COURT FILE NO.	25-2965622
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MANTLE MATERIALS GROUP, LTD.
DOCUMENT	**Supplementary Submissions of Mantle Materials Group, Ltd. – Hearing of August 15, 2023**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 **Attn: Tom Cumming / Stephen Kroeger** Phone: 403.298.1938 / 403.298.1018 Fax: 403.263.9193 Email: tom.cumming@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A171561

To: The Honourable Justice Colin C. Feasby

Further to the hearing before your Lordship on August 15, 2023 in the subject application, the following supplementary submissions are made on behalf of Mantle Materials Group, Ltd. ("**Mantle**") relating to the arguments made on behalf of Travelers Capital Corp. ("**Travelers**"):

1. Travelers' Due Diligence and Knowledge

(a) Attached as **Exhibit "A"** to the affidavit of Cory Pichota, the president and chief executive officer of Mantle, sworn August 8, 2023 (the "**August 8 Affidavit**") is a copy of the loan and security agreement dated October 8, 2021 (the "**Travelers Loan Agreement**") between Travelers and Mantle. Under section 4 of the Travelers Loan Agreement, the obligation of Travelers to enter a Loan and advance the Financed Amount[1] is subject to the fulfilment of a number of conditions precedent, each to be satisfied or waived in the sole discretion of Travelers. The condition precedent set out in section 4(k) provides as follows:

> "(k) satisfactory review by Lender of any and all environmental reports in respect of any real property owned by Borrower and if required by Lender reliance letters in favour of Lender from the applicable environmental firm; **[satisfied/waived]**"

The reference to "[satisfied/waived]" indicates that Travelers had either satisfied itself with respect to, or waived, this condition precedent.

[1] "**Loan**" is defined in section 2 of the Travelers Loan Agreement as a separate loan by Travelers to Mantle on the terms and conditions set out in the Travelers Loan Agreement and a Schedule ("**Schedule**" is defined in section 1(v) as each loan schedule executed by Mantle and the Lender which sets out the terms of a separate Loan). "**Financed Amount**" is defined in section 1(j) of the Travelers Loan Agreement as the amount stated in a Schedule as owing by Mantle to Travelers or the unpaid balance thereof.

(b) In paragraph 6 of the August 8 Affidavit, Mr. Pichota lists the financial due diligence materials provided by Mantle to Travelers that refer to Mantle's environmental reclamation obligations or the security provided by Mantle to Alberta Environment and Protected Areas ("**EPA**"), namely (i) page 2 of the August 2021 Mantle Flash Report (**Exhibit "B"** to the August 8 Affidavit) sets out the "Accrued Reclamation Obligations" under "Long Term Liabilities"; (ii) page 3 of the September 1, 2021 Lender Budget Report (**Exhibit "C"**) sets out the month by month (Aug-21 to Dec-21) Reclamation Security and Reclamation Trust; (iii) page 5 of the September 23, 2021 Equipment Acquisition Analysis - Flasha Deal Analysis & Assumptions (**Exhibit "D"**) sets out the month by month (Jan-22 to Dec-22) Accrued Reclamation Obligations under Current Liabilities; (iv) page 4 of the September 2021 Internal Financial Report (**Exhibit "E"**) sets out the Accrued Reclamation Obligation as at 30-Sept-21 under Long Term Liabilities; and (v) page 4 of the October 2021 Internal Financial Report (**Exhibit "F"**) sets out the Accrued Reclamation Obligation as at 31-Oct-21.

(c) The definition of "Permitted Encumbrances" in section 1(u)(xiii) of the Travelers Loan Agreement includes "deposits to secure performance of … (iii) letters of credit or bonds securing the Borrower's reclamation and remediation obligations under the surface material agreements and royalty agreements;".

(d) Before making advances under the Travelers Loan Agreement, Travelers was aware that Mantle was in the business of extracting, processing and marketing gravel and other aggregates from public and private pits, and that reclamation obligations had accrued. The equipment financed by Travelers was used to carry on this business. Travelers is a sophisticated alternative capital provider to public and private mid-market enterprises seeking custom finance solutions outside of those offered by traditional lending institutions.[2] If the reclamation obligations of Mantle did not factor into Travelers' determination of whether or not to make the loan, then it is unclear what the purpose of the condition precedent in section 4(k) was.

