Court File No. CV-23-00693595-00CL

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

Applicants

FACTUM OF THE APPLICANTS
(SISP Approval and Extension to Stay of Proceedings)

March 7, 2023

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Elizabeth Pillon (LSO #35638M)
Tel: (416) 869-5623
Email: lpillon@stikeman.com

Lee Nicholson (LSO #66412I)
Tel : (416) 869-5604
Email: leenicholson@stikeman.com

Philip Yang (LSO #82084O)
Tel: (416) 869-5593
Email: pyang@stikeman.com

Lawyers for the Applicants

TO: THE SERVICE LIST

PART I - OVERVIEW[1]

1. The Applicants, Acerus Pharmaceuticals Corporation, Acerus Biopharma Inc., Acerus Labs Inc., and Acerus Pharmaceuticals USA, LLC obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") by an Initial Order dated January 26, 2023. On February 3, 2023, the Applicants sought and obtained an amended and restated order.

2. On January 31, 2023, the United States Bankruptcy Court for the District of Delaware (the "**US Bankruptcy Court**") granted provisional relief which gave recognition to the Initial Order and the ARIO (which was anticipated to be entered into at the time). On February 27, 2023, the US Bankruptcy Court provided final recognition of these CCAA Proceedings as foreign main proceedings and to give full force and effect to the orders entered in these CCAA Proceedings.

3. This factum is filed in support of the Applicants' motion for this Court's approval of a sales and investment solicitation process ("**SISP**") and certain related relief. Additionally, the Applicants request an extension to the Stay of Proceedings to May 19, 2023.

4. The SISP is a critical step towards a successful restructuring of the Companies and an appropriate available option to attempt to maximize the Companies' value for all stakeholders.

PART II – FACTS

5. The facts underlying this motion are more fully set out in the affidavit of Naveed Z. Manzoor sworn January 25, 2023 and Second Manzoor Affidavit.

[1] Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the affidavit of Naveed Z. Manzoor sworn March 2, 2023 (the "**Second Manzoor Affidavit**").

A. The CCAA Proceedings

6. The Applicants sought and obtained the Initial Order on January 26, 2023, which, *inter alia*:

(a) granted an Initial Stay of Proceedings in favour of the Applicants, the Monitor, and the Directors and Officers until February 4, 2023;

(b) appointed EY as Monitor;

(c) appointed FAAN to act as CRO, through the services of Naveed Z. Manzoor and other employees or agents of FAAN (as applicable);

(d) approved the Applicants' ability to borrow under the DIP Facility pursuant to the DIP Facility Agreement entered into on January 26, 2023 with the DIP Lender, of which the Applicants were permitted to draw up to a maximum amount of US$500,000 during the Initial Stay of Proceedings; and

(e) granted the Administration Charge, the Directors' Charge, and the DIP Lender's Charge.[2]

7. On February 3, 2023, the Applicants sought and obtained the ARIO, which, *inter alia*:

(a) extended the Initial Stay of Proceedings to and including April 5, 2023 (the "**Stay of Proceedings**");

(b) approved the KERP;

[2] Second Manzoor Affidavit at para. 8.

(c) increased the amounts which may be borrowed by the Applicants under the DIP Facility Agreement to US $7,000,000, secured by an increase to the DIP Lender's Charge; and

(d) increased the Administration Charge and granted the KERP Charge.[3]

8. On January 31, 2023, the US Bankruptcy Court entered the Provisional Relief Order which granted provisional, injunctive, and related relief, including but not limited to, granting recognition and giving effect in the United States to the Initial Order and giving effect to the ARIO that was anticipated at the time to be entered into on or about February 3, 2023. On February 27, 2023 the US Bankruptcy Court granted the Final Recognition Order which recognized the CCAA Proceedings as foreign main proceedings gave full force and effect to the orders entered in the CCAA Proceedings.[4]

B. Discussions with Various Stakeholders

9. Since the issuance of the ARIO, the Applicants, with the assistance of the CRO, and under the supervision of the Monitor, have engaged in discussions with certain vendors, customers, and other key stakeholders with respect to the Applicants' continued operations in the CCAA Proceedings. These discussions include third party logistics companies and distributors and other service providers which provide: (a) "co-paying" support and infrastructure in the United States which assists patients with respect to the purchase of Natesto product; and (b) trial testing in respect of the Natesto product in the United States. To the extent that the Monitor has not been directly involved in these discussions, the Applicants have continually provided updates in respect of same. [5]

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[3] *Ibid* at para. 9.
[4] *Ibid* at para. 12.
[5] *Ibid* at paras. 13-17.

