

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

RESPONDING MOTION RECORD
(returnable on May 30, 2023)

Dated: May 26, 2023

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

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INDEX

Tab	Document	Page
1.	Affidavit of Rebekah Blake sworn May 25, 2023	4-14

TAB 1

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AFFIDAVIT

I, Rebekah Blake, of the City of New York, in the State of New York, in the United States
of America, MAKE OATH AND SAY:

1. I am Partner at the creditor, Jones Day, and, as such, have knowledge of and belief in the matters contained in this affidavit. The facts stated in this affidavit are within my personal knowledge or determined from the face of the documents referred to herein and I believe such information to be true. Where I do not have direct knowledge of the matters set out below, I have stated the source of my knowledge, which I believe to be true.
2. This affidavit is sworn in response to the Applicants' motion for an extension of the Stay Period (as defined in the Amended and Restated Initial Order dated February 3, 2023) and the Approval and Reverse Vesting Order, returnable May 30, 2023. The primary purpose of this affidavit is to address certain omissions and provide additional facts relating to the

Jones Day Action (as defined below) contained in the materials filed by in this proceeding to date.

3. Jones Day takes no position on the relief sought on the Applicants' motion based on the materials served on the Service List as of the date of this affidavit.

Unpaid Accounts Due to Jones Day

4. Jones Day is a law firm that conducts business as a partnership in approximately 40 offices around the world, including in the State of New York, in the United States of America. It was retained, pursuant to an engagement letter dated July 6, 2017, as litigation counsel by Serenity Pharmaceuticals, LLC ("**Serenity**") in relation to two complex intellectual property proceedings in the US (the "**Serenity Litigation**").
5. Throughout its representation of Serenity, Jones Day sent Serenity invoices for the firm's services. With some exceptions, Jones Day's invoices were paid in full through the fall of 2018.
6. Between November 2017 – November 2019, Serenity failed to pay many of Jones Day's invoices for the legal services it rendered to Serenity, and for disbursements relating to Serenity's lawsuits that Jones Day paid on Serenity's behalf.
7. Those fees and costs, which total US\$5,298,178.60, plus interest, remain unpaid.
8. In March 2022, Acerus Pharmaceuticals Corporation ("**Acerus Parent**") acquired Serenity. Since in or around late August 2022, Serenity has conducted business as Acerus Pharmaceuticals USA, LLC ("**Acerus US**"), which is also an Applicant in this *Companies'*

Creditors Arrangement Act (“**CCAA**”) proceeding. Jones Day is a significant creditor of the Applicants.

The Jones Day Action

9. In December 2019, Jones Day commenced a litigation proceeding in the Supreme Court of the State of New York, in the County of New York (the “**NYSC**”), against Serenity (now Acerus US), Samuel Herschkowitz and Alain Kodsi (the “**Jones Day Action**”). As described below, Acerus Parent was later added as a party to the proceeding. A copy of Jones Day’s pleading, the Supplemental Summons and Second Amended Complaint, in the Jones Day Action may be found as document number 209 on the New York State Unified Court System portal for the Jones Day Action (the “**Jones Day Portal**”), which can be reviewed at the following link:

<https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=tBXoxEo4JDTFdDedK5I2dg==&display=all>.

10. Mr. Herschkowitz is a director of Acerus Parent. Mr. Kodsi is currently not a director or officer of either Acerus Parent or Acerus US.

Allegations Against Messrs. Herschkowitz and Kodsi

11. In addition to its claims against the Applicants, the allegations in the Jones Day Action against Messrs. Herschkowitz and Kodsi include that:
- (a) they were shareholders, and the principals, of Serenity. Mr. Kodsi served as Serenity’s President and Director, and Mr. Herschkowitz served as its Chief Executive Officer and Chairman. Mr. Herschkowitz remains a shareholder and a director of Acerus US;

