

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

Acerus Pharmaceuticals Corporation, *et al.*,

Debtors in a foreign proceeding.¹

Chapter 15

Case No. 23-10111 (TMH)

(Jointly Administered)

Re: D.I. 66

**DECLARATION OF ELIZABETH PILLON IN
SUPPORT OF FOREIGN REPRESENTATIVE’S MOTION FOR
ENTRY OF AN ORDER (I) RECOGNIZING AND ENFORCING THE CCAA
VESTING ORDER, (II) APPROVING THE SALE OF SUBSTANTIALLY
ALL OF THE DEBTORS’ INTERESTS FREE AND CLEAR OF LIENS,
CLAIMS, AND ENCUMBRANCES, AND (III) GRANTING RELATED RELIEF**

I, Elizabeth Pillon, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury under the laws of the United States, as follows:

1. I am a Partner of the Canadian law firm of Stikeman Elliot LLP, 5300 Commerce Court West 199 Bay Street, Toronto Ontario M5L 1B9, Canada. I am counsel to Acerus Pharmaceuticals Corporation, Acerus Biopharma Inc., Acerus Labs Inc., and Acerus Pharmaceuticals USA, LLC (the “**Debtors**”), whose reorganization proceedings pursuant to the Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (“**CCAA**”) are currently pending (the “**Canadian Proceedings**”). If I were called upon to testify, I could and would testify competently to the statements set forth herein.

2. I attended the University of Western Ontario where I graduated with a LLB and was admitted to the Ontario Bar in 1994. I have extensive experience in the field of Canadian corporate reorganization and insolvency law, advising creditors and debtors in work-out,

¹ The Debtors in the chapter 15 proceedings, together with the last four digits of their business identification numbers are: Acerus Pharmaceuticals Corporation (6891); Acerus Biopharma Inc. (0687); Acerus Labs Inc (0126); and Acerus Pharmaceuticals USA, LLC (9089). The location of the Debtors’ headquarters and the Debtors’ foreign representative is: 205-7025 Langer Drive, Mississauga, Ontario, Canada.

receivership, bankruptcy, and CCAA proceedings in both Canadian and international contexts. Over the years, I have been involved in numerous cross-border insolvency matters, including Golftown, Nortel and Rockport Shoes. I respectfully submit this declaration in support of the *Foreign Representative’s Motion for Entry of an Order (I) Recognizing and Enforcing the CCAA Vesting Order, (II) Approving the Sale of Substantially All of the Debtors’ Interests Free and Clear of Liens, and Claims, and Encumbrances, and (III) Granting Related Relief* (the “**Motion**”).²

The CCAA Vesting Motion and Order

3. On May 18, 2023, the Debtors served a motion in the Canadian Proceedings (the “**CCAA Vesting Motion**”) seeking entry of an order which, among other things approves the sale of the Debtors to First Generation Capital (“**FGC**”) pursuant to the Transaction Agreement (the “**CCAA Vesting Order**”). The CCAA Vesting Motion also sought an extension of the Stay of Proceedings.

4. The Debtors served all parties entitled to receive notice under the CCAA via their provided email addresses as listed on the service list maintained and updated by the Monitor (the “**Service List**”) with the CCAA Vesting Motion and supporting materials on May 18, 2023. The Debtors also made best efforts to serve all other creditors and stakeholders on May 24, 2023 with the CCAA Vesting Motion and supporting materials. The Monitor also served all parties on the Service List with materials in further support of the CCAA Vesting Motion on the 25th and 26th of May, including the Monitor’s Third Report and the Debtor’s Factum in support of the CCAA Vesting Motion.

