

**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  
(Re CCAA Termination Order)  
(Returnable May 17, 2019)**

May 14, 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. ("**Richter**") was appointed Monitor (the "**Monitor**") in these proceedings (the "**CCAA Proceedings**").

2. This motion is brought by the Applicant seeking a CCAA termination order (the "**Termination Order**"), substantially in the form of the draft order attached at Tab "1A" of the Motion Record, *inter alia*:

- (a) Terminating these CCAA Proceedings and the Stay Period (defined below);
- (b) Terminating the Administration Charge, DIP Lender's Charge, D&O Charge, Key Employee Charge, Transactional Fee Charge and Bid Protections Charge (each defined below);

- (c) Approving the fees and disbursements of the Monitor (defined below) and its counsel;
- (d) Approving the activities of the Monitor, discharging the Monitor and releasing the Monitor from any potential claims against it;
- (e) Authorizing API to file an assignment into bankruptcy; and
- (f) Such further and other relief as the Court deems just.

## PART II - THE FACTS

### A. THE RESTRUCTURING PROCEEDINGS

3. 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 (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.

Affidavit of Christopher Freeland, sworn May 8, 2019 (the “Freeland Affidavit”) at paras. 3-4, Motion Record of the Applicant (the “Applicant’s Motion Record”), Tab 2.

4. On August 10, 2018, the CCAA Entities were granted creditor protection and related relief under the CCAA pursuant to the Initial Order. The Initial Order granted a stay of proceedings (the “Stay Period”) which was extended five times, most recently to July 31, 2019.

Freeland Affidavit at para. 6, Applicant’s Motion Record, Tab 2.

5. Also on August 10, 2018, 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 para. 7, Applicant’s Motion Record, Tab 2.

**B. SALES PROCESS**

6. Pursuant to a Court approved 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 share sale of Aralez Canada to the Purchaser for the price of US\$62.5 million, subject to certain adjustments to be determined at and after the transaction closed (the “**Closing**”), including an adjustment to reflect the working capital of Aralez Canada at the time of the Closing (the “**Adjustment Process**”). This Court approved the SPA Transaction on December 7, 2018 and the Closing occurred on December 31, 2018.

Freeland Affidavit at paras. 13-15, Applicant’s Motion Record, Tab 2.

7. Pursuant to the Adjustment Process, on March 15, 2019, the Purchaser delivered its calculation of Aralez Canada’s working capital (among other things) at the Closing (the “**Closing Date Statement**”). On April 4, 2019, API delivered a notice disputing certain elements of the Closing Date Statement. The parties have engaged in good faith negotiations with respect to this dispute and have reached an agreement in principle that would increase the price of the SPA Transaction by approximately US\$1.8 million. The parties are currently documenting that agreement.

Freeland Affidavit at paras. 14-16, Applicant's Motion Record, Tab 2.

8. In a separate process beginning in the spring of 2017, the CCAA Entities commenced negotiations with Intercept Pharmaceuticals, Inc. to sell certain rights to 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. 12, Applicant's Motion Record, Tab 2.

### C. DISTRIBUTIONS

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

10. As of May 3, 2019, and following a previous distribution of US\$2.3 million to Deerfield, the amount of the Reserve was approximately US\$5.6 million.

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

**D. CLAIMS PROCESS**

11. On October 10, 2018, this Court approved a claims process by which the CCAA Entities called for claims (the “**Claims**”) against themselves and their directors and officers (the “**Claims Procedure Order**”).

Freeland Affidavit at paras. 20-21, Applicant’s Motion Record, Tab 2.

12. All the Claims filed against Aralez Canada by the applicable deadlines contained in the Claims Procedure Order have been irrevocably settled or withdrawn. Two Proofs of Claim (as defined in the Claims Procedure Order) were filed against Aralez Canada after the applicable deadline contained in the Claims Procedure Order (the “**Late Claims**”). By virtue of their late filing, the Late Claims are barred and extinguished (with no distributions available in their respect) pursuant to various provisions of the Claims Procedure Order and the Aralez Canada CCAA Termination Order dated December 7, 2018 (the “**Aralez Canada CCAA Termination Order**”).

