

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

NUANCE PHARMA LTD.

Applicant

- and -

ANTIBE THERAPEUTICS INC.

Respondent

**IN THE MATTER OF AN APPLICATION UNDER SECTION 101
OF THE *COURTS OF JUSTICE ACT***

FACTUM OF THE RECEIVER

January 25, 2025

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PART I - NATURE OF THE MOTION

1. On this motion, FTI Consulting Canada Inc. (“**FTI**”), in its capacity as court-appointed receiver and manager (the “**Receiver**”) of Antibe Therapeutics Inc. (“**Antibe**”) effective April 22, 2024 (the “**Date of Appointment**”) pursuant to an order of this Court issued on April 30, 2024 (the “**Receivership Order**”) seeks, *inter alia*, an order (the “**Approval and Reverse Vesting Order**”) approving the sale transaction (the “**Transaction**”) contemplated by the transaction agreement between the Receiver as vendor, and Taro Pharmaceuticals Inc. (“**Taro**”), as purchaser, dated January 15, 2025 (the “**Transaction Agreement**”) and the Transaction contemplated therein to be implemented by way of a reverse vesting structure.
2. The Transaction Agreement is predicated on the issuance of the Approval and Reverse Vesting Order and results in the best outcome for all stakeholders.

3. Further, the Receiver seeks the approval of the releases in favour of itself, its counsel, and each of their respective affiliates, officers, directors, partners, employees, agents, and financial advisors, as applicable (collectively, the “**Receiver Released Parties**”). Each of these Receiver Released Parties were critical to the consummation of the Transaction.
4. In connection with the Transaction Agreement, the Receiver also seeks a sealing order to protect the confidential information contained in Confidential Appendix “A” (bid summary) and Confidential Appendix “B” (the unredacted Transaction Agreement) to the Second Report.
5. Lastly, the Receiver is seeking the following ancillary relief, namely the approval of:
 - (a) the Receiver’s activities as set out in the Second Report;
 - (b) the fees and disbursements of the Receiver and its counsel, Thornton Grout Finnigan LLP (“**TGF**”);
 - (c) an interim distribution to Nuance Pharma Ltd. (“**Nuance**”) in the amount of approximately US\$519,000 (“Traceable Funds” as defined below) plus accrued interest earned since the Date of Appointment; and
 - (d) an interim distribution to unsecured creditors with proven claims as determined by the Receiver.
6. All capitalized terms not otherwise defined herein have the same meaning ascribed to them in the Receiver’s Second Report.

PART II - THE FACTS

The License Agreement and the Arbitral Award

7. On February 9, 2021, Antibe entered into a licensing agreement (the “**License Agreement**”) with Nuance that licensed Nuance to sell a drug named ATB-346 (the “**Drug**”) in China, Hong Kong, Macau, and Taiwan. The License Agreement included an

upfront payment of US\$20 million (the “**Upfront Payment**”), which was paid by Nuance to Antibe on February 19, 2021.¹

8. In January 2022, Nuance commenced an arbitration proceeding against Antibe before an arbitral tribunal at the Singapore International Arbitration Centre (the “**Tribunal**”), alleging that Antibe had improperly induced Nuance to enter into the License Agreement.²
9. On March 1, 2024, the Tribunal determined that Antibe’s omission of certain documents from the virtual data room setup for Nuance during the Licence Agreement diligence period amounted to fraudulent misrepresentation. The Tribunal confirmed the rescission of the License Agreement and ordered Antibe to return the Upfront Payment to Nuance, plus Nuance’s costs and interest (cumulatively, the “**Arbitral Award**”). The Arbitral Award ordered Antibe to pay Nuance approximately CAD\$33.8 million.³
10. On March 28, 2024, Nuance served Antibe with an application for the enforcement of the Arbitral Award in Ontario.⁴

Procedural History

11. On April 9, 2024, Antibe made an application pursuant to the *Companies’ Creditors Arrangements Act*, R.S.C., 1985, c. C-36, as amended (“**CCAA**”), to the Court for creditor protection (the “**CCAA Proceeding**”). On the same day, the Court granted an initial order (the “**Initial Order**”) pending the comeback hearing.⁵

¹ Second Report of the Receiver dated January 15, 2025 (“**Second Report**”) at para 7, Tab 2 of the Motion Record dated January 15, 2025 (the “**Motion Record**”).

² Second Report at para 2, Tab 2 of the Motion Record.

³ Second Report at para 3, Tab 2 of the Motion Record.

⁴ Second Report at para 4, Tab 2 of the Motion Record.

⁵ Second Report at para 5, Tab 2 of the Motion Record.

