

**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
(Returnable October 10, 2018)**

October 5, 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 motion is brought by the Applicants seeking:

- (a) an order (the "**Bidding Procedures Order**") substantially in the form of the draft order attached at Tab "3" of the Motion Record and:
 - (i) authorizing and directing the CCAA Entities and Richter Advisory Group Inc. in its capacity as Monitor to commence a sales process (the

- “Sales Process”) pursuant to the bidding procedures in the form attached as Schedule “A” (the “Bidding Procedures”) to the Bidding Procedures Order in accordance with its terms and perform their respective obligations thereunder;
- (ii) authorizing the Applicants, *nunc pro tunc*, to execute the Canadian Stalking Horse Agreement (as that term is defined below);
 - (iii) approving the Bid Protections (as that term is defined below);
 - (iv) approving a charge in respect of the Bid Protections (the “Bid Protections Charge”) on the Applicants’ current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situated, including all proceeds thereof (the “Property”); and
 - (v) approving the amendment to the Genus APA (as that term is defined below) and related relief;
- (b) an order (the “Claims Procedure Order”) substantially in the form of the draft order attached at Tab “4” of the Motion Record, approving a process to solicit Claims (as that term is defined in the Claims Procedure Order) against the Applicants and the establishment of a claims bar date for filing Proofs of Claim (as that term is defined below);
- (c) an order (the “Stay Extension Order”), substantially in the form of the draft order attached at Tab “5” of the Motion Record, extending the stay of proceedings (the “Stay Period”) in respect of the Applicants to December 7, 2018; and
- (d) such further and other relief as this Court deems just.

PART II - THE FACTS¹

A. Background to the Restructuring Proceedings

3. 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 (“**Aralez DAC**” and collectively, the “**Chapter 11 Entities**” and with the Applicants, the “**Aralez Entities**”).

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

4. 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 (the “**Chapter 11 Proceedings**” and together with the CCAA Proceedings, the “**Restructuring Proceedings**”).

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

5. Since commencing the Restructuring Proceedings, the Applicants have been working diligently to maintain the stability of their operations, manage relationships with key

¹ The facts with respect to this motion are more fully set out in the affidavits of Andrew I. Koven, sworn August 9, 2018 (the “**Koven Affidavit**”) and Adrian Adams, sworn October 1, 2018 (the “**Adams Affidavit**”).

stakeholders, carry out the terms of the Initial Order and develop a sales process. As a result of these efforts, the Aralez Entities have continued to operate without significant disruption.

Adams Affidavit at para. 11, Applicants' Motion Record, Tab 2.

B. The Development of the Sales Process and Stalking Horse Agreement

6. Prior to the commencement of the Restructuring Proceedings, the Aralez Entities engaged in a thorough review of their strategic alternatives, with the guidance of their legal and financial advisors. After such review and in consideration of the interests of all stakeholders, the Aralez Entities determined that the appropriate approach was to divest substantially all of their assets through one or more sales pursuant to the CCAA or Bankruptcy Code, as applicable. In connection with this approach, the Aralez Entities advised the Court that they had entered into letters of intent with respect to a material portion of their assets with the intention of returning to the Court with definitive documentation.

Koven Affidavit at paras. 74-75, Applicants' Motion Record, Tab 2 - Exhibit A.

7. After an extensive series of arm's length, good faith negotiations, the Applicants have entered into purchase agreements for the assets identified in the above-mentioned letters of intent and now seek approval of a sales process in which those purchase agreements would serve as stalking horse agreements.

Koven Affidavit at para. 78, Applicants' Motion Record, Tab 2 - Exhibit A; Adams Affidavit at para. 14, Applicants' Motion Record, Tab 2.

i. **Canadian Stalking Horse Agreement²**

8. The Canadian Stalking Horse Agreement offers significant value for the Applicants' stakeholders and is an excellent starting point for the Sales Process contemplated by the Bidding Procedures.

