

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF ANTIBE THERAPEUTICS INC. (the "Applicant")

Applicant

**FACTUM OF THE APPLICANT,  
ANTIBE THERAPEUTICS INC.**

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**Paliare Roland Rosenberg Rothstein LLP**  
155 Wellington Street West 35th Floor  
Toronto ON M5V 3H1  
Tel: 416.646.4300

**Kenneth Rosenberg** (LSO# 21102H)  
Tel: 416.646.4304  
Email: [ken.rosenberg@paliareroland.com](mailto:ken.rosenberg@paliareroland.com)

**Massimo Starnino** (LSO# 41048G)  
Tel: 416.646.7431  
Email: [Max.Starnino@paliareroland.com](mailto:Max.Starnino@paliareroland.com)

**Kartiga Thavaraj** (LSO# 75291D)  
Tel: 416.646.6317  
Email: [kartiga.thavaraj@paliareroland.com](mailto:kartiga.thavaraj@paliareroland.com)

**Evan Snyder** (LSO# 82007E)  
Tel: 416.646.6320  
Email: [evan.snyder@paliareroland.com](mailto:evan.snyder@paliareroland.com)

Lawyers for the Applicant, Antibe Therapeutics  
Inc.

TO: THE SERVICE LIST

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**PART I. OVERVIEW**

1 The Applicant, Antibe Therapeutics Inc. ("**Antibe**"), seeks a five (5) week extension of the stay of proceedings herein, to May 24, 2024, and amendments to the Initial Order as indicated at Tab 3 of its Motion Record, consistent with the standard form Initial Order approved by the Commercial List Users Committee. Antibe repeats and relies on its evidence and submissions made in respect of the Initial Order in these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). The purpose of the extension is to allow Antibe to receive an advisory letter from the U.S Food and Drug Administration, so that it may consider its restructuring opportunities in consultation with the Monitor and its stakeholders.<sup>1</sup>

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<sup>1</sup> Capitalized terms not otherwise defined herein have the meaning ascribed to them in the First Curtis Affidavit, being Tab 2 to Antibe's Motion Record dated April 12, 2024 ("**MR**"), and in the Second Curtis Affidavit, being Tab 1 to Antibe's Reply Record to Cross-Application of Nuance ("**RMR**").

2 To its knowledge, all but one Antibe's stakeholders support its restructuring effort, and a number of them have provided letters of support.

3 The relief being sought is opposed only by Nuance Pharma Limited ("**Nuance**"). Nuance was a counter-party to a license agreement granting it the right to commercialize and market the Drug in Greater China (the "**Nuance License Agreement**"), in exchange for, among other things, a non-refundable and non-creditable upfront advance of USD\$20 million (the "**Advance**"). Applying New York law, an arbitrator with the Singapore International Arbitration Centre recently concluded that Antibe's failure to include a certain letter from Health Canada in the transaction data room constituted a fraudulent misrepresentation, and declared the Nuance License Agreement to have been validly rescinded, and ordered Antibe to pay the amount of the Advance to Nuance, together with interest and costs (the "**Award**").

4 Based on the Award, Nuance describes the remaining cash in Antibe's possession as "its [i.e., Nuance's] property" and is demanding its return and is objecting to its use for the purpose of funding these proceedings. Among other things, Nuance's demand overlooks that: (a) the Advance was deposited into Antibe's general operating account, and, very shortly after, Nuance raised approximately CAD\$40 million in the public markets and deposited those funds into the same operating accounts; (b) Nuance neither sought nor was it granted a declaration of trust by the terms of the Award; (c) there are other interests to consider besides those of Nuance, namely those of Antibe's other creditors and stakeholders; and (d) its claim is an equity claim or in the nature of an equity claim, and, as such, it is subordinated by operation of applicable insolvency laws.

5 To the extent that Nuance now seeks a declaration of constructive trust in these CCAA proceedings, Antibe says that, having chosen to proceed as it did before the Arbitrator, it is not open to Nuance to seek to split its case and elevate its claim.

6 Alternatively, if this court is prepared to consider exercising its equitable discretion to grant Nuance a constructive trust over Antibe's cash, Antibe says that Nuance cannot do so on a one day Come-Back Motion brought on short notice. The claim for constructive trust raises a number of issues that can only be addressed through a collective and coordinated claims procedure.

## PART II. FACTS

7 The facts with respect to this Comeback Motion are set out in the affidavit affirmed by the Chief Operating Officer of Antibe, Scott Curtis, on April 8, 2024 (the "**First Curtis Affidavit**"), filed in support of Antibe's application for an Initial Order; the affidavit of Scott Curtis affirmed April 17, 2024 (the "**Second Curtis Affidavit**") and the affidavit of the Chief Medical Officer of Antibe, Dr. Joseph Stauffer, affirmed April 16, 2024 (the "**Stauffer Affidavit**"), filed in support of this Comeback Motion.

