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
(Re: Approval and Reverse Vesting Order and Extension of Stay of Proceedings)

May 26, 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. These are cross-border proceedings involving CCAA Proceedings before the Ontario Superior Court of Justice (Commercial List) and proceedings under Chapter 15 of the United States Bankruptcy Code, 11 U.S. Code § 1501-1532 before the US Bankruptcy Court in Delaware.

2. 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. On March 9, 2023, the Applicants sought and obtained the SISP Order.

3. On February 27, 2023, the United States Bankruptcy Court for the District of Delaware (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. The US Bankruptcy Court recognized the SISP Order on March 23, 2023.

4. This factum is filed in support of the Applicants' motion for this Court's approval of a going-concern sale transaction for the business of the Applicants, to be implemented through the proposed draft Approval and Reverse Vesting Order and related relief.

5. Approval of the Subscription Agreement and authorization of the Transactions contemplated therein is the only viable path forward for the Applicants and the only option for a going-concern exit from the CCAA Proceedings. The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts, which occurred both prior to and after the commencement of the CCAA Proceedings, as well as a robust court-approved SISP.

6. The reverse vesting structure is necessary and appropriate to preserve the going-concern value of the Applicants' business. The granting of the Approval and Reverse Vesting Order is a condition of the Subscription Agreement, which is justified by, among other things: (a) the numerous intellectual properties, licenses, and regulatory approvals that the Applicants maintain in the highly regulated pharmaceutical industry, with such licenses and regulatory

[1] Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the affidavit of Naveed Z. Manzoor sworn January 25, 2023 (the "**Initial Manzoor Affidavit**"), the affidavit of Naveed Z. Manzoor sworn March 2, 2023 (the "**Second Manzoor Affidavit**"), and the affidavit of Naveed Z. Manzoor sworn May 18, 2023 (the "**Third Manzoor Affidavit**").

approvals being cumbersome or very time-consuming to transfer to a third-party purchaser; (b) several of the Applicants' significant contracts with government entities in the US requiring consents to assignment, which will likely cause substantial delays to assign such contracts; and (c) the Applicants will preserve tax attributes which would be otherwise adversely impacted through an asset purchase structure.

7. The Transactions also provide tangible benefits to the Applicants and their stakeholders. The Applicants' ability to carry on operations as a going concern results in several employees preserving their employment; suppliers of goods and services being able to maintain their business relationships with the Applicants, and an opportunity for certain pharmaceutical products to potentially make their way to the market at a future date. All of the Applicants' secured liabilities will be satisfied, and various unsecured and contingent liabilities will be assumed, in comparison to other alternatives which provided for vesting of all liabilities.

PART II – FACTS

8. The facts underlying this motion are more fully set out in the Initial Manzoor Affidavit, the Second Manzoor Affidavit, and the Third Manzoor Affidavit.

A. Background

9. On January 26, 2023, the Court granted an Initial Order pursuant to the CCAA in favour of the Applicants. On February 3, 2023, the Applicants sought and obtained the ARIO. The Initial Order and the ARIO, among other things:

(a) appointed EY as Monitor;

(b) appointed FAAN to act as CRO;

(c) authorized APC to act as foreign representative of the Companies in the Chapter 15 proceedings;

(d) approved the execution by the Applicants of the DIP Facility Agreement, pursuant to which the Applicants may borrow up to a total amount of US$7 million; and

(e) approved the KERP in favour of the key employees.[2]

10. On February 27, 2023, the US Bankruptcy Court granted the Final Recognition Order, which, *inter alia*, recognized the CCAA Proceedings as foreign main proceedings and gave full force and effect to the orders entered in the CCAA Proceedings.[3]

11. On March 9, 2023, the Applicants sought and obtained the SISP Order, which, *inter alia*: (a) extended the Stay of Proceedings to and including May 19, 2023; and (b) approved the SISP and authorized the Applicants and the Monitor to immediately commence the SISP. The US Bankruptcy Court recognized the SISP Order on March 23, 2023.[4]

12. The Stay of Proceedings provided for in the Initial Order has been subsequently extended until and including May 30, 2023.[5]

(i) The Applicants' Business and Operations

13. 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. ABI and ALI are also OBCA corporations. APL was formed under the laws of the State of Delaware.[6]

14. 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.[7]

15. The Companies carry on business as a specialized pharmaceutical company focused on the commercialization and development of prescription men's health products. 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. The Companies' secondary products include Avanafil, Lidbree, Tefina, and TriVair.[8]

16. 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

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[2] Third Manzoor Affidavit, *supra* at paras. 4 and 7.
[3] *Ibid* at para. 8.
[4] *Ibid* at para. 9.
[5] *Ibid* at para. 11.
[6] Initial Manzoor Affidavit, *supra* at paras. 10-11, and 13-15.
[7] *Ibid* at para. 16.
[8] *Ibid* at paras. 17-20.

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. While ABI owns the intellectual property rights to Natesto, commercial activities in respect of Natesto are carried out by APC on behalf of ABI.[9]

17. The Companies currently rely exclusively on contract manufacturing organizations and third-party logistics companies to manufacture and distribute Natesto.[10]

18. 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.[11]

19. 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.[12]

B. The Applicants' Solicitation Efforts

(i) The Pre-Filing Strategic Process

20. Prior to initiating these CCAA Proceedings, the Applicants invested significant time and efforts, with the assistance of advisors, to explore strategic transaction opportunities. The Applicants undertook extensive efforts to explore capital market options throughout 2022. Following the acquisition of Serenity Pharmaceuticals LLC in March 2022, the Applicants encountered additional funding needs in connection with the launch of Noctiva. Consequently, the Applicants expanded their solicitation efforts by contacting known parties in the speciality pharmaceutical industry, as well as financial parties known to be interested in making investments in speciality pharmaceutical companies.[13]

21. Despite several parties expressing interest, these informal marketing efforts did not lead to any viable offers. Accordingly, on September 21, 2022, APC announced that it was commencing a strategic review of capital and business alternatives, including but not limited to,

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[9] *Ibid* at para. 21.
[10] *Ibid* at para. 27.
[11] *Ibid* at para. 19.
[12] *Ibid* at para. 29.
[13] Third Manzoor Affidavit, *supra* at para. 14.

possible debt or equity financing, asset sale, merger & acquisition, or licensing transactions (the "**Pre-Filing Strategic Process**").[14]

22. As part of this initiative, APC established the Special Committee, comprised of independent directors, to supervise the Pre-Filing Strategic Process. EY and EYO were engaged to act as financial advisor to APC in respect of the Pre-Filing Strategic Process. FAAN was also engaged, and Naveed Z. Manzoor was appointed as the Chief Strategic Officer to assist in the Pre-Filing Strategic Process. [15]

23. EYO reached out to various financial and strategic parties as part of the Pre-Filing Strategic 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.[16]

24. As part of the Pre-Filing Strategic Process, EY and FAAN administered the Pre-Filing SISP for the rights to Natesto and Noctiva.[17]

(ii) The Pre-Filing SISP

25. 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. EY also canvassed its global network which led to a number of discussions with strategics throughout the globe.[18]

26. Over the course of the Pre-Filing SISP, various parties signed non-disclosure agreements and reviewed the confidential information memorandum and information provided in the Data Room. EY received submissions from various parties indicating formal interest. However, no actionable transactions were concluded by the end of the Pre-Filing SISP. The Pre-Filing SISP commenced on September 21, 2022 and concluded in November 2022.[19]

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[14] *Ibid* at para. 15.
[15] *Ibid* at para. 16.
[16] Initial Manzoor Affidavit, *supra* at para. 77.
[17] Third Manzoor Affidavit, *supra* at para. 17.
[18] *Ibid* at para. 18.
[19] *Ibid* at para. 20.