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

13. As part of the settlement of the dispute regarding the Closing Date Statement, API and the Purchaser have agreed that Aralez Canada will address the Late Claims. If Aralez Canada and the claimants cannot mutually resolve the Late Claims, it will be incumbent on the claimants to seek relief from this Court. Notice of this motion was sent to the claimants, who have both also been introduced to counsel for Aralez Canada.

Affidavit of Service of Shimshon E. Dukesz, sworn May 8, 2019 (the “**Service Affidavit**”).

Freeland Affidavit at para.25, Applicant’s Motion Record, Tab 2.

14. There are 34 Claims outstanding against API, all of which are unsecured. Given that Deerfield is a secured creditor of API that will suffer a shortfall on its recovery, API does not anticipate that there will be any recovery available in respect of its unsecured Claims, and therefore does not intend to seek a determination of those Claims.

Freeland Affidavit at paras. 26, Applicant's Motion Record, Tab 2.

#### **E. THE CHARGES**

15. The following Court-ordered super-priority charges were granted by the Court, in order of priority:

- (a) The Administration Charge (as defined and approved in the Initial Order) to secure the professional fees and disbursements of API's counsel, the Monitor and its counsel, the Financial Advisor and the Investment Banker;
- (b) The DIP Lender's Charge (as defined and approved in the Initial Order) to secure amounts owing under the DIP Agreement;
- (c) The Bid Protections Charge (as defined and approved in the Order Re Bidding Procedures Approval dated October 10, 2018) to secure the potential payment of certain bid protections to the Purchaser;
- (d) The Key Employee Charge (as defined and approved in the Order Re KEIP Approval & Related Charge dated November 28, 2018) to secure amounts payable to participants of the Key Employee Retention Plan and Key Employee Incentive Plan;
- (e) The D&O Charge (as defined and approved in the Initial Order) to secure the indemnity provided by the CCAA Entities to their directors and officers; and

- (f) The Transactional Fee Charge (as defined and approved in the Initial Order) to secure potential obligations owing to the Investment Banker under its engagement letter,

(collectively, the “Charges”).

Freeland Affidavit at para. 27, Applicant’s Motion Record, Tab 2.

- 16. Aside from the Administration Charge and the D&O Charge, the Charges are no longer required in the CCAA Proceedings. As such, the draft Termination Order provides that all Charges other than the Administration Charge and the D&O Charge be terminated as of the date of the Termination Order’s issuance, and that the Administration Charge and D&O Charge be subsequently terminated at the CCAA Termination Time (defined below).

Freeland Affidavit at para. 28, Applicant’s Motion Record, Tab 2.

#### **F. THE TERMINATION OF THE CCAA PROCEEDINGS**

- 17. The Chapter 11 Entities have previously sold substantially all of their assets and consequently sought judicial approval of a plan that will effectuate the winding down of their estates. The plan was approved by the U.S. Court on May 6, 2019.

Freeland Affidavit at para. 29, Applicant’s Motion Record, Tab 2.

- 18. API has no ongoing business activities and has sold substantially all of its Canadian assets in the SPA Transaction and in the transaction contemplated by the Bezafibrate APA.

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

- 19. Notwithstanding the foregoing, there are several issues that require resolution under the ambit of the CCAA Proceedings, including the completion of the Adjustment Process,

distributions to API's stakeholders and the winding up of certain subsidiaries of API. Once these issues are resolved, there will be no need for the CCAA Proceedings and, accordingly, API seeks an order permitting the CCAA Proceedings to be terminated and replaced by a bankruptcy proceeding, with Richter acting as the trustee in bankruptcy (the "Trustee").