## PART III. ISSUES, LAW AND ARGUMENT

8 This motion raises the following principal issues:

- (a) Should this Court grant the Stay extension? *Yes. An extension of the stay is necessary and appropriate to allow Antibe to receive an advisory letter from the U.S Food and Drug Administration, so that it may consider its restructuring opportunities in consultation with the Monitor and other*

*stakeholders. Antibe has acted, and is acting, in good faith and with due diligence.*

- (b) Should this Court approve the requested increases to the Charges? *Yes, for the reasons set out in the First Monitor's Report, filed, and the materials filed by Antibe in respect of the Initial Application.*

9 In addition, Nuance's cross-application raises the following issues:

- (a) Is it open to Nuance to seek a constructive trust on this Comeback Motion, and, if so, should this Court grant a constructive trust and a tracing and following order in Nuance's favour? *No, on both counts. Nuance's constructive trust claim is res judicata and/or time-barred, and, in any event, the court should not entertain Nuance's claim on this Come-Back Motion.*
- (b) Should this Court appoint a receiver and manager of Antibe? *No. The current CCAA process is viable and the receivership sought by Nuance would be value-destroying for Antibe and its stakeholders, including Nuance.*
- (c) Should this Court lift the stay of proceedings as against Antibe for the purposes of recognizing and making enforceable the Award? *No. There is no urgency or material impending prejudice to Nuance that would support this relief.*

**A. *The Court should grant the Stay extension***

10 On an application other than an initial application, the Court may make a stay order for any period that the court considers necessary, if the applicant satisfies the Court (a) that circumstances exist that make the order appropriate, and (b) that the applicant has acted, and is acting, in good faith and with due diligence.<sup>2</sup>

11 The requirements of appropriateness, good faith and due diligence are satisfied in this case:

- (a) The Stay Period currently expires on April 18, 2024. Additional time is required for the Applicant to continue its engagement with the FDA in order to receive the FDA Hold Letter and clarify the reasons that resulted in the hold on the Phase 2 Trial, to endeavour to satisfactorily address them in order to enable the Phase 2 Trial to proceed or to allow the Applicant to determine what other steps might be necessary and appropriate, all in order to endeavour to maximize value for all stakeholders. An extension of the Stay Period is necessary to provide the stability needed during that time.<sup>3</sup>
- (b) It is expected that the FDA Hold Letter will be received no later than April 28, 2024. While the Applicant has been working on its potential responses based on the information delivered verbally by the FDA, it will need time following receipt of the FDA letter to consider and assess the written reasons, to seek any clarification necessary from the FDA and for the

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<sup>2</sup> CCAA, s. 11.02(2) and (3).

<sup>3</sup> First Report of the Monitor, Deloitte Restructuring Inc., April 16, 2024 (“**First Report of the Monitor**”), p. 10, para. 28.

Applicant to properly formulate its responses, consult with stakeholders and return to the Court for further direction. Accordingly, the Applicant now seeks an extension of the Stay Period to May 24, 2024.<sup>4</sup>

- (c) Antibe's creditors generally would not be materially prejudiced by the proposed extension of the Stay Period. Conversely, creditors, potential creditors and other stakeholders could be materially prejudiced if the Stay Period is not extended and the Applicant is not able to utilize its resources to determine whether the FDA hold on the Phase 2 Trial can be lifted.<sup>5</sup>
- (d) During the Initial Stay Period, Antibe has acted in good faith and with due diligence.<sup>6</sup> Antibe has had extensive discussion with the Monitor, and with key stakeholders, as evidence by the stakeholder letters of support appended to the Second Curtis Affidavit, and has completed a form of non-disclosure agreement in conjunction with Antibe's efforts to share information with Nuance.<sup>7</sup>
- (e) The First Monitor's Report outlines the steps taken by Antibe since the granting of the Initial Order to stabilize its business and operations, including the giving of notice of these CCAA proceedings to affected parties and, in consultation with the Monitor, engaging in discussions with key stakeholders.

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<sup>4</sup> First Report of the Monitor, p. 10, para. 29.

<sup>5</sup> First Report of the Monitor, p. 11, para. 31.

<sup>6</sup> First Report of the Monitor, p. 11, para. 32.

<sup>7</sup> First Report of the Monitor, p. 6, para. 17.

(f) The extension of the stay period is supported by the Monitor.<sup>8</sup>

12 Nuance asserts—wrongly—that as of September 2021 Antibe has been engaged in a “long-term plan to deny Nuance the rightful return of the Investment Payment Amount,” and that therefore “Antibe cannot show the requisite element of good faith necessary for this Court to exercise its discretion to extend the CCAA process.”<sup>9</sup> Nuance’s characterization of Antibe’s conduct during this period of the parties’ litigation and subsequent discussion is inaccurate and, in any event, is misplaced. On a motion to extend the stay period, the question of good faith relates to the applicant’s conduct in the CCAA proceedings, as opposed to the applicant’s activities prior to the CCAA application.<sup>10</sup> As noted above, it is Antibe’s submission and the Monitor’s view that Antibe has acted, and is acting, in good faith and with due diligence in this CCAA proceeding.<sup>11</sup>

***B. The Court should approve the requested increases to the Charges***

13 On this Comeback Motion, Antibe seeks increases to the Charges granted pursuant to the Initial Order, as follows:

(a) Antibe seeks an increase of the Administration Charge from \$250,000 to \$500,000; and

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<sup>8</sup> First Report of the Monitor, p. 11, para. 33.

