

**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 ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS
CANADA INC.**

Applicants

**FACTUM OF THE APPLICANTS
(Re Approval of the Bezafibrate Sale)
(Returnable December 17, 2018)**

December 13, 2018

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PART I - OVERVIEW

1. Aralez Pharmaceuticals Inc. ("**API**") and its wholly owned subsidiary Aralez Pharmaceuticals Canada Inc. ("**Aralez Canada**" collectively with API, the "**Applicants**") 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) dated August 10, 2018 (the "**Initial Order**"). Richter Advisory Group Inc. was appointed Monitor of the Applicants (the "**Monitor**") in these proceedings (the "**CCAA Proceedings**").

2. This factum is in support of the motion brought by the Applicants seeking:

(a) An order, substantially in the form of the draft order attached at Tab "3" of the Motion Record:

(i) approving the asset purchase agreement dated December 6, 2018 (the "**Bezafibrate APA**") between Aralez Canada and Intercept Pharmaceuticals, Inc. ("**Intercept**"), for the sale of the Bezafibrate Assets (defined below) (the "**Bezafibrate Sale**"); and

- (ii) sealing the Confidential Supplement (the “**Confidential Supplement**”) to the Sixth Report of the Monitor dated December 12, 2018 (the “**Monitor’s Report**”); and
- (b) 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 Adrian Adams, sworn December 6, 2018 (the “**Adams Affidavit**”). Capitalized terms not defined herein have the meaning ascribed to them in the Adams Affidavit.

A. Background to the Restructuring Proceedings

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

Adams Affidavit at paras. 4-5, Applicants’ Motion Record, Tab 2.

5. On August 10, 2018, the Applicants were granted creditor protection and related relief under the CCAA pursuant to the Initial Order, thus commencing the CCAA Proceedings. On the same date, 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 (together with the CCAA Proceedings, the “**Restructuring Proceedings**”).

Adams Affidavit at paras. 6-7, Applicants’ Motion Record, Tab 2.

6. The Aralez Entities retained Alvarez & Marsal Healthcare Industry Group, LLC and Alvarez & Marsal Canada Inc. to assist the Aralez Entities in their restructuring efforts, including assistance in cash management and implementing a restructuring plan. The Aralez Entities also engaged the services of Moelis & Company LLC to act as the investment banker to the Aralez Entities during these proceedings.

Adams Affidavit at para. 8, Applicants’ Motion Record, Tab 2.

7. After careful analysis of the alternatives available in the Restructuring Proceedings, and having duly considered the interests of all stakeholders, the Aralez Entities, with the assistance of their advisors and counsel, determined that the appropriate approach was to divest substantially all of their assets through one or more sales pursuant to (a) the CCAA with respect to the Applicants and (b) the Bankruptcy Code with respect to the Chapter 11 Entities.

Adams Affidavit at para. 14, Applicants’ Motion Record, Tab 2.

8. On September 18, 2018, the Aralez Entities entered into three stalking horse agreements (the “**Stalking Horse Agreements**”) one of which was directly and exclusively applicable to the assets and business of the Applicants (the “**Canadian Stalking Horse Agreement**”).

Adams Affidavit at para. 15, Applicants’ Motion Record, Tab 2.

9. The Canadian Stalking Horse Agreement is an agreement between API, Aralez Canada and Nuvo Pharmaceuticals Inc. (the "**Canadian Purchaser**"), pursuant to which the Canadian Purchaser will purchase all of the shares of Aralez Canada (the "**Canadian Assets**"), which are held by API, for the purchase price of \$62,500,000 (subject to certain adjustments).

Adams Affidavit at para. 16, Applicants' Motion Record, Tab 2.

10. A sales process was approved by order of this Court on October 10, 2018 (the "**Sales Process**"). A concurrent sales process was approved in the U.S. Court with respect to the assets of the Chapter 11 Entities. The Applicants have been diligently promoting the Sales Process through compliance with the order.

