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 15177561 CANADA INC. and 15177570 CANADA INC.

Applicants

FACTUM OF THE APPLICANTS
(TERMINATION OF CCAA PROCEEDINGS)

July 21, 2023

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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. APC is a pharmaceutical company who, directly and through its subsidiaries ABI, ALI, and APL, holds intellectual property rights over pharmaceutical products, and various methods of treatment and manufacturing, and carries on a business researching, trialling, and bringing said products to market for distribution. Facing a severe liquidity crisis, the Acerus Entities sought protection under the CCAA pursuant to the Initial Order issued January 26, 2023.

3. Prior to commencing these CCAA Proceedings, the Acerus Entities, with the assistance of EY, conducted an extensive strategic review process which included a pre-filing sales and investment solicitation process (the "**Pre-Filing SISP**"). On March 9, 2023 the Acerus Entities sought and obtained the SISP Order, which was an extension of the Pre-Filing SISP.

4. On May 30, 2023, following the conclusion of the SISP, this Court granted the Approval and Reverse Vesting Order which, *inter alia*, approved the Subscription Agreement and the Transaction contemplated thereby.

5. The Transaction closed on July 10, 2023. The Transaction was structured as a "reverse vesting" transaction pursuant to which FGC became the sole shareholder of APC, and all Excluded Assets, Excluded Contracts, Excluded Leases, and Excluded Liabilities were vested out to the Residual Cos. (now the Applicants).

6. Accordingly, the Applicants now seek the CCAA Termination Order which, *inter alia*:

(a) provides for the termination of these CCAA Proceedings and the discharge of the Monitor and the CRO upon the CCAA Termination Time;

(b) confirms that the Release under the Approval and Reverse Vesting Order applies to the CRO and Naveed Z. Manzoor which may be incurred as a result of acting as a director or officer of Residual Cos;

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[1] Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the affidavit of Naveed Z. Manzoor sworn July 19, 2023 (the "**Manzoor Affidavit**").

(c) approves the activities and reports of the Monitor as set out in the Fourth and Fifth Reports, and the fees and disbursements of the Monitor and its counsel, including the estimate of fees to be incurred through the completion of these CCAA Proceedings;

(d) terminates the Charges upon the CCAA Termination Time;

(e) enhances the Monitor's powers as they relate to Residual Cos.; and

(f) authorizes the Applicants or the Monitor on behalf of the Applicants to file an assignment in bankruptcy and EY to act as the Trustee.

7. For the reasons set forth herein, the Applicants respectfully submit that the relief requested is fair, reasonable, and appropriate for the Court to grant.

PART II – SUMMARY OF THE FACTS

8. The facts underlying this motion are more fully set out in the various affidavits filed by the Acerus Entities in these CCAA Proceedings.

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, before the US Bankruptcy Court in Delaware;

(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 granted the corresponding DIP Lender's Charge;

(e) approved the KERP in favour of the key employees and granted the corresponding KERP Charge; and

(f) granted the Administration Charge and the Directors' Charge.[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.[4]

12. Following the completion of the SISP, the Acerus Entities with the assistance of the Monitor identified the successful bid and transaction. On May 30, 2023, the Acerus Entities sought and obtained the Approval and Reverse Vesting Order which, *inter alia*, approved the Subscription Agreement dated as of May 15, 2023 between APC and FGC and the Transaction contemplated thereby.[5]

13. On June 13, 2023, the US Bankruptcy Court entered an order recognizing and enforcing the Approval and Reverse Vesting Order (the "**RVO Recognition Order**") without a hearing.[6]

14. The Transaction closed on July 10, 2023. Upon delivery of the Monitor's Certificate and closing of the Transaction:

(a) first, (i) with respect to APC, ABI, and ALI (collectively, the "**Canadian Entities**"), all of their right, title and interest in and to their respective Excluded Assets vested absolutely and exclusively in Residual Co. 1, and (ii) with respect to APL (the US entity), all of APL's right, title and interest in and to the Excluded Assets vested absolutely and exclusively in Residual Co. 2, and in each case, all applicable Claims and Encumbrances continued to attach to the Excluded Assets and to the Purchase Price;

(b) second, all Excluded Contracts, Excluded Leases and Excluded Liabilities were channeled to, assumed by and vested absolutely and exclusively in

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[2] Manzoor Affidavit at paras. 6 and 8.
[3] *Ibid* at para. 9.
[4] *Ibid* at para. 10.
[5] *Ibid* at para. 12.
[6] *Ibid* at para. 123.