(iii) The Conduct of the SISP

27. Following the commencement of the CCAA Proceedings and the approval by this Court of the SISP, the Monitor administered the SISP, in consultation with the Applicants. The SISP provide a further 61 days of marketing of the assets and opportunity.[20]

28. The SISP was designed to be broad and flexible. The SISP contemplated 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. Accordingly, the SISP provided the Applicants with the latitude to pursue both asset and share transactions, including through a reverse vesting structure.[21]

29. In accordance with the SISP, the Monitor completed the following steps on or before March 14, 2023:

(a) in consultation with the Applicants, prepared a list of Known Potential Bidders for the SISP;

(b) caused the Applicants to issue a press release regarding the SISP on March 14, 2023;

(c) published a notice of the SISP in The Globe and Mail (National Edition) on March 14, 2023;

(d) posted the SISP Notice on the Monitor's case website; and

(e) updated the Teaser Letter and Confidential Information Memorandum with the assistance of the Applicants.[22]

30. Based on feedback from the Pre-Filing Strategic Process, after consultation with the Applicants, the Monitor focused the SISP outreach efforts on strategic parties. During the SISP, the Monitor reached out to approximately 56 strategic parties and three financial parties in North

[20] *Ibid* at para. 21.
[21] *Ibid* at para. 22.
[22] Third Report of the Monitor dated May 25, 2023 (the "**Third Report of the Monitor**") at para. 35.

America and overseas. This outreach included 20 new parties who had not previously been contacted in the Pre-Filing Strategic Process.[23]

31. The Monitor received six executed NDAs and three parties submitted binding offers by the Bid Deadline. The Bidders expressed interest in different parts or all of the Applicants' assets or operations. As a result, the scope of their due diligence requests varied significantly. The Monitor closely oversaw the due diligence process to ensure that all of these Potential Bidders' information requests were addressed in a timely and reasonable manner.[24]

32. On May 8, 2023, the Special Committee held a meeting with the CRO, the Applicants' counsel, the Monitor and its counsel to discuss the Bids. Following careful consideration of the available options, the Special Committee, in consultation with and based on the recommendation of the Monitor, the CRO and counsel for the Applicants, exercised their business judgment and determined that it was in the Applicants' and its stakeholders' best interest to pursue the FCG Bid and complete negotiations as the Successful Bid under the SISP.[25]

33. Following the review and recommendation of the Special Committee, the Monitor and the Applicants and their respective counsel continued to discuss and finalize the form of the Subscription Agreement and the Approval and Reverse Vesting Order.[26]

34. On May 12, 2023, the Board, without Mr. Ihnatowycz, met to consider the Special Committee's recommendation to approve the Bid submitted by FGC as the Successful Bid. After extensive discussion and careful consideration of the alternative options, the Board also approved the FGC Bid as the Successful Bid. In reaching this conclusion, the Board considered, among other things, financial information and analysis provided by the Monitor and the recommendation of the Monitor, CRO and counsel for the Applicants.[27]

35. The Board agreed with the Applicants' advisors, the Monitor and its counsel that the only viable path forward for the Applicants was to pursue the Bid submitted by FGC. Accordingly, the

[23] *Ibid* at para. 36.
[24] *Ibid* at paras. 38-39.
[25] Third Manzoor Affidavit, *supra* at paras. 30-31.
[26] *Ibid*.
[27] *Ibid* at para. 34.

Subscription Agreement was entered into between APC and FGC on May 15, 2023, subject to Court Approval.[28]

36. To assist the Court in comparing the bids, the Monitor has prepared a confidential bid summary, to be filed as a Confidential Appendix to the Third Report of the Monitor, which contains commercially sensitive information as discussed further below.

C. The Subscription Agreement and Transactions

37. The Transactions which are before the Court are structured in the form of a Subscription Agreement, with the consideration or purchase price in the form of a credit bid of all secured debt obligations owing to FGC. The structure also provides for available funding to remain with the Applicants and court officers, as necessary, to implement the Transactions, address ancillary post-closing steps, and emerge from the CCAA Proceedings.[29]

38. The Transactions contemplated in the Subscription Agreement have been structured to form a "reverse vesting" transaction. The Transactions provide for a share transaction whereby, essentially:

(a) FGC will subscribe for and purchase new shares of APC, who will, in turn, cancel and terminate all of its existing shares so that FGC may become the sole shareholder of APC and ultimately, each of the subsidiaries of APC (including APL); and

(b) all excluded contracts, excluded assets, and excluded liabilities with respect to the Companies (including APL) will be transferred and "vested out" to corporations (Residual Cos.) to be incorporated by APC in advance of the closing date, so as to allow FGC to indirectly acquire APC's business and assets on a "free and clear" basis.[30]

39. The Subscription Agreement offer made by FGC represents the highest and best offer in respect of the Applicants' business and/or assets. Further, the execution of the Subscription Agreement represents the culmination of extensive solicitation efforts on the part of the

[28] *Ibid* at para. 35.
[29] *Ibid* at para. 38.
[30] *Ibid* at para. 41.

Applicants and EY, which occurred both prior to and after the commencement of the CCAA Proceedings.[31]

40. The Transactions contemplated in the Subscription Agreement represent the best and only viable outcome for the Applicants, its creditors, and other stakeholders in the circumstances, providing several benefits to the Applicants and their stakeholders.[32]

41. To help illustrate the proposed Transactions, a pre and post corporate structure of the Applicants is attached as **Schedule "C"**.

PART III – ISSUES

42. The issues to be determined on this motion are whether this Court should:

(a) approve the Subscription Agreement and the Transactions contemplated therein, in the form of an approval and reverse vesting order;

(b) grant the requested releases in favour of the Applicants' directors, officers and advisors, FAAN as CRO, the Monitor and its advisors and FGC and its directors, officers and advisors;

(c) grant ancillary relief in respect of the Shares being cancelled and the Articles of Reorganization;

(d) grant the sealing order request for the Comparison Chart in the Monitor's Report; and

(e) extend the Stay Period.

