Court File No. CV-19-627656-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF AND IN THE MATTER OF PURDUE PHARMA L.P., PURDUE PHARMA INC., RHODES ASSOCIATES L.P., PAUL LAND INC., RHODES TECHNOLOGIES, RHODES PHARMACEUTICALS L.P., UDF LP, SVC PHARMA INC., BUTTON LAND L.P., SVC PHARMA LP, QUIDNICK LAND L.P., SEVEN SEAS HILL CORP., OPHIR GREEN CORP., PURDUE PHARMA OF PUERTO RICO, AVRIO HEALTH L.P., PURDUE TRANSDERMAL TECHNOLOGIES L.P., PURDUE PHARMACEUTICALS L.P., PURDUE PHARMA MANUFACTURING L.P., ALDON THERAPEUTICS L.P., IMBRIUM THERAPEUTICS L.P., GREENFIELD BIOVENTURES L.P., NAYATT COVE LIFESCIENCE INC., PURDUE NEUROSCIENCE COMPANY, PURDUE PHARMACEUTICALS PRODUCTS L.P.

FACTUM OF THE QUEBEC OPIOID CLASS ACTION PLAINTIFF

(Re: Disclosure Statement Order - Returnable November 9, 2021)

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PART I – OVERVIEW

1. The Quebec Plaintiff in the Quebec Opioid Class Action opposes the Canadian Co-Defendants'[1] request to include the Bar Order in the Recognition Order being sought by the Foreign Representative on the grounds that the proposed language of said Order is prejudicial to his rights and the rights of the class members he represents and goes well beyond what might be required to correct the "*asymmetrical unfairness*"[2] alleged by the Canadian Co-Defendants in their Factum.

2. Indeed, the language in the proposed Bar Order does not simply give "*full effect to the settlements entered into between the Chapter 11 Debtors and* ***most*** *Canadian plaintiffs by limiting*

[1] All capitalized terms that are not defined herein have the same meaning as the terms defined in the Affidavit of Margo Siminovitch sworn October 19, 2021 (the "**Siminovitch Affidavit**").
[2] Para. 2 of the Canadian Co-Defendants' Factum; see also Paras. 18, 38, 40, 46 and 56 of the Canadian Co-Defendants' Factum.

those plaintiffs' claims against the non-settling Co-Defendants…"[3] [emphasis added], but rather, includes language intended to enable such Canadian Co-Defendants to argue that their liability should be reduced in actions where the Chapter 11 Debtors are not defendants and vis-à-vis creditors that are not parties to the alleged negotiated settlement invoked in their Factum[4] nor creditors of the Chapter 11 Debtors pursuant to the Plan.

3. Thus, the requested Bar Order does not simply address a perceived inequity by providing a shield to the Canadian Co-Defendants in actions involving the Chapter 11 Debtors where there have been settlements and where they are allegedly deprived of a recourse as a result of the Plan but would, instead, enable the Canadian Co-Defendants to wield the Recognition Order as a sword in unrelated actions, like the Quebec Opioid Class Action, in an effort to reduce their liability by apportioning a share of such liability to the Chapter 11 Debtors. Such overreach is inappropriate, inequitable, and inconsistent with Canadian public policy and the law.

4. In fact, as described hereafter, the jurisprudence relied upon by the Canadian Co-Defendants does not in any way support the Bar Order sought insofar as the Quebec Plaintiff is concerned; quite the opposite.

5. The Quebec Plaintiff is a complete stranger to both the Chapter 11 Plan and Stipulation. Accordingly, if the Court considers it to be appropriate to include any bar order in the Recognition Order, the contents of such order should not affect the Quebec Opioid Class Action in any manner whatsoever.

PART II – FACTS

A. The Quebec Opioid Class Action

6. On May 23, 2019, the Quebec Plaintiff's Authorization Application to institute a class action was filed in the Quebec Court, which was amended twice with the Quebec Court's permission, most recently by way of the Re-Amended Authorization Application.[5]

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[3] Para. 5 of the Canadian Co-Defendants' Factum.

[4] Lowne Affidavit, Exhibit M, Stipulation and Agreed Order by and Among the Debtors and the Canadian Governmental Claimants Pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rules 3006 and 9019 dated August 10, 2021 (page 1120 of 1812) (the "**Stipulation**"), referred to by the Canadian Co-Defendants, *inter alia*, in paras. 31 and 33 as a negotiated settlement.