<sup>9</sup> Responding and Cross-Application Record of the Cross-Applicant, Nuance Pharma Ltd., Tab 1 – Notice of Cross-Application, pp. 9-10, paras. 31, 33.

<sup>10</sup> *Re 4519922 Canada Inc.*, 2015 ONSC 124 (Commercial List) at [para. 45](#), citing *Muscletech Research & Development Inc., Re*, (2006), 19 C.B.R. (5th) 57 (Ont. Sup. Ct, Commercial List) at para. 4.

<sup>11</sup> First Report of the Monitor, p. 11, para. 32.

- (b) Antibe seeks an increase of the Directors' Charge from \$150,000 to \$375,000.

14 The legal basis to approve the Charges is set out in the Factum of the Applicant dated April 9, 2024, filed on the Initial Application, at paragraphs 53-63. Antibe repeats and relies on these submissions in support of the Charges in the increased amounts set out above.

15 Antibe further relies on the First Report of the Monitor, in which the Monitor recommends that the Applicant's request for the increase in the amount of the Directors' Charge and the Administration Charge be granted by the Court.<sup>12</sup>

**C. Nuance's request for a constructive trust should be dismissed**

**1. Applicable legal principles regarding constructive trusts**

16 In certain circumstances, constructive trusts may be ordered as a remedy for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation.<sup>13</sup> However, such conduct does not automatically give rise to the remedy of a constructive trust.<sup>14</sup> Rather, a proper equitable basis *must* exist before the courts will impress certain property with a remedial constructive trust.<sup>15</sup>

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<sup>12</sup> See First Report of the Monitor, p. 9, paras. 24-27.

<sup>13</sup> *Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC) at [para. 43](#).

<sup>14</sup> *Baltman v. Coopers & Lybrand Ltd.*, 1996 CarswellOnt 4337 (Gen. Div.) at para. 46. Also see *Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC) at [para. 45](#), where the Court sets out the four conditions which generally should be satisfied before a constructive trust is awarded to remedy wrongful conduct such as fraud.

<sup>15</sup> *Moore v. Sweet*, 2018 SCC 52 at [para. 33](#).

17 The cause of action in unjust enrichment may provide one such equitable basis for a remedial constructive trust, if, and only if, the plaintiff can establish that (1) a personal remedy—i.e., an order to pay damages—would be inadequate; and (2) that the plaintiff's contribution that founds the action is linked or causally connected to the property over which a constructive trust is claimed.<sup>16</sup> In most cases, a personal remedy for damages will be sufficient to achieve restitution; damages can therefore be viewed as the "default" remedy for unjust enrichment,<sup>17</sup> and the ordinary remedy in cases where the property at stake is money.<sup>18</sup>

18 In determining whether a constructive trust remedy is appropriate, the court will also consider whether the plaintiff reasonably expected to receive an actual interest in property, as opposed to monetary relief, and whether the respondent was or reasonably ought to have been cognizant of that expectation.<sup>19</sup>

19 Finally, special considerations apply in the insolvency proceedings, where the imposition of a constructive trust removes property from the debtor's estate. Thus, in insolvency proceedings the constructive trust as a remedy is used "only in the most

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<sup>16</sup> *Moore v. Sweet*, 2018 SCC 52 at paras. [33](#), [91](#).

<sup>17</sup> *Moore v. Sweet*, 2018 SCC 52 at [para. 89](#).

<sup>18</sup> *Moore v. Sweet*, 2018 SCC 52 at [para. 93](#). In *Moore*, the property at stake was disputed insurance monies; however, among other factors supporting a constructive trust, the Court noted that the monies had been paid into court and were therefore readily available to be impressed with a constructive trust. Thus, on its facts, *Moore* was removed from the default rule an unjust enrichment is remedied by damages.

<sup>19</sup> *Gulamani v. Dewji*, 2007 CanLII 2369 (ON SC) at [para. 12](#), citing *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 at para. 33. Also see *Baltman v. Coopers & Lybrand Ltd.*, 1996 CarswellOnt 4337 (Gen. Div.) at para. 43.

extraordinary cases", and the test to show that there is a constructive trust is "high".<sup>20</sup>

The reason for this is explained by the Court of Appeal in *Creditfinance*:

43 [...] The appeal judge's reasons should not be interpreted to suggest that once a civil fraud by the bankrupt on the claimant, whose claim was disallowed by the trustee, is proven, and that is coupled with a loss and an ability to trace the consequences of the fraud, then a constructive trust will always be imposed. That, in my view, is too broad.

