

**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
VBI VACCINES INC., VBI VACCINES (DELAWARE) INC., VARIATION BIOTECHNOLOGIES
(US) INC., SCIVAC LTD., SCIVAC HONG KONG LIMITED, VBI VACCINES B.V. AND
VARIATION BIOTECHNOLOGIES INC.

Applicants

**FACTUM OF THE APPLICANTS
(RE: ORDER FOR STAY EXTENSION AND SECOND DIP AMENDMENT)**

October 15, 2024

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Me Guy P. Martel
Direct: 514 397-3163
Email: GMartel@stikeman.com

Me Nathalie Nouvet
Direct : 514 397-3128
Email : NNouvet@stikeman.com

Philip Yang (LSO #820840)
Direct: 416 869-5593
Email: PYang@stikeman.com

Me Darien Bahry
Direct : 514 397-2441
Email: DBahry@stikeman.com

Lawyers for the Applicants

TO: **THE SERVICE LIST**

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PART I – OVERVIEW¹

1. The Applicants were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) pursuant to the Initial Order (as amended and restated by the ARIO on August 9, 2024). On August 9, 2024, the Court granted the Solicitation Order which, among other things, approved the Solicitation Process and directed the Applicants and the Monitor to commence the Solicitation Process.

2. As the current Stay Period ends on October 18, 2024, the Applicants now seek an order which:

- (a) extends the Stay Period to and including November 29, 2024;
- (b) approves the Second DIP Amendment which extends the maturity date of the DIP Facility to November 29, 2024, and permits the Applicants to draw an increased maximum principal amount of up to \$4,600,000 under the DIP Facility;
and
- (c) increases the DIP Lender's Charge to \$4,850,000.

3. The Applicants' view is that the proposed order provides the best path forward by allowing the Applicants to continue to conduct the Solicitation Process and seek to identify value-maximizing transaction(s) for the benefit of the Applicants and their stakeholders.

PART II– SUMMARY OF FACTS

4. The facts with respect to this application are more fully set out in the Fourth Baxter Affidavit. All references to currency in this affidavit are references to United States dollars, unless otherwise indicated.

¹ Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the affidavit of Jeffrey Baxter sworn October 11, 2024 (the “**Fourth Baxter Affidavit**”)

5. On July 30, 2024, the Applicants sought and obtained the Initial Order, which was amended and restated by the ARIO on August 9, 2024. Among other things, the ARIO:

- (a) extended the Stay Period to and including September 20, 2024;
- (b) approved the execution by the Applicants of the First Amended and Restated DIP Facility Agreement, which permitted the Applicants to borrow an increased maximum amount of up to \$2,500,000 under the DIP Facility;
- (c) approved the KERP and granted the KERP Charge in the amount of \$679,005;
- (d) granted the Applicants the authority to make severance payments to certain employees who were terminated following issuance of the Initial Order;
- (e) granted VBI the authority to incur no further expenses in relation to the Securities Filings and ordered that none of the directors, officers, employees, and other representatives of the Applicants, or the Monitor (and its directors, officers, employees and representatives) shall have any personal liability for any failure by the Applicants to make the Securities Filings; and
- (f) granted the Administration Charge, in the amount of \$600,000, the Directors' Charge, in the amount of \$300,000, the KERP Charge, in the amount of \$679,005, and the DIP Lender's Charge in the amount of \$2,700,000.²

6. Also on August 9, 2024, this Court granted the Solicitation Order, which, among other things:

- (a) approved the Solicitation Process in accordance with the Solicitation Order;
- (b) granted the Applicants and the Monitor the authority to immediately commence the Solicitation Process; and
- (c) granted the Applicants, the Monitor, and their respective affiliates, partners, employees, advisors and agents the authority to take any and all actions as may

² Fourth Baxter Affidavit, at para. 9.

be necessary and desirable to implement the Solicitation Process in accordance with the Solicitation Order.³

7. On September 20, 2024, this Court granted the Stay Extension and DIP Amendment Order, which, among other things:

- (a) extended the Stay Period to and including October 18, 2024;
- (b) approved the DIP Amendment, which extended the maturity date of the DIP Facility to October 18, 2024, and permitted the Applicants to draw an increased maximum principal amount of up to \$3,600,000 under the DIP Facility; and
- (c) granted an increase to the DIP Lender's Charge in the amount of \$3,850,000.⁴

8. Shortly after the Solicitation Order was granted, the Applicants and the Monitor initiated the Solicitation Process. A number of parties executed NDAs prior to the Phase 1 Bid Deadline and were granted access to the VDR. Ultimately several non-binding LOIs were submitted, and the Monitor, in consultation with the Applicants and the DIP Lender, determined, in accordance with the terms of the Solicitation Procedures, that it was in the best interest of all stakeholders, that the date for the Notification of Phase 1 Qualified Bid(s) be extended.⁵

