

**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 ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS
CANADA INC.**

Applicants

**FACTUM OF THE APPLICANTS
(Returnable November 16, 2018)**

November 14, 2018

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PART I - OVERVIEW

1. Aralez Pharmaceuticals Inc. ("**API**") and its wholly owned subsidiary Aralez Pharmaceuticals Canada Inc. ("**Aralez Canada**", collectively with API, the "**Applicants**") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* (the "**CCAA**") pursuant to the initial order of the Ontario Superior Court of Justice (Commercial List) (the "**Canadian Court**") dated August 10, 2018, as amended and restated (the "**Initial Order**"). Richter Advisory Group Inc. was appointed Monitor of the Applicants (the "**Monitor**") in these proceedings (the "**CCAA Proceedings**").

2. This motion is brought by the Applicants seeking:

(a) An order, substantially in the form of the draft order attached at Tab "3" of the Motion Record:

(i) approving the Key Employee Retention Plan (the "**KERP**") and Key Employee Incentive Plan (the "**KEIP**"), which provide for retention or incentive bonuses, respectively, to certain employees (the recipients under the KERP being the "**KERP Participants**", the recipients under the KEIP being the "**KEIP Participants**", and together, the "**Key Employees**");

- (ii) approving a charge in respect of the KERP and KEIP (the “**Key Employee Charge**”) on the Applicants’ current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situated, including all proceeds thereof (the “**Property**”); and
 - (iii) Sealing the confidential supplement (the “**Confidential Supplement**”) to the Fourth Report of the Monitor dated November 14, 2018 (the “**Fourth Report**”) containing financial information about the KERP Participants; and
- (b) Such further and other relief as the Court deems just.

PART II - THE FACTS

A. Background to the Restructuring Proceedings

3. The Aralez Entities are in the business of acquiring, developing, marketing and selling specialty pharmaceutical products. The Applicants are two entities within a larger corporate structure that includes Aralez Pharmaceuticals Management Inc., Aralez Pharmaceuticals R&D Inc., Aralez Pharmaceuticals U.S. Inc., POZEN Inc. (“**Pozen**”), Halton Laboratories LLC, Aralez Pharmaceuticals Holdings Limited, Aralez Pharmaceuticals Trading DAC (the “**Chapter 11 Entities**” and with the Applicants, the “**Aralez Entities**”).

Affidavit of Adrian Adams, November 9, 2018 (the “**Adams Affidavit**”) at paras 4-5, Applicants’ Motion Record, Tab 2.

4. On August 10, 2018, the Applicants were granted creditor protection and related relief under the CCAA pursuant to the Initial Order. The Chapter 11 Entities are concurrently undergoing proceedings in the United States Bankruptcy Court for the Southern District of New York (the “**U.S. Court**”) under chapter 11 of title 11 of the United

States Bankruptcy Code (the “**Chapter 11 Proceedings**” and together with the CCAA Proceedings, the “**Restructuring Proceedings**”).

Adams Affidavit at paras 6-7, Applicants’ Motion Record, Tab 2.

5. Certain of the Aralez Entities are parties to three stalking horse agreements (the “**Canadian Stalking Horse Agreement**”, the “**Vimovo Stalking Horse Agreement**” and the “**Toprol Stalking Horse Agreement**”, together the “**Stalking Horse Agreements**”) which together have a total purchase price of \$240 million¹ for a majority of the Aralez Entities’ assets.

Adams Affidavit at para 11, Applicants’ Motion Record, Tab 2.

6. On October 10, 2018, the Canadian Court granted an order (the “**Process Order**”) approving the proposed sales process (the “**Sales Process**”) to solicit higher or otherwise better offers than the bid under the Canadian Stalking Horse Agreement. The U.S. Court approved an identical sales process to solicit higher or otherwise better offers than the bids under the Vimovo Stalking Horse Agreement and the Toprol Stalking Horse Agreement (together with the bid under the Canadian Stalking Horse Agreement, the “**Stalking Horse Bids**”) on October 10, 2018.

Adams Affidavit at paras 12-13, Applicants’ Motion Record, Tab 2.

7. The Canadian Stalking Horse Agreement contemplates the purchase of all of the shares of Aralez Canada (the “**Canadian Assets**”), which are held by API, for the purchase

¹All figures in United States Dollars unless otherwise specified.

price of \$62,500,000. The Stalking Horse Agreements are subject to higher or otherwise better offers and the approval of the applicable court at the end of the Sales Process.

