Court File No.

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 COMPROMISE OR ARRANGEMENT OF ACERUS PHARMACEUTICALS CORPORATION, ACERUS BIOPHARMA INC., ACERUS LABS INC., AND ACERUS PHARMACEUTICALS USA, LLC

Applicants

FACTUM OF THE APPLICANTS

January 26, 2023

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TO: THE SERVICE LIST

PART I - OVERVIEW

1. Acerus Pharmaceuticals Corporation ("**APC**") and its wholly owned subsidiaries, Acerus Biopharma Inc. ("**ABI**"), Acerus Labs Inc. ("**ALI**"), and Acerus Pharmaceuticals USA, LLC ("**APL**" and collectively, the "**Applicants**" or the "**Companies**") seek protection from their creditors and certain other ancillary relief pursuant to an order (the "**Initial Order**") made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), substantially in the form of the draft order attached to the Application Record at Tab 3. The Applicants intend to seek certain additional relief at the Comeback Hearing pursuant to a more fulsome order (the "**ARIO**"), substantially in the form of the draft order attached to the Application Record at Tab 5. This factum is being filed in respect of both the relief sought in the Initial Order and the relief to be sought at the Comeback Hearing in the form of the ARIO.

2. APC, directly and indirectly through its subsidiaries ABI, ALI, and APL (the "**Subsidiaries**") are in the business of the commercialization and development of prescription health products, with a focus on urology and men's health. The Companies' primary products are (a) Natesto, which is currently the sole source of revenue for the Companies; and (b) Noctiva, which is currently not in distribution.

3. The Companies also hold intellectual property rights and licensing rights to several other pharmaceutical products which are in various stages of development and commercialization.

4. Without significantly improving the Companies' liquidity situation and right-sizing its capital structure, APC will likely not be able to produce and sell the Natesto product and will be prevented from producing commercial batches of Noctiva and from launching the product in the market.

5. The Companies are insolvent. Without CCAA protection and access to DIP financing (detailed below), the Companies do not have sufficient cash to meet their obligations as they come due, and their liabilities exceed the value of their assets.

6. The Companies require the protection offered by the Initial Order and the CCAA to continue as a going concern while exploring various restructuring options including but not limited to seeking additional financing or implementing a sale of their businesses and property pursuant to a court-supervised sales process, for the benefit of all its stakeholders.

PART II - FACTS

7. The facts with respect to this application are briefly summarized below and more fully set out in the Affidavit of Naveed Z. Manzoor sworn January 25, 2023 filed in support of this CCAA application (the "**Initial Manzoor Affidavit**").[1]

A. CORPORATE STRUCTURE

8. APC was incorporated under the OBCA. It is a public company listed on the TSX and the OTCQB Exchange. APC operates out of its registered head office in Mississauga, Ontario.[2] ABI and ALI are also OBCA corporations. APL was formed under the laws of the State of Delaware.[3]

9. Each of the Subsidiaries (ABI, ALI, and APL) are wholly owned by APC. The Companies are one corporate group, which are operated and controlled by the management of APC at its head office in Mississauga, Ontario. Each of the Subsidiaries are financially dependent upon APC as APC funds their respective cash flow requirements [4]

B. THE COMPANIES' BUSINESS AND OPERATIONS

10. The Companies carry on business as a specialized pharmaceutical company focused on the commercialization and development of prescription men's health products. The Companies'

[1] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Initial Manzoor Affidavit. All references to currency in this factum are to United States dollars, unless otherwise noted.
[2] Initial Manzoor Affidavit at para. 10.
[3] *Ibid* at paras. 13-15.
[4] *Ibid* at para. 16.

primary products are (a) Natesto, which is currently the sole source of revenue for the Companies; and (b) Noctiva, which is currently not in distribution.[5]

(i) *Natesto*

11. Natesto is a patented prescription treatment in the form of a nasal gel for testosterone replacement therapy in males diagnosed with hypogonadism. Natesto has received regulatory approval from the FDA, Health Canada, South Korea's Ministry of Food and Drug Safety, and Taiwan's Food and Drug Administration, and is currently being distributed in each of the foregoing countries.[6]

12. While ABI owns the intellectual property rights to Natesto, commercial activities in respect of Natesto are carried out by APC on behalf of ABI.[7]

13. The Companies currently rely exclusively on contract manufacturing organizations and third-party logistics companies to manufacture and distribute Natesto.[8]

(ii) *Noctiva*

14. Noctiva is a patented prescription treatment for nocturnal polyuria that has received regulatory approval in the United States. Noctiva is currently not in distribution. All intellectual property rights and interests in Noctiva are owned by APL, including the intellectual property in respect of Noctiva across the world. These intellectual property rights include the patent rights registered with the Canadian Intellectual Property Office.[9]

15. APC anticipates that it will depend on a single contract manufacturing organization for the manufacturing and supply of Noctiva. The development and commercialization of Noctiva will likely require significant additional capital and management attention.

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[5] *Ibid* at para. 18.
[6] *Ibid* at paras. 19 and 21.
[7] *Ibid* at para. 23.
[8] *Ibid* at para. 27.
[9] *Ibid* at para. 18.

(iii) *Other Pharmaceutical Products*

16. APC directly and indirectly owns intellectual property and licensing rights to Avanafil, Lidbree, Tefina, and TriVair, which are pharmaceutical products in different stages of development and commercialization. None of the foregoing pharmaceutical products are currently in distribution in any country.[10]

(iv) *Banking Arrangements*

17. As part of the Companies' Cash Management System, it maintains seven bank accounts, which are summarily described below:

(a) Royal Bank of Canada: USD operating account for each of APC, ABI, and ALI;

(b) Royal Bank of Canada: CAD operating account for each of APC, ABI, and ALI; and

(c) Royal Bank of Canada Georgia: USD operating account for APC.[11]

(v) *Employees*

18. APC, directly and through its Subsidiaries, currently employs/contracts ten people. Nine of these individuals are employed/contracted in Canada, and one is employed in the United States. The Applicants do not have any unionized employees or registered pension plans. The total global monthly payroll amounts to approximately $183,000.