12. On April 12, 2024, Antibe served motion materials to seek the granting of an Amended and Restated Initial Order and a continuation of the CCAA Proceeding. On April 15, 2024, Nuance served a responding and cross-application record objecting to the CCAA Proceeding and seeking, *inter alia*:
- (a) an order declaring the Upfront Payment amount included within the Arbitral Award is held in trust for Nuance (the “**Constructive Trust Claim**”); and
 - (b) an order appointing the Receiver, without security, of the assets, undertakings and properties of Antibe (the “**Property**”).⁶
13. On April 22, 2024, the Honorable Justice Osborne issued an endorsement (the “**Endorsement**”) terminating the CCAA Proceeding,⁷ appointing FTI as Receiver; and determining that the Constructive Trust Claim could not be decided on the record before the CCAA Proceeding.⁸
14. The initiation of the receivership proceedings (the “**Receivership**”) and appointment of the Receiver were confirmed to be effective retroactively to April 22, 2024 pursuant to the Receivership Order.⁹
15. On June 24, 2024, the Court granted:
- (a) an Order (the “**Sale Process Approval Order**”) which, among other things:

⁶ Second Report at paras 6-7, Tab 2 of the Motion Record.

⁷ The CCAA Proceeding was terminated effective April 22, 2024 pursuant to an order of the Court issued on May 1, 2024.

⁸ Second Report at para 8, Tab 2 of the Motion Record.

⁹ Second Report at para 9, Tab 2 of the Motion Record.

- (i) approved a sale process in respect of all or substantially all of Antibe's assets (the "**Sale Process**"); and
 - (ii) appointed Bloom Burton Securities Inc. as financial advisor (the "**Financial Advisor**") to assist the Receiver in carrying out the Sale Process;
- (b) an Order (the "**Claims Procedure Order**") approving a claims process, which among other things, authorizes the Receiver to carry out a claims process involving, *inter alia*, the solicitation, review, and allowance and/or disallowance of proof of claims; and
- (c) an ancillary Order (the "**First Ancillary Order**") approving the accounts of the Receiver and of TGF, approving the activities, conduct, and decisions of the Receiver and TGF, and recognizing the Arbitral Award.¹⁰

The Traceable Funds

16. The Receiver completed a tracing analysis of the Upfront Payment through Antibe's bank accounts. The Receiver's analysis indicates that the remaining funds on hand, as at the Date of Appointment, that could be properly traced back to the Upfront Payment is approximately US \$519,000.¹¹ Accordingly, the Receiver is of the view that the Traceable Funds are subject to a constructive trust for Nuance.¹²

The Sale Process

¹⁰ Second Report at para 11, Tab 2 of the Motion Record.

¹¹ Plus accruing interest on the traceable funds since the Date of Appointment.

¹² Second Report at para 65, Tab 2 of the Motion Record.

17. The purpose of the Sale Process was to solicit interest in the opportunity for a sale of all or part of Antibe's Property. The Receiver engaged the Financial Advisor, an investment bank with subject matter expertise, to assist with the Sale Process.¹³
18. The Sale Process consisted of a two-phase process. Five Potential Bidders ultimately executed non-disclosure agreements in Phase 1 and were given access to the data room. Phase 1 required Potential Bidders to submit a non-binding letter of intent ("LOI"). Bidders who met the requirement of Phase 1 were permitted to submit a formal binding offer during Phase 2. Information with respect to the LOIs received at the Phase 1 Bid Deadline are provided in the Confidential Appendix "A" to the Second Report.¹⁴
19. Extensions to the Phase 2 Bid Deadline were granted to accommodate additional due diligence requests prior to the subject deadlines for Potential Bidders. The final Phase 2 Bid Deadline was November 14, 2024. Information with respect to bids received at the Phase 2 Bid Deadline are provided in Confidential Appendix "A" to the Second Report.¹⁵
20. All parties that submitted a Bid were contacted on November 21, 2024, and asked to submit best and final offers. Following receipt of the Phase 2 Bids and further negotiations, the Receiver declared Taro as the Successful Party in the Sale Process and proceeded to negotiate the Transaction Agreement, which was ultimately executed on January 15, 2025.¹⁶

Proposed Transaction with Taro

21. The effect of the Transaction is that, upon closing, Taro will own all of the Purchased Shares of Antibe, which will constitute all of the issued and outstanding shares of Antibe.

¹³ Second Report at para 37, Tab 2 of the Motion Record.

¹⁴ Second Report at paras 38-39, Tab 2 of the Motion Record.

¹⁵ Second Report at paras 38-39, Tab 2 of the Motion Record.

¹⁶ Second Report at para 39, Tab 2 of the Motion Record.