9. Following careful assessment and review by the Applicants, in close consultation with the Monitor and their respective counsel, of the Phase 1 Bids, the Applicants determined that only one (1) Phase 1 Bidder should be invited to continue in Phase 2 of the Solicitation Process. In accordance with the Solicitation Procedures, the Monitor sent notices in writing to the Phase 1 Bidders to inform them whether they were permitted, or not, to proceed to Phase 2 of the Solicitation Process.⁶

10. In accordance with the Solicitation Procedures, the Phase 2 Bid Deadline was extended from September 30, 2024 to October 11, 2024. The Applicants have received a Phase 2 Bid

³ Fourth Baxter Affidavit, at para. 10.

⁴ Fourth Baxter Affidavit, at para. 13.

⁵ Fourth Baxter Affidavit, at paras. 22.

⁶ Fourth Baxter Affidavit, at para. 23.

from the Phase 2 Bidder and are working with the Phase 2 Bidder to finalize same in order to file the Approval Motion as soon as practicable.⁷

PART III– ISSUES

11. The issues to be determined by this Court under the present motion are whether:
- (a) this Court should approve the Second DIP Amendment, which increases the amounts available under the DIP Facility Agreement, and grant the corresponding increase to the DIP Lender’s Charge; and
 - (b) this Court should extend the Stay Period to and including November 29, 2024.

PART IV – LAW AND ARGUMENTS IN RESPECT OF THE ORDER

A. The Second DIP Amendment Should be Approved

12. The Applicants are seeking approval of the Second DIP Amendment which provides for an increase in the amounts available under the DIP Facility Agreement from \$3,600,000 to \$4,600,000 in order to provide the Applicants with the necessary interim financing for the period until November 29, 2024.

13. The Applicants previously addressed the factors under subsection 11.2(1) and (4) that the Court must consider in deciding whether to approve a charge in connection with interim financing in their factum filed in support of the Initial Order (the “**Initial Order Factum**”), the ARIO (the “**ARIO Factum**”) and the Stay Extension and DIP Amendment Order (the “**Stay Extension and DIP Amendment Order Factum**”).

14. The Court’s authority to authorize funding in the context of a CCAA restructuring is found in section 11.2 of the CCAA, which expressly permits the granting of a charge over the property of a debtor that ranks in priority to the claims of any secured creditor.⁸

⁷ Fourth Baxter Affidavit, at paras. 24-25.

15. A court will not grant an order for interim financing unless it is satisfied that the terms of the financing are limited to those that are “reasonably necessary” for the continued operations of the debtors in the ordinary course of business for the period sought, with determining what is “reasonably necessary” being a fact-based exercise.⁹

16. As set out in the Initial Order Factum, the ARIO Factum and the Stay Extension and DIP Amendment Order Factum, the Second DIP Amendment should be approved and the corresponding increase to the DIP Lender’s Charge should be granted, as the factors to be considered under section 11.2(4) of the CCAA¹⁰ and existing jurisprudence¹¹ support such relief:

- (a) the notice requirements under section 11.2(1) of the CCAA have been met;
- (b) given the Applicants’ assets and circumstances, they cannot obtain alternative financing outside of these CCAA Proceedings;
- (c) pursuant to the Updated Cash Flow Statement, the Applicants will likely have insufficient funds to continue operating in the ordinary course through to the end of the proposed extension for the Stay of Proceedings, being November 29, 2024, absent additional financing;
- (d) the DIP Facility, and the amounts advanced thereunder, will allow the Applicants to secure the financing needed to continue to operate, and is necessary for the continued operations of the Applicants in the ordinary course so as to undertake the planned restructuring for the benefit of all its stakeholders, including the conclusion of the Solicitation Process and filing of the Approval Motion as soon as practicable;

⁸ CCAA, s. 11.2(1) and s. 11.2(2) .

⁹ CCAA, s. 11.2(5). See also *Re: Mobilicity Group*, 2013 ONSC 6167, at para. 30.

¹⁰ CCAA, s. 11.2(4) .

¹¹ *Canwest Publishing Inc. Re.*, 2010 ONSC 222, at paras 42-44.