[5] Exhibit A to the Siminovitch Affidavit.

7. The Re-Amended Authorization Application explains that Quebecers are facing a serious health crisis and alleges that this was as a result of misrepresentations made by the defendant pharmaceutical companies about their opioid products and as a result of their failure to adequately warn users of serious and potentially fatal consequences of opioid use.

8. Presently, there are 33 defendants in the Quebec Opioid Class Action, including the Quebec Purdue Defendants, as well as certain of the Canadian Co-Defendants.[6]

9. None of the Chapter 11 Debtors is a defendant in the Quebec Opioid Class Action.[7]

10. The Canadian Co-Defendants are incorrect when they assert that "*the classes in New Ontario, BC and Quebec Class Actions overlap with and are overwhelmingly resolved by the Settled Class Actions* [because they] *include the same Purdue products (OxyContin and OxyNeo), the same time period (1996 to 2017) ...*".[8] There is absolutely no evidence that the Quebec Opioid Class Action is overwhelmingly resolved by such actions. On the contrary, the Quebec Purdue Defendants' opioid products that are encompassed by this class action include, in addition to OxyContin and OxyNeo, Belbuca, BuTrans 5, BuTrans 10, BuTrans 15, BuTrans 20, Codeine Contin, Dilaudid, Dilaudid-HP, Dilaudid-HP-Plus, Dilaudid-XP, Dilaudid Sterile Powder, Hydromorph Contin, Hydromorph.IR, MS Contin, MS.IR, Oxy.IR, Palladone XL, Targin and Zytram XL. This list includes powerful and widely prescribed opioids such as Hydromorph Contin and Dilaudid, which were prescribed to and used by the Quebec Plaintiff as is alleged in his proceedings.[9]

11. On November 6, 2019, the Honourable Justice Gary D.D. Morrison of the Superior Court of Quebec was appointed as case management Judge of the Quebec Opioid Class Action and has managed the case since that date.

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[6] Siminovitch Affidavit at para. 6.
[7] Siminovitch Affidavit at para. 7.
[8] Para. 10 of the Canadian Co-Defendants' Factum.
[9] Siminovitch Affidavit at para. 8.

12. On June 22, 2021, Justice Morrison, J.S.C. advised the parties that the authorization (certification) hearing for the Quebec Opioid Class Action would commence during the week of November 22, 2021 and would be completed in January 2022.[10]

B. The Foreign Recognition Proceedings

13. On September 15 and 16, 2019, Purdue Pharma L.P. in its capacity as Foreign Representative on behalf of itself and the 23 other Chapter 11 Debtors commenced proceedings for relief under Chapter 11 of Title 11 of the U.S. Code in the U.S. Bankruptcy Court for the Southern District of New York.

14. On September 19, 2019, the Foreign Representative obtained recognition orders from the CCAA Court which granted an Initial Order, *inter alia*, recognizing its status as Foreign Representative of the Chapter 11 Debtors, recognized the Chapter 11 Proceedings as a "*foreign main proceeding*", and stayed the proceedings in Canada against the Chapter 11 Debtors.

15. On November 15, 2019, the Foreign Representative filed the Related Party Stay Motion, seeking the assistance of the CCAA Court to recognize the order issued by the U.S. Bankruptcy Court with respect to injunction against governmental entities and certain related parties.

16. By way of the Related Party Stay Motion, the Foreign Representative sought to obtain a Related Party Stay Order in respect of, *inter alia*, the Quebec Purdue Defendants on the basis that the stay period would be used to resolve the issues of the Canadian entities (non-Chapter 11 Debtors) with the Canadian creditors, in order for any residual value to be contributed to the "global" settlement. As appears from the November 2019 Lowne Affidavit:[11]

> *41. Though* ***the Canadian Associated Entities are not debtors in the Chapter 11 Cases****, the Chapter 11 Debtors are requesting that the 180-day injunction also be extended to Purdue Canada as a related party in order* ***to pause the Canadian Related Party Actions and allow the parties to explore whether a global resolution that includes the Canadian Related Party Actions against Purdue Canada can be accomplished (…)*** *the Chapter 11 Debtors believe this is a critical time to*

[10] Exhibit C to the Siminovitch Affidavit.
[11] Exhibit D to the Siminovitch Affidavit.

