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COURT FILE NUMBER 2301-16114

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR
ARRANGEMENT OF MANTLE MATERIALS GROUP, LTD.

DOCUMENT BENCH BRIEF OF MANTLE MATERIALS GROUP, LTD.

ADDRESS FOR SERVICE **GOWLING WLG (CANADA) LLP**

AND CONTACT Suite 1600, 421 – 7th Avenue SW

INFORMATION OF Calgary, AB T2P 4K9

PARTY FILING THIS

DOCUMENT

Telephone: 403-298-1938 / 403-298-1018

Fax: 403-263-9193

Email: tom.cumming@gowlingwlg.com /
stephen.kroeger@gowlingwlg.com

File No.: A171561

Attention: Tom Cumming / Sam Gabor / Stephen Kroeger

**APPLICATION BEFORE THE HONOURABLE JUSTICE C.M. JONES
SEPTEMBER 20, 2024 AT 2:00 PM ON THE CALGARY COMMERCIAL LIST
VIA WEBEX**

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PART 1 – INTRODUCTION

1. Mantle Materials Group, Ltd. (“**Mantle**”) carries on the business of extracting, processing and selling gravel and other aggregates (“**Aggregate**”) from pits that it operates in the Province of Alberta.
2. On July 14, 2023 Mantle filed a notice of intention to make a proposal (the “**NOI**”) under section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the “**BIA**”), and FTI Consulting Canada Inc. (“**FTI**”), a licensed insolvency trustee, was named as the proposal trustee of Mantle (in such capacity, the “**Proposal Trustee**”). The *BIA* proceedings were commenced before this Honourable Court under Court of King’s Bench of Alberta action number B201-965622 (the “**Proposal Proceedings**”).
3. Pursuant to the initial Order of the Honourable Associate Chief Justice D.B. Nixon pronounced on January 10, 2024 (the “**Initial Order**”), the NOI Proceedings were taken up and continued under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**” and these proceedings, the “**CCAA Proceedings**”), FTI was appointed as monitor (the “**Monitor**”) and proceedings against Mantle were stayed until January 20, 2024 (the period of the stay being the “**Stay Period**”). The Initial Order was amended and restated by the Order of the Honourable Justice R.A. Neufeld pronounced on January 16, 2024 (“**Amended Initial Order**”) and the Stay Period was extended to March 1, 2024. The Stay Period was subsequently extended to September 30, 2024 pursuant to an Order of the Honourable Justice M. Hollins on February 23, 2024.
4. This Bench Brief is submitted on behalf of Mantle in support of an Application seeking, *inter alia*, the following relief from this Honourable Court:
 - (a) if necessary, abridging the time for service and deeming service of the Application and supporting materials to be good and sufficient;
 - (a) an Order (the “**Stay Extension Order**”) extending the Stay Period to November 14, 2025;

- (b) a declaration (the “**WEPPA Order**”) that Mantle meets the criteria prescribed in the *Wage Earner Protection Program Regulations* (“**WEPPR**”) and *Wage Earner Protection Program Act* (“**WEPPA**”);
 - (c) an Order (the “**Vesting Order**”) vesting all of the right, title and interest of Mantle in and to DML 120032 and the security deposited in respect thereof to Fleming Cats Inc. (“**Fleming Cats**”) pursuant to an assets purchase agreement dated September 10, 2024 (the “**DML APA**”) between Mantle and Fleming Cats; and
 - (b) such further and other relief as this Honourable Court deems just.
5. This Application is supported by the Affidavit of Byron Levkulich sworn September 9, 2024 (the “**September Affidavit**”). Mr. Levkulich is a director of Mantle.

PART 2– FACTS

6. The facts forming the background to this Application are set out in more detail in the September Affidavit and in the second report of the Monitor dated September 12, 2024 (the “**Second Report**”).
7. Capitalized terms that are not defined in this brief have the meanings given to them in the September Affidavit. All references to monetary amounts referenced herein are in Canadian dollars, unless otherwise stated.

PART 3- ISSUES

8. The issues to be determined by this Honourable Court are:
- (a) whether this Honourable Court should extend the Stay Period;
 - (b) whether this Honourable Court should grant the WEPPA order; and
 - (c) whether this Honourable Court should grant Vesting Order.