5. The Canadian Proceedings provide creditors with notice and an opportunity to retain counsel, to appear, to raise objections, and to appeal. All creditors of the Debtors, including

² Capitalized terms used but not defined herein shall have the meaning given to them in the Motion.

creditors located in the United States, are afforded the same protection as, and are subject to the same procedures and requirements in the Canadian Proceedings. Further, all parties in interest were provided an opportunity to be heard with respect to, and object to, the relief granted under the CCAA Vesting Order at a hearing regarding entry of such order on May 30, 2023 (the “**May 30th Hearing**”). There were no objections submitted to the Canadian Court in connection with the CCAA Vesting Motion. At the May 30th Hearing, the U.S. Department of Justice, Jones Day³ and two additional creditors appeared before Canadian Court and expressed limited, individual issues with respect to the Debtors.

6. The U.S. Department of Justice sought clarification regarding the transferability of contracts or agreements with the United States and its agencies. Jones Day’s submission, expressly stating it was not objecting to the CCAA Vesting Order, reaffirmed its position with respect to the Jones Day Litigation and the carve-out provided for its claims against APL and certain individual defendants named in the proceedings, as set out in the CCAA Vesting Order. Dr. Troels Keldmann for Keldmann Healthcare A/S appeared and expressed concerns regarding the application of a non-compete provision contained in an agreement with the Debtors. Brian Gilderman for Precision Clinical Research, Inc. appeared and expressed concern regarding the payment for services rendered to the Debtors.

7. Each of the issues or concerns raised were resolved to the satisfaction of the Canadian Court at or prior to the May 30th Hearing. The concern raised by the U.S. Department of Justice was resolved with clarifying language in the CCAA Vesting Order. *See* CCAA Vesting Order ¶ 15. Jones Day’s concerns were addressed in the Transaction Agreement and CCAA

³ As set forth in greater detail within the Manzoor Recognition Declaration, Jones Day commenced an action in the New York State Supreme Court against APL and certain members of its senior management for alleged unpaid legal bills. *See* Manzoor Recognition Declaration ¶¶ 39-41. That action remains pending.

Vesting Order prior to the hearing before the Canadian Court through, among other things, an insert to the Court's endorsement.⁴ At the hearing, the Debtors represented they did not intend to enforce the non-compete provision and agreed to disclaim the agreement referenced by Dr. Troels Keldmann. With respect to Precision Clinical Research, Inc., the Debtors represented to the Canadian Court that any claim submitted by Precision Clinical Research, Inc. (and all other claimants) will be addressed through the Canadian Proceedings and in accordance with applicable Canadian Law.

8. On May 31, 2023, the Canadian Court entered the CCAA Vesting Order.

Reverse Vesting Orders Under the CCAA

9. Recent CCAA proceedings typically involve either a (i) restructuring plan, (ii) going concern asset sale of the business or (iii) going concern transaction through reverse vesting order ("RVO").⁵ The first generally allows a debtor to emerge as a "new and improved" restructured company while retaining possession of its assets, agreements, employees, permits, licenses and tax attributes. This process is similar to a traditional reorganization in a chapter 11 case under the U.S. Bankruptcy Code. The second, a going concern sale of the business, is akin to a section 363 sale process under the U.S. Bankruptcy Code. The debtor implements a sale as a going concern through a SISP, which is typically structured as an asset purchase agreement. The third, RVOs, are also implemented through a SISP and are typically utilized where the debtor company has assets that cannot easily be transferred to a purchaser as part of a traditional sale process (*e.g.*, licenses, regulatory permits and tax attributes).

⁴ See *Endorsement* at ¶ 29, of the Canadian Court, date May 30, 2023, attached hereto as **Exhibit 1**.

⁵ Canadian courts have expressed the view that RVOs should not be the "norm" and that monitors and Canadian courts should consider carefully whether this approach is warranted. 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 when, as here, the circumstances justify such a structure. See *infra*. ¶ 12.

10. An RVO generally involves a series of steps, whereby: (1) the purchaser becomes the sole shareholder of the debtor company; (2) the debtor company retains its assets, including key contracts and permits; and (3) the assets and liabilities not retained by the debtor company are “vested out” and transferred, together with any excluded assets, into a newly incorporated entity. Those liabilities that the purchaser does not assume are transferred to the new residual corporation, as well as any assets that the purchaser elects to leave behind. These, along with the residual corporation, may be liquidated using a CCAA plan or wound up through a similar process under Canadian law. The debtor company, now holding only those assumed assets and liabilities desired by the purchaser, may exit the insolvency proceeding on a going-concern basis.

