Court File No. CV-21-00659187-00CL

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 DOMENICO SERAFINO AS A PERSON INTERESTED IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF HYDRX FARMS LTD., CANNSCIENCE INNOVATIONS INC. AND SCIENTUS PHARMA INC.

(the "Applicant")

RESPONDING FACTUM OF THE APPLICANT DOMENICO SERAFINO AS A PERSON INTERESTED IN THE MATTER

(Re: Cobra Claim Process - Returnable June 30, 2021)

June 29, 2021

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PART I – OVERVIEW

1. The issue on this motion is whether Richard Goldstein ("**Goldstein**"), as the directing mind of Cobra Ventures Inc. ("**Cobra**"), should be permitted to profit from Cobra's purchase of a material contract, the Aphria Debenture (defined below), of Hydrx Farms Ltd. (**"Hydrx"**) when Goldstein did not comply with any of the statutory requirements of disclosure and approval as a director of Hydrx under section 120 of the *Canada Business Corporations Act* (**"CBCA"**) that are the statutory preconditions permitting such profit.

2. Pursuant to section 120 of the CBCA, a director is prohibited from realizing a profit from his/her interest in a transaction/contract with the corporation unless the director made full disclosure of his/her interest and obtained express approval from the corporation's board of directors or its shareholders.

3. Goldstein breached his statutory duties in respect of certain material transactions directly resulting from the acquisition of the Aphria Debenture (defined below) by Cobra which transactions took place both before and after Goldstein became a director of Hydrx, namely:

   a. The Cobra Buy-Out Transaction (defined below);
   b. The Rydan Loan Transaction (defined below); and
   c. The Windsor Loan Transaction (defined below),

   (collectively, the "**Material Transactions**").

4. After becoming a director of Hydrx, Goldstein acquired an indirect 50% interest in the Aphria Debenture, not previously owned or controlled by him, without disclosure to and approval by Hydrx's board of directors or its shareholders. To achieve this objective, Goldstein leveraged the Aphria Debenture, a material contract of Hydrx, to secure the loans for Cobra that enabled him to increase his indirect ownership interest in the Aphria Debenture. He did this while a director of Hydrx, without discharging his statutory disclosure obligation to Hydrx to present this corporate opportunity to Hydrx and without requesting and obtaining the requisite board or shareholder approval to profit from this material indirect increase in the Aphria Debenture.

5. In order to protect Hydrx from the self-serving actions of a conflicted director, and given the dead-locked nature of the board of directors, Domenico Serafino ("**Serafino**"), as the only independent director of Hydrx, commenced an application on March 22, 2021 as an "interested person" under the *Companies' Creditors Arrangement Act* (**"CCAA"**).

6. Subsequent to two (2) stay orders in the CCAA proceedings, on April 9, 2021, and having reviewed the concerns of the Applicant about his conduct as set out in the Applicant's materials filed with the court in respect of the CCAA proceedings, Goldstein, while a director of Hydrx, caused Cobra to register a notice on title to the Hydrx Real Property (defined below). The notice pertains to an amendment agreement with respect to the Windsor Loan Transaction executed on April 8, 2021 which changes the nature of the Windsor Loan Transaction.

7. In these CCAA proceedings, Goldstein is attempting to credit bid or otherwise recover (at the expense of the Hydrx stakeholders) the entire $15 million face amount of indebtedness owing by Hydrx under the Aphria Debenture opposite his cost of about $5 million and thereby realize a profit of about $10 million. In essence, Goldstein used his fiduciary position as a director of Hydrx to orchestrate events in such a manner as to effect either:

    a. an acquisition of the Hydrx business for the $5 million it cost Cobra to acquire the Aphria Debenture; or

    b. to realize upon the assets of Hydrx for his material personal benefit to the disadvantage of the stakeholders of Hydrx that he was duty bound to protect.

8. Had Goldstein chosen not to become a director, none of the Material Transactions would:

    a. be in breach of any statutory breach; or,
    b. be otherwise offensive to public policy.

    However, the moment Goldstein became a director of Hydrx, he agreed to accept the fiduciary and statutory obligations of such a directorship to act in the best interests of Hydrx and, as a consequence, is prohibited by the CBCA from profiting from his interest in the

Aphria Debenture. He had a statutory obligation to disclose in writing to Hydrx all particulars of his interest in any material contract (including his intention to profit from his indirect interest in the Aphria Debenture) and to obtain the agreement of the Hydrx board or its shareholders by special resolution expressly authorizing such profit. Goldstein failed to discharge these obligations.

9. Goldstein not only refused to discharge his fundamental statutory obligations, he actively used his position as a director/fiduciary of Hydrx to advance his personal interests at the expense of Hydrx and its stakeholders. Goldstein now seeks refuge behind the claims process in these CCAA proceedings.

10. The Applicant does not seek to challenge the well accepted authority that indebtedness and security can be purchased at a deep discount. However, the statutory duties owed by a director place Goldstein in a completely different position than would be the case with an arm's length third party non-fiduciary.

11. In summary:

    a. Once Goldstein decided to become a director, he accepted the higher duties of disclosure and accountability that occasion directorship of a corporation. He failed to discharge these duties. Accordingly, neither Goldstein nor Cobra should be permitted to profit from Goldstein's failure to comply with his obligations under section 120 of the CBCA;

    b. Goldstein's conscious decision to breach his statutory obligations as a director of Hydrx has directly resulted in unnecessary costs and damages to Hydrx and its stakeholders. The provisions of section 120 of the CBCA provide the Court with a broad discretionary power to remedy such breaches and the Applicant is respectfully requesting that the Court (i) constrain the recovery of Goldstein and Cobra to actual dollars expended to acquire the Aphria Debenture; (ii) reduce any such recovery by an amount sufficient to compensate Hydrx for all of the unnecessary costs and damages it has incurred; and (iii) preclude Cobra from credit bidding any indebtedness that may be found owing to it as part of the court sanctioned SISP.