44 Constructive trust is a discretionary remedy. In a bankruptcy there are other interests to consider besides those of the defrauder and the defraudee: there are other creditors. Thus, the exercise of remedial discretion must be informed by additional considerations than in a civil fraud trial.<sup>21</sup>

## **2. Nuance's request for a constructive trust is *res judicata***

20 In the Arbitration, Nuance did not seek, and the Arbitrator did not award, a proprietary remedy of constructive trust.<sup>22</sup> Nuance seeks that remedy now, for the first time, in these CCAA proceedings.

21 Importantly, the grounds asserted by Nuance in support of this remedy—i.e., Nuance's payment of the Advance and its subsequent rescission of the Nuance License Agreement; and Antibe's retention of the Advance to be used for the development of the Drug—were all known to Nuance at the time of the Arbitration. Before the Arbitrator, Nuance could have asserted a proprietary remedy in respect of the Advance—but did

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<sup>20</sup> See *Kingsett Mortgage Corp et al v. Stateview Homes et al.*, 2023 ONSC 7105 at [para. 71](#), citing *Creditfinance Securities Ltd., Re*, 2011 ONCA 160 at paras. 32-33.

<sup>21</sup> *Creditfinance Securities Ltd., Re*, 2011 ONCA 160 at [paras. 32-33](#). While the Court went on to uphold the appeal judge's imposition of a constructive trust, the Court of Appeal noted that, importantly, the only creditors impacted by the constructive trust were the fraudster himself and his lawyer: see para. 40.

<sup>22</sup> See Award, February 27, 2024, MR Tab 2(B), pp. 134-135, 152, paras. 225-226, 273. At paragraph 276 of her Award, the Arbitrator held: "On that basis, Antibe is ordered to return to Nuance the sum of US\$20 million that represented Nuance's up-front payment to Antibe [...]" [emphasis added] Importantly, the Arbitrator's order was made in respect of an amount *representing* the Advance—i.e., not the specific funds themselves which comprised the Advance. This was, in substance, an order directing a personal remedy of restitution, rather than a proprietary interest in specific funds.

not.<sup>23</sup> Instead, Nuance was satisfied to seek rescission of the Nuance License Agreement and damages. Now, in the face of Antibe's insolvency, Nuance is no longer satisfied with the remedy that it sought and obtained at first instance, and seeks to elevate its claim above those of other unsecured creditors.

22 In these circumstances, Nuance's request for a constructive trust in these CCAA proceedings is *res judicata* and is barred by cause of action estoppel.<sup>24</sup>

23 Courts have previously applied cause of action estoppel in the insolvency context to bar a claimant from asserting a constructive trust remedy where they failed to pursue that remedy in a prior proceeding.<sup>25</sup>

24 Moreover, for many of the same reasons that it is estopped, Nuance's claim for a constructive trust is also time-barred.<sup>26</sup> On its own theory of liability, Nuance knew or ought to have known of its potential claim for a constructive trust as of the date of its rescission of the Nuance License Agreement in 2021, but did not advance this claim until Antibe's insolvency in 2024.

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<sup>23</sup> As in Ontario, constructive trusts are available under New York law to remedy an unjust enrichment: see, ex., *Counihan v. Allstate Insurance Co.*, 194 F.3d 357 (U.S. C.A. 2nd Cir. 1999). Moreover, the Arbitrator had broad jurisdiction in respect of "any dispute or claim arising out of or relating to" the Nuance License Agreement: Award, February 27, 2024, MR Tab 2(B), p. 123, para. 185. This jurisdiction encompassed a claim for a constructive trust.

<sup>24</sup> For the elements of cause of action estoppel, see *Albert Gelman Inc. v. 1529439 Ontario Limited*, 2022 ONSC 4170 at [para. 63](#).

<sup>25</sup> See *Lehman (Re)*, 2015 BCSC 1668 at [paras. 19-21](#); *Albert Gelman Inc. v. 1529439 Ontario Limited*, 2022 ONSC 4170 at [paras. 61-65](#).

<sup>26</sup> *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 5(1). Equitable claims such as claims for constructive trust are "claims" within meaning of the *Limitations Act, 2002*: *McConnell v. Huxtable*, [2014 ONCA 86](#).

**3. This Court should not entertain Nuance’s request for a constructive trust on this Comeback Motion**

25 In the event this Court determines that Nuance’s claim for a constructive trust is not estopped or time-barred, this Court should nonetheless decline to entertain Nuance’s request for a constructive trust and a tracing order at this time. This claim and the issues it engages are properly determined in the context of a claims procedure in this CCAA proceeding, rather than in the limited runway of this 10-day Comeback Motion. This is particularly the case where affected or potentially affected creditors of Antibe may not be ascertained and/or may have received little or no notice of Nuance’s position on this Comeback Motion.