11. The statutory basis for RVOs is found under sections 11 and 36 of the CCAA. Section 11 of the CCAA gives the Canadian Court the power to issue any order that is considers appropriate, while section 36 of the CCAA allows for the sale or disposition of assets outside of the ordinary course of business if specified criteria are met, and if notice has been given “to the secured creditors who are likely to be affected by the proposed sale or disposition.” CCAA, s. 36(3). The Canadian court may consider, among other thing, the following factors in approving an RVO under the CCAA: (i) whether the process leading to the proposed sale or disposition was reasonable under the circumstances; (ii) whether the monitor approved the process leading to the proposed sale or disposition; (iii) 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; (iv) the extent to which the creditors were consulted; (v) the effects of the proposed sale or disposition on the creditors and other interested parties; and (vi) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. *See* 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (CanLII).

12. A number of RVO transactions have been approved by Canadian courts, including *Plasco Energy*, 2015 ONSC 10869; *Stornoway Diamond Corp.*, Montreal, 500-11-057094-191 (Quebec SCJ [Commercial Div.]) (Oct. 7, 2019); *Wayland Group Corp.*, Toronto, CV-19-00632079-00CL (Ont. SCJ [Commercial List]) (Apr. 21, 2020); *Re Comark Holdings Inc.*, Toronto CV-20-00642013-00CL (Ont. SCJ [Commercial List]) (July 13, 2020); *Beleave Inc.*, CITE; *Arrangement relative a Menaska Lithium inc.*, 2020 QCCA 1488; *JMB Crushing Systems, Inc. (Re)*, 2020 ABQB 763; *Cirque due Soleil Canada Inc*, Montreal, 500-11-058415-205 (Quebec SCJ [Commercial Div.]) (Oct. 26, 2020); *Green Relief Inc. (Re)*, 2020 ONSC 6837; *Quest University (Re)*, 2020 BCSC 1883; *JMX Contracting Inc.*, Toronto, CV-20-00648528-00CL (Ont. SCJ [Commercial List]) (Feb. 2, 2021); *Salt Bush Energy Ltd.*, Calgary, 2101-06512 (CQB Alberta) (May 21, 2021); *Harte Gold (Re)*, 2022 ONSC 653; *Arrangement relative a Black Rock Metals Inc.*, 2022 WCCS 2828; *Port Capital Development (EV) Inc.*, Vancouver, S-205095 (SCBC) (Sept. 16, 2022). One of these, *Just Energy Group Inc., et. al. v. Morgan Stanley Capital Group Inc., et. al.*, 2022 ONSC 6354, was recognized by a U.S. Bankruptcy Court under chapter 15 of the Bankruptcy Code. *See In re Just Energy Group Inc., et. al.*, No. 21-30823 (MI) (Bankr. S.D. Tex., Dec. 1, 2022), Docket No. 232.⁶

[Remainder of page intentionally left blank.]

⁶ Copies of these decisions and/or orders, which are voluminous in nature, are not attached hereto, but will be provided to the Court and can be obtained from counsel to the Foreign Representative upon reasonable request.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Dated: June 5, 2023

/s/ Elizabeth Pillon

Elizabeth Pillon
Partner
Stikeman Elliot LLP

Exhibit 1

Endorsement

CITATION: Acerus Pharmaceuticals Corporation (Re), 2023 ONSC 3314
COURT FILE NO.: CV-23-00693595-00CL
DATE: 2023-06-02

SUPERIOR COURT OF JUSTICE – ONTARIO (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

BEFORE: Penny J.

COUNSEL: *Elizabeth Pillon, Lee Nicholson and Philip Yang* for the Applicants

Stuart Brotman and Mitch Stephenson for the Monitor

Mervyn D. Abramowitz for the United States of America

Alex MacFarlane and Xiaodi Jin for First Generation Capital Inc.