Adams Affidavit at para 11, Applicants' Motion Record, Tab 2.

8. Within the Sales Process, the deadline for bids is November 26, 2018, an auction (if required) is November 29, 2018, and a sale hearing is scheduled in the U.S. Court on December 4, 2018, with a Canadian Court sale hearing to be heard as soon as possible thereafter.

Adams Affidavit at para 14, Applicants' Motion Record, Tab 2.

B. The KERP and KEIP

9. Certain Key Employees are critical to facilitating the Sales Process and preserving the value of the Aralez Entities' business as a going concern during the Sales Process period. As a result, the Aralez Entities requested that their financial advisor, Alvarez & Marsal Healthcare Industry Group, LLC and Alvarez & Marsal Canada Inc. (together, "A&M"), formulate a KERP that focused on retaining non-insiders to accomplish the sales of the Aralez Entities' assets and associated tasks and a KEIP that focused on both the sales and on operational success prior to judicial approval of those sales.

Adams Affidavit at paras 15, 21-22, Applicants' Motion Record, Tab 2.

10. In determining who the Key Employees would be, the Aralez Entities undertook a rigorous selection process, considering among other things:

- (a) With respect to the KERP, whether an employee had a high level of retention risk;

- (b) Whether an employee could be replaced if they resigned; and
- (c) Whether an employee was critical to the daily operations and management of the Aralez Entities or to the completion of the Sales Process.

Adams Affidavit at para 23, Applicants' Motion Record, Tab 2

11. Each of the Key Employees has been with the Aralez Entities since at least 2016, the year the current structure of the Aralez Entities was formed, and has significant institutional knowledge about the business of the Aralez Entities. Each Key Employee also has a unique role in the operations or management of the Aralez Entities, making their continued employment during the Sales Process essential to the Applicants' ability to maintain normal operations and preserve the value of their business, which is a critical component to the ultimate sale of the Canadian business.

Adams Affidavit at paras 28, 35, Applicants' Motion Record, Tab 2

12. The Key Employees have assumed considerable additional responsibilities in connection with the Restructuring Proceedings, and are expected to continue to do so until the proceedings are concluded.

Adams Affidavit at paras 34-35, Applicants' Motion Record, Tab 2

13. The Key Employees were advised early within the Restructuring Proceedings that the Applicants would be seeking a KERP and KEIP in order to retain and/or incent them, as applicable, during the Restructuring Proceedings, and align their interests with the restructuring goals of the Aralez Entities.

Adams Affidavit at para 42, Applicants' Motion Record, Tab 2

14. The Applicants have been advising the Court, the public and the Key Employees of their intention to seek approval of key employee retention and incentive plans since the commencement of the CCAA Proceedings, noting that the CCAA Entities are “developing a key employee plan for retention and incentive of certain key employees who are critical to ongoing operations and the sales process intended to be run in these CCAA Proceedings”, and that the CCAA Entities are “preparing to return to this Court for approval of a key employee program and an extension of the stay period”.

Affidavit of Adrian I. Koven, sworn August 9, 2018 and forming part of the Applicants’ Motion Record returnable August 10, 2018 at para 114; Affidavit of Adrian Adams, sworn October 19, 2018 and forming part of the Applicants’ motion record returnable October 25, 2018 at para 11.

15. The Applicants expect that this advisement further incited the Key Employees to continue their employment and diligently pursue maximization of value for the Aralez Entities’ stakeholders.

16. Without the KERP, the Key Employees who are critical to the success of the Sales Process and the Applicants’ ongoing operations are likely to pursue other employment and may not be motivated to perform at their highest level.

Adams Affidavit at para 31, Applicants’ Motion Record, Tab 2.

17. Similarly, the Applicants believe that the KEIP will incentivize the KEIP Participants to maximize proceeds from a sale transaction while maintaining operational efficiencies at a time when their terms of employment are coming to an end.

Adams Affidavit at paras 19, 45, Applicants’ Motion Record, Tab
2

18. Both a KERP and a KEIP are contemplated in the Chapter 11 Proceedings. The participants in the KEIP in the U.S. are the same as in the proposed KEIP. There is no overlap between KEIP Participants and KERP Participants, and none of the KERP Participants are proposed to be the subject of the KERP in the U.S.

