ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

ENDORSEMENT

COURT FILE NO.: **CV-24-00717410-00CL** **DATE:** **April 22, 2024**

TITLE OF PROCEEDING: ***In the Matter of a Plan of Compromise or Arrangement of Antibe Therapeutics Inc.***

BEFORE: **Justice Osborne**

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE OSBORNE:

1. This is the comeback hearing in this *CCAA* proceeding commenced by Antibe Therapeutics Inc. ("Antibe"), which has already had a tumultuous history in its short life.

2. At the conclusion of the hearing, I advised the parties that, pending the release of this Endorsement, the stay of proceedings granted by Justice Black on April 9, 2024 would remain in effect on an interim basis.

Background to the CCAA Application of Antibe and the Receivership Application of Nuance

3. Much of the relevant background is set out in Justice Black's endorsement of April 9, 2024. The matter came before the Court on that date originally scheduled as a case conference to schedule a hearing at the request of Nuance Pharma Ltd. ("Nuance").

4. That case conference was scheduled in the context of an application that Nuance had commenced for the recognition and enforcement of an arbitral award it obtained against Antibe, and the appointment of a receiver over the assets of Antibe.

5. Nuance is a Hong Kong biopharmaceutical company. Antibe is an *OBCA* company, the shares of which traded, until trading was recently suspended, on the TSX Venture Exchange.

6. Nuance is the largest creditor of Antibe, and Antibe has no secured creditors.

7. Antibe is, and has been since 2004, working to develop and commercialize a drug known as Otenaproxesul (the "Drug"). The Drug is a non-steroidal anti-inflammatory ("NSAID") said to have the potential to provide significant pain relief for various conditions such as osteoarthritis while avoiding or at least minimizing some of the side effects frequently associated with the use of NSAIDs, such as effects on the liver and gastrointestinal issues. As further described below, one of the issues is whether the Drug was and is intended for either or both of chronic and/or acute pain management.

8. Antibe entered into a licence agreement dated February 9, 2021 with Nuance pursuant to which, among other things, Nuance obtained exclusive licencing rights for the Drug in China, Hong Kong, Macau and Taiwan. Nuance paid an upfront licence fee of USD $20 million.

9. On January 19, 2021, in the course of the regulatory approval process, Health Canada expressed serious concerns regarding the potential risk of liver-related adverse events related to the use (and particularly the extended use) of the Drug. Nuance alleged that these serious concerns were intentionally withheld from it by Antibe so as to amount to a fraudulent misrepresentation, upon which Nuance relied in entering into the licencing agreement and making the USD $20 million prepayment. That payment was made by Nuance to Antibe in accordance with the licence agreement on February 19, 2021, one month after Health Canada expressed its concerns.

10. On July 30, 2021, a clinical trial being conducted in Canada by Antibe known as an AME Study (described below) was stopped for safety reasons as a result of the concerns expressed by Health Canada.

11. On September 5, 2021, Nuance formally advised Antibe that it was rescinding the licence agreement, and demanded the immediate return of the USD $20 million. Antibe refused, with the result that Nuance filed a Notice of Arbitration (in accordance with the dispute arbitration provisions of the licence agreement) alleging the fraudulent misrepresentation and seeking rescission of the licence agreement.

12. The parties appointed an arbitral tribunal which rendered its final decision on February 27, 2024. The tribunal found, among other things, that:

    a. Antibe and its Chief Executive Officer, Mr. Dan Legeault, made material misrepresentations and/or omissions leading up to the licence agreement;

b. Antibe's response to due diligence inquiries by Nuance could "only be characterized as being so incomplete as to be affirmatively and deliberately misleading, evincing conscious mis-behaviour and recklessness, rather than an intent to be truthful or honest"; and

c. "no amount of due diligence would have enabled [Nuance] to discover that Antibe had omitted/misled it with respect to key regulatory information";

all with the result that the arbitral tribunal determined that the licence agreement was validly rescinded by Nuance.

13. Antibe was ordered to "return to Nuance the sum of USD $20 million that represented Nuance's upfront payment to Antibe, plus interest" together with costs.

14. Antibe still refused to return the funds, with the result that Nuance brought an application here in Ontario for the recognition and enforcement of the arbitral award, and sought the appearance before Justice Black referred to above to schedule the hearing of that application.

