

S-169829

NO. \_\_\_\_\_  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN

ACUITAS THERAPEUTICS INC.

PLAINTIFF

AND

ARBUTUS BIOPHARMA CORPORATION

DEFENDANT

**NOTICE OF CIVIL CLAIM**

**This action has been started by the Plaintiff for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

- (a) file a Response to Civil Claim in Form 2 in the above-named registry of this court within the time for Response to Civil Claim described below, and
- (b) serve a copy of the filed Response to Civil Claim on the Plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a Response to Civil Claim in Form 2 and a Counterclaim in Form 3 in the above-named registry of this court within the time for Response to Civil Claim described below, and
- (b) serve a copy of the filed Response to Civil Claim and counterclaim on the Plaintiff and on any new parties named in the Counterclaim.

**JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the Response to Civil Claim within the time for Response to Civil Claim described below.**

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## **TIME FOR RESPONSE TO CIVIL CLAIM**

A Response to Civil Claim must be filed and served on the Plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed Notice of Civil Claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed Notice of Civil Claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed Notice of Civil Claim was served on you, or
- (d) if the time for Response to Civil Claim has been set by order of the court, within that time.

## **CLAIM OF THE PLAINTIFF**

### **PART 1: STATEMENT OF FACTS**

1. The Plaintiff Acuitas Therapeutics Inc. (“**Acuitas**”) is a British Columbia company with an address for service of 2400-745 Thurlow Street, Vancouver, British Columbia. Acuitas is a biotechnology company that researches, develops, and commercializes new or improved medicines.

2. The Defendant Arbutus Biopharma Corporation, formerly Tekmira Pharmaceuticals Corporation (“**Tekmira**”), is a British Columbia corporation with a registered and records office at 25<sup>th</sup> floor, 700 West Georgia Street, Vancouver, British Columbia.

#### **The Cross License Agreement**

3. Acuitas, Tekmira, and Tekmira’s wholly-owned affiliate, Protiva Biotherapeutics Inc., entered into a contract titled “Cross License Agreement” dated November 12, 2012 (the “**Cross License Agreement**”).

4. The Cross License Agreement grants Acuitas a worldwide, non-exclusive right and license to research, develop, and commercialize products known as “Antisense” and “Gene Therapy” containing, comprising, or based on certain biotechnology owned by Tekmira. The Cross License

Agreement also grants Acuitas the right to sublicense that right and license (the “**Sublicensing Right**”). Acuitas has exercised these rights since 2012 with the consent of Tekmira, and met all associated obligations to Tekmira under the Cross License Agreement.

5. The Cross License Agreement provides that it may be terminated by either party upon any material breach by the other party of any material obligation under the agreement, such termination to be effective 60 days in the case of a material breach not involving any non-payment of any amount due, after receipt of written notice of termination describing the material breach in reasonable detail.

### **The Anticipatory Repudiation**

6. By letter of August 29, 2016 (the “**August 29 Letter**”), Arbutus stated that it intended to terminate the Cross License Agreement on the basis that Acuitas was in material breach of the Cross License Agreement by co-developing products licensed thereunder with a third party, failing to provide the identity of its customers to whom it sells its products, and sublicensing “vaccines” (the “**Arbutus Allegations**”). In the August 29 Letter, Arbutus stated that it considered the breaches impossible to cure and requested that Acuitas advise immediately if it attempted to cure the breaches.

7. The allegations in the August 29 Letter first arose out of a sublicense by Acuitas to a third party, an arrangement which Arbutus had been aware of for more than a year, and under which Arbutus received milestone payments, pursuant to the Cross License Agreement.

8. The August 29 Letter did not, and could not, point to any clause or term in the Cross License Agreement that would allow Arbutus to claim Acuitas was in material breach or to terminate the Cross License Agreement on the bases that it claimed. The Arbutus Allegations are without merit.