9. Under the Canadian Stalking Horse Agreement, Nuvo Pharmaceuticals Inc. (the "**Canadian Purchaser**") will purchase the shares of Aralez Canada (the "**Canadian Assets**") for the purchase price of \$62,500,000, subject to better offers and the approval of the Canadian Court (the "**Canadian Stalking Horse Agreement**").

Adams Affidavit at para. 20, Applicants' Motion Record, Tab 2.

10. The Canadian Stalking Horse Agreement provides for bid protections in favour of the Canadian Purchaser, consisting of a Termination Fee of \$2,187,500 and an Expense Reimbursement payment of all reasonable out-of-pocket expenses up to \$575,000 (the "**Bid Protections**") which together represent up to 4.3% of the purchase price. The Bid Protections are to be secured by the Bid Protections Charge. The Bid Protections were the subject of extensive negotiations and are necessary components of the Canadian Stalking Horse Agreement.

Adams Affidavit at paras. 20-23, Applicants' Motion Record, Tab 2.

11. The Chapter 11 Entities are concurrently seeking approval of the Vimovo Stalking Horse Agreement and the Toprol Stalking Horse Agreement (as defined below; together with the Canadian Stalking Horse Agreement, the "**Stalking Horse Agreements**"). The

² Capitalized terms used in this section but not otherwise defined shall have the definition attributed to them in the Canadian Stalking Horse Agreement. To the extent there are any ambiguities or inconsistencies between this summary and the Canadian Stalking Horse Agreement, the terms of the Canadian Stalking Horse Agreement shall govern in all respects.

Stalking Horse Agreements together contemplate the purchase of a significant portion of the Aralez Entities' assets, including a significant portion of the Applicants' assets.

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

12. The Vimovo Stalking Horse Agreement is between Pozen, Aralez DAC and Nuvo Pharmaceuticals (Ireland) Limited, an affiliate of the Canadian Purchaser. The Vimovo Stalking Horse Agreement relates to the purchase of, among other things, royalties collected by Pozen for the pain-management drug product Vimovo (the "**Vimovo Assets**"), which rights are owned by Pozen, for the price of \$47,500,000, subject to better offers and the approval of the U.S. Court (the "**Vimovo Stalking Horse Agreement**").

Adams Affidavit at para. 24, Applicants' Motion Record, Tab 2.

13. The Canadian Stalking Horse Agreement and Vimovo Stalking Horse Agreement are both conditional upon the satisfaction or waiver of certain conditions contained in the opposite agreement.

Adams Affidavit at paras. 21(j) and 26(f), Applicants' Motion Record, Tab 2.

14. The Toprol Stalking Horse Agreement is between Aralez DAC and Toprol Acquisition LLC (an affiliate of the Deerfield Management Company, L.P. (the "**DIP Agent**") and the pre-filing secured lenders of the Aralez Entities). This agreement contemplates a credit bid of \$130,000,000 for the Toprol-XL franchise (together with the Canadian Assets and the Vimovo Assets, the "**Purchased Assets**"), subject to better offers and the approval of the U.S. Court (the "**Toprol Stalking Horse Agreement**").

Adams Affidavit at para. 34, Applicants' Motion Record, Tab 2.

15. The three Stalking Horse Agreements will serve to set the floor, or minimum acceptable bids, for the sales processes to follow, which are designed to achieve the highest or otherwise best offer for the Purchased Assets. The Stalking Horse Agreements set a competitive starting point for the sale process and present the best option for maximizing value for the Aralez Entities' stakeholders.

Adams Affidavit at para. 19, Applicants' Motion Record, Tab 2.

ii. The Bidding Procedures³

16. The Bidding Procedures set out the process for potential bidders to make higher or otherwise better offers for the assets of the Applicants, including the manner in which bids qualify, the procedures for bid receipt and negotiation, auction conduct, the selection and approval of successful bidders and any related timelines. The Bidding Procedures provide a fair and efficient process to canvass the market for offers superior to the Canadian Stalking Horse Agreement.