Residual Co. 1, as to those which relate to the Canadian Entities, and Residual Co. 2, as to those that related to APL; and

(c) the Acerus Entities were deemed to cease being Applicants in these CCAA Proceedings and were deemed to be released from the purview of the Initial Order and all other Orders of this Court granted in respect of these CCAA Proceedings, save and except for the Approval and Reverse Vesting Order. In their place, the Residual Cos. continued as the CCAA Applicants.

15. The Stay of Proceedings provided for in the Initial Order has been subsequently extended until and including July 31, 2023.[7]

B. Termination of the CCAA Proceedings and Discharge of the Monitor and CRO

16. The proposed CCAA Termination Order provides that the CCAA Proceedings will be terminated, and EY discharged as Monitor, and the CRO shall be released upon the filing of the Monitor's Termination Certificate certifying that all matters described in the Fifth Report (and outlined in detail immediately below) to be attended to in connection with the CCAA Proceedings have been completed.[8]

17. Prior to the CCAA Termination Time, the Applicants and/or the Monitor are required to take various steps such as:

(a) terminating the Chapter 15 Proceedings in the near term;

(b) addressing an amount regarding unpaid wages alleged by a former employee of the Acerus Entities;

(c) providing necessary cooperation with FGC to address matters arising from the Transaction, including communication with vendors;

(d) collaborating with FGC to address outstanding tax matters that need to be completed before terminating the CCAA Proceedings;

(e) process disbursements held by the Monitor;

[7] *Ibid* at para. 11.
[8] *Ibid* at para. 19.

(f) coordinating with FGC to manage record retention and issue employment records to terminated employees;

(g) distributing the administrative expense amount in the amount of $1,073,000 and US$150,000 received by the Monitor from the Acerus Entities (the "**Administrative Reserve**") to pay:

(i) the reasonable and documented fees and costs of the Monitor and its professional advisors and professional advisors of the Acerus Entities and the Applicants relating to these CCAA Proceedings;

(ii) costs required to bankrupt and administer Residual Cos.;

(iii) the success fee owing to the CRO pursuant to its engagement letter;

(iv) certain of the Charges granted in these CCAA Proceedings, specifically the KERP Charge; and

(h) bankrupting and administering Residual Cos (collectively, the "**Remaining CCAA Tasks**").[9]

18. At the CCAA Termination Time, the court ordered Charges will also be released.[10]

C. Discharging the CRO and Releases in Favour of the CRO and Naveed Z. Manzoor

19. The Approval and Reverse Vesting Order provided releases in favour of various parties including the CRO. After the granting of the Approval and Reverse Vesting Order, the CRO agreed to act as initial director of the Residual Cos. for the purposes of finalizing the Transaction, when other alternative directors were not available. To address this additional role and restricted time period, the proposed CCAA Termination Order provides confirmation that the previously court-ordered release applies to claims which may exist as a result of acting as a director of Residual Cos. Specifically, the CCAA Termination Order provides that "Released Claims" as defined in the Approval and Reverse Vesting Order shall include all present and

[9] Manzoor Affidavit, *supra* at para. 36.
[10] *Ibid* at paras. 21-22.

future liabilities or claims of any nature or kind against the CRO or Naveed Z. Manzoor which may be incurred as a result of acting as a director or officer of Residual Cos (the "**Releases**").[11]

D. Authority to Assign the Applicants into Bankruptcy and Monitor's Expanded Powers

20. Given that the Transaction did not provide sufficient proceeds to satisfy Residual Cos.' indebtedness to their creditors, the proposed CCAA Termination Order envisions a bankruptcy for the Residual Cos. / Applicants and authorizes the Applicants or the Monitor to file an assignment in bankruptcy and EY to act as the Trustee.[12]

21. There are currently no directors of Residual Cos. The Residual Cos. will not be immediately assigned into bankruptcy as the Monitor is completing the Remaining CCAA Tasks. As such, the Residual Cos. may have no directors and officers for several weeks before they are assigned into bankruptcy.[13]

