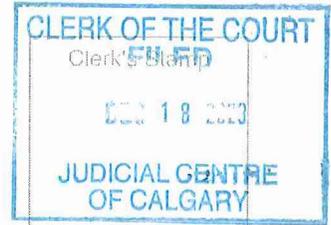


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COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY



IN THE MATTER OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, RSC 1985, c C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR
ARRANGEMENT OF MANTLE MATERIALS GROUP, LTD. and
RLF CANADA HOLDINGS LTD.

APPLICANT MANTLE MATERIALS GROUP, LTD.

DOCUMENT **BRIEF OF MANTLE MATERIALS GROUP, LTD. IN RESPONSE
TO APPLICATION TO COMPEL RESPONSES**

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OVERVIEW

1. Mantle Materials Group, Ltd. (“**Mantle**”) submits this brief in response to the application of Travelers Capital Corp. (“**Travelers**”) seeking to compel responses to objections made and undertaking requests refused (the “**Refused Questions/Undertakings**”) during the course of questioning on the Affidavit sworn by Byron Levkulich (“**Levkulich**”) on November 27, 2023 (the “**Affidavit**”) held on December 4, 2023.
2. Mantle asserts that the within Application is without merit and should be dismissed in its entirety, with costs payable to Mantle on an enhanced basis.

PART I – FACTS

3. Mantle relies on the facts as set out in its Brief filed on December 7, 2023 (the “**Mantle Brief**”) in support of its Originating Application (the “**Mantle Application**”) seeking an order under the *Companies’ Creditors Arrangement Act*¹ for an Initial Order (as defined therein).²
4. The Refused Questions/Undertakings are set out in the tables in paragraphs 22 to 26 of the Brief filed on December 15, 2023 by Travelers (the “**Travelers Brief**”) in support of the within Application.
5. Capitalized terms used herein are as defined in the Affidavit unless otherwise defined herein.

PART II – ISSUE

6. The sole issue on this application is whether the Refused Questions/Undertakings are required to be answered.

¹ *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended [**Mantle Book of Authorities (“Mantle BOA”), Tab 1**].

² Mantle Brief, paras 6-35.

7. Mantle respectfully submits that the Refused Questions/Undertakings are not relevant and material, or otherwise fall within the scope of permissible objections in rule 5.25, and therefore it should not be compelled to answer.

PART III – LAW AND ARGUMENT

A. Only Relevant and Material Questions Must Be Answered

8. Mantle agrees that the scope of cross-examination is framed by the application before the Court. However,

[i]t must be kept in mind at all times that the reason for the examination on the affidavit is to assist the Court to decide the application, and questions and answers which would not assist the Court and would not be relevant to the determination of the issue on the motion nor question the truth of the statement contained in the affidavit or the credibility of the affiant and are obviously questions that should be put on examination for discovery should not be allowed.[emphasis added]³

9. Rule 5.25 of the *Alberta Rules of Court* provides as follows:

5.25(1) During questioning, a person is required to answer only

(a) relevant and material questions, and

(b) questions in respect of which an objection is not upheld under subrule (2).

(2) A party or a witness being questioned may object to an oral or written question during questioning but only for one or more of the following reasons:

(a) privilege;

(b) the question is not relevant and material;

(c) the question is unreasonable or unnecessary;

(d) any other ground recognized at law.⁴

³ *Edmonton (City) v Gosine*, 2020 ABQB 546 at para 13 [**Travelers’ Book of Authorities (“Travelers BOA”)**, **Tab B3**], citing *Ed Miller Sales & Rentals Ltd. v Caterpillar Tractor Co.*, [1981] 4 WWR 760 (Alta QB) at para 6.

⁴ *Alberta Rules of Court*, Alta Reg 124/2010, r 5.25 [**Mantle BOA, Tab 2**].

10. Relevance and materiality is defined in Rule 5.2:

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.⁵

11. Relevance is determined by the pleadings, whereas materiality is “measured by the potential of the information sought to directly or indirectly prove a fact that is in issue.”⁶

There is no fixed standard of what is “material”. An element of judgment is required, and questioning is not permitted just because some remote and unlikely line of analysis can be advanced.

...