Adams Affidavit at paras. 18-19, Applicants' Motion Record, Tab 2

11. As announced on November 29, 2018, the Canadian Purchaser was the highest bidder for the Canadian Assets. This Court subsequently approved the Canadian Stalking Horse Agreement on December 7, 2018. The parties expect the transaction to close prior to the end of this calendar year.

Adams Affidavit at para. 22, Applicants' Motion Record, Tab 2;
Monitor's Report at para. 7.

B. The Bezafibrate Sale

12. As successor to Tribute Pharmaceuticals Canada Inc. ("**Tribute**"), Aralez Canada is party to a Product Development and Profit Share Agreement with Allergan Pharmaceuticals International Limited ("**Allergan**") (as successor to Actavis Group PTC ehf) effective as of

May 4, 2011 (as amended, the “**Allergan Agreement**”, together with the Product IP License and the Purchased Regulatory Documentation, the “**Bezafibrate Assets**”).

Adams Affidavit at paras. 23-24, Applicants’ Motion Record, Tab 2.

13. Pursuant to the Allergan Agreement, Aralez Canada has agreed to develop and, if approved, market products containing bezafibrate (“**Bezalip Products**”) in the United States.¹

Adams Affidavit at paras. 23-24, Applicants’ Motion Record, Tab 2.

14. The Bezafibrate Assets are a non-core component of the Applicants’ business as the Bezalip Products are not approved or sold in the United States. At the time Tribute entered into the Allergan Agreement, the market in which Bezalip operated, had limited competition. By 2016, there were multiple generic competitors, such that the development and marketing of Bezalip as a monotherapy drug in the United States was considered by the Applicants to be challenging. The Applicants believe that, if they chose to sell Bezalip in the United States as a monotherapy drug, they would realize limited revenues by doing so.

Adams Affidavit at paras. 25-26, Applicants’ Motion Record, Tab 2.

¹ The Bezafibrate Assets exclusively relate to the development and, if approved, marketing of the Bezalip Products in the United States, even though the Bezafibrate Assets are held solely by Aralez Canada. For clarity, the Bezafibrate Assets do not include any agreements or assets related to the sale of the Bezalip Products in Canada. None of the Chapter 11 Entities are parties to, or have any interest in, the Allergan Agreement.

i. Attempts to Sell the Bezafibrate Assets

15. In February 2014, Tribute retained JSB Partners, LP (“**JSB**”), to act as an executive advisor in an effort to identify a partner or purchaser for the Bezafibrate Assets. The Applicants, with the assistance of JSB, contacted at least 96 parties regarding the Bezafibrate Assets, of which 28 parties expressed an interest, five parties signed a non-disclosure agreement and two parties submitted non-binding term sheets. At the time, one of the parties interested in the Bezafibrate Assets was Intercept, an international pharmaceutical company with operations in North America.

Adams Affidavit at paras. 28-29, Applicants’ Motion Record, Tab 2.

16. The aforementioned market process was suspended in 2015 due to the acquisition of Tribute by Pozen. In early 2017, Intercept contacted Aralez Canada to discuss a purchase of the Bezafibrate Assets. In response, senior executives of Aralez Canada conducted their own search for potential purchasers of the Bezafibrate Assets. Ultimately, the best offer received for the Bezafibrate Assets was from Intercept.

Adams Affidavit at paras. 29-30, Applicants’ Motion Record, Tab 2.

ii. Asset Purchase Agreement

17. Negotiations between the Applicants and Intercept for the sale of the Bezafibrate Assets began in the spring of 2017. These negotiations, which have been delayed by, and continued through, the CCAA Proceedings, concluded with the execution of the Bezafibrate APA, an associated assignment of rights under the Allergan Agreement and an agreed form

of amendment and restatement of the Allergan Agreement (the “**Amended Allergan Agreement**”).

Adams Affidavit at paras. 31, 34, Applicants’ Motion Record, Tab 2.

18. Allergan’s consent to the Bezafibrate Sale and its ultimate execution of the Amended Allergan Agreement are necessary for the transaction to close. Intercept expended significant time and effort to secure Allergan’s consent to the Bezafibrate Sale, and it is unclear that any other party would be able to do so.