22. The proposed CCAA Termination Order enhances the Monitor's powers such that that it may exercise any powers which may be properly exercised by any board of directors of Residual Cos., which will allow it to address any issues that may arise prior to the CCAA Termination Time and allow it to facilitate the Applicants' assignment in bankruptcy as needed.[14]

E. Approval of the Monitor's Fees and Activities

23. In the Approval and Reverse Vesting Order, the Monitor's activities as outlined in the First Report dated February 2, 2023, the Second Report dated March 7, 2023, and the Third Report dated May 25, 2023 were approved.[15] The Monitor seeks approval of its activities as outlined in the Fourth and Fifth Report.

24. The proposed CCAA Termination Order provides for the approval of the fees and disbursements of the Monitor incurred during the period January 3, 2023 through to and including June 30, 2023 and approval of the fees and disbursements of the Monitor's counsel,

[11] *Ibid* at para. 25.
[12] *Ibid* at para. 28.
[13] *Ibid* at para. 29.
[14] *Ibid* at para. 31.
[15] Manzoor Affidavit, *supra* at para. 33.

Fasken Martineau DuMoulin LLP ("**Fasken**") incurred during the period January 17, 2023 through to and including July 7, 2023.[16]

25. In support of this motion, the Monitor delivered its Fifth Report, which attaches affidavits from representatives of the Monitor and its counsel that provide a comprehensive listing of the accounts sought to be passed, including each account (redacted for matters of privilege) and summary tables identifying the individual professionals who have worked on this matter, their hourly billing rates and total number of hours worked, among other information.[17]

26. The accounts of the Monitor and its counsel up to and including July 7, 2023 total approximately $973,557.48, inclusive of applicable taxes.[18]

27. The Monitor and the Monitor's counsel expect to incur additional fees related to the Remaining CCAA Tasks, prior to the CCAA Termination Date. The Applicants are requesting approval to pay these amounts without further order of the Court.

28. Any fees and disbursements related to the subsequent bankruptcy proceedings have been provided for and will be paid from the Administrative Expense Amount, supplemented by the retainer funds currently held by the Monitor and its counsel.[19]

29. Pursuant to the Subscription Agreement, any unused portion of the Administrative Expense Amount will ultimately be returned to APC.[20]

F. Extending the Stay Period

30. As noted above, the Monitor will be completing the CCAA Remaining Tasks, While these activities will be completed as soon as possible, they may not be able to completed prior to July 31, 2023.[21] To avoid the cost of a future stay extension, the Applicants seek a stay extension through to the CCAA Termination Date.[22]

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[16] Fifth Report of the Monitor dated July 20, 2023 (the "**Fifth Report**") at paras. 34-35.
[17] Affidavit of Allen (Liang) Yao sworn July 18, 2023, Appendix "E" to Fifth Report ("**Yao Affidavit**"); Affidavit of Dylan Chochla sworn July 18, 2023, Appendix "F" to Fifth Report ("**Chochla Affidavit**").
[18] Fifth Report at paras. 34-35.
[19] *Ibid* at para. 38.
[20] *Ibid* at para. 39.
[21] *Ibid* at para. 37.
[22] *Ibid* at para. 39.

PART III – ISSUES

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

(a) authorize the termination of the CCAA Proceedings, and the discharge of the Monitor and the CRO as at the CCAA Termination Time;

(b) confirm that the Release under the Approval and Reverse Vesting Order applies to the CRO and Naveed Z. Manzoor which may be incurred as a result of acting as a director or officer of Residual Cos.;

(c) authorize the Applicants to make an assignment in bankruptcy, provide for various procedural steps within the bankruptcy proceedings, and expand the Monitor's powers;

(d) approve the activities of the Monitor as outlined in the Fourth and Fifth Report, and the fees and disbursements of the Monitor and its counsel, including the estimate of the fees to be incurred through the completion of these CCAA Proceedings;

(e) unseal Confidential Appendix "E" to the Third Report, being the results of the bids from the SISP; and

(f) extend the Stay Period until and including the CCAA Termination Time;

PART IV – LAW AND ARGUMENT

A. The CCAA Proceedings Should be Terminated and the Monitor and the CRO Should be Discharged.

32. Section 11 of the CCAA vests this Court with broad discretion to make "any order that it considers appropriate in the circumstances."[23] The discretion conferred by section 11 of the CCAA is not boundless. Rather, it must be exercised in furtherance of CCAA's remedial objectives, having regard to whether:

(a) the order sought is appropriate in the circumstances;

[23] CCAA, s. 11.