It is not sufficient for a litigant to show some theoretical line of argument in order to establish “materiality”. The case management judge is fully entitled to reject lines of pretrial discovery that are unrealistic, speculative, or without any air of reality. As R. 5.3(1)(b) implies, the case management judge is allowed to reject questioning where the expense involved is disproportionate to the likely benefits that will result. At an interlocutory stage of proceedings, the court should not measure counsels' proposed line of argument too finely... But that does not mean that a proposed line of questioning must be accepted at face value. The case management judge’s decision that this line of questioning was not sufficiently material to warrant the expense involved in discovery is entitled to deference, and discloses no reviewable error. [emphasis added]⁷

12. Accordingly, only questions that are relevant and material to these issues are required to be answered as part of Travelers’ questioning of Levkulich on his Affidavit.

⁵ *Alberta Rules of Court*, r 5.2 [Mantle BOA Tab 2].

⁶ *AltaLink, LP v SNC-Lavalin ATP Inc.*, 2022 ABKB 772 at para 17 [Mantle BOA, Tab 3], citing *Dow Chemical Canada Inc. v Nova Chemicals Corp.*, 2014 ABCA 244 [Dow Chemical] at para 17 [Mantle BOA, Tab 4].

⁷ *Dow Chemical* at paras 19-21 [Mantle BOA, Tab 4].

B. Issues Arising on the Mantle Application

13. The issues arising on the Mantle Application and Mantle's response to each is set out in the Brief filed December 7, 2023 in the within proceedings,⁸ along with what is required before Mantle will be granted an Initial Order under the CCAA.⁹
14. For ease of reference, Mantle responds below to the submissions made by Travelers in the same order and using the same categories as Travelers.

C. Refused Undertakings

15. The first two Refused Undertakings¹⁰ relate to reporting by RLF Lender to Resource Land Fund V, LP ("RLF V"), and whether any provisioning for losses has been reported to RLF V. Travelers does not explain how this is relevant and material to the issues raised on the Mantle Application. As noted below, whether the loans provided by RLF Lender to Mantle are reported, if at all, and how they may be reported, is not relevant and material to the issues raised by the Mantle Application. Travelers appears to suggest that something can be inferred from the accounting treatment of a loan, but it does not explain how this would assist in determining any issue on the Mantle Application.
16. Accordingly, Mantle respectfully submits that these Refused Undertakings do not seek relevant and material information, and therefore, Mantle is not required to provide responses.
17. The third Refused Undertaking¹¹ requested the draft of a document being prepared by Mantle and FTI to set out the administrative process sought by Mantle. As set out at paragraph 109 of the November 30th Affidavit, it was contemplated that this document would be circulated to interested parties prior to seeking Court approval, which includes Travelers. A draft document, subject to further revisions by Mantle and FTI was circulated to Travelers on December 8, 2023.

⁸ Mantle Brief, para 36.

⁹ Mantle Brief, paras 37-63.

¹⁰ Travelers Brief, para 22.

¹¹ *Ibid.*

D. Lender Financing Questions

18. Travelers categorizes these questions as relating to “the source of funds invested in Mantle by RLF V, through RLF Canada [Holdings Limited] and [RLF Lender], the availability of future funds from those entities, and how the RLF Group has characterized those invested funds in light of the insolvency of Mantle and its predecessor, JMB/216.”¹²
19. Notwithstanding that it is not clear from the Travelers Brief as to why it believes these questions are relevant and material, Mantle asserts that they are not. Travelers appears to be arguing that RLF Lender, as a current secured creditor to Mantle and a related party, should make further funding available to address the Reclamation Liabilities, regardless of the solvency of Mantle and its lack of ability to repay those funds. In advancing this argument, Travelers appears to be suggesting that it should be permitted to realize on its security prior to the Mantle estate having satisfied its Reclamation Liabilities. This is directly contrary to the decision of the Supreme Court of Canada in *Orphan Well Association v Grant Thornton Ltd.*,¹³ as well as the three decisions previously rendered in the Proposal Proceedings by the Alberta Courts on this issue.¹⁴
20. Both the Supreme Court of Canada and the Alberta Courts have been clear that Reclamation Liabilities are obligations of the estate that must be satisfied prior to any distributions to creditors.

Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. ...

Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-

¹² Travelers Brief, para 23.

¹³ *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 [*Redwater*] [Mantle BOA, Tab 5].