- (b) Mr. Herschkowitz directed Jones Day's legal work in the Serenity Litigation and instructed Jones Day not to "discuss trial costs [with] anyone other than me... since I'm the only check writer." Mr. Herschkowitz directed Jones Day to send its invoices to him at his residences, and to send Mr. Kodsi and him emails at their personal email addresses, rather than to those individuals at their Serenity email addresses;
- (c) Messrs. Herschkowitz and Kodsi commingled their funds with Serenity's funds. On numerous occasions Mr. Herschkowitz offered to pay portions of Jones Day's accounts from his own funds, including by mortgaging his private home and/or securing personal loans;
- (d) they made intentional misrepresentations to Jones Day that induced it to continue to provide legal services to Serenity. Serenity repeatedly represented that, while it did not currently have the funds to pay Jones Day, it had every intention of paying the amounts owed. Such representations were made to cause, and did cause, Jones Day to continue to represent Serenity and continue to accrue unpaid legal fees;
- (e) all the while they were making such misrepresentations, Messrs. Herschkowitz and Kodsi were siphoning funds from Serenity to their personal accounts that could have been used to pay Jones Day. This conduct rendered Serenity insolvent and unable to pay the Jones Day accounts;
- (f) Serenity received over US\$100 million from its commercial partners, including an eight-figure payment in 2018. Messrs. Herschkowitz and Kodsi directed Serenity to disburse over 90% of that 2018 payment to its shareholders, including

themselves, instead of satisfying their obligations to creditors such as Jones Day.

These payments were fraudulent conveyances;

- (g) after Jones Day commenced the Jones Day Action, Messrs. Herschkowitz and Kodsi continued to transfer funds from Serenity to themselves. Upon information and belief, on or about September 1, 2021, Herschkowitz caused Serenity to transfer \$500,000 to his personal accounts and on or about September 1, 2021, Kodsi caused Serenity to transfer \$250,000 to his personal accounts; and
- (h) Messrs. Herschkowitz and Kodsi directed and controlled Serenity's operations. They took for themselves the money that Serenity owed and still owes to Jones Day, they and should be personally liable for Serenity's debt to Jones Day.

Certain Counterclaims Against Jones Day are Dismissed

- 12. In response to the Jones Day Action, Serenity (now Acerus US) counterclaimed for breach of contract, fraud and malpractice. Jones Day successfully brought a motion, resulting in the NYSC dismissing the fraud and malpractice claims. A copy of the order dismissing such claims may be found as document number 117 on the Jones Day Portal.
- 13. Serenity's breach of contract claim is that Jones Day agreed to limit its fees in a complex, multi-year patent litigation to US\$100,000, notwithstanding the terms of the Jones Day engagement letter which provide that unless specifically agreed to by Jones Day, Serenity would pay Jones Day's usual and customary fees, subject to a 10% discount, plus out-of-pocket costs and disbursements.

14. A copy of Serenity's pleading, the Amended Counterclaims, Answer To Second Amended Complaint, Affirmative Defenses, And Jury Demand Of Defendant Serenity Pharmaceuticals, LLC, may be found as document number 305 on the Jones Day Portal.

Herschkowitz and Kodsí's Unsuccessful Pleadings Motion

15. Messrs. Herschkowitz and Kodsí deny the claims against them. A copy of their Answer to Second Amended Complaint may be found as document number 303 on the Jones Day Portal.
16. In September 2020, Messrs. Herschkowitz and Kodsí brought a pleadings motion to dismiss the fraudulent conveyance and piercing the corporate veil claims against them. The NYSC dismissed that motion (see document number 117 on the Jones Day Portal).

Herschkowitz, Kodsí and Acerus US Fail to Comply with Court-ordered Discovery Obligations

17. Pursuant to an order dated July 6, 2022, a copy of which may be found as document number 168 on the Jones Day Portal, the defendants in the Jones Day Action were required to produce significant additional discovery, including a number of categories of documents and missing responses to Jones Day's interrogatories, much of which is critical to Jones Day's claims for fraudulent conveyance and piercing the corporate veil.
18. On November 11, 2022, the Court issued an order requiring the defendants to comply with the July 6, 2022, discovery order by December 6, 2022.
19. Certain parts of the July 6, 2022, order were overturned on appeal. However, as at the date of this affidavit, the defendants in the Jones Day Action, including Acerus Parent and Acerus US, have not complied with the majority of the remaining portions of the July 6, 2022, order that remain in force.

Herschkowitz and Kodsi's Unsuccessful Summary Judgment Motion

20. In August 2022, Messrs. Herschkowitz and Kodsi brought a motion for summary judgment on the claims against them. One of the effects of bringing this motion was to stay the discovery obligations imposed on the defendants in the Jones Day Action.
21. Pursuant to an order dated November 23, 2022, the NYSC dismissed Messrs. Herschkowitz and Kodsi's motion, stating that Jones Day "argued compellingly that there remain factual issues as to whether [Messrs. Herschkowitz and Kodsi] exercised complete control over Serenity's board that cannot be resolved until the defendants comply with their court-ordered discovery obligations". A copy of this order may be found as document number 298 on the Jones Day Portal.
22. Messrs. Herschkowitz and Kodsi filed a notice stating that they will appeal the dismissal of their summary judgment motion. To date, however, they have not perfected their appeal or filed an appellate brief.