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

20. Upon delivery of a certificate from the Monitor confirming that it has been advised by API that the outstanding issues in the CCAA Proceedings have been resolved (the "CCAA Termination Time"), the following will occur (among other things):

- (a) The CCAA Proceedings and the Stay Period will be terminated;
- (b) The Administration Charge and the D&O Charge will be terminated;
- (c) The Monitor will be discharged;
- (d) The Monitor will set aside C\$100,000 from the Reserve to fund the bankruptcy, which will be transferred to the Trustee once appointed; and
- (e) The Monitor will distribute the remainder of the Reserve to Deerfield.

Freeland Affidavit at para. 33, Applicant's Motion Record, Tab 2.

#### **G. APPROVAL OF THE MONITOR'S FEES AND ACTIVITIES**

21. API seeks to have the activities of the Monitor undertaken pursuant to its mandate in these CCAA Proceedings approved by the Court, *nunc pro tunc*, to the extent not specifically approved in prior orders of the Court. API is further seeking a release and discharge of any potential or actual claim of any person against the Monitor and its counsel in respect of their

conduct in these CCAA Proceedings, other than claims arising from their gross negligence or wilful misconduct.

Termination Order at paras. 13-14, 16-20, Applicant's Motion Record, Tab 2A.

Freeland Affidavit at para. 34, Applicant's Motion Record, Tab 2.

22. API further seeks approval of the fees and disbursements of the Monitor and its counsel up to April 30, 2019, inclusive, as well as the estimated fees and disbursements of the Monitor and its counsel to complete, or assist in the completion of, the administration of the CCAA Proceedings. API and Deerfield have reviewed, and do not oppose, these fees and disbursements.

Freeland Affidavit at para. 36, Applicant's Motion Record, Tab 2.

Ninth Report of the Monitor dated May 9, 2019 (the "Monitor's Report") at para. 57.

23. Notice of this motion has been provided to all parties that will be directly affected by the draft Termination Order, including the service list, the beneficiaries of the Charges and the claimants that filed the API Claims and the Late Claims, among other parties.

Service Affidavit.

### **PART III - ISSUES**

24. The issue on this motion is whether the Court should approve the Termination Order, which most notably provides for:

- (a) The termination the CCAA Proceedings; and

- (b) The termination of the Charges, the discharge of the Monitor, the release of the Monitor and its counsel and the approval of their fees and disbursements.

#### PART IV - THE LAW

##### A. THE CCAA PROCEEDINGS SHOULD BE TERMINATED

25. 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 the appropriateness requirement must be assessed with reference to whether the relief in question furthers the underlying purposes of the CCAA.

CCAA, s. 11.

*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 ["*Century Services*"] at paras. 70-71, Book of Authorities of the Applicant (the "BOA"), Tab 1.

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

For example, see *Re Dondeb Inc.*, 2012 ONSC 6087 ["*Dondeb*"] at para. 15, BOA, Tab 2.

27. The Supreme Court of Canada has also held that there is sufficient discretion under the CCAA to convert ongoing CCAA proceedings into bankruptcy proceedings.

*Century Services* at para. 80, BOA, Tab 1.

28. Courts have regularly granted orders either converting a CCAA proceeding into a bankruptcy proceeding or terminating a CCAA proceeding and granting a residual authority

for the debtor, Monitor or Chief Restructuring Officer to assign the debtor into bankruptcy, with the Monitor often authorized to assume the role of trustee in the bankruptcy.

*Re Armetec US Limited, Inc. et. al*, Order granted July 24, 2015, Court File No. CV-15-10950-00CL (Ont. Sup. Ct.) [*“Armetec”*] at paras. 3, 13, BOA, Tab 3.

*Re Golf Town Canada Inc. et. al*, Order granted March 29, 2018, Court File No. CV-16-11527-00CL (Ont. Sup. Ct.) [*“Golf Town”*] at paras. 9-11, BOA, Tab 4.

