SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00693595-00CL

DATE: 24-JUL-2023

NO. ON LIST: 1

TITLE OF PROCEEDING: ACERUS PHARMACEUTICALS CORPORATION et al. v. DAY et al.

BEFORE: JUSTICE STEELE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

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For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

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ENDORSEMENT OF JUSTICE STEELE:

[1] The applicant's CCAA proceedings are close to complete. The initial order in these proceedings was made in January 2023. In May 2023, Justice Penny granted an order approving the Transaction and approving the reverse vesting order. The applicants do not have any ongoing business operations.

[2] The applicants seek the CCAA Termination Order, which provides for the termination of the proceedings and the discharge of the Monitor and the CRO upon the CCAA Termination Time, among other things.

[3] No party objected to the relief sought on this motion. Mr. Keldmann appeared and raised an issue related to the relief provided when the Transaction was approved. The applicant and the Monitor confirmed that none of the relief sought today impacts Mr. Keldmann or his agreements. Further, counsel for the applicant advised that the purchaser has no intention of enforcing the non-compete in the APA with Keldmann Health.

[4] The Monitor supports the relief sought.

Should the Court authorize the termination of the CCAA Proceedings and the discharge of the Monitor and the CRO as at the CCAA Termination Time?

[5] Section 11 of the CCAA gives this Court broad discretion to make "any order that it considers appropriate in the circumstances." The Court's discretion must be exercised further to the CCAA's remedial objectives with regard to whether the order sought is appropriate and whether the debtor company is acting in good faith and with due diligence: *9354-9186 Quebec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 49.

[6] The Court has routinely granted similar orders terminating the CCAA proceedings and discharging the Monitor and any CRO: *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 Harte Gold Corp.* (February 15, 2022), Toronto, CV-21-00663304-00CL.

[7] The applicants submit that this relief is appropriate for the reasons set out at para. 35 of their factum. Among other things, the Monitor supports the relief, the applicants have no ongoing business operations, and all matters requiring resolution within the ambit of the CCAA will have been completed by the CCAA Termination Time and no amounts are or will be owing in respect of any of the Charges. The applicants have acted in good faith and with due diligence through the proceedings.

[8] I am satisfied that it is appropriate to terminate the CCAA proceedings and discharge the Monitor as at the CCAA Termination Time.

Should the Court confirm that the Release under the Approval and RVO applies to the CRO and Naveed Z. Manzoor?

[9] The applicants request that the "Released Claims" as defined in the Approval and Reverse Vesting Order include any liabilities against the CRO or Naveed Z. Manzoor, incurred as a result of acting as a director or officer of the Residual Cos. The applicants submit that this relief is being sought to confirm that the

existing Release covers this additional period when the CRO or Mr. Manzoor were acting as a director or officer of the Residual Cos.

[10] The relief is supported by the Monitor.

[11] I agree with the submission of the applicants that the same factors as were noted by Justice Penny in granting the releases under the Approval and Reverse Vesting Order are applicable to the issue before me. In particular,

a. The Residual Cos. were necessary for the Transaction to close and no one else was willing to be a director of the Residual Cos., other than Mr. Manzoor;

b. The releases are limited in nature. They are sought to confirm that the prior releases granted by Justice Penny apply to the CRO and Mr. Manzoor in respect of the additional role they assumed. Accordingly, the Releases are fair and reasonable; and

c. The Releases will bring certainty and finality for the CRO and Mr. Manzoor.

[12] I am satisfied that it is appropriate to clarify that the Releases in favour of the CRO and Mr. Manzoor include any liabilities that may be incurred as a result of acting as a director or officer of Residual Cos.

Should the Court authorize the Applicants to make an assignment in bankruptcy, provide for various procedural steps and expand the Monitor's powers?

[13] There are currently no directors of Residual Cos. These companies may not be immediately assigned into bankruptcy and may have no directors or officers for several weeks before they are assigned into bankruptcy. Accordingly, the Monitor requests an enhancement of its powers to allow it to act on behalf of the Residual Cos. and, among other things, cause the assignment of the Residual Cos. into bankruptcy.

[14] The Monitor states that this is the most cost-effective solution.