Adams Affidavit at paras. 37-38 & 40, Applicants' Motion Record, Tab 2.

17. The Sales Process contemplated under the Bidding Procedures is designed such that all of the Aralez Entities will conduct bidding and auction processes in a coordinated fashion, with the same procedures and timelines, in an effort to maximize value, maintain flexibility and reduce the overall cost of the Sales Process. The Bidding Procedures allow prospective purchasers to bid for a combination of assets from the Applicants and the Chapter 11 Entities. This degree of coordination is intended to encourage as many bidders as

³ Capitalized terms used in this section but not otherwise defined shall have the definition attributed to them in the Bidding Procedures. To the extent there are any ambiguities or inconsistencies between this summary and the Bidding Procedures, the terms of the Bidding Procedures shall govern in all respects.

possible to put forth their best offers. Approval of the Bidding Procedures is being sought in the U.S. Court on or about October 10, 2018.

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

18. The Bidding Procedures were developed under the supervision of the Monitor and are the culmination of arm's length negotiations with the stalking horse purchasers.

Adams Affidavit at para. 37, Applicants' Motion Record, Tab 2.

19. The Bidding Procedures contemplate 40 days from the granting of the proposed Bidding Procedures Order to the Bid Deadline, with an additional 10 days between the Bid Deadline and the Sale Hearing to hold an auction (if necessary) and determine the Successful Bidder or Successful Bidders. The Applicants cannot solicit bids for the Canadian Assets until the granting of the Bidding Procedures Order.

Adams Affidavit at paras. 21, 41, Applicants' Motion Record, Tab 2.

20. The key dates under the Bidding Procedures are as follows:

- (a) **November 19, 2018:** Bid Deadline
- (b) **November 21, 2018:** Deadline to Notify Qualified Bidders
- (c) **November 27, 2018:** Auction (if required)
- (d) **November 28, 2018:** Notice of Successful Bidders
- (e) **November 29, 2018:** Sale Hearing, conducted in the U.S. and Canada, jointly, concurrently or as otherwise determined by the Courts.

Adams Affidavit at paras. 41 and 43, Applicants' Motion Record, Tab 2.

C. The Claims Process⁴

21. The Canadian Stalking Horse Agreement requires a claims process be conducted to solicit Claims both as against the Applicants and their directors and officers (the “Claims Process”). The Claims Process, which will run concurrently with the Bidding Procedures, is scheduled to conclude on November 29, 2018.

Adams Affidavit at paras. 49-50 and 58, Applicants’ Motion Record, Tab 2.

22. The Claims Process has been designed so that the Applicants, the Monitor and the Court can obtain a clear picture of the universe of claims that the Applicants may have to contend with in the context of their CCAA Proceedings.

Adams Affidavit at para. 53, Applicants’ Motion Record, Tab 2.

23. The Claims Process also contemplates Claims be submitted in respect of the Applicants’ directors and officers. Pursuant to the Initial Order, the Applicants indemnified their directors and officers against certain obligations and liabilities, secured by a charge in the amount of up to \$1 million (the “D&O Charge”). The call for D&O Claims is necessary to understand the scope and nature of any potential claims against the directors and officers in order to be able to identify and address any claims that may be secured by the D&O Charge and to discharge the D&O Charge in connection with any plan or sale.

Adams Affidavit at para. 52, Applicants’ Motion Record, Tab 2.

⁴ Capitalized terms used herein but not otherwise defined shall have the definition attributed to them in the Claims Procedure Order. To the extent there are any ambiguities or inconsistencies between this summary and the Claims Procedure Order, the terms of the Claims Procedure Order shall govern in all respects.

24. The Applicants have developed the proposed Claims Process with input from their counsel and financial advisors, the Monitor and its counsel, the DIP Agent and its counsel, and the Canadian Purchaser.