15. Nuance's application was issued on March 27, 2024. In addition to the recognition and enforcement of the arbitral award, Nuance sought an order restraining Antibe from selling or encumbering any assets, and an order appointing a receiver pursuant to section 101 of the *Courts of Justice Act*. The scheduling appointment was sought on notice to Antibe and was returnable on April 9, 2024 at 9:45 AM.

16. However, at 2:11 AM that morning (April 9), Antibe delivered an application record to commence a *CCAA* proceeding to seek protection from its creditors.

17. The result was that when the matter came on before Justice Black some seven hours later, both applications were sought to be returnable. The parties jointly advised the Court that they had had discussions which ultimately resulted in an agreement as to the terms of a consent order. Upon hearing the submissions of the parties, Justice Black was satisfied that the proposed order was appropriate, and granted an initial order in the *CCAA* proceeding, imposing, among other terms, an initial 10 day stay of proceedings on the terms set out in the order.

18. Later that day on April 9, 2024, the Canadian Investment Regulatory Organization issued a suspension in trading in the securities of Antibe.

19. In his endorsement released with the order, Justice Black observed that it would be important for Antibe to demonstrate on the comeback hearing that there was a realistic basis to expect that the Drug would be approved for use in the foreseeable future.

20. Nuance advised that it would be seeking the termination of the *CCAA* proceeding, and the appointment of a receiver as it had originally requested, at the comeback hearing.

The Relief Sought on this Comeback Hearing

21. At this comeback hearing, Antibe seeks the following relief:

a. an extension of the stay of proceedings to and including May 24, 2024;

b. an increase in the quantum of the Administration Charge from $250,000 - $500,000; and

c. an increase in the Directors' Charge from $150,000 - $375,000.

22. Antibe relies on the Affidavit of its Chief Operating Officer, Scott Curtis ("Curtis"), affirmed on April 8, 2024, the Affidavit of Scott Curtis affirmed on April 17, 2024 and the Affidavit of Dr. Joseph Stauffer affirmed on April 16, 2024, each together with the respective exhibits thereto, as well as the First Report of the Monitor dated April 16, 2024. Antibe has also filed several letters of support from stakeholders.

23. Nuance opposes the relief sought by Antibe and by way of responding and cross application seeks an order:

    a. declaring that as of September 5, 2021 Antibe held USD $20 million (the licence agreement prepayment) in trust for Nuance;

    b. declaring that as of April 8, 2024, Antibe held CAD $19.6 million (the amount of cash it had on hand as of that date) in trust for Nuance;

    c. a tracing order in respect of the licence agreement prepayment and subsequent rescission; and

    d. an order appointing a Receiver over the property of Antibe.

24. In the alternative, and if the Court grants the relief sought by Antibe extending and continuing the *CCAA* proceeding, Nuance seeks an order lifting the stay to allow it to seek the order originally sought in its application, recognizing and making enforceable the arbitral award as a judgment of this Court.

25. Nuance relies on the Affidavit of Mark Lotter, the Chief Executive Officer of Nuance, sworn April 15, 2024, together with exhibits thereto.

Clinical Development of the Drug - the FDA Hold and the Basis for the Requested Stay Extension

26. The principal basis for the requested stay extension is to allow Antibe to receive an advisory letter from the US Food and Drug Administration ("FDA"), "so that it may consider its restructuring opportunities and options, in consultation with the Monitor and its stakeholders".

27. That letter from the FDA is expected as a result of the fact that, on March 28, 2024, (one month after the date of the arbitral award and approximately two weeks before Nuance commenced its application), the FDA met with Antibe and verbally advised that it was placing a hold on Antibe's pending Phase II trial in respect of the Drug.

28. The FDA advised that it would send, within 30 days, a letter that would contain more details of its reasons for the hold, in response to which Antibe would have an opportunity to provide further data and responses with a view to addressing the concerns of the FDA.

29. Unless and until the FDA hold is lifted, however, the Phase II trial cannot proceed. The Phase II trial is a step, albeit a significant one, on the road to regulatory approval and commercialization of Drug.

30. FDA drug approval typically has five stages:

    a. Stage 1 - discovery and development;

    b. Stage 2 - preclinical research (laboratory and animal testing);

    c. Stage 3 - clinical research (human testing, conducted in phases, to assess safety and efficacy);

    d. Stage 4 - FDA review (of all data submitted, leading to a decision as to whether approve the relevant drug or not); and

    e. Stage 5 - FDA post-market safety monitoring (undertaken while the drug is available for use by the public).