Jones Day Successfully Adds Acerus Parent as a Party to the Jones Day Action

23. In September 2022, Jones Day successfully brought a motion to add Acerus Parent as a defendant to the Jones Day Action and amend its pleading (First Amended Complaint) in the Jones Day Action. That amended complaint is the Supplemental Summons and Second Amended Complaint (document number 209 on the Jones Day Portal). A copy of the order adding Acerus Parent as a party may be found as document number 294 on the Jones Day Portal.
24. In January 2023, shortly before commencing this proceeding, Serenity (now Acerus US) counterclaimed in the Jones Day Action (document number 305 on the Jones Day Portal).

Serenity makes nearly identical allegations of malpractice and fraud that it previously made, and which the NYSC has previously dismissed in Jones Day's favour. Before Jones Day could deny, or bring a motion to dismiss those allegations, the Applicants commenced this proceeding and obtained a recognition order pursuant to Chapter 15 of the United States Bankruptcy Code (the "**Recognition Order**"), which had the effect of staying the Jones Day Action. A copy of the Recognition Order is attached as Exhibit "C" to the Affidavit of Naveed Manzoor, sworn May 18, 2023 (the "**RVO Affidavit**").

The Initial Affidavit

25. The Applicants relied on the affidavit of Naveed Manzoor, sworn January 25, 2023 (the "**Initial Affidavit**"), in support of its application for relief pursuant to the CCAA and its request for a stay of proceedings in favour of the Applicants and its directors and officers. The Initial Affidavit was based on information provided by the Applicants to the deponent and includes an incomplete and inaccurate description of the Jones Day Action. A copy of the Initial Affidavit is found at Exhibit "A" to the RVO Affidavit.

26. The Initial Affidavit:

- (a) omits that the NYSC dismissed the fraud and malpractice claims made against Jones Day in May 2021 (the same type of allegations that were repeated in materials filed by Acerus US a few days prior to the commencement of this CCAA proceeding);
- (b) omits that the NYSC dismissed the motions brought by Acerus US's senior management (ie Messrs. Herschkowitz and Kodsi) to dismiss the claims against them;

- (c) inaccurately states that Messrs. Herschkowitz and Kodsi's motion for summary judgment was still pending, when in fact it was dismissed more than two months before the Initial Affidavit was sworn. There is no reference to Messrs. Herschkowitz and Kodsi having had to appeal from their failed motion, or that the appeal has not meaningfully progressed; and
- (d) incorrectly states that Jones Day's motion to amend its complaint was still pending when the Initial Affidavit was sworn, even though the NYSC granted that motion in full more than two months earlier.

The Applicants Obtained the Initial Order and Recognition Order

- 27. The Applicants relied on the Initial Affidavit in support of their requests for all of the orders made to date in this proceeding. A copy of the Amended and Restated Initial Order is attached as Exhibit "B" to the RVO Affidavit.
- 28. After obtaining the initial order made in this proceeding, the Applicants sought and obtained the Recognition Order.
- 29. I am advised by Alexander Soutter, a lawyer with Thornton Grout Finnigan LLP ("TGF"), Jones Day's lawyers in this matter, that TGF has asked counsel to the Applicants and the court-appointed monitor in this matter for certain information relating to the transaction contemplated on the Applicants' motion so that Jones Day can better understand any impact of the proposed transaction on the Jones Day Action and any future prospects for recovery on any judgment that may be obtained. TGF remains in discussion with counsel to the Applicants and the court-appointed monitor in this matter.

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30. This Affidavit is filed in order to provide the Canadian Court, and, if the Order sought by the Applicants is granted, the United States Bankruptcy Court in respect of which recognition will be sought, with a more complete factual context to the Jones Day Action.

SWORN by Rebekah Blake of the City of New York, in the State of New York, in the United States of America, before me at the City of Toronto, in the Province of Ontario, on May 25, 2023, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

ALEXANDER SOUTTER
Barrister & Solicitor



REBEKAH BLAKE

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