

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

CIT FINANCIAL LTD.

Applicant

- and -

AUSTIN PHARMA DRUGS LTD.

Respondent

**APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED**

A. FARBER & PARTNERS INC.

**SECOND REPORT OF THE RECEIVER
JUNE 11, 2012**

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- “A” Appointment Order
- “B” July 29 Order
- “C” May 3 Order
- “D” May 8 Order
- “E” Receivers Certificate CIT-001
- “F” Notice and Statement of Receiver

INTRODUCTION

1. By Order of the Honourable Mr. Justice Morawetz dated April 17, 2012 (the “**Appointment Order**”), A. Farber & Partners Inc. (“**Farber**” or the “**Receiver**”) was appointed as Receiver of all of the assets, undertakings and properties of Austin Pharma Drugs Ltd. (“**Austin**” or the “**Debtor**”). The Appointment Order is attached hereto as **Appendix “A”**.
2. The Debtor carries on business as an independent, full service pharmacy and methadone dispensary (the “**Pharmacy**”). The Pharmacy is located in units 103 and 104 on the main floor of a multi-story medical building located at 1525 Albion Road in Toronto, Ontario (the “**Premises**”).
3. Mr. Sheriff Ghattas (“**Ghattas**”) is the principal and majority shareholder of the Debtor. The Debtor employs 8 full time employees who perform pharmacy technician duties. In addition, two licensed pharmacists are retained on a subcontracted basis.
4. The appointment of the Receiver was sought by CIT Financial Ltd. (“**CIT**”). CIT is the primary secured lender of Austin, having advanced funds for the purchase of the Pharmacy in October 2008.
5. The Debtor’s landlord of the Premises is Albion Kipling Medical Building Corp. (the “**Landlord**”). The Debtor obtained its leasehold interest in the Premises, as assignee of a former tenant, pursuant to a Lease Agreement dated August 23, 1996, as amended by an Extension Agreement dated November 24, 1999, and a Lease Assignment/Amending Agreement dated October 29, 2008 (collectively, the “**Lease**”). The Lease is a significant asset of Austin.
6. In July of 2011, well prior to the Receiver’s appointment, a dispute arose between the Debtor and the Landlord regarding whether the Debtor had exercised its right to renew the Lease. The dispute prompted the Debtor to initiate an action against the Landlord for relief from forfeiture in Toronto, in Court File No. CV-11431612 (the “**RFF Proceeding**”).
7. On July 29, 2011, the Honourable Mr. Justice Brown, on consent, enjoined the Landlord from re-entering the Premises or terminating the Debtor’s tenancy (the “**July 29 Order**”). The Court further ordered the Debtor to continue to make payments to the Landlord for its occupation of

the Premises on a without prejudice basis. A copy of the July 29 Order is attached as **Appendix “B”**.

8. On November 2, 2011, the Court established a schedule for the filing of further materials, for conducting cross-examinations, for filing facts and fixed the hearing of a motion for relief from forfeiture in the RFF Proceeding (the “**RFF Motion**”) for May 29, 2012.

9. In March of 2012, the Landlord served a cross motion returnable on May 29, 2012 to dismiss the RFF Proceeding for the failure of Ghattas to attend for cross-examination on his affidavits.

10. Shortly following the Receiver’s appointment, by Order of the Honourable Mr. Justice Brown dated May 3, 2012 (the “**May 3 Order**”), on a motion brought by the Receiver, the RFF Proceeding was transferred to the Commercial List and the RFF Motion was fixed for hearing on June 15, 2012. A copy of the May 3 Order is attached as **Appendix “C”**.

11. By further Order of the Honourable Mr. Justice Brown dated May 8, 2012, by (the “**May 8 Order**”), the Court, *inter alia*, ordered Ghattas to attend on May 14, 2012 at the offices of the Receiver’s independent counsel, Dickinson Wright LLP (“**DWLLP**”), to prepare for cross examination, and to attend on May 15, 2012 to be cross-examined on his affidavits filed in support of the RFF Motion. A copy of the May 8 Order is attached as **Appendix “D”**.

PURPOSE OF THIS REPORT

12. The purpose of this Second Report of the Receiver (the “**Second Report**”) is to:

- (a) report on the activities of the Receiver since its appointment and seek approval of the Receiver’s activities to date; and
- (b) report on the Receiver’s unsuccessful efforts to produce Ghattas for cross-examination to date.