31. Stage 3 includes relatively standard Phases of clinical trials:

    a. Phase I - clinical trials involving a very limited patient population designed to find the highest dose of the drug that can be given safely without causing severe side effects and the best way to administer the proposed treatment;

b. Phase II - clinical trials with a larger patient population in which patients are given the dose and method found to be the safest and most effective in Phase I (i.e., to evaluate the safety and efficacy of the drug); and

c. Phase III - clinical trials with a very large patient population (i.e., where the drug is given to a larger number of patients to confirm safety and efficacy).

32. Stage 5 often includes what are commonly referred to as Phase IV trials, in which patients taking the new drug or treatment are observed, often over a significant period of time, to evaluate the long-term effects of the drug or treatment and identify rare side effects or side effects that appear only after a patient has been taking the drug or treatment for a significant period of time.

33. It is the Phase II clinical trial in respect of the Drug that is on hold by the FDA here.

34. As described in the first Curtis Affidavit, a serious side effect of NSAIDs is an elevation of certain kinds of liver enzymes in the blood. While the levels of liver enzymes in the blood can fluctuate for benign reasons, increases in certain liver enzymes beyond three times the upper limit of normal are commonly called "clinically significant increases," or "liver transaminase elevations" ("LTEs").

35. According to the evidence of Antibe, between 2014 and 2021, while conducting its Phase I and Phase II studies on the Drug for chronic use, Antibe experienced clinically significant instances of LTEs after administration of the Drug during clinical trials. The latest of those trials involved an Absorption, Metabolism and Excretion study (the "AME Study") conducted by Antibe in Canada and described above.

36. Antibe had filed a clinical trial application protocol for the AME Study with Health Canada in December, 2020. On January 19, 2021, Health Canada requested additional information, advising that it had serious concerns regarding the potential risk of liver-related adverse events.

37. Following a dialogue between Antibe and Health Canada that ensued, and the submission of additional data by Antibe, Health Canada advised that it could not issue a favourable decision on the clinical trial application protocol. Antibe then agreed with the suggestion of Health Canada that it withdraw its application, and later resubmitted it when it obtained additional study data requested, and when it had included suggested revisions.

38. Health Canada approved the AME Study in June 2021, and the study began the following month. Almost immediately, however, on July 30, 2021, the study (as expressed by Curtis) "hit the required stopping criteria and Antibe paused the study".

39. Those "stopping criteria" were the result of revisions to the study protocol suggested by Health Canada that mandated a specified stop to the study if two patients exhibited LTEs at levels of five times the upper limit of normal. As set out in the first Curtis Affidavit, increases in LTEs greater than three times the upper limit of normal are clinically significant.

40. The AME Study was then resumed in September, 2021 and the report on the Study was finalized.

41. Ultimately, Antibe reviewed and analyzed the data and the AME Study results, and concluded that the LTEs only occurred in a given period after a certain exposure to the Drug, thus suggesting that a lower cumulative dose, if used for a shorter period, could be effective and safe.

42. As a result, Antibe "began to focus more exclusively on developing the Drug for acute pain relief", as opposed to long-term or chronic pain relief. By Antibe's own admission, it had been working since 2004 until 2021 on developing the Drug for chronic pain, but the biggest hurdle was this very issue of LTEs.

43. Over the last few years, and since what Antibe describes itself as its "pivot" to focusing on acute pain, the company has been working to determine that the issues causing the LTEs would not occur with the development of the Drug for acute use, particularly when used with specifically designed dosing regimens.

44. It was with a view to demonstrating this in a clinical setting that Antibe began undertaking the Phase II trial in the US in late 2023. It is that trial that was subjected to the FDA "hold" on March 28, 2024 that remains in effect today.

45. At this comeback hearing, Antibe's efforts with respect to the Drug (and since development of the Drug is its business, its activities generally) are on hold or in a period of suspension until the concerns of the FDA are addressed and the "hold" is lifted.

46. According to Antibe itself, it "is not yet in a position to fully understand or respond to the FDA's advice." Antibe submits that it is prepared, if needed, to make adjustments to the Phase II trial design to provide sufficient comfort to the FDA, while still providing for a trial that would confirm liver safety, provide good indications of effectiveness of the Drug in patients, and possibly determine the optimal dosing regimen.

47. Also, according to Antibe, the regulatory process within the FDA "can be iterative, and at this juncture, Antibe does not know what a final design for the Phase II trial acceptable to the FDA will look like". Curtis estimates that, using Antibe's current Phase II trial design (and therefore assuming no significant changes mandated by the FDA), enrolment could be completed within three months, with final follow-up patient visits ending following the in-patient dosing.