> *encourage discussions and negotiations between the parties to take place…* [Emphasis added]

17. On December 30, 2019, the CCAA Court granted the Related Party Stay Order, which, *inter alia*, extended the stay of proceedings to the Quebec Purdue Defendants. Justice Hainey granted the stay order on the basis of the representations before him, namely that the rights of the **Quebec Plaintiff** would not be materially prejudiced (rather that referring more broadly to all "*Canadian Stakeholders*" as is incorrectly asserted by the Canadian Co-Defendants[12]):

> *(...)* ***any prejudice to the Quebec Plaintiff*** *arising from the Related Party Stay Order* ***will be minimal****. This order merely pauses the litigation.* ***It does not affect the availability of the Quebec Purdue Defendants' assets to the Quebec Plaintiff*** *and it does not affect the merits of the Quebec Plaintiff's certification motion* ***or claim for damages as against the Quebec Purdue Defendants****. [Emphasis added]*

18. Despite representing that the intended purpose of this stay period was to explore the possibility of a consensual settlement, there was no settlement made during the period of the related party stay and, consequently, on September 21, 2021, this Court lifted the Related Party Stay Order in order to permit the Quebec Opioid Class Action to proceed to the hearing on authorization against all defendants.[13]

19. While the Plan provides broad releases to various related parties to the Chapter 11 Debtors, including the Quebec Purdue Defendants, the claim of the Quebec Plaintiff in the Quebec Opioid Class Action is an **Excluded Claim** pursuant to the Plan.[14]

20. Thus, the Quebec Plaintiff's proceeding is not impacted in any way by the Plan.

C. The Quebec Class Members are not Class 10(b) Claimants under the Plan

21. The Canadian Co-Defendants are incorrect in stating in paragraph 10(d) of their Factum that the Quebec Plaintiff is a personal injury claimant under the Plan. He is not. The authority cited for this proposition is paragraph 22(b) of the September 9, 2021 affidavit of John Lowne. In fact,

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[12] Para. 7 of the Canadian Co-Defendants' Factum; Siminovitch Affidavit at para. 15.
[13] Siminovitch Affidavit at para. 16.
[14] Siminovitch Affidavit at para. 17 and Exhibit E to the Siminovitch Affidavit.

such affidavit does not characterize the Quebec Opioid Class Action as a personal injury claimant under the Plan but, rather, references only the existence of such claim and clearly acknowledges that no Chapter 11 Debtor is a defendant in such action. Notably, in contrast to the Quebec Opioid Class Action, the Canadian personal injury class actions listed at subparagraphs 10 (a), (b) and (c) of the Canadian Co-Defendants' Factum all include a Chapter 11 Debtor as a defendant.

22. More significantly, the claims process materials for the Chapter 11 proceedings specifically noted that creditors with claims **only** against Purdue Pharma (Canada) should **not file claims**:[15]

> ***Purdue Pharma (Canada) is not a debtor in this case. If Your claim is against only Purdue Pharma (Canada), You do not have a claim in this case and should not file and submit this form.*** [Emphasis is original]

23. As they are not creditors affected by the Plan, the Quebec Plaintiff and the class he represents were not entitled to vote under the Plan and will not receive any distribution thereunder (contrary to the assertion made by the Canadian Co-Defendants in paragraph 10 of their Factum).

D. Request to modify the proposed language

24. Upon receipt of the Canadian Co-Defendants' Factum, counsel for the Quebec Plaintiff reached out to the Information Officer to express concerns that the language proposed by the Canadian Co-Defendants could be construed as impacting the claims made by the Quebec Plaintiff in the Quebec Opioid Class Action.

25. Despite a request being made to modify the proposed language in order to ensure that same would be neutral to the Quebec Plaintiff and the Quebec Opioid Class Action, no proposed language has been accepted, and the Canadian Co-Defendants have maintained their position that the Bar Order as drafted should be included in the Recognition Order.