C. FINANCIAL POSITION OF THE COMPANIES

(i) *Assets and Liabilities*

19. As at September 30, 2022, the assets of the Companies had an unaudited net book value of approximately $47.67 million and consisted of approximately $10.416 million in current assets and $36.637 million in intangible assets.[12]

[10] *Ibid* at para. 19.
[11] *Ibid* at para. 33.
[12] *Ibid* at Exhibit **G**.

20. As at September 30, 2022, the liabilities of the Companies had an unaudited book value of approximately $61.565 million and consisted of approximately $15.45 million in current liabilities and $46.113 million in non-current liabilities.[13]

(ii) *Secured Debt*

21. The Companies primary secured financing has come through the FGC Facility and the Second FGC Facility. The President of FGC is Ian Ihnatowycz, who also serves as Chairperson of APC's Board of Directors. FGC holds approximately 89.3% of the outstanding shares in APC.[14]

22. As at the date of this Application, the FGC Facility has been fully advanced, and APC is indebted to FGC in the amount of $47.945 million. The Subsidiaries have each guaranteed the full amount of APC's obligations to FGC in respect of the FGC Facility.[15]

23. As at the date of this Application, APC and APL are indebted to FGC in the amount of $2 million pursuant to the Second FGC Facility. The Companies have each provided a guarantee and pledged security to FGC, to guarantee APC and APL's obligations in respect of the Second FGC Facility, and APC's obligations in respect of the FGC Facility.[16]

(iii) *Unsecured Debt*

24. The remainder of the Companies liabilities are unsecured.[17]

D. THE COMPANIES' FINANCIAL DIFFICULTIES

25. As of September 30, 2022 the Applicants had negative cash flow for the fiscal year of nearly $18.6 million from operating activities and losses continued to the end of 2022.[18] Working to advance Natesto through the COVID-19 pandemic resulted in a net-loss in respect of

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[13] *Ibid*.
[14] Initial Manzoor Affidavit, *supra* at paras. 10, 46 and 52.
[15] *Ibid* at para. 50.
[16] *Ibid* at paras. 50 and 51.
[17] Details regarding the unsecured and contingent liabilities of the Companies are detailed in the Initial Manzoor Affidavit at paras. 53-67.
[18] *Ibid* at para. 68.

Natesto. Health care provider offices were closed for a significant period from 2020 through 2021, resulting in patient volumes declining significantly. As a result, prescription growth through this period was blunted.[19]

26. Additionally, the significant costs associated with sales and marketing to develop the market for Natesto in the United States resulted in significant losses for the Companies and are a primary reason behind the Companies' financial difficulties.[20]

27. At the same time, the Companies have incurred further debt in its acquisition of APL and in respect of the potential commercialization of Noctiva. While the acquisition of APL was a strategic growth opportunity, it has resulted in significant additional current and long-term debt to the Companies' balance sheet[21]

28. Further, the clinical development and testing of drug candidates are a long, expensive, and uncertain process. The Applicants have incurred substantial expense for and devoted a significant amount of time to pre-clinical testing and clinical trials. Given the nature of the Companies' business and product pipeline, the Companies will continue to incur increasing R&D expenses in the future to obtain regulatory approvals.[22]

29. To fund these expenses along with other operating expenses, the Applicants have no readily available revenue stream other than Natesto sales, which were only approximately $3 million in 2022. To date losses have been funded since April 30, 2021 by FGC, which has advanced $49.945 million to the Applicants. However, FGC is no longer willing to make further advances to the Applicants outside of these CCAA proceedings.[23]

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[19] *Ibid* at para. 69.
[20] *Ibid* at para. 70.
[21] *Ibid* at para. 71.
[22] *Ibid* at para. 72.
[23] *Ibid* at para. 73.

30. These financial challenges have also resulted in the Companies losing a number of key employees from 2021 through 2022 resulting in certain operational turmoil and difficulties. Most recently, the former Chief Financial Officer who was the senior finance lead for the Companies resigned in November 2022 and a former member of APC's board of directors resigned in December 2022.[24]

E. THE PRE-FILING STRATEGIC PROCESS

31. In order to address the Applicants' liquidity situation, throughout 2022 APC undertook numerous efforts to raise additional capital. APC reached out to numerous investors in the pharmaceutical industry in an attempt to raise additional capital that would allow the Companies to implement their plans to grow sales of Natesto and develop and commercialize Noctiva. Despite these efforts, APC was unable to find a workable financing transaction.[25]

32. On September 21, 2022, APC announced that it was commencing a strategic review of capital and business alternatives, including but not limited to, possible debt or equity financing, asset sale, merger & acquisition, or licensing transactions. As part of this initiative, APC established the Independent Committee to supervise the Pre-Filing Strategic Process.[26]

33. EY and EYO were also engaged as the independent financial advisor to the Companies, and FAAN was also engaged to assist in the strategic review As part of the Pre-Filing Strategic Process, EYO reached out to various financial and strategic parties as part of this process in order to develop a sale, financing or licensing transaction. While EYO received interest and advanced with multiple parties, the process did not lead to any actionable transaction.[27]

[24] *Ibid* at para. 74.
[25] *Ibid* at para. 75.
[26] *Ibid* at para. 76.
[27] *Ibid* at para. 77.

F. THE DIP FACILITY AGREEMENT

34. As appears from the Cash Flow Statement prepared by the Companies and reviewed by the Proposed Monitor, the Companies expect the need for interim financing to fund these CCAA proceedings.[28]

35. On January 25, 2023, APC and APL, as co-Borrowers, and FGC, in its capacity as DIP Lender, entered into the DIP Facility Agreement which remains subject to Court approval. The Independent Committee, in consultation with FAAN, the proposed Monitor, and the Applicants' legal counsel, independently reviewed and considered the proposed DIP Facility Agreement and approved it following their deliberations.[29]

36. The DIP Facility Agreement provides for a super-priority, interim, non-revolving credit facility up to a maximum principal amount of $7,000,000. The interest rate applicable to advances under the DIP Facility is 8% per annum, calculated and compounded monthly and payable on the Maturity Date.[30]

37. Within the initial 10-day stay period, the Applicants are requesting authority to draw up to a maximum amount of $500,000 under the DIP Facility Agreement. As shown in the Cash Flow Statement, given their liquidity situation, the Applicants likely will require this Initial Advance to continue operating in the ordinary course within the initial 10-day stay period. Additionally, if there are any issues or delays in collecting receipts or unexpected required expenditures within the initial 10-day stay period, the Initial Advance provides certainty to the Applicants and its stakeholders.[31]

