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2001-05630

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

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

PAYMENT OF FEES

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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1. This Brief is filed by Credit Suisse AG, Cayman Islands Branch, as agent (the “**Agent**”) for the first secured lenders (the “**Lenders**”) to Dominion Diamond Mines ULC (“**Dominion**”), Washington Diamond Investments, LLC and various of their direct and indirect subsidiaries (together, the “**Debtor**”) and as a supplement to the short written submissions submitted by the Agent in its Bench Brief of May 7, 2020.

2. The Agent objects to the payment of fees at this time to Wilmington Trust, National Association, in its capacity as Trustee, Notes Collateral Agent, Paying Agent, Transfer Agent, and Registrar (the “**Trustee**”) and/or the Ad Hoc Committee of Noteholders (the “**Committee**”) in these proceedings. In the alternative, the Agent submits that if the fees of the Trustee and/or Committee are to be paid at this time in these proceedings, the Agent’s fees should also be paid in accordance with the terms of the Intercreditor Agreement and the Agent’s priority in the Debtor’s capital structure.

3. All capitalized terms used but not otherwise defined herein shall have the meanings given to them in 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

Payment of Trustee’s Fees

4. Pursuant to the Intercreditor Agreement, the parties agreed that:

- (a) *Section 2.01* – any Lien on the Shared Collateral purporting to secure any Senior Obligations (which includes all unpaid principal, accrued and unpaid interest, and

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

all accrued and unpaid liabilities and obligations), regardless of how acquired, whether by grant, statute, operation of law, subrogation or otherwise, shall have priority over and be senior in all respects and prior to any lien on the shared collateral securing any Junior Obligations;

- (b) *Section 6.03* – to the extent the Senior Secured Parties are granted adequate protection in the form of payments in the amount of current post-petition fees and expenses, and/or other cash payments, the Junior Secured Parties shall not be prohibited from seeking adequate protection in the form of payments in the amount of current post-petition incurred fees and expenses, and/or other cash payments; and
- (c) *Section 6.10(b)* – none of the Senior Secured Parties shall oppose or seek to challenge any claim by any Junior Secured Party for allowance in an insolvency proceeding of Junior Obligations consisting of claims for post-petition interest, fees, costs, expenses and/or charges, to the extent of the value of the Lien of the Junior Secured Parties on the Shared Collateral (after taking into account the Senior Obligations and the Senior Liens).

5. In accordance with the Inter-Creditor Agreement, the Trustee is only permitted to seek payment of its fees and expenses to the extent that the fees of the First Secured Lenders are being paid by Dominion. To date, this Court has not granted any order permitting Dominion to pay the fees of the First Lien Lenders, nor has Dominion proposed to do so. Further, the Trustee is only permitted under the Inter-Creditor Agreement to advance a claim for its fees and expenses to the extent that its Lien on the Shared Collateral has value in excess of the Senior Obligations owed by Dominion to the Senior Secured Parties. At this early stage of the CCAA Proceeding, the value of

the Shared Collateral, whether the Trustee has any economic interest in the Shared Collateral, and the quantum of such interest is unknown.

6. As discussed in the Trustee's Application, section 7.6 of the Trust Indenture, dated October 23, 2017 provides the Trustee with "a lien prior to the Notes on all money or property held or collected by the Trustee" to secure its "fees, expenses and compensation". To the extent that the Notes are "in the money", the Trustee will recover its fees.

7. Accordingly, the Agent submits that: (a) it is premature for this Court make any order with respect to payment of the Trustee's fees until a SISP and DIP are established and the value of Dominion's estate is better ascertained; and (b) in the event this Court orders payment of the Trustee's fees, Dominion should also be required to pay the fees and expenses of the Agent.

Payment of Committee's Fees

8. For the same reasons that it is premature for this Court to consider payment of the Trustee's fees, it is premature for the Committee to seek payment of its fees and expenses. At this early stage of the proceeding, it is unknown whether the Noteholders are "in the money". Payment of the Committee's fees and expenses without assurance that the First Lien Lenders will be paid in full is inappropriate. It is also contrary to the spirit of the Intercreditor Agreement and inconsistent with the Committee's priority in the Debtor's capital structure.

9. The Committee also seeks a charge securing payment of its fees pursuant to section 11.52 of the *Companies' Creditors Arrangement Act* ("CCAA"). Section 11.52 permits the Court to grant a charge to secure the fees and expenses of "any financial, legal, or other expert engaged by any other interested person if the court is satisfied that the security or charge is necessary for their

effective participation in proceedings under this Act.² There is no suggestion that a charge securing the fees and expenses of the Committee is necessary for their participation in these proceedings. The Committee is comprised of “large, well known investment institutions” holding or controlling more than 50% of the issued and outstanding Notes of approximately \$800,000,000 CAD.³ According to the Committee’s own evidence, the Noteholders are “the largest creditors in these proceedings”.⁴ Nowhere in the Committee’s materials do they suggest that unless the Committee’s fees are paid, they will be unable to effectively participate in these proceedings.

10. Accordingly, the Agent submits that: (a) it is premature for this Court make any order with respect to payment of the Committee’s fees; and (b) in the event this Court orders payment of the Committee’s fees, Dominion should also be required to pay the fees and expenses of the Agent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13TH DAY OF MAY, 2020

OSLER, HOSKIN & HARCOURT LLP



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

² *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 at s. 11.52.

³ Affidavit of Eric Hoff, sworn May 6, 2020 (the “**Hoff Affidavit**”) at paras 2 and 12.

⁴ Hoff Affidavit at para 31.