PART II – FACTS

About Hydrx

12. Hydrx is incorporated under the CBCA. It is a privately held corporation and its shares are not publicly traded.[1] Hydrx is a vertically integrated biopharmaceutical company with a

[1] Affidavit of Domenico Serafino, sworn May 20, 2021 [Affidavit of Serafino], exhibit "A", para. 5.

focus on developing and commercializing pharmaceutical grade cannabinoid derivative products.[2]

Hydrx Material Contract: The Aphria Debenture

13. On April 15, 2017, Hydrx granted a charge in favour of Aphria Inc. ("**Aphria**") in respect of a senior, secured convertible debenture with a face principal amount of $11.5 million (the **"Aphria Debenture**"). The Aphria Debenture created a security interest in all real and personal property assets of Hydrx and was registered on title to Hydrx's 46,000 square foot state of the art production facility in Whitby, Ontario (the **"Hydrx Real Property**").[3]

14. The maturity date under the Aphria Debenture was originally August 14, 2019, and this date was subsequently extended to November 12, 2019, and then again to the earlier of January 30, 2020 or the date of the occurrence of a termination event under a support agreement between the parties. On January 20, 2020, Aphria demanded repayment and issued a notice of intention to enforce security.[4]

Goldstein Purchases Hydrx Shares

15. In 2019, Goldstein was introduced to Hydrx and he purchased Hydrx shares giving him an approximate 0.65% ownership interest its capital stock.[5]

The July Plan

16. In July 2020, aware of Hydrx's financial circumstances, Goldstein in conjunction with Leo Chamberland (**"Chamberland**"), the President of World Class Extractions Inc. (**"WCE"**) and Rosy Mondin (**"Mondin"**), CEO of WCE, presented to Serafino, the Applicant in these proceedings and an independent director of Hydrx, a proposal wherein Goldstein and WCE would arrange for the acquisition of the Aphria Debenture (the **"July Plan"**). Under the July Plan, the Aphria Debenture, once acquired by Goldstein and WCE, would be converted into the common share equity of Hydrx on the condition that Hydrx terminate all of its other efforts to raise capital through its own sources.

17. Under the July Plan, Goldstein, through his company First Republic Capital Corporation, would raise approximately $6 million in equity capital to invest in the common share equity in Hydrx to be used as operating capital.

18. The July Plan, contemplating as it did the conversion of the bulk of the Aphria Debenture indebtedness into common share equity in the capital stock of Hydrx, would thereby

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[2] Affidavit of Serafino, exhibit "A", para. 5-7.

[3] Affidavit of Serafino, para. 20 & 22.

[4] Affidavit of Serafino, para. 24-25, Affidavit of Richard Goldstein, sworn April 23, 2021 [*Moving Affidavit of Goldstein]*, paras. 15-16.

[5] Affidavit of Serafino, exhibit "A", para 61.

eliminate all secured debt owing by Hydrx, and preserve both the Hydrx business and existing shareholder equity participation.

19. The July Plan was fundamental to all of Serafino's future dealings, as an independent director of Hydrx, with Goldstein. Despite repeated assurances, the July Plan was never implemented. [6]

Cobra Purchases the Material Contract - The Aphria Debenture

20. On July 28, 2020, Cobra and Aphria entered into an agreement to assign the Aphria Debenture to Cobra for the deeply discounted price of $5 million. This assignment transaction was completed on October 1, 2020. On October 2, 2020, the assignment of the Aphria Debenture to Cobra was registered against title to the Hydrx Real Property.[7]

21. At this time:

    a. Cobra was owned 50% by WCE having invested $2.5 million and 50% by 2775361 Ontario Inc. ("**277 Ontario**") (a company in which Goldstein is an owner, president and controlling mind);[8] and
    b. Goldstein was a shareholder of Hydrx.

Hydrx Board of Directors Resign

22. On September 6, 2020, the Hydrx Board of Directors, excluding Serafino, resigned when the D&O insurance carrier refused to renew coverage.[9]

Rydan Loan Transaction

23. On October 7, 2020, Goldstein caused Cobra to enter into an agreement to borrow $1 million from Rydan Financial Inc. (**"Rydan"**). Pursuant to the commitment letter between the parties:

    a. As security for the Rydan loan, Goldstein caused Cobra to grant an assignment of the Aphria Debenture in favour of Rydan; and

    b. Upon the occurrence of an event of default by Cobra, Rydan would be in a position to exercise its rights as a secured creditor over all assets of Hydrx, including the Hydrx Real Property.

    (collectively, the "**Rydan Loan Transaction**")

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[6] Affidavit of Serafino, paras. 27-32, 36, 39, 46. Affidavit of Leo Chamberland, sworn May 20, 2021, Responding Record, Tab 2, paras. 9-11.
[7] Affidavit of Serafino, paras. 33-34.
[8] Affidavit of Richard Goldstein, sworn June 3, 2021 [*Reply Affidavit of Goldstein]*, para. 4.
[9] Affidavit of Serafino, para. 36.

24. Particulars of the Rydan Loan Transaction were not disclosed to the Hydrx board either before or after Goldstein became a director of Hydrx and were only fully disclosed as part of these CCAA proceedings.[10]

Goldstein Becomes Director of Hydrx

25. On October 23, 2020, Goldstein along with Mondin became directors of Hydrx.[11] Goldstein was the sole "mind and management" of Cobra and 277 Ontario and Mondin was a senior executive and the "mind and management" of WCE.

26. For both Serafino and Mondin, the principal objective of Goldstein and Mondin joining the board of Hydrx was to better pursue of objectives of the July Plan. Serafino and Mondin were led to believe by Goldstein that this was his reason for joining the board as well.[12]

27. Goldstein requested to become a director of Hydrx. He was not forced or otherwise coerced to accept the responsibilities and statutory obligations that arise upon the acceptance of this role.[13]

28. At this time:

    a. The Hydrx Board of Directors comprised Serafino, Goldstein and Mondin;
    b. WCE and Goldstein were owners of Cobra;
    c. Mondin was a director and CEO of WCE;
    d. The Aphria Debenture had been assigned to Cobra and registered against the Hydrx Real Property; and,
    e. Goldstein was a shareholder and director of Hydrx.

29. On October 23, 2020, the very same day Goldstein became a director of Hydrx, Goldstein caused Cobra to register a transfer of charge as between Cobra and Rydan on title to the Hydrx Real Property in order to complete the Rydan Loan Transaction. Notably, there was no disclosure by Goldstein to Serafino, Hydrx or its shareholders that the assets of Hydrx were pledged to support the Cobra loan obligations to Rydan and were, as a result, subject to seizure in the event of a default by Cobra.[14]

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[10] Affidavit of Serafino, para. 43-44, Reply Affidavit of Goldstein, para. 45, exhibit "M".
[11] Affidavit of Serafino, para. 38.
[12] Affidavit of Serafino, para. 39. Affidavit of Leo Chamberland, Responding Record, Tab 2, para. 14.
[13] Affidavit of Serafino, paras. 37 – 40.
[14] Affidavit of Serafino, para. 44, exhibit "G".