38. In order to fund the operations of the Companies during these CCAA proceedings, the Applicants commenced negotiations with FGC to provide debtor-in-possession financing. Based

[28] *Ibid* at para. 94.
[29] *Ibid* at para. 96.
[30] *Ibid* at para. 97.
[31] *Ibid* at para. 98.

on the results of the Pre-Filing Strategic Process, which included solicitation of potential third-party financing, and the available collateral to secure any DIP financing, the Applicants did not believe any third parties would be interested in providing such financing.[32]

G. APPROVAL OF FAAN AS CRO

39. From August 22, 2022 to November 20, 2022, FAAN, through Naveed Z. Manzoor was appointed as Chief Strategy Officer of APC. During this time, FAAN was engaged to assist with, among other things, APC's Pre-Filing Strategic Process. FAAN's current position is that of CFO of APC, commencing November 20, 2022. Should the Initial Order be granted, it is anticipated, and the DIP Facility requires the appointment of FAAN in an expanded role as CRO. The terms of the CRO appointment shall be as outlined in the CRO Engagement Letter, finalized between APC and FAAN as at January 25, 2023, subject to Court approval.[33]

40. The pharmaceutical industry is heavily regulated and complex. Accordingly, the success of APC's restructuring requires leadership with substantial experience and knowledge. Since 2016, FAAN has been appointed as CRO in several other CCAA proceedings involving significant and complex restructuring and sale transactions.[34]

41. Naveed Manzoor, one of the Managing Directors of FAAN, is a Licensed Insolvency Trustee and has been involved with APC since August 22, 2022. Accordingly, FAAN also has extensive personal knowledge of the circumstances of these proceedings.[35]

H. KERP

42. The Companies have certain Key Employees who perform roles critical to advancing the Applicants' restructuring, including various institutional knowledge related to the Companies' business and operations. As described above, certain senior members of management resigned prior to these CCAA proceedings. Accordingly, the Applicants have worked with their advisors to

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[32] *Ibid* at para. 95.
[33] *Ibid* at paras 1, 76 and 87.
[34] *Ibid* at para. 89.
[35] *Ibid*.

develop a KERP to provide three Key Employees. The maximum aggregate amount payable under the KERP is C$455,250. Payments under the KERP are due only upon certain triggers or milestones in the Applicants' restructuring.[36]

43. The Compensation Committee of APC's board of directors, in consultation with FAAN, EY and the Companies' legal counsel, reviewed the terms of the KERP in order to ensure that those employees subject to the KERP were properly incentivized to maximize the Applicants' operational success and their chance at a going-concern solution for the benefit of the Companies and their stakeholders.[37] If appointed, the Monitor will have reviewed the KERP and will be in a position to file its First Report on the proposed terms of the KERP prior to the Comeback Hearing.

I. CHAPTER 15 PROCEEDING

44. Should the Initial Order be granted, the Companies intend to initiate Chapter 15 proceedings in the United States Bankruptcy Court seeking, among other things: (a) recognition of these CCAA proceedings as a foreign main proceeding pursuant to the United States Bankruptcy Code; (b) recognition and enforcement of the Initial Order; and (c) other appropriate relief under the Bankruptcy Code.[38]

45. The proposed Initial Order also provides that APC will be appointed as the "foreign representative" for the purposes of the Chapter 15 proceedings.[39]

46. The Chapter 15 proceedings are necessary to ensure that if the Initial Order is granted, this Court's stay of proceedings is recognized and enforced in the United States generally and the New York State Supreme Court in particular.[40]

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[36] *Ibid* at para. 113.
[37] *Ibid* at para. 114.
[38] *Ibid* at para. 122.
[39] *Ibid* at para. 124.
[40] *Ibid* at para. 125.

PART III – ISSUES

47. The issues in respect of the relief being sought under the Initial Order are whether:

(a) this Court should grant protection to the Applicants under the CCAA, including the requested Stay of Proceedings;

(b) the relief being sought is reasonably necessary;

(c) the CRO should be appointed and whether this Court should grant a sealing order in respect of the unredacted copy of the CRO Engagement Letter;

(d) this Court should approve the DIP Facility Agreement and grant the DIP Lender's Charge;

(e) this Court should grant: the Administration Charge and Directors' Charge; and

(f) this Court should authorize and empower APC to act as Foreign Representative.

48. The issues in respect of the relief being sought under the ARIO are whether:

(a) this Court should grant the ARIO, expanding the restructuring and other powers available to the Applicants and Monitor thereunder, and extending the Stay of Proceedings;

(b) this Court should approve the KERP, grant the KERP Charge, and grant a sealing order in respect of the unredacted KERP; and

(c) this Court should grant: the increase to the Administration Charge, the DIP Facility, and DIP Lender's Charge.

PART IV – LAW AND ANALYSIS IN RESPECT OF INITIAL ORDER

A. This Court should grant protection to the Applicants under the CCAA.

i. The Applicants are either "debtor companies" or "affiliated debtor companies" to which the CCAA applies

49. The CCAA applies to a "debtor company" or "affiliated debtor companies" where the total of claims against the debtor or its affiliates exceeds $5 million. The CCAA defines a "debtor company" as, among other things, any company that is insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**").[41]

50. The CCAA defines "company" as, among other things,

> Any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated (...)[42]

51. APC, ABI, and ALI, as companies incorporated or formed under the legislature of a province (Ontario), meet the CCAA definition of "company" and are therefore eligible for CCAA protection in this respect.[43]

52. APL is also a "company" as defined in the CCAA because it is an incorporated company (under the laws of Delaware) having assets and/or doing business in Canada. APL does not maintain its own bank account and relies entirely on its Canadian parent, APC, to fund all its cash flow requirements. APL's operations are also entirely controlled by management at APC at its head office in Mississauga, Ontario. Further, APL has assets in Canada, being the patent rights associated with Noctiva being registered with the Canadian Intellectual Property Office.[44]

53. In *Re Cinram*, Justice Morawetz (as he then was) held that having only nominal assets in Canada met the test for being a "company" under the CCAA:

> Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, bring a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the

[41] CCAA, s. 2(1) and s. 3(1).
[42] CCAA, s 2(1).
[43] Initial Manzoor Affidavit, *supra* at paras. 10 and 13-14.
[44] *Ibid* at paras. 16 and 19.

> CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.[45]

54. The testing for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business in Canada" is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.[46]

55. When determining whether an applicant is a debtor company on the basis of having nominal assets in Canada, courts have stated that they will not engage in a qualitative or quantitative analysis of the applicant's assets, as doing so would undermine the effectiveness of the CCAA.[47]

ii. This Court has jurisdiction over the Applicants

56. Subsection 9(1) of the CCAA provides that an application under the CCAA may be made to the court that has jurisdiction in the province where the debtor company has its "head office or chief place of business." If "the head office is in one province or territory and its chief operations are located in another, an application can be made in either jurisdiction."[48]

57. The Applicants' chief place of business is in Ontario. Three out of four of the Applicants' registered head offices are located in Mississauga, Ontario.[49]

58. The Applicants' centre of main interest is in Canada. The Applicants have assets in Canada and its operations are directed from its head office located in Mississauga. The Companies' business decisions are primarily made in Canada.[50] Only the Canadian Applicants have bank accounts.[51] Further, 90% of the Companies' employees are located in Canada.[52]

59. Accordingly, the Ontario court is the appropriate venue for these CCAA proceedings.

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[45] *Re Cinram*, 2012 ONSC 3767 at para. 47.
[46] *Ibid* at para. 46.
[47] *Re Global Light Telecommunications Inc.*, 2004 BCSC 745 at para. 17.
[48] CCAA, s. 9(1); J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at p. 128
[49] Initial Manzoor Affidavit, *supra* at paras. 10, 13, 14 and 16.
[50] *Ibid* at para. 15. See also CCAA s. 45(2); *Re Angiotech Pharmaceuticals Ltd.*, 2011 BCSC 115 at para. 7.
[51] Initial Manzoor Affidavit, *supra* at para. 33.
[52] *Ibid* at para. 34.

iii. The Applicants are insolvent

60. As set out above, companies are entitled to CCAA protection if they are, a "debtor company" which means, *inter alia*, a company that is insolvent.[53]Although the CCAA does not define the term "insolvent," the definition of "insolvent person" under section 2(1) of the BIA is well-established to be the governing definition in applications under the CCAA. The definition of "insolvent person" in the BIA is as follows:

> ... "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
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> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.[54]

61. The tests for "insolvent person" under the BIA are disjunctive. A company satisfying either (i), (ii) or (iii) of the test is considered insolvent for the purposes of the CCAA.[55]

62. In *Stelco*, Justice Farley applied an expanded definition of insolvent in the CCAA context to reflect the "rescue" emphasis of the CCAA, modifying part (a) of the BIA's definition of "insolvent person" to include a financially troubled corporation that is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring".[56]

63. The Applicants are insolvent due to the following:

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[53] CCAA, s. 2(1) and s. 3(1).
[54] *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (Ont. Sup. Ct. J. [Commercial List]), [*Stelco*]
[55] *Ibid* at para. 28.
[56] *Ibid* at paras. 25-26.

(a) as demonstrated by the Cash Flow Statement, the Applicants are unable or is expected to soon become unable to meet its obligations generally as they become due without the additional financing provided by the DIP Facility; and

(b) the Applicants' current and long term liabilities both exceed its current and long term assets; and

(c) the Applicants, either individually or as a whole, have debts in excess of $5 million.[57]

64. For all of the foregoing reasons, the Applicants are debtor companies to which the CCAA applies and are eligible for protection under the CCAA.

B. The relief sought is reasonably necessary.

65. Pursuant to s. 11.001, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period. The stated purpose of s. 11.001 is to "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."[58]

66. As detailed in the Manzoor Affidavit and below, the Applicants have worked with its advisors and the Proposed Monitor to limit the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of its businesses. In each case, the Applicants considered whether the requested relief is necessary for the immediate stabilization of their businesses to protect them and the interests of its various stakeholders. In cases where immediate relief is necessary, the Applicants have attempted to limit any authorizations from the Court to what is required within the proposed initial stay period and will only seek additional authorization on the Comeback Hearing.

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[57] Initial Manzoor Affidavit, *supra* at paras. 39-41 and 81.

[58] CCAA, s. 11.001, 11.02(1) and (3); *Lydian International Limited (Re)*, 2019 ONSC 7473 at paras. 22-26.

67. For the sake of cost efficiency, and to provide all stakeholders with time to consider the Applicants' position on the various relief sought and to be sought at the Comeback Hearing, this Factum is filed at the outset of the proceeding to address all relief.

C. The Stay of Proceedings is necessary.

68. Pursuant to section 11.02(1) of the CCAA, a Court may grant an order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.[59]

69. Exercising discretionary authority to grant a stay pursuant to the CCAA must be informed by the purpose behind the CCAA, which should be broadly and liberally interpreted.[60]

70. The purpose of the CCAA is to, amongst other things, maintain the status quo for the debtor company for a period while it consults with its stakeholders with a view to continuing operations for the benefit of both the debtor company and its stakeholders. The Supreme Court of Canada has held that when exercising judicial discretion under the CCAA, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, and even other parties doing business with the insolvent company.[61]

71. The Applicants require a Stay of Proceedings in order to provide them with the breathing room necessary to obtain the necessary funding to continue operations[62] while seeking additional financing or refinancing and pursuing various restructuring options such as the sale of the Applicants' assets. The commencement of a CCAA proceeding to address the significant issues the Applicants face represents the only realistic path forward for the Applicants at this

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[59] CCAA, s. 11.02(1).

[60] *Stelco Inc. (Re)*, 2005 CarswellOnt 1188 (Ont. C.A.) at paras 23-26; *Nortel Networks Corporation (Re)*, 2009 CarswellOnt 4467 (Ont. Sup. Ct. J. [Commercial List]) at paras. 31 and 47 [*Nortel*]; *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 at para. 40.

[61] *Ted Leroy Trucking [Century Services] Ltd. (Re)*, 2010 SCC 60 at para. 60; *Nortel*, *supra* at para. 47.

