Form 49
[Rule 13.19]

COURT FILE NUMBER & BANKRUPTCY ESTATE NUMBER	**25-3009380**	Clerk's Stamp
COURT	COURT OF KING'S BENCH OF ALBERTA, IN BANKRUPTCY AND INSOLVENCY	
JUDICIAL CENTRE	CALGARY	
	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 ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD.	
APPLICANT	ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD.	
DOCUMENT	**AFFIDAVIT OF JOHN DAVID CHURCHILL**	

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Attn: Robyn Gurofsky / Jessica Cameron 3400 First Canadian Centre 350-7 Avenue SW Calgary, AB T2P 3N9 Telephone: (403) 261-9469/261-9468 Facsimile: (403) 261-5351 Email: rgurofsky@fasken.com / jcameron@fasken.com File No. 318938.00024

AFFIDAVIT NO. 4 OF JOHN DAVID CHURCHILL

Sworn on March 4, 2024

I, John David Churchill, of the City of Calgary, in the Province of Alberta, SWEAR AND SAY THAT:

1. I am the Chief Financial Officer ("**CFO**") of the Applicant, Athabasca Minerals Inc. ("**AMI**"). I have been the CFO of AMI since May 2022. I am also a director of all of the Applicants, excepting AMI. I have over 33 years of financial experience including 15 years in oilfield services, aggregates, and the industrial minerals industry, focusing on financial and accounting management and corporate finance. I have personal knowledge of the matters to which I depose in this Affidavit, except where such matters are stated to be based on information and belief, in which case I have stated the source of my information and, in all cases, I believe such information to be true. In preparing this Affidavit, I consulted with the Companies' management team and advisors and reviewed relevant documents and information concerning the Companies' operations, financial affairs, and restructuring activities.

2. I previously swore several affidavits in these proceedings, including on December 6, 2023 (my "**First Affidavit**") and on February 26, 2024 (my "**Third Affidavit**"). All capitalized terms used but not otherwise defined herein have the meaning given to them in my First Affidavit or my Third Affidavit, as the case may be. This Affidavit should be read in conjunction with my Third Affidavit, which provides the background to the Companies' application for approval of the corporate Transaction with Badger, by way of approval of the Subscription Agreement and requested RVO.

3. I am authorized to swear this Affidavit as a corporate representative of the Companies.

4. All monetary references in this Affidavit are in Canadian dollars, unless otherwise stated.

5. I swear this Affidavit as both a supplement to my Third Affidavit and in support of the relief set out in that Third Affidavit, as well as in support of the Companies' application for an order that, amongst other things:

   (a) abridges the time for service of notice of this Application and the supporting materials, if necessary, and deems service thereof to be good and sufficient;

   (b) authorizes AMI to obtain replacement interim financing pursuant to the terms of the interim financing term sheet between AMI and Badger dated March 4, 2024 (the "**Second Interim Financing Term Sheet**"), up to the principal amount of $5,300,000.00 (the "**Second Interim Financing Facility**");

(c) authorizes repayment of the amounts owing to JMAC under the existing Interim Financing Term Sheet;

(d) amends the Interim Lender's Charge granted in these proceedings by the Honourable A.C.J. Nixon on December 12, 2023, by replacing JMAC with Badger as Interim Lender and the beneficiary of the Interim Lender's Charge, and increasing the amount of the Interim Lender's Charge to $5,300,000.00;

(e) dismisses JMAC's cross-application to stay the Companies' Application to approve the Transaction and Subscription Agreement with Badger and grant the RVO; and

(f) grants such further and other relief as the Companies may request and this Honourable Court may deem just.

6. I have been advised by the Proposal Trustee that it supports this application.

Procedural Background

7. The Companies each filed notices of an intention to file a proposal, pursuant to Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**") on November 13, 2023.

8. On December 12, 2023, the Companies returned before the Court seeking various relief, including the approval of (1) a stalking horse sale and investment solicitation process ("**SISP**"), (2) interim financing for the Companies in accordance with the terms of the Interim Financing Term Sheet advanced by JMAC (the "**Interim Financing Facility**"), and (3) the Interim Lender's Charge granted in favour of JMAC to secure the Interim Financing Facility. The relief sought by the Companies was granted pursuant to an Order issued by the Honourable A.C.J. Nixon (the "**December 12 Order**").

9. The existing Interim Financing Term Sheet between AMI and JMAC was attached as Exhibit "O" to my First Affidavit. I have attached a copy of the executed Interim Financing Term Sheet to this Affidavit as **Exhibit "A"** for ease of reference of the Court.

10. The Companies required the Interim Financing Facility to fund, primarily, a cash call in AMIS LLC, and to pay employee compensation, ongoing payment of essential trade creditors, general administrative expenses, and payment of the fees of the professional advisors engaged to assist the Companies with their restructuring efforts in the within Proposal Proceedings.

11. Certain key terms of the Interim Financing Term Sheet provided by JMAC include:

    (a) the Interim Financing Loan was for an aggregate amount of $2,850,000.00;

    (b) interest accrues on the Interim Financing Loan, at a rate of 18% per annum;

    (c) a court-ordered priority charge over the Companies' assets was required to secure the Interim Financing Loan, subordinate only to the Administration Charge, as a condition of advancing the Interim Financing Loan; and

    (d) the term of the Interim Financing Loan matures (the "**Maturity Date**") on the date that is three months following the Closing Date (as defined therein), at which time, all amount owing under the Interim Financing Loan are due and payable to JMAC.

12. The Closing Date occurred on December 13, 2023. As a result, the Maturity Date is March 12, 2024. That facility was fully drawn shortly after it was granted, in order for the Companies to satisfy a cash call obligation in relation to AMIS LLC.

13. At the time that the December 12 Order was granted, the Companies anticipated repaying the Interim Financing Facility from proceeds realized from a sale or investment generated through the SISP.

