IN THE MATTER OF AN ARBITRATION BETWEEN
[redacted] AND [redacted]

AND IN THE MATTER OF AN AGREEMENT DATED MAY 5, 2004

BETWEEN:

[redacted]

Applicant

- and -

[redacted]

Respondent

DECISION OF THE ARBITRATOR

INTRODUCTION

1. This is an arbitration arising out of a dispute between [redacted] and [redacted] The parties agreed to appoint a sole arbitrator to arbitrate the following dispute:

> What is the quantum of fees (cash or shares) payable by [redacted] pursuant to one or more letter agreements dated December 14, 2001, December 15, 2001, May 27, 2002 and October 31, 2002?

2. The parties agreed that the arbitration will be conducted pursuant to the *Arbitration Act*, R.S.A. 2000, c. A-43, as amended and that the arbitrator has jurisdiction to arbitrate the dispute.

3. The parties exchanged statements of position and documents before the hearing. A Statement of Facts was agreed to and admitted as an exhibit. An oral hearing was conducted

in the presence of representatives of each of the parties on May 25, 2004. Present at the hearing were [redacted] of [redacted] and [redacted] and [redacted] of [redacted]

4. In the Statement of Facts, the parties agreed that [redacted] a private company and predecessor to [redacted] hired [redacted] to assist in raising equity via private placements (although [redacted] was not required to raise the financing) for [redacted] as well as to provide financial advisory services for [redacted] to go public. The parties signed several documents, including a December 14, 2001 Financial Advisory Services Contract, a December 15, 2001 Letter of Engagement – Private Placement Financing, a May 27, 2002 Clarification of Financial Advisory Services Agreement and an October 31, 2002 Extension to the December 14, 2001 Financial Advisory Services Contract.

5. The parties also agreed that based on the financial advice and private placement financing support provided by [redacted] raised $2,487,363 in private placements from April 2002 to April 2003, completed on April 25, 2003 a reverse take-over of a public company, and changed the name of that company to [redacted] then became a subsidiary of [redacted] The dispute surrounds the quantum of fees payable to [redacted] for the services it provided to assist [redacted] in raising this equity and providing financial advisory services in relation to the reverse take-over.

FACTS

6. [redacted] was incorporated in February 2001. [redacted] was one of its founders. [redacted] was a private technology company that focussed on the pharmaceutical market that deals with HDL cholesterol.

7. In September 2001, [redacted] and [redacted] first discussed taking [redacted] public. Two private placements were contemplated, with an anticipation that $3.5 million would be raised. [redacted] was not to be responsible for raising the money but would provide advice on the financing structure.

8. An initial Financial Advisory Services Contract ("Consulting Contract") dated December 14, 2001 was prepared but not signed. A revised Consulting Contract of the same date was signed in mid December. Pursuant to this agreement, [redacted] appointed [redacted] to act as its exclusive financial advisor for a term from December 17, 2001 to March 31, 2002 in connection

with identifying and completing an acquisition of a publicly listed company. [redacted] would earn a Retainer Fee of $7,000 and a Success Fee equal to 2% of the total transaction value, payable half in cash and half in shares or in such combination as [redacted] determined, on completion of the acquisition of a "shell". The combined entity would also cause to be issued to [redacted] options equal to 5% of the total final outstanding shares.

9. [redacted] testified that his normal fee was 3% of the total transaction value and options equal to 5% of the final outstanding shares. This was the fee structure in the unsigned document dated December 14, 2001, but the 3% was changed to 2% in the second, signed version.

10. At or about the same time, [redacted] and [redacted] signed a document described as an addendum to the December 14, 2001 Consulting Contract. It stated that [redacted] will have an option to invest $90,000 in [redacted] at $1.00 per share and that if this option is exercised, [redacted] will earn a 3% rather than a 2% Success Fee under the Consulting Contract. This provided [redacted] with a fee similar to its normal fee if it invested in [redacted]

11. Despite having agreed to these terms, the parties continued to discuss the terms of [redacted]s engagement and the fee structure. This resulted in two agreements: a December 14, 2001 Consulting Contract (the parties did not provide a signed copy at the arbitration hearing but agreed it was signed) and a December 15, 2001 Letter of Engagement – Private Placement Financing ("Financing Engagement").