[62] See Initial Manzoor Affidavit, *supra* at para. 73. FGC has been the only source of funding for the Companies since April 2021 and is no longer willing to provide any additional financing to the Companies outside of a court-supervised process.

time. An inability to restructure in a coordinated, court-supervised manner would be potentially disastrous for many stakeholders of the Applicant, including the employees and customers of the Applicants.

72. For the foregoing reasons, the initial Stay of Proceedings up to February 3, 2023, should be granted on the terms sought herein.

D. The CRO should be appointed.

73. Courts have held that the appointment of a CRO is appropriate as such expertise will assist the debtor in achieving the objectives of the CCAA.[63] The Court has the statutory jurisdiction to make any order appropriate in the circumstances pursuant to section 11 of the CCAA.[64]

74. In *Northstar Aerospace, Inc. (Re)* and *Priszm Income Fund (Re)*, the courts have found that the appointment of a CRO is appropriate in order to ensure ongoing corporate governance; and as such expertise will assist the debtor in achieving the objectives of the CCAA.[65]

75. While not all of the directors and officers of APC have resigned or stated an intention to resign, APC has lost several key employees from 2021 through 2022, and most recently, the former CFO and a former director of APC resigned in the past few months.[66]

76. The DIP Facility is also conditional upon FAAN being appointed as CRO.[67]

77. The Proposed Monitor is satisfied with the qualifications, expertise, and experience of FAAN, and supports the Applicants' retention of FAAN as CRO pursuant to the terms of the CRO Engagement Letter.[68]

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[63] *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 at para. 35 [*Walter*]; *JTI-MacDonald Corp., Re*, 2019 ONSC 1625 at paras. 26-27.
[64] CCAA, s. 11.
[65] *Northstar Aerospace, Inc. (Re)*, 2012 ONSC 3974 at paras. 11-12 and *Priszm Income Fund (Re)*, 2011 ONSC 2061 at paras. 40 and 46.
[66] Initial Manzoor Affidavit, *supra* at para. 74.
[67] *Ibid* at para. 100.

E. Sealing Request.

78. Pursuant to the *Courts of Justice Act* (Ontario), this Court has the discretion to order that any document filed in a civil proceeding be treated as "confidential", sealed and not form part of the public record."[69]

79. The test to determine if a sealing order should be granted is set out in *Sierra Club* as recast in *Sherman Estate*:

(a) court openness poses a serious risk to an important public interest;

(b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[70]

80. The Supreme Court in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests such as preserving confidential information or avoiding a breach of a confidentiality agreement are an "important public interest" for purposes of this test. [71]

81. Courts have applied the Sierra Club and Sherman Estate tests in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors.[72] This Court has previously granted sealing orders with respect to financial advisors' engagement letters.[73]

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[68] *Ibid* at para. 105.
[69] *Courts of Justice Act*, R.S.O. 1990, c C.43, s. 137(2). See also *Target Canada Corp, Re*, 2015 ONSC 1487 at paras. 28-30.
[70] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53 [*Sierra Club*]; *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 38 and 43. [*Sherman Estate*]
[71] *Sierra Club*, *supra* at para. 55; *Sherman Estate*, *supra* at paras. 41-43.
[72] *Re Danier Leather Inc.*, 2016 ONSC 1044 at para. 82; *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 at paras. 23-28.
[73] *Target Canada Co. Re*, 2015 ONSC 303 at paras. 83-84; *Jaguar Mining Inc, Re*, 2014 ONSC 494 at para. 37 [*Jaguar*].

82. The Applicants respectfully request that, in the Initial Order, this Court seals Confidential Exhibit "B" to the Pre-Filing Report, which is the unredacted CRO Engagement Letter. This document contains commercially sensitive information that, if disclosed, could be detrimental to the CRO's ability to obtain market rates in future engagements.

83. The salutary effects of the sealing order, which provides the CRO with the ability to obtain market rates in future engagements, far outweighs the deleterious effects of the public not knowing the commercial points of the CRO's engagement. The Proposed Monitor has also reviewed the CRO Engagement Letter and believes FAAN's engagement as CRO is necessary and in the best interests of the Applicants and its stakeholders and supports the sealing request.

F. The DIP Facility Agreement and DIP Lender's Charge should be approved and granted, respectively.

84. The Applicants are facing a liquidity crisis. The Cash Flow Statement demonstrates that the Companies expect the need for interim financing to fund these CCAA proceedings.[74] The Applicants are requesting approval of the DIP Facility between the APC and APL, as borrowers, and FGC as DIP Lender, the terms of which are further described in the DIP Facility Agreement attached as Exhibit "S" to the Manzoor Affidavit.

85. Based on the results of the Pre-Filing Strategic Process, the Applicants did not believe any third parties would be interested in providing such financing, nor would be in a position to provide financing on better economic terms. Therefore, the Applicants secured the DIP Facility from FGC pursuant to the DIP Facility Agreement.[75]

86. Pursuant to the DIP Facility Agreement, the DIP Lender agreed to loan the initial principal amount of $500,000 to APC and APL, subject to the terms and conditions prescribed in the DIP Facility Agreement during the initial 10 day period of the CCAA Proceedings. APC and APL's access to the DIP Facility is conditional upon the provision of an order of this Court,

[74] Initial Manzoor Affidavit, *supra* at para. 94.
[75] *Ibid* at para. 95.

among other things, approving the DIP Facility Agreement and the DIP Facility and granting the DIP Lender's Charge.[76]

87. Section 11.2 of the CCAA provides the Court with the express statutory authority to approve the DIP Facility Agreement the DIP Lender's Charge, and that the DIP Lender's Charge rank in priority over the claim of any secured creditor of the company.[77] Section 11.2(4) sets out the following factors to be considered by the Court in deciding whether to grant a super-priority charge in respect of the DIP Facility:

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report.[78]

88. In *Canwest Publishing*, Justice Pepall highlighted the importance of meeting the criteria set out in section 11.2(1) in addition to those found in section 11.2(4), namely:

(a) whether notice has been given to secured creditors likely to be affected by the security or charge;

[76] *Ibid* at paras 98-99.
[77] CCAA, s. 11.2.
[78] CCAA, s. 11.2(4).