48. Distilled down, the objective fact today is that the Phase II study is on hold, and Antibe does not know and will not know until it receives the particulars from the FDA, what lies ahead in terms of what protocol amendments are required to allow the Phase II trial to continue, and therefore what the timing and potential profitability of the Drug may look like going forward.

49. For these reasons, its position is effectively that the status quo should be maintained to "wait-and-see", with the result that it seeks the stay extension to May 24 and the increases in the Directors' Charge and the Administration Charge to ensure that the directors remain in office and that the professionals remain engaged so that the company is in a position to respond in a nimble and efficient way to whatever concerns the FDA may express.

50. Antibe also submits vigourously that, whether or not the CCAA proceeding is continued and whether or not a receiver is appointed, Nuance should not be entitled to the constructive trust relief it claims in respect of the prepayment made under the licence agreement, or in respect of the cash that Antibe has on hand. Antibe submits that those issues ought not to be determined on the basis of the limited record before the Court, and should be deferred to be determined on a full record, on notice to all affected parties, and once those parties have had an opportunity to assess their own positions.

51. Antibe is supported by Knight Therapeutics, who appeared on this motion both to support the continued *CCAA* proceeding, and particularly to argue that Nuance's Trust claim should not be determined today. Knight submitted that it had just become aware of this matter, was assessing its own position and rights as a counterparty to a licencing agreement in respect of the Drug just like Nuance (albeit in a different geographic region), and may seek to take a position on the claims regarding trust property.

52. The Monitor supports the relief sought by the Applicant, and submits in the First Report that the stay of proceedings is necessary and justified in the circumstances.

CCAA or a Receivership: the Relevant Law and Application to this Matter

53. Sections 11.02 (2) and (3) of the *CCAA* are clear: on an application other than an initial application, the Court may make a stay order for any period that the court considers necessary. However, the Court shall

not make the order unless the applicant satisfies the Court that circumstances exist that make the order appropriate; and the applicant has acted, and is acting, in good faith and with due diligence. The order is discretionary.

54. In the same way, the appointment of a receiver is discretionary. The test for the appointment of a receiver pursuant to section 101 of the *Courts of Justice Act* ("*CJA")* is not in dispute. The Court may appoint a receiver where it appears just or convenient to do so.

55. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

56. The Supreme Court of British Columbia, citing Bennett on Receivership, 2nd ed. (Toronto, Carswell, 1999) listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and with which I agree: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527 at para. 25):

    a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

    b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;

    c. the nature of the property;

    d. the apprehended or actual waste of the debtor's assets;

    e. the preservation and protection of the property pending judicial resolution;

    f. the balance of convenience to the parties;

    g. the fact that the creditor has a right to appointment under the loan documentation;

    h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

    i. the principle that the appointment of a receiver should be granted cautiously;

    j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

    k. the effect of the order upon the parties;

    l. the conduct of the parties;

    m. the length of time that a receiver may be in place;

    n. the cost to the parties;

    o. the likelihood of maximizing return to the parties; and

    p. the goal of facilitating the duties of the receiver.

57. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as

to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54).

58. It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted: *Bank of Montreal v. Carnival National Leasing Ltd*., 2011 ONSC 1007 at paras. 24, 28-29.

59. Accordingly, where, as here, there are competing applications for a continued insolvency proceeding under the *CCAA*, or the appointment of a receiver, the Court must consider all of the relevant factors in the exercise of its discretion to determine the most appropriate path forward.

60. At its most basic, Antibe seeks more time and concedes, as is apparent on the record, that it cannot really achieve much by way of designing or implementing a restructuring plan, until it knows the scope and breadth of the concerns of the FDA which are to be set out in the letter it expects to receive no later than April 28 (i.e., 30 days from the verbal advice received on March 28). It seeks a stay extension to May 24, in order to give itself an opportunity to digest the letter when received and respond to the FDA.

61. Antibe submits that since the stay extension it is seeking is for a period of approximately six weeks only, this Court ought not to disrupt the status quo with the appointment of a receiver. It submits that the proposed increases to each of the Administration Charge and the Directors' Charge are appropriate for the limited period of the proposed stay extension.

62. It further submits that Antibe's creditors would not be materially prejudiced by the proposed extension but could be prejudiced if the stay was not extended and Antibe was not able to utilize its resources to determine whether the FDA hold on the Phase II trial can be lifted and if so on what terms.

