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2001-05630

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COURT OF QUEEN'S BENCH OF ALBERTA

JS
June 19, 2020
Justice Eidsvik

JUDICIAL CENTRE

CALGARY

APPLICANTS

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC, and DOMINION FINCO INC.

DOCUMENT

BENCH BRIEF OF CREDIT SUISSE AG

APPLICATION BEFORE THE HONOURABLE MADAM JUSTICE EIDSVIK ON JUNE 19, 2020

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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1. This Bench Brief is filed by Credit Suisse AG, Cayman Islands Branch, as agent (the “**Agent**”) for the first secured lenders (the “**First Lien Lenders**”) to Dominion Diamond Mines ULC (“**Dominion**”), Washington Diamond Investments, LLC and various of their direct and indirect subsidiaries (together, the “**Debtors**”) pursuant to a Revolving Credit Agreement, dated as of November 1, 2017 (as amended, the “**First Lien Credit Agreement**”):

- (a) in support of the Applicants’ Amended Application (the “**Amended Application**”);
- (b) to provide this Court with information regarding the amendments which were made to the Interim Financing Term Sheet to better clarify and define the respective rights of the Interim Lenders as between themselves in the event an Event of Default occurs, and Washington Diamond takes possession of any Dominion diamond collateral following the exercise of its rights and remedies; and
- (c) to respond to an allegation made by Wilmington Trust, National Association, in its capacity as Trustee, Notes Collateral Agent, Paying Agent, Transfer Agent, and Registrar (the “**Trustee**”) that section 22(f) of the Interim Financing Term Sheet constitutes a breach of the Intercreditor Agreement between Dominion (as successor in interest to Northwest Acquisitions ULC), Washington Diamond Investments B.V., the Agent and the Trustee, dated as of November 1, 2017 (the “**Intercreditor Agreement**”).¹

2. All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Amended Application and the Interim Financing Term Sheet.

¹ Affidavit of Mark Freake, sworn May 12, 2020 at Exhibit B.

Agent and Lenders Support the Amended Application

3. The Agent supports the Applicants' Amended Application for the following reasons, among others:

- (a) the Stalking Horse Bid is subject to market testing and is designed to incentivize potential bidders to submit competing bids, thereby maximizing the potential value of the Applicants' assets for the benefit of the DIP Lenders, First Lien Lenders, and all stakeholders;
- (b) since the Applicants obtained the Initial CCAA Order on April 22, 2020 – a period of almost two months – and since the Applicants first served this Application on May 21, 2020 – a period of almost one month – no other parties, apart from the Stalking Horse Bidder, have volunteered to act as a stalking horse bidder so as to provide stability to the SISP and encourage all prospective bidders to put their best bid forward;
- (c) the Stalking Horse Bid is a baseline Bid and, in conjunction with the SISP, permits a fair, efficient, competitive and value maximizing auction process for the Applicants' assets, consistent with the timeline established in these CCAA proceedings, and which process can be used to confirm that the Stalking Horse Bid is the best and highest offer, or to promptly identify an alternative bid that is higher or otherwise better; and
- (d) the proposed interim financing provided by the Interim Lenders is at below market rates and is the cheapest interim financing available to the Applicants, thereby minimizing accruing interest and costs in order to preserve and maximize the chances of recovery for other stakeholders of the Applicants, including the First Lien Lenders and the Noteholders.

4. In the view of the Agent, all of the foregoing facilitates a process designed to maximize the value of the Applicants for the benefit of all stakeholders. Such a process benefits not only the Interim Lenders and First Lien Lenders, but all stakeholders of the Applicants, including DDMI, the Noteholders, trade creditors, the Government of the Northwest Territories and the northern communities in which the Applicants operate.

Amendments to the Interim Financing Term Sheet

5. The Interim Financing Term Sheet includes a number of amendments to section 24 to better clarify and define the respective rights of the Interim Lenders as between themselves in the event an Event of Default occurs, and Washington Diamond takes possession of any Dominion diamond collateral following the exercise of its rights and remedies. Amendments to section 24 of the Interim Financing Term Sheet clarify that upon an exercise of rights and remedies thereunder which results in Washington Diamond holding diamond collateral, it is required to hold such diamonds for the benefit of itself, and the other Interim Lenders, the First Lien Lenders, and the Agent for a period of 60 days (the “**Initial Holding Period**”). As discussed further below, a number of amendments to section 24 of the Interim Financing Term Sheet also clarify that certain rights and obligations accrue only to the First Lien Interim Lenders (as defined below) and not to the larger First Lien Lender group.