PART 4– LAW AND ARGUMENT

The Stay Period Should be Extended

9. The Stay Period currently expires on September 30, 2024. Mantle is seeking an extension of the Stay Period to and including November 14, 2025.
10. Under section 11.02(2) of the CCAA, the Court has the discretion to extend the Stay Period on any terms it deems appropriate. Under section 11.02(3), Mantle must satisfy the Court that circumstances exist that make the order appropriate and that Mantle has acted, and is acting, in good faith and with due diligence.¹
11. On February 23, 2024 the Honourable Justice M. Hollins granted certain Orders (the “**February Orders**”) which, *inter alia*, extended the Stay Period to September 30, 2024 and approved three sales and vesting orders, which orders were subject to the conditions contained within their respective purchase agreements.
12. Since the granting of the February Orders, Mantle has continued to act diligently and in good faith in these CCAA Proceedings by, among other things²:
 - (a) closing the transaction contemplated by the St. Paul APA, which required working with Upland Environmental and the County to obtain the AEPA’s approval of the transfers of the registrations of the Freehold Lands, responding to any information requests of the AEPA in respect of the transaction, and seeking the lifting of the EPOs against the Freehold Lands;
 - (b) working to advance the transaction contemplated by the SML APA, including working with Upland Environmental and PEA Holdings to obtain the AFP’s consent to the assignment of the SMLs to PEA Holdings and determining the amount of the security deposits required in connection therewith;
 - (c) closing the transaction contemplated by the Arrow-West APA;

¹ CCAA, s. 11.02(2) [**Tab 1**].

² September Affidavit, para 40.

- (d) communicating with AEPA and AFP in relation to the EPOs issued during the 2020 CCAA Proceedings and during these CCAA Proceedings by the AEPA;
 - (e) communicating with the Alberta Environmental Appeals Board in respect of Mantle's appeals of the EPOs issued during these CCAA Proceedings;
 - (f) completing the Major Reclamation Work in respect of the Mantle Lands and continuing the Assessment Period Reclamation Work, and applying for reclamation certificates in respect of Mantle Lands where the Assessment Period has been completed;
 - (g) preparing the within Application; and
 - (h) continuing to plan, prepare and complete the Assessment Period Work required to be conducted during the Spring, Summer and Fall of 2025.
13. The extension of the Stay Period to November 14, 2025 is necessary in order to provide Mantle with the stability under this Honourable Court's protection to, among other things, accomplish the following³:
- (a) continuing discussions with the AFP to finalize the quantum of the security deposits required in connection with the assignment of the SMLs pursuant to the SML APA;
 - (b) seeking the lifting of the EPOs issued by the AEPA in respect of the SML Lands;
 - (c) seeking the return of the security deposits provided to the AEPA and AFP in respect of the Mantle Lands, other than in respect of the SML Lands and DML Lands;
 - (d) completing the sale transactions contemplated by the SML APA and DML APA;
 - (e) carrying out, directing and monitoring the Assessment Period Work throughout the remainder of 2024 and 2025;

³ September Affidavit, para 41.

- (f) applying to the AEPA for reclamation certificates in respect of the Mantle Lands upon the completion of all Assessment Period Work at the end of the applicable Assessment Periods; and
 - (g) seeking the collection of accounts receivable owing to it and carrying out the other activities contemplated hereby.
14. While the length of the extension is long, Mantle respectfully submits that it is necessary in order to fully satisfy its Reclamation Obligations. Even though the Major Reclamation Work has been completed, until the end of the Assessment Period in respect of the remaining Mantle Lands, Mantle's Reclamation Obligations will not be fully satisfied. Further, until the Reclamation Obligations are satisfied or otherwise appropriately provided for, distributions to creditors will not be realistically possible and therefore it is in the interests of all stakeholders that the Stay Period be extended in order to permit Mantle to ensure this is accomplished.
15. Mantle has carried out these activities in good faith and with due diligence throughout the NOI Proceedings and CCAA Proceedings and respectfully submits that the requested stay extension is appropriate in the circumstances.
16. The Third CCAA Cash Flow Statement (as defined in the Second Report) confirms that Mantle is forecasted to have sufficient liquidity to continue to fund its activities and the cost of the CCAA Proceedings to November 15, 2025.⁴
17. The Monitor supports the proposed extension to the Stay Period.

