



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO: CV-24-00719237-00CL

DATE: January 29, 2025

NO. ON LIST: 3

TITLE OF PROCEEDING: Nuance Pharma Ltd. v. Antibe Therapeutics Inc. et al

BEFORE: JUSTICE OSBORNE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Andrew Winton	Counsel to the Former Directors	awinton@lolg.ca
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Jim Robinson	Receiver, FTI Consulting Canada Inc.	jim.robinson@fticonsulting.com

ENDORSEMENT OF JUSTICE OSBORNE:

[1] The Receiver moves for various relief:

a. an approval and reverse vesting order:

- i. approving the sale transaction between the Receiver as vendor and Taro Pharmaceuticals Inc. as Purchaser dated January 15, 2025;
- ii. vesting all right, title and interest in the Purchased Shares to be issued to the Purchaser, free and clear of encumbrances;
- iii. cancelling and terminating without consideration all equity interests of Antibe except for the Purchased Shares;
- iv. granting releases in favour of the Receiver and other parties;
- v. deeming Antibe to cease being a Respondent in these proceedings, upon delivery by the Receiver of its certificate; and
- vi. sealing the unredacted Transaction Agreement until the Transaction is closed or further order of the Court; and

b. an Ancillary Order:

- i. approving the Second Report of the Receiver dated January 15, 2025 and the activities of the Receiver and its counsel as described therein;
- ii. approving the fees of the Receiver and its counsel;
- iii. approving an interim distribution of funds to proven unsecured creditors on a *pro rata* basis, subject to certain sufficient holdbacks for costs to complete the administration of the Receivership and claims that have not yet been proven; and
- iv. a distribution of funds in Canadian dollars equivalent to USD \$519,000 of Traceable Funds, plus accrued interest, converted at the prevailing foreign exchange rate on the date of transfer, to Nuance as a permanent and indefeasible repayment of the indebtedness and obligations secured by the Nuance Constructive Trust.

[2] The Receiver relies on the Second Report. Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

- [3] The Service List has been served. I note in particular, given the nature and scope of the relief sought (and in particular, the proposed reverse vesting structure intended in part to preserve the value of tax loss carry forwards, certain scientific and research tax credits, and the transfer of certain patents and intellectual property), that the Service List includes the Department of Justice, the Canada Revenue Agency, the Ontario Securities Commission and the Ministry of Finance.
- [4] The relief sought today is unopposed, including by the Former Directors, given the agreement reached with respect to the scope and terms of the order sought.
- [5] For the reasons set out below, the relief sought is granted, with the exception of the proposed interim distribution of funds to proven unsecured creditors.
- [6] With respect to the Transaction with Taro, the Sale Process was conducted in accordance with the Sale Process Approval Order I granted earlier in this proceeding. It consisted of two phases. Following receipt of the Phase 2 Bids and further negotiations, the Receiver declared the Purchaser as the Successful Party and proceeded to negotiate the Transaction Agreement which was executed on January 15, 2025.
- [7] The terms of the Transaction Agreement are set out in the materials. The Purchaser will own 100% of the issued and outstanding shares of Antibe free and clear of encumbrances. The Purchase Price is set out in the materials proposed to be the subject of a sealing order, and is to be satisfied in part by a deposit equal to 10%. That has already been paid. The Transaction is on an “as is, where is” basis, scheduled to close no later than March 7, 2025.
- [8] The Receiver is of the view that the Transaction provides the best possible outcome for the stakeholders in the circumstances given that it represents the highest and best offer received in the Sale Process. It is supported by the Financial Advisor.
- [9] The Transaction contemplates a reverse vesting structure because the Purchaser requires certain intellectual property that is registered globally in approximately 41 jurisdictions around the world. In addition, the reverse vesting structure will preserve certain tax attributes including tax loss carry forwards and Scientific, Research and Experimental Development (SRED) credits, the value of which are an integral component of the consideration for the Purchaser.
- [10] This Court and other courts have granted reverse vesting orders in receiverships brought pursuant to section 101 of the *Courts of Justice Act* and section 243 of the *Bankruptcy and Insolvency Act*, as well as in CCAA proceedings. While they remain the exception and not the rule, in certain circumstances such as I am satisfied are present in this case, these structures are appropriate, and are consistent with the well-established purposes of a receivership to enhance and facilitate the preservation and realization of the assets of the debtor for the benefit of creditors.