D.J. Miller and Alexander Soutter for Jones Day

Kristina Bezprozvannykh for The Canada Life Assurance Company

Troels Keldmann as principal of Keldmann Healthcare and Keldmann Innovation

Brian Gilderman as principal of Precision Clinical Research, Inc.

HEARD: May 30, 2023

ENDORSEMENT

Overview

- [1] On May 30, 2023 I granted a sale approval and reverse vesting order, extended the stay and granted other ancillary relief, with reasons to follow. These are my reasons. The capitalized terms used in these reasons reflect the meanings attributed to those terms in the relevant documents submitted to the court on this motion.

Background

- [2] APC is an Ontario 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. There is a cross border component to these proceedings.

- [3] Each of the subsidiaries (ABI, ALI, and APL) are wholly owned by APC. The applicants comprise one corporate group which is operated and controlled by the management of APC at its head office in Mississauga, Ontario.
- [4] The applicants are in a specialized pharmaceutical business, focused on the commercialization and development of prescription men's health products. Their primary products are (a) Natesto, which is currently the sole source of revenue; and (b) Noctiva, which is currently not in distribution. There are also a number of secondary products.
- [5] The procedural history is uncontroversial. It is well laid out in the supporting material, the Monitor's Third Report and the applicants' factum. I will not repeat any of that here, other than to note that the proposed transactions are the result of both a pre-filing strategic process and SISP, initialed by the applicants and overseen by E&Y, and a subsequent court approved SISP, also overseen by E&Y, which had been appointed Monitor by the initial order in these proceedings.
- [6] The proposed 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 First Generation Capital (FGC). FGC is the majority shareholder of APC. It is also the first in priority secured creditor of the applicants and the court approved DIP Lender. It is owed over \$60 million in secured debt.
- [7] The proposed transaction structure 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. The transactions contemplated in the Subscription Agreement have been structured as a "reverse vesting" (or RVO) transaction. The transactions provide for a share transaction under which:
- (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.

Issues

- [8] The issues to be determined on this motion are whether this Court should:
- (a) approve the Subscription Agreement and proposed transactions in the form of an Approval and Reverse Vesting Order;
 - (b) grant the requested releases in favour of the applicants' directors, officers, employees 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 over the bid comparison chart in the Monitor's Third Report; and
- (e) extend the stay period.

Analysis

Jurisdiction and Factors

- [9] Section 11 of the CCAA confers jurisdiction on the court in the broadest of terms: “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”.
- [10] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. While this motion is not for approval of a traditional asset sale, the s. 36(3) factors have been applied in an ARVO context. The 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 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.
- [11] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:
 - (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
 - (b) the interests of all parties;
 - (c) the efficacy and integrity of the process by which offers have been obtained; and

- (d) whether there has been unfairness in the working out of the process: see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.

[12] Use of the ARVO structure is an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an ARVO structure must be preceded by close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of the ARVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must address questions such as:

- (a) Why is the ARVO necessary in this case?
- (b) Does the ARVO structure produce an economic result at least as favourable as any other viable alternative?
- (c) Is any stakeholder worse off under the ARVO structure than they would have been under any other viable alternative? and
- (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the ARVO structure?

The ARVO Structure is Necessary

[13] The applicants operate in the pharmaceutical industry which is heavily regulated. In order for the applicants to carry on business, therefore, they are required to maintain various licenses. These licences are essential to the viability of the business. The insolvent circumstances of the applicants rules out a simple share purchase. In a traditional asset transaction, the purchaser would have to apply to transfer existing licences or apply for new ones. The purchaser in this case is not prepared to take the risk or invest the time and money to go through that process which is, by its very nature uncertain at best. There is no other comparable or viable transaction on offer.

[14] The Subscription Agreement was structured as an ARVO transaction which is necessary to provide the following benefits:

- (a) the applicants will maintain the multiple licenses that are required to maintain operations;
- (b) the applicants have several in-progress trials and testing programs that are proceeding under and in the name of the applicants;
- (c) the applicants hold various contracts with government entities; and

(d) the applicants have net operating losses in the approximate amount of \$215 million.

