

**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 OLD API WIND-DOWN LTD.

Applicant

**FACTUM OF THE APPLICANT
(Returnable March 28, 2019)**

March 25, 2019

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PART I - OVERVIEW

1. Old API Wind-down Ltd. ("**API**", or the "**Applicant**") and Aralez Pharmaceuticals Canada Inc. ("**Aralez Canada**", and together with API, the "**CCAA Entities**") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* (the "**CCAA**") pursuant to the initial order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated August 10, 2018 (as amended, the "**Initial Order**"). Richter Advisory Group Inc. was appointed Monitor (the "**Monitor**") in these proceedings (the "**CCAA Proceedings**").

2. This motion is brought by the Applicant seeking:

- (a) An order authorizing API to transfer Intercompany Claims (defined below) to one or more of its affiliates for nominal consideration;
- (b) An order extending the Stay Period (defined below) to July 31, 2019; and
- (c) Such further and other relief as the Court deems just.

PART II - THE FACTS

3. The facts with respect to this motion are more fully set out in the affidavit of Christopher Freeland sworn March 20, 2019 (the “**Freeland Affidavit**”). Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Freeland Affidavit.

A. THE RESTRUCTURING PROCEEDINGS

4. The CCAA Entities were two entities within a larger corporate structure that included Aralez Pharmaceuticals Management Inc., Aralez Pharmaceuticals R&D Inc., Aralez Pharmaceuticals U.S. Inc., POZEN Inc., Halton Laboratories LLC, Aralez Pharmaceuticals Holdings Limited and Aralez Pharmaceuticals Trading DAC (“**Trading DAC**”, collectively the “**Chapter 11 Entities**” and with the CCAA Entities, the “**Aralez Entities**”). The Aralez Entities were in the business of acquiring, developing, marketing and selling specialty pharmaceutical products.

Freeland Affidavit at paras. 3-4, Motion Record of the Applicant (the “**Applicant’s Motion Record**”), Tab 2.

5. On August 10, 2018, the CCAA Entities were granted creditor protection and related relief under the CCAA pursuant to the Initial Order. On the same day, the Chapter 11 Entities filed voluntary petitions in the United States Bankruptcy Court for the Southern District of New York (the “**U.S. Court**”) under chapter 11 of title 11 of the United States Bankruptcy Code.

Freeland Affidavit at paras. 6-7, Applicant’s Motion Record, Tab 2.

B. SALES PROCESS

6. Pursuant to a Court approved sales process (the “**Sales Process**”), API entered into a transaction (the “**SPA Transaction**”) contemplated by a share purchase agreement among API, as vendor, and Nuvo Pharmaceuticals Inc., as purchaser (the “**Purchaser**”) dated September 18, 2018. The SPA Transaction contemplated the sale of all of the shares of Aralez Canada to the Purchaser for the price of US\$62.5 million, subject to certain adjustments to be determined after the transaction closed (the “**Adjustment Process**”). This Court approved the SPA Transaction on December 7, 2018 and the transaction subsequently closed on December 31, 2018 (the “**Closing**”). The Adjustment Process is ongoing.

Freeland Affidavit at paras. 12-15, Applicant’s Motion Record, Tab 2.

7. In a separate process beginning in the spring of 2017, the CCAA Entities commenced negotiations with Intercept Pharmaceuticals, Inc. to sell certain contractual rights to develop and market products containing bezafibrate in the United States. Negotiations concluded during the CCAA Proceedings with the execution of an asset purchase agreement (the “**Bezafibrate APA**”). The transaction contemplated by the Bezafibrate APA was approved by this Court on December 17, 2018 and closed on December 18, 2018.

Freeland Affidavit at para. 11, Applicant’s Motion Record, Tab 2.

C. DISTRIBUTIONS

8. Pursuant to an order of this Court dated December 17, 2018 (the “**Distribution Order**”), API and the Monitor, in consultation with Deerfield Private Design Fund III, L.P. and Deerfield Partners, L.P. (together, “**Deerfield**”) established a reserve in the amount of

US\$10.5 million from the proceeds of the SPA Transaction and the Bezafibrate APA (the “Sale Proceeds”) to secure and/or satisfy various priority obligations.

Freeland Affidavit at para. 17, Applicant’s Motion Record, Tab 2.

9. Pursuant to the Distribution Order, API distributed US\$55.1 million to Deerfield via an offset of debt amounts owing under the pre-filing Facility Agreement with Deerfield (the “Facility Agreement”). API and the Monitor distributed a further US\$2.3M to Deerfield on March 6, 2019.

Freeland Affidavit at paras. 18-19, Applicant’s Motion Record, Tab 2.

D. CLAIMS PROCESS

10. On October 10, 2018, this Court approved a claims process pursuant to which the CCAA Entities called for claims against themselves and their directors and officers.

Freeland Affidavit at para. 20, Applicant’s Motion Record, Tab 2.