PART IV – LAW & ARGUMENT

A. The Subscription Agreement and the Transactions Should be Approved

(i) This Court has Jurisdiction to Approve a Reverse Vesting Transaction

43. A reverse vesting order ("**RVO**") generally involves a series of steps whereby: (a) the purchaser becomes the sole shareholder of the debtor company; (b) the debtor company retains

[31] *Ibid* at paras. 38-39.
[32] *Ibid* at para. 40.

its assets, including key contracts and permits; and (c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, to a newly incorporated entity. The assets and liabilities that are vested in the separate entity or entities (referred to in the Approval and Reverse Vesting Order as "**Residual Cos.**") may then be addressed through a bankruptcy or similar process.[33]

44. An RVO can be contrasted with a traditional vesting order, as contemplated by section 36(4) of the CCAA, in which the assets of the debtor company that a purchaser acquires are transferred out of the debtor entity and vested in the purchaser free and clear of any encumbrances or claims, other than those expressly assumed by the purchaser.[34] All excluded assets and liabilities remain with the debtor company.

45. RVOs have been described as a relatively new structure to achieve the remedial objectives of the CCAA.[35] Courts have expressed the view that they should not be the "norm" and that the Monitor and the Court should consider carefully whether this approach is warranted.[36] However, RVOs have been recognized on a number of occasions as an appropriate way for a debtor to sell its business as a going-concern where the circumstances justify such a structure.[37]

46. Examples of recent RVOs approved by Courts include:

(a) *Blackrock Metals*: RVO granted in July 2022 by the Superior Court of Quebec in respect of a metals and materials manufacturing business[38];

(b) *Quest University*: RVO granted in December 2020 by the Supreme Court of British Columbia in respect of a private, not-for-profit, post-secondary institution[39];

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[33] *Just Energy Group Inc. et. Al. v Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354 at para. 27. [*Just Energy*]
[34] *Arrangement relatif à Black Rock Metals Inc.*, 2022 QCCS 2828 at para. 85, leave to appeal to QCCA denied, August 5, 2022. [*Blackrock Metals*]
[35] *Ibid*.
[36] *Ibid* at para. 99, citing *Harte Gold (Re)*, 2022 ONSC 653 at para. 38. [*Harte Gold*]
[37] To name a few examples, see *Blackrock Metals*, *supra*; *Harte Gold*, *supra*; *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488, leave to appeal to SCC denied [*Nemaska*]; *Quest University (Re)*, 2020 BCSC 1883, leave to appeal to BCCA refused [*Quest University*]; and *Just Energy*, *supra*.
[38] *Blackrock Metals*, *supra*.
[39] *Quest University*, *supra*.

(c) *Harte Gold*: RVO granted in February 2022 by the Superior Court of Justice (Ontario) (Commercial List) in respect of a gold producer operating a gold mine in northern Ontario[40]; and

(d) *Just Energy*: RVO granted in November 2022 by the Superior Court of Justice (Ontario) (Commercial List) in respect of a retail energy provider.[41]

47. As submitted further below, compelling circumstances justifying this relief exist here. Referring to the factors identified in *Harte Gold* as guideposts for this Court in considering a proposed RVO[42], the Approval and Reverse Vesting Order is necessary in this case to give effect to the sole available going-concern restructuring of the Applicants' business.

48. The jurisdiction to approve a transaction that is to be implemented through an RVO is found in section 11 of the CCAA, which gives the Court broad powers to make any order it thinks fit.[43] Section 11 of the CCAA states:

> "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."

49. Section 36 of the CCAA is also sometimes seen as providing jurisdiction for RVOs and/or providing guidance in respect of factors to be considered in assessing whether to exercise discretion to approve such a transaction, as further outlined below.[44]

(ii) The Subscription Agreement and the Transactions are Appropriate in the Circumstances

50. In *Harte Gold*, Justice Penny held that scrutiny of a proposed reverse vesting transaction may be informed by the following enquiries:

(a) why the reverse vesting order is necessary in this case;

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[40] *Harte Gold*, *supra*.
[41] *Just Energy*, *supra*.
[42] *Harte Gold*, *supra* at para. 38.
[43] *Blackrock Metals*, *supra* at para. 87; *Quest University*, *supra* at para. 27; *Harte Gold*, *supra* at paras. 36-37.
[44] *Just Energy*, *supra* at paras. 30-31.

(b) whether the reverse vesting transaction structure produces an economic result at least as favourable as any other viable alternative;

(c) whether any stakeholder is worse off under the reverse vesting transaction structure than they would have been under any other viable alternative; and

(d) whether the consideration being paid for the debtors' business reflects the importance and value of the licenses and permits (or other intangible assets) being preserved under the reverse vesting transaction structure.[45]

51. When exercising its jurisdiction under section 11 of the CCAA to approve a reverse vesting transaction, this Court has also concurrently considered the non-exhaustive factors enumerated under subsection 36(3) of the CCAA and those articulated in *Royal Bank v Soundair*. Together, these factors include:

(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 its opinion the sale or disposition would be more beneficial to creditors than a sale or disposition under a bankruptcy;

(d) the extent to which creditors were consulted;

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

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

(g) whether sufficient effort has been made to obtain the best price and that the debtors have not acted improvidently;

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[45] *Harte Gold, supra* at para. 38; *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841 at para. 52 [*CannaPiece*]; *Just Energy*, *supra* at para. 33.

(h) the efficacy and integrity of the process by which officers have been obtained;

(i) whether the interests of all parties have been considered; and

(j) whether there has been unfairness in the working out of the process.[46]

52. Applied here, the foregoing considerations and factors support the approval of the Subscription Agreement and the Transactions, and the granting of the Approval and Reverse Vesting Order.

(A) *Harte Gold Factors*

53. ***The proposed reverse vesting restructure is necessary in the circumstances***. Courts have held that RVOs are generally appropriate in at least three types of circumstances:

(a) where the debtor operates in a highly-regulated environment in which its existing permits, licences or other rights are difficult or impossible to assign to a purchaser;

(b) where the debtor is party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser; and

(c) where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.[47]

54. The Applicants operate in the pharmaceutical industry which is heavily regulated. In order for the Companies to carry on its business, they are required to maintain various licenses. The licenses and contracts currently held by the Companies which would require transfer or re-establishment and/or new arrangements to be entered into if an asset transfer was implement include but are not limited to:

(a) drug establishment license and import license in Canada;

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[46] *CCAA*, *supra* s. 36(3); *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (Ont. CA) at para. 16. See also, *Harte Gold*, *supra* at paras. 20-21; *CannaPiece*, *supra* at paras. 53-54; *Just Energy*, *supra* at paras. 31-32.

