proposals, but could (a) continue negotiations with any party that had made a binding acquisition proposal to it as a result of activity during the "go-shop" period, and (b) discuss with, negotiate with or furnish information to any person (other than a person that submitted an acquisition proposal to, or had meaningful discussions with, Afexa prior to the end of the Go-Shop Period, or a person that Afexa had solicited prior to the end of the Go-Shop Period) that had made an unsolicited proposal after the end of the Go-Shop Period that the special committee of the Afexa Board determined was, or was reasonably expected to result in, what the Support Agreement defined as a "Superior Proposal";
- if a Superior Proposal were made, Valeant would be given five business days to amend the Valeant Offer;
- as mentioned, Afexa would waive the application of the Rights Plans to the Valeant Offer but would take no action to waive it for any other acquisition proposal;
- Afexa would pay Valeant a termination fee of \$3.75 million if, among other events, Afexa were to accept a Superior Proposal; and
- Valeant could terminate the Valeant Offer if less than 66 2/3% of the Afexa Shares were tendered to the Valeant Offer, any change to that threshold requiring Afexa's consent.

### **C. Other Relevant Activity**

[24] The evidence was that the Afexa Board undertook, and continued at the time of the hearing to pursue, a serious and active effort to generate alternatives to the Paladin Offer and the Valeant Offer. A data room was opened, potentially interested parties were sought out, and a number – including three in the week preceding the start of this hearing – signed confidentiality agreements to gain access to the data. White described at least some of the interested parties as sophisticated and having a special interest in the "science side" of Afexa's business. Counsel for Afexa described the auction process as having "a real prospect" of additional offers.

[25] Prior to the hearing, Paladin announced publicly its intention to increase the consideration offered under the Paladin Offer (without specifying what that increased

consideration would be or the terms of such offer), but only if the Rights Plans were waived or cease-traded within an unspecified "reasonable time" of the hearing of the Application. Paladin reiterated this in a further announcement after the hearing began and before we issued our decision orally, this time specifying that the proposed increased consideration would be, at the option of an Afexa shareholder, \$0.81 or 0.0217 common shares of Paladin per Afexa Share.

[26] After that, but also before we issued our decision orally, Valeant announced an increase in the consideration under the Valeant Offer, to \$0.85 per Afexa Share, conditional on Afexa's agreement to reduce the minimum tender condition in the Valeant Offer.

[27] The latter two announcements were brought to our attention (and were in any event in the public domain), but were not tendered as evidence nor the subject of any submissions. Neither affected our analysis or decision.

### **III. ANALYSIS AND FINDINGS**

#### **A. The Parties' Positions**

##### **1. Points of Consensus**

[28] All parties appeared generally to agree on the relevant test and factors (as set out below), including the following points:

- National Policy 62-202 *Take-over Bids – Defensive Tactics* ("NP 62-202") describes the primary objective of take-over bid provisions in Canadian securities legislation as protection of the interests of the target company's shareholders.
- Shareholders have a fundamental right to be allowed to decide for themselves whether to tender to a take-over bid. A shareholder rights plan may interfere with that right; at some point, absent unusual circumstances, a shareholder rights plan "must go". That point will typically be reached when a shareholder rights plan is found not (or no longer) to enhance shareholders' choice but, rather, to impair their ability to exercise their fundamental right to decide whether to accept or reject a take-over bid for their shares.
- The Commission has discretion in determining whether and when a shareholder rights plan must go. In exercising that discretion – in assessing whether a plan is enhancing as opposed to impairing shareholder choice – the test is whether there is, and remains, a real and substantial possibility that, given a reasonable period of further time under the protection of the plan, the directors of the target company can increase shareholder choice and maximize shareholder value (see, for example, *Re MDC Corp.* (1994), 17 O.S.C.B. 4971).
- The determination of whether or when a shareholder rights plan must go is, thus, heavily dependent on the particular circumstances of each case. Factors relevant to such determination have been enumerated in decisions of this Commission and its counterparts elsewhere in Canada, including in *Re Royal Host Real Estate Investment Trust* (1999), 8 ASCS 3672 #08/48.