12. The new Consulting Contract replaced the previously signed agreement of the same date and the addendum. The term of the new Consulting Contract was from December 17, 2001 to October 31, 2002. The Retainer Fee was unchanged. The Success Fee was 2% of the total transaction value, payable in shares on completion of the reverse take-over and related financings. In addition, the public company agreed to cause to be issued to [redacted] warrants equal to 5% of the total final outstanding shares. [redacted] was also granted a right of first refusal on future financings for 24 months where an agent is used or where a fee is paid to raise money for the company.

13. Pursuant to the December 15, 2001 Financing Engagement, [redacted] engaged [redacted] on a best efforts basis to assist in raising approximately $8 million in two rounds of private

placement financing. [redacted] agreed to pay [redacted] a commission fee of 5.5% of the total funds raised under both rounds.

14. Another agreement, apparently signed at the same time as the previously described agreements, was also dated December 14, 2001. This was an agreement between [redacted] and [redacted] a company owned by [redacted] ([redacted] father). [redacted] was not a party to this agreement. Pursuant to this agreement, [redacted] gave [redacted] an option to acquire 125,000 shares of [redacted] from [redacted] for a total sum of $1.00 after completion of the qualifying transaction, that is, the proposed reverse take-over.

15. One of the issues raised by the parties related to [redacted]s obligation to provide [redacted] with the option to acquire shares pursuant to this agreement. I do not have the jurisdiction to enforce any obligations that may arise under this agreement. I heard conflicting evidence about the origin and the purpose of this agreement. It is not necessary for me to attempt to reconcile that evidence and I decline to do so.

16. However, this topic is also addressed in the May 27, 2002 agreement between [redacted] and [redacted] described below. To the extent that agreement purports to document or create an obligation by [redacted] to [redacted] or to [redacted], I have not been asked to and I do not have jurisdiction to address it. As a matter of contract law, [redacted] is not a party to this agreement and it is difficult to see how any legal obligations to [redacted] could be created by it. To the extent that agreement purports to create a new obligation on [redacted] to issue an additional 125,000 shares to [redacted] I have jurisdiction to consider it.

17. [redacted] and [redacted] entered into a May 27, 2002 Clarification of Financial Advisory Services Agreement ("Clarification Agreement"). The purported purpose of this agreement was "to confirm" certain terms of the December 14, 2001 and December 15, 2001 agreements between [redacted] and [redacted] and "for purposes of greater clarity, to document what our understanding of the total remuneration shall be for this entire engagement as it was originally envisioned". It was also noted that the December 14, 2001 and December 15, 2001 agreements "were structured in such a manner so as to fit within the rules for compensation to outside advisors". Under the Clarification Agreement, the Retainer Fee was unchanged. The Success Fee was stated to be 3% of the total transaction value, half to be paid in shares and

half in cash or such combination as [redacted] determined, plus the combined entity agreed to cause options equal to 5% of the total outstanding shares to be issued to [redacted] There was no reference to a commission fee of 5.5% of the total funds raised. Finally, the parties addressed [redacted]s agreement with [redacted], by stating that [redacted] will arrange from the shares issued to it to transfer 125,000 shares to [redacted] at a nominal amount and that "these 125,000 shares will be constituted as additional remuneration to that described above and will be handled accordingly in the engagement letters". (emphasis in original)

18. The final agreement between the parties was an October 31, 2002 Extension of the Consulting Contract, which provided for the "reappointment" of [redacted] as financial advisor to [redacted] and extended the term of the December 14, 2001 Consulting Contract for a term of one year or until completion of the qualifying transaction. This agreement did not refer to the May 27, 2002 agreement.

19. The qualifying transaction was completed on April 25, 2003, following the vote on April 9, 2003 of the shareholders of the public company involved in the reverse take-over with [redacted] The Information Circular with respect to the qualifying transaction was signed by [redacted], who stated the information disclosed contained full, true and plain disclosure of all material facts contained therein. Both [redacted] and [redacted] actively participated in the preparation of the Information Circular.