C. The Pre-Filing SISP Process

10. Prior to the granting of the Initial Order, on September 21, 2022, APC retained EY and FAAN to administer a sales and investment solicitation process for the rights to Natesto and Noctiva as part of its strategic review of capital and business alternatives (the "**Pre-Filing SISP**").[6]

11. While the Pre-Filing SISP did not lead to an actionable transaction, the Companies, the Monitor, and the CRO believe it would be appropriate to undertake a further brief SISP under the supervision of this Court with the benefit of the Stay of Proceedings. It is also a requirement of the DIP Facility Agreement that a SISP acceptable to the DIP Lender be commenced.[7]

12. During the course of the Pre-Filing SISP, the Applicants together with EY assembled a list of approximately one hundred and thirteen (113) potential buyers and investors (the "**Prospective Bidders**"). EY also canvassed its global network which led to a number of discussions with strategics throughout the globe. A data room was also set up which included information in respect of the Applicants and its products, to assist Prospective Bidders (the "**Data Room**")[8]

13. Since the granting of the Initial Order, the Monitor has continued discussions with the parties who had previously expressed interest for the purpose of updating them on the status of the CCAA Proceedings and assessing their continued interest in the Applicants' assets and operations.[9]

D. Proposed SISP

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[6] *Ibid* at para. 6.
[7] *Ibid* at para. 22.
[8] *Ibid* at para. 23.
[9] *Ibid* at para. 26.

14. With the benefit of the steps taken and information learned from the Pre-Filing SISP, the Applicants, in consultation with the Monitor and the CRO, have developed the SISP.[10]

15. The SISP is intended to solicit interest in the opportunity (the "**Opportunity**") for a sale of or investment in all or part of the Applicants' assets (the "**Property**", which includes Noctiva, Natesto, Strendra (avanafil), Lidbree, Tefina, TriVair and all other products of the Applicants (the "**Products**")) and business operations (the "**Business**"). During the SISP, the Companies will continue operating in the normal course.[11]

E. The SISP[12]

i. Overview

16. The SISP provides that the Monitor, with the assistance of the Applicants and the CRO, will solicit interest in, and opportunities for, an acquisition or refinancing of the Applicants' business or a sale of the assets and/or business of the Applicants, in whole or in part. The SISP was designed to be broad and flexible. Accordingly, the SISP contemplates one or more of a restructuring, recapitalization, or other form of reorganization of the business and affairs of the Applicants as a going concern or a sale of all, substantially all or one or more components of the Property and the Companies' Business pursuant to a reverse vesting order.[13]

17. The SISP will proceed in one phase. Should the SISP Approval Order be granted the on March 9, 2023, the key dates under the SISP are as follows:

(a) **March 14, 2023:** Notice of SISP published; Teaser Letter and NDA delivered to Known Potential Bidders (five (5) days following issuance of the SISP Order)

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[10] *Ibid* at para. 27.
[11] *Ibid* at para. 28.
[12] Capitalized terms used in this section and not otherwise defined have the meanings ascribed to them in the SISP.
[13] *Ibid* at para. 31.

(b) **April 28, 2023:** Bid Deadline (fifty (50) days following issuance of the SISP Order)

(c) **No later than May 5, 2023:** Deadline to notify Qualified Bidders and advise whether an Auction will take place (within five (5) business days following the Bid Deadline)

(d) **May 9, 2023:** Auction (if required) (sixty-one (61) days following issuance of the SISP Order)

(e) **No later than May 19, 2023:** Deadline for Sale Approval Motion to be heard (no later than seventy-one (71) days following issuance of the SISP Order)[14]

ii. Qualified Bids and the Successful Bid

18. The Applicants, in consultation with the Monitor and the CRO will evaluate Bids based upon several factors including, without limitation:

a. the purchase price and the net value of the consideration provided by such Bid (with the value of any non-cash consideration being determined by the Applicants in their business judgment, in consultation with the Monitor and CRO);

b. the identity, circumstances and ability of the Bidder to successfully complete such transactions;

c. the proposed transaction documents;

d. factors affecting the speed, certainty and value of the transaction;

e. the assets and liabilities included or excluded from the Bid,

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[14] *Ibid* at para. 32.

f. any related restructuring costs;

g. the manufacturing capabilities of the Bidder; and

h. the likelihood and timing of consummating such transaction.[15]

19. If the Monitor receives one or more Bids that are designated as Qualified Bids, the Applicants, in consultation with the Monitor and the CRO, may (a) select one or more of such Qualified Bids as the Successful Bid, and the Qualified Bidder(s) making such bid, the Successful Bidders, with or without negotiation of Qualified Bids with Qualified Bidders; or (b) direct such Qualified Bidders to participate in an Auction to be conducted and administered by the Monitor, with the assistance of the Applicants, in accordance with the terms of the SISP.[16]

iii. Auction

20. The Auction (if necessary) shall proceed on May 9, 2023. Unless otherwise agreed to in writing by the Monitor, only the Applicants, the CRO, the Auction Participants, the Monitor and each of their respective advisors will be entitled to attend the Auction.[17]