## **2. Paladin**

[29] Paladin argued that the Rights Plans should be cease-traded on various grounds, several of which we summarize here.

- The evidence fell far short of establishing a real and substantial possibility that another bid would emerge and, therefore, the Rights Plans had served their purpose and should be cease-traded immediately.
- The Rights Plans had, indeed, become an obstacle to an auction between the two bidders (Paladin and Valeant) and to Afexa shareholders being offered increased consideration; maintenance of the Rights Plans could leave Afexa shareholders with just one offer (Valeant's).
- Paladin intended to increase the Paladin Offer to exceed the Valeant Offer, but would incur the costs of doing so only if the Rights Plans were cease-traded.
- The Rights Plans together with the Support Agreement represented an attempt to force all bidders onto the same timetable, depriving first-bidder Paladin of its timing advantage – an outcome repeatedly rejected by securities regulators.
- Only 18.46% of Afexa shareholders approved the First Rights Plan, and none the Second Rights Plan.
- The Second Rights Plan was tactical in nature – designed not to generate a superior offer but rather to deny entirely the right of Afexa shareholders to decide whether to tender to the Paladin Offer – contrary to the principles expressed in NP 62-202.
- Claims by Afexa and Valeant notwithstanding, bids (like the Paladin Offer) made for "any and all" of the shares of the target company are not inherently coercive and the Paladin Offer itself is not coercive.

## **3. Afexa and Valeant**

[30] Both Afexa and Valeant opposed the Application and submitted that the Rights Plans – and their continuation – were in the best interests of Afexa shareholders, citing several grounds including these:

- The auction process was continuing and offered a real and substantial possibility of generating additional offers as evidenced by the eight confidentiality agreements signed since the date of the Valeant Offer (including the three in the week prior to the hearing) and the continuing activities of the Afexa Board to generate additional offers.
- Analysis of the *Royal Host* factors supported a conclusion that there was no justification for cease-trading the Rights Plans at the time.

- In general, "any and all" bids are coercive because shareholders may feel compelled to tender when they otherwise would not want to – for, if they do not tender, they could be stuck with a no-longer-liquid minority position in the target company.
- More particularly, the "any-and-all" Paladin Offer, with no minimum tender condition, was coercive and contrary to the public interest because Paladin already held 14.95% of the Afexa Shares. Paladin was thus, if unconstrained, in a position to impede a change-of-control auction by blocking a party (at that point, Valeant) seeking 100% of the Afexa Shares. Absent the Rights Plans, Paladin could accumulate a further 5% of Afexa Shares (to hold almost 20%) through market purchases, or amend the Paladin Offer to slightly better the Valeant Offer, then quickly take-up just enough Afexa Shares under such enriched bid to create a blocking position. Such blocking position would foil or deter any potential bidders (including Valeant) who might contemplate following a successful bid with a second-stage "take-out" to obtain 100% of the Afexa Shares, by depriving them of the chance of obtaining a first-stage shareholding sufficient to ensure success in a second stage. In this scenario, any other bids would be withdrawn, Paladin could then terminate its own bid and be free, later, to acquire additional (possibly all) Afexa Shares at a reduced price. The Ontario Securities Commission ("OSC") decision in *Re Falconbridge Ltd.* (2006), 29 O.S.C.B. 6783 was cited as having involved a comparable situation in which a shareholder rights plan was let stand in the public interest to prevent just such a premature termination of an auction given fear of a blocking position being established. Valeant suggested that it would not be interested in continuing its pursuit under the Valeant Offer were Paladin to obtain a blocking position that would make a full change of control of Afexa impossible.
- Paladin could have alleviated concerns about coercion by announcing the price and terms of its intended superior offer and including a minimum 50% tender condition, but chose not to do so. Moreover, the Rights Plans did not prevent Paladin from making a Permitted Bid.
- The Rights Plans represented bona fide efforts by the Afexa Board to promote the best interests of Afexa and its shareholders by preventing a "creeping" take-over of Afexa, providing an opportunity to create and maintain an auction and ensuring equal treatment of Afexa shareholders in the event of a change of control of Afexa – efforts to which deference should be accorded.

