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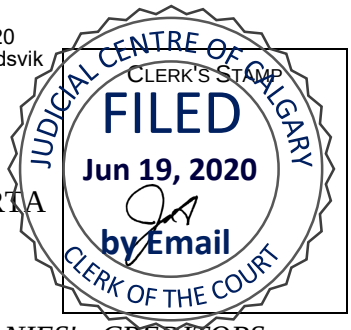
June 19, 20
Justice Eidsvik



COURT FILE NUMBER	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	**REPLY BENCH BRIEF OF CREDIT SUISSE AG**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Suite 2500, 450 – 1 Street SW Calgary, AB T2P 5H1 Attention: Marc Wasserman / Michael De Lellis / Emily Paplawski Telephone: 416.862.4908 / 416.862.5997 / 403.260.7071 Facsimile: 403.260.7024 Email: mwasserman@osler.com / mdelellis@osler.com / epaplawski@osler.com Matter: 1210529

1. This Reply Bench Brief is filed by the Agent for the First Lien Lenders in reply to: (a) the Affidavit of Eric Hoff, sworn June 17, 2020 and Bench Brief filed by the Committee seeking an Order approving the Noteholder DIP; and (b) the Bench Brief of the Trustee seeking payment of its post-filing fees and expenses.

Prejudice to the First Lien Lenders

2. The Agent, on behalf of the First Lien Lenders, strongly opposes the request by the Noteholder Committee and the Trustee that this Court direct the Company to approve the Noteholder DIP, as opposed to the Amended Washington/First Lien DIP.

3. In determining whether to approve the Amended Washington/First Lien DIP or to direct the Company to enter into the Noteholder DIP, this Court is required to consider the prejudice to the First Lien Lenders.[1]

4. The Courts have held that the benefit of the proposed DIP financing must clearly outweigh the potential prejudice to secured creditors whose security is potentially being eroded.[2] Courts have accordingly been favourably disposed to approve DIP financing that respects the debtor's existing capital structure.[3]

5. Where there are competing DIP proposals, the factors set out under the CCAA for approval of interim financing apply equally to determining which of two competing DIP proposals to accept.[4] In addition, the business judgment of the debtor is an important factor, subject to the CCAA criteria.[5] Finally, the fact that approval of one of the competing proposals will be hotly contested by a secured creditor whose security is proposed to be primed is a highly relevant factor in determining which of

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1 CCAA, s. 11(2)(f).

2 *Re United Used Auto & Truck Parts Ltd.*, 1999 CarswellBC 2673, aff'd 2000 BCCA 146 at para. 28.

3 See, for example, *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 at para. 33;

4 *Re Great Basin Gold Ltd.*, 2012 BCSC 1459 at para. 14.

5 *Great Basin Gold*, at para. 186.

the competing proposals to accept.[6] All of these factors favour the approval of the Amended Washington/First Lien DIP, which is supported by the Agent on behalf of the First Lien Lenders.

6. It is disingenuous for the Noteholder Committee to state that the proposed Noteholder DIP treats the First Lien Lenders in the same manner as the Amended Washington/First Lien DIP, and therefore that "it would not be credible for [the First Lien Lenders] to oppose the fairness and appropriateness of the Noteholder DIP."[7] The Agent has legitimate legal and business reasons for opposing the Noteholder DIP on the grounds that it is materially prejudicial to the First Lien Lenders and entirely fails to recognize the first-ranking priority position of the First Lien Lenders.

7. The First Lien Lenders agreed to participate in and support the Amended Washington/First Lien DIP on the condition that it was accompanied by the Shareholder Bid. The Shareholder Bid represents significant value not only to the First Lien Lenders, but also to several other key stakeholders including employees and trade creditors of the Applicants. If it is the successful bid, it provides some comfort that the First Lien Lenders could be made whole, in accordance with their priority position in the Company's capital structure.

8. Since the Shareholder Bid acts as the "floor", the SISP can only generate better recoveries for the Company's stakeholders and the First Lien Lenders cannot do worse. The Shareholder Bid (together with the right of the First Lien Lenders to participate in the Amended Washington/First Lien DIP) therefore at least partially offsets the material prejudice to the First Lien Lenders of priming their first-secured position. The Agent, on behalf of the First Lien Lenders, would otherwise have raised strenuous objections to having the first-ranking security primed by the Amended Washington/First Lien DIP (or indeed, any DIP).

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6 *Great Basin Gold* at para. 198.

7 Affidavit #2 of Eric Hoff, sworn June 17, 2020, para. 38 ("Second Hoff Affidavit").

9. The Noteholder DIP is more expensive relative to the Amended Washington/First Lien DIP, increasing the amount that will rank in priority to the amounts owed to the First Lien Lenders. In addition, the Amended Washington/First Lien DIP confers a number of hard-fought information and consultation rights on the Agent on behalf of the First Lien Lenders. These rights reflect their priority status in the capital structure and recognizes that the agreement of First Lien Lenders (and ultimately their repayment) is critical to any viable restructuring solution for the Company. The Noteholder DIP effectively strips all of these protections away.