[15] The CCAA gives the court broad discretion in respect of the Monitor's functions. 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." Further, as noted above, s. 11 of the CCAA gives the Court broad discretion to make any order that is necessary and appropriate in the circumstances.

[16] The applicants provided the Court with numerous examples of the Court in CCAA proceedings granting expanded powers to the Monitor where such relief is warranted, including in *Harte Gold*.

[17] The applicants also provided the Court with examples of the Court in CCAA proceedings granting orders akin to the proposed CCAA Termination Order with respect to authorization for the debtor company to be assigned into bankruptcy, including in *GolfTown.*

[18] The applicants also request certain procedural orders, including the procedural consolidation of the bankrupts' estates. The applicants note that the Court has the jurisdiction to make these orders under s. 11 of the CCAA. The applicants provided the Court with examples of the Court in CCAA proceeding

granting substantially similar orders, including *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.

[19] I am satisfied that it is appropriate to make these orders.

Should the Court approve the Monitor's activities in the Fourth and Fifth Report and the fees and disbursements of the Monitor and its counsel?

[20] As stated by Morawetz R.S.J. (as he then was) in *Re Target Canada Co.*, 2015 ONSC 7574 at para 2, a request to approve a Monitor's report "is not unusual." He further noted the following reasons why Court approval may be sought by the Monitor, at para. 22:

a. It allows the Monitor to move forward with next steps in the proceedings;

b. It brings the Monitor's activities before the Court;

c. It allows an opportunity for any stakeholder concerns to be addressed;

d. It enables the Court to satisfy itself that the Monitor's activities have been conducted in a prudent and diligent manner;

e. It provides additional protection to the Monitor; and

f. It protects the creditors from the delay and distribution that would be caused by re-litigation of steps taken, and potential indemnity claims by the Monitor.

[21] The form of the proposed order sought approving the Monitor's Fourth and Fifth Report and the Monitor's activities, is consistent with the language used in *Target* and other proceedings.

[22] The Monitor also requests that the Monitor's fees and disbursements and those of its counsel are approved. Fee affidavits have been filed.

[23] In determining whether to approve fees, the Court does not engage in a line-by-line assessment of the professional services. The Court of Appeal provided the Court with guidance in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at para. 45: "The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took."

[24] The Court of Appeal has endorsed a non-exhaustive list of factors that may be useful as a guideline for the Court in determining whether a court-appointed officer's fees are fair and reasonable: *Confectionately Yours Inc., Re* (2002, 36 C.B.R. (4th) 200 (Ont. CA), at para. 51, referencing *Belyea v. Federal Business Development Bank (1983),* 1983 CanLII 4086 (NB CA). 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.

[25] In this case, there is an excess of USD$62 million of secured debt and millions of dollars of unsecured obligations. Further, the Acerus Entities operate in a highly regulated industry, which requires the companies to hold numerous licences. There were many complexities in this CCAA proceeding, including Chapter 15 proceedings before the US Bankruptcy court. The total professional time spent was 1042 hours as of July 7, 2023. The Monitor, with the assistance of counsel, carried out extensive activities during the proceedings, including obtaining and overseeing DIP financing requirements, carrying out a SISP and the completion of the Transaction.

[26] In the circumstances of this proceeding, I am satisfied that the remuneration of the Monitor and its counsel is fair and reasonable, and their fees and disbursements are approved.

Other

[27] The applicants request that Confidential Appendix E to the Third Report now be unsealed because the Transaction has closed and the information in the appendix is no longer commercially sensitive. The Monitor supports this relief.

[28] Given that the Transaction is now complete, I am satisfied that the Confidential Appendix E should now be unsealed.

[29] The applicants request that the stay period, which currently expires on July 31, 2023, be extended to the CCAA Termination Time. 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: CCAA, s. 11.02(3).

[30] The applicants seek the proposed extension so that the applicants and the Monitor can complete the remaining activities, including those set out at para. 40 of the Monitor's Fifth Report, in an efficient manner. The applicants note that the proposed extension will obviate the need for a further Court attendance and additional costs. The applicants have sufficient liquidity for the duration of the extension. The applicants have acted in good faith and with due diligence. There is no evidence otherwise.

[31] The Monitor supports the proposed extension.

[32] The Stay Period, which currently expires on July 31, 2023, will be extended to the CCAA Termination Time.

[33] Order attached.