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

25. The Claims Process governs the manner in which the Claims Process will be conducted. The Claims Process, as encapsulated in the Claims Procedure Order, describes, among other things:

- (a) the definition of a Claim;
- (b) the procedures by which the Monitor will publicize the Claims Process;
- (c) the manner in which a claimant may submit proof of potential Claims to the Monitor by filing a form evidencing their Claim (the "Proof of Claim");
- (d) the potential to return to court to establish the mechanism for adjudication and resolution of Claims; and
- (e) the Claims Bar Date, being 5:00 p.m. Eastern Time on November 29, 2018 with respect to Pre-filing Claims and D&O Claims, and the later of (i) the Claims Bar Date for Pre-filing Claims and D&O Claims (that being November 29, 2018) and (ii) the date that is 10 Business Days after the Monitor sends a Claims Package in accordance with the Claims Procedure Order with respect to Restructuring Claims.

Adams Affidavit at paras. 54-60, Applicants' Motion Record, Tab 2.

26. The Claims Procedure Order contemplates certain Claims as Excluded Claims, being Claims secured by Charges (as defined in the Initial Order or any subsequent Order of the Court) and Claims relating to the pre-filing debt of Deerfield owed by the Applicants.

Claims Procedure Order at para. 2(p), Applicants' Motion Record, Tab 4.

D. The Amendments to the Genus APA

27. On July 10, 2018, API and Pozen entered into a purchase agreement (the "Genus APA") with Genus Lifesciences, Inc. ("Genus"), pursuant to which API and certain of the Chapter 11 Entities transferred or licensed certain assets relating to the pharmaceutical product sold under the brand name Yosprala in the United States to Genus. To correct certain provisions in the drafting of the Genus APA, API, Pozen and Genus have entered into an amendment to the Genus APA dated September 17, 2018 (the "Genus Amendment").

Adams Affidavit at paras. 27-28, Applicants' Motion Record, Tab 2.

28. The Genus Amendment requires, among other things, that API seek approval of the Genus Amendment, the assumption of the Genus APA as amended, the assumption of the licences granted under the Genus APA and approval of such obligations required to give effect to the Genus APA from the Canadian Court. The Chapter 11 Entities are simultaneously seeking approval of the Genus Amendment, the assumption of the Genus APA, as amended, and the assumption of the licenses granted thereunder in the Chapter 11 Proceedings.

Adams Affidavit at paras. 32-33, Applicants' Motion Record, Tab 2.

PART III - ISSUES

29. The issues on this motion are as follows:

- (a) with respect to the Bidding Procedures Order, whether to:
 - (i) approve the Canadian Stalking Horse Agreement, the associated Bid Protections and Bid Protections Charge;
 - (ii) approve the Bidding Procedures; and
 - (iii) approve the amendment to the Genus APA and related relief;
- (b) with respect to the Claims Procedure Order, whether to approve the Claims Process; and
- (c) with respect to the Stay Extension Order, whether to extend the Stay Period to and including December 7, 2018.

PART IV - THE LAW

A. The Canadian Stalking Horse Agreement, Bid Protections and Bid Protections Charge Should be Approved

30. The remedial nature of the CCAA confers broad powers to facilitate restructuring, including the power to approve a sale process in relation to a CCAA debtor's business and assets, prior to or in the absence of a plan of compromise and arrangement.

Nortel Networks Corp (Re), [2009] OJ No 3169 (SCJ) at para. 48
[*Nortel*], Applicants' Book of Authorities (the "BOA"), Tab 1;
CCAA, sections 11 and 36.

31. Stalking horse agreements facilitate sales by establishing a baseline price and deal structure for superior bids from interested parties, maximizing the value of a business for the benefit of its stakeholders and enhancing the fairness of the sales process. Stalking horse agreements have been approved concurrently with a sales process under the CCAA and in other insolvency proceedings.

Danier Leather Inc, Re, 2016 ONSC 1044 at para. 20 [*Danier*], BOA, Tab 2; *CCM Master Qualified Fund Ltd v Blutip Power Technologies Ltd*, 2012 ONSC 1750 at para. 7 [*CCM*], BOA, Tab 3; *Nortel* at para. 56, BOA, Tab 1.