14. The SISP concluded on February 9, 2024, following the conclusion of the Auction, and as more particularly described in my Third Affidavit. As I have previously stated, the Companies determined, with the assistance of the Proposal Trustee and the Sales Advisor, that the corporate share Transaction advanced by Badger was the best and most favourable offer submitted through the SISP. The Proposal Trustee subsequently advised Badger that it was the Winning Bidder at $29.2 million, and JMAC would stand as Back-up Bidder at $29.1 million. As a result, the Companies are seeking court approval of the Transaction through the approval of the Subscription Agreement and granting of the RVO, as more particularly detailed in my Third Affidavit.

15. Further to paragraphs 59 to 66 of my Third Affidavit, since swearing my Third Affidavit it has since become abundantly clear to the Companies that JMAC opposes the Companies' Application to approve the Transaction. This is evident by the fact that the day after serving the Companies' Application materials for approval of the Transaction, JMAC commenced legal proceedings against AMI in the United States District Court, District of North Dakota (the "**US Proceedings**") seeking

various forms of relief, but primarily seeking a Temporary Restraining Order ("**TRO**") and, after a hearing, a preliminary injunction to prevent the Companies from proceeding with the Badger Transaction. Attached hereto and marked respectively as **Exhibits "B"** to **"E"**, are copies of all of the following:

(b) Civil Complaint Cover Sheet, Summons in a Civil Action delivered to AMI, and Complaint by JMAC against AMI, all of which were filed on February 27, 2024 (including Exhibit 1 to the Complaint, which is a copy of the LLC Operating Agreement previously filed with this Court);

(c) Declaration of Jon McCreary dated and filed February 28, 2024, in support of JMAC's motion for a TRO and preliminary injunction;

(d) Declaration of Hugh D. Brown dated and filed February 28, 2024, in support of JMAC's motion for a TRO and preliminary injunction; and

(e) Plaintiff's Memorandum of Law in Support of Motion for a TRO and Preliminary Injunction filed by JMAC on February 28, 2024.

16. The Companies are in the process of responding to JMAC's motion for a TRO and Preliminary Injunction, as well as the Complaint, in the US Proceedings with the assistance of their US legal counsel. To date, AMI has filed a preliminary response to the TRO motion so that no order would be issued against it, without any response from AMI on the record in the US Proceedings. AMI intends to file a fulsome response to the TRO motion as soon as possible. As at the time of swearing this Affidavit, no hearing date has been set with respect to JMAC's motion for a TRO or injunctive relief in the US Proceedings. A copy of the preliminary response filed by AMI to the TRO motion is attached hereto as **Exhibit "F"**.

17. I have reviewed the Affidavit of Todd Erickson sworn on February 29, 2024 (the "**Second Erickson Affidavit**") and filed in the within Proposal Proceedings. I note that AMI's US counsel, Mr. Zachary Pelham, has indicted AMI is willing to waive formal service of the pleadings in the US Proceedings and is currently waiting for an admission of service from JMAC's US counsel. Attached hereto and marked as **Exhibit "G"** is email correspondence between Mr. Pelham and Hugh Brown, JMAC's US counsel regarding service of the documents filed by JMAC in the US Proceedings.

18. Also, outlined in this correspondence is AMI's advice that it would not waive any conflict of interest in Mr. Brown's office, Fabyanske, Westra, Hart & Thomson, continuing to represent JMAC in the US Proceedings. In particular, Mr. Brown's office is presently engaged on behalf of AMI in a bonding matter, and has had correspondence with AMI as recently as February 27, 2024.

19. On February 28, 2024, a District Judge of the United States District Court for North Dakota, issued an order to JMAC to show cause why the US Proceedings should not be dismissed for lack of subject matter jurisdiction by March 6, 2024 (the "**Jurisdiction Order**"). In the Jurisdiction Order, the Court advised that it would not consider JMAC's motion for a TRO until such time as that Court is satisfied it has jurisdiction over the matter. Attached hereto and marked as **Exhibit "H"** is a copy of the Jurisdiction Order.

20. On February 29, 2024, JMAC responded to the Jurisdiction Order as set out in the Response to Order attached hereto and marked as **Exhibit "I"**.

21. Based upon discussions with the Company's US legal counsel, Mr. Pelham, I understand that the US Court could grant or deny the TRO at any time, and if granted, an expedited hearing regarding whether the TRO will become a preliminary injunction or be dissolved will generally be held within 14 days from the date of the TRO. It is uncertain whether the US Court will issue a TRO, whether the US Court will issue a preliminary injunction, or the date of any corresponding hearing, but the motion and related proceedings could potentially be heard by the US Court in mid to late March, with a decision on the hearing issued approximately one to two weeks later. Meaning that a resolution of JMAC's motion for a TRO and preliminary injunction would likely not be resolved until after March 30, 2024.

22. Further, in terms of resolving JMAC's underlying Complaint, the Companies have been advised that a trial date would likely not be set down until late 2025, with deadlines for dispositive summary judgment motions likely set for March or April 2025, a year from now or more.

23. I am providing the above information solely to provide this Court with evidence regarding the anticipated procedural timelines for resolution of the US Proceedings, and in no way am I intending to waive any solicitor-client privilege associated with discussions between the Companies and Mr. Pelham.

Second Interim Financing Facility

24. In light of the foregoing, and the uncertainty it has created regarding the Companies' ability to close the Badger Transaction by March 12, 2024, the Companies had serious concerns about their ability to repay the existing Interim Financing Facility to JMAC by the Maturity Date. Additionally, the Companies had serious concerns about obtaining an extension to the Maturity Date from JMAC, as well as obtaining an increase and further advances to that existing Interim Financing Facility.

25. These concerns persisted notwithstanding the representations made in JMAC's materials filed in this Court that they would be willing to extend the existing Maturity Date and advance further funds if necessary. Other than putting these statements in their Court materials, JMAC has not communicated these offers to the Companies.

26. In fact, as at the time of swearing this Affidavit, the Companies are still awaiting a payout statement from JMAC despite several requests for the provision of one. More specifically, on February 28, 2024, through counsel, the Companies requested a payout statement from JMAC's counsel effective March 12, 2024 in relation to the Interim Financing Facility. Having not received a reply initially, on March 1, 2024, the Companies' counsel followed-up on this email correspondence and again reiterated the request for a payout statement. JMAC's counsel advised that they had passed along this request. As at the time of swearing this Affidavit, no payout statement had been provided by JMAC to the Companies in response to their request for one. Attached hereto and marked as **Exhibit "J"** is a copy of email correspondence between the Companies' counsel and JMAC's counsel between February 28, 2024 and March 1, 2024 regarding the request for a payout statement.