The WEPPA Order should be granted

18. Mantle seeks an Order pursuant to section 5(5) of the WEPPA, and submits that it is appropriate to grant this Order given the facts in these CCAA Proceedings.
19. The WEPPA provides employees whose employment is terminated in connection with certain insolvency proceedings access to government funds for unpaid wages, vacation pay,

⁴ September Affidavit at para 43; Second Report, para 47(e).

severance and termination pay, up to certain limits. Although access to the WEPPA resources are available in any bankruptcy or receivership proceeding, under section 5(1)(b)(iv) of WEPPA, access to the WEPPA resources for former employees in an NOI or CCAA proceeding is only available if a Court determines under section 5(5) of WEPPA that the criteria established by regulation are met.

20. Section 5(5) of the WEPPA provides that on application by a person in proceedings under the CCAA, a Court may determine that a former employer meets the criteria prescribed by the WEPPR. Section 3.2 of the WEPPR provides that “a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.”
21. Similar relief has been granted in other insolvency proceedings including:
 - (a) *Re: BBB Canada ltd.*, Amended and Restated Initial Order;
 - (b) *Re: FIGR, Brands Inc.*, CV-21-00655373-00CL, Stay Extension, Distribution, WEPPA and Fee Approval Order;
 - (c) *Re: Nilex Inc.*, Estate No. 24-2878531, Interim Distribution Order; and
 - (d) *Re: the Proposal of Scotch and Soda Canada Inc.*, Estate No. 31-2941767, Stay Extension, Charge Approval, SISP Approval and WEPPA Declaration.
22. The CCAA Proceedings were commenced with the intention of liquidating and winding-down Mantle’s business operations, which is exactly what has occurred during the pendency of these CCAA Proceedings. During the NOI Proceedings, Mantle terminated the employment of all but one full time employee and one independent contractor who remain employed specifically to assist with the ongoing liquidation and wind-down, including completing the Reclamation Work.⁵
23. Mantle respectfully submits that it is appropriate for this Honourable Court to declare that Mantle meets the criteria as prescribed in the WEPPR and that former employees of Mantle

⁵ Second Report, para 50.

may be entitled to receive payments under WEPPA, as such declaration is necessary in order for employees to apply to seek their entitlements under WEPPA with respect to unpaid termination and/or severance pay.

24. Subject to this Honourable Court making the declaration that Mantle meets the criteria prescribed by WEPPR, the Monitor will assist terminated employees in filing claims for payments under WEPPA. For certainty, all claims against the Mantle will remain subject to the adjudication process set out in the Chapter 11 Proceedings.
25. The Monitor is supportive of the WEPPA Order.⁶

The Vesting Order should be approved

26. The DML APA and the transaction contemplated thereby (the “**DML Transaction**”) are described in detail in the September Affidavit and the Second Report and a copy of the DML APA is attached as Appendix A to the Second Report.⁷
27. It is well established under both the common law and the CCAA that the Court has the jurisdiction to approve a sale of all or substantially all of the assets of a debtor company in a CCAA proceeding in the absence of plan of arrangement where the sale is in the best interests of the stakeholders generally.⁸ Pursuant to section 36 of the CCAA, this Court has the jurisdiction to approve a sale or disposition of assets outside of the ordinary course of business. Sections 36(1), (2), (6) and (7) of the CCAA provide as follows:

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

⁶ Second Report, para 51.

⁷ September Affidavit, at paras 29-33; Second Report, paras 20-27.

⁸ *Re Nortel Networks Corporation*, 2009 CarswellOnt 4467 (SC) at paras 35-41 and 48 [Tab 2].

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

28. Section 36(3) sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor company's sale or disposition of assets outside the ordinary course⁹:
- (a) whether the process leading to the proposed sale or disposition was reasonable;
 - (b) whether the monitor approved that process;
 - (c) whether the monitor filed with the Court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effect of the proposed sale or disposition on the creditors and other interested parties; and

⁹ CCAA, s. 36(3) [Tab 1]; *Re Nelson Education Ltd.*, 2015 ONSC 5557 [*Nelson*] at para 38 [Tab 3].

- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
29. Also relevant when reviewing a sale or disposition of assets in a CCAA proceeding are the factors set out in *Royal Bank v Soundair Corp.*, which include considering whether sufficient effort was made to obtain the best price, the interests of all parties have been considered, the efficacy and integrity of the sales process and whether the process was fair.¹⁰
30. A Court should also give effect to the business judgment rule, which affords deference to the exercise of the commercial and business judgment of the debtor company in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient.¹¹
31. The consideration in respect of the DML Transaction is below the threshold of \$100,000 set out in paragraph 11(a) of the Amended Initial Order where the approval of this Honourable Court is required for such a transaction, however, an Order is required in order to vest the DML in Fleming Cats free and clear of any encumbrances.
32. Mantle submits that the DML Transaction satisfies the criteria in section 36(3) of the CCAA and the *Soundair* principles as follows:
- (a) Mantle, in consultation with the Monitor, did not consider the DML to have any economic value for the estate;
 - (b) Fleming Cats proposed to acquire Mantle's right, title and interest in the DML Lands and the DML Security for a purchase price equal to one dollar (\$1.00) plus the assumption by Fleming Cats of the Reclamation Obligations in respect of the DML Lands;
 - (c) the DML Lands have no reserves of gravel or other aggregates;

¹⁰ *Royal Bank v Soundair Corp.*, 1991 CarswellOnt 205 (ONCA) at para 16 [Tab 4]; *Nelson*, supra at paras 37-38 [Tab 3]; *Pricewaterhousecoopers Inc. v 1905393 Alberta Ltd.*, 2019 ABCA 433 at paras 10-13 [Tab 5]

¹¹ *Re Bloom Lake*, 2015 QCCS 1920 at para 28 [Tab 6]

- (d) Fleming Cats is the only company operating in the area where the DML Lands are located and therefore the only party that may have an interest in acquiring Mantle's interests in the DML Lands;
 - (e) the Reclamation Obligations in respect of the DML Lands are significant and greatly exceed the quantum of the DML Security, and if the DML Transaction is not completed, the Reclamation Obligations will remain with Mantle, resulting in significant costs to the estate and delay in resolving the CCAA Proceedings;
 - (f) no other party has expressed any interest in acquiring the DML Lands.
 - (g) the interests of the affected parties, including Mantle's creditors, the AEPA and the AFP have been considered;
 - (h) there is no unfairness as a result of the Pit Sale Process, as the Monitor (and in its capacity as Proposal Trustee) and Mantle undertook several processes to sell any of its potentially saleable properties and assets; and
 - (i) the Monitor supports the DML Transaction and granting of the Vesting Order.¹²
33. Mantle submits that the DML Transaction satisfies the criteria under section 36(3) of the CCAA and the *Soundair* factors and should be approved by this Honourable Court.

¹² Second Report, para 27.

PART 5– CONCLUSION AND RELIEF SOUGHT

34. For the reasons set out above, Mantle respectfully requests the relief described in paragraph Part 14 of this Brief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2024.

GOWLING WLG (CANADA) LLP

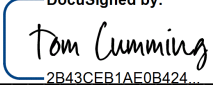
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Tom Cumming/Sam Gabor/Stephen Kroeger
Counsel for Mantle Materials Group, Ltd.

TABLE OF AUTHORITIES

| Tab | Authority |
|------------|---|
| 1. | <u><i>Companies Creditors Arrangement Act, R.S.C., 1985, c. C-36.</i></u> |
| 2. | <u><i>Re Nortel Networks Corporation, 2009 CarswellOnt 4467 (SC).</i></u> |
| 3. | <u><i>Re Nelson Education Ltd., 2015 ONSC 5557</i></u> |
| 4. | <u><i>Royal Bank v Soundair Corp., 1991 CarswellOnt 205 (ONCA)</i></u> |
| 5. | <u><i>Pricewaterhousecoopers Inc. v 1905393 Alberta Ltd., 2019 ABCA 433</i></u> |
| 6. | <u><i>Re Bloom Lake, 2015 QCCS 1920</i></u> |