32. In the present case, the Stalking Horse Agreements are the culmination of an exhaustive sales effort that first began with Moelis' engagement to evaluate strategic alternatives and establish a sales process. In its pre-filing process, Moelis reached out to 38 potential acquiring parties for either the whole company or a combination of the Vimovo royalties and certain Canadian assets and ultimately distributed a confidential presentation to 26 potential acquirers of the Vimovo Assets and certain Canadian Assets. A total of 14 parties received confidential presentations with respect to all of the Purchased Assets.

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

33. Since entering into the letters of intent and obtaining relief from this Court and the U.S. Court, Aralez Entities have been engaged in extensive, arm's length, good faith negotiations with the assistance from their advisors and involvement and oversight of the Monitor. The Stalking Horse Agreements are the product of those negotiations.

34. The Stalking Horse Agreements, including the Canadian Stalking Horse Agreement, set an excellent starting point for the Sales Process as contemplated by the Bidding Procedures and present the best option for maximizing value for the Applicants' stakeholders. More particularly, the Stalking Horse Agreements set the minimum bid floor in the Bidding Procedures, which are designed to solicit the best offers for the Aralez Entities' businesses.

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

35. As noted, the Canadian Stalking Horse Agreement provides for Bid Protections in the form of a Termination Fee and reasonable Expense Reimbursement. The total potential amount of the Bid Protections represents 4.3% of the Purchase Price. These fees are secured by a Bid Protections Charge against the Property.

Adams Affidavit at para. 21-22, Applicants' Motion Record, Tab 2.

36. Break fees and expense reimbursement payments have been approved by Courts as part of stalking horse agreements. These fees compensate stalking horse purchasers for the time, resources and risk taken in developing a stalking horse agreement. Such fees and payments also represent the price of stability, and thus some premium over simply providing for expenses may be expected. Courts recognize that such payments vary by case, but may justifiably reach up to 5% of the expected transaction value.

Danier at paras. 41-42, BOA, Tab 2; *CCM* at para. 13, BOA, Tab 3.

37. It has also been recognized that agreeing to bid protections and any consequent charges are matters of business judgement, and that judicial deference to the carefully considered business decisions of the debtor is appropriate if the decisions fall within a range of reasonableness.

Brainhunter Inc (Re), 2009 CarswellOnt 8207 (Ont SCJ) at para. 20 [*Brainhunter*], BOA, Tab 4; *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para. 40, BOA, Tab 5; *Pente Investment Management Ltd v Schneider Corp*, 42 OR (3d) 177 (Ont CA) at para. 36, BOA, Tab 6.

38. In this case, the Bid Protections and Bid Protections Charge were the subject of extensive arm's length negotiations and are reasonable in light of the significant value provided by the Canadian Stalking Horse Agreement. The Bid Protections and Bid

Protections Charge were a necessary component for the Canadian Purchaser to agree to the Canadian Stalking Horse Agreement, which as noted above, will be beneficial in maximizing value for the Applicants' stakeholders. The Applicants have been advised by Moelis that the amount of the Bid Protections is not unreasonable in a CCAA proceeding, and the Monitor has opined that the Bid Protections and the Bid Protections Charge are reasonable.

Adams Affidavit at paras. 23, Applicants' Motion Record, Tab 2;
the Report of the Monitor dated October 5, 2018 (the "Monitor's
Second Report") at para. 35.

B. The Genus Amendment Should be Approved

39. Section 11 of the CCAA provides that the Court may make any order that it considers appropriate in the circumstances. Debtor companies turn to the CCAA specifically for its flexibility and to facilitate creative but practical-minded restructuring solutions.

CCAA, section 11.

40. The Applicants require the Court's approval of the Genus Amendment and the transactions contemplated thereby, and the authorization to perform under the Genus Amendment and the Genus APA, in order to fulfill their obligations under the Genus Amendment.

Adams Affidavit at paras. 30-31, Applicants' Motion Record, Tab
2.