Adams Affidavit at para 20, Applicants' Motion Record, Tab 2.

i. The KERP

19. The KERP covers three employees of Aralez Canada, each of whom has a specific qualification, skill or expertise and is indispensable to the core business functions of the Applicants. The Applicants believe that these three employees are essential to the continued operation of the Aralez Entities during the Sales Process.

Adams Affidavit at paras 33, 37, Applicants' Motion Record, Tab 2.

20. The list of KERP Participants and the quantum of payments offered to them were formulated by the Applicants' management with the assistance of the Applicants' legal counsel and professional advisors. The quantum of payments are based upon each KERP Participant's position, responsibilities, compensation package and other factors.

Adams Affidavit at paras 24-25, 40, Applicants' Motion Record, Tab 2.

21. The aggregate bonus pool under the KERP is \$256,710, which represents less than 0.4% of the value of the \$62.5 million bid for the Canadian Assets. Per person, the KERP would pay on average \$85,570 per employee.

Adams Affidavit at para 39, Applicants' Motion Record, Tab 2.

22. Payments under the KERP will be made upon the earlier of: (a) termination without cause by Aralez Canada or upon death or permanent disability; and (b) the closing of a sale for the Canadian Assets. Resignation or termination for cause prior to the closing of a sale for the Canadian Assets will result in the forfeiture of any earned payments under the KERP. Any forfeited allocation will not be made available to the remaining KERP Participants.

Adams Affidavit at para 40, Applicants' Motion Record, Tab 2.

ii. The KEIP

23. The KEIP covers nine Key Employees of the Aralez Entities, each of whom has significant influence over the Restructuring Proceedings. The KEIP was created to ensure that KEIP Participants are motivated during the Restructuring Proceedings and incented to both pursue value maximizing sale transactions and achieve certain financial performance objectives during the pendency of the restructuring.

Adams Affidavit at paras 33, 43-44 , Applicants' Motion Record, Tab 2;
Fourth Report at para 21.

24. Due to the interrelated corporate structure of the Aralez Entities, the KEIP Participants generally provide value to both the Canadian and U.S. businesses. Consequently, with one exception described below, the targets to award payments under the KEIP are consolidated across both the U.S. and Canadian businesses and the costs associated with payments under the KEIP are split between the Applicants and the Chapter 11 Entities, with the goal of motivating the KEIP Participants to maximize operating and sale value in both jurisdictions. The exception to this joint approach is one KEIP Participant who provides services for the primary benefit of the Chapter 11 Entities (the "**Ineligible KEIP Employee**");

as such, any payments owed to the Ineligible KEIP Employee will be entirely paid by the Chapter 11 Entities.

Adams Affidavit at para 44, 53, 57, Applicants' Motion Record, Tab 2.

25. The KEIP is a two-pronged incentive payment. The first prong focuses on the KEIP Participants' ability to achieve certain cash flow targets (the "**Cash Flow Target**"), whereas the second prong focuses on their ability to maximize the value obtained in the sales (the "**Sales**") of the Aralez Entities' assets contemplated under the Stalking Horse Agreements (the "**Asset Sale Target**", together with the Cash Flow Target, the "**Performance Targets**"). Acting in concert, the Performance Targets maximize value for the Aralez Entities' stakeholders through promoting operational efficiencies during the Restructuring Proceedings and facilitating the Sales at the highest or otherwise best offer(s) available.

Adams Affidavit at paras 46-49, Applicants' Motion Record, Tab 2.

Cash Flow Target

26. The Cash Flow Target measures the ability of the Aralez Entities to meet or exceed the net operating cash flow projected in the consolidated debtor in possession rolling 13-week budget (the "**Consolidated DIP Budget**").

Adams Affidavit at para 47, Applicants' Motion Record, Tab 2.

27. Due to the interrelated corporate structure of the Aralez Entities, the eight KEIP Participants eligible for payment by the Applicants provide value to both the Canadian and U.S. businesses, therefore providing value to both the Canadian and U.S. estates. The Cash Flow Target is therefore based on a *consolidated* DIP budget for the Applicants and the

Chapter 11 Entities because the KEIP Participants provide services that benefit both sets of entities. Similarly, and with the exception of the lone KEIP Participant that provides benefit primarily to the Chapter 11 Entities, the costs under the KEIP are split between the Applicants and the Chapter 11 Entities.