27. Additionally, the Companies had serious concerns about continuing interim financing arrangements with JMAC due to the fact that the extension and increased funding required are only necessary to respond to and fund litigation commenced against the Companies by JMAC itself. In considering all of the foregoing, the Companies did not therefore request a Maturity Date extension or an increase to the Interim Financing Facility from JMAC.

28. Instead, the Companies engaged in discussions with Badger regarding the provision of replacement interim financing. As the Successful Bidder under the SISP and proposed Purchaser under the Transaction, Badger was the natural choice to provide the Companies with the liquidity required to pursue closing of the Transaction for the benefit of all stakeholders.

29. The Companies have prepared a revised cash flow forecast for the period February 25, 2024 to May 19, 2024 (the "**Revised Cash Flow Forecast**"). In addition to the Companies' repayment of the existing Interim Financing Facility to JMAC, the Companies require further interim financing until

the Transaction closes, for, among other things, paying operational expenses for potentially a further month, while litigation is ongoing regarding the Transaction approval, and paying fees of the professional advisors engaged to assist the Companies in both pursuing the Transaction approval and responding to the litigation commenced by JMAC in the United States. Attached hereto as **Exhibit "K"** is a copy of the Cash Flow Forecast.

30. The Cash Flow Forecast demonstrates that the Companies require interim financing to repay the Interim Financing Loan and to fund ongoing operational expenses until the Transaction closes. The Companies have also negotiated a brief one-month extension to the Outside Date under the Subscription Agreement with Badger from March 30, 2024 to April 30, 2024.

31. Accordingly, the Companies have negotiated the Second Interim Financing Term Sheet with Badger for the provision of replacement interim financing, which is referred to above as the Second Interim Financing Facility. Attached hereto as **Exhibit "L"** is a copy of the executed Second Interim Financing Term Sheet. Key terms of the Second Interim Financing Term Sheet include:

(a) the Second Interim Financing Facility is for the principal amount of $5,300,000;

(b) interest will accrue on the Second Interim Financing Facility, at a rate of 18% per annum, which is the same interest rate under the existing Interim Financing Facility with JMAC;

(c) The Second Interim Financing Facility is intended to provide working capital for the Companies, and may be used for (each capitalized term as defined in the Second Interim Financing Term Sheet):

(i) satisfying the Borrowers' obligations under the previously approved Interim Financing Term Sheet between Athabasca Minerals Inc. and JMAC Energy Services LLC;

(ii) satisfying any cash calls, whether for equity or debt financing from its members, made by AMI Silica LLC to the Borrowers or Borrower, as applicable, in accordance with the Forecast; and

(iii) payment of ongoing professional fees incurred by the Borrowers in relation to their ongoing restructuring proceedings.

(d) a court-ordered priority charge over the Companies' assets must be granted to secure the Second Interim Financing Facility, subordinate only to the Administration Charge, as a condition of advancing the Second Interim Financing Facility; and

(e) the term of the Second Interim Financing Facility becomes due and payable to Badger upon the earliest of the following events (each capitalized term as defined in the Second Interim Financing Term Sheet):

(i) the date on which the Lender demands repayment after the occurrence of an Event of Default;

(ii) the implementation of a proposal within the Proceeding, which has been approved by the requisite majorities of the Borrowers' respective creditors and by an order made by the Court;

(iii) the sale of all or substantially all of the Property;

(iv) the termination of the Proceeding;

(v) the complete or partial lifting of the stay of proceedings in the Proceeding; or

(vi) April 30, 2024, or such other later date as may be communicated in writing by the Lender, in its sole and unfettered discretion, and otherwise agreed to by the Borrowers.

(f) The Companies may pre-pay the Second Interim Financing Facility at any time.

32. As the Companies have not received the requested pay-out statement from JMAC, I have performed calculations on behalf of the Companies to calculate the pay-out in full of the existing Interim Financing Facility to JMAC effect March 12, 2024. Based upon the principal amount advanced of $2,850,000, incurring interest at a rate of 18% per annum, the Companies will be required to repay JMAC $2,930,000 in full satisfaction of the existing Interim Financing Facility.

33. The Companies have also budgeted approximately $1,300,000 under the Second Interim Financing Facility in the event there are liquidity issues at AMIS LLC, which would likely trigger a further cash call on its members, including AMI. This amount is not anticipated to be drawn by the Companies unless it is necessary.

34. The balance of the funds will go towards ongoing operational expenses and professional fees.

35. The Companies believe that obtaining the Second Interim Financing Facility from Badger represents the best option available to them taking into account their financial position and circumstances, in particular, considering that Badger is the proposed purchaser of the Companies' business under the Transaction.

36. The terms of the Second Interim Financing Facility are similar to the terms of the Interim Financing Term Sheet that were approved by the Court in the December 12 Order.

37. In light of the foregoing, the Companies are of the view that the funding made available under the Second Interim Financing Facility is in the best interests of stakeholders.