41. The Genus Amendment does not impose any material obligations on the Applicants.

The Monitor's Second Report at para. 39.

42. The Genus Amendment clarifications will permit Pozen to continue to have clear and valid title to certain patents and, accordingly, to properly include those patents in the purchased assets under the Vimovo Stalking Horse Agreement (or a Successful Bidder's

asset purchase agreement) which closing is cross-conditioned with the Canadian Stalking Horse Agreement. As such, the Genus Amendment is critical to the Sales Process and it is accordingly appropriate to approve the Genus Amendment and grant the related relief pursuant to section 11 of the CCAA.

Adams Affidavit at paras. 30-31, Applicants' Motion Record, Tab 2.

C. The Bidding Procedures Should Be Approved

43. In *Nortel*, the Court identified several factors to consider in determining whether to approve a sales process, which have since been consistently applied:

- (a) Is a sale warranted at this time?
- (b) Will the sale be of benefit to the whole "economic community"?
- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?

Nortel at para. 49, BOA, Tab 1; *Danier* at para. 23, BOA, Tab 2; *US Steel Canada Inc (Re)*, 2015 ONSC 2523 [*U.S. Steel*] at para 3, BOA, Tab 7; *Mustang GP Ltd (Re)*, 2015 ONSC 6562 at paras. 37-38, BOA, Tab 8; *Brainhunter* at para. 13, BOA, Tab 4.

44. In *U.S. Steel* it was noted that, while not technically applicable at the process approval stage of a proceeding, the factors set out in s. 36(3) of the CCAA may be considered in approving a sales process. Section 36(3) of the CCAA provides:

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.

U.S. Steel at para. 8, BOA, Tab 7; *Brainhunter* at paras. 15-17, BOA, Tab 4; CCAA, s. 36(3).

45. In these circumstances, the Bidding Procedures provide an appropriate framework for the Sales Process to obtain the best offer for the Applicants' assets and business. Considering the *Nortel* Criteria and applicable factors set out in s. 36(3) of the CCAA, the Bidding Procedures should be approved as:

- (a) **A sale transaction is warranted at this time:** The Applicants are insolvent, unable to indefinitely continue operations in their current state and must restructure to preserve their business. A sale will maximize value for the Applicants' stakeholders, either through allowing the business to continue as a going-concern or through ascribing fair market value to the business and assets of the Applicants;
- (b) **A sale will benefit the whole economic community:** The Canadian Stalking Horse Agreement, which sets the floor for other sale transactions, may contribute to a higher valuation for the Applicants' assets, thereby increasing the sale proceeds and optimizing the distributions received by creditors. More generally, the Bidding Procedures are designed to solicit the highest value

available for the Property, suggesting that the value that results from any sale transaction will benefit the Applicants' stakeholders;

- (c) **No objections:** The DIP Agent is supportive of the Sales Process. No creditor has objected to the Bidding Procedures in the CCAA Proceeding to date, although objections have been raised in the U.S. Court and the Applicants will update the Court as they are resolved by the parties on the U.S. Court. Copies of the objections filed in the U.S. Court are provided at Appendices "C" and "D" of the Monitor's Second Report;
- (d) **There was no better viable alternative:** As described throughout, the Aralez Entities determined after careful consideration that the Stalking Horse Agreements and Bidding Procedures were the best resolution for the Aralez Entities. The Bidding Procedures, with the stability provided by the Canadian Stalking Horse Agreement, represented the best option in the circumstances;
- (e) **Monitor Involvement:** The Monitor was involved in the negotiations that led to the Canadian Stalking Horse Agreement and Bidding Procedures and has opined that the Bidding Procedures provide for a fair and transparent marketing process that should allow the Aralez Entities to maximize realizations by seeking higher or otherwise better offers for the Canadian Assets. The Monitor is also of the view that the Bid Protections, including the requested priority charge, are fair and reasonable in the circumstance. The Monitor will continue to be involved in the Sales Process as it progresses; and
- (f) **The Consideration Received is Reasonable and Fair:** The Monitor is of the view that sufficient information was made available to potential acquirers to evaluate the transaction opportunity during the pre-filing marketing process. The Canadian Stalking Horse Agreement is the result of a lengthy, transparent and extensive marketing and negotiation process, thereby ensuring a fair value for the Applicants' assets and an excellent basis for the solicitation of otherwise better offers. The Sales Process contemplated by the related Bidding Procedures will elicit the best possible offers for the Applicants' assets.