Adams Affidavit at paras 44, 53, Applicants' Motion Record, Tab 2.

28. The incentive levels available at the Cash Flow Target are "target", "stretch", and "super stretch". Payments at the target level will be allocated evenly between the CCAA Entities and the Chapter 11 Entities. Allocation of any payments at the stretch or super-stretch levels will be allocated based on the relative contribution to the positive incremental cash flow by Applicants and the Chapter 11 Entities. For example, if the Aralez Entities generate positive incremental cash flow of \$3 million (\$2 million generated by the Chapter 11 Entities and \$1 million by the Applicants), the KEIP Participants would receive incentive payments totalling approximately \$1.5 million, of which approximately \$1 million would be allocated to, and payable by, the Chapter 11 Entities and \$0.5 million allocated to, and payable by, the Applicants. Similarly, if the entire \$3 million of incremental cash flow was generated by the Companies, 100% of the incentive payment (i.e. \$1.5 million) would be allocated to the Companies.²

Fourth Report at paras 28, 29, 30, 38, 39.

29. To obtain any payouts under the Cash Flow Target, the KEIP Participants will have to diligently manage relationships with their wholesalers, customers, vendors and government

² As noted, any payments earned by the Ineligible KEIP Employee will be paid entirely by the Chapter 11 Entities.

entities on a daily basis, as these parties are the main sources of the Applicants' revenue. While the Cash Flow Target will be determined based on the date of court approval of a sale transaction, any incentive payments will not be payable until the close of such a transaction.

Adams Affidavit at para 54, Applicants' Motion Record, Tab 2.

Asset Sale Target

30. The Asset Sale Target measures the Aralez Entities' ability to maximize the value of their assets by: (a) consummating one or more Sales; (b) selling the assets of the Chapter 11 Entities not included as part of the Stalking Horse Bids; and/or (c) generating incremental value above the purchase price consideration set forth in the Stalking Horse Bids. The aggregate value under the Stalking Horse Agreements is \$240 million, which includes a credit bid by the Applicants' pre-filing secured lender and their DIP lender (collectively, including related affiliates, "**Deerfield**").

Adams Affidavit at paras 48, 58, Applicants' Motion Record, Tab 2.

31. The incentive levels available under the Asset Sale Target are "threshold", "target", "stretch", and "super stretch". As with the Cash Flow Target, the eight KEIP Participants eligible for payment by the Applicants are providing services that benefit both the Applicants and the Chapter 11 Entities. Consequently, the Asset Sale Target is based on the aggregate consideration for the sale of all of the Aralez Entities' assets and operations in the U.S. and Canada and will be allocated on a pro rata percentage depending upon the ultimate purchase price (which is then adjusted so that the Chapter 11 Entities bear payments for the KEIP Participant who benefits the Chapter 11 Entities only). For example, based solely on the Stalking Horse Bids, it is anticipated that, at the "threshold" performance level, 76% of

the total payments (i.e., \$426,641) would be paid by the Chapter 11 Entities and 24% of the total payments (i.e., \$146,113) would be paid by the CCAA Entities.

Adams Affidavit at para 57, Applicants' Motion Record, Tab 2;
Fourth Report at paras 34-36.

Aggregate Performance Targets

32. The KEIP Participants' aggregate payout consists of, and is equally weighted between, the Cash Flow Target and the Asset Sale Target. The sum of both of these at the "target" payout level equals 50% of the base salary of all KEIP Participants. As a baseline, if the "target" performance level is achieved for the Cash Flow Target and the "threshold" performance level is achieved for the Asset Sale Target, participants receive a payment equal to 37.5% of each KEIP Participant's salary. This amount can be earned if the Aralez Entities: (a) meet 100% of the Cash Flow Target; and (b) consummate the Sales for at least \$230 million in the aggregate. Additional payments are dependent on meeting or exceeding the Cash Flow Target and/or obtaining combined sale consideration equal to or greater than \$250 million, which is \$10 million more than the value of the Stalking Horse Bids.

Adams Affidavit at para 50, Applicants' Motion Record, Tab 2.