6. During and after the Initial Holding Period:

- (a) Washington Diamond has the right, but not the obligation, to purchase from the First Lien Lenders participating in the Interim Facility as Interim Lenders (the “**First Lien Interim Lenders**”) all Interim Financing Obligations held by such First Lien Interim Lenders, and all Obligations and all liens securing such Obligations held by the First Lien Lenders under the First Lien Credit Agreement upon five days written notice to the Agent (the “**Washington Diamond Call Right**”); and

- (b) The First Lien Interim Lenders have the right, but not the obligation, to purchase from Washington Diamond all Interim Financing Obligations held by Washington Diamond (the “**First Lien Interim Lender Call Right**”).

7. In addition, upon the expiration of the Initial Holding Period, if the Agent has not issued a “Diamonds Sale Request” (as defined and described below) Washington Diamond may, upon five days written notice to the Agent, require that the First Lien Interim Lenders purchase all Interim Financing Obligations held by Washington Diamond at par, plus all interest, fees, and expenses incurring during and after the Initial Holding Period (the “**First Lien Interim Lender Put Obligation**”).

8. In the event the First Lien Interim Lenders Call Right or the First Lien Interim Lender Put Obligation is exercised, amendments to the Interim Financing Term Sheet define a distribution waterfall as amongst the Agent, the First Lien Interim Lenders, and the First Lien Lenders in respect of the proceeds realized from the sale of the diamond collateral. This waterfall was implemented to reflect the additional risk being taken by the First Lien Interim Lenders in circumstances where the First Lien Interim Lender Put Obligation is exercised.

9. The Interim Financing Term Sheet amendments further provide that:

- (a) during the Initial Holding Period, the Agent may issue to Washington Diamond a written notice requesting that Washington Diamond sell all diamonds that are collateral of the Interim Lenders (a “**Diamonds Sale Request**”). Upon issuance of a Diamonds Sale Request: (i) the First Lien Interim Lender Call Right and the First Lien Interim Lender Put Obligation are void and no longer capable of exercise, (ii) any subordination of the October Advance is terminated, and (iii) Washington Diamond has 10 days to either accept or request such Diamond Sale Request. If accepted, Washington Diamond is permitted to dispose of all diamond collateral in one or more

transactions in Washington Diamond's sole and complete discretion, including with respect to timing, process and manner of disposition; and

- (b) upon expiry of the Initial Holding Period, and at any time thereafter (provided that Washington Diamond has not triggered the First Lien Interim Lender Put Obligation and the Agent has not issued a Diamonds Sale Request), Washington Diamond is permitted to liquidate the diamond collateral with proceeds distributed as among the Interim Lenders and First Lien Lenders according to their respective priorities, provided, however, that five days prior to any such liquidation, Washington Diamond must provide written notice to the Agent of its intention to sell diamond collateral, during which notice period the First Lien Interim Lenders are permitted to exercise the First Lien Interim Lender Call Right.

10. Apart from the Diamonds Sale Request construct, the vast majority of the foregoing was included in the original draft of the Interim Financing Term Sheet and was simply amended by the Interim Lenders in the current amended and restated draft to clarify that, like any junior priority lender, if Washington Diamond attempts to foreclose on Dominion's diamond collateral following an Event of Default, the First Lien Interim Lenders have the right to acquire and pay out all Interim Financing Obligations held by Washington Diamond so as to protect their interest, and the interest of the First Lien Lenders, therein.

11. The Diamonds Sale Request construct was added to the amended and restated Interim Financing Term Sheet to protect the First Lien Interim Lenders from exercise by Washington Diamond of the Washington Diamond Call Right and the First Lien Interim Lender Put Obligation in circumstances where the First Lien Interim Lenders are of the view that a sale of the diamond collateral is more commercially advantageous. The protection offered by the Diamonds Sale

Request was intended to ameliorate some of the risk to the First Lien Interim Lenders and the First Lien Lenders caused by Washington Diamond having the sole and complete discretion under the Interim Financing Term Sheet respecting disposal of diamond collateral upon expiry of the Initial Holding Period.

Section 22(f) of the Interim Financing Term Sheet and the Intercreditor Agreement

12. The Trustee has suggested in recent discussions that the First Lien Interim Lenders' agreement to section 22(f) of the Interim Financing Term Sheet constitutes a breach of the Intercreditor Agreement. The First Lien Interim Lenders strongly disagree with any suggestion that they are in violation of the Intercreditor Agreement and will respond to any such allegation once the substance of the Trustee's position is known.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF JUNE, 2020

OSLER, HOSKIN & HARCOURT LLP



Marc Wasserman / Michael De Lellis / Emily Paplawski
Counsel to Credit Suisse AG