[31] Neither Afexa nor Valeant made any concrete suggestions as to when the Rights Plans could reasonably be considered to have fulfilled their purposes and should go. We discern from their submissions that Afexa thought the end of the Go-Shop Period might be such a time, but that Valeant was of the view that our acting even then would fail to address its coercion concern – implying that then-current circumstances did not indicate an imminent end to the Rights Plans would be appropriate.

#### **4. Staff**

[32] Staff recommended that the Rights Plans be cease-traded immediately as there was no evidence, in Staff's submission, of a real and substantial possibility that another bidder would join the auction. Were the panel to consider that such evidence had been adduced, Staff recommended that the Rights Plans be cease-traded on or around the expiry of the Go-Shop Period.

#### **B. The Law**

[33] Canadian securities laws establish a framework for the fair conduct of a take-over bid. In Alberta (and elsewhere) Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* ("MI 62-104") is supplemented by guidance contained in NP 62-202 – sections 1.1(1) and (2) of which state:

(1) The Canadian securities regulatory authorities recognize that take-over bids play an important role in the economy by acting as a discipline on corporate management and as a means of reallocating economic resources to their best uses. . . .

(2) The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment. The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision. The Canadian securities regulatory authorities are concerned that certain defensive measures taken by management of a target company may have the effect of denying to shareholders the ability to make such a decision and of frustrating an open take-over bid process.

[34] The take-over bid regime seeks to protect securityholders of a target company in three principal ways:

- ensuring they have the information they need to make an informed decision to accept or reject the offer;
- ensuring they have sufficient time to consider the information and make a reasoned decision; and
- requiring all securityholders be treated equally in terms of price and pro rata participation (see David Johnston & Kathleen Doyle Rockwell, *Canadian Securities Regulation*, 4th ed. (Markham: LexisNexis, 2006) at 286-87).

[35] The Commission is empowered under section 198 of the Act to make orders in the public interest, among them orders that would, in effect, terminate the application of a shareholder rights plan. In exercising this power in the context of a contested take-over bid, the Commission acts as an impartial referee, its primary consideration being the protection of the bona fide interests of the shareholders of the target company (see, for example, *Royal Host* and *Re Cara Operations Ltd.* (2002), 25 O.S.C.B. 7997 at paras. 54-55).

[36] Canadian decisions in this field recognise that a fundamental right of ownership of shares is the right to sell the shares as the owner sees fit – a right not lightly to be thwarted. As the OSC commented in *Cara Operations* at para. 53:

While it may be important for shareholders to receive advice and recommendations from the directors of the target company as to the wisdom of accepting or rejecting a bid, and for directors to be satisfied that a particular bid is the best likely bid under the circumstances, in the last analysis the decision to accept or reject a bid should be made by the shareholders, and not by the directors or others.

[37] Canadian securities regulatory authorities have upheld shareholder rights plans in circumstances in which their continuation offers a real and substantial possibility of enhancing the choices available to shareholders and maximizing the value they might ultimately realize. However, the same authorities have also recognized that there will generally come a time when even the most useful of shareholder rights plans must go, and that it is the shareholders (of Afexa, in this case) – not the directors – who ultimately are entitled to make the choice of whether to accept an offer (see, for example, *Re Canadian Jorex Ltd.* (1992), 15 O.S.C.B. 257; *Re BGC Acquisition Inc. and Argentina Gold Corp.*, 1999 LNBCSC 55; and *Re 1153298 Alberta Ltd.*, 2005 ABASC 725).