DISCLAIMER

13. Farber has relied upon the financial records and information provided by the Debtor, as well as other information supplied by management, appraisers, accountants, auditors and advisors, and Farber has not independently reviewed or verified such information. Farber assumes no responsibility or liability for any loss or damage incurred by or caused to any person or entity as a result of the circulation, publication, re-production or use of or reliance upon this Second Report. Any use which any person or entity, other than the Ontario Superior Court of Justice (Commercial List) (the “**Court**”), makes of this Second Report, or any reliance on or a decision made based upon this Second Report is at such person’s or entity’s own risk.

ACTIVITIES OF THE RECEIVER

14. Upon its appointment, the Receiver took possession of the Premises. Since that time the Pharmacy has continued to provide pharmacy services with no significant service interruptions.

15. The Receiver notified Pharmacy employees that, in accordance with the Appointment Order, their employment would continue with the Debtor. The services of sub-contracted pharmacists were also secured to ensure continuity of service delivery.

16. The Receiver contacted the Debtor’s former managing pharmacist, Fady Suliman (“**Suliman**”), to obtain the books and records and other information regarding the business and affairs of the Debtor. Suliman is a minority shareholder of the Debtor. The Receiver elected not to continue Suliman’s services as the managing pharmacist.

17. The Receiver was advised by Suliman that the books and records of the Debtor were held off-site by Magdy Yany (“**Yany**”), the bookkeeper of the Debtor. The Receiver contacted Yany and requested the financial information of the Debtor, including the most recent financial statements, payroll information, accounts payable information and bank statements and cancelled cheques. Yany is assisting the Receiver in processing payroll information and other bookkeeping functions, as required.

18. The Receiver also advised the Ontario College of Pharmacists of its appointment and made certain requisite changes to Austin’s registration to enable the Pharmacy to operate while in

receivership.

19. The Receiver contacted the Debtor's insurer and had the Receiver added to the insurance policy as a named insured.

20. The Receiver also contacted drug benefit insurance providers to direct all future receivable payments to the Receiver's trust account.

21. The Receiver took possession of the Debtor's bank account held at the TD Canada Trust to ensure the continued receipt of automatic deposits, generally from insurance and benefit providers, and to suspend outstanding cheques and automatic withdrawals. The Receiver continues to monitor the bank account balance and periodically transfers funds to the Receiver's estate trust account.

22. The Receiver prepared a cash flow projection for the period ended June 30, 2012 (the "**Cash Flow**"). Insofar as the Receiver intends to sell the Pharmacy, subject to the outcome of the RFF Proceeding, the Cash Flow is not being filed herewith.

23. Prior to the Receiver's appointment, Austin had been placed on C.O.D. status with Kohl & Frisch Limited ("**K&F**"), Austin's primary comprehensive drug supplier, which severely hampered Austin's ability to purchase product. Upon the Receiver's appointment, inventory levels needed to be restored. The Receiver has gradually been restoring inventory levels primarily based on sales levels.

24. The Receiver understands that K&F holds a registered purchase money security interest in the inventory at the Pharmacy. Western Inventory Services ("**WIS**") was engaged, with K&F's knowledge, to conduct a financial count of the inventory at the Pharmacy. WIS attended on April 21, 2012 to count the inventory and provided a report to the Receiver.

25. An initial advance of \$50,000 was funded by CIT to the Receiver by way of Receiver's Certificate CIT-001, secured by the Receiver's Borrowing Charge in accordance with paragraph 21 of the Appointment Order. A copy of the Receiver's Certificate CIT-001 is attached hereto as **Appendix "E"**.

26. The Receiver also secured an initial \$250,000 credit limit with K&F. The credit limit has

since been increased to \$400,000 based on the current operating requirements of the Pharmacy. The credit limit increase has been critical to the replenishment of inventory and the associated retention of customers and maintenance of the value of the business.

27. On April 27, 2012, the Receiver filed the Notice and Statement of Receiver for the Debtor in accordance with subsections 245(1) and 246(1) of the BIA, a copy of which is attached as **Appendix “F”**.

28. The Receiver is in the process of reviewing the Debtor’s bank statements for the twelve months preceding its appointment. The Receiver has requested additional supporting documents for certain transactions from the Debtor’s bank, TD Canada Trust. The Receiver will report back to the Court on its findings once the information has been received and reviewed.