29. A similar order terminating the CCAA Proceedings at the CCAA Termination Time and allowing API to make an assignment into bankruptcy is appropriate in this case because:

- (a) All matters requiring resolution under the ambit of the CCAA will have been completed by the CCAA Termination Time;
- (b) The remaining issues, namely the windup of API and its affiliates, can be more efficiently and cheaply accomplished through a bankruptcy proceeding;
- (c) The assignment into bankruptcy will provide some finality in these restructuring proceedings;
- (d) Deerfield has agreed to provide a limited guarantee of the fees and disbursements of the Trustee; and
- (e) The Monitor supports the termination of these CCAA Proceedings on the terms set forth in the Termination Order and has consented to act as Trustee.

Freeland Affidavit at paras. 31-33, Applicant’s Motion Record, Tab 2.

Monitor’s Report at paras. 46, 58.

30. Ultimately, converting the CCAA Proceedings into bankruptcy proceedings will allow for the orderly wind-up of API in the most efficient manner available, thereby maximizing value for API’s stakeholders and consequently satisfying one of the fundamental

purposes of the CCAA. In light of the above, the Applicant respectfully submits that this relief be granted pursuant to this Court's flexible jurisdiction under section 11 of the CCAA.

Freeland Affidavit at paras. 32, 37, Applicant's Motion Record, Tab 2.

*Dondeb* at para. 15, BOA, Tab 2.

**B. THE COURT SHOULD APPROVE THE ANCILLARY RELIEF REQUESTED IN THE TERMINATION ORDER**

31. The draft Termination Order also provides for certain ancillary relief, including:

- (a) The approval of the activities of the Monitor, the discharge of the Monitor and the release of any potential claims against the Monitor and its counsel, other than claims arising from their gross negligence or wilful misconduct;
- (b) The approval of the fees and disbursements of the Monitor and its counsel;
- (c) The immediate termination of all Charges other than the Administration Charge and the D&O Charge; and
- (d) The termination of the Administration Charge and the D&O Charge at the CCAA Termination Time.

Termination Order at paras. 6-7, 9-12, 16-20, Applicant's Motion Record, Tab 2A.

Freeland Affidavit at paras. 28, 33-34, 36, Applicant's Motion Record, Tab 2.

32. A discussion of the foregoing relief as it relates to both the Monitor and to the Charges is included below.

**i. The Monitor**

33. As noted above, section 11 of the CCAA provides that a Court may make any order it considers appropriate in the circumstances. In the context of a CCAA termination order, this Court has regularly approved the activities of a Monitor, discharged a Monitor from the CCAA proceedings, released a Monitor and its counsel from any potential claims made against them and approved their fees and disbursements.

*CCAA, s. 11.*

*Armtec* at paras. 5-12, BOA, Tab 3.

*Golf Town* at paras. 5-8, 12-14, BOA, Tab 4.

34. In this case, the Court has already approved the activities of the Monitor up to and including its fifth report in the *Aralez Canada CCAA Termination Order*.

*Aralez Canada CCAA Termination Order* at para. 13, BOA, Tab 5.

35. Moreover, and particularly with respect to the fees and disbursements of the Monitor and its counsel, the Initial Order tracks the Court's Model Order in authorizing the Monitor and its counsel to be paid at their "standard rates and charges" and requiring that the Monitor and its counsel have their accounts approved by the Court.

*Initial Order* at paras. 29-30, BOA, Tab 6.

36. The question for the Court in deciding to approve the Monitor's fees and disbursements is whether those fees were "fair and reasonable in all of the circumstances." "The concerns are ensuring that the Monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process."

*Re Winalta Inc.*, 2011 ABQB 399 [“*Winalta*”] at para. 30, BOA, Tab 7.

37. Given the paucity of case law regarding the fees of the Monitor, Courts have often relied on the non-exhaustive list of factors used in reviewing the fees of a receiver, which include:

- (a) The nature, extent and value of the assets;
- (b) The complications and difficulties encountered;
- (c) The degree of assistance provided by the debtor;
- (d) The time spent;
- (e) The receiver’s knowledge, skill and experience;
- (f) The diligence and thoroughness displayed;
- (g) The responsibilities assumed;
- (h) The result of the receiver’s efforts; and
- (i) The cost of comparable services when performed in a prudent and economical manner.