[15] The evidence is that it was not possible to structure the transaction 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 that approach.

More Favourable Economic Result

[16] 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, including advances under the DIP Facility, totals over \$65 million), 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 do not; and
- (c) sufficient liquidity to provide for post-filing obligations incurred to date and those necessary to exit the CCAA proceedings, in comparison to the other potential alternatives which do not provide comparable funding.

[17] The only other bid options available to the applicants were what is referred to in the material as Unsuccessful Bid 1 and Unsuccessful Bid 2. Neither of the unsuccessful bids was a better or even viable option because:

Unsuccessful Bid 1 offered nominal consideration for a minor asset owned by the applicants, where the consideration being offered was insufficient to cover even the expected professional fees related to closing that bid; and,

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 the 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.

The Transactions Do Not Disadvantage Any Stakeholder Relative to Any Other Viable Transaction

- [18] Under the proposed transactions, the applicants, some of the unsecured creditors and all of the existing shareholders will have no recovery. However, the evidence makes it clear that these stakeholders would not realize any recovery in any other available restructuring alternative either (i.e., under either of the unsuccessful bids or in a bankruptcy/liquidation).
- [19] The proposed transactions, by contrast, 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;
 - (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 on an ongoing basis in the future.

Is the Consideration Fair and Reasonable?

- [20] The consideration payable for the purchased shares under the Subscription Agreement is fair, reasonable, and reflects the importance of the assets being preserved under the RVO structure. The purchase price for the purchased shares will be satisfied through FGC's credit bid and the financing of post-filing obligations, which, as noted, together total in excess of \$65 million. The fairness and reasonableness of the consideration is confirmed by the results of the pre-filing strategic process, the pre-filing SISP, and the court approved SISP (discussed in more detail below). The consideration allows for the satisfaction of all the applicants' secured liabilities and assumption of some unsecured liabilities. Further, the consideration provides the applicants with the ability to implement the transactions and exit the CCAA proceedings as a going-concern.
- [21] As noted earlier, the applicants' licenses and contracts with government entities may be difficult to transfer. Further, the applicants' tax attributes are also an important asset being preserved under the ARVO structure. The evidence is that the tax attributes were an important consideration for FGC in making its credit bid for all of the applicants' secured debt.
- [22] The market (and the evidence) has shown that there is no other bidder out there who is willing to pay more for these assets.

Section 36 CCAA Factors

The Process Leading Up to the Subscription Agreement and the Transactions

- [23] 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 E&Y beginning from September 2022. These efforts include:

- (a) the applicants seeking refinancing or investment options;
- (b) the pre-filing SISP which commenced in September 2022 and concluded in November 2022, with E&Y 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 approaching known potential bidders from prior processes and contacting 20 additional parties;
- (d) the careful consideration of all the bids by the Special Committee, the applicants, the Monitor, the CRO, and their 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 proposed transactions.

[24] The SISP appears to have been well structured and, when combined with the pre-filing strategic processes, resulted in a broad canvassing of the market for potential purchasers of the applicants' business.

The Monitor Approved the Process Leading up to the Subscription Agreement and the Transactions

[25] E&Y assisted with the pre-filing strategic initiative and the pre-filing SISP. The court approved SISP was developed in consultation with and supported by E&Y as Monitor. Further, the Monitor administered the SISP in accordance with its terms and the SISP order of this court. 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. It is the best alternative available.

More Beneficial to Creditors Than a Sale or Disposition Under a Bankruptcy

[26] The Monitor has conducted an analysis of whether the completion of the proposed 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 value of the business. The uncertainty surrounding the timeline for transferring the patents and license to a purchaser during bankruptcy proceedings adds to the uncertainty and complexity. This, coupled with the bankruptcy procedure itself, could result in a substantial delay in closing any transaction;

- (b) the RVO structure 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 RVO, 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.