Antibe will then own, free and clear of all Encumbrances, the Intellectual Property and other Retained Assets, certain Retained Contracts, and will continue to be liable for all Retained Liabilities. All Excluded Assets and Excluded Liabilities will be transferred into a corporation to be incorporated by the Receiver (“**ResidualCo**”).¹⁷

22. A description of the key commercial terms of the Transaction Agreement is provided in the Second Report. Some of the salient terms include:
- (a) Purchased Shares: Taro will own 100% of all of the issued and outstanding shares of Antibe, free and clear of any and all encumbrances;
 - (b) Purchase Price: is subject to the request for a sealing order, however, it includes a 10% good faith deposit that has already been paid by Taro to the Receiver.
 - (c) “As is, where is”: The Transaction is on an “as is, where is” basis with limited representations and warranties, consistent with the standard terms of an insolvency transaction.
 - (d) Outside Date: March 7, 2025.¹⁸
23. The Transaction is structured as a “reverse vesting” transaction because the Purchaser requires certain intellectual property (“IP”) registered globally in many jurisdictions and certain tax attributes in connection with the consummation of the Transaction (as described in the Transaction Agreement). Due to restrictions and complexities regarding the transfer or assignment of the IP and tax attributes, a reverse vesting transaction is required to permit the Purchaser to acquire the shares of Antibe free and clear of any claims and encumbrances associated with Antibe in an efficient manner for the benefit of Antibe’s stakeholders.¹⁹

¹⁷ Second Report at para 41, Tab 2 of the Motion Record.

¹⁸ Second Report at para 42, Tab 2 of the Motion Record.

¹⁹ Second Report at para 43, Tab 2 of the Motion Record.

24. In a traditional asset sale, it is difficult, costly and time consuming to transfer IP registered in many jurisdictions globally to a purchaser and, to the extent that such transfer is possible, the steps required to proceed with such transfer will likely result in additional delays, costs, and uncertainty, and considerably extend the time required to close the Transaction, which increases overall closing risk.²⁰
25. Additionally, the reverse vesting structure permits the maintenance of Antibe's tax attributes, which includes Antibe's operating losses, and the Receiver understands this to be a value component in the Transaction for Taro.²¹
26. This structure does not result in any material prejudice or impairment of any of Antibe's creditors' rights that they would otherwise have under an asset sale transaction or under any other alternative available to Antibe.²²
27. The Transaction Agreement represents the highest and best offer received in the Sale Process, and the Receiver and the Financial Advisor both support the Transaction Agreement and the Transaction.²³

Proposed Distribution to Unsecured Creditors with Proven Claims

28. The Receiver has conducted an analysis of: (i) the Claims received by the Claims Bar Date (estimate subject to change upon finalization each of Claim), (ii) the funds remaining in the estate accounts, and (iii) the anticipated additional sale proceeds. It has become apparent that unsecured creditors will be receiving material distributions. Accordingly, the Receiver is seeking authorization to issue an interim distribution on a *pro rata* basis, in amounts to be determined by the Receiver, to unsecured creditors with proven claims

²⁰ Second Report at para 43, Tab 2 of the Motion Record.

²¹ Second Report at para 43, Tab 2 of the Motion Record.

²² Second Report at paras 44-45, Tab 2 of the Motion Record.

²³ Second Report at para 43, Tab 2 of the Motion Record.

without requiring a further Order of the Court, subject to holdbacks for unsecured creditors with claims not-yet-proven and estimated costs to complete administration of the Receivership.²⁴

PART III - THE ISSUES

29. The issues to be determined on this motion are whether this Court should:
- (a) approve the Transaction Agreement and the Transaction contemplated therein;
 - (b) grant certain releases in favour of the Receiver and its representatives;
 - (c) seal the unredacted Transaction Agreement and bid summary until after Closing or further Order of the Court is made;
 - (d) approve the Second Report of the Receiver, and the activities, conduct, and decisions of the Receiver and TGF as set out therein;
 - (e) approve the fees and disbursements of the Receiver and TGF as set out in the Second Report and the fee affidavits appended thereto;
 - (f) approve 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 (as defined below) and unproven claims;
 - (g) approve an immediate distribution of the Traceable Funds plus accrued interest since the Date of Appointment, converted to Canadian dollars at the prevailing foreign exchange rate on the date of transfer, to Nuance as a permanent paydown and indefeasible repayment of the indebtedness and obligations secured by the Nuance Constructive Trust (as described above).

²⁴ Second Report at paras 68-70, Tab 2 of the Motion Record.

PART IV - THE LAW

(a) The Transaction Agreement and Transaction Should Be Approved

This Court Has Jurisdiction to Grant the Reverse Vesting Order

30. Courts have recognized that there exists jurisdiction to grant reverse vesting orders (“RVOs”) in receivership proceedings brought under section 101 of the *Courts of Justice Act* (“CJA”) and section 243 of the *Bankruptcy and Insolvency Act* (“BIA”).²⁵ Recent examples of Ontario courts approving transactions with RVO structures in the context of receiverships include *Vert Infrastructure*²⁶ and *Pure Global Cannabis*.²⁷
31. Courts have granted similar relief in the CCAA proceedings of *Green Relief*,²⁸ *Wayland*,²⁹ and *Nemaska*,³⁰ in each case pursuant to their inherent jurisdiction in furtherance of similarly-structured exit transactions. The same principles apply in the context of a receivership.
32. Although neither the CJA nor the BIA expressly confer upon courts the authority to grant reverse vesting orders in receivership proceedings, it is well-established that the purpose

²⁵ See e.g. *British Columbia v Peakhill Capital Inc.*, [2024 BCCA 246](#) at paras 3, 24 [*Peakhill*], followed in *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, [2024 BCSC 1722](#) at para 32.