33. The payout structure on an aggregate basis if both Performance Targets are met at varying levels is set forth below:

Level	Payout as a Percentage of Salary	Payout as a Percentage of Target	Net Operating Cash Flow Variance	Total Payouts
Below Threshold for both Targets	NA	0%	\$<230 million + <100% of Consolidated DIP Budget CF	\$0

Threshold for Asset Sale Target and Target for Cash Flow Target	18.75%	75%	\$230 million – \$249.99 million+ 100% Consolidated DIP Budget CF	\$608,754
Target for both Targets	50%	100%	\$250 million – \$259.99 million + 100% Consolidated DIP Budget CF	\$1,623,344
Stretch for both Targets	75%	150%	\$260 million – \$279.99 million; + Consolidated DIP Budget CF + \$2.4 million – \$4.1 million (incremental positive cash flow)	\$2,435,016
Super-Stretch for both Targets	125%	250%	\$280 million or greater Consolidated DIP Budget CF; + \$4.1 million or greater (incremental positive cash flow)	\$4,058,360

Adams Affidavit at para 59, Applicants’ Motion Record, Tab 2.

34. As a baseline, assuming the Aralez Entities meet the Cash Flow Target and close the sales currently contemplated under the Stalking Horse Agreements, the Applicants would pay a total of \$520,161 in respect of the KEIP, representing \$374,049 on the Cash Flow Target component and \$146,113 on the Asset Sale Target component. Based on the aggregate value of the Stalking Horse Bids and the cash flow results as at November 9, 2018, the KEIP Participants would receive payments totalling approximately \$2.6 million, a portion of which (between \$200,000 and \$2.0 million, depending on the relative performance of the Applicants on the under the Cash Flow Target) would be allocated and payable by the Applicants.

Adams Affidavit at para 60, Applicants’ Motion Record, Tab 2.
Fourth Report at para 24.

35. The termination provisions of the KEIP are identical to those of the KERP.

Adams Affidavit at para 66, Applicants' Motion Record, Tab 2.

36. The Aralez Entities are required to consult with the Monitor prior to making a final determination of incentive payments and allocation of amounts amongst the Aralez Entities.

Fourth Report at para 41.

C. The Key Employee Charge

37. The Aralez Entities intend to secure amounts owing under the KERP and the KEIP through the Key Employee Charge, which would act as a charge upon the Property up to the maximum amount of \$2.8 million. This aggregate availability is broken down to \$256,710 available for KERP payments and approximately \$2.5 million available for KEIP payments. In order for the Applicants to pay out \$2.5 million under the KEIP, the Applicants' cash flow must have a favourable variance of at least \$4.1 million, with the Chapter 11 Entities failing to realize a cash flow variance of 100% of target, and the sale of the Canadian Assets would have to exceed \$102 million, while the sale of the Chapter 11 Entities' assets could not exceed the value available under the Vimovo Stalking Horse Agreement and the Toprol Stalking Horse Agreement. As the current purchase price under the Canadian Stalking Horse Agreement is \$62.5 million, the Applicants would have to receive a bid that attributed an additional \$39.5 million in value over the current bid to achieve a sale of the Canadian Assets to exceed \$102 million.

Adams Affidavit at para 67, Applicants' Motion Record, Tab 2.

38. The benefit of the Key Employee Charge will be limited to individual respective entitlements under the KERP or the KEIP and will not include any amounts owing to the KEIP Participant whose work does not affect Canadian operations. Any payments to this KEIP Participant will be borne solely by the Chapter 11 Entities.

Adams Affidavit at para 68, 71, Applicants' Motion Record, Tab 2.

39. The Key Employee Charge will rank subordinate to the Administration Charge, the DIP Lender's Charge (as defined in the Initial Order) and the Bid Protections Charge (as defined in the Process Order) but in priority to the D&O Charge and the Transactional Charge (as defined in the Initial Order).

Adams Affidavit at para 69, Applicants' Motion Record, Tab 2.

PART III - ISSUES

40. The issues on this motion are whether to:
- (a) approve the KERP and KEIP;
 - (b) approve the Key Employee Charge; and
 - (c) approve the sealing of the Confidential Supplement (as defined below).

PART IV - THE LAW

- A. The KERP and KEIP Should be Approved and the Charge Should be Granted**
- i. This Court has the Discretion to Approve the KEIP, the KERP and the Key Employee Charge**

41. CCAA courts have discretion to authorize key employee plans and grant a charge to secure the Applicants' obligations thereunder.