(b) the debtor company is acting in good faith; and

(c) the debtor company is acting with due diligence.[24]

33. An order under section 11 of the CCAA will be appropriate where it "advances the policy objectives underlying the CCAA." These objectives include maximizing creditor recovery and providing a "timely, efficient and impartial resolution of a debtor's insolvency".[25]

34. In furtherance of the remedial objectives of the CCAA, this Court has routinely granted orders akin to the proposed CCAA Termination Order – terminating a debtor company's proceedings under the CCAA and discharging the court-appointed monitor and any chief restructuring officer.[26] The prior CCAA Termination Orders have also provided for a variety of additional relief to assist in the interim and subsequent periods surrounding the termination of the CCAA proceedings.

35. Having regard to the foregoing considerations, the Applicants submit that it is appropriate for this Court to terminate the CCAA Proceedings in the manner contemplated by the CCAA Termination Order given that:

(a) the Applicants have no ongoing business operations;

(b) since the granting of the Initial Order, the Acerus Entities and thereafter the Residual Cos. (as Applicants), in consultation with the Monitor, have acted in good faith and with due diligence to, among other things, stabilize their business, apprise their stakeholders of the CCAA Proceedings, prepare and implement the SISP, and consummate the Transaction[27];

(c) all matters requiring resolution within the ambit of the CCAA (the CCAA Remaining Tasks) will have been completed by the CCAA Termination Time and no amounts are or will be owing in respect of any of the Charges[28]; and

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[24] *9354-9186 Quebec Inc. v Callidus Capital Corp.*, 2020 SCC 10 at para. 49. [*Callidus*]
[25] *Ibid* at paras. 40 and 46.
[26] *In the Matter of a Plan of Compromise or Arrangement of GolfTown Canada Holdings Inc. et al* (March 29, 2018), Toronto, CV-19-629552-00CL; *In the Matter of a Plan of Compromise or Arrangement of Old API Wind-Down Ltd.* (May 17, 2019), Toronto, CV-18-603053-00CL; *In the Matter of a Plan of Compromise or Arrangement of Forme Development Group Inc.* (February 20, 2020), Toronto, CV-18-608313-00CL; *In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp.* (February 15, 2022), Toronto, CV-21-00673304-00CL.
[27] Manzoor Affidavit, *supra* at para. 18.
[28] Fifth Report, *supra* at para. 45; Manzoor Affidavit, *supra* at para. 36.

(d) the Monitor supports the termination of the CCAA Proceedings on the terms set out in the proposed CCAA Termination Order.[29]

B. The Releases in Favour of the CRO and Naveed Z. Manzoor Should be Granted.

36. The proposed CCAA Termination Order provides that the "Released Claims" as defined in the Approval and Reverse Vesting Order shall include any and all present and future liabilities of any nature or kind whatsoever against the CRO or Naveed Z. Manzoor which may be incurred as a result of acting as a director or officer of Residual Cos.

37. In granting the releases under the Approval and Reverse Vesting Order (which included releases in favour of the CRO), Justice Penny considered the non-exhaustive list of relevant factors to consider in determining court approval of proposed releases laid out by Chief Justice Morawetz in *Lydian*.[30]

38. In granting the releases, Justice Penny noted, among other things:

(a) the claims released were rationally connected to the restructuring;

(b) the released parties made significant contributions to the restructuring, both prior to and throughout the CCAA Proceedings;

(c) the release was fair and reasonable;

(d) the release brought certainty and finality for the released parties; and

(e) creditors had knowledge of the releases being sought.[31]

39. The same factors support the Releases being granted in favour of the CRO and Naveed Z. Manzoor which may be incurred as a result of acting as a director or officer of Residual Cos., as:

(a) the Residual Cos. were required to be incorporated for the Transaction to successfully close and there were no other individuals willing to be a director of Residual Cos.[32];

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[29] Fifth Report, *supra* at para. 47.
[30] *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54.
[31] Endorsement of Justice Penny dated June 2, 2023, Exhibit "D" to Manzoor Affidavit. [Endorsement of Penny J.]