Cobra Buy-Out Transaction and Windsor Loan Transaction

30. In December of 2020, Goldstein and WCE had a falling out.[15]

31. According to Chamberland, the falling out was caused by the failure of WCE and Goldstein to agree upon how to implement the July Plan. Specifically, WCE did not agree with Goldstein that Cobra should use its creditor remedies against Hydrx to profit from Cobra's investment in the Aphria Debenture as the intention of all parties was that Cobra would not profit from the acquisition of the Aphria Debenture through realization. Chamberland and Mondin were aware of the obligations under the CBCA to disclose an interest in a material contract and to seek permission to profit from same but did not consider such disclosure necessary as the intention was to convert the Aphria indebtedness into equity of Hydrx – not to use the face value of the indebtedness to permit Cobra to acquire the Hydrx business and thereby realize a profit of approximately $10 million. The evidence given by Chamberland is uncontroverted.[16]

The Cobra Buy-Out Transaction

32. On or about January 19, 2021, Goldstein through his numbered corporation, 277 Ontario, acquired the 50% interest of WCE in Cobra (the **"Cobra Buy-out Transaction"**). Goldstein financed the acquisition through a $4 million loan he caused Cobra to obtain from Windsor Private Capital Limited Partnership (the **"Windsor Loan Transaction"**). The funds were used by Goldstein to both repay the Rydan loan and to fund his buy-out obligations to WCE.

33. As a result, Mondin resigned from the board of Hydrx in early January of 2021.[17] This left a "deadlocked" board consisting of Serafino and Goldstein.

34. Under the term sheet dated December 29, 2020, as security for the Windsor loan, Cobra agreed to provide to Windsor, among other things, an assignment of the Aphria Debenture. In short, Goldstein used the assets of Hydrx to secure the Cobra loan from Windsor which permitted him to increase his own interest in Cobra by 40% and thereby increase his indirect ownership interest in the Aphria Debenture – all at a time when he was a director of Hydrx and without the required disclosure to and consent from the board of Hydrx or its shareholders.[18]

35. Goldstein provided Serafino with a copy of the Windsor term sheet <u>after</u> it was executed by Goldstein on behalf of Cobra.[19]

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[15] Affidavit of Serafino, para. 48. Reply Affidavit of Goldstein, para. 62.

[16] Affidavit of Leo Chamberland, sworn May 20, 2021, Responding Motion Record, Tab 2, para. 12, 16-17.

[17] Affidavit of Leo Chamberland, Responding Motion Record, Tab 2, para. 17.

[18] Affidavit of Serafino, paras. 12-13, 49-51.

[19] Affidavit of Serafino, para. 51.

36. Under the Windsor commitment letter dated January 15, 2021:

    a. Goldstein caused Cobra to grant to Windsor as security:

        i. A first assignment of the Aphria Debenture;
        ii. A transfer of charge registered against the Hydrx Real Property;

    b. 2775361 Ontario Inc. guaranteed the Windsor loan;

    c. An opinion was required as to the corporate authority of Cobra to deliver the Security documents together with an opinion from Cobra's solicitor that Cobra has good and marketable title to the Hydrx Real Property.[20]

37. The Windsor commitment letter also contemplated the delivery of a notice and direction to Hydrx. There is no evidence that such a notice was delivered to Hydrx.[21]

38. As part of the deal, Windsor obtained a 10% ownership stake in Cobra.[22]

39. Upon the occurrence of an event of default by Cobra in its loan repayment obligations, Windsor would be entitled to enforce its secured creditor rights against all assets of Hydrx, including, the Hydrx Real Property which represents substantially all of Hydrx's assets.

40. The Windsor commitment letter was not provided to Serafino, Hydrx or its shareholders until it was included in Goldstein's affidavit of June 3, 2021, as part of the CCAA proceedings.[23]

41. The net effect of the acquisition by Goldstein of WCE's 50% interest in Cobra and the Windsor Loan Transaction is that Goldstein acquired an additional 50% indirect interest in the Aphria Debenture that he did not previously own after he became a director of Hydrx. From that, he granted Windsor a 10% ownership interest in Cobra and by extension a 10% indirect interest in the Aphria Debenture. Put differently, the $4 million total investment arranged by Goldstein through Windsor allowed Goldstein and Windsor to acquire between them a 100% indirect interest in the approximately $14.8 million Aphria Debenture.[24]

42. At no point in time since his appointment to the Hydrx board did Goldstein:

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[20] Reply Affidavit of Goldstein, para. 64-65, exhibit "U".
[21] Reply Affidavit of Goldstein, exhibit "U", provision 2.5(g).
[22] Reply Affidavit of Goldstein, paras. 4 and 64. Affidavit of Serafino, exhibit "I".
[23] Affidavit of Serafino, paras. 51-52. Reply Affidavit of Goldstein, para. 64, exhibit "U".
[24] Affidavit of Serafino, para. 12,

a. advise Hydrx, it's independent board of directors or its shareholders that an opportunity existed to acquire the WCE 50% indirect interest in the $15 million Aphria Debenture for $2.5 million or potentially the total indirect interest for $5 million. This was an extraordinary material corporate opportunity for Hydrx;[25]

b. request a board or shareholders meeting to formally disclose in writing to Hydrx his material indirect interest in the Material Transactions;

c. enter into the Minutes his interest in the Material Transactions, which Material Transactions collectively served to significantly increase his ownership interest in Cobra and thereby his indirect interest in the Aphria Debenture;

d. seek approval to profit from such transactions as is required under section 120 of the CBCA.[26]

Windsor Not An Innocent Third Party Lender

43. Windsor has been served with all materials in connection with the CCAA proceedings, including, the motion materials in respect of this Cobra Claims Process but it has chosen not to participate.

44. Windsor knew, or with the exercise of reasonable diligence, would have known that:

a. Goldstein and Mondin were directors of Hydrx in January 2021;
b. The Cobra Buy-Out Transaction constituted a transaction involving a corporate opportunity of Hydrx;
c. This corporate opportunity was not disclosed to Hydrx by either Goldstein or Mondin, as required by law.[27]

45. Windsor did not request confirmation from Hydrx that it agreed to have the Hydrx Real Property pledged as security for the loan to Cobra.[28]

Goldstein Causes Cobra to Demand Payment from Hydrx

46. Goldstein while a director of Hydrx, caused Cobra to demand payment from Hydrx and issue notices of intention to enforce its security dated December 22, 2020.[29]

47. From the first presentation of the July Plan to Serafino, neither Goldstein nor Mondin (as a representative of WCE) ever indicated to Hydrx, its board or its shareholders, that after

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[25] Affidavit of Serafino, paras. 11-16.
[26] Affidavit of Serafino, para. 59.
[27] Affidavit of Serafino, para. 54.
[28] Affidavit of Serafino, para. 55.
[29] Affidavit of Serafino, para 77. Moving Affidavit of Goldstein, exhibit "I".

acquiring the Aphria Debenture, they would reserve the right to simply realize on the Aphria Debenture for personal profit if the July Plan was unsuccessful. In fact, the contrary is true. WCE was transparent in confirming that it had no such intention to profit. This explains why Mondin felt no obligation to comply with section 120 of the CBCA.[30]