20. The Information Circular lists as material contracts the December 14, 2001 and December 15, 2001 agreements, but does not list the May 27, 2002 agreement. The agreements are described as follows:

(a) The first agreement was dated December 14, 2001, regarding a financial advisory services agreement contract (the "Financial Advisory Services Contract") wherein the Financial Advisor was engaged to act as [redacted] exclusive financial advisor in connection with the First and Second Private Placements and in connection with identifying and completing a Qualifying Transaction with an Exchange listed capital pool company, as that term is defined in the Policy. The term of this agreement was for an initial period ending October 31, 2002, and has been extended by a renewal letter agreement dated October 31, 2002 for a further one year period or until completion of the Qualifying Transaction. Pursuant to the Financial Advisory Services Contract, the Financial Advisor has been paid a non-refundable fee of $7,000.00 and will be paid a success fee equal to approximately 2% of the total value of the Resulting Issuer on completion of the Qualifying Transaction, as mutually determined by the parties. The fee shall

be paid in [redacted] Shares at the proposed total Transaction value. The [redacted] Shares will be issued pursuant to exemptions from registration and prospectus requirements contained in Part 3.1 of Multilateral Instrument 45-103. In addition, the Financial Advisor, or its nominees, will be issued warrants to purchase Common Shares equal to 5% of the total issued and outstanding Common Shares of the Resulting Issuer after completion of its Qualifying Transaction. These warrants to purchase Common Shares will be exercisable within 24 months of the closing of the Qualifying Transaction at a price of $1.60 per share. These warrants to purchase Common Shares are to be issued in recognition of the Financial Advisor's role as consultant and financial advisor to [redacted]

(b) The second agreement between the Financial Advisor and [redacted], dated December 15, 2001 ("Letter of Engagement – Private Placement Financing") provides the Financial Advisor with a commission fee of 5.5% of the aggregate private placement proceeds raised by [redacted] from the First Private Placement and the Second Private Placement. If the First Private Placement is fully subscribed, such commission will equal $165,000. If the Second Private Placement is fully subscribed and paid for, such commission will increase by an aggregate of a further $275,000, for an aggregate total of $440,000, if both the First and Second Private Placements are fully subscribed.

21. On April 9, 2003, [redacted] provided a letter stating that "In accordance with the December 14, 2001 and December 15, 2001 engagement letters . . . please use this letter as your authority to allocate the fees as detailed in Schedule "A" attached". Schedule "A" to that letter provides for a cash fee of $136,820, the issuance of 287,532 shares and 729,768 warrants. Of the 287,532 shares, 100,821 are stated to be allocated to [redacted] The cash portion represented [redacted] 5.5% commission under the Financing Engagement. The shares and options represented the 2% Success Fee and warrants for 5% of the outstanding shares under the Consulting Contract.

22. Upon closing, [redacted] was paid in accordance with Schedule "A" and provided three receipts dated April 25, 2003. The first two referenced the "Financial Advisory Services Agreement dated December 14, 2001, as amended on October 31, 2002" and acknowledged receipt of the shares and warrants. The third referenced the "December 15, 2001 Letter of Engagement – Private Placement Finance" and acknowledged receipt of $136,820 "representing the commission payable to [redacted] . . . to assist in [redacted] Private Placement Financing at $1.11 and $1.60."

DECISION

23. [redacted] claims to be entitled to additional fees based on the May 27, 2002 Clarification Agreement.

24. The purpose and effect of this agreement were difficult to construe. The testimony regarding this agreement and its relationship to the earlier agreements were equally difficult to understand and reconcile. The absence of reference to this agreement in the Information Circular with respect to the qualifying transaction was telling.

25. The evolution of [redacted]s fee structure provides some assistance. [redacted] testified a fee based on 3% of transaction value and options equal to 5% of the final outstanding shares is [redacted]s standard fee. This appeared in the first unsigned version of the Consulting Contract, but 2% of transaction value replaced 3% in the first signed version, subject to a revision to 3% in the addendum if [redacted] invested in [redacted] However, the parties agree that none of these agreements is the applicable Consulting Contract, and the final December 14, 2001 Consulting Contract was the effective agreement. It provides for a fee based on 2% of the transaction value, plus options. That and the December 15, 2001 agreement setting out the fees to be paid to [redacted] for the private placement financing were the material contracts described in the Information Circular. [redacted] explained "the way it was to work" with respect to these agreements was that [redacted] would get 2% of the transaction value plus options, plus 5.5% for the first private placement and second private placement and would have enough shares to pay [redacted]. This was accepted by both parties, although it was different from [redacted]s standard fee.