10. Although the Noteholders have indicated an intention to credit bid their debt, the terms of that credit bid remain uncertain, despite the almost 60-day period that has elapsed since these proceedings were initiated. With no concrete credit bid proposal on the table, the First Lien Lenders have no confidence that a credit bid will be submitted by the Noteholders that must provide for repayment of their first-ranking indebtedness. Instead, the proposed Noteholder DIP effectively feeds a potential credit bid of the Noteholder DIP in priority to the rights of the First Lien Lenders, creating a further risk that the First Lien Lenders may not be fully repaid. This result would turn the capital structure of the Company on its head.

The Noteholder Bid Violates the Intercreditor Agreement

11. Allowing the Noteholders, who rank below the Lenders in the Company's capital structure and whose securities are currently trading at a significant discount to face value, to successfully oppose the Amended Washington/First Lien DIP and establish a super-priority position in relation to the First Lien Lenders would violate the intercreditor arrangements to which the Noteholders have freely agreed.

12. In particular, the requested relief violates clause 6.01 of the Intercreditor Agreement:

> if the Agent consents to "the sale … of … collateral .. or … to the Borrower's or any other Grantor's obtaining financing under … any … Bankruptcy Law to be secured by the Senior Collateral ("DIP Financing"), then each Junior Representative [i.e. Noteholder], for itself and on behalf of each Junior Secured Party under its Junior Debt Facility, agrees that it will (as applicable) raise no (a)

> objection to and will not otherwise contest … such DIP Financing … or (e) objection to (and will not otherwise contest or oppose) any order relating to a sale or other disposition of any or all of the Senior Collateral for which the Designated Senior Representative has consented …[8] (emphasis added)

13. Under the above provision, the Noteholders have expressly agreed that they will not oppose a DIP financing proposal that the First Lien Lenders have agreed to. Nowhere in the materials placed before this Court by the Noteholder Committee is there any reference at all to this provision, let alone any submissions to support the right of the Noteholder Committee to object to the Amended Washington/First Lien DIP in the face of such clear contractual language.

14. To be clear, the First Lien Lenders are supportive of a potential credit bid by the Noteholders. However, if such a credit bid is to succeed, it must first pay out the First Lien Lenders, given their priority ranking in the capital structure and the terms of the intercreditor arrangements.[9] This is true regardless of whether the Shareholder Bid is allowed to form the basis for the SISP or not. Approving the Amended Washington/First Lien DIP and the related Shareholder Bid does not foreclose the ability of the Noteholders to submit a credit bid that is superior to the Shareholder Bid.

The Interim Financing Term Sheet does not Violate the Intercreditor Agreement

15. The Trustee suggests in its Bench Brief that section 22(f) of the Interim Financing Term Sheet (what the Trustee refers to as the "Retaliatory Amendment") violates the Intercreditor Agreement. The Agent strongly disagrees with such suggestion.

16. Section 6.03 of the Intercreditor Agreement only provides that the Trustee "shall not be prohibited from seeking adequate protection in the form of payments…" There is nothing in section

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[8] Intercreditor Agreement, dated November 1, 2017, attached as Exhibit B to the Affidavit of Mark Freake, sworn May 12, 2020.

[9] See Intercreditor Agreement, clause 6.01: "… In addition, the Junior Secured Parties are not deemed to have waived any rights to credit bid on the Shared Collateral in any such sale or disposition in accordance with Section 363(k) of the Bankruptcy Code (or any similar provision of or order made under any other applicable Bankruptcy Law), so long as such credit bid provides for the payment in full in cash of the Senior Obligations."

22(f) or otherwise in the Interim Financing Term Sheet which prohibit the Trustee from requesting payment of its fees. Section 22(f) is expressly subject to "as may be otherwise ordered by the Court." An order of the Court presumes a request for relief to the Court. Not only does section 22(f) not interfere with the Trustee's ability to seek payment of its fees, it expressly permits such request.

17. Language similar to section 22 (f) of the Interim Financing Agreement was approved by the Quebec Superior Court in the White Birch Paper CCAA proceeding.[10]

18. The Trustee further suggests in its Bench Brief that if it "rejects[s] the Retaliatory Amendment" it then "forego[es] receiving any payment that it is otherwise be [*sic*] entitled to receive pursuant to the Trust Indenture and the Intercreditor Agreement." There is nothing in the Trust Indenture, the Intercreditor Agreement, the CCAA, or otherwise at law which entitles the Trustee as of right to payment of its fees. The lack of a prohibition in the Intercreditor Agreement on the Trustee requesting payment of its fees does not equate with a right to be paid such fees. The Trustee cannot "forego" a right it does not have.