(b) whether the amount to be granted under a DIP facility is appropriate and required having regard to the debtors' cash-flow statement; and

(c) whether the DIP charge secures an obligation that existed before the order approving the DIP was made.[79]

89. Based on the foregoing factors prescribed in subsections 11.2(1) and 11.2(4) of the CCAA, the DIP Facility Agreement and the DIP Lender's Charge should be approved and granted, as:

(a) the notice requirements under section 11.2(1) of the CCAA have been met;

(b) given the Applicants' circumstances, they cannot obtain alternative financing outside of these CCAA proceedings;

(c) the DIP Facility is necessary in order for the Applicants to pursue its restructuring efforts, which will preserve its maintenance as a going-concern for the benefit of all its stakeholders;

(d) without the DIP Facility, the Applicants may not be able to continue operating;

(e) the quantum of the DIP Facility is reasonable and appropriate having regard to the Cash Flow Statement;

(f) the $500,000 being advanced during the initial 10-day Stay of Proceedings is "reasonably necessary for the continued operations" of the Applicants in the "ordinary course of business during the same 10-day Stay of Proceedings" [80]; and

(g) the Proposed Monitor is supportive of the approval of the DIP Facility Agreement and corresponding DIP Lender's Charge.

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[79] CCAA, s. 11.2(1); *Canwest Publishing Inc. Re*, 2010 ONSC 222, at paras. 42-44 [*Canwest Publishing*].
[80] *Lydian*, *supra* at paras. 22-26; Initial Manzoor Affidavit, *supra* at para. 98.

G. The Administration Charge should be granted.

90. The Applicants request that this Court grant a super-priority Administration Charge on the Property in favour of the CRO, the Proposed Monitor, counsel to the Proposed Monitor, and counsel to the Applicants. At the initial hearing, the Administration Charge will be requested in the amount of C$150,000 in respect of the initial stay period.

91. This Court has the jurisdiction to grant the Administration Charge pursuant to section 11.52 of the CCAA. In *Canwest Publishing*, Justice Pepall identified six non-exhaustive factors that the Court may consider when determining whether to grant an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.[81]

92. The Administration Charge is warranted, necessary, and appropriate in the circumstances, given that:

(a) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout these CCAA proceedings;

(b) the Applicants' businesses are heavily regulated and complex;

(c) there is no anticipated unwarranted duplication of roles;

(d) the Applicants' advisors have engaged in a significant amount of work on a pre-filing basis in exploring strategic alternatives, conducting the Pre-Filing

[81] *Canwest,* at para. 54.

Strategic Process, and obtaining the DIP Facility for the benefit of the Applicants' stakeholders; and

(e) the Proposed Monitor believes that the proposed quantum of the Administration Charge is reasonable.

H. The Directors' Charge should be granted.

93. The Applicants request that this Court grant a priority Directors' Charge on the Property in favour of APC's current and future directors and officers in the amount of C$200,000, ranking subordinate to the Administration Charge.

94. The Directors' Charge protects the current and future directors and officers against obligations and liabilities they may incur as directors and officers of APC after the commencement of the CCAA proceeding, except to the extent that any such claims or the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct.

95. Section 11.51 of the CCAA provides the Court with the express statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.[82]

96. In Jaguar Mining Inc., Re, Justice Morawetz (as he then was) stated that, in order to grant a Directors' Charge, the Court must be satisfied of the following factors:

(a) notice has been given to the secured creditors likely to be affected by the charge;

(b) the amount is appropriate;

(c) the applicant could not obtain adequate indemnification insurance for the directors at a reasonable cost; and

[82] CCAA, s. 11.51.

(d) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.[83]

97. With respect to the Applicants, the Directors' Charge is reasonable in the circumstances because:

(a) the Applicants will benefit from the active and committed involvement of the directors and officers, who have considerable institutional knowledge and valuable experience and whose continued participation will help facilitate an effective restructuring;

(b) APC cannot be certain whether the existing insurance will be applicable or respond to any claims made, and APC does not have sufficient funds available to satisfy any given indemnity should its directors and officers need to call upon such indemnities;

(c) the Directors' Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct;

(d) absent approval by this Court of the Directors' Charge in the amounts set out above, some or all of the Companies' directors and officers may resign;

(e) the amount of the Directors' Charge was specifically analyzed by EY to cover potential accruals as of the filing date and liabilities arising from the payroll cycle; and

(f) the Proposed Monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances.[84]

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[83] *Jaguar*, at para. 45.
[84] Initial Manzoor Affidavit, *supra* at para. 111.

I. APC should be authorized and empowered to act as Foreign Representative.

98. Section 56 of the CCAA grants this Court the unfettered authority to appoint "any person or body" to act as a representative for the purpose of having these CCAA proceedings recognized in any jurisdiction outside of Canada, including but not limited to the United States.[85]

99. In order to enforce the stay of proceedings established under the Initial Order (if it is granted by this Court) in the United States and to facilitate the restructuring strategy contemplated herein, it is necessary to seek recognition of the Initial Order by the United States Bankruptcy Court. Accordingly, the Applicants seek authorization in the Initial Order for APC, as foreign representative of the Applicants, to seek recognition of these proceedings in the United States under Chapter 15 of the Bankruptcy Code.

100. Courts have consistently encouraged comity and cooperation between courts in cross-border insolvencies to enable enterprises to restructure on a cross-border basis. To authorize APC to act as foreign representative and seek recognition of these proceedings in the United States is consistent with and gives full effect to the foregoing principles.[86]

101. The commencement of proceedings in the United States is necessary and appropriate under the circumstances because, among other things, the Applicants operate a cross-border business that is operationally and functionally integrated in several significant respects. Among other things, the Applicants have assets, and a significant amount of its revenues are derived from the United States. In addition to the ongoing litigation with APC and APL in the United States, it is possible that one or more parties in the United States will seek to commence proceedings in respect of one or more of the Applicant entities.[87]

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[85] CCAA, s. 56.
[86] *Caesars Entertainment Operating Company Inc., Re*, 2015 ONSC 712 at para. 38; *Payless Holdings LLC, Re*, 2017 ONSC 2242 at para. 35.
[87] Initial Manzoor Affidavit, *supra* at para. 125.