[47] *Blackrock Metals*, *supra* at paras. 114-116; *Harte Gold, supra* at para. 71; *Quest University*, *supra* at para. 136, referring to the RVO granted in *Re Comark Holdings Inc et al*, (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. SCJ [Commercial List]) proceeding to preserve tax attributes, and para. 142, referring to the RVO granted in *JMB Crushing Systems Inc. (Re)*, 2020 ABQB 763 to preserve both licenses and tax attributes.

(b) state business licenses in the US;

(c) contracts with the US government and payors;

(d) contracts with distributors in Canada, the US, and globally;

(e) intellectual property which would require re-recording and registration of the names and assignment on all patents worldwide; and

(f) marketing materials in the name of the Companies, originally approved by the US Food and Drug Administration and Pharmaceutical Advertising Advisory Board in Canada and other organizations, which may require resubmission and approval, and thereafter the cost of rebranding of materials.[48]

55. Accordingly, the Subscription Agreement was structured as a reverse vesting transaction for a variety of factors, including *inter alia*:

(a) the Companies maintain various licenses that are required to maintain its operations;

(b) the Companies have several in-progress trials and testing programs that are proceeding under and in the name of the Companies;

(c) the Companies hold various contracts with government entities; and

(d) the Companies have net operating losses in the approximate amount of $215 million.[49]

56. Under a traditional asset sale transaction structure, some of the Companies' licenses and contracts with government entities may be difficult to transfer to a purchaser and, to the extent that such transfer is possible, the steps required to proceed with such transfer will likely result in additional delays, costs and uncertainty.[50]

57. Additionally, the reverse vesting structure permits the maintenance of the Companies' tax attributes, which include net operating losses in the approximate amount of $215 million.

[48] Third Manzoor Affidavit, *supra* at para. 43.
[49] *Ibid* at paras. 44-46.
[50] *Ibid*.

FGC has advised the Monitor that the Companies' tax attributes is an important consideration in their decision to credit bid the entire amount of the Companies' secured debt.[51]

58. It was not available to structure the RVO in a different manner. The Monitor canvassed the possibility of structuring the transaction with FGC by way of a plan of arrangement. However, FGC was not willing to consider this structure to implement a transaction.[52]

59. ***The Subscription Agreement and the Transactions produce an economic result more favourable than any other alternative***. The Transactions contemplated in the Subscription Agreement represent the best and only viable outcome for the Applicants, its creditors, and other stakeholders in the circumstances.

60. The benefits of the Transactions include:

(a) based on the price payable under the Subscription Agreement, all of the Applicants' secured liabilities will be satisfied by way of the credit bid, which would not otherwise be satisfied by any other potential alternative;

(b) various unsecured and contingent liabilities will be assumed, in comparison to the other potential alternatives which provided for vesting of all liabilities; and

(c) sufficient liquidity to provide for post-filing obligations incurred in the CCAA Proceedings and to exit the CCAA Proceedings, in comparison to the other potential alternatives which do not provide for same.[53]

61. The SISP was well structured, and when combined with the Pre-Filing Strategic Process, it resulted in a broad canvassing of the market for potential purchasers of the Applicants' business. The SISP was administered by the Monitor, which has extensive experience in marketing businesses and assets, and included extensive consultation with the Applicants.[54]

62. Accordingly, the only other options to the Applicants were Unsuccessful Bid 1 and Unsuccessful Bid 2. Both of these Bids were not viable options as:

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[51] *Ibid* at para. 46.
[52] *Ibid* at para. 47.
[53] *Ibid* at para. 40.
[54] Third Report of the Monitor, *supra* at paras. 62-63.

(a) in respect of Unsuccessful Bid 1, it offered nominal consideration for a minor asset owned by the Applicants, with such consideration being insufficient to cover expected professional fees related to closing the Unsuccessful Bid 1;

(b) in respect of Unsuccessful Bid 2:

(i) the cash payment provided by Unsuccessful Bidder 2 was insufficient to repay the DIP Facility and amounts secured by charges in order to permit the Applicants to exit these CCAA Proceedings and the Applicants are unable to generate liquidity from the excluded assets;

(ii) the vast majority of the offer value was driven by future sales, which are subject to a high degree of uncertainty and risk;

(iii) the Bid was only for a single Product of the Applicants and did not provide for a going-concern solution related to the remaining business of the Applicants; and

(iv) the Bid does not assume any liabilities of the Applicants nor provide for the potential employment of any existing employees.[55]

63. ***The Subscription Agreement and the Transactions do not disadvantage any stakeholder***. The Applicants are not aware of any creditor that would be materially disadvantaged by the Subscription Agreement and the Transactions contemplated therein, including their implementation by way of a reverse vesting transaction.[56]

64. While the Applicants' unsecured creditors and shareholders will have no recovery in any available restructuring alternative, the proposed Transactions will, unlike in the case of such alternatives, assure a going concern result. This will result in:

(a) an opportunity for each of the pharmaceutical products previously held by the Applicants to be pursued and determine if they can be successfully brought to market at a future date;

[55] Third Manzoor Affidavit, *supra* at para. 31.
[56] *Ibid* at para. 48.

(b) potential for several of the Applicants' employees preserving their employment; and

(c) suppliers of goods and services having the opportunity to maintain their business relationship with the Applicants.[57]

65. ***The consideration payable for the Purchased Shares pursuant to the Subscription is fair, reasonable, and reflects the importance of the assets being preserved under the RVO structure***. The purchase price for the Purchased Shares, satisfied through credit bid and financing of post-filing obligations totals in excess of US$65 million. This purchase price is fair and reasonable, as confirmed by the results of the Pre-Filing Strategic Process, the Pre-Filing SISP, and the SISP. The consideration allows for the satisfaction of all the Applicants' secured liabilities and assumption of certain unsecured liabilities. Further, the consideration provides the Applicants with the ability to implement the Transactions and exit the CCAA Proceedings as a going-concern.[58]

66. As referenced above, the Applicants' licenses and contracts with government entities may be difficult to transfer. Further, the Applicants' tax attributes is also an important asset being preserved under the RVO structure, with FGC advising that such asset was an important consideration for it to credit bid all of the Applicants' secured debt.[59]

(B) Section 36 CCAA Factors

67. ***The process leading up to the Subscription Agreement and the Transactions was reasonable***. The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investments beginning from March 2022 and a robust sales process conducted by the Applicants and EY beginning from September 2022.[60]

68. Such efforts include:

(a) the Applicants seeking refinancing or investment options;

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[57] *Ibid* at para. 40.
[58] *Ibid*.
[59] *Ibid* at para. 46.
[60] *Ibid* at paras. 14-20.