Adams Affidavit at paras. 6, 12, 15-17, 19, 37 and 42, Applicants' Motion Record, Tab 2; the Monitor's Second Report at para. 35-36, 43.

46. The Bidding Procedures provide for an orderly and appropriately competitive process through which potential acquirers may submit bids for some or all of the Canadian Assets. Given the time constraints, and in light of the pre-filing marketing process, the Aralez Entities, with the assistance of their advisors, have structured the Bidding Procedures to market the Canadian Assets for a period of approximately 40 days in order to promote active bidding by potential acquirers and to confirm the highest or otherwise best offer reasonably available for the Canadian Assets.

Adams Affidavit at para. 45, Applicants' Motion Record, Tab 2; the Monitor's Second Report at para. 51.

47. The market has been aware for some time that the assets of the Aralez Entities are for sale, as described in the Applicants' initial application materials and the reports filed by the Monitor in this proceeding to date. Additionally, the Bidding Procedures will allow the Aralez Entities to conduct the Auction, if required, in a fair and transparent manner that will encourage participation by financially capable bidders with demonstrated ability to consummate a timely transaction(s).

The Monitor's Second Report at para. 51.

48. For the reasons above, it is the view of the Applicants, their advisors and the Monitor that the Canadian Stalking Horse Agreement, Bidding Procedures and Bid Protections represent the best option under the circumstances to maximize value for the Applicants' stakeholders.

D. The Claims Procedure Order Should Be Approved

49. Section 11 of the CCAA affords the Court the jurisdiction to make any order it considers appropriate in the circumstances, which includes the “well-accepted” ability to approve a process to solicit claims against the debtor company.

Re Toys “R” Us (Canada) Ltd, 2018 ONSC 609 at para. 8, BOA, Tab 9; *Timminco Ltd, Re*, 2014 ONSC 3393 at para. 40, BOA, Tab 10; CCAA, ss. 11, 12 and 19.

50. In this case, the proposed Claims Process accords with the Court’s discretion under the CCAA and typical practice in CCAA proceedings. It is flexible, expeditious and procedurally fair, ensuring an efficient solicitation of claims against the Applicants. The proposed Claims Process is the first step in a comprehensive claims process and therefore, meets the purpose of claims processes generally, which is “to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner.” The Applicants have preserved the right to return to the Court to establish a process for adjudicating and finally determining Claims.

Canwest Global Communications Corp (Re), 2011 ONSC 2215, at para. 40, BOA, Tab 11.

51. Considering these objectives, this Court should approve the proposed Claims Process because, *inter alia*:

- (a) it is necessary to ascertain the potential universe of Claims that may exist against the Applicants, as this will inform the Applicants’ restructuring efforts and will have an impact on the Sales Process;
- (b) it promotes a fair outcome for all involved parties by:

- (i) the inclusion of numerous advisors and other stakeholders in the development of the terms of the proposed Claims Process
- (ii) a public and transparent call for Claims;
- (iii) providing any Person with the opportunity to file a proof of claim prior to the applicable bar date if they wish to assert a Claim;
- (iv) allowing claimants sufficient time (approximately 50 days following the approval of the Claims Procedure Order) to deliver a proof of claim; and
- (v) including a detailed process for adjudicating disputed Claims.

Adams Affidavit at paras. 51, 53, 55-64, Applicants' Motion Record, Tab 2.

52. The Monitor is of the view that the Applicants' timetable to complete the Claims Process is achievable. The Monitor believes that the Claims Process is fair and reasonable and respectfully recommends that the Applicants' request for the approval of the Claims Process be granted.