9. The August 29 Letter evinced an intention not to be bound by the Cross License Agreement. In the circumstances, the August 29 Letter constituted an anticipatory repudiation of the Cross License Agreement. Alternatively, the August 29 Letter constituted a wrongful repudiation of the Cross License Agreement.

## **Acuitas Affirms the Cross License Agreement**

10. By letter to Arbutus of October 21, 2016, Acuitas advised Arbutus that the Arbutus Allegations are without merit, affirmed the Cross License Agreement, confirmed that it intended to continue to honour its obligations under the Cross License Agreement, and reserved all of its rights in respect of Arbutus' anticipatory repudiation.

11. On October 24, 2016, Arbutus confirmed that, further to the August 29 Letter, "the [Cross License Agreement]" shall terminate" on Friday October 28, 2016 (the "**October 24 Letter**").

12. At all times, the Plaintiff has been ready, willing, and able to perform and proceed with the Cross License Agreement.

13. The Plaintiff has not accepted the Defendant's anticipatory repudiation, or, alternatively, its repudiation, and continues to be ready, willing, and able to perform and its obligations under the Cross License Agreement.

14. The Defendant's breach of the Cross License Agreement has caused and will continue to cause the Plaintiff to suffer loss, damage, and expense.

## **PART 2: RELIEF SOUGHT**

The Plaintiff claims relief as follows:

1. An order that the Defendant specifically perform its obligations under the Cross License Agreement, including its obligation to grant Acuitas the right to sublicense Antisense and Gene Therapy products in accordance with the terms of the Cross License Agreement;

2. Damages ancillary to specific performance;

3. Injunctive relief;

4. Interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;

5. Such other and further relief as this Honourable Court may consider just; and
6. Costs.

**PART 3: LEGAL BASIS**


1. The Cross License Agreement is a contract between the Plaintiff and the Defendant.
2. The Defendant's August 29 Letter and the October 24 Letter constituted an anticipatory repudiation of the Cross License Agreement as the words evinced an intention to breach the Cross License Agreement by wrongfully terminating the agreement.
3. In the alternative, the August 29 Letter and the October 24 Letter constituted a wrongful repudiation of the Cross License Agreement.
4. At all material times, the Plaintiff has been and continues to be ready, willing, and able to perform and proceed with the Cross License Agreement, and has fulfilled all of its obligations under the Cross License Agreement.
5. As a result of the Defendant's anticipatory breach of the Cross License Agreement, or, alternatively, its repudiation of the Cross License Agreement, which has not been accepted by the Plaintiff, the Plaintiff has been prevented from obtaining its rights under the Cross License Agreement, including the Sublicensing Right, causing the Plaintiff to suffer loss, damage, and expenses ancillary to the remedy of specific performance.

**PLAINTIFF'S ADDRESS FOR SERVICE:**

Address for service:	McCarthy Tétrault LLP Barristers & Solicitors Suite 2400, 745 Thurlow Street Vancouver BC V6E 0C5 <b><u>Attention: Miranda Lam</u></b>
Direct Fax number for service (if any):	604-622-5764
Email address for service (if any):	<u><a href="mailto:mlam@mccarthy.ca">mlam@mccarthy.ca</a></u>

Place of Trial: Vancouver, BC  
The address of the Registry is: The Law Courts  
800 Smithe Street  
Vancouver, BC

DATED: October 25, 2016

  
for MIRANDA LAM  
Counsel for the Plaintiff

Rule 7-1 (1) of the Supreme Court Civil Rules states:

1. Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  - (a) prepare a list of documents in Form 22 that lists
    - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    - (ii) all other documents to which the party intends to refer at trial, and
  - (b) serve the list on all parties of record.

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**APPENDIX**

**PART 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

1. The Plaintiff claims that the Defendant committed an anticipatory repudiation, or alternatively, a repudiation, of a licensing agreement and seeks specific performance of that licensing agreement.

**PART 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

**PART 3: THIS CLAIM INVOLVES:**

- a class action
- maritime law

- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

**PART 4: ENACTMENTS**