²⁶ [Approval and Vesting Order of Justice Conway in the Matter of Vert Infrastructure Ltd.](#), dated June 8, 2021, Toronto, Court File No. CV-20-00642256-00CL (ONSC).

²⁷ [Approval and Vesting Order of Justice Hainey in the Matter of Pure Global Cannabis Inc. et al.](#), dated January 7, 2021, Toronto, Court File No. CV-20-00638503-00CL.

²⁸ [Approval and Vesting Order of Justice Koehnen in the Matter of Green Relief Inc.](#), dated November 9, 2020, Toronto, Court File No. CV-20-00639217-00CL (ONSC); [Endorsement of Justice Koehnen in the Matter of Green Relief Inc.](#), dated November 9, 2020, Toronto, Court File No. CV-20-00639217-00CL (ONSC).

²⁹ [Approval and Vesting Order and Endorsement of Hainey J. in the Matter of Wayland Group Corp. et al.](#), dated April 21, 2020, Toronto, Court File No. CV-19-006632079-00CL (ONSC).

³⁰ [Approval and Vesting Order in the matter of Nemaska Lithium Inc. et al.](#), dated October 15, 2020, District of Montreal, Court File No: 500-11-057716-199 (QCSC).

of a receivership is to “enhance and facilitate the preservation and realization of the assets [of a debtor] for the benefits of creditors.”³¹ This is why receivers are consistently granted the power to sell debtors’ property.³²

33. Further, pursuant to section 101 of the CJA, a court can make any order it considers just in appointing a receiver, which often includes the power to sell a debtor’s assets.
34. RVOs are but one possible outcome of this power to sell. As described by the British Columbia Court of Appeal in *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, “I can see no reason to conclude that an RVO is not incidental or ancillary to a receiver’s power to sell. An RVO advances the same goals as an AVO — albeit by employing a different transaction structure.”³³

The Soundair Principles Are Met

35. It is settled law that where a court is asked to approve a transaction in a receivership context, the court is to consider the following principles (collectively, the “**Soundair Principles**”):³⁴
 - (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
 - (b) whether the interests of all parties have been considered;
 - (c) the efficacy and integrity of the process by which offers are obtained; and

³¹ [2019 ONCA 508](#) at paras [73-76](#) [*Third Eye*].

³² *Third Eye* at para [74](#).

³³ *Peckhill* at para [24](#) [emphasis added].

³⁴ [1991 CanLII 2727 \(ON CA\)](#) [*Soundair*].

- (d) whether there has been an unfairness in the working out of the process.
36. Absent clear evidence that a proposed sale is improvident or that there was an abuse of process, a court is to grant deference to the recommendation of a receiver to sell a debtor's assets. Only in such exceptional circumstances will a court intervene and proceed contrary to the recommendation of its officer, in this case, the Receiver.³⁵
37. The Transaction satisfies the Soundair Principles and should therefore be approved for the following reasons:
- (a) ***Sufficient effort was made to obtain the best price and the Receiver did not act improvidently.*** The Sale Process was conducted to obtain the highest and best value for Antibe's Property. The Receiver, with the assistance of its Financial Advisor, ran a robust process to canvass the market and solicit interest from prospective purchasers. Interested parties were provided with a reasonable opportunity to conduct due diligence, consider potential transactions and deal structures, and make an offer by the Bid Deadline. The Receiver is of the view that the purchase price is fair and reasonable and that further marketing efforts are unlikely to result in a superior transaction.³⁶
- (b) ***The interests of all parties are best served by the Transaction Agreement.*** The Transaction provides for the best possible outcome in the circumstances for all parties with an economic interest in these proceedings. Taro put forth the highest Bid such that any alternative transaction would have resulted in lesser recoveries for Antibe's creditors.³⁷
- (c) ***The sale process was run efficaciously and with integrity.*** Antibe's Property was marketed extensively by the Financial Advisor who the Receiver engaged

³⁵ Soundair.

³⁶ Second Report at paras 37-39, 43, Tab 2 of the Motion Record.

³⁷ Second Report at paras 39, 43, Tab 2 of the Motion Record.

particularly for their specialization in transactions within the pharmaceutical industry. The Receiver worked closely with the Financial Advisor and provided oversight throughout the sale process. All interested parties were given a meaningful opportunity to participate in the sale process and were provided with access to the data room upon executing the appropriate confidentiality arrangements. The Transaction was negotiated in good faith and with due diligence.³⁸

- (d) ***There was no unfairness.*** The Sale Process was robust and conducted under the supervision of this Court pursuant to the Sale Process Order. No exceptional circumstances exist that would justify this Court departing from the recommendation of the Receiver.