63. Nuance submits that Antibe is not proceeding in good faith, that it commenced the *CCAA* proceeding purely as a defensive tactic to avoid recognition and enforcement of the arbitral award in Ontario and that it is continuing to deplete funds that belong to Nuance.

64. Nuance submits that if the *CCAA* proceeding is permitted to continue, it is forced involuntarily into the role of a *de facto* DIP lender, albeit without the protections usually associated therewith. Nuance submits that there is no plan, or even the germ of a plan, present in this case.

65. Having considered all of the relevant factors and the submissions of the parties, I am not persuaded that it is appropriate to continue the *CCAA* proceeding in the particular circumstances of this case. In my view, it is just or convenient to appoint a receiver.

66. If this case represented a more typical example of competing applications for a continued *CCAA* proceeding and a receivership, I might have been of the view that a stay extension of some six weeks might be appropriate, in order to maintain the status quo and allow the parties to consider their respective positions. Without question, the filing for protection under the *CCAA* by Antibe was done defensively, just as Nuance alleges. But that alone is not determinative of the issue. There are examples of cases where protection under the *CCAA* has been granted in circumstances where protection was sought primarily to stay the enforcement of a claim or a judgment. The *CCAA* proceedings involving the Canadian tobacco manufacturers are such examples.

67. However, in my view, the particular circumstances of this case are unique, and I am not persuaded that the *CCAA* proceedings should continue.

68. The Drug at issue here is for all intents and purposes the entire business of Antibe. The evidence before the Court on these competing motions is clear (and the contrary is not seriously argued by Antibe) that the

success or failure of the company rests with approval and commercialization of the Drug. There is no other viable, let alone ongoing, material business or operations.

69. Second, the Drug is a long way from commercialization and the point at which it might generate operating profits for Antibe. This is not in and of itself the fault of the company, and nor as Antibe vigourously submits, is it unusual in the context of developing and commercializing pharmaceutical compounds. Extensive testing through clinical trials following research, with the attendant delays and hurdles, is part of the process.

70. The challenge here is that even if the stay extension until May 24 were granted, there is, in my view, no prospect whatsoever, let alone a reasonable prospect, of there being a plan, or even the germ of a plan within that proposed stay extension period. On the contrary, and in any event of what the FDA letter says (assuming it is received on or before April 28), a further stay extension, likely of a significant period of time, will be required.

71. One possibility is that the concerns expressed by the FDA that led to the existing and continuing hold on the Phase II trial can be addressed relatively quickly and without significant delay or additional cost, by Antibe. Even if this most optimistic possibility came to pass, however, the Phase II trial would continue, with all of the subsequent steps to be completed before the Drug came to market.

72. Antibe has equally been clear in its submissions that if this optimistic outcome in fact occurred, it would require a subsequent stay extension and would clearly require significant additional capital to continue the Phase II study and complete the various subsequent steps.

73. Antibe has approximately CAD $19 million cash on hand. If the trust claims of Nuance succeed, it has no cash whatsoever. While the latter outcome would clearly be more dire for the company, and whether or not the trust claim succeeds, Antibe will require, by its own admission, very significant additional capital. That will have to be raised in the marketplace through debt or equity or both.

74. Antibe submits that it admittedly cannot raise capital now, but once it is armed with the ability to represent to the marketplace that it has addressed the concerns of the FDA such that the hold is lifted and the Phase II trial can continue, it will be much better positioned to have a reasonable chance of success in raising the necessary funds.

75. In my view, and while Antibe may be correct, the challenge is real and formidable. The first hurdle is the obvious one of satisfying the concerns of the FDA. I cannot make, and do not make, any determination in the disposition of these competing motions about what the likelihood of satisfying those concerns may be. That issue will be significantly better informed in the coming weeks when the FDA letter is received.

76. If the FDA letter is relatively favourable, it is likely that the ability to raise capital would be somewhat less challenging, and if the FDA letter raises significant hurdles to be overcome, or is overwhelmingly negative about proceeding with further clinical trials at all, the ability to raise capital will be very materially impaired.

77. In either event, however, the company is going to have to go into the marketplace in circumstances where, as submitted by Nuance, it faces the claim by Nuance arising from the arbitral award, as well as the specific factual findings made by the arbitral tribunal, some of which are summarized above at paragraph 12.

