



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-23-00693595-00CL **DATE:** 3 February 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: **In the Matter of a Plan of Compromise or
Arrangement of Acerus Pharmaceuticals
Corporation *et al***

BEFORE JUSTICE: **Osborne**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Stuart Brotman	Proposed Monitor	sbrotman@fasken.com
Alex MacFarlane	First Generation Capital, Proposed DIP Lender	amacfarlane@blg.com
Maya Poliak	Ontario Securities Commission	maya@chaitons.com

ENDORSEMENT OF JUSTICE OSBORNE:

- [1] This is the comeback hearing in this CCAA proceeding in which I granted the Initial Order on January 26, 2023.
- [2] The background to, and my reasons for, the Initial Order are set out in my endorsement of January 26, 2023. Defined terms in this endorsement have the meaning given to them in my earlier endorsement unless otherwise indicated.

- [3] The Applicants bring this motion for an Amended and Restated Initial Order. None of the relief sought today is opposed. It is fully supported and recommended by FGC and the Monitor.
- [4] I observe that counsel for the Ontario Securities Commission is present today and does not oppose the relief sought, the language of the ARIO having been discussed among the parties. Counsel for the OSC did make helpful submissions with respect to the jurisdiction of this Court and of the Commission, the latter in respect of the regulation of capital markets.
- [5] I observe from the Affidavit of Service filed that the Ministry of Finance, the Canada Revenue Agency and the TSX, among others, were served with the materials.
- [6] Today, the Applicants seek a stay extension and the other ancillary relief foreshadowed on the first day hearing, including the increase in DIP financing to \$7 million, approval of a KERP, the continuation of the charges and the other relief set out in the materials.
- [7] As noted, the Monitor supports the stay extension and the other relief sought. It has been involved in the negotiation of the KERPs and supports the position of the Applicants that they are necessary and will be accretive to the maximization of recovery for stakeholders. The increase in DIP financing will be critical to see the Applicants through the stay extension period as reflected in the cash flow statements.
- [8] I am also satisfied that a sealing order is appropriate in respect of the quantum amounts of the proposed KERPs, and meet the test required by section 137 of the *Courts of Justice Act*, as set out by the Supreme Court of Canada in *Sierra Club* and refined in *Sherman Estate*.
- [9] Courts have authorized sealing orders over confidential or commercially sensitive documents in the insolvency context to protect the interests of debtors. (See, for example, *Re Danier Leather Inc.*, 2016 ONSC 1044 at para. 82; *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 at paras. 23-28 (“*Bridging Finance*”); *Target Canada Co. Re*, 2015 ONSC 303 at paras. 83-84 and *Jaguar Mining Inc. Re*, 2014 ONSC 494 at para. 37).
- [10] In *Bridging Finance*, Justice Morawetz, now Chief Justice, was similarly satisfied that the three prerequisites had been satisfied in respect of details of the compensation of eligible employees who would participate in a KERP for which approval was being sought in that case.
- [11] I am satisfied that for the time being, the benefits of the proposed order outweigh its negative effects with the result that it should be granted, pending further order of the Court. I indicated to counsel for the Applicants today that while I am also prepared to continue the sealing order granted on the first day with respect to the CRO engagement letter, I would require submissions on the next appearance as to whether and why that aspect of the sealing order should continue.
- [12] In addition to the general comeback provisions applicable to the ARIO, the sealing order may be varied by the Court on motion of any party brought on notice at any time.
- [13] Counsel for the Applicants are directed to file a physical copy of the unreacted KERP document with the Commercial List Office in a sealed envelope marked: “confidential and sealed by Court order; not to form part of the public record”.
- [14] Counsel for the OSC and the Applicants have, as noted, consented to the form of order. Nothing in the order or this endorsement is intended to encroach on the jurisdiction of the Commission or other similar securities regulatory authorities in regulating the conduct of market participants and to issue cease trade orders if and when required pursuant to applicable securities law. Further, nothing in the order or this Endorsement shall constitute or be construed as an admission by the Commission that the Court has jurisdiction over matters that are within the exclusive jurisdiction of the Commission under the *Securities Act*, R.S.O. 1990, c. S.5.

- [15] The proposed form of order is appropriate in the relief is approved. The next hearing in this matter shall take place on Tuesday, April 4, 2023 commencing at 10:00 AM via Zoom.
- [16] The order I have signed is effective immediately and without the necessity of issuing and entering.

A handwritten signature in black ink, appearing to read "Osborne, J.", written above a horizontal line.

Osborne, J.