Goldstein's February 21, 2021 Email

48. Serafino, only in possession of the Windsor Term Sheet at this time, sought to obtain particulars of the Windsor loan transaction. In response and by email to Serafino dated February 21, 2021, Goldstein wrote, in part, as follows:

> *Let me start by saying that the arrangement between Cobra, Windsor and any other of Cobra's sources of funding is* ***none of your business****. The area you really ought to focus on is the accumulating debt of the company for which you are a fiduciary by virtue of your being a Director…* [31] [emphasis added]

Goldstein Acknowledges His Conflict of Interest Position

49. In that same February 21, 2021 email, Goldstein further wrote:

> *I find myself increasingly aware of the potential conflicts of interest and am discussing with my lawyers and Health Canada the prospect of resigning as soon as practical, likely within the next 14 days…* [32]

50. Notwithstanding his recognition of a conflict of interest, Goldstein refused to resign as a director of Hydrx and undertook various actions which served only to benefit Cobra at the expense and detriment of Hydrx. Specifically:

a. Goldstein directed his compliance consultant, Roula Sotirakos, to not renew the Cannabis Excise Tax Licence that is required to permit Hydrx to sell cannabis products. The evidence given by Ms. Sotirakos is uncontroverted;[33] and

b. Goldstein directed a Cobra contractor, Philip Hemans (then the designated Health Canada Responsible Person for Hydrx) to enquire of Health Canada the best way to transfer Hydrx's cannabis licences to Cobra.[34]

Serafino Seeks CCAA Protection for Hydrx

51. Concerned that the actions of Goldstein would permanently damage Hydrx, and with a deadlocked board of directors, Serafino, as an "interested person" under section 11 of the

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[30] Affidavit of Leo Chamberland, Responding Record, Tab 2, paras. 15 & 17.
[31] Affidavit of Serafino, para 52, exhibit "J".
[32] Affidavit of Serafino, para. 84, exhibit "M".
[33] Affidavit of Roula J. Sotirakos, sworn May 21, 2021, para. 11, Responding Record, Tab 3.
[34] Affidavit of Serafino, para. 85, exhibit "N".

Companies' Creditor Arrangement Act (**"CCAA"**), sought and obtained an initial order pursuant to the *CCAA* seeking, on an *ex parte* basis, a stay of proceedings and the appointment of Schwartz Levitsky Feldman Inc. as monitor (the **"Monitor"**).[35] But for Goldstein's conflict, Hydrx would have commenced the CCAA proceedings rather than Serafino as an "interested person".

52. Goldstein caused Cobra to deliver a responding and supplementary affidavit in respect of the application for CCAA protection. Goldstein swore the affidavits on March 29 and March 30, 2021.[36]

53. By Orders dated March 31, 2021 and April 30, 2021, the Court extended the stay under the Initial Order to July 30, 2021.[37]

Goldstein/Windsor Change Nature of Windsor Loan Transaction

54. In his affidavit, Goldstein states that Cobra did not transfer/sell the Aphria Debenture to Windsor and, according to Goldstein, that the "misunderstanding" appears to have arisen because on January 18, 2021, a transfer of charge between Cobra as assignor and Windsor as assignee was registered against title to the Hydrx Real Property.[38]

55. There was no "misunderstanding". Goldstein and Windsor attempted to change the nature of the Windsor Loan Transaction during the CCAA proceedings.

56. On April 8, 2021, subsequent to the commencement of these CCAA proceedings and the issuance of two (2) stay orders, Goldstein caused Cobra to enter into an amendment agreement with Windsor (the **"Amendment Agreement**"). Pursuant to the Amendment Agreement:

    a. Upon full repayment to Windsor, Windsor shall transfer the Debenture, Charge and Security back to Cobra;
    b. Proceeds of realization on the Charge, Debenture and Security shall first be distributed to Windsor and the balance to Cobra;
    c. Cobra was authorized to register the Windsor Notice on title to the Hydrx Real Property.[39]

57. On April 9, 2021, Goldstein caused Cobra to register a notice attaching the Amendment Agreement on title to the Hydrx Real Property.[40]

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[35] Responding Affidavit of Serafino, exhibit "A", para. 4.
[36] Moving Affidavit of Goldstein, para. 4, exhibit "A" and "B".
[37] Responding Motion Record, Tabs 4, 5 and 7.
[38] Moving Affidavit of Goldstein, paras. 33-34.
[39] Moving Affidavit of Goldstein, para. 35, exhibit "P".
[40] Moving Affidavit of Goldstein, para. 35, exhibit "P".

58. By letter dated April 20, 2021, Windsor wrote to counsel for the Monitor and Cobra's then counsel, Cassels Brock & Blackwell LLP, in part, as follows:

> "We wish to confirm that until such time as you receive notice in writing from us or our counsel….HydRx, the Monitor and any other parties may deal exclusively with Cobra and its counsel Cassels Brock & Blackwell LLP with respect to any matters related to the Security, including enforcement thereof.
>
> Further, we authorize Cobra to credit bid the Debenture and the indebtedness evidenced and secured thereby."[41]

Shareholders Meeting Removing Goldstein As Director

59. On April 28, 2021, a special meeting of shareholders was held and Goldstein was removed as a director of Hydrx by approximately 83% of the voting shareholders.[42]

Goldstein Resigns As Director of Hydrx

60. On April 30, 2021, after his removal by the shareholders of Hydrx, Goldstein tendered his resignation as a director of Hydrx in escrow and conditional upon the issuance of the April 30, 2021 Order approving a SISP Process and appointment of a CRO.[43]

61. It was apparent to Goldstein in February of 2021, that he was in an intractable position of conflict given his divided loyalties between his duties to each of Cobra and Hydrx. He could have, and should have, resigned at this point. However, he chose not to resign and instead continued to act to benefit himself and Cobra at the expense of Hydrx and its shareholders.