PART III – ISSUES

26. The issues before the Court are as follows:

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[15] Exhibit F to the Siminovitch Affidavit.

a. If the Court determines that the Recognition Order should include a bar order, is the Bar Order proposed by the Canadian Co-Defendants too broad?

b. If the proposed language is too broad, what alternative language for a bar order should be included in the Recognition Order to satisfy the concerns of both the Quebec Plaintiff and the Canadian Co-Defendants?

PART IV – LAW AND ARGUMENT

A. If the Court concludes a bar order is required, the language proposed by the Canadian Co-Defendants is too broad

27. A Pierringer Order facilitates settlements between a plaintiff and a defendant in multi-party litigation that wish to settle, while maintaining a level playing field for the remaining non-settling defendants. As explained by the Ontario Court of Appeal in *Endean*, Pierringer arrangements include the following essential provisions:[16]

> *(1) The **settling defendant settles with the plaintiff**;*
>
> *(2) The plaintiff discontinues its claim [against] the settling defendant;*
>
> *(3) **The plaintiff continues its action against the non-settling [defendant] but limits its claim to the non-settling defendant's several liability (a 'bar order');***
>
> *(4) The settling defendant agrees to co-operate with the plaintiff by making documents and witnesses available for the action against the non-settling defendant;*
>
> *(5) The settling defendant agrees not to seek contribution and indemnity from the non-settling defendant; and*
>
> *(6) The plaintiff agrees to indemnify the settling defendant against any claims over by the non-settling defendants.*
>
> [Emphasis Added]

28. The Canadian Co-Defendants' argue that a bar order is required in this case because the consensual settlement between the Canadian Governmental Claimants and the Chapter 11 Debtors does not include such language, creating a possible asymmetry whereby the non-settling

[16] *Endean v. St. Joseph's General Hospital,* 2019 ONCA 181 at para. 52 [***Endean***].

defendants (the Canadian Co-Defendants) could be liable for 100% of the damages claimed by the settling plaintiffs (the Canadian Governmental Claimants) without any recourse against the settling defendants (the Chapter 11 Debtors). For example, the Canadian Co-Defendants argue:

- **Paragraph 18**: The settlement between the Canadian Governmental Claimants and the Chapter 11 Debtors combined with the releases of the Chapter 11 Debtors creates a possible asymmetry: **the settlement combined with the Plan eliminates the non-settling Co-Defendants' right to claim contribution and indemnity from the Chapter 11 Debtors. However, it does not prohibit the Canadian Governmental Claimants from seeking to hold the non-settling Co-Defendants liable for wrongs attributable to the Chapter 11 Debtors**.

- **Paragraph 28:** In multi-defendant litigation, Canadian law protects **non-settling defendants** from being unfairly pursued for damages properly apportioned to a **settling defendant**.

- **Paragraph 29:** An "essential" element of a Pierringer arrangement is that the **plaintiff** limits its claim against the **non-settling defendants** to their proportionate or several liability.

- **Paragraph 30:** It is unprecedented in CCAA proceedings for a **settling co-defendant** to enter a settlement that does not include a bar order protecting **non-settling co-defendants**.

- **Paragraph 31**: A settlement is an agreement between the parties that brings a dispute to an end without a judgment on the merits.[43] **The Stipulation is such a negotiated settlement between the Canadian Governmental Claimants and the Chapter 11 Debtors**.

- **Paragraph 32:** **The Chapter 11 Debtors and the Canadian Governmental Claimants** "agreed to" certain amendments to the Releases and the Canadian Government Guarantee, "in consideration for which the Canadian Governmental Claimants have agreed to withdraw the Canadian Proofs of Claim as of right and release the [Chapter 11] Debtors and their Related Parties from any and all Claims."

- **Paragraph 35:** As outlined above, in Canada a partial settlement in multi-defendant litigation is generally embodied in a Pierringer agreement. **The Stipulation, however, is missing an essential term: the Stipulation settles the Canadian Governmental Claimants' claims against the Chapter 11 Debtors without limiting their claims against non-settling Co-Defendants to proportionate or several liability**. It is not consistent with Canadian settlements in multi-defendant litigation.

- **Paragraph 39:** The Recognition Order, absent the Bar Order, **favours the Canadian Governmental Claimants** by potentially allowing them to offload onto the Co-

Defendants the risk that the Claimants' settlement with the Chapter 11 Debtors was inadequate.