78. The arbitral award is final and binding. That was clear from the terms of the arbitration agreed to by the parties, and in any event, Antibe did not seek to appeal the award. On the contrary, it issued a public statement on March 4, 2024 to the effect that the award required "Antibe to refund the USD $20 million upfront payment and pay interest and costs of approximately USD $4 million", and it further disclosed that Antibe "respects … the final nature of the award and will accept the decision in good faith."

79. Even if the *CCAA* stay were extended, Antibe still faces this liability (by far its largest). Moreover, and even if that stay is not lifted for the purpose of permitting Nuance to prosecute its recognition and enforcement proceeding, the liability remains and will be a factor taken into account by any potential investor or lender considering whether to commit capital to the company.

80. The challenges faced by Antibe in this regard are exacerbated by the nature of the findings made by the arbitral tribunal summarized above at paragraph 12 to the effect that the non-disclosure by Antibe to Nuance amounted to conduct that was "affirmatively and deliberately misleading, evincing conscious misbehaviour and recklessness, rather than an intent to be truthful or honest", and that no amount of due diligence by Nuance would have enabled it to discover the omission with respect to the regulatory issues.

81. The challenge in raising new capital from an investor or lender is increased further by the fact that the nature of the misrepresentations found by the arbitral tribunal were not unique to the contractual relationship with Nuance, or otherwise unrelated to the core business of Antibe.

82. On the contrary, the findings were to the effect that the company, and particularly its Chief Executive Officer (who has not given any evidence on these motions), misled a significant licensee of the Drug that represents the core and only business of the company, as a result of which that licensee made an advance payment of USD $20 million, as a result of all of which the arbitral tribunal found that the licensee (Nuance) is entitled to rescind its licence agreement.

83. These concerns about the ability of the company to raise capital are real, and none of them is fully answered, even by the most favourable of possible outcomes regarding the FDA hold letter.

84. Antibe submits that some of the concerns about the conduct of the Chief Executive Officer are mitigated by the fact that it has amended its governance structure to impose a management special committee comprised of three members, which committee exercises most of the CEO functions. I pause again to observe that Mr. Legeault remains one of the three members of that committee.

85. Nuance has, as a result of the above events, completely lost confidence in the management of Antibe. There are no secured creditors, and Nuance is the largest creditor of the company today.

86. Moreover, I do not accept the submission of Antibe that a termination of the CCAA proceeding and the appointment of a receiver necessarily represents a fatal blow to any possibility of a successful outcome, let alone a viable going-concern outcome.

87. A Court-appointed receiver owes obligations to the Court and to all stakeholders, notwithstanding that it may have been appointed at the request of one creditor or other stakeholder. As noted above, much in this case will depend upon the FDA letter to be received. However, a receiver is (and will be, in this case) capable of and tasked with the mandate of considering how best to proceed in the circumstances as they may evolve with a view to formulating a course of action to maximize recovery for all stakeholders.

88. Nuance submits on these motions that the "pivot" referred to above from extended use of the Drug for chronic pain relief to temporary acute pain management was significant, and that the commercial potential of the Drug lay in its enhanced efficacy and safety for extended use as compared to other NSAIDs in the marketplace.

89. Nuance also submits that the use of NSAIDs (such as the Drug) for acute pain management (where adverse effects on liver function are reduced because the Drug is administered for a shorter period of time) are not novel and that NSAIDs are "among the most common pain relief medicines in the world" (as was the evidence of Mr. Legeault quoted in the arbitral award).

90. I am not in a position to make any determination on those points and need not do so to dispose of these motions as I have done.

91. I do observe that the Drug is the only potentially marketable product that Antibe has, and that it remains in early stages of development. I am satisfied on the evidence in the record that even if the Phase II clinical trial proceeds, there remain significant hurdles to commercialization and that not only many, but indeed the majority of drug candidates fail at this stage of development. Even if the Phase II clinical trial is completed successfully, there are additional phases of clinical trials to be conducted (summarized above), followed by additional approvals required by regulatory authorities prior to the Drug ever being available in the market.

92. The formidable challenges of commercializing the Drug are illustrated by the fact that Antibe itself has already spent approximately CAD $124 million and approximately 20 years on its development.

93. However, it is far from clear in my view on the record in this case that the market would react more negatively to an investment opportunity if a receiver were in place, than it would, given the facts that have already occurred (including the arbitral award) and the fact that even without a receivership, the company is in *CCAA* protection under the oversight of the Monitor.