ROFR Allegations

38. The Second Erickson Affidavit adopts as fact all of the facts alleged in JMAC's Complaint filed in the US Proceedings, notwithstanding none of those allegations have been proven in a Court of law. I note the following in response to some of the statements contained in the JMAC Complaint and adopted in the Second Erickson Affidavit:

    (a) There are various assertions that AMI received an offer from Badger at $13.1 million that AMI was willing to accept. This is incorrect. AMI was never willing to accept Badger's initial bid in the SISP, which bid was actually made at $13.2 million. Rather, AMI was only willing to accept the Successful Bid after Auction made by Badger of $29.2 million;

    (b) To date, AMI has invested approximately $1.3 million in developing the Montney resource. AMI believes this project will have future benefits given the location of the assets and difficulty for any other parties to obtain mineral claims in the area due to restrictions placed by the Government of British Columbia;

    (c) To date AMI has invested approximately $5.0 million in the Prosvita Sand Project. While there are still some approvals required by the Government of Alberta and regulatory bodies, the planning and approval stages are substantially complete. This means that the next phases of engineering and construction planning could be started, together with updated project economics and financing requirements. This also means that this asset would have value to other parties should AMI decide to sell entirely or part of its interest in the project;

    (d) Athabasca personnel have been advised by Tim Bergen, one of the Geofounders of the Prosvita Sand Project, and holder of a royalty interest, that on or about February 15, 2024, JMAC approached Mr. Bergen to ask if he, and the other two Geofounders, would be willing to sell JMAC 50% of their respective royalty holdings in the Prosvita resource. Mr. Bergen, along with the other two royalty holders, did not accept this offer; and

(e) AMI filed its materials for approval of the SISP on December 6, 2023 and it was subsequently approved on December 12, 2023.

Securities Issues

39. Under the Badger Transaction, it is currently a condition precedent to closing that AMI will receive the ASC Revocation Order which practically requires AMI to be delisted from the TSX-V and the OTC Pink Markets. Until the Revocation Order has been received, AMI will remain a reporting issuer and subject to its ongoing continuous disclosure obligations. In particular, AMI is required to file its annual securities law disclosure documents (including, but not limited to, its annual audited financial statements and annual management's discussion and analysis) ("**Disclosure Documents**") no later than April 29, 2024. It is anticipated that the preparation and filing of such annual disclosure documents will cost AMI approximately $125,000 in audit and legal fees. AMI has not accounted for this additional cash burn and accrual of professional fees in its Revised Cash Flow Forecast.

40. Additionally, based upon discussions with the Companies' legal counsel, Jason Giborski, partner in the Securities & Capital Markets Group with Fasken, AMI had originally submitted an application to cease to be a reporting issuer pursuant to the simplified procedure set forth in National Policy 11-206 – Process for Cease to be a Reporting Issuer Applications ("**NP 11-206**"). Under this simplified procedure, AMI would be able to cease to be a reporting issuer if it meets the following criteria:

(a) it is not an OTC reporting issuer under Multilateral Instrument 51-105 – Issuers Quoted in the U.S. Over-the-Counter Markets;

(b) its outstanding securities, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 securityholders in each of the jurisdictions of Canada and fewer than 51 securityholders in total worldwide;

(c) its securities, including debt securities, are not traded in Canada or another country on a marketplace or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported, and

(d) it is not in default of securities legislation in any jurisdiction.

41. In order to meet the above requirements, AMI must be delisted from the TSX-V and have its U.S. ticker symbol deleted by Financial Industry Regulatory Authority ("**FINRA**").

42. In the event that the Transaction does not close sufficiently in advance of April 29, 2024, AMI will be required to file its Disclosure Documents, at significant cost to AMI. In the event that AMI does not file its Disclosure Documents, it will be in default of applicable securities laws. Once in default of applicable securities laws, AMI will no longer be eligible to apply to cease to be a reporting issuer under the simplified procedure set forth in NP 11-206. As such, AMI would be required to make an application under Section 21 of NP 11-206. Section 21 sets forth that AMI would be required to explain why it does not meet the criteria under the simplified procedure and provide submissions to both the ASC and the OSC as to why the application should be granted, notwithstanding AMI's default under the securities legislation.

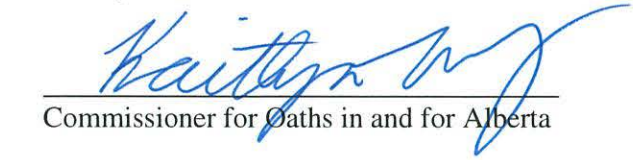
43. An application under this section can take significantly longer to be approved as AMI's application will be assigned to a lawyer at the ASC to review. It may take several weeks for such an application to be approved by the ASC and other applicable securities regulators, potentially causing further delays in AMI's ability to close the Badger Transaction.

44. In order to avoid triggering the requirement for AMI to file its Disclosure Documents, it is critical that AMI close the Badger Transaction, or a transaction, no later than late April.

Conclusion

45. I swear this Affidavit in support of the Companies' Application for granting the relief as more particularly set forth in paragraph 5 above, and as a supplement to my Third Affidavit and the relief requested therein.

SWORN BEFORE ME at Calgary, Alberta, this)
4th day of March, 2024.)



Commissioner for Oaths in and for Alberta

Kaitlyn Wong
Barrister & Solicitor
3400, 350 7th Avenue SW
Calgary, Alberta T2P3N9
Ph: 1-403-261-7388

JOHN DAVID CHURCHILL

This is Exhibit "**A**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

A Commissioner for Oaths in and for the
Province of Alberta

Kaitlyn Wong
Barrister & Solicitor
3400, 350 7th Avenue SW
Calgary, Alberta T2P3N9
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ATHABASCA MINERALS INC.

Terms and Conditions for Debtor-in-Possession Financing
(the "**Term Sheet**")

This Term Sheet summarizes the proposed credit facility ("**DIP Facility**") between Athabasca Minerals Inc. ("**Athabasca**" or the "**Borrower**") and JMAC Energy Services LLC (the "**Lender**").

Borrower: Athabasca Minerals Inc., as a debtor-in-possession in a restructuring pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") by commencing proceedings (the "**BIA Proceedings**").

Lender: JMAC Energy Services LLC

DIP Facility: The "**DIP Facility**" provides for a loan of up to an aggregate of $**2,850,000** (together, the "**Principal Amount**") over and above the amounts advanced under the Loan Agreement, and the provisions in this Term Sheet shall bind the parties. The Principal Amount is inclusive of the DIP Facility Fee (as defined herein) and Expenses (as defined herein) set out herein (collectively, the "**Loan**"), from the Closing Date, as defined below, to the expiry of the term, provided that:

(a) at the time of the making the Loan, no default or event of default under the DIP Facility shall exist or be continuing;

(b) the Borrower shall be in compliance with the Budget (as hereinafter defined); and

(c) the Borrower shall at all times utilize the Loan for the Purpose (as defined herein).