(b) the Releases are limited in nature and are sought as confirmation that the prior releases granted by Justice Penny under the Approval and Reverse Vesting Order apply to the CRO and Naveed Z. Manzoor in respect of the additional role that was undertaken. Accordingly, the Releases are fair and reasonable; and

(c) the Releases bring certainty and finality for the CRO and Naveed Z. Manzoor.

40. The Monitor supports the Releases being sought by the Applicants.[33]

C. The Monitor's Powers Should be Expanded and the Applicants Should be Authorized to Make an Assignment in Bankruptcy. Additional Procedural Steps Within the Bankruptcy Proceedings are Reasonable.

41. The CCAA provides the Court with broad discretion in respect of the Monitor's functions in a particular CCAA proceeding. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct".[34] In addition, section 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.[35]

42. There are numerous examples of CCAA courts granting expanded powers to the Monitor where such relief is warranted in the circumstances.[36]

43. The proposed CCAA Termination Order provides the Monitor with authority to (a) take any and all actions and steps, and execute all documents and writings, on behalf of, and in the name of Residual Cos. in order to facilitate the performance of their obligations; and (b) exercise any powers which may be properly exercised by any board of directors of Residual Cos.

44. As there are currently no directors of Residual Cos. and the Residual Cos. may not be immediately assigned into bankruptcy, the Residual Cos. may have no directors and officers for several weeks before they are assigned into bankruptcy. Accordingly, the most cost-effective solution is to enhance the Monitor's powers to allow it to act on behalf of Residual Cos. and take

[32] Manzoor Affidavit, *supra* at para. 26; Fifth Report, *supra* at para. 49.
[33] Fifth Report, *supra* at para. 50.
[34] CCAA, s. 23(1)(k).
[35] CCAA, s. 11.
[36] *In the Matter of a Plan of Compromise or Arrangement of Wayland Group Corp. (Re)* (April 17, 2020), Toronto, CV-19-00632079-00CL; *In the Matter of a Plan of Compromise or Arrangement of 12463873 Canada Inc.* (March 29, 2023), Toronto, CV-20-00639217-00CL; *In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp.* (January 28, 2022), Toronto, CV-21-00673304-00CL.

on their behalf any actions and steps which may be necessary to, among other things, assign or cause the assignment of Residual Cos. into bankruptcy in order to complete this matter.[37]

45. In furtherance of the remedial objectives of the CCAA, this Court has routinely granted orders akin to the proposed CCAA Termination Order with respect to authorization for the debtor company to be assigned in bankruptcy.[38]

46. The Monitor is of the view that expanding the Monitor's powers is appropriate and supports the authorization for the Applicants to be assigned into bankruptcy.[39]

47. The proposed CCAA Termination Order at paragraphs 20 and 21 also provides for various procedural orders that will assist the Trustee with the subsequent bankruptcy proceedings. CCAA Courts have granted similar orders in seeking to facilitate the subsequent proceedings, including with respect to the administration of the bankrupts' estates on a consolidated basis as proposed here.[40]

48. This Court has inherent jurisdiction to grant procedural consolidation of the bankrupts' estates pursuant to section 11 of the CCAA.[41] The granting of the proposed CCAA Termination Order at this time will alleviate the time and cost of the Trustee seeking such relief on a separate motion.

D. The Monitor's Activities in the Fourth and Fifth Report, and the Monitor and its Counsel's Accounts Should be Approved.