*Winalta* at para. 24, BOA, Tab 7.

*Re Nortel Networks Corp.*, 2017 ONSC 673 at paras. 13-15, BOA, Tab 8.

38. In this case, the value of the assets of the Aralez Entities totalled in the hundreds of millions of dollars, with assets and corporate entities scattered throughout Canada, the U.S., Ireland, Barbados and Luxembourg. The size and international nature of the insolvency, as well as the administration of the Claims and the Adjustment Process, necessitated a more involved role from the Monitor, who consequently spent a significant amount of time

administering the CCAA Proceedings. Lastly, both the Monitor and its counsel have substantial knowledge, skill and experience in administering proceedings under the CCAA.

39. No party has raised any objection to the activities undertaken by the Monitor or its counsel and both API and Deerfield expressly do not oppose the fees and disbursements of the Monitor and its counsel, which the Monitor and its counsel believe to be reasonable and consistent with market rates for the provision of similar services in matters of this scope and complexity. Given that Deerfield is the sole secured creditor of API that will suffer a significant shortfall on its recovery, API respectfully submits that the Court should give significant weight to its decision to not oppose the fees of the Monitor or its counsel.

Freeland Affidavit at para. 35, Applicant's Motion Record, Tab 2.

Monitor's Report at para. 57.

Appendix "E" of the Monitor's Report at paras. 9-10.

Appendix "D" of the Monitor's Report at paras. 13-14.

**ii. The Charges**

40. All charges other than the Administration Charge and the D&O Charge are no longer necessary to the CCAA Proceedings. In particular:

- (a) The DIP Lender's Charge has been rendered unnecessary by the termination of the DIP Agreement (as defined in the Initial Order) and the anticipated payment of all the remaining Sale Proceeds to Deerfield;
- (b) The Bid Protections Charge was intended to secure the payment of bid protections owing to the Purchaser if its bid for the shares of Aralez Canada had failed. Given that the Purchaser's bid was ultimately successfully and led to the consummation of the Nuvo SPA, this Charge is no longer required;

- (c) The amounts secured by the Key Employee Charge have been paid; and
- (d) The amounts secured by the Transactional Fee Charge have been paid.

Freeland Affidavit at para. 28, Applicant's Motion Record, Tab 2.

41. Consequently, the draft Termination Order rightfully provides for the immediate termination of all of the Charges other than the Administration Charge and the D&O Charge, which will each be terminated at the CCAA Termination Time. The beneficiaries of the Charges have been provided with notice of this motion.

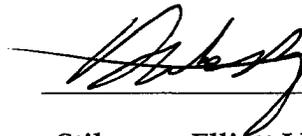
Freeland Affidavit at para. 28, Applicant's Motion Record, Tab 2.

Service Affidavit.

#### **PART V - ORDER SOUGHT**

42. For all of the foregoing reasons, the Applicant respectfully submits that the Court grant the Termination Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of May, 2019.



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**Stikeman Elliott LLP**  
Lawyers for the Applicant

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
2. *Re Dondeb Inc.*, 2012 ONSC 6087
3. *Re Armtec US Limited, Inc. et. al*, Order granted July 24, 2015, Court File No. CV-15-10950-00CL (Ont. Sup. Ct.)
4. *Re Golf Town Canada Inc. et. al*, Order granted March 29, 2018, Court File No. CV-16-11527-00CL (Ont. Sup. Ct.)
5. *Re Old API Wind-down Ltd.*, Order granted December 7, 2018, Court File No. CV-18-603054-00CL (Ont. Sup. Ct.)
6. *Re Old API Wind-down Ltd.*, Order granted August 10, 2018 (as amended and restated), Court File No. CV-18-603054-00CL (Ont. Sup. Ct.)
7. *Re Winalta Inc.*, 2011 ABQB 399
8. *Re Nortel Networks Corp.*, 2017 ONSC 673

**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.

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

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**FACTUM OF THE APPLICANT**  
**(RETURNABLE MAY 17, 2019)**

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