(b) the Pre-Filing SISP which commenced in September 2022 and concluded in November 2022, with EY having canvassed its global network for Prospective Bidders;

(c) during the course of the CCAA the Monitor broadly canvassed the market under the SISP by having returned to 59 Known Potential Bidders and contacted 20 additional parties;

(d) the careful consideration of the Bids by the Special Committee, Applicants, Monitor, CRO, and its respective advisors and counsel of all available options; and

(e) negotiations between the Monitor, APC, and FGC in respect of the Subscription Agreement and the Transactions contemplated therein.[61]

69. The SISP was well structured, and when combined with the Pre-Filing Strategic Process, it resulted in a broad canvassing of the market for potential purchasers of the Applicants' business.[62]

70. ***The Monitor approved the process leading up to the Subscription Agreement and the Transactions***. The SISP was developed in consultation with and supported by the Monitor. Further, the Monitor administered the SISP in accordance with its terms and the SISP Order. The Subscription Agreement is the product of the Applicants and the Monitor's continued efforts to solicit interest in the Applicants' business and/or assets and is supported by the Monitor.[63]

71. ***The Third Report of the Monitor states that the Subscription Agreement and the Transactions would be more beneficial to creditors than a sale or disposition under a bankruptcy***. The Monitor has conducted an analysis of whether the completion of the Transactions contemplated by the Subscription Agreement would be more beneficial to the Applicants' creditors and other stakeholders as compared to a sale or disposition of the business and assets of the Applicants under a bankruptcy. The Monitor determined that:

(a) a potential bankruptcy could cause significant disruption in operations and delay the market launch of Noctiva, thus adversely impacting the business

[61] *Ibid* at paras. 18-20, 23-24, 30-31 and 47.
[62] Third Report of the Monitor, *supra* at para. 62.
[63] Second Manzoor Affidavit, *supra* at para. 27; Third Manzoor Affidavit, *supra* at paras. 21, 23 and 39.

value. The uncertainty surrounding the timeline for transferring the patents and license to the Purchaser during bankruptcy proceedings adds to the complexity. This, coupled with the bankruptcy procedure itself, could result in a substantial delay in closing the Transactions;

(b) the obtaining of the ARVO is a condition of closing the Subscription Agreement. The reverse vesting structure is unlikely to be available in a potential bankruptcy given the vesting of the assets in the trustee. Furthermore, even if FGC was willing to proceed based on an asset sale structure, instead of the ARVO, the Monitor believes it is unlikely that the recovery could be enhanced by pursuing a sale transaction in a bankruptcy;

(c) accordingly, it is the Monitor's view that a sale or disposition of the business and assets of the Applicants in a bankruptcy would most likely result in a lower recovery. In the Monitor's view, the market has been sufficiently canvassed and the FGC Bid is the only viable bid in the circumstances. It is unlikely that there is any material value to the assets of the Applicants in any transaction other than the FGC Bid.[64]

72. ***Stakeholders were consulted during the sale process***. The Companies consulted with its largest secured creditor, FGC, throughout the Pre-Filing Strategic Process. FGC and FGC in its capacity as the DIP Lender were given the opportunity to submit bids in respect of the Applicants' business and assets, which FGC did.[65]

73. ***The Subscription Agreement and the Transactions allows various stakeholders to maintain their rights***. As referenced above, the Applicants are not aware of any creditor that would be materially disadvantaged by the Subscription Agreement and the Transactions contemplated therein.

74. In addition, the Subscription Agreement maintains the rights that creditors would otherwise have in an asset sale transaction. In the case of parties with existing contracts with the Companies, though no assignment of contracts (consensual or through an assignment order) is contemplated as part of the Transactions, the Subscription Agreement provides for all contracts, other than the Excluded Contracts, to remain with the Companies. The contracting

[64] Third Report of the Monitor, *supra* at para. 66.
[65] Second Manzoor Affidavit, *supra* at para. 54; Third Manzoor Affidavit, *supra* at para. 26.

parties therefore have the opportunity to continue supplying goods and services to the Companies post-emergence from the CCAA Proceedings.[66]

75. While the Subscription Agreement does not require FGC to cure pre-filing arrears under the Retained Contracts, all contract counterparties have also been served with the Companies' motion record to provide them with notice that their contracts are either being retained or excluded as part of the Transactions.[67]

76. While the Excluded Assets and Excluded Liabilities will be vested out into Residual Cos, in this structure, the outcome would be the same as if the Transactions had been carried out using an asset purchase structure. There will be no inter-company transfer of assets and liabilities among the existing Applicants prior to closing. Therefore, the Transactions will not result in any material prejudice or impairment of any creditors' rights which would have been avoided in an asset purchase transaction.[68]

77. ***Sufficient effort has been made to obtain the best price and the Applicants have not acted improvidently***. As referenced above, the execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investments beginning from March 2022 and a robust sales process conducted by the Applicants and EY beginning from September 2022.

(iii) The Ancillary Features of the Approval and Reverse Vesting Order are Appropriate in the Circumstances

78. Consistent with RVOs previously granted by this Court[69], the proposed Approval and Reverse Vesting Order will terminate and cancel all options, securities and other rights held by any person that are convertible or exchangeable for any securities of APC (the "**Ancillary Relief**"). APC, previously publicly traded on the TSX, will be taken private as a result of the transaction.

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[66] Third Manzoor Affidavit, *supra* at para. 48.
[67] Third Report of the Monitor, *supra* at para. 70; Third Manzoor Affidavit, *supra* at para. 48.
[68] Third Report of the Monitor, *supra* at para. 71.
[69] *In the Matter of a Plan of Compromise or Arrangement of FIGR Brands, Inc., FIGR Norfolk Inc. and Canada's Island Garden Inc.* (June 10, 2021), Toronto, CV-21-00655373-00CL (Approval and Vesting Order) (ONSC); *In the Matter of a Plan of Compromise or Arrangement of Superette Inc. et al.* (December 20, 2022), Toronto, CV-22-00686245-00CL (Approval and Vesting Order) (ONSC) at paras 4, 5(g); *In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp.* (January 28, 2022), Toronto, CV-21-00673304-00CL (Approval and Reverse Vesting Order) (ONSC) at paras 6, 7(c); *In the Matter of a Plan of Compromise or Arrangement of Just Energy Group Inc. et al.* (November 3, 2022), Toronto, CV-21-00658423-00CL (Approval and Vesting Order) (ONSC) at paras 4, 5(e).

79. The purchaser, FGC, currently holds approximately 89% of the issued and outstanding shares of APC. The other shareholders have been notified of the CCAA Proceedings and proposed transaction by way of various press releases and notices issued by the Applicants and/or the Monitor.