Stakeholders Were Consulted During the Sale Process

- [27] The applicants consulted with their largest secured creditor, FGC, throughout the pre-filing strategic process. FGC, and FGC in its capacity as the DIP Lender, was given the opportunity to submit a bid in respect of the applicants' business and assets, which FGC did. This was through a court approved process on notice to all stakeholders. In addition, notice of this motion was given to a broad spectrum of the applicants' stakeholders as well.
- [28] In this context, I will address three specific situations which arose before and/or during the hearing of the motion.
- [29] Jones Day has an existing action against APL in the U.S. for outstanding professional fees owed by an APL predecessor. One of the issues in that litigation potentially involved a challenge to the priority of FGC's security. The applicants, FGC and Jones Day were able to negotiate a specific carve-out of the Jones Day claim from the proposed releases and agreed that the following language would be approved by the court in this endorsement:

For greater certainty, in providing the releases as outlined in paragraph 31 of the proposed Approval and Reverse Vesting Order, such relief shall not be used or raised by APL or any individual defendants in the course of the Jones Day Litigation, to limit or adversely affect the Jones Day Litigation as against APL or any individuals that have been named as defendants.

This language is so approved.

- [30] Dr. Troels Keldmann attended the hearing. He is a principal of Keldmann Healthcare and Keldmann Innovation which sold certain product rights to a predecessor of APL in 2009. Part of the payment to Keldmann Innovation A/S was to be in the form of royalties under the Amended Product Development Agreement between Trimel Biopharma SRL, Keldmann Healthcare A/S and Keldmann Innovation A/S dated December 30, 2009. This agreement, however, is one of the Excluded Contracts being transferred to a ResidualCo under the terms of the Subscription Agreement. Dr. Keldmann was concerned that, although the Keldmann counterparties would lose the right to any future payments, should the product sold to APL be successfully developed at some future point, they would remain subject to a non-compete provision embedded in that agreement. The applicants

immediately made it clear that they had no intention of relying on enforcement rights under this excluded contract and proposed that they would issue a formal disclaimer of rights under that contract. This appeared to satisfactorily address Dr. Keldmann's concern.

- [31] Mr. Brian Gilderman also attended the hearing. Mr. Gilderman is a principal of Precision Clinical Research, Inc., which is conducting clinical trials on an APL product. Mr. Gilderman expressed concern about a potential mis-match between his obligation to continue to perform contractual services under the court's CCAA order while being at risk of not being paid for those services. This situation was complicated by the existence of "hold back" provisions in the service agreement. There was insufficient evidence before the court to address this issue properly. The applicants and the Monitor undertook to pursue the matter with Mr. Gilderman. If a satisfactory understanding cannot be reached, the parties may return to court for further direction.

The Subscription Agreement and the Proposed Transactions Allow Various Stakeholders to Maintain their Rights

- [32] As noted earlier, the analysis of the applicants and the Monitor is that none of the applicants' creditors will be materially disadvantaged by the Subscription Agreement and the proposed transactions relative to any other viable alternative. In addition, the Subscription Agreement maintains many of the rights that creditors would otherwise have in an asset sale transaction. In the case of parties with existing contracts with the applicants, though no assignment of contracts (consensual or through an assignment order) is contemplated as part of the proposed transactions, the Subscription Agreement provides for all contracts, other than the Excluded Contracts, to remain with the applicants. The contracting parties, therefore, have the opportunity to continue supplying goods and services to the applicants post-CCAA proceedings if they choose to do so. 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 applicants' motion record to provide them with notice that their contracts are either being retained or excluded as part of the proposed transactions.
- [33] While the Excluded Contracts, Assets and Liabilities will be vested out into Residual Cos in this structure, this outcome is no different from the result that would obtain if the proposed transactions had been carried out using a typical asset purchase structure. Nor will there be any inter-company transfer of assets and liabilities among the existing applicants prior to closing. Therefore, the proposed transactions will not result in any material prejudice or impairment of any creditors' rights which might have been avoided in an asset purchase transaction.