A Reverse Vesting Structure is Optimal for the Transaction

38. It is also settled law that courts may consider the following RVO-specific questions, as set out in *Harte Gold Corp. (Re)*:

- (a) Why is the RVO necessary in this case?
- (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
- (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
- (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?³⁹

³⁸ Second Report at para 38, Tab 2 of the Motion Record.

³⁹ [2022 ONSC 653](#) at para 38 [*Harte Gold*].

39. *Harte Gold* has been applied in the context of receivership proceedings.⁴⁰ As explained below, each of the answers to these questions favours the granting of an RVO.
40. ***The RVO is necessary in the circumstances.*** The first *Harte Gold* question deserves special attention in this case and strongly favours the approval of the Transaction. Courts have held that RVOs are generally appropriate in at least three types of circumstances:
- (a) where the debtor operates in a highly regulated environment in which its existing permits, licences or other rights are difficult or impossible to assign to a purchaser;
 - (b) where the debtor is party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser; and
 - (c) where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.⁴¹
41. The first and third circumstances are both applicable here. Antibe operates in the highly regulated pharmaceutical industry. The Patents held by Antibe, which represent the core asset of Antibe and are integral to the Transaction, are registered in forty-one (41) international jurisdictions. The cost, delay, and risk relating to requesting the approval of Patent transfers would jeopardize the Transaction and risk a lengthy extension with material incremental Receivership-related costs to the potential detriment of Antibe's creditors. The Transaction is the only efficient means to ensure that all such Patents and Intellectual Property are conveyed to Taro in a timely manner, representing the best outcome for the creditors of Antibe.⁴²

⁴⁰ See *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, [2024 BCSC 1722](#) at para [31](#).

⁴¹ See *Arrangement relatif à Blackrock Metals Inc.*, [2022 QCCS 2828](#) at paras [114-116](#); *Harte Gold* at para [71](#); *Quest University Canada (Re)*, [2020 BCSC 1883](#) at paras [136](#) (referring to the RVO granted in *Re Comark Holdings Inc et al*, (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. SCJ [Commercial List]) to preserve tax attributes) and [142](#) (referring to the RVO granted in *JMB Crushing Systems Inc. (Re)*, 2020 ABQB 763 to preserve both licenses and tax attributes).

⁴² Second Report at para 43(d), Tab 2 of the Motion Record.

42. Moreover, Antibe has accumulated significant tax losses and Scientific Research and Experimental Development tax credits (jointly, the “**Tax Assets**”). By completing the proposed Transaction Agreement using the RVO structure, Taro can preserve these Tax Assets to contribute incremental value to the estate. Completing this type of transaction as an asset sale would necessitate the exclusion of Tax Assets and reduce the value of the transaction. Indeed, the Receiver is of the view that the Transaction Agreement would not be obtained absent the RVO structure.⁴³
43. ***The RVO produces the best economic outcome.*** The Transaction Agreement represents the best possible outcome for Antibe and its stakeholders in the circumstances. The Transaction yielded the highest value from all competitive bids submitted in the Sale Process. The Receiver is of the view that the Transaction Agreement with Taro could not have proceeded *except* by way of a reverse vesting structure. There is no indication that further canvassing the market will yield a better result.⁴⁴
44. ***Stakeholders are not worse off under the reverse vesting structure.*** Courts may approve the transfer of assets and liabilities to a related company for an internal reorganization where such transfer is in the best interests of stakeholders and does not prejudice major creditors.⁴⁵ The transfer of the Excluded Liabilities, Excluded Contracts, and Excluded Assets is required to carry out the Transactions, which represent the best outcome in the circumstances for the stakeholders (as described above).
45. No creditors 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 making distributions to stakeholders. Furthermore, the purchase

⁴³ Second Report at para 43(c), Tab 2 of the Motion Record.

⁴⁴ Second Report at paras 39, 45, 49, Tab 2 of the Motion Record.

⁴⁵ *Canwest Global Communications Corp. (Re)*, [2009 CanLII 63368 \(ON SC\)](#) at paras [36-39](#).

price proceeds attributable to Antibe's Property will vest in ResidualCo and any creditor claims shall attach to those proceeds.⁴⁶

46. ***The consideration paid is fair, reasonable, and reflects the importance of the assets being preserved under the reverse vesting structure.*** The Receiver is of the view that the purchase price is fair and reasonable. The consideration for Antibe's Property will allow for enhanced recoveries to the benefit of Antibe's unsecured creditors.
47. Ultimately, the RVO structure creates a solution which is better for all, meets the well-established Soundair and Harte Gold criteria, and which is directly in line with the purpose of the receivership.

(b) The Releases in the Approval and Vesting Order Should Be Granted

48. The Receiver respectfully submits that it is appropriate to grant a limited release in favour of the Receiver Released Parties. Each of the Receiver Released Parties were critical to the identification, execution, and consummation of the Transaction.⁴⁷
49. Courts regularly grant releases to receivers. Indeed, the release "is a standard term in the Commercial List model order of discharge".⁴⁸ Although the Receiver in this case is not at the stage to be discharged, the principles underlying releases still apply. The purpose of the releases is to achieve finality for the releasees and the orderly conclusion of the Sale Process and resulting Transaction in the most efficient manner possible, all with a view to maximizing value to Antibe's stakeholders.