80. Read together, subsection 36(1) and section 11 of the CCAA authorize this Court to grant the Ancillary Relief. Subsection 36(1) of the CCAA expressly authorizes this Court to approve sale transactions notwithstanding "any requirement for shareholder approval" – the logic of which has been extended to reverse vesting transactions and the cancellation of equity interests – while section 11 of the CCAA permits this Court to make "any order that it considers appropriate in the circumstances."[70]

81. As this Court recognized in *Harte Gold* and affirmed in *Just* Energy, where shareholders "have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders".[71]

82. In this case, the Applicants submit that it is appropriate for this Court to exercise its discretion to approve the Ancillary Relief. To do otherwise would be contrary to the treatment of equity claims under subsections 6(8) and 22(1) of the CCAA.[72]

83. APC was incorporated under the OBCA. Pursuant to section 186(1) of the OBCA, “reorganization” means a court order made under the *Bankruptcy and Insolvency Act* or an order made under the CCAA approving a proposal. While the term “proposal” is unfortunate (because there are no formal “proposals” under the CCAA), Justice Penny in *Harte Gold* viewed the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as a proposed transaction brought forward for the approval of the Court under the provisions of the CCAA.[73]

84. Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any

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[70] *CCAA*, *supra* s. 11 and 36(1); *Harte Gold*, *supra* at paras. 59-64; *Just Energy*, *supra* at para. 58.
[71] *Harte Gold*, *supra* at para. 64; *Just Energy*, *supra* at para. 58.
[72] *CCAA*, *supra* s. 6(8) and 22(1); *Harte Gold*, *supra* at paras. 63-64.
[73] *Harte Gold*, *supra* at para. 61; OBCA, s. 186(1).

rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the Court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.[74]

B. The Releases in the Approval and Reverse Vesting Order Should be Granted

(i) This Court has Jurisdiction to Approve the Releases Outside of a CCAA Plan of Compromise or Arrangement

85. The proposed Order includes Releases in favour of (a) the present and former directors, officers, employees, legal counsel and advisors of the Applicants; (b) the CRO; (c) the Monitor and its legal counsel; (d) FGC, in its capacities as secured lender to the Applicants and majority shareholder of APC, and its current and former directors, officers, employees, legal counsel and advisors; and (e) FGC and its current and former directors, officers, employees, legal counsel, and advisors.[75]

86. The Releases cover any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the Transactions or the Applicants, its asset, business or affairs or administration of the Applicants, except any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA, in connection with the Subscription Agreement or the closing documents, or any individuals named as defendants in the litigation with Jones Day.[76] For avoidance of doubt, the Releases will not release APL or the individuals named as defendants in the Jones Day litigation from liability in respect of that action.

87. Releases for directors, the Monitor and other advisors to debtor companies are a common feature of CCAA plans. The absence of a CCAA plan, however, does not deprive the court of the jurisdiction to approve releases for these parties. Section 5.1(1) of the CCAA, for example, which deals with releases relating to directors, is drafted permissively. It does not limit the jurisdiction of the Court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.[77]

88. CCAA courts have, on multiple occasions, approved releases in the absence of a CCAA plan, both on consent and in contested matters, including the case of RVOs. These releases

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[74] *Harte Gold*, *supra* at para. 62; OBCA, s. 168 and 186(2).
[75] Third Manzoor Affidavit, *supra* at para. 52.
[76] *Ibid* para. 53.
[77] *CCAA*, *supra* s. 5.1(1); *Green Relief Inc. (Re)*, 2020 ONSC 6837 at paras. 23 and 25. [*Green Relief*]

have been in favour of, among other parties, directors, officers, monitors, counsel, employees, shareholders and advisors.[78]

89. In *Harte Gold*, Justice Penny, as part of an approval and vesting order in respect of a reverse vesting transaction, granted a release in favour of (a) the current and former directors and officers of the debtor company and the new companies to be incorporated pursuant to the RVO, the monitor, and the purchaser and its directors and officers.[79]

90. Justice Penny, citing Morawetz C.J.'s decision in *Lydian*, evaluated the requested release with reference to the following non-exhaustive factors:

(a) Whether the claims to be released are rationally connected to the purpose of the plan;

(b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.[80]

91. Justice Penny noted that, as in most discretionary exercises, it is not necessary for each of the above factors to apply in order for a release to be granted.[81]

92. The Release sought by the Applicants are consistent with those that have previously been approved by this Court and as will be described below, are aligned with the factors set out in *Lydian*.

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[78] *Green Relief*, *supra* at para. 76; *Nelson Education Limited (Re)*, 2015 ONSC 5557 at para. 49; *Golf Town Canada Holdings Inc. (Re)* (March 29, 2018), Toronto, CV-16-11527-00CL (CCAA Termination Order) (ONSC); *Green Growth Brands Inc. et al. (Re)*, (May 19, 2021), Toronto, Court File No. CV-20-00641220-00CL (Order Terminating CCAA Proceedings) (ONSC).
[79] *Harte Gold*, *supra* at para. 80.
[80] *Harte Gold*, *supra* at paras. 80-86; *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. [*Lydian*]. See also *Green Relief, supra*, where Justice Koehnen also cited Morawetz C.J.'s decision in *Lydian*.
[81] *Harte Gold*, *supra* at para. 80.

(ii) The Release Should be Granted in the Circumstances

93. The Releases are reasonable and appropriate in the circumstances and should be granted for the following reasons:

(a) ***The claims to be released are rationally connected to the purpose of the restructuring***. The claims released are rationally connected to the Applicants' restructuring. The Release will have the effect of diminishing claims against the Released Parties, which in turn will diminish indemnification claims by the Released Parties against the Administration Charge and the Directors' Charge. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Applicants' restructuring.

(b) ***The releasees contributed to the restructuring***. The Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of the Applicants were instrumental to the conduct of the Pre-Filing Strategic Process, the Pre-Filing SISP, the SISP and the continued operations of the Applicants during the CCAA Proceedings. With a proposed sale that, if approved by this Court and completed, will maintain the Applicants as a going concern, these CCAA Proceedings have had a successful outcome for the benefit of the Applicants' stakeholders. The Released Parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of the Release.[82]

(c) ***The Release is fair, reasonable and not overly broad***. The Release is fair and reasonable. The Applicants, for example, are unaware of any statutory liabilities in respect of the Released Parties (particularly, the directors and officers of the Applicants) and to date, no stakeholder of the Applicants have made the Applicants or the Monitor aware that they intend to assert a claim against any of the Released Parties in respect of any claims covered by the Release.

[82] Third Manzoor Affidavit, *supra* at paras. 14-37 and 55.

Further, the Release is sufficiently narrow in circumstances as the Release carves out and preserve claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct.