(i) Monitor's Reports and Activities

49. In *Re Target Canada Co.*, Morawetz R.S.J. (as he then was) stated that a request to approve a monitor's report "is not unusual"[42] and that: there are good policy and practical

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[37] Manzoor Affidavit, *supra* at paras. 29-30.
[38] See Justice Wilton Siegel's order granted with substantially similar bankruptcy provisions: *In the Matter of a Plan of Compromise or Arrangement of TGF Acquisition Parent Ltd. et al* (June 22, 2021), Toronto, CV-21-00657098-00CL; *In the Matter of a Plan of Compromise or Arrangement of GolfTown Canada Holdings Inc. et al* (March 29, 2018), Toronto, CV-19-629552-00CL*; In the Matter of a Plan of Compromise or Arrangement of Old API Wind-Down Ltd.* (May 17, 2019), Toronto, CV-18-603053-00CL.
[39] Fifth Report, *supra* at paras. 47 and 53.
[40] See *In the Matter of a Plan of Compromise or Arrangement of TGF Acquisition Parent Ltd. et al* (June 22, 2021), Toronto, CV-21-00657098-00CL; and *In the Matter of a Plan of Compromise or Arrangement of King Street Company et al* (March 29, 2021), Toronto, CV-20-00650945-00CL.
[41] CCAA, s. 11.
[42] *Re Target Canada Co.*, 2015 ONSC 7574 at para. 2 [*Target*], cited with approval in *Laurentian University of Sudbury*, 2022 ONSC 2927 at para. 9. (Monitor's Website) [*Laurentian*]

reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process… Specifically, Court approval:

(a) allows the Monitor to move forward with next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date; and

(ii) potential indemnity claims by the Monitor.[43]

50. The form of the proposed CCAA Termination Order with respect to approval of the Fourth Report and Fifth Report and the Monitor's activities described therein, is consistent with the language used in *Target* and subsequent proceedings.[44]

51. In the present case, the Fourth Report and the Fifth Report, and the conduct and activities of the Monitor referred to therein should be approved. The Monitor has acted responsibly and carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with the ARIO. No party has put forward evidence to the contrary.

(ii) Jurisdiction of this Court to Approve the Accounts

52. The jurisdiction of this Court to approve the accounts of the Monitor and its counsel is confirmed in the ARIO, which directs that: "the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal

[43] ***Target, supra*** at para. 22.
[44] ***Ibid*** at paras. 7 and 26; *In the Matter of a Plan of Compromise or Arrangement of Old CLHC Company* (September 29, 2020), Toronto, CV-19-631523-00CL.

counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice."[45]

(iii) The Fair and Reasonable Test for Approval of Accounts

53. The role of the Court on a motion to pass accounts is to evaluate them based on the "overriding principle of reasonableness".[46] The overall value contributed by the Monitor and its counsel is the predominate consideration in assessing the reasonableness of the accounts.[47]

54. The Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional's services may not be instructive when looked at in isolation. The Ontario Court of Appeal provides the following guidance: "The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took".[48]

55. In this case, it is not necessary or desirable for the Court to engage in a review of each individual entry to determine whether the Monitor's and Fasken's accounts are fair and reasonable. There has been considerable disclosure of the activities of the Monitor and Fasken in the Monitor's Reports filed throughout the CCAA Proceedings. Based on the record filed in support of the motion and the degree of Court oversight and involvement throughout the CCAA Proceedings, it is respectfully submitted that the Court can and should determine that the Monitor's and Fasken's accounts are fair and reasonable.

(iv) The Factors to be Considered

56. As mentioned, the test to be applied in determining whether to approve the Monitor's and Fasken's fees is whether they are fair and reasonable. Any challenges to a court officer's accounts are evaluated based on specific objections as "without some specified principled objection, it would be inappropriate to reduce the fees of Court officers based on the suggestion that they are too high".[49]

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[45] Amended and Restated Order dated February 3, 2023 at para. 41.
[46] *Laurentian, supra* at para. 9.
[47] *Nortel Networks Corp. (Re)*, 2017 ONSC 673 at para. 17. [*Nortel*]
[48] *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at para. 45. [*Diemer*] and cited with approval in *Laurentian* at para. 9.
[49] *Tiger Brand Knitting Co., Re*, 2006 CarswellOnt 9983 at paras. 14-15 (Ont. Sup. Ct. J.), Book of Authorities, Tab 1.

57. To aid in the determination of whether a court-appointed officer's fees are fair and reasonable, the Ontario Court of Appeal have recognized certain factors as a useful guideline.[50] These factors are not intended to be an exhaustive list and other factors may be material in any particular case.[51] These factors include:

(a) the nature, extent and value of the assets being handled;

(b) the complications and difficulties encountered;

(c) the degree of assistance provided by the company, its officers or its employees;

(d) the time spent;

(e) the Monitor's knowledge, experience and skill;

(f) the diligence and thoroughness displayed;

(g) the responsibilities assumed;

(h) the results achieved; and

(i) the cost of comparable services when performed in a prudent and economical manner.