- (e) the Applicants' business will be managed by its directors and senior management, in consultation with the Monitor who will supervise the spending of the funds drawn under the DIP Facility;
- (f) the DIP Facility is being advanced by K2HV, the Applicants' secured lender, thereby demonstrating confidence in management;
- (g) no creditor will be materially prejudiced as a result of the DIP Facility and the DIP Lender's Charge, given that the DIP Facility will be provided by K2HV who already benefits from a first ranking security interest;
- (h) the availability of the DIP Facility is contingent on an order of this Court approving same and the DIP Lender's Charge, and the DIP Lender's Charge is restricted to what is necessary during the Stay of Proceedings;
- (i) the DIP Lender's Charge does not secure an obligation that existed before the present motion will have been granted; and
- (j) based on discussions with the Applicants' counsel and the Monitor, the increase in the quantum of the DIP Facility Agreement is reasonable and competitive having regard to the Cash Flow Statement, and the Monitor is supportive of the DIP Facility Agreement and the DIP Lender's Charge.¹²

B. The Stay Period Should be Extended

17. On an application other than an initial application, section 11.02(2) of the CCAA provides that the Court may make a stay order for any period that the Court considers necessary, if the applicant satisfies the Court that: (a) circumstances exist that make the order appropriate; and (b) the applicant has acted, and is acting, in good faith and with due diligence.¹³

¹² Fourth Baxter Affidavit, at para. 32.

¹³ CCAA, s. 11.02(2).

18. The Applicants are seeking an extension of the Stay Period to and including November 29, 2024. The extension of the Stay Period is necessary and appropriate in the circumstances to allow the Applicants to continue to operate its business in the ordinary course and to implement additional restructuring steps, as necessary, to improve the financial efficiency of the Applicants for the benefit of all stakeholders. In particular, the extension of the Stay Period is necessary to allow the Applicants to carry out Phase 2 of the Solicitation Process to further identify value-maximizing transaction(s) for the benefit of the Applicants and their stakeholders, and to work with the Phase 2 Bidder to finalize the transaction provided pursuant to the Phase 2 Bid in order to file the Approval Motion as soon as practicable

19. The Applicants have acted in good faith and with due diligence to advance its restructuring within these CCAA Proceedings and will continue to do so.¹⁴

20. As set out in the Updated Cash Flow Statement that was prepared by the Applicants and reviewed by the Monitor, subject to this Court authorizing the Applicants to draw the increased maximum principal amount of \$4,600,000 under the DIP Facility, the Applicants have sufficient liquidity to operate through the proposed extension of the Stay Period to and including November 29, 2024.¹⁵

21. The Applicants do not believe that any creditor will suffer any material prejudice if the Stay of Proceedings is extended as requested, and the Applicants' stakeholders will benefit from the extension of the Stay Period. Additionally, the Monitor and the DIP Lender, which is also the VBI Group's largest secured creditor, are both supportive of the proposed extension of the Stay Period.¹⁶

¹⁴ Fourth Baxter Affidavit at para. 35.

¹⁵ Fourth Baxter Affidavit, at para. 37.

¹⁶ Fourth Baxter Affidavit, at paras. 38 and 39.

22. Lastly, this Court has granted similar relief in the past. For instance, in *Tacora Resources Inc. (Re)*, this Court recently approved the extension of a stay of proceedings in very similar circumstances.¹⁷

PART V – ORDER SOUGHT

23. For all of the foregoing reasons, the Applicants request an Order substantially in the form of the draft Stay Extension and Second DIP Amendment Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of October, 2024.

Stikeman Elliott

STIKEMAN ELLIOTT LLP
Counsel for the Applicants

¹⁷ *Tacora Resources Inc. (Re)*, Stay Extension and DIP Amendment Approval Order of the Applicant, Court File No. CV-23-00707394-00CL, at para. 3.

**SCHEDULE A
LIST OF AUTHORITIES**

Cases

1. *Re: Mobilicity Group*, 2013 ONSC 6167
2. *Canwest Publishing Inc, Re*, 2010 ONSC 222
3. *Tacora Resources Inc. (Re)*, Stay Extension and DIP Amendment Approval Order of the Applicant, Court File No. CV-23-00707394-00CL

Other Authorities

4. *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36

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.

operations of the debtor company in the ordinary course of business during that period.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- **(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#);
- **(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.

Stays, etc. — other than initial application

(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

(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.

Stays — directors

11.03 (1) An order made under [section 11.02](#) may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- **(a)** the period during which the company is expected to be subject to proceedings under this Act;
- **(b)** how the company's business and financial affairs are to be managed during the proceedings;
- **(c)** whether the company's management has the confidence of its major creditors;

- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in [paragraph 23\(1\)\(b\)](#), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in [subsection 11.02\(1\)](#) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

- (3) In deciding whether to grant the authorization, the court is to consider, among other things,
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- **(a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- **(b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

- **(a)** a director or officer of the company;
- **(b)** a person who has or has had, directly or indirectly, control in fact of the company; and
- **(c)** a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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FACTUM OF THE APPLICANTS

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Lawyers for the Applicants