The scope of the Release is sufficiently balanced to allow the Applicants and the Released Parties to move forward with the Subscription Agreement and the Transactions and work to conclude these CCAA Proceedings.[83]

(d) ***The Applicants' restructuring may be jeopardized without the Release***. The Release will bring certainty and finality for the Released Parties. Additionally, the Applicants, the Monitor, and FGC all believe that the Release is also an essential component to the Transactions.[84]

(e) ***The Release benefits the Applicants as well as the creditors generally***. The Release benefits the Applicants' creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the Applicants, thus minimizing further claims against the Applicants.

(f) ***Creditors had knowledge of the nature and effect of the Release***. All creditors on the Service List were served with materials relating to this motion. The Applicants also took additional efforts to serve all parties with excluded claims under the Transactions. To date, no creditor has objected to the Release. A specific claims process for claims against the Released Parties in these circumstances would only result in additional costs and delay without any corresponding benefit.

C. Confidential Appendix "E" to the Third Report of the Monitor Should be Sealed

94. 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."[85]

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

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[83] *Ibid* at paras. 53 and 55-56
[84] *Ibid* at para. 57.
[85] *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.

(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.[86]

96. 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. [87]

97. 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.[88] In particular, Morawetz C.J. recently granted a sealing order in *Bridging Finance* respect of bids and a receiver's summary of the economic terms of such bids, because they contained confidential information.[89]

98. The Applicants respectfully request that this Court seals Confidential Appendix "E" to the Third Report of the Monitor, which contains a summary of the economic terms of the Bids received. This document contains commercially sensitive information that, if disclosed, could be detrimental to the Applicants' ability to maximize value for its assets at a future date.

99. The salutary effects of the sealing order, which provides the Applicants with the ability to maximize value for its assets at a future date, far outweighs the deleterious effects of the public not knowing the exact details of the Bids received. The Applicants and the Monitor have both publicly disclosed certain key terms of the Bids which provides sufficient information for the public to understand why the FGC Bid was selected as the Successful Bid.

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[86] *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*]
[87] *Sierra Club*, *supra* at para. 55; *Sherman Estate*, *supra* at paras. 41-43.
[88] *Re Danier Leather Inc.*, 2016 ONSC 1044 at para. 82; *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 at paras. 23-28.
[89] *Ontario Securities Commission v Bridging Finance Inc.*, 2022 ONSC 1857 at paras. 50-54. [*Bridging Finance*]

D. The Stay Extension Should be Granted

100. The current Stay Period expires on May 30, 2023. Pursuant to s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.[90]

101. The Subscription Agreement contemplates an Outside Date for Closing of June 30, 2023. Additional time is required to complete the Transactions contemplated under the Subscription Agreement and an extension of the Stay Period is necessary to provide the stability required during that time.[91]

102. No creditors are expected to suffer material prejudice as a result of the extension of the Stay Period to June 30, 2023. The Applicants are acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Updated Cash Flow Forecast at Appendix B to the Third Report of the Monitor, the Applicants are expected to maintain liquidity to fund operations up to July 2, 2023.

E. Monitor's Support for Relief Sought

103. The Monitor supports the relief being sought by the Applicants in its entirety.

104. With respect to the structure, conduct, and outcome of the SISP, the Monitor notes that the SISP was well structured, and when combined with the Pre-Filing Strategic Process, it resulted in a broad canvassing of the market for potential purchasers of the Applicants' business.[92]

105. The Monitor further notes that the Subscription Agreement arose from a fair, transparent, and robust SISP, which represents the only viable option arising out of the SISP.[93]

106. With respect to the Subscription Agreement and the Transactions contemplated therein, the Monitor believes same benefits numerous stakeholders by facilitating a transaction that

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[90] CCAA, *supra* s. 11.02(2) and (3).
[91] Third Manzoor Affidavit, *supra* at para. 65.
[92] Third Report of the Monitor, *supra* at para. 62.
[93] *Ibid* at para. 64.

allows the Applicants to continue operating as a going concern and is superior to a bankruptcy.[94]

107. With respect to the RVO structure, the Monitor notes, among other things:

(a) the reverse vesting structure facilitates a more efficient and swift completion of the Transactions, without exposure to the risks, costs or delays of attempting to seek the transfer of the patents, licences and regulatory approvals, which is critically important to preserve the value of the Applicants' business and assets; and

(b) the reverse vesting structure represents the only viable option to implement the Transactions for the benefit of the Applicants' stakeholders.[95]

PART V – ORDER SOUGHT

108. For the reasons set out above, the Applicants respectfully submit that the Court should grant the Approval and Reverse Vesting Order in the form attached to the Applicants' Motion Record.

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

/s Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP

[94] *Ibid* at para. 66.
[95] *Ibid* at paras. 69 and 74.

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Just Energy Group Inc. et. Al. v Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354
2. *Arrangement relatif à Black Rock Metals Inc.*, 2022 QCCS 2828
3. *Harte Gold (Re)*, 2022 ONSC 653
4. *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488
5. *Quest University (Re)*, 2020 BCSC 1883
6. *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841
7. *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (Ont. CA)
8. *Green Relief Inc. (Re)*, 2020 ONSC 6837
9. *Nelson Education Limited (Re)*, 2015 ONSC 5557
10. *Lydian International Limited (Re)*, 2020 ONSC 4006
11. *Target Canada Corp, Re*, 2015 ONSC 1487
12. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
13. *Sherman Estate v. Donovan*, 2021 SCC 25
14. *Re Danier Leather Inc.*, 2016 ONSC 1044
15. *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347
16. *Ontario Securities Commission v Bridging Finance Inc.*, 2022 ONSC 1857

SCHEDULE "B"
RELEVANT LEGISLATION

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

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Payment — equity claims

6 (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

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.

Burden of proof on application

11.02 (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.

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

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.

***Business Corporations Act*, R.S.O. 1990, c. B.16**

Amendments

168 (1) Subject to sections 170 and 171, a corporation may from time to time amend its articles to add, change or remove any provision that is permitted by this Act to be, or that is, set out in its articles, including without limiting the generality of the foregoing, to,

(a) change its name;

(b) Repealed: 1994, c. 27, s. 71 (20).

(c) add, change or remove any restriction upon the business or businesses that the corporation may carry on or upon the powers that the corporation may exercise;

(d) add, change or remove any maximum number of shares that the corporation is authorized to issue or any maximum consideration for which any shares of the corporation are authorized to be issued;

(e) create new classes of shares;

(f) Repealed: 1994, c. 27, s. 71 (20).

(g) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;

(h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;

(i) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(j) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(k) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;

(l) revoke, diminish or enlarge any authority conferred under clauses (j) and (k);

(m) subject to sections 120 and 125, increase or decrease the number, or minimum or maximum number, of directors; and

(n) add, change or remove restrictions on the issue, transfer or ownership of shares of any class or series. R.S.O. 1990, c. B.16, s. 168 (1); 1994, c. 27, s. 71 (20).