- **Paragraph 40: In light of the Stipulation**, giving effect to the Plan without the Bar Order has an asymmetric impact on third-party creditors.

- **Paragraph 44:** If the Plan is implemented without the Bar Order, then the Canadian governments may try to collect from non-settling Co-Defendants the very damages they bargained away in reaching their settlement with the Chapter 11 Debtors. This unfairness is the rationale for the standard bar language in Pierringer agreements that was omitted from the Stipulation.

[Emphasis Added]

29. As appears from the extracts above, the justification for the proposed Bar Order is clearly predicated on the Stipulation, which is described by the Canadian Co-Defendants as a negotiated settlement between the Canadian Governmental Claimants and the Chapter 11 Debtors.

30. However, the language in the proposed Bar Order extends beyond that specific settlement to any "*party in any Pending Opioid Action (as defined in the Plan…) in Canada … which asserts or would have the right to make claims… from or against the Debtors (as defined in the Plan)*"[17] and then purports to require subsequent courts to reduce the liability of the Canadian Co-Defendants in any Canadian action on the basis of any wrongdoing which the relevant court would attribute to any of the Chapter 11 Debtors.

31. The jurisprudence cited by the Canadian Co-Defendants supports the applicability of Pierringer orders or bar orders in situations where a plaintiff has chosen to enter into a settlement arrangement with one or more defendants in a multi-party litigation. The principle is not controversial. However, such jurisprudence does not support what the Canadian Co-Defendants are now attempting to do by their request to include a bar order so broadly worded that it could be used to attempt to reduce liability in actions involving plaintiffs that are not parties to the settlement and who have not instituted any proceedings against the "settling defendant".

32. In contrast to the decisions they rely upon in their Factum, the Canadian Co-Defendants suggest that the proposed Bar Order would result in a reduction of their liability in any case that

[17] Para. 19 of the Canadian Co-Defendants' Factum.

even mentions the Chapter 11 Debtors, even where the subject plaintiff is not a party to the Stipulation, and the Chapter 11 Debtors were never their co-defendants.[18]

33. In support of their position, the Canadian Co-Defendants assert that the language of the proposed Bar Order is similar to the text in other bar orders approved by this Court.[19] This assertion is not correct. For example, in reference to the decision of *Re Japan Airlines*, 2011 CarswellOnt 19455 (WL Can) (ONSC [Commercial List]), the Canadian Co-Defendants refer to a clause in Schedule A to such decision, which is the language included in the Settlement Agreement. However, the language employed by the Court regarding the bar order is different. The language employed by the Court, notably in paragraph 20 thereof, explicitly provides, *inter alia*, for the allocation of liability between the defendants **in the subject action** and further limits any recovery from the non-settling defendants to their proportionate liability in that action. Similarly, the bar order provided for in paragraph 52 of the decision in *Osmun v. Cadbury Adams Inc.*, 2010 ONSC 2643 does not extend beyond the parties in the subject actions nor does it contemplate that defendants in an unrelated action could assert that their liability should be reduced because of the conduct of a person who was never a party to the subject actions and who never settled with the plaintiff in those actions.

34. The Canadian Co-Defendants also rely on the decision of the Ontario Superior Court in *CannTrust*[20] to support the need to introduce a bar order to ensure fairness **with regard to the settlement with the Canadian Governmental Claimants**.[21] The *CannTrust* decision illustrates that a court must carefully examine the specific circumstances in considering whether a bar order is fair and reasonable. In that case, the court concluded that the bar order proposed by the applicant was not appropriate as drafted because it barred claims of the non-settling co-defendants against the settling defendant, but did not restrict the plaintiffs' claims against such non-settling parties accordingly.[22]

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[18] Para. 36 of the Canadian Co-Defendants' Factum.
[19] Para. 30 of the Canadian Co-Defendants' Factum.
[20] *Re CannTrust Holdings Inc.*, 2021 ONSC 4408 [***CannTrust***].
[21] Para. 39 of the Canadian Co-Defendants' Factum.
[22] *CannTrust, supra* note 20 at para 54.