26 Without being exhaustive, issues for determination in a claims procedure include:

- (a) Whether Nuance’s claim for repayment of the Advance is properly characterized in these CCAA proceedings as a trust claim, a debt claim, or an equity claim. Antibe submits that the claim flowing from the Nuance License Agreement and its rescission is properly an “equity claim” within the meaning of the CCAA, in that the license agreement and the Advance were made in respect of a “share in the company”—i.e., the right to license and commercialize the Drug in a defined territory and to receive the revenues from the sale of the Drug in that territory.<sup>27</sup> The Advance was not extended to Antibe as a debt, but rather as a non-refundable and non-creditable upfront payment in consideration of the rights and interests received by

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<sup>27</sup> CCAA, s. 1, “equity claim” and “equity interest”. The meaning of an “equity claim” under the CCAA has been interpreted expansively, and with a view to the substance, rather than the form, of the claim: see generally, *Sino-Forest Corporation (Re)*, 2012 ONCA 816 at [para. 39-56](#).

Nuance. However, if Nuance’s claim does not qualify as an “equity claim”, it nonetheless engages the same principles which justify the subordination of equity claims in CCAA proceedings.<sup>28</sup> Like a shareholder, Nuance as a licensee held unlimited upside potential for the commercialization and sale of the Drug in its territory. Properly characterized, Nuance’s claim comes last—not first—in these CCAA proceedings.

- (b) Whether or not Nuance’s constructive trust claim can be established as a matter of fact and law. The Arbitrator did not make this determination, and, assuming it is not estopped and time barred, this issue must be determined *de novo*. As discussed below, it appears at this stage that the constructive trust claim does not have merit, but a claims procedure is needed to make this determination;
  
- (c) Whether or not the amounts that Antibe has been ordered to pay to Nuance pursuant to the Award can be followed or traced and impressed with a constructive trust. While Nuance has asserted its understanding that “Antibe had earmarked and reserved Nuance’s US\$20 million for Phase 3 testing”, in reality, the funds provided by Nuance were not “earmarked” in any way for Phase 3, nor were they deposited into a segregated account.<sup>29</sup> Rather, the funds were deposited into Antibe’s general operating account;

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<sup>28</sup> See, ex., *Sino-Forest Corporation (Re)*, 2012 ONCA 816 at [para. 30](#).

<sup>29</sup> Second Curtis Affidavit, RMR Tab 1, p. 16-17, paras. 25-26. Nuance appears to be relying on the evidence given by Mr. Legault at the Arbitration, which was that “Antibe is relying on [the Advance] to conduct its Phase 3 testing of the Drug and bring it forward for regulatory approval in the USA and Canada. Without the money, Antibe will not be able to develop and commercialize the Drug.”

approximately two weeks later, Antibe raised another CAD\$40 million in the capital markets, which it also deposited into its general operating account.<sup>30</sup>

There is no evidence on this Comeback Motion as to whether the funds provided by Nuance can be followed through the activity in Antibe's general operating account and/or traced into specific property;

- (d) Assuming that the constructive trust claim can be established, an issue may arise as to whether other licensees or claimants of Antibe may come forward with rescission, unjust enrichment, and/or constructive trust claims of their own, on the basis of (among other things) amounts paid to Antibe pursuant to license agreements entered into in respect of the Drug;
- (e) An issue may also arise as to whether other stakeholders may seek to advance claims comparable to those advanced by Nuance.

27 While a claims procedure will be required to determine these issues and Nuance's entitlement to a constructive trust and a tracing of funds, it is apparent at this stage that the constructive trust claim is defective in many respects:

- (a) As noted above, damages are the default award for an unjust enrichment, particularly where, as here, the property at stake is money. Assuming an unjust enrichment can be established,<sup>31</sup> Nuance has not explained, as it must, why a personal remedy of damages is inadequate.

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<sup>30</sup> First Curtis Affidavit, MR Tab 2, p. 44, para. 39; Second Curtis Affidavit, RMR Tab 1, p. 16-17, para. 26.

<sup>31</sup> While Nuance does not appear to seek a *Soulos* constructive trust—i.e., as a remedy for fraud or wrongful conduct, rather than unjust enrichment—considerable difficulties would also arise in respect of

- (b) Nuance must clear the high hurdle of the test for a constructive trust in the insolvency context, where the court’s exercise of remedial discretion must account for the interests of other creditors, and where a proprietary remedy is granted only in the most extraordinary cases. Nuance will need to persuade this Court that, notwithstanding the intervening interests of Antibe’s other creditors and stakeholders, Nuance should be entitled to a constructive trust to the tune of CAD\$33 million, where, as of this CCAA filing, Antibe had a current cash balance of CAD\$19.6 million.
- (c) Nuance cannot have reasonably expected to obtain a property interest in the funds it provided to Antibe—indeed, Nuance never sought such an interest in the Arbitration that it commenced.<sup>32</sup>
- (d) Nuance rushed its due diligence when entering the Nuance License Agreement, as explained in detail in the First Curtis Affidavit at paragraphs 102-106, and the Second Curtis Affidavit at paragraphs 30-48. While Antibe does not dispute the finding of liability made in the

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such a claim, given that: (i) Antibe was under no equitable obligation in respect of its contractual relationship with Nuance; (ii) the Advance did not result from deemed or actual agency activities (indeed, the parties’ license agreement specifically disclaimed any agency relationship); (iii) Nuance has not shown a legitimate reason for seeking a proprietary remedy; and (iv) there are interests of intervening creditors which would render the imposition of a constructive trust unjust in the circumstances of this case: see *Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC) at [para. 45](#).