Cobra Claims Procedure Motion

62. On April 23, 2021, Goldstein caused Cobra to deliver its motion record seeking a declaration that:

a. The indebtedness owing to Cobra by Hydrx is in the amount of about $14.8 million as at March 31, 2021;

b. the indebtedness owing to Cobra is secured by valid and enforceable security over all of Hydrx's property;

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[41] Moving Affidavit of Goldstein, para. 36, exhibit "Q".
[42] Affidavit of Serafino, para. 98.
[43] Affidavit of Serafino, para 98.

c. Cobra is entitled to credit bid up to the full amount of its alleged indebtedness, including any sale and investment solicitation process.[44]

Goldstein's Allegations Regarding "Disclosure"

63. In his affidavits, Goldstein states that he "disclosed" the acquisition of the Aphria Debenture and his personal interest in Cobra as follows:

a. "I personally informed Serafino of the pending transaction no later than July 24, 2020". This statement is disputed by Serafino. Further, at this time, Serafino was not the only director of Hydrx.

b. "On July 29, 2020, WCE (then the 50% owner of Cobra) issued a press release (the "July Press Release") that confirmed that Cobra had entered into an agreement to acquire…" the Aphria Debenture.

c. "The day after the July Press Release was issued, Har Grover, then the Chief Executive Office of HydRx sent an email stating "Congratulations on your press release. Please see attached letter." Attached to the email appears to be a letter which was cc'd to "The Hydrx Farms Ltd. Board of Directors."

d. "On October 1, 2020, WCE issued a further press release announcing the completion of the … assignment transaction…"

e. By way of text messages with Serafino.[45]

SISP

64. By Order dated April 30, 2021, the Court approved the Monitor's proposed sale and investment solicitation process (the **"SISP**"). As part of the SISP, the Monitor sought a process to be followed to determine the amount, if any, owing to Cobra by Hydrx together with any issues impacting the ability to credit-bid Cobra's claim as part of the SISP.[46]

65. The SISP Order provides as follows:

"Redemption of Secured Debt and Filing of CCAA Plan of Arrangement

12. Within 29 days of the Cobra Claim Decision becoming final, the Companies shall have the right to redeem the secured debt owing to Cobra As established by the Cobra Claims Decision and any appeals therefrom (the "Cobra Secured Debt").

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[44] Moving Affidavit of Goldstein, para. 10.
[45] Moving Affidavit of Goldstein, paras. 24-25, Reply Affidavit of Goldstein, paras. 17-18.
[46] Responding Motion Record of Serafino, Tab 6.

13. Upon payment of the Cobra Secured Debt in readily available funds, Cobra shall, at the sole option of the Companies, either discharge its security interest in the Property of the Companies or assign the same to a third party as directed by the Companies. For greater certainty: the form of any assignment of security shall be on an "as is, where is" basis with no recourse to Cobra, and to avoid or reduce a potential residual security interest in favour of Windsor Private Capital Limited Partnership ("Windsor") in the assets of Hydrx, the first funds payable by Hydrx as part of its redemption of the Cobra Secured Debt shall be paid directly to Windsor up to the extent of any indebtedness owing by Cobra to Windsor, in the event that Windsor continues to hold a security interest in the assets of Hydrx at the time of such redemption payment. The quantum of any such payment to Windsor by Hydrx shall reduce on a dollar for dollar basis any indebtedness owing by Hydrx to Cobra in respect of the Cobra Secured Debt."[47] [emphasis added]

PART III – ISSUES AND LAW

66. The issues on this motion are:

a. **Issue #1:** Whether Goldstein discharged his statutory duties of disclosure and approval under section 120 of the CBCA?

Answer: No. At all material times when Goldstein was dealing with a material contract of Hydrx, the Aphria Debenture, Goldstein failed to make formal written disclosure, or disclosure at all, to Hydrx and did not seek board or shareholder approval to profit from his indirect interest in a material contract of Hydrx by realizing on the Aphria Debenture.

b. **Issue #2:** If not, whether Goldstein and Cobra are entitled to profit from Cobra's acquisition of the Aphria Debenture?

Answer: No. Goldstein is statutorily prohibited from any profit as he failed to discharge his disclosure and approval obligations under section 120 of the CBCA.

c. **Issue #3**: Is Hydrx entitled to damages or protection from the economic loss resulting from Goldstein's breach of his statutory obligations as a fiduciary of Hydrx?

Answer: Yes. Hydrx has suffered economic loss from the breach by Goldstein of his statutory and other fiduciary duties to Hydrx in an amount equal to the costs of the Hydrx CCAA proceeding.

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[47] Website of Monitor, CRO Appointment and SISP Approval Order dated April 30, 2021

Issue #1: Whether Goldstein Discharged His Statutory Duty Of Disclosure Under Section 120 of the CBCA?

67. Pursuant to section 120 of the *CBCA*:

a. A director of a corporation shall disclose to the corporation, in writing or request to have it entered into the minutes of meetings of directors, the nature and extent of **any** interest in any material contract/transaction, whether made or proposed, with the corporation.

b. The disclosure obligation applies to a person who subsequently becomes a director of the corporation while continuing to be interested in that contract.

c. A director who is required to make disclosure shall not vote on any resolution to approve the contract/transaction.

68. The policy behind section 120 of the CBCA is to identify those situations in which a director's ability to consider, fairly and effectively, the corporation's interest may be inhibited by self-interest. In 2001, the section was amended to add the term "transaction" to broaden the coverage of section 120 and clarify the extent of the section's application by requesting identification of interests which extend beyond those resulting from material contracts.[48]

69. A board of directors is entitled to expect compliance with disclosure duties. Its role is not to play detective. The duty to disclose is an absolute one. There must be the "fullest disclosure" and "informed consent". The duty to disclose under the CBCA lies with the director who has an interest in a material contract. [49]

70. In 2017, Justice Myers in *Dunsmuir v. Royal Group, Inc.*, considered section 120 of the CBCA and stated as follows:

> "The section requires directors and officers to make formal, written disclosure to the board of directors of their personal interests in material contracts. The section is intended to apply to contracts in which the interests of the corporation are in need of protection from the risk of compromise by the competing personal interest of an officer or director who, as a fiduciary, is required to be protecting selflessly the interests of the corporation. In my view, adopting a purposive reading leads readily to the conclusion that, at minimum, a contract is material for the purpose of … s.

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[48] Analysis of the Changes to the *Canada Business Corporations Act*, Government of Canada, Brief of Authorities of the Applicant [*Brief]* ; Tab 7.

[49] *Dunsmuir v. Royal Group, Inc.* 2017 ONSC 4391, paras. 145-148; affirmed on appeal, Brief, Tab 2. *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* 2002 CanLII 49507 (ONSC), para. 117; affirmed on appeal, Brief, Tab 5.