- [11] I am satisfied that the Taro Transaction meets the *Soundair Principles*. Sufficient effort was made to obtain the best price. The Receiver did not act improvidently, and it considered the interests of all parties, and those are best served by the Transaction Agreement. The Sale Process was run efficaciously and with integrity and there was no resulting unfairness.
- [12] The *Harte Gold* factors applicable to a consideration of whether a reverse vesting order should be granted have also been satisfied here. Such a structure is necessary in this case as the debtor operates in a highly regulated environment in which its existing permits, licences and other rights are difficult or impossible to assign to a purchaser.
- [13] Moreover, and as set out above, maintaining the existing legal entities will preserve tax attributes and SRED credits, and avoid the very material cost, delay and risk relating to what would otherwise be necessary requests for approval of patent transfers which are registered in 41 separate international jurisdictions, but which also represent the core assets of Antibe and as such, are integral to the Transaction.
- [14] The Transaction yielded the highest value from all competitive bids submitted in the Sale Process. The Receiver is strongly of the view that the Transaction Agreement with Taro could not have proceeded except by way of a reverse vesting structure. I am satisfied that the proposed reverse vesting order produces the best economic outcome. I am also satisfied that stakeholders are not worse off under such a structure, and that major creditors are not prejudiced. The Receiver submits that no creditor will be prejudiced by transferring the Excluded Assets, the Excluded Contracts, and the Excluded Liabilities to ResidualCo, which will stand in the place of Antibe for the purposes of distributions to stakeholders.
- [15] Moreover, the purchase price proceeds attributable to the Property of Antibe will vest in ResidualCo and any creditor claims shall attach to those proceeds.
- [16] I am also satisfied that the proposed limited release in favour of the Receiver Released Parties is appropriate here. Each was critical to the identification, execution and completion of the Transaction.
- [17] I am further satisfied that Confidential Appendices “A” and “B” to the Second Report should be sealed as requested on the limited basis, pending closing of the Transaction, or until further order of the. These materials include information on the Phase 1 and 2 bids received and the unredacted Transaction Agreement. If the Transaction does not close and the property that is the subject of the Transaction is required to be remarketed and sold, the disclosure of this information would materially impair both the integrity of the subsequent sales process and the likely recoveries for stakeholders.
- [18] For all of these reasons, the sealing order is granted pursuant to section 137(2) of the *Courts of Justice Act* as it meets the factors articulated by the Supreme Court of Canada in *Sierra Club* and refined in *Sherman Estate*.

- [19] The Second Report and the activities set out therein are also approved, as is appropriate from time to time: see *Target Canada Co., Re*. The activities of the Receiver as set out in the Second Report are consistent with the mandate given to the Receiver in the original appointment order and are accretive to the progress of this proceeding and the steps necessary to be taken to maximize recovery for stakeholders.
- [20] The fees and disbursements of the Receiver and its counsel are fully set out in the Fee Affidavits. I am satisfied that they are reasonable, consistent with the activities described above, and are appropriate. They meet the overriding principle of reasonableness reflecting the knowledge, experience and skill of the Receiver and its counsel, the diligence displayed, responsibilities assumed, results of the efforts and cost of comparable services. See *Laurentian University of Sudbury, Re* and *Bank of Nova Scotia v. Diemer*.
- [21] Finally, and with respect to the proposed distributions, I am satisfied that the distribution of the Traceable Funds should be approved. As noted, it is not opposed. More substantively, the Receiver has conducted an extensive analysis and determined that the Traceable Funds constitute property that is subject to a constructive trust in favour of Nuance. It follows that those funds are beneficially owned by that party and should be paid out for its benefit.
- [23] However, I am not prepared today to approve the proposed interim distribution to unsecured creditors with Proven Claims. While this relief was initially opposed by the Former Directors, those parties reached an agreement with the Receiver that would essentially provide that the Receiver would serve and file a Supplementary Report setting out a summary of the proposed distributions prior to proceeding with any interim distributions, and the parties on the Service List would be provided with a notice period of seven days within which they could file any notices of dispute. Absent such a notice, the Receiver would be authorized to proceed with an interim distribution, and if disputes remained, the Receiver would seek directions from the Court.
- [24] The challenge for me is that an interim distribution is appropriate where the court is satisfied that no creditors will be prejudiced and that sufficient holdbacks or reserves are made for unproven claims. See: *Maple Bank GmbH (Re)*, 2017 ONSC 2536 at para. 34. The evidence in the record today is such that I cannot be so satisfied.
- [25] The problem is that, through no fault of its own, the Receiver is not yet able to quantify the value of all unresolved claims (such as outstanding claims against the Former Directors advanced under the claims process or corresponding indemnity claims of those Former Directors against Antibe), and there is no evidence as to the exact quantum of the proposed holdbacks or reserves relative to the estimated value of, or maximum exposure in respect of, unresolved claims.
- [26] The proposed accommodation is essentially an agreement to make the necessary calculations later, give affected parties seven days to decide whether to object, and then if none does, make the distribution. While I acknowledge the practical approach this represents

(something encouraged by the Commercial List), I am not comfortable that it is sufficient in the circumstances to meet the test set out in *Maple Bank* today.

- [27] I have advised the Receiver and the other parties that I will make myself available to hear a distribution approval motion on an expedited basis once these issues are resolved.
- [28] For all of these reasons, the requested relief (with the exception of the proposed interim distribution to unsecured creditors with proven claims) is granted.
- [29] Orders to go in the form I have signed today which are effective immediately and without the necessity of issuing and entering.

Osborne J.