11. Pursuant to an order of this Court dated December 10, 2018, API retained the authority to address and resolve Claims filed against Aralez Canada following the closing of the SPA Transaction. API, in consultation with the Monitor, the Purchaser and Deerfield, is currently resolving those Claims directly.

Freeland Affidavit at paras. 23-24, Applicant’s Motion Record, Tab 2.

E. TRANSFER OF INTERCOMPANY CLAIMS

12. In the ordinary course and prior to the CCAA Proceedings, the CCAA Entities entered into certain intercompany transactions with their affiliates. These transactions

created claims (the “**Intercompany Claims**”) owing among the CCAA Entities and their affiliates, including the Chapter 11 Entities, Aralez Luxembourg Finance S.á r.l. (“**Aralez Luxembourg**”) and Tribute Pharmaceuticals International Inc. (“**Aralez Barbados**”).

Freeland Affidavit at paras. 25-26, Applicant’s Motion Record, Tab 2.

13. Having substantially completed the Sales Process, the Aralez Entities are in the process of winding down. To that end, on February 5, 2019, each of the Chapter 11 Entities other than Trading DAC filed a joint liquidation plan and related disclosure statement. On March 22, 2019, the Chapter 11 Entities filed a joint liquidation plan that included Trading DAC.

Freeland Affidavit at para. 27, Applicant’s Motion Record, Tab 2; Notice of Filing of (A) Proposed Disclosure Statement Supplement For Second Amended Joint Liquidating Plan Of Debtors Under Chapter 11 of Bankruptcy Code; (B) Proposed Second Amended Joint Liquidating Plan; And (C) Blackline of Proposed Second Amended Joint Liquidating Plan, filed with the U.S. Court on March 22, 2019.

14. To facilitate the liquidation of the Aralez Entities and specifically Trading DAC, Aralez Luxembourg and Aralez Barbados, it would be helpful if certain Intercompany Claims could be netted off to the extent permitted under applicable law and the applicable entities’ respective balance sheets be updated to reflect the actual amounts due after such setoff. To this end, the liquidation plan for the Chapter 11 Entities located in the U.S. permits the Chapter 11 Entities to extinguish and/or cancel all claims held by one Chapter 11 Entity against another Chapter 11 Entity or API. API is similarly seeking this Court’s authority to transfer and assign some or all of the Intercompany Claims it holds to its affiliates.

Freeland Affidavit at paras. 27-28, Applicant’s Motion Record, Tab 2.

15. Deerfield, which is a secured creditor of all entities against which API has an outstanding Intercompany Claim, will suffer a shortfall on its advances under the Facility Agreement. There are no unencumbered funds or assets available to API's affiliates to satisfy the Intercompany Claims. The transfer of Intercompany Claims would be done solely to facilitate the wind up of various entities in the most efficient manner possible. No cash will leave API as a result of the transfer of any Intercompany Claims.

The Eighth Report of the Monitor dated March 21, 2019 (the "Monitor's Report") at para. 29; Freeland Affidavit at paras. 29-30, Applicant's Motion Record, Tab 2.

F. STAY EXTENSION

16. The Initial Order granted a stay of proceedings up to and including September 7, 2018 (the "Stay Period"). The Stay Period was most recently extended to April 19, 2019.

Freeland Affidavit at para. 31, Applicant's Motion Record, Tab 2.

17. The Applicant submits that the Stay Period be extended to July 31, 2019 to allow it to:
- (a) Address any post-closing matters ancillary to the SPA Transaction, including completing the Adjustment Process;
 - (b) Review and address the remaining Claims; and
 - (c) Distribute the Sale Proceeds to its stakeholders.

Freeland Affidavit at para. 32, Applicant's Motion Record, Tab 2.

18. The Monitor supports the extension of the Stay Period to July 31, 2019 and Deerfield does not oppose the extension.

The Monitor's Report at para. 44; Freeland Affidavit at para. 33, Applicant's Motion Record, Tab 2.

PART III - ISSUES

19. The issues on this motion are whether the Court should approve an order:
- (a) Authorizing the transfer and assignment of Intercompany Claims for nominal consideration; and
 - (b) Extending the Stay Period to July 31, 2019.

PART IV - THE LAW

A. TRANSFER OF INTERCOMPANY CLAIMS

20. Section 11 of the CCAA provides the Court with the power to make any order that it considers appropriate in the circumstances. The Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)* confirmed that this appropriateness requirement is to be assessed with reference to whether the proposed relief furthers the purposes underlying the CCAA.

CCAA, s. 11; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 70-71, Applicant's Book of Authorities, Tab 1.

21. Courts have repeatedly recognized that a fundamental purpose of the CCAA is to achieve the maximum value available for stakeholders.

Dondeb Inc., Re, 2012 ONSC 6087 ["*Dondeb*"] at para. 15, Applicant's Book of Authorities, Tab 2.

22. In *AbitibiBowater, (Re)*, the Court approved a series of intercompany transactions outside of a plan of arrangement in order to prevent adverse tax consequences arising from

the repayment of an intercompany note. The Court noted that, among other things, there were economic reasons for the tax restructuring and the restructuring appeared reasonable and legitimate.