¹⁴ *Re Mantle Materials Group, Ltd.*, 2023 ABKB 488 [Mantle ABKB] [Mantle BOA, Tab 6], aff'd in *Mantle Materials Group, Ltd. v Travelers Capital Corp.*, 2023 ABCA 302 [Mantle ABCA #1] [Mantle BOA, Tab 7], further aff'd in *Mantle Materials Group, Ltd v Travelers Capital Corp.*, 2023 ABCA 339 [Mantle ABCA #2] [Mantle BOA, Tab 8].

monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. ... End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.¹⁵

21. As set out in the Affidavit,¹⁶ Travelers' challenge to the applicability of *Redwater* to Mantle was denied by the Alberta Court of King's Bench¹⁷ and twice by the Alberta Court of Appeal.¹⁸ Accordingly, Mantle is required to use its assets to satisfy the Reclamation Liabilities before any distribution to creditors may be made. There is no requirement in *Redwater* or otherwise that Mantle obtain funding from its ultimate parent company for the purposes of satisfying the Reclamation Liabilities to ensure that secured creditors like Travelers can realize on their security. Another type of insolvency process would not affect the requirement that Mantle satisfy its Reclamation Liabilities.
22. In addition, the evidence is that RLF V (through RLF Lender) is not prepared to provide additional financing on an unsecured basis, or on a secured basis but subordinated to any other creditor. In appropriate circumstances, RLF Lender may be prepared to fund Reclamation Liabilities relating to the Active Pits.¹⁹ Accordingly, absent a requirement that these entities be compelled to provide further funding, the source of funds invested in Mantle by RLF V through RLF Lender, the availability of future funds from those entities, and how the RLF Group has characterized those invested funds in light of the insolvency of Mantle and its predecessor, JMB/216, are not relevant and material. Answers to these questions will not significantly help determine an issue on the Mantle Application, nor ascertain evidence that could reasonably be expected to significantly help determine such an issue.
23. As this Court will be aware, lenders may or may not be prepared to provide funding to insolvent companies. Whether funds could be made available, along with any reason for

¹⁵ *Redwater*, paras 159-160 [Mantle BOA, Tab 5].

¹⁶ Affidavit, paras 65-71.

¹⁷ *Mantle ABKB* [Mantle BOA, Tab 6].

¹⁸ *Mantle ABCA #1* [Mantle BOA, Tab 7], *Mantle ABCA #2* [Mantle BOA, Tab 8].

¹⁹ Affidavit, para 109.

declining to provide such funding, is not relevant and material. The real issue on the Mantle Application is whether the terms of the Interim Facility are reasonable, and whether the stakeholders benefit from the continuation of a priority charge in favour of RLF Lender as interim lender with respect to the Interim Facility. This has already been decided for the purposes of the Proposal Proceedings, and there is nothing in Travelers' materials to explain how the Lender Financing Questions would elicit any fact or evidence that would be helpful in determining whether the terms of the Interim Facility are reasonable and should be accepted and the related charge continued by this Court.

24. Moreover, an internal decision made by a lender as to how it treats a loan is also not relevant and material. Travelers appears to suggest that something can be inferred from the accounting treatment of a loan, but does not explain how this would assist in determining an issue on the Mantle Application.
25. Accordingly, Mantle respectfully submits that the Lender Financing Questions are not relevant and material, and therefore are not required to be answered pursuant to rule 5.25(2).

E. Financial Reporting Questions

26. Travelers characterizes these questions as relating to “the RLF Group’s obligations to report on the status of their investments including any exposure to risk in respect of same, environmental liabilities associated with their investments, advances (whether secured loans or unsecured capital injections) made to wholly owned subsidiaries in respect of the acquisition or subsequent to the acquisition to each respective corporation’s parent company, and/or their investors.”²⁰ As can be seen from the questions, Travelers seeks information about past reporting by RLF V to its limited partners and by RLF Lender to RLF V, including whether any provisioning has been made on the loans by RLF Lender.
27. Whether the loans provided by RLF Canada to Mantle have been reported, if at all, and how they may have been reported, is not relevant and material to the issues raised by the Mantle Application. Again, Travelers’ suggestion seems to be that something can be

²⁰Travelers Brief, para 24.

inferred from the accounting treatment of a loan, but it does not explain how this would assist in determining any issue on the Mantle Application.