120 of the statute where an officer or director who is involved in the approval of the contract on behalf of the corporation has a non-trivial personal interest in the subject matter." [emphasis added]

"While the word "material" can refer to a measure of relative value or a measure of relative importance in a context, at the very least, where a director or officer is charged with considering a contract selflessly on behalf of a corporation, the fact that she has a personal interest in the contract will always be material to the board of directors and investors. Regardless of whether director or officer is believed to be an entrepreneurial genius or a person who is beyond ethical reproach, even the appearance of conflict of interest calls out for protection by disclosure and independent approval. The common law and common sense recognize that conflict of interest is an insidious force that can deprive even the best of us of balanced, independent judgment. Peoples' capacity to be convinced of the righteousness of their own conduct by the lure of lucre has no known limits." [50] [emphasis added]

71. In other cases, the courts have stated as follows:

a. "The meaning of "material contract" and "material interest" is conditioned by the purpose behind the section…Any personal relationship or monetary interest he may have in the other side that might be thought to be an inhibiting factor is a material interest if disclosure of the relationship or interest might be relevant to the corporate decision whether to involve the particular manager in the negotiations…the corporation is entitled to full disclosure from its fiduciaries of all facts that might affect that decision." [51]

b. "As working rules to determine whether or not a material interest exists, it is submitted that an assessment of control and benefit ought to be made. If the director or officer has the ability to cause the person in question to enter into the contract with the corporation, the director has a "material interest" in the transaction. The conflict of interest is clear and the nature of the circumstances must be disclosed."[52]

c. "The authorities, in my view, disclose that the term "material" is a question of fact that extends beyond the more commonly held notion of financially material. In my view, what is meant by material contract is that if there is a possibility that the Director was to benefit from the contract more than de minimis then the transaction should be disclosed to the corporation. Professor Welling states what may be a good rule of thumb: there should be disclosure whenever the director or officer's involvement might be relevant to the corporation's decision making process. This

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[50] *Dunsmuir v. Royal Group, Inc.* 2017 ONSC 4391, paras. 37-38; Brief, Tab 2.
[51] McAteer v. Devoncroft Ltd., [2001] A.J. No. 1481, para. 309, Brief, Tab 4.
[52] Zysko v. Thorarinson, [2003] A.J. No. 1375, para 63, Brief, Tab 6.

> would appear to mean that if the corporation would undertake additional due diligence to determine whether the contract or any of its terms is truly in its best interest…"[53]

72. Subsequent to the completion of the Material Transactions and while a director of Hydrx, Goldstein himself acknowledged his conflict of interest position.

73. Goldstein became a director of Hydrx on October 23, 2020. Shortly before becoming a director, on October 1, 2020, Goldstein caused Cobra to consummate an assignment of the Aphria Debenture. The Aphria Debenture is a material contract of Hydrx. Goldstein is not relieved of the obligations under section 120 of the CBCA by virtue of the fact that he held an interest in a material contract of Hydrx before becoming a director. In such instances, subsection 120(2) mandates disclosure at the first meeting after he became a director. Goldstein failed to comply with his statutory obligations in this respect.

74. After becoming a director, and on January 15, 2021, Goldstein caused Cobra to enter into a loan transaction with Windsor to finance the buy-out of WCE's 50% interest in Cobra – thereby significantly increasing his indirect interest in the Aphria Debenture at a time when he was a director of Hydrx. Subsection 120(2) of the CBCA mandates that Goldstein make disclosure of the Cobra Buy-Out Transaction (his acquisition of WCE's 50% interest in Cobra) through the Windsor Loan Transaction at the meeting at which the proposed contract or transaction is first considered. Goldstein failed to comply with his statutory obligations in this respect.

75. Goldstein has not provided any evidence that he gave written notice to Hydrx, its board or its shareholders of his indirect interest in the Aphria Debenture, his increased equity interest in Cobra after the Cobra Buy-Back Transaction was consummated nor any evidence that he sought or obtained approval to profit from the Material Transactions. At all material times, the Hydrx Board of Directors consisted of Mondin, Serafino and Goldstein from October 2020 to January 2021 and Serafino and Goldstein thereafter until Goldstein's removal as a director on April 28, 2021.

76. It would appear that Goldstein is asserting the position that texts to Serafino, emails to various members of former management of Hydrx and after the fact press releases by third parties are sufficient to discharge his written disclosure obligations as a director under section 120 of the CBCA. This position is absurd.

77. On April 9, 2021, Goldstein caused Cobra to register a notice on title to the Hydrx Real Property. At this time, CCAA protection and 2 stay orders had been granted, Goldstein was still a director of Hydrx and was aware of all of the allegations against him in respect

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[53] Zysko v. Thorarinson, [2003] A.J. No. 1375, para 66, Brief, Tab 6.

of the Aphria Debenture and the Rydan and Windsor Loan Transactions. According to Goldstein, the notice was registered to clear up a "misunderstanding" with respect to the Windsor Loan Transaction.

78. Goldstein had many choices. He chose to become a director of Hydrx. Once he became a director, the onus was on Goldstein, and Goldstein alone, to comply with this statutory disclosure and approval obligations. He chose not to. It is no defence to state that the corporate culture created an environment in which Goldstein ought to be relieved of the fundamental duties of his high office. Holding Goldstein to his legal and fiduciary duties is vitally important to the sanctity and proper functioning of business corporations.

79. In isolation, the Rydan Loan Transaction would not have been viewed by Hydrx or Serafino (had they known about it) as overly objectionable as certain of the loan proceeds were used to benefit Hydrx. However, as the assets of Hydrx were used to secure the performance of Cobra's loan obligations, disclosure to Hydrx and its board was required. Unfortunately, the nonchalant and dismissive attitude of Goldstein towards his disclosure obligations in relation to the Rydan Loan Transaction foreshadowed the more egregious breach of his obligation to disclose both the Cobra Buy-Out Transaction and the Windsor Loan Transaction with the resulting significant increase in his indirect interest in the Aphria Debenture.

80. Cobra's position appears to be that section 120 of the CBCA is not triggered as none of the impugned Material Transactions were directly with Hydrx. To accept such a position would allow any other director to do exactly what Goldstein has done with no consequence: use a separate corporation as a tool to gain an interest in a material contract of a company. That is surely not the intention of section 120 of the CBCA.

Issue #2: Whether Goldstein/Cobra are Entitled to Profit the Acquisition of the Aphria Debenture In the Face of Goldstein's Statutory Breaches?

81. The Applicant does not seek to challenge the well accepted authority that indebtedness and security can be purchased at a deep discount. However, a director has certain common law fiduciary duties and clearly defined statutory duties of disclosure and a requirement to obtain consent to profit under section 120 of the CBCA which must be discharged before he or she can profit from any such transaction.

82. Subsection 120(7) of the CBCA prohibits a director from profiting in any way from a material contract unless the opportunity to profit:

i. Has been disclosed, in writing, to the corporation; and

ii. The ability to profit has been approved by either:

1. The independent board members at a meeting called for that purpose; or

2. The shareholders of the corporation, by way of a special resolution.

iii. The contract/transaction was reasonable and fair to the corporation at the time of approval.

83. Subsection 120(8) of the CBCA provides that where a director fails to comply with the disclosure and approval requirements of the CBCA, a court may set aside the contract/transaction on any terms that it thinks fit, or require the director to account to the corporation for any profit or gain realized on it, or do both of these things.