58. The relevant factors are addressed immediately below.

(A) *Nature, extent, and value of the assets being handled*

59. The extent and value of assets in this case are significant, including in excess of USD$62 million of secured debt and millions of dollars of unsecured obligations. In addition, the Acerus Entities operate in the highly regulated and complex pharmaceutical industry, for which it must maintain various material licenses.[52] Accordingly, the Acerus Entities held, among other things, drug establishment license and import licenses in Canada, state business licenses in the

[50] *Confectionately Yours Inc., Re* (2002, 36 C.B.R. (4th) 200 (Ont. CA) at para. 51, cited with approval in *Laurentian* at para. 10 and *Diemer* at para. 33.
[51] *Nortel*, *supra* at para. 14.
[52] Affidavit of Naveed Z. Manzoor sworn May 18, 2023 at paras. 38 and 44.

US, contracts with the US government and payors, and various intellectual property including worldwide patents.[53]

(B) *Complications and difficulties encountered*

60. These CCAA Proceedings, although relatively brief, have been complex and intensive. The matters involve cross border elements, including Chapter 15 proceedings before the US Bankruptcy Court. Coordination has been required with Canadian, US and global stakeholders. As described in the Monitor's Reports to this Court, the Transaction is the culmination of an extensive pre-filing strategic review process and Court-approved SISP. Further, the Monitor and its counsel played critical roles throughout the Acerus Entities' negotiations with various key stakeholders.

61. As an example, the Acerus Entities were required to reach a resolution and entered into an agreement with its primary third-party logistics company and distributor to assist with the distribution of its primary asset in the United States and Canada.[54] The Monitor oversaw and assisted the Acerus Entities with these negotiations.[55]

62. Additionally, the CCAA Proceedings have involved complex issues and a multitude of competing interests from various groups of stakeholders. Significant complex issues include the identification, negotiation and implementation of "reverse vesting" transaction structure and addressing the concerns from various stakeholders impacted by the Transaction.

(C) *Time spent*

63. The combined billings of the Monitor and its counsel comprise a total of 1,042.2 professional hours as at July 7, 2023. This scope of work involved, among other things, assisting the Acerus Entities in obtaining and overseeing DIP financing requirements. The Monitor played key roles in developing the SISP, the conduct and oversight of the SISP process, addressing the competing bids received, and, ultimately, the negotiation of the Subscription Agreement and closing of the Transaction. The Monitor also assisted and in many cases dealt directly with suppliers, creditors, and other stakeholders to maintain normal course operations following the commencement of the CCAA Proceedings.

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[53] *Ibid* at para. 43.
[54] Affidavit of Naveed Z. Manzoor sworn March 2, 2023 at paras. 14-17.
[55] *Ibid* at para. 15.

(D) *Monitor's knowledge, experience and skill*

64. The Monitor and Fasken have significant knowledge, experience and skill in complex restructuring matters. The Monitor and its counsel have acted in this capacity in some of Canada's largest and most complicated restructuring mandates. The lead professionals involved are all highly regarded and possess significant expertise in complex and special situations.

(E) *Diligence and thoroughness displayed*

65. The breadth of matters detailed in the Fifth Report demonstrate the diligence and thoroughness displayed by the Monitor and Fasken.

(F) *Responsibilities assumed*

66. The Monitor, with the assistance of Fasken, carried out extensive activities during the CCAA Proceedings. These activities are detailed in the Fifth Report and the prior Monitor Reports filed.

67. The more significant responsibilities that the Monitor has assumed include the responsibilities and actions taken by the Monitor and its counsel referenced above at paragraph 60.

(G) *Results achieved*

68. The activities of the Monitor and its counsel in carrying out the SISP were integral in leading to the Transaction, which is valued at over US$62 million – an amount which greatly exceeds the approximately $973,000 of accounts for the Monitor and its counsel for the period up to July 7, 2023 – and will result in the Acerus Entities continuing as a going-concern and ongoing business opportunities for suppliers of goods and services to the Acerus Entities. The Monitor concluded in its Third Report that the Transaction provides for a vastly superior recovery for creditors as a whole as compared to a liquidation. Accordingly, the efforts of the Monitor and its counsel over in these CCAA Proceedings achieved very positive results for stakeholders.