<sup>32</sup> See *Baltman v. Coopers & Lybrand Ltd.*, 1996 CarswellOnt 4337 (Gen. Div.) at para. 43, where the bank’s inability to show it had a reasonable expectation of obtaining a proprietary interest in artwork purchased by the debtor using funds from a fraudulently obtained loan was the “*coup de grace*” to the bank’s constructive trust argument.

Award, Nuance's failure of due diligence is a relevant factor where this Court is called upon to exercise its remedial discretion in Nuance's favour; for example, in *Baltman v. Coopers & Lybrand Ltd.*, the bank's constructive trust claim failed, in part because the Court found that the bank "was negligent in doing its due diligence leading up to the grant of the credit line to [the fraudster]".<sup>33</sup>

- (e) The Court's remedial discretion will also need to account for the fact that (i) Nuance's evidence in the Arbitration that it would have proceeded with the License Agreement once Health Canada approved the AME study;<sup>34</sup> (ii) that Nuance ought to have known about the LTEs by reviewing the documents in the Data Room;<sup>35</sup> and (iii) Nuance never responded to Antibe's Repayment and Restructuring Proposal, which Antibe prepared and presented with a view to engaging with Nuance in good faith.<sup>36</sup>
- (f) Nuance cannot obtain a tracing order unless and until it establishes an entitlement to a constructive trust. A proprietary interest must be established before a tracing order is appropriate.<sup>37</sup>

28 At this stage, a determination of Nuance's constructive trust claim and the other issues it engages is premature. These matters cannot be appropriately canvassed and

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<sup>33</sup> *Baltman v. Coopers & Lybrand Ltd.*, 1996 CarswellOnt 4337 (Gen. Div.) at para. 35.

<sup>34</sup> Second Curtis Affidavit, RMR Tab 1, p. 25, para. 60.

<sup>35</sup> Second Curtis Affidavit, RMR Tab 1, p. 22-25, paras. 52-59.

<sup>36</sup> Second Curtis Affidavit, RMR Tab 1, p. 25-26, paras. 61-65.

<sup>37</sup> See, ex., *Cohen v. Debbie Gail Zagdanski Trust*, 2006 CanLII 32067 (ON SC) at [paras. 27-28](#).

determined on this 10-day Comeback Motion, particularly where potentially affected creditors and stakeholders may not have received notice or the opportunity to respond to Nuance's position. Ultimately, these issues will need to be determined in the context of a claims procedure pursuant to s. 11 and 12 of the CCAA.<sup>38</sup>

**D. The appropriate insolvency process is this CCAA proceeding, not a receivership**

29 In choosing between a receivership or a CCAA process, the Court must balance the competing interests of the various stakeholders to determine which process is more appropriate. Both an order appointing a receiver and an initial order under the CCAA are highly discretionary in nature; as a result, the specific factors taken into account by a court are very circumstance-oriented.<sup>39</sup>

30 As noted in Antibe's materials filed for the Initial Application, by seeking a receivership, while also claiming all of Antibe's cash and advising that it does not want the Phase 2 Trial or acute development to continue, Nuance is, in effect, seeking a liquidation of Antibe.<sup>40</sup> In these circumstances, the following factors are relevant to the Court's exercise of discretion, and strongly favour a CCAA process over the receivership sought by Nuance:

- (a) **Viability of the current CCAA process:** Nuance's cataclysmic prediction that Antibe's CCAA process is "doomed to failure" is not borne out by the

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<sup>38</sup> Claims procedure orders are routinely granted under the court's general powers under ss. 11 and 12 of the CCAA: *Re TOYS "R" US (CANADA) LTD.*, 2018 ONSC 609 (Commercial List) at [para. 8](#).

<sup>39</sup> *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at [para. 60](#); *Hush Homes Inc. (Re)*, 2015 ONSC 370 at [paras. 20, 23](#); *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781 at [para. 61](#).

<sup>40</sup> See the First Curtis Affidavit, MR Tab 2, p. 67-68, para. 127.

evidence. As explained in detail in Dr. Stauffer's affidavit, a clinical hold, such as that placed on the Drug by the FDA, is a hurdle, not a brick wall.<sup>41</sup> And, as explained in detail in the First Curtis Affidavit, and in the Second Curtis Affidavit, the Drug is viable and has significant potential in the marketplace.<sup>42</sup> The viability of the CCAA process will turn in large part on the contents of the FDA Hold Letter; however, at this stage, it cannot be said that the CCAA process is not viable.