35. The Court in *CannTrust* refers to the decision of the Ontario Court of Appeal in *Endean*[23], *inter alia*, because the applicants in that case had raised the argument that since they were insolvent, the non-settling defendants' right to indemnity and contribution was worthless, thereby rendering the limitation of their liability without the corresponding protection for their co-defendant, reasonable in the circumstances. In that case, the Court did not accept the argument because it was expected that the applicants would emerge from the insolvency proceedings as a solvent entity. In the present case, entirely different considerations apply as the Chapter 11 Debtors will not emerge from the Chapter 11 Proceedings and will not be solvent entities when the issue of liability of the Canadian Co-Defendants will be determined.

36. As it relates to the attempt to impose a bar order that would impact claimants that are strangers to the settlement, the *Endean* case is instructive and illustrates the inappropriateness of the language proposed by the Canadian Co-Defendants. In *Endean*, the appellants had been injured by an implanted medical device and took action against the hospital and surgeons. The hospital and surgeons cross-claimed against one another in four actions. The appellants settled with the surgeons and a Pierringer Order was made in each action which made it clear that the court at trial had the authority to adjudicate upon the apportionment of fault among all the defendants who had been named in each action, i.e. the hospitals and the surgeons. In deciding the issue of liability, the trial judge apportioned fault, not only as between the hospital and the surgeons, but apportioned 50% of the fault to the manufacturer of the device and 25% to the distributor who sold the device to the hospital, even though neither the manufacturer nor the distributor were ever parties to the actions and both were bankrupt.

37. The Court of Appeal overturned the lower court decision with respect to the apportionment of liability which had the effect of reducing the recovery of the appellants, holding that it was inappropriate to interpret the bar order at issue as applying to bankrupt non-defendants. In explaining this decision, Justice Zarnett, J.A., at paras. 47 and 49, confirmed that a plaintiff can recover 100% of their losses from any defendant who caused the injury regardless of the degree of fault of that defendant, "***and regardless of whether others, parties or non-parties, were also at fault.***" As well, "*the entire risk that a wrongdoer, liable to pay 100% of the plaintiff's damages*

[23] *Supra*, note 16.

while not 100% at fault, will be able to actually recover indemnity from another wrongdoer, ***is on that first wrongdoer – not the plaintiff****. ...*" [Emphasis added].

38. Most specifically, the Court of Appeal held that the Pierringer Order did not allow a reduction of recovery due to the fault of anyone other than the surgeons, the settling defendants:

> *[57]* ***However, the effect the hospital argues for goes much further. According to the hospital,*** *the effect of the Pierringer Order was to also reduce the Hearsey appellants' recovery from the hospital by the amount of fault the trial judge might attribute to the manufacturer and the distributor. These were entities against whom the hospital had not claimed indemnity under the Negligence Act, and from whom the hospital had no practical ability to recover indemnity even if claimed.* ***The Pierringer Order, if so interpreted, would do more than maintain a level playing field for the hospital compared to its pre-Order position. The effect of the interpretation the hospital seeks is to put the hospital in a better position than it was in before the Pierringer Order.*** *Before the Pierringer Order, the hospital was at risk, if found at fault to any degree, to pay all of the Hearsey appellants' damages without the ability to obtain indemnity from the manufacturer and distributor. This risk was on the hospital, regardless of the degrees of fault of the concurrent tortfeasors. As interpreted by the hospital, the Pierringer Order would free the hospital of that risk. The hospital would be placed in as good a position as it would have been had it claimed indemnity from the manufacturer and distributor and had the manufacturer and distributor been creditworthy and able to pay indemnity, rather than being bankrupt. No reason why this should be the case was suggested.*
>
> *[58] The Pierringer Order's language, including that incorporated into the amended statement of claim, does not, taken as a whole, support this broader interpretation.*
>
> *(...)*
>
> *[59]* ***The Pierringer Order was made in the context of an action that included the oral surgeons and the hospital as defendants — no one else****. It was made in the context of a settlement by the appellants with the oral surgeons against whom the hospital had cross-claimed. It dismissed the hospital's cross-claim against the oral surgeons. It expressly provided that the court at trial may apportion fault among "all Defendants named in the Statement of Claim" (emphasis added), which meant only the hospital and the oral surgeons. It did not refer to apportionment of fault to anyone else.*
>
> *[60] We were not referred to evidence that any of the appellants had made an agreement, as a result of settlements with the manufacturer or distributor, that claims the appellants might pursue against the hospital, would be reduced by the percentage fault that would be attributed to the manufacturer or distributor.*
>
> *[61] In his reasons, the trial judge referred to the manufacturer having gone bankrupt shortly after it ceased to make the implant in 1988. No reference is made to any settlement with the manufacturer or recovery from it, let alone to the terms on which that may have occurred.*
>
> [Emphasis added]