Purpose: The Principal Amount will be used exclusively for:

(a) funding the Borrower's ordinary course working capital needs; and

(b) paying key senior Athabasca employees retention bonuses, the quantum of which has been approved by the Lender in advance,

and for no other purpose (collectively, the "**Purpose**"), unless the Lender has provided its prior written consent for such use, which consent may be withheld in its discretion. For the avoidance of doubt, the Borrower is prohibited from using any portion of the Principal Amount to repay any existing debt other than accounts payable due in the ordinary course of business.

Interest Rate: All amounts owing hereunder on account of the principal, overdue interest, fees and expenses shall bear interest at the rate of 18% per annum payable in cash monthly in arrears on the last day of each calendar month.

DIP Facility Fee: As consideration for the Lender entering into the DIP Facility, the Borrower will pay a cash fee to the Lender in the amount of $25,000 (the "**DIP Facility Fee**"), which will be earned in full on the Closing Date, added to the Loan, and payable in full concurrently with the full repayment of the Loan in accordance with this Term Sheet.

Expenses: The Borrower shall reimburse the Lender for all of the Lender's reasonable out-of-pocket costs and expenses relating to this financing transaction (the "**Expenses**"), and the transactions contemplated thereby and the BIA Proceedings, including solicitor-client fees and disbursements on a solicitor and his own client, full indemnity basis. The Expenses will be added to the Loan and will be payable in accordance with this Term Sheet.

Term: All amounts owing to the Lender under the DIP Facility shall be due and payable on the earliest of the occurrence of any of the following:

(a) three months following the Closing Date (as defined below);

(b) an Event of Default in respect of which the DIP Lender has elected in its sole discretion to accelerate all amounts owing and demand repayment.

Closing Date: The DIP Facility shall close on the first date, which date shall not be later than December 13, 2023, on which all conditions precedent to the effectiveness of the DIP Facility have been satisfied (the "**Closing Date**").

Use of Proceeds: All advances are subject to compliance with the covenants governing the DIP Facility and withdrawals set forth in the Budget.

All repayments of the Loan, including the DIP Facility Fee and Expenses, shall be paid to the Lender.

Collateral: All obligations of the Borrower to the Lender arising hereunder shall be:

(a) entitled to a super-priority charge under the BIA (the "**DIP Charge**"), subordinated only to an administration charge ("**Administration Charge**") in favor of the Borrower's legal counsel and KSV Advisory Inc. (the "**Proposal Trustee**") and its legal counsel; and

(b) secured by a security interest in and lien on all of the present and after-acquired personal property and real property, tangible or intangible, of the Borrower, including, without limitation, all accounts receivable, inventory, plant and equipment, intellectual property, real estate, leasehold interests, avoidance actions, and all of the shares of each subsidiary of the Borrower.

All borrowings by the Borrower, the DIP Facility Fee, the Expenses of the Lender and all other obligations owed to the Lender under the DIP Facility shall be secured as described above.

Conditions: The obligation of the Lender to make any loans under the DIP Facility will be subject to the following special conditions precedent:

(a) the conditions precedent contained herein shall have been satisfied in a manner satisfactory to the Lender;

(b) no material adverse change shall have occurred since the date of the DIP Amendment, and any audit opinion containing a going concern statement shall not be deemed a material adverse change;

(c) no default or Event of Default (as defined below) shall exist under the DIP Facility;

(d) an order by the Court of King's Bench of Alberta (the "**BIA Court**") having jurisdiction over the BIA Proceedings, which order shall be, in respect of the DIP Facility, in a form and substance satisfactory to the Lender (the "**Approval Order**") and shall have been entered by the BIA Court no later than December 12, 2024. The Approval Order shall provide that the liens granted in favor of the Lender shall have the priority set forth in the "Collateral" section of this Term Sheet;

(e) the Lender shall have received a budget for the Borrower, in form and substance satisfactory to the Lender, including weekly projections and monthly projections through to February 11, 2024, including cash flow statements and a statement of operations on a consolidated basis (the "**Budget**"); and

(f) the Lender shall be satisfied in its reasonable discretion with the Borrower having required governmental and third-party approvals, consents, licenses and permits to conduct their business and to borrow under the DIP Facility.

Ongoing Obligations: From the Closing Date until full repayment of the DIP Facility, the Borrower:

(a) will provide the Lender with a full weekly accounting of all receipts and disbursements for Athabasca (including a comparison to the Budget), which weekly accounting shall be provided no later than 5:00 p.m. on Thursday of the following week;

(b) will provide any other accounting or reporting as the Lender may request from time to time, including but not limited to, evidence of payment of all government priority payables; and

(c) will use the Principal Amount exclusively for the Purpose.

Events of Default: An "**Event of Default**" under the DIP Facility shall occur if:

(a) the Borrower fails to comply with any of the terms and conditions contained in this Term Sheet which, for the avoidance of doubt, includes the obligation of the Borrower to use the Principal Amount exclusively for the Purpose, except for defaults of such terms existing before December 12, 2023;

(b) the BIA Proceedings are terminated or, without the prior written consent of the Lender, converted to a receivership or bankruptcy;

(c) the BIA Court grants a super-priority claim that is senior to or *pari passu* with the DIP Charge, other than the Administration Charge;

(d) the Approval Order is stayed, amended or modified in a manner materially adverse to the Lender, or is reversed or vacated;

(e) a plan of arrangement is filed in the BIA Proceedings which does not provide for repayment in full in cash of the Borrower's obligations hereunder or under the Loan Agreement;

(f) the Borrower takes any action, including the filing of an application, in support of any of the foregoing, or any person or entity other than the Borrower does so, and any such application is not contested in good faith by the Borrower and the relief requested in such application is granted in an order that is not stayed pending appeal; or

(g) the BIA Court enters an order granting relief from the automatic stay under the BIA Proceedings to the holder of any security interest in any asset of the Borrower.