94. I do not accept the submission of Nuance to the effect that if the *CCAA* process were continued, it would be an involuntary DIP lender, since such a submission presupposes the conclusion that the funds are in fact owned by Nuance and held in trust for its benefit by Antibe. That may ultimately be the case, but I am not prepared to make that determination today.

95. However, the objective fact is that there is no DIP lender or proposed DIP lender in the *CCAA* proceeding and nor is there even any candidate on the horizon. There is no evidence before me of there even being any discussions between Antibe and any possible source of DIP funding.

96. Here, Antibe did not seek to restructure as a result of the clinical concerns raised by Health Canada, or even as a result of the concerns raised by the FDA. Nor did it seek to restructure even when the arbitral award granting rescission was released. Rather, it waited to seek protection under the *CCAA* until 2 AM in the morning before the hearing of the case conference to schedule the already pending enforcement and recognition proceeding brought by Nuance. Antibe had already publicly disclosed to the market that it accepted "in good faith" the arbitral award, which is now final and binding. In the circumstances, all of the facts militate in favour of the application of a receiver: see *Callidus v. Carcap*, 2012 ONSC 163 at paras. 58 – 62, quoting with approval *Re Inducon Development Corp*., [1992] O.J. No. 8 (Gen. Div.) where the court stated:

> [57] The respondents ask, what is the harm in letting them reorganize? While that is an interesting question, it is not the test. It seems to me this is nothing more than a last ditch effort on the respondents' part to stave off the inevitable. In *Re Marine Drive Properties Ltd.* the court put a similar situation this way: "to put in bluntly, the Petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding … they need time to 'try to pull something out of the hat.'" Or, as Farley J. put it in *Re Inducon Development Corp*., "… *CCAA* is designed to be remedial; it is not however designed to be preventative. *CCAA* should not be the last gasp of a dying company; it should be implemented if it is to be implemented, at a stage prior to the death throe."
>
> [58] Here, the respondents only brought their application after Callidus had brought its application for a receiver. The respondents knew in November that Callidus intended to seek a receiver. They waited until they had been served with the receivership application before launching their own effort to restructure. As a result, the cross-application for *CCAA* relief seems more a defensive tactic than a *bona fide* attempt to restructure. The respondents have no restructuring plan. They

have no outline of a plan. They do not have even a "germ of a plan". Again, as the court said in *Inducon*:

> [W]hile it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be requisite for the germ of a plan.

> [59] The respondents have been attempting to refinance for some time. They have failed to meet every deadline for payment they agreed to with Callidus as well as with the TD Bank. Even when I delayed the date for the receivership order to take effect in order to give the respondents time to complete a refinancing, they were unable to do so.
>
> [60] The absence of even a "germ of a plan" militates against granting relief under the *CCAA*.
>
> [61] Finally, in considering the question of whether to grant relief under the *CCAA*, I must also look at the position of the two major secured creditors. Neither will support a plan of arrangement. They represent a considerable part of the respondents' creditors. I have no evidence any other creditors would support a plan, either. I see no merit in making an initial order and imposing a stay in circumstances where a plan of arrangement is most likely going to be defeated.
>
> [62] Having considered all these factors, I decline to grant relief under the *CCAA*.

97. Moreover, in my view, the objective should be to minimize the expenditure of funds pending receipt and consideration of the FDA letter. It is difficult to see why much should be done in the interim period until that occurs, beyond that which is reasonably necessary to ensure the continued viability of the Drug and the value of the intellectual property associated therewith, so that if the FDA concerns can be addressed, and addressed in a cost-effective and timely manner, the value of the Drug has not been lost. Both parties made submissions about the advantages and disadvantages of trying to maintain the company as a going concern, as opposed to, for example, the sale of an asset such as intellectual property. All of those issues are for another day.

98. At present, however, I am satisfied that the appointment of a receiver should minimize costs and the expenditure of financial resources in this interim period and is appropriate in the circumstances.

99. Perhaps most fundamentally, the inescapable fact is that Antibe has been found, in an arbitral award which is not only final and binding but which has been publicly accepted by Antibe, to have deliberately misled a licencing counterparty to a very significant agreement, as a result of which that counterparty advanced USD $20 million and is now entitled to rescission of that agreement. In the circumstances, and considering all of the above factors, in my view, it is appropriate that a receiver be appointed.

100. Finally, I observe that, as discussed below, even if I had been persuaded that it was not just or convenient to appoint a receiver, and that the *CCAA* proceeding should continue, I would have granted leave to lift the stay of proceedings to permit Nuance to continue its application to recognize and enforce the arbitral award.