The Monitor's Second Report at para. 63.

E. The Stay Period Should Be Extended

53. A second extension of the Stay Period is required until and including December 7, 2018 to give the Applicants sufficient time to execute and complete the sales process and continue dealing with other restructuring matters. Pursuant to section 11.02 of the CCAA, the Court may extend the stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor companies have acted and are acting in good faith and with due diligence.

CCAA, s. 11.02.

54. In *Canwest Global Communications Corp (Re)*, the Court granted an extension of the Stay Period to allow the debtors to continue working towards a solution that would result in their businesses continuing as a going concern. In support of that decision, the Court considered that: (a) the cash-flow forecast indicated that the debtors had sufficient cash resources to operate throughout the extension of the stay period; (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] OJ No 4788 (SCJ [Comm. List]) [*Canwest*] at para. 43, BOA, Tab 12.

55. The Applicants' situation is similar to that in *Canwest* in that: (a) the Applicants have sufficient liquidity to operate during the proposed Stay Period; (b) the Monitor supports the extension; (c) the Applicants' are 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 Applicants have acted and continue to act in good faith and with due diligence.

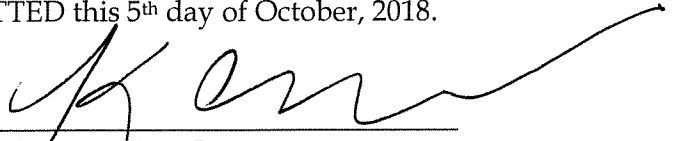
Adam's Affidavit at para. 7, Applicants' Motion Record, Tab 2;
the Monitor's Second Report at para. 65.

56. For the reasons described above, the Stay Period should be extended to and including December 7, 2018.

PART V - ORDER SOUGHT

57. For all of the foregoing reasons, the Aralez Entities request an order approving (i) the Canadian Stalking Horse Agreement, Bid Protections, Bid Protections Charge, and Bidding Procedures; (ii) the amendment to the Genus APA; (iii) the Claims Process; and (iv) the Stay Extension Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of October, 2018.

A handwritten signature in black ink, appearing to be 'J. A. ...', written over a horizontal line.

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Nortel Networks Corp (Re)*, [2009] OJ No 3169 (SCJ)
2. *Danier Leather Inc, Re*, 2016 ONSC 1044
3. *CCM Master Qualified Fund Ltd v Blutip Power Technologies Ltd*, 2012 ONSC 1750
4. *Brainhunter Inc (Re)*, 2009 CarswellOnt 8207 (Ont SCJ)
5. *BCE Inc v 1976 Debentureholders*, [2008] 3 SCR 560
6. *Pente Investment Management Ltd v Schneider Corp*, 42 OR (3d) 177 (Ont CA)
7. *US Steel Canada Inc (Re)*, 2015 ONSC 2523
8. *Mustang GP Ltd (Re)*, 2015 ONSC 6562
9. *Re Toys "R" Us (Canada) Ltd*, 2018 ONSC 609
10. *Timminco Ltd, Re*, 2014 ONSC 3393
11. *Canwest Global Communications Corp (Re)*, 2011 ONSC 2215
12. *Canwest Global Communications Corp (Re)*, [2009] OJ No 4788 (SCJ [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. - 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 30 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.

...

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.

...

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

...

Fixing deadlines

12 The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

...

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

- (i) the day on which proceedings commenced under this Act, and
 - (ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and
- (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

- (a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;
- (b) any award of damages by a court in civil proceedings in respect of
 - (i) bodily harm intentionally inflicted, or sexual assault, or
 - (ii) wrongful death resulting from an act referred to in subparagraph (i);
- (c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
- (d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or
- (e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

...

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.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED

Court File No: CV-18-603054-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF ARALEZ PHARMACEUTICALS INC. ET AL.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(RETURNABLE OCTOBER 10, 2018)**

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