Grant Forest Products Inc, (Re), [2009] OJ No 3344 [**Grant Forest**] at para 8 (SCJ [Comm List]), BOA, Tab 1; *Re Essar Steel Algoma Inc.*, 2015 ONSC 7656 [**Essar**] at para 10, BOA, Tab 2.

42. KERPs are designed to retain employees who are important to the management and operations of a debtor company at a time when they are likely to look for other employment because of the company's financial distress. KERPs have been approved in numerous CCAA proceedings where the retention of key employees is critical to a successful restructuring. KEIPs focus on providing milestone incentives for key employees who have a significant role in a debtor company's restructuring, and KEIPs have been approved by this Court in, among others, *Nortel* and *Northstar*, with the courts drawing on the same rationale applied to approve KERPs.

Nortel Networks Corp (Re), [2009] OJ No 1044 [**Nortel**] at para 14 (SCJ [Comm List]), BOA, Tab 3; *Northstar Aerospace Inc. (Re)*, 2012 CarswellOnt 17448 at paras 4-11 (SCJ [Comm List]), BOA, Tab 4; *Performance Sports Group Ltd (Re)* (10 January 2017), Toronto, Ont Sup Ct [Comm List] CV-16-11582-00CL (order issued by Newbould J), BOA, Tab 5.

43. In Canadian insolvency proceedings, courts and practitioners have not always formally distinguished between retention plans and incentive plans. In these proceedings, as the Chapter 11 Entities are seeking an incentive program for executives who are considered ineligible under U.S. law for retention programs, the CCAA Entities have structured separate incentive and retention programs in order to harmonize across the Restructuring Proceedings. Canadian courts have approved programs titled as retention programs which have included an incentive component.

FirstOnSite GP Inc (Re) (21 April 2016), Toronto, Ont Sup Ct [Comm List] CV-16-11358-00CL (endorsement of Newbould J), BOA, Tab 6.

44. In this case, the three KERP Participants are considered critical to ongoing operations and may seek other employment if the KERP is not approved. The KERP Participants have been diligently working on behalf of the Applicants to facilitate the Restructuring Proceedings, in part in reliance on the Applicants instituting a KERP on their behalf.

Adams Affidavit at paras 37-38, 42, Applicants' Motion Record, Tab 2.

45. Similarly, the KEIP was designed to promote the achievement of financial performance objectives, ensure that the interests of key executives align with maximizing stakeholder value and motivate key executives during the Sales Process. The KEIP is critical to align the eight KEIP Participants eligible for payment by the Applicants with the success of the Sales Process and motivate them to maximize recoveries for the Applicants' stakeholders. These eight KEIP Participants have been working diligently on behalf of the Applicants to maximize recoveries under the Restructuring Proceedings.

Adams Affidavit at paras 43, 54, Applicants' Motion Record, Tab 2.

46. In *Grant Forest*, the Court considered the following factors in approving an employee retention plan and a key employee charge:

- (a) Whether the monitor supports the employee retention agreement and the key employee charge;
- (b) Whether the beneficiaries are likely to consider other employment opportunities if the key employee charge is not approved;
- (c) Whether the beneficiaries are crucial to the successful restructuring of the debtor company;
- (d) The beneficiaries' history with and knowledge of the debtor;

- (e) Whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment;
- (f) The business judgement of the board of directors of the debtor company;
- (g) Whether the KERP was supported by secured creditors of the debtor; and
- (h) Whether payments under the KERP are payable upon the completion of the restructuring process.

Grant Forest at paras 8-23, BOA, Tab 1; *Re Cinram International Inc*, 2012 ONSC 3767 [*Cinram*] at para 91, BOA, Tab 7; *Target Canada Co, (Re)*, 2015 ONSC 303 at paras 56-59, BOA, Tab 8.

47. The Court further emphasized judicial deference towards the business judgement of the monitor and the board of directors of the debtor company in approving a KERP and key employee charge. The *Grant Forest* analysis should also apply to the KEIP.

Grant Forest at para 18, BOA, Tab 1.

48. The Court has approved KERPs that contemplate payments being made prior to the resolution of the restructuring process, provided such payments are just and fair in the circumstances and the KERP is intended to retain key employees through the term of the restructuring process.