21. During the Auction, the Applicants, in consultation with the Monitor, will (a) review Qualified Bids and Overbids, as the case may be, considering the factors set out in paragraph 20 above with respect to the selection of the Successful Bid from the Bids received; and (b) identify the highest or otherwise best Qualified Bid or Overbid received at any given time during the Auction, being the Successful Bid(s), and the Qualified Bidder(s) making such bid the Successful Bidder(s).[18] Any bid made at the Auction must proceed in minimum additional increments of $100,000 or as otherwise declared by the Monitor during the Auction with the approval of the Applicants.

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[15] *Ibid* at para. 45.
[16] *Ibid* at para. 47.
[17] *Ibid* at para. 49.
[18] *Ibid* at para. 50.

iv. Potential of Stalking Horse Bid

22. Notwithstanding anything to the contrary in the SISP, the Applicants, in consultation with, and with the approval of, the Monitor, may attempt to negotiate a Stalking Horse Bid prior to the Bid Deadline to provide certainty for the Applicants during the SISP. If the Applicants, in consultation with, and with the approval of, the Monitor, accept a Stalking Horse Bid, such Stalking Horse Bid will be subject to approval by this Court and the Applicants shall bring a motion before this Court on notice to the service list in these CCAA Proceedings seeking the approval of the Stalking Horse Bid, together with approval of necessary amendments to the SISP. All Potential Bidders will be promptly informed of any Court approval of a Stalking Horse Bid and any related amendments to the SISP.[19]

v. Secured Creditors' Participation in the SISP

23. The Secured Creditor and DIP Lender, FGC, has not concluded at this time whether it will be participating in the SISP as a potential bidder. Pending formal confirmation of its intentions, the SISP provides for mechanisms to protect the competitive integrity of the SISP.[20]

F. Stay of Proceedings

24. The current Stay of Proceedings expires on April 5, 2023. While time remains prior to the expiry of the stay of proceedings, in order to avoid the cost of an additional motion and in order to reconcile with the timing of the SISP, the Applicants are seeking an extension to the Stay of Proceedings up to May 19, 2023 (being the outside date for the Sale Approval Motion). The

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[19] *Ibid* at para. 53.
[20] *Ibid* at para. 54.

Cash Flow Forecast reflects that the Applicants are expected to maintain liquidity and fund operations up to May 19, 2023.[21]

PART III – ISSUES

25. The issues to be considered on this motion are whether this Court should:

(a) grant the SISP Order approving the SISP; and

(b) extend the Stay of Proceedings to May 19, 2023.

PART IV – LAW & ARGUMENT

A. The SISP Should be Approved.

26. The remedial nature of the CCAA confers broad powers to facilitate restructurings, including the power to approve a sale and investment solicitation process in relation to a CCAA debtor and its business and assets, prior to or in the absence of a plan of compromise and arrangement.[22]

27. In *Nortel*, the Court identified several factors to be considered in determining whether to approve a sales process, which have since been consistently applied:

(a) Is a sale warranted at this time?

(b) Will the sale be of benefit to the whole "economic community"?

(c) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

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[21] *Ibid* at paras. 60 and 62.
[22] *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ONSC) at paras 47-48 [*Nortel*]; CCAA at ss. 11 and 36.

(d) Is there a better viable alternative?[23]

28. These criteria have also been applied recently by this Court in *Green Growth Brands*.[24]

29. This Court has noted that Section 36 of the CCAA directly applies only in the context of the approval of a sale, not of a sales process.[25] In other words, it is not this Court's role in approving a sale process to apply the Section 36 criteria. Such criteria will apply and be considered by the Court if the Court is eventually asked to approve the Successful Bid arising from the SISP.

30. Nevertheless, the *Nortel* criteria for approving a sales process should be evaluated in light of the considerations that may ultimately apply when seeking approval for a concluded sale under Section 36 of the CCAA.[26] This Court is entitled to consider whether the proposed SISP is likely to satisfy the requirement that the process be fair and that the best price has been obtained, whether the Monitor supports the SISP, as well as the extent to which creditors were consulted and other relevant factors.