Remedies on Default: Upon the occurrence of any Event of Default, the Lender shall provide the Borrower and the Proposal Trustee with notice of the Event of Default, and the Borrower shall have five business days from the date of notice to cure the Event of Default. If the Event of Default is not cured within the five business day cure period, in addition to any remedy otherwise provided in law, the Lender shall be entitled to exercise the following remedies in its sole discretion:

(a) accelerating the balance of the Loan and demanding full payment of the balance of the Loan immediately; and/or

(b) applying for the appointment of a receiver or a receiver and manager for Athabasca.

Governing Law: All documentation in connection with the DIP Facility shall be governed by the laws of the Province of Alberta.

Assignments and Participations: The Lender may sell or assign to one or more other persons their loan or commitment under the DIP Facility without the consent of the Borrower.

JMAC ENERGY SERVICES LLC

Per: DocuSigned by: Jon McCreary E4E71718AA6742D...

Jon McCreary

Chief Executive Officer

ATHABASCA MINERALS INC.

Per: DocuSigned by: Dana Archibald 108CBD7A6DC144E... December 15, 2023

Dana Archibald

Chief Executive Officer

This is Exhibit "**B**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

A Commissioner for Oaths in and for the
Province of Alberta

Kaitlyn Wong
Barrister & Solicitor
3400, 350 7th Avenue SW
Calgary, Alberta T2P3N9
Ph: 1-403-261-7388

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

JMAC Energy Services, LLC

(b) County of Residence of First Listed Plaintiff Chelan, WA
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Hugh D. Brown
Fabyanske Westra Hart & Thomson PA
333 South 7th Street, #2600, Minneapolis, MN 55402; 612-359-7600

DEFENDANTS

Athabasca Minerals, Inc.

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*
Zachary Pelham
Pearce Durick PLLC
314 East Thayer Avenue, Bismarck, ND 58501; 701-223-2890

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☒ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☒ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☒ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District *(specify)*
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 U.S.C. § 1332(a)

Brief description of cause:
Breach of contract, Injunction

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 2/27/2024

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

UNITED STATES DISTRICT COURT

for the

District of North Dakota

JMAC Energy Services LLC,

Plaintiff

v.

Athabasca Minerals Inc.

Defendant

Civil Action No. 1:24-cv-037

SUMMONS IN A CIVIL ACTION

To: Above Named Defendant(s)

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Hugh D. Brown
333 South Seventh Street, Suite 2600
Minneapolis, MN 55402

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

KARI M. KNUDSON,CLERK OF COURT

Date: February 27, 2024

/s/ Melissa Fischer, Deputy Clerk

Signature of Clerk or Deputy Clerk

Civil Action No. 1:24-cv-037

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):* _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ _____ .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

JMAC Energy Services LLC,

Plaintiff,

vs.

Athabasca Minerals Inc.,

Defendant.

Case File No: _____

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff JMAC Energy Services LLC ("JMAC") as and for its Complaint against Defendant Athabasca Materials Inc. ("Athabasca") states and alleges as follows:

INTRODUCTORY STATEMENT

1. JMAC brings this action to assert its right of first refusal ("ROFR") to purchase Athabasca's membership interest in AMI Silica, LLC ("AMI Silica"). JMAC and Athabasca, a Canadian corporation, are the founding members of AMI Silica, a limited liability company they formed under the laws of North Dakota to jointly acquire and operate a silica sand supply business. JMAC and Athabasca are the sole members of AMI Silica, each owning a fifty percent share. In the Operating Agreement for AMI Silica, the parties agreed that each would have a right of first refusal in the event that the other sought to sell or otherwise transfer its membership interest in AMI Silica. A primary purpose of these ROFR rights are and were to protect each member from being forced into business with an outsider if the other member decided to sell its membership interest.

2. In January 2023, Athabasca's financial situation began to deteriorate, and in November 2023, it filed a Notice of Intention to Make a Proposal to its Creditors ("Notice of

Intention") as the first step of a restructuring process under Canadian bankruptcy and insolvency legislation in Alberta, Canada. As part of this restructuring process, Athabasca, over JMAC's frequent objection, established an auction process to sell itself to a third party, in violation of JMAC's ROFR. This auction took place in February 2024, and Badger Mining Corporation – one of AMI Silica's biggest competitors – was the winning bidder for Athabasca. Athabasca and Badger intend to seek court approval of the transaction in Alberta, Canada, on or before March 8, 2024.

3. A sale of Athabasca to Badger would place fifty percent ownership interest of AMI Silica in the hands of Badger. As one of AMI Silica's largest competitors, permitting Badger to obtain Athabasca's membership interest in AMI Silica would give it access to proprietary information about one of its competitors, force AMI Silica to run a business with a partner whose interests with respect to the business diverge from its own, and give that competitor the ability to inhibit the management of AMI Silica. This would run counter to the fundamental principle that a business should be able to choose those with whom it does business, and has caused or will cause serious harm to JMAC, as AMI Silica's other member.

4. For these reasons, JMAC is entitled to a declaration that it is entitled to exercise its ROFR the first time Athabasca received a bona fide offer, which was for $13.1 million. JMAC is also entitled to temporary and permanent injunctive relief prohibiting Athabasca from proceeding with the sale to Badger.

PARTIES

5. JMAC is a Delaware limited liability company with its principal office address in Wenatchee, Washington.

6. Athabasca is a corporation organized under the laws of the Province of Alberta and with its principal office address located in Calgary, Alberta.

JURISDICTION AND VENUE

7. This court has subject matter jurisdiction over the matter under 28 U.S.C. §1332 (a) (2) because the Plaintiffs, JMAC and AMI, are both citizens of different states and Defendant Athabasca is a citizen of Canada, a foreign state, and the amount in controversy exceeds $75,000.

8. Venue is proper in the United States District Court for the District of North Dakota under 28 U.S.C, §1391 (b) (2), because the property that is the subject of the action is an interest in a North Dakota LLC.

FACTUAL BACKGROUND

9. JMAC and Athabasca formed AMI Silica on or about June 2, 2021. AMI Silica is in the business of mining and supplying silica sand for industrial purposes. JMAC and Athabasca are the sole members of AMI Silica, each owning 50% of the company.