28. Accordingly, Mantle respectfully submits that the Financial Reporting Questions are not relevant and material, and therefore are not required to be answered pursuant to rule 5.25(2).

F. Indemnification Questions

29. Travelers characterizes these questions as relating to “Mr. Levkulich and Mr. Patsch’s personal exposure to liability in their capacity as directors of Mantle and any indemnities or rights of recovery they have against the RLF Group (or any individual corporation thereof) in respect of same.”²¹
30. The context of the Indemnification Questions relates to the personal liability of directors under the EPEA, and specifically, with respect to the EPOs that have been issued by the AEPA. Mantle asserts that these questions are not relevant and material.
31. As noted above, Mantle is obligated to satisfy its environmental obligations from the assets in its estate. Whether the AEPA may have recourse to Mantle’s directors, or whether Mantle’s directors have indemnity arrangements in place with Mantle or other any other company within the RLF Group, does not alter Mantle’s own obligation to satisfy the obligations arising under the EPOs, and is therefore not relevant and material to the issues arising on the Mantle Application.
32. Travelers appears to be suggesting that if the directors are indemnified in some way, that indemnification could provide a further source of funding for the Reclamation Liabilities. The fact that the directors have personal liability for the Reclamation Liabilities does not change the analysis under *Redwater*, confirmed by the Alberta Courts to be applicable to the entire Mantle estate. No distribution to creditors is permitted until the Reclamation Liabilities have been satisfied.

²¹ Travelers Brief, para 25.

33. Accordingly, Mantle respectfully submits that the Indemnification Questions are not relevant and material, or are otherwise not required to be answered pursuant to rule 5.25(2).

G. EPO Reporting Questions

34. Travelers characterizes these questions as relating to “the reporting obligations, if any, of Mantle’s directors to Mantle’s parent companies or to governmental/regulatory bodies in the case of their personal liability in respect of the EPOs.”²²

35. The first EPO Reporting Question asks whether the regulator in the United States has issued any environmental protection orders to RLH, LLC or any of its other investments. Mantle asserts that this is clearly not relevant and material, as it is asking for orders issued by an out-of-jurisdiction regulator with respect to out-of-jurisdiction projects for other non-Mantle entities. None of this is at issue on the Mantle Application.

36. The balance of the EPO Reporting Questions are hypothetical. They seek answers to hypothetical situations that have not occurred. What Levkulich may have to report in the case of a sanction or being pursued personally by the AEPA under the EPOs to RLF V, government contracts or the US regulator is not relevant and material to the Mantle Application, as again, none of this is at issue on the Mantle Application.

37. Moreover, this line of questioning is wholly speculative and no clear factual foundation has been provided for same. Accordingly, Mantle respectfully submits that the EPO Reporting Questions are not relevant and material, and therefore are not required to be answered pursuant to rule 5.25(2).

38. Accordingly, Mantle respectfully submits that the EPO Reporting Questions are not relevant and material, or are otherwise not required to be answered pursuant to rule 5.25(2).

PART IV – ORDER SOUGHT

39. Mantle respectfully requests that the within Application be denied, with costs payable forthwith to Mantle on an enhanced basis.

²² Travelers Brief, para 26.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of December, 2023.

Gowling WLG (Canada) LLP

A handwritten signature in blue ink, appearing to read "C. Hanert", is written over a horizontal line.

Tom Cumming/Caireen E. Hanert
Counsel for the Respondent
Mantle Materials Group, Ltd.

PART V – AUTHORITIES

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended
2. *Alberta Rules of Court*, Alta Reg 124/2010, r 5.2, 5.25
3. *AltaLink, LP v SNC-Lavalin ATP Inc.*, 2022 ABKB 772
4. *Dow Chemical Canada Inc. v Nova Chemicals Corp.*, 2014 ABCA 244
5. *Orphan Well Association Ltd. v Grant Thornton Ltd.*, 2019 SCC 5
6. *Re Mantle Materials Group, Ltd.*, 2023 ABKB 488
7. *Mantle Materials Group, Ltd. v Travelers Capital Corp.*, 2023 ABCA 302
8. *Mantle Materials Group, Ltd. v Travelers Capital Corp.*, 2023 ABCA 339