26. [redacted] testified that in April or May 2002 it looked like someone was going to put up much of the second private placement, so [redacted] and [redacted] entered into the May 27, 2002 Clarification Agreement (which clarified both the December 14, 2001 and December 15, 2001 agreements), changed the Success Fee from 2% to 3% of transaction value plus options, eliminated the financing commission of 5.5%, and stated the, 125,000 shares for [redacted] were additional remuneration. [redacted] testified "this is what the deal was supposed to end up as" and also more closely reflected [redacted]s standard "3% and 5% fee".

27. [redacted] testified that [redacted] proposed the May 27, 2002 agreement. [redacted] was agreeable if it was acceptable to the TSX. He testified that [redacted] told him within one

week of May 27, 2002 that the TSX would not accept the fee structure in the May 27, 2002 agreement. He understood that the parties then reverted to the December 14, 2001 and December 15, 2001 agreements, which were extended on October 31, 2002.

28. On cross-examination, [redacted] testified the TSX Venture Exchange Policy did not prohibit fees in amounts set out in the May 27, 2002 agreement. The applicable policies effective January 2000 and August 2002 were put in evidence. It is not clear that either policy would prohibit the May 27, 2002 fee structure, nor is it clear how the TSX would make any administrative decisions with respect to the fee structure in the May 27, 2002 agreement.

29. What is clear is that at no time after the May 27, 2002 agreement did either of the parties act on the basis that this was the operative agreement or that the fee structure in the December 14, 2001 and December 15, 2001 agreements had been changed.

30. [redacted] and [redacted] proceeded to work on the transaction through the summer of 2002. It took more time than expected. In October 2002, the December 14, 2001 Consulting Contract was extended for one year. At this point, [redacted] testified he had no idea [redacted] thought the May 27, 2002 was still alive.

31. As stated above, the May 27, 2002 agreement was not identified as a material contract in the Information Circular. [redacted] fees were described in the Information Circular as those based on the December 14, 2001 Consulting Agreement and December 15, 2001 Financing Engagement. [redacted] testified the May 27, 2002 Clarification Agreement was not included in the Information Circular because [redacted] told him the TSX would not approve the deal. [redacted] believed the May 27, 2002 agreement was dead and that this was verified by the October 31, 2002 agreement. If either he or [redacted] had thought the May 27, 2002 agreement was still alive, he said it would have been included in the Information Circular. [redacted] testified that, although the May 27, 2002 agreement varied [redacted]s fee structure, he did not consider it to be a material contract and said it was not required to be disclosed in the Information Circular. I do not accept this. While described as a "Clarification Agreement", the May 27, 2002 agreement materially changed the remuneration to be paid to [redacted] If either [redacted] or [redacted] considered the May 27, 2002 Clarification Agreement to be the operative agreement, it would have been listed and described.

32. [redacted] requested and received payment on closing based on the fees in the December 14, 2001 and December 15, 2001 agreements. [redacted] testified he did not take the position at closing that the amounts on Schedule "A" of his letter were all that [redacted] was entitled to. Nor did he explain why the documents suggest this is [redacted]s fee or why [redacted] acknowledged receipt without reference to the additional fee now claimed.

33. I am driven to the conclusion that the May 27, 2002 Clarification Agreement was conditional upon the fee structure in that agreement being acceptable to the TSX and that this condition was not met. I reach this conclusion not because it is plain on the face of the TSX policy that this fee structure is unacceptable, but because [redacted] evidence is that [redacted] told him shortly after the agreement was signed that the TSX would not accept the fee structure, and because all the evidence after that date is consistent with the parties common intention that [redacted]s fees were to be based on the December 14, 2001 Consulting Agreement and the December 15, 2001 Financing Engagement, and inconsistent with an intention by either party the [redacted]s fees were to be determined by the May 27, 2002 Clarification Agreement.