Sufficient Effort has been Made to Obtain the Best Price and the Applicants have not Acted Improvidently

- [34] The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investment or sale opportunities beginning in March 2022 and a robust sales process conducted by the applicants and E&Y from September 2022, both privately and under a court approved SISP post-filing. There is no evidence, or suggestion,

that the process was less than fair and robust. Nor is there any prospect that a “better deal” was somehow available but not pursued.

The Share Transactions

- [35] Consistent with ARVOs previously granted by this court, the proposed order in this case will terminate and cancel all options, securities and other rights held by any person that are convertible or exchangeable for any securities of APC. APC, previously publicly traded on the TSX, will be taken private as a result of the proposed transaction. 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 the proposed transactions by way of various press releases and notices issued by the applicants and/or the Monitor.
- [36] The jurisdictional and legal basis for these orders has been canvassed extensively in prior decisions of this court so I will not repeat that analysis here: *Harte Gold (Re)*, 2022 ONSC 653; *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354. In essence, equity claims must be subordinate to the claims of creditors. In no possible scenario, on the record before me, would there be any recovery for the shareholders of APC. The OBCA provides the relevant authority to order the restructuring of the shares and the articles as contemplated in the proposed Approval and Reverse Vesting Order.

The Releases

- [37] The Release covers 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 assets, business or affairs or administration of the applicants, except any claim that is not permitted to be released under s. 5.1(2) of the CCAA. For avoidance of doubt, as noted above, the Releases will not release APL or the individuals named as defendants in the Jones Day litigation from liability in respect of that action.
- [38] A non-exhaustive list of relevant factors to consider in determining court approval of proposed releases was laid out by Chief Justice Morawetz in *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54.
- [39] Considering those factors, I conclude the Release is reasonable and appropriate in the circumstances and that they should be granted for the following reasons:
- (a) 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 Released Parties made significant contributions to the applicants’ restructuring, both prior to and throughout the 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 SISF,

the court-approved SISP and the continued operations of the applicants during the CCAA proceedings. The proposed transactions will maintain the applicants as a going concern; in this sense at least, the CCAA proceedings have had a successful outcome for the benefit of at least some of the applicants' stakeholders. This is an outcome which is, as discussed above, better than any other reasonably available alternative. The Released Parties have contributed time, energy and resources to achieve this outcome; they are deserving of the Release.

- (c) 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. 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, 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 the CCAA proceedings.
- (d) The Release will bring certainty and finality for the Released Parties. Additionally, the applicants, the Monitor, and FGC all believe that the Release is an essential component to the transactions.
- (e) 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 made additional efforts to serve all parties with excluded claims under the transactions. To date, no creditor has objected to the Release. At this point, and in these circumstances, requiring a specific claims process for claims against the Released Parties would only result in additional costs and delay without any apparent corresponding benefit.

Sealing Order

- [40] The applicants seek a limited sealing order regarding the results of the bids under the SISP. Preservation of the confidentiality of bid information is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate*. It is in the public interest that the ability of the applicants and the Monitor to maximize value be preserved until the transactions contemplated by the Subscription Agreement have closed. The request for a sealing order of the bid information is granted.

Extension of the Stay

- [41] The applicants need further time to close the proposed transactions and implement the remaining steps to bring these proceedings to their conclusion. 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. The stay is extended to June 30, 2023.

Monitor Support

- [42] I will say, in summary fashion to the extent not specifically mentioned in connection with the issues addressed above, that the Monitor has deep familiarity and experience with the applicants and their circumstances, dating back to March 2022. The Monitor has worked closely with the stakeholders, the CRO and other players. The Monitor, appointed by the court and answerable to the court, fully supports all the relief being sought by the applicants and has explained the basis for its support in detail in its Third Report.

Conclusion

- [43] For the forgoing reasons, the motion is granted. The Subscription Agreement and proposed transactions, including the ARVO, are approved. The sealing order regarding the bid summary is granted. The stay of proceedings is extended to June 30, 2023.



Penny J.

Date: June 2, 2023