31. In other CCAA cases, courts have also considered the following factors:

(a) the fairness, transparency and integrity of the proposed process;

(b) the commercial efficacy of the proposed process in light of the specific circumstances; and

(c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.[27]

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[23] *Ibid* at para. 49.
[24] *Green Growth Brands, (Re)*, 2020 ONSC 3565 at para. 61
[25] *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ONSC) at para. 17. [*Brainhunter*].
[26] *Brainhunter, supra* at para. 16.
[27] *Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107 at paras. 20-21; *CCM Master Qualified Fund v blutip Power*

32. In consideration of the above criteria and factors, the SISP should be approved as:

(a) The Applicants are insolvent, unable to indefinitely continue operations in their current state and must restructure to preserve their business. A sale will maximize value for the Applicants' stakeholders, either through allowing the business to continue as a going-concern or through ascribing fair market value to the business and assets of the Applicants;

(b) The broad flexibility afforded by the SISP is designed to solicit the highest value available for the Property and Business, suggesting that the value that results from any sale transaction will benefit the Applicants' stakeholders. The SISP is flexible and capable of canvassing the market for a variety of potential transaction structures including one or more of a restructuring, recapitalization, or some other form of reorganization of the business and affairs of the Applicants as a going concern or a sale of all, substantially all or one or more components of the Property and the Companies' business pursuant to a reverse vesting order;

(c) The Applicants do not believe that any creditor has a reasonable basis to object to the SISP and no objection has been received since the Motion Record of the Applicants was served on March 2, 2023;

(d) The DIP Facility Agreement requires a sales process to be commenced. The DIP Lender has been consulted in respect of the terms and timing of the SISP, and what is proposed in the balance of the SISP to be implemented;

(e) The SISP is the best option in the circumstances, particularly in consideration of the Applicants' liquidity constraints;

Technologies, 2012 ONSC 1750 at para. 6.

(f) The SISP was developed by the Applicants, in consultation with the Monitor, the CRO, and is intended to provide a flexible, fair, and efficient structure for canvassing the market;

(g) The SISP is built upon information and feedback from the Pre-Filing SISP;

(h) The Monitor and the CRO believe that the milestones of the proposed SISP will provide sufficient time to canvass the market, particularly in light of the Pre-Filing SISP that had been conducted;

(i) The Monitor believes that the factors to be considered in arriving at a Successful Bid(s) are appropriate in the circumstances;

(j) The SISP will cause minimal interruption to ongoing operations; and

(k) The Monitor is supportive of the SISP.[28]

B. The Stay of Proceedings Should be Extended.

33. 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.[29]

34. Since the granting of the ARIO, the Applicants have acted in good faith and with due diligence to, among other things, stabilize its business, negotiate, and liaise with its key vendors and customers, and prepare the SISP, all with the oversight of the Monitor.[30]

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[28] Second Manzoor Affidavit at paras. 5, 22, 27-29, 31, 33, 57 and 64.
[29] CCAA, s. 11.02(2).
[30] Second Manzoor Affidavit at paras. 13-18.

35. The SISP contemplates a Bid Deadline of April 28, 2023. The Applicants are seeking an extension to the Stay of Proceedings from April 5, 2023 to May 19, 2023 (being the outside date for the Sale Approval Motion). By extending the Stay of Proceedings, the Applicants can direct its resources towards a successful SISP without returning to this Court to seek an extension to the Stay of Proceedings while in the middle of the proposed SISP.

36. The Cash Flow Forecast also reflects that the Applicants are expected to maintain liquidity and fund operations up to May 19, 2023.[31]

37. The Monitor is supportive of the proposed extension to the Stay of Proceedings to May 19, 2023 and believes it will not materially prejudice any creditor.[32] Should any issues arise in the interim that require the Court's attention, the Applicants and Monitor will be in a position to report on the matter and/or seek the Court's assistance as may be required.

38. For the reasons set out above, the Applicants' requested extension to the Stay of Proceedings to May 19, 2023 should be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of March, 2023.

/s Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP

[31] *Ibid* at para. 62.
[32] *Ibid* at para. 64.

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ONSC).

2. *Green Growth Brands, (Re)*, 2020 ONSC 3565.

3. *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ONSC).

4. *Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107.

5. *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750.

SCHEDULE "B"
RELEVANT LEGISLATION

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

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.

Stays, etc. — other than initial application

11.02 (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.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

> **(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> **(b)** whether the monitor approved the process leading to the proposed sale or disposition;
>
> **(c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party’s right to use the intellectual property — including the other party’s right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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PROCEEDING COMMENCED AT TORONTO

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STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Elizabeth Pillon (LSO #35638M)
Tel: (416) 869-5623
Email: lpillon@stikeman.com

Lee Nicholson (LSO #66412I)
Tel : (416) 869-5604
Email: leenicholson@stikeman.com

Philip Yang (LSO #82084O)
Tel: (416) 869-5593
Email: pyang@stikeman.com

Lawyers for the Applicants