19. Further, section 6.03 of the Intercreditor Agreement is expressly "subject to the right of the Senior Secured Parties to object to the reasonableness of the amount of fees and expenses or other cash payments so sought by the Junior Secured Parties". The Agent strongly objects to payment of the Trustee's Fees on the basis that, among other things, the parties agreed in section 2.01 of the Intercreditor Agreement that the lien held by the Agent to secure amounts due and owing under the First Lien Credit Agreement "shall have priority over and be senior in all respects and prior to" any lien held by the Trustee. The Trustee is accordingly only permitted under the Intercreditor Agreement to advance a claim for its fees and expenses to the extent that the Notes are "in the money". At this point in the CCAA, the value of Dominion's collateral, whether the Trustee has any interest in such

[10] See Schedule "A" for section 5.10(b) of the Senior Secured Super Priority Debtor in Possession Term Loan Credit Agreement, dated March 1, 2010 and approved by the Court on February 24, 2010

collateral, and the quantum of such interest is unknown. By the admission of the Committee – which represent more than 50% of the issued and outstanding Notes – the cash offered by the Stalking Horse Bid "is barely sufficient to repay the debt of the 1st Lien Lenders".[11]

20. Further, to the extent that Notes are "in the money" the Trustee will recover its fees as section 7.6 of the Trustee Indenture 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".

21. The Trustee's request for payment of its post-filing fees and expenses is akin to the order sought earlier in these proceedings by the Committee and adjourned by this Court as premature. A similar disposition should be made of the Trustee's application. Any other result would be inconsistent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18TH DAY OF JUNE, 2020

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Counsel to Credit Suisse AG

[11] Second Hoff Affidavit at para 20.

Schedule "A"
Senior Secured Super Priority Debtor in Possession Term Loan Credit Agreement, dated March 1, 2010

Section 5.10 Use of Proceeds

(b) Not use the proceeds of the Loans or the proceeds of Collateral: (i) for the payment of any Prepetition Junior Obligation, Subordinated Debt, other than interest in respect of the Soucy Intercompany Note and the Soucy 1 Intercompany Note, and except for amounts approved by the Bankruptcy Court and Canadian Court in the First Day Orders and the Initial CCAA Order, as applicable, that are consistent with the Approved Budget, (ii) to finance in any way any action, suit, arbitration, proceeding, application, motion or other litigation of any type adverse to (a) the interests of Agents and Lenders or their rights and remedies under this Agreement, the other Loan Documents, or the Applicable Orders, or (b) the interests of the Prepetition Senior Agents and Prepetition Senior Lenders or their rights and remedies under the Prepetition Senior Credit Agreement, the other Prepetition Senior Loan Documents, or the Applicable Orders, including, without limitation, for the payment of any services rendered by the professionals retained by the Loan Parties or any Committee in connection with the assertion of or joinder in any claim, counterclaim, action, proceeding, application, motion, objection, defense or other contested matter, the purpose of which is to seek, or the result of which would be to obtain, any order, judgment determination, declaration or similar relief (x) invalidating, setting aside, avoiding or subordinating, in whole or in part, the Prepetition Senior Obligations or the Liens securing same, or the Obligations or the Liens securing same, (y) for monetary, injunctive or other affirmative relief against any Prepetition Senior Lender or Prepetition Senior Agent or any Lender or Agent or their respective collateral or claims, or (z) preventing, hindering or otherwise delaying the exercise by any Prepetition Senior Lender, Prepetition Senior Agent, Lender or Agent of any rights and remedies under the Applicable Order, the Prepetition Senior Loan Documents, the Loan Documents or applicable law, or the enforcement or realization (whether by foreclosure, credit bid, further order of the court or otherwise) by any or all of the Prepetition Senior Lenders, the Prepetition Senior Agents, the Lenders and the Agents upon any of their respective collateral; (iii) except as expressly permitted by this Agreement, to pay any fees or similar amounts to any person who has proposed or may propose to purchase interests in any Borrower or any other Loan Party (including so-called "Topping Fees," "Exit Fees," and similar amounts) and/or (iv) to investigate, conduct discovery for, assert, join, commence, support, finance or prosecute, or pay or reimburse any fees, costs or expenses related to the foregoing for, any action for preferences, fraudulent conveyances, substantive consolidation, re-characterization, other avoidance power claims or any other claim, counter-claim, action, proceeding, application, motion, objection, defense, or other contested matter seeking any order, judgment, determination or similar relief against, or adverse to the interests of, any Agent, Lender, Prepetition Senior Agent or Prepetition Senior Lenders, or any of their respective officers, directors, employees, agents, attorneys, professionals, affiliates, subsidiaries, assigns, or successors, including, without limitation, "lender liability" claims and causes of action, any actions under chapter 5 of the Bankruptcy Code or any other similar claims and causes of action under Canadian law, in each case without the prior written consent of the Administrative Agent, Syndication Agent and Lead Arrangers given in their sole discretion.