AbitibiBowater, Re, 2009 QCCS 5833 at paras. 29-32, Applicant's Book of Authorities, Tab 3.

23. In this case, the Aralez Entities are in the process of winding down. While most of those entities are located in North America, Trading DAC, Aralez Luxembourg and Aralez Barbados are located in Ireland, Luxembourg and Barbados, respectively. The transfer and netting off of certain Intercompany Claims will facilitate the liquidation of these entities, and in some cases, assist in determining the type of liquidation proceedings available to them.

Freeland Affidavit at paras. 27-28, Applicant's Motion Record, Tab 2.

24. As a result, the transfer of Intercompany Claims is expected to decrease the costs of winding down the Aralez Entities, thus maximizing the proceeds distributable to the stakeholders of API, which has been judicially recognized as a fundamental purpose of the CCAA regime.

Freeland Affidavit at para. 30, Applicant's Motion Record, Tab 2.

Dondeb at para. 15, Applicant's Book of Authorities, Tab 2.

25. Moreover, the transfer of Intercompany Claims is in the best interests of API's stakeholders and will not prejudice those stakeholders either individually or in the aggregate.

26. In particular, Deerfield, which is the only secured creditor of the Aralez Entities and is a secured creditor of all entities against which API has an outstanding Intercompany Claim, will suffer a shortfall on its recovery against the Aralez Entities' assets. None of API's affiliates have any unencumbered funds or assets to satisfy the Intercompany Claims, such that the setting off of Intercompany Claims would be done solely to facilitate each entity's ability to wind up in the most efficient manner. No cash will leave API as a result of these transfers. Moreover, in light of API's inability to actually collect on any Intercompany Claims, API will not lose any material assets by assigning those claims, suggesting that no prejudice to Deerfield will result from such assignments. In fact, by facilitating the efficient winding up of the Aralez Entities, the transfer of Intercompany Claims will be beneficial to Deerfield. Furthermore, the draft order expressly provides that any transfer of Intercompany Claims be done with the consent of Deerfield and the Monitor or on further order of the Court, thus preserving Deerfield's involvement in the proposed transfer of any Intercompany Claims.

Freeland Affidavit at paras. 29-30, Applicant's Motion Record, Tab 2;
Monitor's Report at para. 29.

27. The transfer of certain Intercompany Claims is a fair and appropriate mechanism that is beneficial to Deerfield and will not prejudice any of API's other stakeholders. The Monitor supports the proposed transfers. In light of the above, the Applicant respectfully submits that this relief be granted pursuant to this Court's broad and flexible jurisdiction under s. 11 of the CCAA.

Monitor's Report at para. 29.

B. EXTENSION OF THE STAY PERIOD

28. An extension of the Stay Period is required until and including July 31, 2019 to give the Applicant sufficient time to address the Claims, various post-closing matters under the SPA Transaction and other restructuring matters. The current Stay Period expires on April 19, 2019.

Freeland Affidavit at paras. 31-32, Applicant's Motion Record, Tab 2.

29. Under Section 11.02 and pursuant to Section 11.02(3) of the CCAA, the Court may extend the stay of proceedings when 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. In granting an extension of a stay period, the Court in *Canwest Global Communications Corp (Re)* considered that:

- (a) The cash-flow forecast indicated that the debtors had sufficient cash resources to operate throughout the extension;
- (b) The monitor supported the extension;
- (c) There was a lack of opposition to the motion; and
- (d) The debtors had acted and were continuing to act in good faith and with due diligence.

Canwest Global Communications Corp (Re), 2009 CarswellOnt 7169 (Sup Ct [Comm List]) at para. 43, Applicant's Book of Authorities, Tab 4.

31. In this case:
- (a) The cash flow forecast indicates that the Applicant has sufficient liquidity to operate during the proposed Stay Period;
 - (b) The Monitor supports the extension of the Stay Period to July 31, 2019;
 - (c) The Applicant is presently unaware of any opposition to the extension and no creditors are expected to be materially prejudiced as a result of the extension;
and
 - (d) the Applicant has acted and continues to act in good faith and with due diligence in respect of all matters relating to the CCAA Proceedings.

Freeland Affidavit at para. 33-35, Applicant's Motion Record, Tab 2;
Monitor's Report at para. 44.

32. For the reasons delineated above, the Stay Period should be extended to and including July 31, 2019.

PART V - ORDER SOUGHT

33. For all of the foregoing reasons, the Applicant respectfully requests that the Court grant the relief proposed herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of March, 2019.

A handwritten signature in black ink, appearing to read "R. H. H. H.", written over a horizontal line.

Stikeman Elliott LLP
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
2. *Dondeb Inc., Re*, 2012 ONSC 6087
3. *AbitibiBowater, Re*, 2009 QCCS 5833
4. *Canwest Global Communications Corp (Re)*, 2009 CarswellOnt 7169 (Sup Ct [Comm List])

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C. 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.

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