⁴⁶ Second Report at paras 41, 44-45, Tab 2 of the Motion Record.

⁴⁷ Second Report at paras 50-51, Tab 2 of the Motion Record.

⁴⁸ *Pinnacle v Kraus*, [2012 ONSC 6376](#) at para 47. For other examples of releases in favour of receivers, see [Order \(Final Distributions, Approval of Activities and Fees & Discharge\) of Justice Morawetz in the Matter of UrbanCorp \(Leslieville\) Developments Inc. et al.](#), dated September 14, 2020, Toronto, Court File No. CV-16-11409-00CL; [Approval and Discharge Order of Justice Conway in the Matter of 33 Yorkville Residences Inc et al.](#), dated March 22, 2023, Toronto, Court File No. CV-20-00637297-00CL.

50. The proposed releasees have contributed to the restructuring by supporting the Sale Process being overseen by the Receiver and attempting to identify interested parties. Without the involvement of the Receiver and the Receiver Released Parties, it is less likely that the Sale Process would have been successful.⁴⁹
51. The purpose of the releases is to achieve finality for the Receiver Released Parties and the orderly conclusion of the Sale Process and resulting Transaction in the most efficient manner possible in the circumstances, all with a view to maximizing value to Antibe's stakeholders.⁵⁰

(c) The Unredacted Transaction Agreement Should Be Sealed

52. The Receiver seeks a sealing order in respect of Confidential Appendices "A" and "B" to the Second Report. Confidential Appendix "A" contains information on the Phase 1 and Phase 2 bids received. Confidential Appendix "B" contains the unredacted Transaction Agreement. The redacted version of the Transaction Agreement redacted the purchase price and other applicable monetary amounts that reveal the economic terms of the Transaction, such as the Deposit (the "**Economic Terms**"). The Receiver seeks to seal Appendices "A" and "B" until after Closing or until further order of the Court.
53. The applicable legal test for granting a sealing order, as set out by the Supreme Court of Canada in *Sherman Estate v Donovan*, is that the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
- (a) court openness poses a serious risk to an important public interest;
 - (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

⁴⁹ Second Report at para 51, Tab 2 of the Motion Record.

⁵⁰ Second Report at para 52, Tab 2 of the Motion Record.

- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁵¹
54. The Receiver respectfully submits that the request for a sealing order in respect of the Economic Terms satisfies the *Sherman Estate* test. The economic terms of a transaction are routinely sealed until closing on the basis that there is a broader public interest in maintaining the confidentiality of such information and maximizing value in insolvency proceedings.⁵²
55. In the Receiver’s view, disclosure of the Economic Terms would prejudice recoveries for Antibe’s stakeholders in the event that the Transaction does not close because the disclosure of such terms would effectively create a “price ceiling” on the amount that a new purchaser, if any, would be prepared to pay for the Property.⁵³
56. There are no alternatives to sealing the Economic Terms. In terms of proportionality, given the proposed sealing order is time limited to the pre-closing period, the Receiver submits that the limitation on the open court principle is both minimal and justified. The broader public interest in maintaining the confidentiality of economic terms pre-closing and maximizing recoveries for Antibe’s stakeholders outweighs the minimal limitation on the open court principle in these circumstances.⁵⁴

⁵¹ *Sherman Estate v Donovan*, [2021 SCC 25](#) at para 38.

⁵² See e.g. *Ontario Securities Commission v Bridging Finance Inc.*, [2023 ONSC 4203](#) at paras 25-31; *U.S. Steel Canada Inc. et al. v The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, [2023 ONSC 2579](#) at para 54; *American General Life Insurance Company et al. v Victoria Avenue North Holdings Inc. et al.*, [2023 ONSC 3322](#) at para 30; and *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) at para 84.

⁵³ Second Report at paras 86-87, Tab 2 of the Motion Record.

⁵⁴ Second Report at paras 86-87, Tab 2 of the Motion Record.

(d) The Second Report and Activities Set Out Therein Should Be Approved

57. The Receiver and TGF seek approval of their activities, conduct, and decisions as set out in the Second Report. There are good policy and practical reasons to do so. In *Target Canada Co (Re)*, Morawetz RSJ (as he then was) acknowledged that the approval of a court officer's, in that case a Monitor's, activities:

- (a) allows all stakeholders to move forward confidently with next steps in the proceeding;
- (b) brings their activities before the court, “allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;”
- (c) provides certainty and finality, as all parties have an opportunity to raise specific objections and concerns;
- (d) enables the court to satisfy itself that the court officer's activities have been conducted prudently and diligently;
- (e) provides for protection for the court officer not otherwise offered by statute; and
- (f) protects creditors from delay in distribution that would be caused by the re-litigation of steps taken to date and/or potential indemnity claims by the court officer.⁵⁵

58. The same principles apply in a receivership.⁵⁶

⁵⁵ *Re Target Canada Co*, [2015 ONSC 7574](#) at paras [12](#), [22-23](#). See also *Laurentian University of Sudbury*, [2022 ONSC 2927](#) at paras [13-14](#).