84. The court cannot guess what the board of directors might have done had disclosure been made. The board must decide for itself.[54]

85. In *Exide Canada Inc. v. Hilts*, the court set aside the contract and stated as follows:

> "Given the nature of non-disclosure, it is my view that the contract should be set aside, regardless of whether Exide received value for its money from Ryad. It is clear that Mr. Hilts was a director and officer of Exide when he breached his fiduciary duty to Exide by causing them to enter into the contract with Ryad, without disclosing the true extent of his connection to Ryad and Ms. Prijatelj. Therefore, I am prepared to make an order that he account to Exide for any profit or gain he realized as a result of the contract."[55]

86. In 2018, Justice Penny stated the following in *Borrelli v. Chan:*

> "A fiduciary's liability arises from the mere fact of a profit having been made from a breach. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."
>
> In *Canadian Aero Service Ltd. v. O'Malley,* [1974] S.C.R. (S.C.C.), the Supreme Court of Canada endorsed these basic principles established in *Regal* Hastings. The Supreme Court of Canada has continued to hold that a fiduciary who breaches his or her fiduciary duty must account for and disgorge any profits received, even if the beneficiary suffered no loss; the relevant cause of action is the breach of fiduciary duty and the fiduciary's gain". [56] [emphasis added]

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[54] *Dunsmuir v. Royal Group, Inc.*, paras. 145 & 154, Brief, Tab 2.
[55] *Exide Canada Inc. v. Hilts*, 2005 CarswellOnt 5916, para. 13, Brief, Tab 3.
[56] *Borrelli v. Chan*, 2018 ONSC 1429, paras. 1033-1034; affirmed on appeal, Brief, Tab 1.

87. Goldstein's position appears to be that he complied with his disclosure duties and that the loan transactions that he entered into ultimately benefited Hydrx. If that is the case, it would have been quite easy for Goldstein to obtain the necessary approval from directors or shareholders permitting him to profit. Yet, Goldstein failed to do so.

88. Leaving aside the issue of disclosure, Goldstein himself does not allege that his ability to profit has been approved by either the board of directors of Hydrx at a meeting called for that purpose or the shareholders of Hydrx by way of a special resolution. On this basis alone, Goldstein is prohibited from realizing on any profit.

89. In the face of such disregard for the discharge of his statutory and other obligations as a fiduciary of Hydrx, the consequences to Goldstein for such conduct should not simply be to put him back into the position he would have been in had the requisite disclosure and consent to profit have been obtained. Specifically, to avoid encouraging other would be offenders, the consequences must entail some significant disincentive to lessen the risk that others may be tempted to ignore the important duties of a director. In the case at bar, such disincentive is for the court to use its broad discretionary powers under section 120 of the CBCA to materially reduce any entitlement of Cobra to an amount less than it paid to acquire the Aphria Debenture and to preclude Cobra from credit bidding in the SISP process should the SISP be necessary.

90. What Goldstein attempts to do now is to take refuge behind the claims procedure process set by the Monitor and thereby seek to avoid any adverse consequences for his clear breach of his statutory duties as a director of Hydrx under section 120 of the CBCA.

Issue #3: Is Hydrx Entitled to Damages/Protection from Economic Loss Resulting from Goldstein's Breach of his Fiduciary Obligations?

91. At some point in time after the July Plan was proposed to Serafino, Goldstein abandoned the July Plan, bought out WCE and proceeded to attempt to profit from the Aphria Debenture through realization. After Goldstein bought out WCE, Mondin resigned from the Hydrx board. Goldstein did not and, in fact, refused to resign until he was removed by the Hydrx shareholders.

92. At all material times, Goldstein's conduct as a director of Hydrx was undertaken not to advance the interest of Hydrx and its stakeholders but to use his fiduciary office to actively disadvantage Hydrx and its stakeholders to the benefit of Cobra and his personal interest in Cobra. In particular:

a. Acting as an alternate "responsible person" to control access to the Health Canada licensing portal [57] and his instructions to take no steps to renew Hydrx's Excise Tax license; [58]
b. Enquiring of Health Canada for steps to transfer the Hydrx licenses under the *Cannabis Act* to Cobra;[59]
c. Acquiring 50% interest of WCE in the Aphria Debenture, actively concealing the Cobra Buy-Out transaction from Hydrx and refusing to present the opportunity to Hydrx in order to increase his chance of personal profit.

93. In contrast to his actual conduct, Goldstein should have:

a. Acknowledged to Hydrx in December of 2020 that the July Plan could not proceed;
b. Informed Hydrx that WCE was prepared to sell its 50% interest in Cobra for its cost ($2.5 million);
c. Offered his own interest in Cobra to Hydrx for its cost ($2.5 million) plus the amount of any funds actually advanced by Cobra to Hydrx;
d. Resigned as a "responsible person" and director of Hydrx.

94. In the event that Hydrx could not purchase the full indirect interest in the Aphria Debenture from Cobra, Goldstein would have been entitled to realize on the Aphria Debenture in the manner prescribed by law, recover Cobra's costs and transfer any profit to Hydrx. However, Hydrx did have available resources to redeem or purchase the Aphria Debenture for Cobra's aggregate costs thereof.[60]

95. Had Goldstein fulfilled his undeniable statutory obligations as a fiduciary of Hydrx, there would have been no need for the Hydrx CCAA proceedings. The CCAA proceedings, including the need for Serafino to commence it as "person interested in the matter" was occasioned entirely by:

a. Goldstein's refusal to resign as a director of Hydrx. That refusal was driven entirely by his desire to confound Hydrx in the pursuit of its legal remedies to protect itself. If Goldstein had resigned as a director, as he should have, given the clear and intractable conflict that he faced (and admitted to by email to Serafino) there would have been no need for the "interested person" component of the CCAA proceeding.

b. Goldstein's refusal to resign as a "person in charge". Again, that refusal was not occasioned by his pursuit of his fiduciary obligations to Hydrx, it was driven entirely by his desire to make it more difficult for Hydrx to resurrect itself and

[57] Affidavit of Serafino, para. 94.
[58] Affidavit of Serafino, para. 92.
[59] Affidavit of Serafino, para. 85.
[60] Affidavit of Serafino, paras. 63-65.

undertake commercial operations. If Goldstein had resigned as "person in charge" as he should have, given the clear and intractable conflict of interest that he faced, there would have been fewer complications and expenses relating to the restart of the Hydrx business.

c. Goldstein's acquisition of WCE's 50% interest in the Aphria Debenture, actively concealing the transaction from Hydrx and refusing to present the opportunity to Hydrx as required by law. If Goldstein had fulfilled his fiduciary obligations, presented the entire Cobra interest to Hydrx for purchase at cost (as described above) there would have been no need for the creditor protection components of the CCAA proceeding.

d. If Goldstein had complied with all of his statutory obligations as a fiduciary of Hydrx, summarized above, there would have been no need for the appointment of a Monitor or a Chief Restructuring Officer

96. Hydrx has suffered economic loss from the breach by Goldstein of his fiduciary duties to Hydrx in an amount equal to the costs of the Hydrx CCAA proceeding.