29. The Receiver has made contact with the brand and generic drug manufacturers that supply product through K&F to the Pharmacy. K&F has advised that it is industry practice for the generic drug manufacturers to pay pharmacies a ‘professional allowance’ for sale of their product. The Receiver continues to follow up with these manufacturers to ensure that all amounts owing to the Pharmacy are accounted for and paid.

30. Numerous potential interested parties (the “**Interested Parties**”) have been in contact with the Receiver enquiring about the possibility of purchasing the Pharmacy. The Receiver has advised the Interested Parties that the Pharmacy is not for sale at the present time and that a possible sale of the Pharmacy is subject to the outcome of the RFF Proceedings. The Receiver has begun compiling a list of the Interested Parties in the event a sales process is approved by the Court. Notwithstanding the Receiver’s advice, an Interested Party has provided the Receiver with a letter of intent to purchase the Pharmacy, subject to due diligence and reaching a reasonably commercial arrangement in respect to leasing the Premises.

31. Austin leased a vehicle from BMW Financial Services Canada (“**BMW Finance**”). The Receiver has determined that the value of the leased vehicle is below the liability owed to BMW Finance and, accordingly, has released its interest in the vehicle. The Receiver has requested that BMW Finance take possession of the vehicle, however, as of the date of the Second Report, the vehicle continues to remain in the Receiver’s possession.

32. The Receiver continues to closely monitor the daily sales, cash receipts, inventory requirements and other business needs of the pharmacy.

SECURED CREDITORS

33. In October 2008, Austin executed a promissory note in favour of CIT in the principal amount of \$14,500,000. Austin's obligations to CIT are secured by a general security agreement executed by Austin on October 29, 2008. On October 17, 2008, CIT registered its security interest as against Austin pursuant to the *Personal Property Security Act* ("PPSA") for a term of 16 years.

34. The total indebtedness owed to the secured creditors as at the date of the Appointment Order was approximately \$17,106,986. At the date of the Appointment Order, Austin was indebted to CIT in the principal and interest amount of \$16,227,356.

35. In addition to the financing statements registered by CIT, there are also registrations in favour K&F, St. Abrahams Drugs Ltd., McKesson Canada Corporation and BMW Canada Inc.

36. DWLLP has conducted a review of the validity and enforceability of the security granted by Austin to CIT. DWLLP has advised Farber that, subject to certain usual qualifications and assumptions in opinions of this nature, the security granted by the Debtor to CIT pursuant to the security documents is a valid and perfected security interest in the personal property of the Debtor described in those security documents, respectively, in accordance with the terms of such security documents.

RFF PROCEEDING

37. As noted above, the May 8 Order required Ghattas to attend on May 14, 2012 at the offices DWLLP to prepare for cross examination and to attend on May 15, 2012 to be cross-examined on his affidavits filed in support of the RFF Motion.

38. Shortly following the granting of the May 8 Order, counsel for Ghattas wrote to DWLLP that Mr. Ghattas had advised that he was out of the country for an indefinite period of time and was unable to return to Canada.

39. DWLLP subsequently wrote to counsel for Ghattas to inquire whether Ghattas was prepared

to make himself available for cross-examination by video conference.

40. On May 25, 2012 counsel for Ghattas responded that Ghattas remained out of the country but was prepared to make himself available in front of his laptop at a mutually acceptable time. However, if Ghattas had to make himself available at a special location that would be difficult since his physical movement and country of location was both unpredictable and erratic. As an alternative, Ghattas anticipated he will back in Toronto on or after July 15, 2012.

41. In view of the current return date of the RFF Motion on June 15, 20102, counsel for the Landlord advised the Landlord does not wish to defer the RFF Motion.

42. On June 8, 2012, counsel for Ghattas confirmed to DWLLP that Ghattas would be available for cross-examination via skype on Thursday, June 14, 2012 at the earliest.

43. Although the Receiver intends to continue in its efforts to enable Ghattas to be cross-examined by the Landlord in relation to the RFF Motion, the Receiver will prepare a further report in relation to the RFF Motion prior to the hearing thereof.

RECOMMENDATIONS

44. The Receiver respectfully requests that this Honourable Court approve the Receiver's activities hereinabove described.

All of which is respectfully submitted this 11th day of June, 2012.

**A. FARBER & PARTNERS INC.
IN ITS CAPACITY AS THE COURT APPOINTED RECEIVER
OF AUSTIN PHARMA DRUGS LTD.**

A. Farber & Partners Inc.