Adams Affidavit at paras. 41-42, 50, Applicants’ Motion Record, Tab 2.

19. Pursuant to the Bezafibrate APA, and immediately following its execution, Intercept advanced a substantial deposit to an agreed upon escrow agent.

Adams Affidavit at para. 37, Applicants’ Motion Record, Tab 2;
Monitor’s Report at para. 32(iv).

20. Once the Bezafibrate Sale closes, and in exchange for certain consideration under the Bezafibrate APA, (a) the Applicants will grant, and Intercept will accept, the Product IP License in accordance with the terms of the Bezafibrate APA, and (b) Aralez Canada will sell, transfer, convey, assign and deliver (or cause its affiliates to do the same) to Intercept the Purchased Regulatory Documentation and the Allergan Agreement.

Adams Affidavit at para. 36, Applicants’ Motion Record, Tab 2.

21. Closing of the Bezafibrate Sale is conditional on, *inter alia*, the Applicants obtaining the order that is the subject of this motion.

Adams Affidavit at para. 41, Applicants' Motion Record, Tab 2.

22. The Bezafibrate Assets are excluded assets under the Canadian Stalking Horse Agreement. The Bezafibrate APA further mandates that no transactions approved through the Canadian sales processes or in the CCAA Proceedings may negatively impact the benefits conferred to Intercept under the Bezafibrate APA and requires that any transaction documentation for a sale approved under those processes explicitly note that the Bezafibrate Assets are not involved in any such approved sale(s) and that the benefits conferred under the Bezafibrate APA are not adversely affected by any such sale(s).

Adams Affidavit at paras. 21, 38, Applicants' Motion Record, Tab 2.

23. The Bezafibrate APA creates certain obligations, conditions and releases binding upon Aralez Canada (and its successors) subsequent to closing. The Canadian Stalking Horse Agreement is structured as a share deal, such that the aforementioned obligations will remain with Aralez Canada, which will be owned by the Canadian Purchaser following the closing of the transactions contemplated by the Canadian Stalking Horse Agreement. The Canadian Purchaser has been fully informed of the obligations and restrictions it may assume under the Bezafibrate APA and associated agreements, and does not oppose the Bezafibrate Sale.

Adams Affidavit at paras. 43-45, Applicants' Motion Record, Tab 2.

iii. Approval Outside of the Sales Process

24. Intercept's continued interest in the Bezafibrate Assets is driven by plans to create a combination drug utilizing their own patent-protected monotherapy product. The success of this plan is dependent on the Bezafibrate Sale proceeding expeditiously, such that Intercept has advised that the value of the Bezafibrate Assets depreciates every day that it is not able to develop them. It is therefore critical to Intercept that this transaction be closed as expeditiously as possible.

Adams Affidavit at para. 32, Applicants' Motion Record, Tab 2.

25. Relatedly, considerable expense has already been borne by Intercept and the Applicants in negotiating the Bezafibrate APA. Requiring the Applicants to conduct an additional sales process would require the Aralez Entities to incur significant legal fees and administrative expenses which are unnecessary given the exhaustive market outreach that the Applicants have already conducted to confirm that there are no better offers for the Bezafibrate Assets.

Adams Affidavit at paras. 33, 49, Applicants' Motion Record, Tab 2.

26. Intercept has further advised that it is not prepared to serve as a stalking horse bidder in a sales process nor is it prepared to extend its offer to purchase the Bezafibrate Assets for the duration of an additional sale process. Consequently, given the aforementioned time constraints and the costs associated with an additional sales process, requiring such a process could jeopardize the definitive offer from Intercept.

Adams Affidavit at paras. 33, 49, Applicants' Motion Record, Tab 2.

27. The Bezafibrate Sale has been approved by the respective Boards of Directors for each of the Applicants. The Bezafibrate Sale is also supported by the Monitor, the Canadian Purchaser and the DIP Agent.

Adams Affidavit at para. 51, Applicants' Motion Record, Tab 2.

PART III - ISSUES

28. The issues on this motion are whether to:
- (i) approve the Bezafibrate Sale; and
 - (ii) approve the sealing of the Confidential Supplement.