⁵⁶ *Re Hangfen Evergreen Inc.*, [2017 ONSC 7161](#) at para [15](#).

59. Where a court-appointed receiver demonstrates that it has acted reasonably, prudently, and not arbitrarily, this Court has the inherent jurisdiction to approve the receiver's activities as set out in its reports.⁵⁷
60. The activities of the Receiver described in the Second Report were undertaken in good faith and in furtherance of the Receiver's mandate.⁵⁸ For example, those activities include: (a) engaging the Financial Advisor to assist with the Sale Process; (b) taking steps to solicit, review, and make decisions on claims pursuant to the Claims Procedure Order; (c) conducting the Sale Process in accordance with the Sale Process Approval Order; (d) negotiating the Transaction Agreement with Taro and taking preliminary steps to prepare for closing; and (e) bringing this motion.
61. The activities of the Receiver and TGF as described in the Second Report ought to be approved.
- (e) The Fees and Disbursements of the Receiver and TGF Should Be Approved**
62. The Receiver seeks approval of the fees and disbursements set out in the Fee Affidavits.
63. In *Laurentian*, Morawetz CJ accepted that on a motion for fee approval the "overriding principle" is reasonableness. The Court should not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of the professional services rendered may not be instructive when viewed in isolation. The focus should be on what was accomplished, and not how much time it took.⁵⁹
64. The following factors provide guidance regarding evaluating the quantum of fees:

⁵⁷ *Lang Michener v American Bullion Minerals Ltd.*, [2005 BCSC 684](#) at para 21.

⁵⁸ Second Report at para 80, Tab 2 of the Motion Record.

⁵⁹ *Laurentian* at [para 9](#), citing *Re Nortel Networks Corporation et al*, [2017 ONSC 673](#) [*Nortel*] and *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#) at para 45.

- (a) the receiver's knowledge, experience and skill;
- (b) the diligence and thoroughness displayed;
- (c) the responsibilities assumed;
- (d) the results of the receiver's efforts; and
- (e) the cost of comparable services when performed in a prudent and economical manner.⁶⁰

65. The fees were necessarily incurred in connection with the Receiver's duties under the Receivership Order.⁶¹ The fees incurred are also reasonable given the uniqueness of this proceeding in respect of the complex pharmaceutical Property being canvassed for marketing and sale, the significant collaboration with the Financial Advisor undertaken to complete the Sale Process and negotiate the Transaction Agreement, engaging with the FDA, and the other matters attended to by the Receiver and its counsel.

66. It is reasonable in the circumstances to approve the activities and fees of the Receiver and TGF in the circumstances.

(f) The Interim Distributions to Unsecured Creditors with Proven Claims Should Be Approved

67. It is appropriate to order interim distributions for proven claims where no creditors will be prejudiced and where sufficient holdbacks or "reserves" are made for unproven claims.⁶²

⁶⁰ *Confectionately Yours Inc (Re)*, [2002 CanLII 45059 \(ON CA\)](#) at paras [42-54](#); *Laurentian* at [para 10](#); *Nortel* at para [14](#).

⁶¹ Second Report at para 84, Tab 2 of the Motion Record.

⁶² See e.g. *Maple Bank GmbH (Re)*, [2017 ONSC 2536](#) at para [34](#).

Courts regularly order distributions in connection with or subsequent to asset sales in insolvency proceedings.⁶³

68. The Receiver has performed an initial review of the claims in accordance with the Claims Procedure Order and, subject to pending final determination of the Claims and formal allowance or disallowance to Claimants as applicable, determined that interim distributions can be made for proven claims subject to sufficient holdbacks for unproven claims. For greater clarity and subject to on-going review and final determination of Claims, there is only one unproven claim that the Receiver anticipates having to make a sufficient holdback for.⁶⁴

(g) The Interim Distribution of the Traceable Funds Should Be Approved

69. Similarly, an interim distribution of the Traceable Funds should be approved. The Receiver has conducted an extensive analysis and determined that the Traceable Funds constitute a constructive trust in favour of Nuance. Moreover, as the name suggests, the funds are traceable and have been held in a separate account by the Receiver. As such, the funds belong to Nuance and can be paid out forthwith.⁶⁵

PART V - RELIEF REQUESTED

70. For the reasons set out above, the Receiver respectfully submits that the Court grants the relief requested by the Receiver in the Motion Record.

The undersigned lawyer certifies that they are satisfied as to the authenticity of every authority cited in this factum, the content of which is respectfully submitted.