[38] In *Royal Host* this Commission, in conjunction with the OSC and the British Columbia Securities Commission, cautioned that each case is fact-specific and that no one test or consideration constitutes a "holy grail" that can be applied in all circumstances. However, the three commissions offered the following non-exhaustive enumeration of factors potentially relevant to the determination of when a shareholder rights plan "must go":

- whether shareholder approval of the rights plan was obtained;
- when the plan was adopted;
- whether there is broad shareholder support for the continued operation of the plan;
- the size and complexity of the target company;
- the other defensive tactics, if any, implemented by the target company;
- the number of potential, viable offerors;
- the steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders;
- the likelihood that, if given further time, the target company will be able to find a better bid or transaction;
- the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
- the length of time since the bid was announced and made;
- the likelihood that the bid will not be extended if the rights plan is not terminated.

[39] In reaching our decision, we gave consideration to these factors and the arguments of counsel with respect to such factors.

### **C. Evidence**

[40] Among the evidence we considered were: (for Afexa) affidavits and testimony of White and of Eric Choi, a Managing Director of Afexa's financial adviser in relation to offers received by Afexa from other parties; and (for Paladin) affidavits and testimony of Mark Beudet, the

interim president and chief executive officer of Paladin, and of William Gula, Managing Director of Paladin's financial adviser in relation to the Paladin Offer.

## **D. Application of the Law**

### **1. The Auction Was at or Nearing an End**

[41] Paladin and Afexa took diametrically opposed positions on whether there was a real and substantial possibility that additional offers would emerge. We were satisfied from the evidence that the Afexa Board had conducted a thorough market canvass – which had already resulted in a significant increase in the price available to Afexa shareholders. Moreover, the Afexa Board continued to the date of the hearing to seek further offers which, if forthcoming, would have to, realistically, be crystallized in the form of binding offers by the end of the Go-Shop Period (at 11:59 pm on 29 September 2011).

[42] We concluded that the auction process was at or nearing an end. There were two competing bids and, at the end of the Go-Shop Period at the latest, the choices realistically available to Afexa shareholders would have been fully explored and known. In our view it was extremely unlikely that additional offers would emerge after that date, as Afexa then became subject to the no-shop covenant under the Support Agreement. Afexa was, therefore, in much the same position as the target was in *Re Baffinland Iron Mines Corp.* (2010), 33 O.S.C.B. 11385, a situation about which the OSC commented (at para. 32):

Accordingly, in our view, it is not necessary for the [rights plan] to remain in place in order to facilitate an auction; there are now two competing bids on the table. To us, the most important consideration in these circumstances is that Baffinland has agreed in the [support agreement] not to solicit further offers and, accordingly, it needs no further time to do so. That suggests that the auction process is coming to an end. It seems unlikely that the [rights plan] will achieve more for shareholders in terms of inducing a further offer from a new bidder.

### **2. Impeding Shareholder Choice**

[43] We consider that the Rights Plans, coupled with the Go-Shop Period arrangement, have worked in the interests of Afexa shareholders by enabling Afexa to generate an additional bid. However, at the time of the hearing, it was clear to us that the Rights Plans did, or very soon would, impede the further maximization of shareholder value by effectively preventing Afexa shareholders from receiving the intended enhanced offer announced by Paladin. In other words, the time had come (or very shortly would) at which the Rights Plans would limit rather than enhance shareholder choice and value. In our view the public interest favoured allowing the two competing offers to unfold without the hindrance of the Rights Plans.