102. The Proposed Monitor has reviewed the circumstances and agrees that Canada is the centre of main interest for the Companies.[88]

PART V – LAW AND ANALYSIS IN RESPECT OF ARIO

A. The Stay of Proceedings should be extended.

103. On an application other than an initial application, s. 11.02(2) of the CCAA provides that the Court may make a stay order for any period that the court considers necessary, if the applicant satisfies the Court that: (a) circumstances exist that make the order appropriate; and (b) that the applicant has acted, and is acting, in good faith and with due diligence.[89]

104. The Applicants will seek to extend the Stay of Proceedings up to and including April 5, 2023. This extended Stay of Proceedings is necessary and appropriate in the circumstances to allow for continued steps to stabilize the Applicants' businesses, to engage with stakeholders and to explore restructuring options.

105. The Applicants intend to act in good faith and with due diligence, including giving notice of these CCAA proceedings to affected parties and, in consultation with the Proposed Monitor, to engage in discussions with its key stakeholders.

B. The KERP and KERP Charge should be approved and granted, respectively.

106. The Applicants will seek approval of the KERP and related KERP Charge on the Comeback Hearing. The approval of a KERP and related KERP Charge is in the discretion of the CCAA court. The authority to grant such a charge is derived from the Court's general jurisdiction to make any order that the CCAA Court thinks appropriate.[90] KERPs have been approved in numerous CCAA proceedings.[91]

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[88] *Ibid* at para. 126.
[89] CCAA, s. 11.02(2).
[90] *Mountain Equipment Co-operative, Re*, 2020 BCSC 1586 at para. 66 [*MEC*], citing *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 at para. 27. [*U.S. Steel*]
[91] See, for example, *Aralez Pharmaceuticals Inc., Re*, 2018 ONSC 6980 at para. 57 [*Aralez*]; *Target Canada Co., Re*, 2015 ONSC 303, at para. 59; *U.S. Steel* at paras. 28 to 33; *MEC*, *supra* at para. 71.

107. As the Court held in *Walter Energy*, the factors to be considered by the Court in granting a KERP vary from case to case. However, some factors are generally present.[92] Factors supporting a KERP and a related KERP charge have been held to include

(a) the approval of the Monitor;

(b) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP charge is not approved;

(c) whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company;

(d) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and

(e) the business judgement of the board of directors of the debtor.[93]

108. As Justice Dunphy held in *Aralez*, three criteria underlie the factors applicable to approving a KERP or similar incentive program in an insolvency proceeding: (a) arm's length safeguards; (b) necessity; and (c) reasonableness of design.[94]

109. The oversight of the Monitor in relation to the KERP design is of considerable importance. Also relevant is the support (or lack of objection) of secured creditors who are affected by the granting of a court-ordered KERP charge.[95]

110. The KERP was developed by the Applicants, with input from the Proposed Monitor, to facilitate and encourage the continued participation of senior management and other key employees of the Applicants who are required to guide the business through the restructuring and preserve value for stakeholders. The beneficiaries of the KERP are employees with

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[92] *Walter,* at para. 58, citing *Grant Forest Products, Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) [*Grant Forest*]
[93] *Grant Forest*, supra at para. 19; *Walter*, supra at para. 59; *MEC*, supra at para. 68.
[94] *Aralez*, *supra* at para. 30.
[95] *Aralez*, *supra* at para. 35.

significant experience and specialized expertise that cannot be easily replicated or replaced. Further, these key employees will also be faced with a significantly increased workload during the restructuring process.[96]

111. Should this Court approve the KERP, the KERP Charge, which will act as a priority charge on the Property in the maximum amount of C$455,250, should also be approved. The amount of the KERP Charge is premised on the terms of the KERP. The KERP Charge is proposed to rank subordinate to the Administration Charge, the DIP Lender's Charge, and the Directors' Charge.

C. Sealing Request.

112. In addition to principles stated above in respect of sealing orders in the insolvency context, this Court has granted sealing orders for KERPs. Notably, in *Essar Steel Algoma*, Justice Newbould stated: "Sealing orders are routinely granted in KERP cases and found to meet the *Sierra Club* tests."[97]

113. Confidential Exhibit "**[●]**" to the First Report of the Monitor, being the KERP, also contains commercially sensitive and personal information. In this case, the KERP reveals individually identifiable information, including, among other things, compensation information. Disclosure of such sensitive personal and compensation information may cause harm to the Key Employees and to the Applicants, and the protection of such information is an important commercial and privacy interest that should be protected.

114. The salutary effects of protecting this important commercial and privacy interest outweighs any deleterious effect of restricting the accessibility of court proceedings, and the Monitor supports such sealing. 2015

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[96] Initial Manzoor Affidavit, *supra* at paras. 113-115.
[97] *Ontario Security Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 at paras. 23-28; *Re Essar Steel Algoma Inc et al*, 2015 ONSC 7656 at para. 22.

D. The increased DIP Facility, DIP Lender's Charge, and Administration Charge should be granted.

115. The Applicants will seek to increase the amount of the DIP Facility, DIP Lender's Charge, and Administration Charge at the Comeback Hearing. Pursuant to the ARIO, the Charges are proposed to have the following priorities:

First – Administration Charge (to the maximum amount of C$300,000)

Second – DIP Lender's Charge;

Third – Directors' Charge (to the maximum amount of C$200,000); and

Fourth – KERP Charge (to the maximum amount of $455,250).

116. The appropriateness of the DIP Facility, DIP Lender's Charge, and Administration Charge are addressed above. The ARIO contemplates that the Administration Charge will increase from C$150,000 to C$300,000. The increase is based upon additional fees that the professionals will incur following the initial 10-day Stay of Proceedings. The increase in the DIP Facility is also based on the Cash Flow Statement and the projected need for the Companies to have access to increased funding in order to successfully restructure in these CCAA proceedings. The increase in the DIP Lender's Charge corresponds with the Companies' increased need for funding.

PART VI – ORDER SOUGHT

117. For all of the foregoing reasons, the Applicants request an Order substantially in the form of the draft Initial Order at the initial hearing and an Order substantially in the form of the draft ARIO at the Comeback Hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26 day of January, 2023.

STIKEMAN ELLIOTT LLP
Counsel for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Re Cinram*, 2012 ONSC 3767

2. *Re Global Light Telecommunications Inc.*, 2004 BCSC 745

3. *Re Angiotech Pharmaceuticals Ltd.*, 2011 BCSC 115

4. *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (Ont. Sup. Ct. J. [Commercial List])

5. *Lydian International Limited (Re)*, 2019 ONSC 7473 at paras. 22-26

6. *Stelco Inc. (Re)*, 2005 CarswellOnt 1188 (Ont. C.A.)