- (b) **Comparative value under a CCAA vs. receivership:** The value of Antibe's intellectual property can only be preserved through continuation and completion of the FDA process.<sup>43</sup> A CCAA will provide Antibe with the breathing room required to address the clinical hold imposed by the FDA. Conversely, a liquidation under a receivership would be value-destroying for the company: if Antibe is liquidated, the number of aggregate claims against the company will be increased, creditors' recovery will be limited to the cash on hand, and the potential societal benefits of the Drug will be lost.<sup>44</sup> Antibe's assets in a liquidation scenario are not expected to be sufficient to allow Antibe to pay the Award and its other debt.<sup>45</sup>
- (c) **Antibe's key personnel:** Antibe perceives a significant risk of departure of key personnel in the event a receiver is appointed to take control of Antibe

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<sup>41</sup> Stauffer Affidavit, RMR Tab 2, p. 191, para. 22.

<sup>42</sup> Second Curtis Affidavit, RMR Tab 1, p. 11-16, paras. 9-24.

<sup>43</sup> First Curtis Affidavit, MR Tab 2, p. 39, para. 23.

<sup>44</sup> First Curtis Affidavit, MR Tab 2, p. 68, para. 128.

<sup>45</sup> First Curtis Affidavit, MR Tab 2, p. 72, para. 142.

– especially when liquidation is being telegraphed by Nuance. Antibe’s current development team is best positioned to review the FDA Hold Letter and to work with the FDA to address and resolve the issues outlined in that letter, with a view to ultimately removing the hold.<sup>46</sup> A departure of key personnel at this juncture would significantly jeopardize the development of the Drug, to the detriment of all of Antibe’s stakeholders.

(d) **Protection of all stakeholders:** Antibe has obligations to stakeholders beyond only Nuance, and the development of the Drug for acute purposes through a successful Phase 2 Trial will bring great value to Antibe’s other stakeholders and societally, and is anticipated to facilitate repayment of the Award, in full.<sup>47</sup> Antibe expects that its stakeholders other than Nuance will be supportive of Antibe’s efforts to develop the Drug for acute use,<sup>48</sup> and indeed, Antibe has already received letters of support from creditors and stakeholders.<sup>49</sup>

(e) **Speed of the Process and Cost:** While Nuance suggests that FTI, as receiver, would be well positioned to engage with potentially interested parties to assess whether a sale or refinancing transaction might be available, the reality is that Nuance and FTI simply do not share the deep knowledge and experience in respect of the Drug and its ongoing

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<sup>46</sup> First Curtis Affidavit, MR Tab 2, p. 39, para. 23.

<sup>47</sup> First Curtis Affidavit, MR Tab 2, p. 40, para. 26.

<sup>48</sup> First Curtis Affidavit, MR Tab 2, p. 40, para. 28.

<sup>49</sup> Second Curtis Affidavit, RMR Tab 1, p. 13-14, paras. 18-19; Letters of Support from Antibe’s Stakeholders and Creditors, RMR Tab 1(A), p. 33-52.

development that Antibe and its professional advisors possess. It can be reasonably expected that the appointment of a receiver would entail a considerable expenditure of time and money as FTI and Nuance are brought up to speed in respect of Antibe's business operations. However, if this court were inclined to appoint a receiver, Deloitte would be the more sensible choice, given its existing role.

(f) **Nuance's opposition to a CCAA process:** While Nuance has indicated that it has no confidence in the management of Antibe or a debtor-driven CCAA process, such opposition from a creditor—even that of a major creditor who may have a blocking position to any CCAA plan—is not determinative of the Court's analysis.<sup>50</sup> In response to Nuance objection to a debtor-controlled CCAA process, Antibe notes as follows:

- (i) a new executive committee of Antibe has been appointed and has assumed the decision-making authority of the office of the CEO, including with respect to day-to-day operations, Antibe's conduct of negotiations and litigation with Nuance and the within CCAA proceedings, and Antibe's interactions with the FDA<sup>51</sup>;
- (ii) Antibe's development team is best positioned to address the hold placed by the FDA due to their institutional familiarity with the Drug,

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<sup>50</sup> See *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at [paras. 97, 104](#).

<sup>51</sup> First Curtis Affidavit, MR Tab 2, p. 43, para. 38.

its history, and their prior interactions with the FDA and work on the Phase 2 Trial, as well as their technical expertise<sup>52</sup>; and

- (iii) At this stage, Antibe's continued engagement with the FDA, and ultimately its successful completion of the Phase 2 Trial, in the context of a CCAA process is the only avenue by which Antibe may be in a position to pay the Award in full.

31 In sum, the current CCAA process should be preferred over the receivership/liquidation sought by Nuance on its cross-application.

***E. There is no basis to lift the stay of proceedings***

32 As with the imposition of a stay, the lifting of a stay is discretionary; there are no statutory guidelines contained in the CCAA. An opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action and the good faith and due diligence of the debtor company.<sup>53</sup>

33 In this case, none of the situations in which courts will lift a stay order are engaged.<sup>54</sup> In particular, Nuance has not demonstrated that the stay causes hardship or

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<sup>52</sup> First Curtis Affidavit, MR Tab 2, p. 39, para. 23.