### **3. Coercion**

[44] Afexa and Valeant strongly asserted that the Rights Plans offered needed protection against a coercive and creeping Paladin Offer. Afexa and Valeant cited, for example, *Falconbridge* in support of that position. As mentioned, Paladin denied that the Paladin Offer was coercive, citing cases such as *Re Icahn Partners LP*, 2010 BCSECCOM 432 (appeal dismissed *Lions Gate Entertainment Corp. v. Icahn Partners LP*, 2010 BCCA 231) and *Baffinland* in support. After due consideration of the issue, we were not persuaded that the Paladin Offer was coercive. Among other things, we note that:

- Bids with no minimum tender conditions are apparently not common in Canada. However, the absence of such a condition in a bid has a comparable effect to a bid with a waiveable minimum tender condition – a form of bid found in other cases not to be inherently coercive (see, for example, *Baffinland* at para. 39). MI 62-104 does not prohibit an offeror from taking either approach. Paladin's evidence was that the Paladin Offer was designed to be attractive to the Afexa shareholders – Paladin and its advisers believed that Paladin's "any and all" bid with no minimum tender condition would be attractive to Afexa shareholders due to the certainty that whatever shares they tendered would be taken up irrespective of what other shareholders did. We agree that there is nothing inherently wrong in that.
- Shareholders were not being forced or coerced into accepting the Paladin Offer. Given the price difference between the Paladin Offer (\$0.55) and the Valeant Offer (\$0.71) at the commencement of the hearing, it was unlikely that any shareholders would tender to the Paladin Offer. If the Paladin Offer were increased to a competitive level and Afexa shareholders tendered to it for whatever reason (for example, the price, certainty of take-up or availability of a tax-deferring roll-over if they elected to receive Paladin Shares), that would simply be the exercise, by shareholders, of their rights in what they considered to be in their own respective best interests. If the Afexa Board believed that shareholders should not tender to the Paladin Offer, it could communicate that view and its reasons to the shareholders. As stated in *Re Chapters Inc.* (2001), 24 O.S.C.B. 1657 at para. 38:

... It is inevitable that competing bids will have different terms, conditions and time periods for which they remain open. Shareholders are more than capable of deciding between these factors and factoring in such considerations as market risk and the time value of money. The premise of the legislation is based on shareholder choice and shareholders should have the right to exercise that choice.

Any shareholders troubled by the Paladin Offer could sell their shares in the market at a price that, during the hearing, exceeded the higher of the cash prices under either current offer.

- Some of the arguments of Afexa and Valeant focused on future actions that Paladin might take that could be coercive – such as the mentioned hypothetical scenario of it acquiring a certain number of shares then withdrawing its bid, retaining the ability later to take out remaining shares at a lower price. On the other hand, we had Paladin's evidence that its ultimate goal was to acquire 100% of the Afexa Shares, declared in the circular enunciating the Paladin Offer. We found no evidence of a contrary intent. On the evidence before us, we consider it inappropriate to speculate, much less predicate a conclusion, on an unproved assumption that Paladin would take future steps coercive to Afexa shareholders.