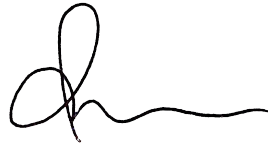
⁶³ See e.g. *Arrangement relatif à Bloom Lake General*, [2021 QCCS 2946](#) at paras [6-7](#); *Re Nortel Networks Corporation et al*, [2014 ONSC 5274](#) at paras [56-57](#), citing *AbitibiBowater Inc., (Re)*, [2009 QCCS 6461](#) at paras [56-58](#), [71](#).

⁶⁴ Second Report at paras 68-70, Tab 2 of the Motion Record.

⁶⁵ Second Report at paras 64-67, Tab 2 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January, 2025.

January 25, 2025



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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *AbitibiBowater Inc., (Re)*, [2009 QCCS 6461](#)
2. *American General Life Insurance Company et al. v Victoria Avenue North Holdings Inc. et al.*, [2023 ONSC 3322](#)
3. [Approval and Vesting Order of Justice Conway in the Matter of Vert Infrastructure Ltd.](#), dated June 8, 2021, Toronto, Court File No. CV-20-00642256-00CL (ONSC).
4. [Approval and Vesting Order of Justice Hainey in the Matter of Pure Global Cannabis Inc. et al.](#), dated January 7, 2021, Toronto, Court File No. CV-20-00638503-00CL.
5. [Approval and Vesting Order and Endorsement of Hainey J. in the Matter of Wayland Group Corp. et al.](#), dated April 21, 2020, Toronto, Court File No. CV-19-006632079-00CL (ONSC).
6. [Approval and Vesting Order in the matter of Nemaska Lithium Inc. et al.](#), dated October 15, 2020, District of Montreal, Court File No: 500-11-057716-199 (QCSC).
7. [Approval and Vesting Order of Justice Koehnen in the Matter of Green Relief Inc.](#), dated November 9, 2020, Toronto, Court File No. CV-20-00639217-00CL (ONSC);
8. [Approval and Discharge Order of Justice Conway in the Matter of 33 Yorkville Residences Inc et al.](#), dated March 22, 2023, Toronto, Court File No. CV-20-00637297-00CL
9. *Arrangement relatif à Blackrock Metals Inc.*, [2022 QCCS 2828](#)
10. *Arrangement relatif à Bloom Lake General*, [2021 QCCS 2946](#)
11. *British Columbia v Peakhill Capital Inc.*, [2024 BCCA 246](#)
12. *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, [2024 BCSC 1722](#)
13. *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#)
14. *Canwest Global Communications Corp. (Re)*, [2009 CanLII 63368 \(ON SC\)](#)
15. *Confectionately Yours Inc (Re)*, [2002 CanLII 45059 \(ON CA\)](#)
16. *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#)
17. [Endorsement of Justice Koehnen in the Matter of Green Relief Inc.](#), dated November 9, 2020, Toronto, Court File No. CV-20-00639217-00CL (ONSC)

18. *Harte Gold Corp. (Re)*, [2022 ONSC 653](#) (CanLII)
19. *Lang Michener v American Bullion Minerals Ltd.*, [2005 BCSC 684](#)
20. *Re Laurentian University of Sudbury*, [2022 ONSC 2927](#)
21. *Maple Bank GmbH (Re)*, [2017 ONSC 2536](#)
22. [Order \(Final Distributions, Approval of Activities and Fees & Discharge\) of Justice Morawetz in the Matter of UrbanCorp \(Leslieville\) Developments Inc. et al.](#), dated September 14, 2020, Toronto, Court File No. CV-16-11409-00CL
23. *Ontario Securities Commission v Bridging Finance Inc.*, [2023 ONSC 4203](#)
24. *Pinnacle v Kraus*, [2012 ONSC 6376](#)
25. *Quest University Canada (Re)*, [2020 BCSC 1883](#)
26. *Re Hangfen Evergreen Inc.*, [2017 ONSC 7161](#)
27. *Re Nortel Networks Corporation et al.*, [2017 ONSC 673](#)
28. *Re Nortel Networks Corporation et al.*, [2014 ONSC 5274](#)
29. *Re Target Canada Co.*, [2015 ONSC 7574](#)
30. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727](#) (ON CA)
31. *Sherman Estate v Donovan*, [2021 SCC 25](#)
32. *U.S. Steel Canada Inc. et al. v The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, [2023 ONSC 2579](#)

**SCHEDULE “B”
RELEVANT STATUTES**

[Courts of Justice Act, R.S.O. 1990, c. C.43](#)

Injunctions and receivers

101.(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

[Bankruptcy and Insolvency Act \(R.S.C., 1985, c. B-3\)](#)

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, *receiver* means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that

was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

- (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
- (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

[...]

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*
NUANCE PHARMA LTD. - and - ANTIBE THERAPEUTICS INC.

Applicant

Respondent

Court File No. CV-24-00719237-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceedings commenced at Toronto, Ontario

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