PART IV – ORDER REQUESTED

97. As a result of Goldstein's failure to discharge his statutory duties as a director of Hydrx under section 120 of the CBCA, the Applicant respectfully requests an Order:

a. prohibiting Goldstein and Cobra from profiting from the Aphria Debenture and requiring each of Goldstein and Cobra to account to Hydrx for any profit or gain realized as a result of Cobra's acquisition of the Aphria Debenture;

b. further reducing any entitlement of Cobra under the Aphria Debenture in an amount equal to the costs incurred by Hydrx in respect of the CCAA proceedings which would not have been necessary but for the need to protect Hydrx from Goldstein as a defaulting and predatory director;

c. alternatively, should Cobra be found to have no entitlement to payment under the Aphria Debenture, an order for damages against each of Goldstein and Cobra in an amount equal to the costs incurred by Hydrx in respect of the CCAA proceedings which would not have been necessary but for the need to protect Hydrx from Goldstein as a defaulting and predatory director; and

d. a declaration that Windsor is not an innocent arm's length third party creditor for value without notice of irregularities and, as such, is not entitled to (i) recover any amount over and above the amount that is found to be owing by Hydrx to Cobra, if any; and (ii) a security interest over the real and personal property assets of Hydrx to support the loan obligations of Cobra to Windsor.

June 29, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sepideh Nassabi

Sepideh Nassabi
Minden Gross LLP
Lawyers for the Applicant

SCHEDULE "A"

Statutes Referred To

***Canada Business Corporations Act*, RSC 1985, c C-44,**

Disclosure of interest

- **120** (1) A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of any interest that he or she has in a material contract or material transaction, whether made or proposed, with the corporation, if the director or officer

    (a) is a party to the contract or transaction;
    (b) is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or
    (c) has a material interest in a party to the contract or transaction.

- Time of disclosure for director

    (2) The disclosure required by subsection (1) shall be made, in the case of a director,

    (a) at the meeting at which a proposed contract or transaction is first considered;
    (b) if the director was not, at the time of the meeting referred to in paragraph (a), interested in a proposed contract or transaction, at the first meeting after he or she becomes so interested;
    (c) if the director becomes interested after a contract or transaction is made, at the first meeting after he or she becomes so interested; or
    (d) if an individual who is interested in a contract or transaction later becomes a director, at the first meeting after he or she becomes a director.

- Time of disclosure for officer

    (3) The disclosure required by subsection (1) shall be made, in the case of an officer who is not a director,

    (a) immediately after he or she becomes aware that the contract, transaction, proposed contract or proposed transaction is to be considered or has been considered at a meeting;
    (b) if the officer becomes interested after a contract or transaction is made, immediately after he or she becomes so interested; or
    (c) if an individual who is interested in a contract later becomes an officer, immediately after he or she becomes an officer.

- Time of disclosure for director or officer

(4) If a material contract or material transaction, whether entered into or proposed, is one that, in the ordinary course of the corporation's business, would not require approval by the directors or shareholders, a director or officer shall disclose, in writing to the corporation or request to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of his or her interest immediately after he or she becomes aware of the contract or transaction.

- Voting

(5) A director required to make a disclosure under subsection (1) shall not vote on any resolution to approve the contract or transaction unless the contract or transaction

(a) relates primarily to his or her remuneration as a director, officer, employee, agent or mandatary of the corporation or an affiliate;
(b) is for indemnity or insurance under section 124; or
(c) is with an affiliate.

- Continuing disclosure

(6) For the purposes of this section, a general notice to the directors declaring that a director or an officer is to be regarded as interested, for any of the following reasons, in a contract or transaction made with a party, is a sufficient declaration of interest in relation to the contract or transaction:

(a) the director or officer is a director or officer, or acting in a similar capacity, of a party referred to in paragraph (1)(b) or (c);
(b) the director or officer has a material interest in the party; or
(c) there has been a material change in the nature of the director's or the officer's interest in the party.

- Access to disclosures

(6.1) The shareholders of the corporation may examine the portions of any minutes of meetings of directors or of committees of directors that contain disclosures under this section, and any other documents that contain those disclosures, during the usual business hours of the corporation.

- Avoidance standards

(7) A contract or transaction for which disclosure is required under subsection (1) is not invalid, and the director or officer is not accountable to the corporation or its shareholders for any profit realized from the contract or transaction, because of the director's or officer's interest in the contract or transaction or because the director was present or was counted to determine whether a quorum existed at the meeting of directors or committee of directors that considered the contract or transaction, if

(a) disclosure of the interest was made in accordance with subsections (1) to (6);
(b) the directors approved the contract or transaction; and
(c) the contract or transaction was reasonable and fair to the corporation when it was approved.

- Confirmation by shareholders

(7.1) Even if the conditions of subsection (7) are not met, a director or officer, acting honestly and in good faith, is not accountable to the corporation or to its shareholders for any profit realized from a contract or transaction for which disclosure is required under subsection (1), and the contract or transaction is not invalid by reason only of the interest of the director or officer in the contract or transaction, if

(a) the contract or transaction is approved or confirmed by special resolution at a meeting of the shareholders;
(b) disclosure of the interest was made to the shareholders in a manner sufficient to indicate its nature before the contract or transaction was approved or confirmed; and
(c) the contract or transaction was reasonable and fair to the corporation when it was approved or confirmed.

- Application to court

(8) If a director or an officer of a corporation fails to comply with this section, a court may, on application of the corporation or any of its shareholders, set aside the contract or transaction on any terms that it thinks fit, or require the director or officer to account to the corporation for any profit or gain realized on it, or do both those things.

SCHEDULE "B"

Authorities Referred To

1. *Borrelli v. Chan,* [2018] OJ No 1436 ; affirmed on appeal 2019 ONCA 525.
2. *Dunsmuir v. Royal Group, Inc.* 2017 ONSC 4391 ; affirmed on appeal 2018 ONCA 773.
3. *Exide Canada Inc. v. Hilts*, 2005 CarswellOnt 5916
4. *McAteer v. Devoncroft Ltd.*, [2001] A.J. No. 1481
5. *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* 2002 CanLII 49507 (ONSC) ; affirmed on appeal 2004 CanLII 9479 (ON CA).
6. *Zysko v. Thorarinson*, [2003] A.J. No. 1375, para 63.
7. Analysis of the Changes to the *Canada Business Corporations Act*, Government of Canada

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

AND DOMENICO SERAFINO AS A PERSON INTERESTED IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF HYDRX FARMS LTD., CANNSCIENCE INNOVATIONS INC. AND SCIENTUS PHARMA INC.

Court File No. CV-21-00659187-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding Commenced at Toronto

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