- As mentioned, it appeared unlikely that any Afexa Shares would be tendered to the \$0.55 Paladin Offer. Therefore, taking-up Afexa Shares would not be a viable option for Paladin without amending the Paladin Offer. Absent the Second Rights Plan, the most that Paladin could legally acquire by additional open-market purchases would be a further 5%, which would take its holding to 19.95%. We were not satisfied that this level – still below the 20% threshold that triggers the take-over bid provisions under Alberta securities laws – would constitute a blocking position. Moreover, a 20% threshold was implemented by the Afexa Board and approved by Afexa shareholders as an acceptable trigger level for the First Rights Plan. These thresholds suggest that a less than 20% shareholding is not, of itself, objectionable or prejudicial.
- Paladin had a timing advantage as a result of being the first bidder. That is, in a bidding competition it would have the first opportunity to take-up shares tendered to its bid. Canadian securities regulators have not been prepared to take away that timing advantage. Any take-up by the first bidder would naturally affect other bidders. Such is the nature of the process. It is not objectionable if the auction has developed to the point where the bidders have been reasonably identified and competing bidders have been able to act with knowledge of the terms of the first (and any intervening) bid. Here, Valeant would have time to respond to any increased bid by Paladin. In *Re Tarxien Corp.* (1996), 19 O.S.C.B. 6913 the OSC cease-traded a shareholder rights plan in circumstances in which the first bidder had entered into lock-up agreements with the holders of in excess of 50% of the shares of the target, notwithstanding an argument by the target that the take-up of the locked-up shares would preempt any other existing and future bids.
- The 66 2/3% minimum tender condition in the Support Agreement and the Valeant Offer was the result of an agreement between Afexa and Valeant, freely negotiated or decided. If Valeant now found that condition too restrictive, insufficient enticement to Afexa shareholders or otherwise a danger to the success of its bid, it was open to Valeant and Afexa to agree to a change in terms. It was not, in the circumstances, reason for us to preserve the prospects of their arrangement to the potential detriment of others, notably Afexa shareholders.
- Paladin was not under any obligation to announce its intended increased price or the terms of its proposed amended offer (for example, see *Baffinland* at para. 40).
- We concur with the following statement from para. 54 of *Baffinland*:
  - ... The Commission has clearly stated in the past that it is not its role to assess the financial terms or desirability of a particular offer or transaction. That is the role of shareholders. [The] shareholders are capable of making the relevant choices. As stated by the Commission in *Canadian Jorex* [at 6]:
    - ... we have every confidence that the shareholders of a target company will ultimately be quite able to decide for themselves, with the benefit of advice they receive from the target board and others, including their own advisers, whether or not to dispose of their shares and, if so, at what price and on

what terms. And to us the public interest lies in allowing them to do just that.

#### **4. Deference to Afexa Board Decisions**

[45] Counsel for Afexa argued that a degree of deference should be shown to the decisions of a target company's board of directors in circumstances such as these. In our view, while some degree of deference is provided to decisions of the board of directors of an issuer, it is ultimately within the authority of the Commission – acting in the public interest – not the directors, to determine when a shareholder rights plan has served its purposes and should be terminated. The Commission's assessment may not accord with that of the issuer's board of directors.

[46] In reaching our decision, we were satisfied from the evidence that the Afexa Board recognized and conducted itself in accordance with its fiduciary responsibilities. Our decision is not, and should not be taken as, any aspersion on its conduct. However, for the reasons noted above, we concluded that the time was very near when the Rights Plans had to go.

#### **5. Timing**

[47] As noted above, we found that the time had come (or very shortly would come) at which the Rights Plans would have served their purposes and should go. The mentioned evidence of new signatories to confidentiality agreements under the Afexa auction process as recently as the week preceding the hearing, and the short six-day period remaining to the end of the Go-Shop Period, satisfied us that it was not inappropriate to allow the Rights Plans to remain in place to the end of the Go-Shop Period, but not thereafter. Based on the evidence we concluded that there was no real and substantial possibility that shareholder choice would be increased by leaving the Rights Plans in place after 29 September 2011.

### **IV. ORDERS**

[48] For the reasons given, the Commission, considering that it was in the public interest to do so, ordered, permanently with effect from 12:01 am (Calgary time) on 30 September 2011, that:

- (a) under sections 198(1)(a) and (b) of the Act, trading must cease in respect of any securities issued or to be issued in connection with the Rights Plans (including, without limitation, rights issued under the Rights Plan [the "Rights"] and any securities of Afexa issuable upon exercise of Rights); and
- (b) under section 198(1)(c), all exemptions from the prospectus requirement (as defined in National Instrument 14-101 *Definitions*) contained in Alberta securities laws do not apply in respect of any trade in securities pursuant to, or in connection with, the Rights Plans (including, without limitation, the distribution of Rights on the occurrence of the "Separation Time", as defined in the respective Rights Plans, and in respect of the exercise of Rights).

[49] This proceeding is concluded.

14 October 2011

**For the Commission:**

"original signed by"  
Kenneth Potter, QC

"original signed by"  
Stephen Murison

"original signed by"  
Richard Shaw, QC