7. *Nortel Networks Corporation (Re)*, 2009 CarswellOnt 4467 (Ont. Sup. Ct. J. [Commercial List])

8. *Sino-Forest Corporation (Re)*, 2012 ONSC 2063

9. *Ted Leroy Trucking [Century Services] Ltd. (Re)*, 2010 SCC 60

10. *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107

11. *JTI-MacDonald Corp., Re*, 2019 ONSC 1625

12. *Northstar Aerospace, Inc. (Re)*, 2012 ONSC 3974

13. *Priszm Income Fund (Re)*, 2011 ONSC 2061

14. *Target Canada Corp, Re*, 2015 ONSC 1487

15. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41

16. *Sherman Estate v. Donovan*, 2021 SCC 25

17. *Re Danier Leather Inc.*, 2016 ONSC 1044

18. *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347

19. *Target Canada Co. Re*, 2015 ONSC 303

20. *Jaguar Mining Inc, Re*, 2014 ONSC 494

21. *Canwest Publishing Inc, Re*, 2010 ONSC 222

22. *Caesars Entertainment Operating Company Inc., Re*, 2015 ONSC 712

23. *Payless Holdings LLC, Re*, 2017 ONSC 2242

24. *Mountain Equipment Co-operative, Re*, 2020 BCSC

25. *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145

26. *Aralez Pharmaceuticals Inc., Re*, 2018 ONSC 6980

27. *Target Canada Co., Re*, 2015 ONSC 303

28. *Grant Forest Products, Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List])

29. *Re Essar Steel Algoma Inc et al*, 2015 ONSC 7656

Other Authorities

30. J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at p. 128

SCHEDULE "B"
RELEVANT LEGISLATION

Companies' Creditors Arrangement Act, RSC 1985, c C-36

Definitions

2 (1) In this Act,

aircraft objects[Repealed, 2012, c. 31, s. 419]

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

bond includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

cash-flow statement, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (*état de l'évolution de l'encaisse*)

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (*réclamation*)

collective agreement, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

court means

- **(a)** in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,
- **(a.1)** in Ontario, the Superior Court of Justice,
- **(b)** in Quebec, the Superior Court,
- **(c)** in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,
- **(c.1)** in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

- **(d)** in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

debtor company means any company that

- **(a)** is bankrupt or insolvent,
- **(b)** has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,
- **(c)** has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or
- **(d)** is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

director means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; (*administrateur*)

eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

- **(a)** a dividend or similar payment,
- **(b)** a return of capital,
- **(c)** a redemption or retraction obligation,
- **(d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
- **(e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

- **(a)** in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
- **(b)** in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

financial collateral means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

- **(a)** cash or cash equivalents, including negotiable instruments and demand deposits,
- **(b)** securities, a securities account, a securities entitlement or a right to acquire securities, or
- **(c)** a futures agreement or a futures account; (*garantie financière*)

income trust means a trust that has assets in Canada if

- **(a)** its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or
- **(b)** the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act; (*fiducie de revenu*)

initial application means the first application made under this Act in respect of a company; (*demande initiale*)

monitor, in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company; (*contrôleur*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

prescribed means prescribed by regulation; (*Version anglaise seulement*)

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (*créancier garanti*)

shareholder includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; (*actionnaire*)

Superintendent of Bankruptcy means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*; (*surintendant des faillites*)

Superintendent of Financial Institutions means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; (*surintendant des institutions financières*)

title transfer credit support agreement means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; (*accord de transfert de titres pour obtention de crédit*)

unsecured creditor means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chirographaire*)

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- **(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

- **(a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and
- **(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- **(a)** the period during which the company is expected to be subject to proceedings under this Act;
- **(b)** how the company's business and financial affairs are to be managed during the proceedings;

- **(c)** whether the company’s management has the confidence of its major creditors;
- **(d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- **(e)** the nature and value of the company’s property;
- **(f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
- **(g)** the monitor’s report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Security or charge relating to director’s indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

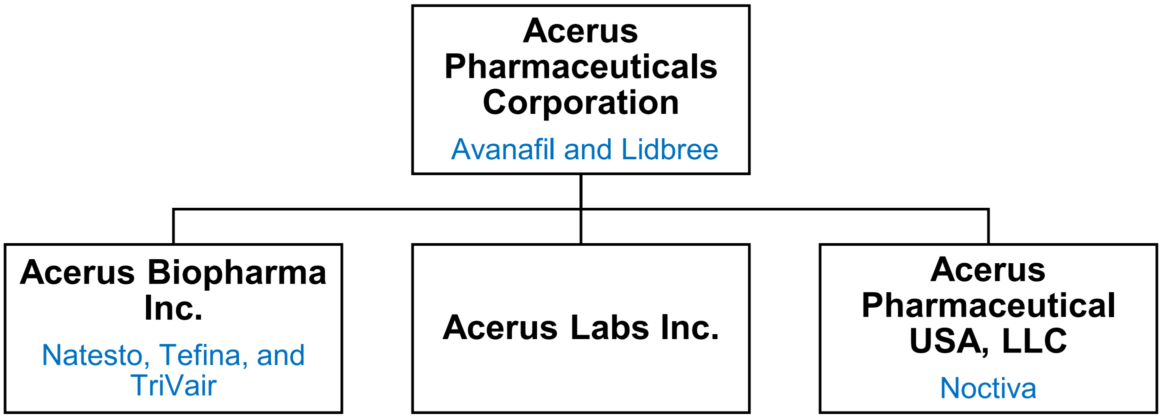
Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director’s or officer’s gross negligence or wilful misconduct or, in Quebec, the director’s or officer’s gross or intentional fault.

Authorization to act as representative of proceeding under this Act

56 The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

SCHEDULE "C"
CORPORATE ORGANIZATIONAL CHART



Court File No.

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

AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF ACERUS PHARMACEUTICALS CORPORATION, ACERUS BIOPHARMA INC., ACERUS LABS INC. AND ACERUS PHARMACEUTICALS USA, LLC.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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