PART IV - THE LAW

C. The Bezafibrate Sale should be approved

29. Pursuant to s. 36 of the CCAA, this Court has the jurisdiction to approve a sale of assets outside of the ordinary course of business. Section 36(3) sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor's sale of assets outside the ordinary course of business:

- (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.

CCAA, s. 36.

30. CCAA courts have noted that the s. 36 criteria largely correspond with *Soundair* principles for approval of a sale of assets in an insolvency scenario, being:

- (a) Whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) The interests of all parties;
- (c) The efficacy and integrity of the process by which offers have been obtained; and
- (d) Whether there has been unfairness in the working out of the process.

Re Canwest Publishing Inc., 2010 ONSC 2870 at para. 13, Applicants' Book of Authorities, Tab 1; *Re Target Canada Co.*, 2015 ONSC 1487 at paras. 14-17, Applicants' Book of Authorities, Tab 2; *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) at para. 16, Applicants' Book of Authorities, Tab 3.

31. CCAA courts have previously approved sales procured in sales processes conducted outside of restructuring proceedings. The fact that a sale process leading to the proposed sale was not approved in the CCAA Proceedings “is not of itself abusive of the CCAA.” Rather, “it is the specific details of the (sales process) as conducted that will be scrutinized” to ensure the process and ultimate sale meets “the principles and requirements of section 36 of the CCAA.”

Re Sanjel Corp., 2016 ABQB 257 at paras. 70-71, Applicants’ Book of Authorities, Tab 4; *Re Nelson Education Ltd.*, 2015 ONSC 5557 at paras. 31-33, Applicants’ Book of Authorities, Tab 5.

32. For the reasons that follow and for the reasons discussed in the Confidential Supplement, the Bezafibrate Sale, satisfies each of the s. 36(3) criteria and the *Soundair* principles:

- (a) **The Sales Process was reasonable, effective and fair; sufficient effort was made to obtain the best price for the Assets:** The Applicants conducted two exhaustive market outreach proposals in 2014 and 2017 and have publicly communicated a willingness to sell their assets in the months preceding their restructuring. These efforts, which led to a lengthy negotiation with Intercept, were fair and reasonable in the circumstances and evidence sufficient efforts by the Applicants to obtain the best price for the Bezafibrate Assets;
- (b) **The Consideration is Reasonable and Fair:** The results of the above-described market outreach demonstrate that the consideration received from the Bezafibrate Sale would result in greater proceeds than could be realized for the Bezafibrate Assets in a liquidation or any additional sales process. The

consideration is fair and reasonable in light of both the arm's length negotiations that occurred prior to execution of the Bezafibrate APA and the lack of superior alternative offers for the assets. The Applicants believe that Intercept's offer for the Bezafibrate Assets is the best offer they can hope to obtain;

- (c) **Monitor Approval:** The Monitor has agreed with the Applicants' assessment of Intercept's offer and submitted a Report (i) stating that the Bezafibrate Sale is more beneficial to the Applicants' stakeholders than a liquidation of the Bezafibrate Assets, and (ii) recommending its approval;
- (d) **Consultation was Extensive:** The Applicants reviewed the Bezafibrate Sale with the Monitor, the DIP Agent and the Canadian Purchaser. All of these parties do not object to the approval of the Bezafibrate Sale;
- (e) **Effect of the Sale on Creditors and other Interested Parties:** The Bezafibrate Sale is expected to enhance recoveries for the Applicants' stakeholders as the consideration received is greater than what would otherwise be realized in a liquidation. The Bezafibrate Sale also permits the Canadian Stalking Horse Agreement to proceed unimpeded.

Adams Affidavit at paras. 21, 28-31, 33, 41-42, 49-53, Applicants' Motion Record, Tab 2; Monitor's Report at paras. 46-47.

33. For reasons related to the aforementioned depreciation of the Bezafibrate Assets, Intercept has advised that it will not serve as a stalking horse bidder in any subsequent sale process, and is not prepared to extend its offer to purchase the Bezafibrate Assets for the duration of any additional sale process.