<sup>53</sup> *Canwest Global Communications Corp. (Re)*, 2009 CanLII 70508 (ON SC) at [para. 32](#).

<sup>54</sup> See *Canwest Global Communications Corp. (Re)*, 2009 CanLII 70508 (ON SC) at [para. 33](#).

prejudice (let alone significant prejudice) to Nuance, and the lifting of the stay is not necessary to permit Nuance to take steps to protect a right which could be lost with by the passing of time. There is no immediate urgency calling for a lifting of the stay to recognize and make enforceable the Award; as Nuance notes: “the Tribunal’s determination already represents a liability to Antibe”.<sup>55</sup> Importantly, the issues to be resolved in respect of Nuance’s claim, as detailed above, prevail both inside and outside of these CCAA proceedings.

#### **PART IV. ORDER SOUGHT**

34 For all of the foregoing reasons, the Applicant requests an Order substantially in the form of the Amended and Restated Initial Order included at Tab 3 of the Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 17<sup>th</sup> day of April, 2024.



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Of counsel to the Applicant

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<sup>55</sup> Responding and Cross-Application Record of the Cross-Applicant, Nuance Pharma Ltd., Tab 1 – Notice of Cross-Application, p. 23, para. 49.

## SCHEDULE A – TABLE OF AUTHORITIES

1. *Re 4519922 Canada Inc.*, 2015 ONSC 124 (Commercial List)
2. *Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC)
3. *Baltman v. Coopers & Lybrand Ltd.*, 1996 CarswellOnt 4337 (Gen. Div.)
4. *Moore v. Sweet*, 2018 SCC 52
5. *Gulamani v. Dewji*, 2007 CanLII 2369 (ON SC)
6. *Kingsett Mortgage Corp et al v. Stateview Homes et al.*, 2023 ONSC 7105
7. *Creditfinance Securities Ltd., Re*, 2011 ONCA 160
8. *Counihan v. Allstate Insurance Co.*, 194 F.3d 357 (U.S. C.A. 2nd Cir. 1999)
9. *Albert Gelman Inc. v. 1529439 Ontario Limited*, 2022 ONSC 4170
10. *Lehman (Re)*, 2015 BCSC 1668
11. *Sino-Forest Corporation (Re)*, 2012 ONCA 816
12. *Cohen v. Debbie Gail Zagdanski Trust*, 2006 CanLII 32067 (ON SC)
13. *Re TOYS “R” US (CANADA) LTD.*, 2018 ONSC 609 (Commercial List)
14. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953
15. *Hush Homes Inc. (Re)*, 2015 ONSC 370
16. *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781
17. *Canwest Global Communications Corp. (Re)*, 2009 CanLII 70508 (ON SC)
18. *McConnell v. Huxtable*, 2014 ONCA 86

## SCHEDULE B – TABLE OF STATUTORY AUTHORITIES

### *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36*

#### Definitions

**2 (1)** In this Act,

***equity claim*** means a claim that is in respect of an equity interest, including a claim for, among others,

- (a)** a dividend or similar payment,
- (b)** a return of capital,
- (c)** a redemption or retraction obligation,
- (d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
- (e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

***equity interest*** means

- (a)** in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
- (b)** in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

#### **Stays, etc. — other than initial application**

**11.02(2)** A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

### **Burden of proof on application**

**(3)** The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

### **Limitations Act, 2002, S.O. 2002, c. 24, Sched. B**

#### **Discovery**

**5 (1)** A claim is discovered on the earlier of,

- (a) the day on which the person with the claim first knew,
  - (i) that the injury, loss or damage had occurred,
  - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
  - (iii) that the act or omission was that of the person against whom the claim is made, and
  - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ANTIBE THERAPEUTICS INC. (the "Applicant")

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

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF APPLICANT**

**Paliare Roland Rosenberg Rothstein LLP**  
155 Wellington Street West 35th Floor  
Toronto ON M5V 3H1

**Kenneth T. Rosenberg** (LSO# 21102H)  
Tel: 416.646.4304  
Email: [ken.rosenberg@paliareroland.com](mailto:ken.rosenberg@paliareroland.com)

**Massimo Starnino** (LSO# 41048G)  
Tel: 416.646.7431  
Email: [Max.Starnino@paliareroland.com](mailto:Max.Starnino@paliareroland.com)

**Kartiga Thavaraj** (LSO# 75291D)  
Tel: 416.646.6317  
Email: [kartiga.thavaraj@paliareroland.com](mailto:kartiga.thavaraj@paliareroland.com)

**Evan Snyder** (LSO# 82007E)  
Tel: 416.646.6320  
Email: [evan.snyder@paliareroland.com](mailto:evan.snyder@paliareroland.com)

Lawyers for the Applicant, Antibe Therapeutics Inc.