Cinram at para 92, BOA, Tab 7; *Grant Forest* at paras 22-23, BOA, Tab 1.

ii. The KEIP and KERP Should Be Approved

49. In this instance, the *Grant Forest Products* factors have been met. In particular:

- (a) The Applicants discussed the KERP and KEIP with the Monitor and obtained its feedback prior to finalizing the programs, making a number of changes to the KEIP in order to address concerns voiced by the Monitor;

- (b) The Monitor is of the view that the KERP and KEIP are reasonable in the circumstances. While the Monitor notes that, in the event the maximum targets are met under both of the Performance Targets, the amounts under the KEIP are high on average, it also notes that Deerfield does not object to KEIP including the quantum of payments thereunder;
- (c) The Applicants determined there was a risk that KERP Participants would leave prior to the conclusion of the Sales Process, as while they are not expected to be terminated under the Canadian Stalking Horse Agreement, there is uncertainty as to whether the Canadian Stalking Horse Bid will be successful and as to the ultimate job security of the KERP Participants;
- (d) The KEIP Participants are senior managers who are not expected to retain their roles under the Stalking Horse Agreements, leading the Applicants to conclude that the KEIP was critical to retain senior management and align them with the success of the Sales Process in order to maximize recovery for the Applicants' stakeholders;
- (e) The Applicants have selected each of the Key Employees precisely because they are essential to their business operation during the Restructuring Proceedings. The loss of any of the Key Employees would have a materially detrimental effect on the Applicants' business;
- (f) The Key Employees have all been employed by the Aralez Entities since at least 2016, the year that the Aralez Entities formed their current structure;
- (g) The Key Employees have institutional knowledge and experience which cannot be easily replaced at this time, especially considering the compressed timeline for the Sales Process;

- (h) At 12 participants, the collective size of the KERP and KEIP are reasonable relative to the total workforce of the Aralez Entities, who currently employ approximately 64 employees;
- (i) The Aralez Board, including all independent directors, approved the list of the Key Employees and the quantum offered under the KERP or KEIP after a rigorous selection process assisted by the Applicants financial advisors and in consultation with the Monitor. The business judgment of the Aralez Board is respectfully entitled to judicial deference; and
- (j) The quantum offered under the KERP and KEIP are reasonable. In developing the KERP and KEIP, A&M reviewed existing historical compensation for the Key Employees and recent incentive programs for comparable companies undergoing insolvency proceedings. A&M found that the KERP and KEIP were both reasonable and in the range of other similar programs granted in insolvency proceedings, and the Monitor has also noted the reasonableness of the KEIP (based on the current outcome) and the KERP.

Adams Affidavit at paras 16, 24-26, 28-29, 30, 38, 41, 45, 61-65, Applicants' Motion Record, Tab 2;
Fourth Report at paras 19, 42-48.

50. Deerfield does not object to the KERP or KEIP. The principal amount of debt owed by the Aralez Entities to Deerfield is \$275 million, well in excess of the purchase prices under the Stalking Horse Agreements, which includes a \$130 million credit bid from Deerfield under the Toprol Stalking Horse Agreement. The Monitor's counsel has conducted an independent review of Deerfield's security and has opined that subject to the typical assumptions and qualifications for opinions of this nature, Deerfield's security is valid and enforceable in the Province of Ontario, the State of New York and the State of New Jersey.

Adams Affidavit at paras 16, 24-26, 28-29, 30, 38, 41, 45, 61-65, Applicants' Motion Record, Tab 2;
Fourth Report at paras 61 and 62.

51. The Aralez Entities, with the assistance of A&M, have intended to seek approval of a KERP and KEIP since the outset of the CCAA Proceedings and have communicated that intention to the Key Employees. However, in order to facilitate an orderly insolvency process, finalize the Stalking Horse Agreements and commence the court-approved Sales Process, the Aralez Entities have delayed seeking approval of the KERP and KEIP until this time. Essentially, the Key Employees put maximizing the value of the CCAA Entities over their own interests of having the KEIP and KERP approved and penalizing such actions could impair future restructuring proceedings.

Fourth Report at para 44.

B. The Key Employee Charge Should Be Approved

52. Should this Court approve the KERP and KEIP, the Key Employee Charge, which will act to secure the priority of moneys paid under the KERP and KEIP, should also be approved.

Adams Affidavit at para 67, Applicants' Motion Record, Tab 2.