34. [redacted] and [redacted] were both actively involved in drafting the Information Circular. If either believed that [redacted]s fees were to be determined by the terms of the May 27, 2002 Clarification Agreement, it is not conceivable that they would have drafted such an important document, to be relied on by the shareholders who voted to approve the qualifying transaction, without reference to that agreement.

35. I find that [redacted]s fee was calculated and paid as it directed on Schedule "A" to its April 19, 2003 letter and that this fee is payment in full under the December 14, 2001 and December 15, 2001 agreements.

36. This leaves for consideration [redacted] "fall-back" position that if the May 27, 2002 Clarification Agreement is not enforceable, [redacted] is entitled to a 5.5% commission on the financings by [redacted] in January or February 2004.

37. [redacted] rights regarding future financings are described in both the December 14, 2001 Consulting Agreement and the December 15, 2001 Financing Engagement. Under the former, [redacted] granted [redacted] a right of first refusal for future financings for 24 months from December 14, 2001. That ended on December 14, 2003 and cannot create any rights for [redacted]

with respect to financings in 2004. Under the latter, [redacted] agreed to pay [redacted] a commission of 5.5% of the total funds raised under two rounds of private placement financings.

38. The First Private Placement, as described in the Information Circular, was for up to 2,705,560 [redacted] Shares at $1.11 per share. [redacted] was paid its 5.5% commission on this private placement.

39. The Second Private Placement was described in the Information Circular as "a private placement of up to a maximum of $5,000,000 worth of [redacted] Shares at a deemed issue price of approximately $1.60 per share for a maximum of 3,125,000 [redacted] Shares with arm's length individuals and/or institutional investors. It is expected that the Second Private Placement will be completed prior to, or concurrently with, the completion of the Qualifying Transaction. . . . There is no assurance that the Second Private Placement will close either in part or in its entirety."

40. The evidence regarding the financings by [redacted] after the reverse take-over was limited. It appears the Second Private Placement by [redacted] referred to in the Information Circular did not occur, but that [redacted] raised $2,000,000 in January 2004 and $1.75 million in February 2004. I understand [redacted] to claim in the alternative a commission of 5.5% on either the January 2004 or the February 2004 financing by [redacted]

41. In the description of the December 15, 2001 Financing Engagement in the Information Circular, [redacted] commission is described in reference to the First Private Placement and Second Private Placement, as defined in the Information Circular. This is more specific than the wording in the December 15, 2001 Financing Engagement, which states that [redacted] will be paid a 5.5% commission on "two rounds of private placement financing" by [redacted]

42. I cannot interpret the December 15, 2001 Financing Engagement, which provides for a commission to [redacted] for two rounds of private placement financing by [redacted] to apply to a subsequent financing by [redacted] after the reverse take-over. Again, I find that the description in the Information Circular, that the commission is payable on the First Private Placement and Second Private Placement, as defined, accurately describes the parties' common intention. I do not conclude that either financing by [redacted] in 2004 was the second

round of financing contemplated by the December 15, 2001 Financing Engagement or the Second Private Placement as defined in the Information Circular. I therefore find [redacted] is not entitled to a commission on either of those financings.

43. In conclusion, I dismiss [redacted]s claim for additional fees. I conclude that the quantum of fees payable to [redacted] is the amount paid to [redacted] at its direction on closing of the qualifying transaction and that this was properly calculated under the December 14, 2001 Consulting Contract and the December 15, 2001 Financing Engagement. I note that a portion of the shares received by [redacted] were allocated to [redacted] in the schedule to [redacted] April 9, 2003 letter, but I do not have jurisdiction to address this allocation or any rights [redacted] may have with respect to these shares. I do not conclude that any enforceable rights were created by the May 27, 2002 Clarification Agreement and therefore do not find that this agreement created an obligation on [redacted] to issue an additional 125,000 shares to [redacted] to be transferred to [redacted].

DATED at Calgary, Alberta on July 30, 2004

D.J. McDonald, Q.C.
Arbitrator

TO: [redacted]

[redacted]