39. In the present case, regardless of whether any argument could be made that the Chapter 11 Debtors bear any responsibility for any damages caused to the Quebec Plaintiff or the class he represents (which claims have not even been asserted), the Chapter 11 Debtors are not parties to the Quebec Opioid Class Action, which has been taken exclusively against the Canadian manufacturers and distributors of opioids.

40. Just as the liability of the hospital in *Endean* could not be reduced because of the contribution to the injury allocated to the bankrupt manufacturer and distributor by the lower court because they were not parties to the subject actions, the Canadian Co-Defendants cannot have their liability reduced in the context of the Quebec Opioid Class Action on the basis of any liability potentially attributable to the Chapter 11 Debtors, who are not parties to that proceeding.

41. This Court should not render any orders that could be improperly used by the Canadian Co-Defendants to support a request that the Quebec Court reduce their liability on the basis of any potential contributory faults of the Chapter 11 Debtors. In effect, the inclusion of the Bar Order as drafted would improperly shift the burden to the victims, rather than on the wrongdoers, on the basis of a "settlement" to which the victim was not even a party and will receive absolutely no benefit of any distribution. This would be contrary to law[24] and equity.

B. The bar order, if included in the Recognition Order, must be limited to apply only to the claims of the Canadian Governmental Claimants or to the Canadian actions

42. As described above, the stated purpose of the order being sought is to ensure that the plaintiffs that have settled their claims with the Chapter 11 Debtors should not be able to call upon any of the Canadian Co-Defendants to cover the Chapter 11 Debtors' share of liability in proceedings in which the Chapter 11 Debtors have been sued alongside the Canadian Co-Defendants. The language of any bar order to be implemented by the Court must therefore be limited so that it strictly applies in the actions of claimants that were actually parties to the referenced settlement, or, at the very least, those claimants that have asserted claims against the Chapter 11 Debtors and will share in the distributions from the Chapter 11 Plan. The bar order

[24] *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 SCR 458 at para. 19; *Endean, supra* note 16 at paras. 47-49.

cannot, as the proposed language would suggest, have any applicability in any action where the Chapter 11 Debtors are not, and never were, co-defendants with the Canadian Co-Defendants.

43. As the Canadian Co-Defendants recognize, the Settled Class Actions[25] already include appropriate bar language in their Settlement Agreement with the Chapter 11 Debtors,[26] such that the language to be added to the Recognition Order does not need to cover these actions.

44. Accordingly, the Quebec Plaintiff proposes that the Bar Order, if deemed to be required in these circumstances by the Court, be limited as follows:

> ***THIS COURT ORDERS*** *that a Canadian Governmental Claimant shall not claim or be entitled to recover from any defendant in any Canadian Governmental Action (the "**Canadian Co-Defendants**") that portion of any damages, costs or interest that corresponds to the liability of the Chapter 11 Debtors proven at trial or otherwise. For greater certainty, such Canadian Governmental Claimant shall limit its claims against the Canadian Co-Defendants collectively to, and shall be entitled to recover from the Canadian Co-Defendants, only those damages, costs and interest attributable to the Canadian Co-Defendants' conduct and their aggregate joint and several liability related thereto, if any.*
>
> ***THIS COURT ORDERS*** *that any Canadian Court seized with determining the Canadian Co-Defendants' liability to any Canadian Governmental Claimant shall have full authority to determine the proportionate liability of the Chapter 11 Debtors regardless of whether the Chapter 11 Debtors participate in that proceeding and any such finding in respect of the Chapter 11 Debtors' proportionate liability shall only apply in that proceeding and shall not be binding upon the Chapter 11 Debtors in any other proceedings.*
>
> ***THIS COURT ORDERS*** *that nothing in this Order is intended to or shall limit, restrict or affect any position, argument or defense that may be asserted by the Canadian Co-Defendants including, without limitation, any arguments which the Canadian Co-Defendants may make regarding the reduction of any judgment against them.*

[25] As defined in the Canadian Co-Defendants' Factum at Para. 10(a).
[26] Para. 48 of the Canadian Co-Defendants' Factum.