10. JMAC and Athabasca subsequently executed an operating agreement for AMI Silica (the "Original Operating Agreement, together with the "Operating Agreement Amendment, (as later defined), the "Operating Agreement") on or about July 19, 2021. A true and correct copy of the Operating Agreement is attached as **Exhibit 1**. AMI Silica is organized under the laws of the State of North Dakota, and the Operating Agreement specifies that it shall be governed by North Dakota law.

11. Under the Operating Agreement, JMAC and Athabasca share equally in the governance of AMI Silica, each holding 50% of the Voting Membership Units in AMI Silica and each entitled to elect two of the four members of the board of governors. (Ex. 1, §§ 4.01, 5.03, and Ex. A.)

12. In light of the close relationship between JMAC and Athabasca in forming and running AMI Silica, JMAC and Athabasca also agreed to limit the transferability of their membership units in AMI Silica.

13. With respect to the transfer of membership units, JMAC and Athabasca agreed that a non-selling party would have a right of first refusal to purchase the other member's interest in the event one member sought to sell its membership interest.

14. In pertinent part, the Operating Agreement provides the following with respect to the right of first refusal:

> 11.01 General. **Except as otherwise specifically provided herein neither a Member nor an Economic Interest Owner shall have the right to**:
>
> (a) **sell, assign, pledge, hypothecate, transfer, exchange or otherwise transfer for consideration (collectively, "sell")**,
>
> (b) gift, bequeath, or otherwise transfer for no consideration (whether or not by operation of law except in the case of bankruptcy) all or any part of its Membership Interest or Economic Interest.
>
> 11.02 Right of First Refusal.
>
> (a) In the event a Selling Member desires to sell all or any portion of its Membership Interest or Economic Interest in the Company to a third party purchaser, the Selling Member shall first obtain from such third party purchaser a bona fide written offer to purchase such interest, stating the terms and conditions upon which the purchase is to be made and the consideration offered therefor. The Selling Member shall give written notification to the remaining Members, by certified mail or personal delivery, of its intention to so transfer such interest, furnishing to the remaining Members a copy of the aforesaid written offer to purchase such interest.
>
> (b) **The remaining Members, and each of them shall, on a basis pro rata to their Capital Interests (voting having a right of first refusal as to voting and non-voting having a right of first refusal as to non-voting) or on a basis pro rata to the Capital Interests of those remaining Members exercising their right of first refusal, have the right to exercise a right of first refusal to purchase all (but not less than all) of the interest proposed to be sold by the Selling Member upon the same terms and conditions as stated in the aforesaid**

> **written offer to purchase** by giving written notification to the Selling Member within twenty (20) days after receiving written notice from the Selling Member.

(Ex. 1, §§ 11.01-.02 (emphasis added).)

15. The Operating Agreement also provides that the transferee of membership units will not become a participating member in AMI Silica absent unanimous consent from all of the remaining members after the transfer unless the transferee was already a member in AMI Silica. (Ex. 1, §§ 11.03 ("if all of the remaining Members do not **approve by unanimous written consent** the proposed sale or gift of the Transferring Member's Membership Interest or Economic Interest to a transferee or donee which is not a Member immediately prior to the sale or gift, then the proposed transferee or donee shall have no right to participate in the management of the business and affairs of the Company or to become a Member") (emphasis added).)

16. The Operating Agreement also prohibits the joining of new Members to AMI Silica except as expressly permitted by the above-referenced provisions.

17. Consistent with this intent, JMAC has consistently provided whatever financial support to AMI Silica and Athabasca was necessary to prevent third-party involvement in the financing or management of AMI Silica.

18. In February of 2022, Athabasca was not able to meet its financial commitments to AMI Silica and in consideration for JMAC entering into a bonding arrangement on Athabasca's behalf, JMAC and Athabasca entered into an amendment to the operating agreement dated February 16, 2022 (the "Operating Agreement Amendment"), whereby Athabasca made certain concessions, which among other terms to JMAC's benefit contained a right of first refusal if either debt or equity capital was required by AMI Silica, then JMAC would have the right of first refusal to provide such capital, which further reflects the intention of both Athabasca and JMAC to have no third-party involvement in AMI Silica.

19. In the Fall of 2022, Athabasca began experiencing significant financial difficulties that continued into 2023. In early 2023, Athabasca explored the possibility of going to market for sale, with such sale including the sale of Athabasca's interests in AMI Silica. At this time, JMAC warned Athabasca that it expected that any bond fide offer extended to Athabasca which contemplated a transfer of Athabasca's interest in AMI Silica would be presented to JMAC pursuant to the ROFR.

20. Beginning in 2023, Athabasca began to sell off its Canadian assets, and eventually disposed of nearly all of its Canadian assets, while retaining all Canadian liabilities.

21. On November 14, 2023, Athabasca filed the Notice of Intention. As noted above, a Notice of Intention is a process under Canada's Bankruptcy and Insolvency Act which provides for a stay and is the first step that troubled companies can take to restructure.

22. Athabasca's only asset of significant value is its interests in AMI Silica. Its remaining assets consist either of cash or cash equivalents, its office and software lease, and interests in two numbered companies which hold the following assets: (i) the Montney prospecting rights from the government, which have not turned up any commercial deposits, and (ii) their permitted Prosvita mine in northern Alberta, which has not been determined to be commercially feasible. Thus, any purchase of Athabasca is, in effect, simply a purchase of Athabasca's interests in AMI.

23. Any assets held by Athabasca outside of its investment in AMI Silica are more than counterbalanced by the liabilities held by Athabasca.

24. Athabasca's only revenues come from management fees paid by AMI Silica for various administrative services provided to AMI Silica by Athabasca.

25. Athabasca personnel have stated that it was attempting to structure the sale of its interest in AMI Silica in such a manner as to avoid the ROFR, because it believed that the presence of the ROFR would reduce the price it would receive for its membership interest in AMI Silica.

26. After commencing the Notice of Intention, Athabasca established a process to sell itself through an auction. The auction process was inconsistent with JMAC's ROFR, because, under the ROFR, the first offer that Athabasca was willing to accept was required to be submitted to JMAC for acceptance. In other words, Athabasca was not permitted to solicit successive third party offers. JMAC repeatedly informed Athabasca that its proposed auction was inconsistent with the ROFR.