Adams Affidavit at para. 49, Applicants' Motion Record, Tab 2.

34. The Bezafibrate Sale will maximize recoveries for the Bezafibrate Assets and is in the best interests of the Applicants' stakeholders. If the Applicants are forced to conduct an additional sales process for the Bezafibrate Assets, the delays and costs associated with that process may derail the Bezafibrate Sale, which is the best offer the Applicants expect to receive for the Bezafibrate Assets. As such, it is in the best interests of the Applicants and their stakeholders that this Court approve the Bezafibrate Sale without requiring an additional sales process.

Adams Affidavit at paras. 49, 52-53, Applicants' Motion Record, Tab 2.

D. The Confidential Supplement Should be Sealed

35. The Applicants request that the Court seal the Confidential Supplement to the Monitor's Report pending the closing of the Bezafibrate APA. The Confidential Supplement contains commercially sensitive information that may jeopardize the Bezafibrate Sale and any subsequent attempts to market the Bezafibrate Assets to the detriment of the Aralez Entities and their stakeholders.

Adams Affidavit at para. 48, Applicants' Motion Record, Tab 2.

36. Pursuant to the Ontario *Courts of Justice Act*, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential and sealed and not form part of the public record.

Courts of Justice Act, R.S.O. 1990, c. C. 43 at s. 137(2).

37. In *Sierra Club of Canada v. Canada (Minister of Finance)*, Justice Iacobucci adopted the following test to determine when a sealing order should be made:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 at para. 53, Applicants' Book of Authorities, Tab 6.

38. The Court has evaluated sealing requests by reference to these factors and sealed unredacted asset purchase agreements in restructuring proceedings on the basis that they contain highly sensitive commercial information, which, if disclosed prior to the closing of the related transaction, could jeopardize dealings with any future prospective purchasers.

Elleway Acquisitions Ltd. v. 4358376 Canada Inc., 2013 ONSC 7009 at paras. 46-48; Applicants' Book of Authorities, Tab 7. *Re Comstock Canada Ltd.*, 2014 ONSC 493 at para. 16; Applicants' Book of Authorities, Tab 8.

39. Protecting the disclosure of the Confidential Supplement (the disclosure of which could jeopardize the Bezafibrate Sale and cause harm to both the Applicants and their stakeholders) is an important commercial interest that should be protected. The salutary effects of sealing the Confidential Supplement—namely the protection of commercially

sensitive information that could negatively affect the Applicants and their stakeholders—
outweigh any deleterious effect of restricting the accessibility of court proceedings.

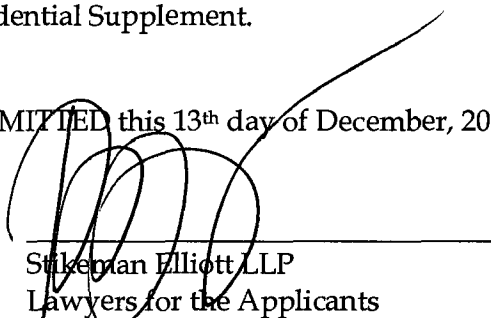
40. The Monitor supports the sealing of the Confidential Supplement for substantially
the reasons discussed above.

Monitor's Report at para. 26.

E. ORDER SOUGHT

41. For all of the foregoing reasons, the Aralez Entities request an order (i) approving the
Bezafibrate Sale; and (ii) sealing the Confidential Supplement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December, 2018.



Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Canwest Publishing Inc.*, 2010 ONSC 2870
2. *Re Target Canada Co.*, 2015 ONSC 1487
3. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
4. *Re Sanjel Corp.*, 2016 ABQB 257
5. *Re Nelson Education Ltd.*, 2015 ONSC 5557
6. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
7. *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, 2013 ONSC 7009
8. *Re Comstock Canada Ltd.*, 2014 ONSC 493

SCHEDULE "B"
RELEVANT STATUTES

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

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(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

Courts of Justice Act, R.S.O. 1990, c. C.43

137. Documents public

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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**ONTARIO
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(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(RETURNABLE DECEMBER 17, 2018)**

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