(e) Mantle borrowed from Travelers in late 2021, a year and a half prior to these proposal proceedings were commenced, when Mantle was attempting to rebuild its business. There is nothing on the record suggesting it obtained the loan with the goal of spreading the risk of reclamation liabilities to lenders. The most reasonable inference to be drawn from the Travelers Loan Agreement and the due diligence materials provided to Travelers was that it was aware of those liabilities and had the opportunity to factor them into its analysis of whether to lend money to Mantle.

2. Public Policy

(a) In *Orphan Well Association v Grant Thornton Ltd*. ("***Redwater***"),[3] Wagner CJ and Côté J essentially debated the appropriateness of subordinating creditors to the environmental regulator. Wagner CJ and Côté J expressed diametrically opposed views as to how the three part test in *Newfoundland and Labrador v. AbitibiBowater Inc*.[4] ("***Abitibi***") should be applied, whether or not that test was satisfied, how section 14.06 of the *Bankruptcy and Insolvency Act* (Canada) (the "***BIA***") should be interpreted, whether the majority was making a public policy choice or interpreting the relevant federal and provincial legislation, and the applicability of the paramountcy and cooperative federalism doctrines.

[2] See Travelers' website: https://www.travelerscapital.com/about/

[3] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, Supplemental Bench Brief of Mantle, at [Tab 5]

[4] *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67.

(b) In paragraphs 30 and 31, Wagner CJ referred to the public policy considerations underlying the environmental legislation and the *BIA*, and determined that the environmental legislation and *BIA* were not in conflict. Hence, the effective priority of regulatory obligations that were not in substance provable claims in bankruptcy did not disrupt the *BIA's* priority regime. In paragraph 156, Wagner CJ recognized that environmental obligations that are in substance regulatory rather than provable claims diminish the value of the bankrupt estate and therefore the amounts available to secured creditors. In paragraph 159, he also recognized that as a result, the estate had to perform those obligations before distributions are made to creditors.

(c) By contrast, Côté J strongly criticized the majority decision, noting that whatever the merits of the competing positions of the receiver and the environmental regulator, the Court's role is one of statutory interpretation, not policy. She added that the majority was effectively disregarding federal bankruptcy law in the pursuit of otherwise valid statutory objectives, with the effect that the "polluter-pays" principle of Parliament being displaced in favour of a "lender-pays" regime.[5] Further, in paragraph 286, she disagreed with Wagner CJ's statement in paragraph 159 that section 14.06(7) of the *BIA* showed that the regulator's actions facilitated rather than frustrated the priority scheme legislated by Parliament. She noted that Wagner CJ had acknowledged that section 14.06(7) was not applicable, and it was for Parliament to extend an environmental super-priority, not the Supreme Court. In paragraph 209, Côté J stated that in section 14.06(7), Parliament specifically envisioned that a government could obtain a super priority and leapfrog other creditors, but only where the government had already remediated the environmental damage.

(d) While paragraph 159 of Wagner CJ's decision is potentially confusing, we submit that it is best understood as a response to Côté J's remarks that he was making a policy decision that had the effect of defeating the legislated priority scheme in the *BIA*.

(e) Wagner CJ's decision in *Redwater* does not only materially and adversely affect secured creditors with purchase-money security interests ("**PMSIs**") in equipment. It also materially and adversely impacts the claims of all other secured creditors, Canada Revenue Agency's source deductions claims, employees' claims for wages that are secured by a charge in bankruptcy and receivership ranking in priority to every other security or charge,[6] beneficiaries of pensions for claims secured by similar charges in bankruptcy and receivership,[7] trade creditors, persons having litigation claims or judgments against a debtor, and employees and pension beneficiaries for their unsecured claims. Wagner CJ did not differentiate the treatment of or exempt any of these classes of creditors, or provide a basis for differentiating or exempting them.

(f) Whether, on a policy basis, one leans towards the reasoning and conclusions of Wagner CJ or Côté J, his decision represents the current law, namely that environmental obligations that are in substance regulatory must be satisfied before claims of secured and unsecured creditors.

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By: DocuSigned by: Thomas Cumming 1E8A29218C6147F...

Tom Cumming

[5] *Redwater*, at paras 289 and 290.

[6] *BIA*, ss. 81.3 & 81.4.

[7] *BIA*, ss. 81.5 & 81.6.