Idem

(2) Where the directors are authorized by the articles to divide any class of unissued shares into series and determine the designation, rights, privileges, restrictions and conditions thereof, they may authorize the amendment of the articles to so provide. R.S.O. 1990, c. B.16, s. 168 (2).

Revocation of resolution

(3) The directors of a corporation may, if so authorized by a special resolution effecting an amendment under this section, revoke the resolution without further approval of the shareholders at any time prior to the endorsement by the Director of a certificate of amendment of articles in respect of such amendment. R.S.O. 1990, c. B.16, s. 168 (3).

Change of number name

(4) Despite subsection (1), where a corporation has a number name, the directors may amend its articles to change that name to a name that is not a number name. R.S.O. 1990, c. B.16, s. 168 (4).

Authorization

(5) An amendment under subsection (1) shall be authorized by a special resolution and an amendment under subsection (2) or (4) may be authorized by a resolution of the directors. R.S.O. 1990, c. B.16, s. 168 (5).

Special Act corporations excepted

(6) This section does not apply to a corporation incorporated by special Act, except that a corporation incorporated by special Act, including a corporation to which *The Railways Act*, being chapter 331 of the Revised Statutes of Ontario, 1950, applies, may under this section amend its articles to change its name. R.S.O. 1990, c. B.16, s. 168 (6).

Reorganization

186 (1) In this section,

"reorganization" means a court order made under section 248, an order made under the *Bankruptcy and Insolvency Act* (Canada) or an order made under the *Companies Creditors Arrangement Act* (Canada) approving a proposal. 2000, c. 26, Sched. B, s. 3 (9).

Articles amended

(2) If a corporation is subject to a reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 168. R.S.O. 1990, c. B.16, s. 186 (2).

***Courts of Justice Act*, R.S.O. 1990, c C.43**

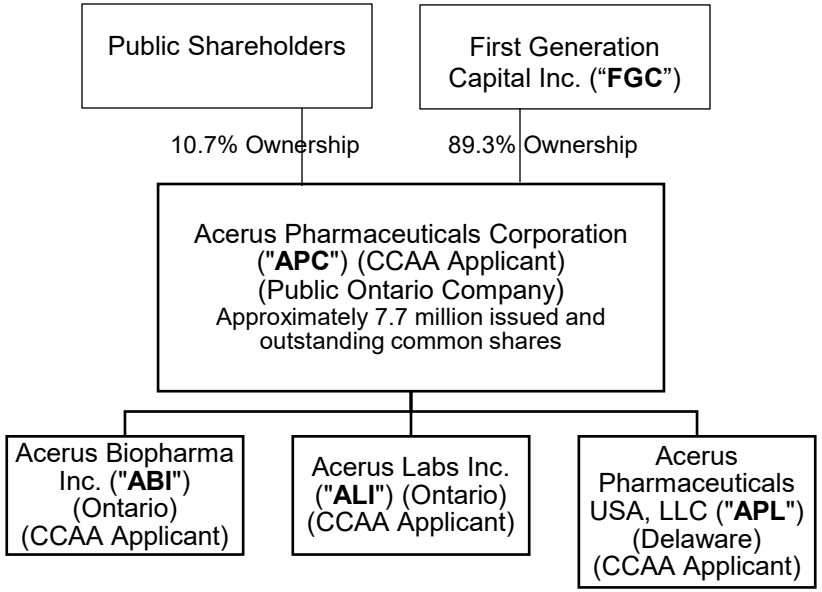
Sealing documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

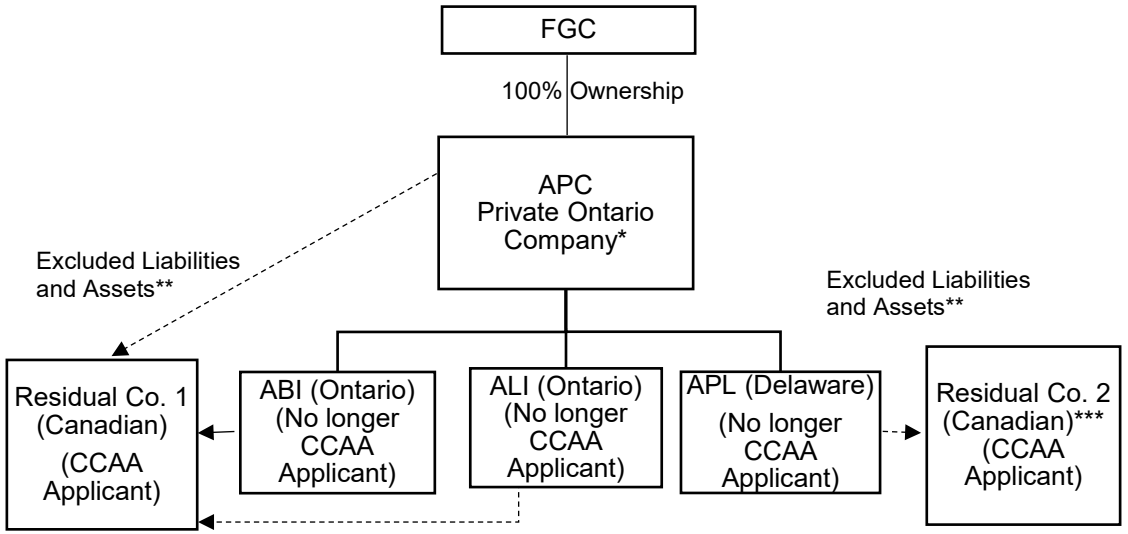
SCHEDULE “C”

PRE AND POST CORPORATE STRUCTURE OF THE APPLICANTS

PRE-RVO STRUCTURE



POST-RVO STRUCTURE



NOTES

*All equity interests of APC outstanding shall be cancelled, with APC issuing 1,000,000,000,000,000 common shares to FGC, resulting in APC becoming a private company that is wholly owned by FGC.

Retained Liabilities include: (a) all Post-Filing Claims; (b) all liabilities arising from and after Closing; (c) tax liabilities; (d) Intercompany Claims; (e) indemnification obligations to D&Os; and (f) Jones Day litigation with respect to APL.

Retained Assets include all assets which are not Excluded Assets

**Excluded Assets include: (a) tax records relating to Excluded Liabilities; (b) Administrative Expense Amount; (c) Excluded Contracts; (d) Excluded Leases; (e) communications related to the transaction; and (f) rights which accrue to Residual Cos.

Excluded Liabilities include all debts, obligations, and liabilities which are not expressly retained or specifically contemplated as a Retained Liability.

***The excluded US assets and liabilities will be vested out to Residual Co. 2, which is a Canadian corporation

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

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

FACTUM OF THE APPLICANTS
(APPROVAL AND REVERSE VESTING ORDER AND EXTENSION OF STAY OF PROCEEDINGS)

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