(H) ***Cost of comparable services when performed in a prudent and economical manner***

69. The Monitor's and Fasken's professional fees and disbursements are comparable to the rates charged by other professional firms in the Toronto market for the provision of similar services regarding significant complex commercial restructuring matters.

(v) Conclusion on Fairness and Reasonableness

70. It is respectfully submitted that a consideration of the factors articulated by the courts supports the conclusion that the remuneration of the Monitor and Fasken is fair and reasonable and their fees and disbursements for the Period should be approved.

E. Confidential Appendix "E" to the Third Report Should be Unsealed.

71. At paragraph 39 in the Endorsement of Penny J., the bid results under the SISP were sealed so that the ability of the Acerus Entities and the Monitor to maximize value could be preserved until the Transaction could be closed.[56]

72. As the Transaction has now closed, the information contained in the bid results at Confidential Appendix "E" to the Third Report is no longer commercially sensitive.

73. The Monitor supports the Applicants' request to unseal Confidential Appendix "E" to the Third Report.[57]

F. The Stay Period Should be Extended.

74. The Stay Period currently expires on July 31, 2023. Pursuant to the CCAA Termination Order, the Stay Period is proposed to be extended to the CCAA Termination Time.

75. Section 11.02(2) of the CCAA provides the Court the discretion to make an Order extending the stay granted in an initial order.[58]

76. Prior to the CCAA Termination Time, the Applicants and/or the Monitor are required to take various steps as outlined above. In order to make an order pursuant to Section 11.02(2),

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[56] Endorsement of Penny J.
[57] Fifth Report, *supra* at para. 47.
[58] CCAA, s. 11.02(2).

the Court must be satisfied that: (i) circumstances exist that make the order appropriate; and (ii) the applicant has acted, and is acting, in good faith and with due diligence.[59]

77. The Applicants have acted and continue to act in good faith and with due diligence in respect of all matters relating to these CCAA Proceedings. The extension of the Stay Period to the CCAA Termination Time will permit the Applicants and the Monitor to complete the above-noted activities in an efficient manner with the benefit of the stay of proceedings. Further, the proposed extension of the Stay Period will obviate the need for a further attendance before the Court which would only result in additional costs being incurred by Residual Cos. and occupation of further court time.[60]

78. No creditor will be materially prejudiced by the proposed extension of the Stay Period and the Applicants will have sufficient liquidity for the duration of the extended Stay Period.[61] The Applicants will have sufficient liquidity

79. The Monitor supports the proposed extension of the Stay Period.[62]

PART V – ORDER SOUGHT

80. For the reasons set out above, the Applicants respectfully submit that the Court should grant the CCAA Termination Order in the form attached to the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21 day of July, 2023.

/s Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP

[59] CCAA, s. 11.02(3).
[60] Manzoor Affidavit, *supra* at para. 37.
[61] *Ibid* at para. 38; Fifth Report, *supra* at para. 55.
[62] Fifth Report, *supra* at para. 55.

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *9354-9186 Quebec Inc. v Callidus Capital Corp.*, 2020 SCC 10
2. *Lydian International Limited (Re)*, 2020 ONSC 4006
3. *Laurentian University of Sudbury*, 2022 ONSC 2927
4. *Nortel Networks Corp. (Re)*, 2017 ONSC 673
5. *Bank of Nova Scotia v Diemer*, 2014 ONCA 851
6. *Tiger Brand Knitting Co., Re*, 2006 CarswellOnt 9983
7. *Confectionately Yours Inc., Re* (2002, 36 C.B.R. (4th) 200 (Ont. CA)
8. *Re Target Canada Co.*, 2015 ONSC 7574

SCHEDULE "B"
RELEVANT LEGISLATION

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

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Stays, etc. — other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

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.

Duties and Functions

23 (1) The monitor shall

> **(k)** carry out any other functions in relation to the company that the court may direct.

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 15177561 CANADA INC. and 15177570 CANADA INC.

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)

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