> ***THIS COURT ORDERS*** *that nothing in this Order is intended to apply to any action in which the Chapter 11 Debtors are not, and were never, named as defendants.*

45. Alternatively, to the extent that the Court considers a bar order is necessary in all cases where a Chapter 11 Debtor was sued, the language must be clear that it applies exclusively to claimants in the Canadian Actions in which the Chapter 11 Debtors have been sued, and in no other actions:

> ***THIS COURT ORDERS*** *that a plaintiff in any Canadian Action ("**Canadian Action Plaintiff**") shall not claim or be entitled to recover from any defendant in any Canadian Action (the "**Canadian Co-Defendants**") that portion of any damages, costs or interest that corresponds to the liability of the Chapter 11 Debtors proven at trial or otherwise. For greater certainty, such Canadian Action Plaintiff shall limit its claims against the Canadian Co-Defendants collectively to, and shall be entitled to recover from the Canadian Co-Defendants, only those damages, costs and interest attributable to the Canadian Co-Defendants' conduct and their aggregate joint and several liability related thereto, if any.*
>
> ***THIS COURT ORDERS*** *that any Canadian Court seized with determining the Canadian Co-Defendants' liability to any Canadian Action Plaintiff shall have full authority to determine the proportionate liability of the Chapter 11 Debtors regardless of whether the Chapter 11 Debtors participate in that proceeding and any such finding in respect of the Chapter 11 Debtors' proportionate liability shall only apply in that proceeding and shall not be binding upon the Chapter 11 Debtors in any other proceedings.*
>
> ***THIS COURT ORDERS*** *that nothing in this Order is intended to or shall limit, restrict or affect any position, argument or defense that may be asserted by the Canadian Co-Defendants including, without limitation, any arguments which the Canadian Co-Defendants may make regarding the reduction of any judgment against them.*
>
> ***THIS COURT ORDERS*** *that nothing in this Order is intended to apply to any action in which the Chapter 11 Debtors are not, and were never, named as defendants.*

PART V – RELIEF REQUESTED

46. For all of the reasons set forth herein, the Quebec Plaintiff requests that, if this Honorable Court considers that a bar order as requested by the Co-Defendants is just and appropriate in the circumstances, the language of such bar order be restricted as suggested above and have no application whatsoever to the Quebec Opioid Class Action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of October, 2021

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SCHEDULE "A"
LIST OF AUTHORITIES

Jurisprudence

1. *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 SCR 458
2. *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181

SCHEDULE "B"

LEGISLATION

Companies' Creditors Arrangement Act **(R.S.C., 1985, c. C-36)**

Recognition of Foreign Proceeding

Purpose

44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote Documents that must accompany application

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

Other orders

49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF AND IN THE MATTER OF PURDUE PHARMA L.P., PURDUE PHARMA INC., RHODES ASSOCIATES L.P., PAUL LAND INC., RHODES TECHNOLOGIES, RHODES PHARMACEUTICALS L.P., UDF LP, SVC PHARMA INC., BUTTON LAND L.P., SVC PHARMA LP, QUIDNICK LAND L.P., SEVEN SEAS HILL CORP., OPHIR GREEN CORP., PURDUE PHARMA OF PUERTO RICO, AVRIO HEALTH L.P., PURDUE TRANSDERMAL TECHNOLOGIES L.P., PURDUE PHARMACEUTICALS L.P., PURDUE PHARMA MANUFACTURING L.P., ALDON THERAPEUTICS L.P., IMBRIUM THERAPEUTICS L.P., GREENFIELD BIOVENTURES L.P., NAYATT COVE LIFESCIENCE INC., PURDUE NEUROSCIENCE COMPANY, PURDUE PHARMACEUTICALS PRODUCTS L.P.

Applicants

Court File No. CV-19-627656-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST
Proceeding commenced at Toronto

FACTUM OF THE QUEBEC OPIOID CLASS ACTION PLAINTIFF
(Re: Disclosure Statement Order, Returnable November 9, 2021)

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