101. In such circumstances, the balance of convenience favours the granting of a receivership rather than a continuation of the *CCAA* proceedings, since to allow the *CCAA* proceedings to continue but then permit the Nuance application to proceed, would clearly be inefficient and likely result in additional time

and expense, which would not enure to the benefit of the stakeholders generally, or to the maximization of chances of recovery.

102. The proposed receiver has consented to act in that capacity and is qualified to do so.

103. The receiver is appointed effective immediately.

The Proposed Increases in the Administration Charge and the Directors' Charge

104. Given my findings, it is unnecessary for me to consider the appropriateness of the proposed quantum increases in the Administration Charge and the Directors' Charge.

Nuance's Trust Claim

105. Nuance seeks today a declaration that as of September 5, 2021 Antibe held the licence agreement prepayment of USD $20 million in trust for its benefit, or in the alternative, a declaration that as of April 8, 2024 Antibe held the cash remaining on hand of CAD $19.6 million in trust for its benefit.

106. At its core, Nuance's argument is to the effect that the trust arises by operation of law, as a result of the arbitral award granting rescission of the licence agreement. It submits that equity converts the holder of property that was acquired in circumstances where that holder does not retain a beneficial interest, into a trustee of that property for the beneficiary.

107. Nuance also submits that Antibe has been unjustly enriched by possession of the funds in question and, since there is no contract between the parties (which is the result of the rescission), there is no juristic basis on which Antibe can hold the funds.

108. Nuance submits that the arbitral award is final and binding (as acknowledged by Antibe) and that the trust, therefore, automatically arises.

109. In response, Antibe submits that, upon receipt of the licence agreement prepayment amount over which the trust is asserted, it lawfully and in the ordinary course co-mingled the funds with its own funds, including the proceeds of a capital raise in the market. The funds from Nuance were not required to be segregated and Antibe was entitled to use the funds for the continued commercialization of the Drug in the ordinary course, with the result that it should be permitted to continue to do so.

110. Antibe further submits that while Nuance sought the remedy of rescission (and obtained it) in the arbitration proceeding, it did not seek relief in the form of a declaration of trust which it now asserts, all with the result that such a claim is *res judicata*. Finally, it submits that the claim is barred by the expiry of the relevant limitation period.

111. I make no determination today about Nuance's claim that the funds are held in trust, without prejudice to Nuance pursuing that relief in the future. I do accept the position advanced by Antibe that the matter should be determined on the basis of a full record, and that, as submitted by Knight Therapeutics, there may be other parties who assert similar trust claims, and they should have an opportunity to consider their position.

112. In the circumstances, and particularly given my decision to appoint a receiver, in my view, the matter should not be decided today on a rushed basis. It follows that the arguments raised by Antibe that the nature of Nuance's claim make it a holder of equity, rather than a secured creditor, should also be determined another day.

113. As noted above, and had it been necessary to do so, I would have granted leave to lift the stay for the application of Nuance for the recognition and enforcement in Ontario of the arbitral award to be heard. Also as noted above, I do not accept today the argument of Nuance that it would be an involuntary DIP

lender for the reasons expressed above that such a finding presupposes the conclusion that it is entitled to the trust relief it seeks.

114. However, in my view, Nuance would be entitled to have that issue determined before a *CCAA* proceeding continued for a significant period of time, since if Nuance were successful in its trust claim, the result would indeed appear to be that the continued funding of Antibe would be effected through the use of its funds, absent any new DIP lender. Accordingly, the issue of whether the cash on hand at Antibe is held in trust for Nuance, ought to be determined before, for example, a CCAA process continued through to a conclusion.

115. In the circumstances of this case, and given the absence of any plan of Antibe (including but not limited to even any negotiations with the potential DIP lender, let alone a definitive agreement), the significant prejudice to Nuance of its enforcement application not proceeding, the fact that there are no secured creditors of Antibe, and the interests of justice generally, a lifting of the stay would have been appropriate: see *CanWest Global Communications Corp. (Re),* 2009 CanLII 70508 (ONSC) at para. 33.

Result and Disposition

116. For all of the above reasons, the CCAA proceeding is terminated and the receiver is appointed. I make no determination with respect to Nuance's trust claim.

117. Order to go to give effect to these reasons. Nuance should submit to me a draft order. The order is effective immediately and without the necessity of issuing and entering.