53. The amount of the charge (\$2.8 million) is premised upon a \$256,710 payment under the KERP and an approximately \$2.5 million payment under the KEIP. This charge amount was set by the Applicants using the highest possible target in an abundance of caution.

Adams Affidavit at para 67, Applicants' Motion Record, Tab 2.

54. The Monitor has submitted a report in support of the granting of the KERP, KEIP and Key Employee Charge.

Adams Affidavit at paras 25, 70, Applicants' Motion Record, Tab 2;
Fourth Report at para 48, 52, 57.

C. The Confidential Supplement Should be Sealed

55. The Applicants request that the Court seal the Confidential Supplement to the Fourth Report, which contains the list of KERP Participants and their positions, wages and proposed KERP payments. The titles, wages, and proposed payouts of the KEIP Participants was ultimately disclosed in the Chapter 11 Proceedings, so the Applicants are not seeking the sealing of this information.

Adams Affidavit at para 72, Applicants' Motion Record, Tab 2.

56. Pursuant to the Ontario *Courts of Justice Act*, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

Courts of Justice Act, RSO 1990, c C. 43 at s 137(2).

57. In *Sierra Club of Canada v. Canada (Minister of Finance)*, Justice Iacobucci held that a confidentiality order should be granted when: such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and the salutary effects of the confidentiality order outweigh the deleterious effects.

Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41 at para 53, BOA, Tab 9.

58. Orders sealing confidential supplements relating to KERPs containing sensitive personal and compensation information have been previously granted by this Court.

Canwest Global Communications Corp, Re, [2009] OJ No 4286 at para 52, BOA, Tab 10; *Canwest Publishing Inc (Re)*, 2010 ONSC 222 [*Canwest*] at para 65 (Ont SCJ [Comm List]), BOA, Tab 11.

59. The Confidential Supplement contains sensitive personal and compensation information about the KERP Participants. This information, which is not generally made public by the Aralez Entities, is highly personal to the KERP Participants. Further, most of the employees of the Applicants are not proposed to receive payments under the KERP or the KEIP. Identifying the KERP Participants and the payments they may receive is likely to create tension between employees at a time when they must closely coordinate with one another to close the Sales and maintain operations.

Adams Affidavit at para 72, Applicants' Motion Record, Tab 2.

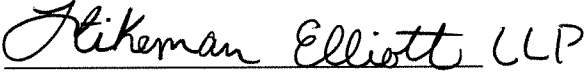
60. Protecting the disclosure of such sensitive personal and compensation information (the disclosure of which will cause harm to the Applicants, their operations and the KERP Participants) is an important commercial interest that should be protected. Moreover, and as previously noted by the Court, the KERP Participants of private companies have a reasonable expectation that their income and identities will be kept confidential. These salutary effects outweigh any deleterious effect of restricting the accessibility of court proceedings, and the Monitor supports such sealing.

Essar at para 24, BOA, Tab 2; *Canwest* at paras 64-65, BOA, Tab 11.
Fourth Report at para 16.

PART V - ORDER SOUGHT

61. For all of the foregoing reasons, the Aralez Entities request an order approving: (i) the KERP, the KEIP and the Key Employee Charge; and (ii) the sealing of the Confidential Supplement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of November, 2018.


Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Grant Forest Products Inc, (Re)*, [2009] OJ No 3344
2. *Re Essar Steel Algoma Inc*, 2015 ONSC 7656
3. *Nortel Networks Corp (Re)*, [2009] OJ No 1044
4. *Northstar Aerospace, Inc (Re)*, 2012 CarswellOnt 17448
5. *Performance Sports Group Ltd (Re)* (10 January 2017), Toronto, Ont Sup Ct [Comm List] CV-16-11582-00CL (order issued by Newbould J)
6. *FirstOnSite GP Inc (Re)* (21 April 2016), Toronto, Ont Sup Ct [Comm List] CV-16-11358-00CL (endorsement of Newbould J)
7. *Re Cinram International Inc*, 2012 ONSC 3767
8. *Target Canada Co, (Re)*, 2015 ONSC 303
9. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
10. *Canwest Global Communications Corp, Re*, [2009] OJ No 4286
11. *Canwest Publishing Inc (Re)*, 2010 ONSC 222

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act, RSO 1990, c C.43

137. Documents public

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF ARALEZ PHARMACEUTICALS INC. ET AL.

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

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(RETURNABLE NOVEMBER 16, 2018)**

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