27. After Athabasca filed the Notice of Intention, JMAC continued to provide financial assistance to Athabasca. Among other things, when AMI Silica required additional working capital to fund its ongoing operations and approved a capital call to obtain additional funding from its members, JMAC provided financing to Athabasca to fund its share of the capital call.

28. On December 5, 2023, JMAC and Athabasca agreed on the terms of a Letter of Intent ("LOI"), whereby JMAC would become the Stalking Horse bidder for Athabasca's assets, which would be prima facie accepted subject to being superseded by a superior bid. The LOI preserved JMAC's right to assert the ROFR, stating: "materials provided to potential purchasers with the SISP shall recognize and include the [ROFR] currently held by JMAC pursuant to the AMI Silica LLC Operating Agreement."

29. Athabasca established a Sales and Investment Solicitation Process ("SISP") whereby it would solicit competing offers to JMAC's Stalking Horse bid. The SISP was submitted for Court approval on December 12, 2023, which was granted the same day. The SISP, and Court

order accepting the SISP expressly preserved JMAC's right to assert that the ROFR in the Operating Agreement applied.

30. Badger Mining Corporation ("Badger") subsequently made an offer to purchase for a sale price of $13.1 million.

31. Badger's offer of $13.1 million constituted a bona fide offer within the meaning of the Operating Agreement and triggered Athabasca's obligation to submit the offer in writing to JMAC for JMAC to match pursuant to Section 11.02 of the Operating Agreement.

32. Athabasca was willing to sell its interest in AMI Silica for $13.1 million and would have done so had it not implemented its plan to hold an auction in violation of JMAC's ROFR.

33. JMAC would have exercised its ROFR had it been given the opportunity as required by the AMI Silica Operating Agreement.

34. Badger is a major competitor of AMI Silica, and its potential acquisition of Athabasca's membership interest in AMI Silica raises serious concerns. Specifically, if Badger were able to obtain Athabasca's membership interest in AMI Silica, it would gain access to cost and pricing information of one of its direct competitors, as well as access to its relationships with transportation providers and customers. This would potentially give a significant and unfair competitive advantage over AMI Silica through access to proprietary AMI Silica information.

35. If permitted to participate in the management of AMI Silica, Badger would also have the ability to restrict or inhibit AMI Silica's ability to properly function, by using its fifty percent control to affect or inhibit investment and other business decisions of AMI Silica in a manner calculated to benefit Badger to the detriment of JMAC and AMI Silica.

36. Further, Badger would have a clear financial motivation to use this information to increase its market share to the detriment of AMI Silica. Specifically, Badger would benefit by

obtaining 100% of the benefit of shifting volume from AMI Silica to Badger, while losing volume in an entity in which it owns only 50%.

37. JMAC's ability to prevent this through enforcement of the fiduciary duties that Badger would owe to AMI Silica would likely be limited. Any proprietary knowledge gained by Badger in its position as a member in AMI Silica will provide incalculable advantages in highly competitive markets, and it would be difficult or impossible to prevent Badger from exploiting this knowledge to compete with AMI Silica. Any fiduciary violation from a practical standpoint would be virtually impossible to identify. Further, there is no practical remedy once information becomes known, or relationships are damaged. This is a primary reason why JMAC bargained for the ROFR in the AMI Silica Operating Agreement and certain other provisions to control who other members may be.

38. On February 9, 2024, Athabasca conducted an auction, subject to JMAC's reservation of its right to assert the ROFR.

39. Bidding opened with Badger's January bid of $13.1 million, and proceeded in increments of $100,000.

40. Badger made the winning bid, in the amount of $29.2 million. JMAC subsequently confirmed in writing that it intended to assert its ROFR. Athabasca has refused to honor JMAC's ROFR and Athabasca and Badger intend to apply for approval of the sale in the Alberta Court on or about March 8, 2024 in violation of US contract law and JMAC's US property rights.

41. JMAC has not approved Badger's assumption of membership rights in AMI Silica in writing or otherwise.

42. Athabasca's agreement to sell its membership interest to Badger without offering JMAC the opportunity to match Badger's bona fide offer of $13.1 million is a breach of Section 11.02 of the Operating Agreement and the covenant of good faith and fair dealing.

43. Athabasca is seeking to sell itself through a restructuring structure available under the Canadian Companies' Creditors Arrangement Act ("CCAA") known as a Reverse Vesting Order ("RVO"). Essentially, in an RVO, the debtor company, in this case Athabasca, transfers liabilities and assets out of the debtor company to a newly created "ResidualCo" that the purchaser, in this case Badger, did not want to purchase/retain. The purchaser then purchases the shares in the debtor company that now includes only the assets and liabilities that the purchaser desired to purchase/retain. In other words, an RVO is, in everything but name a form of asset sale in which the purchaser of the debtor company is permitted to pick and choose what assets/liabilities it desires to purchase and purchases only those assets/liabilities.

44. The RVO sale structure is effectively an asset sale, wherein Badger is permitted to pick and choose what assets it wishes to purchase, including Athabasca's interests in AMI Silica, while accepting no unwanted liabilities or assets. As such, Athabasca is "selling" or "transferring" its interests in AMI Silica within the meaning of the ROFR to the same extent it would be doing so by selling its interests in AMI Silica as part of a traditional asset sale, which not even Athabasca could deny would trigger JMAC's ROFR rights.

45. Upon information and belief, Athabasca has structured the transaction in this fashion in whole or in part in an attempt to avoid the ROFR in the Operating Agreement.

46. The fact that the sale/transfer is being conducted in the form of Canada's novel RVO structure rather than a straightforward traditional asset sale does not permit Athabasca to

end-run JMAC's ROFR rights and violate JMAC's rights in a US-based LLC organized under US law.

47. By agreeing to enter into the above-referenced transaction, Athabasca has violated the Operating Agreement's express terms, and its duties under the implied covenant of good faith and fair dealing.

48. If permitted to close, Athabasca's transfer of its AMI Silica membership interest to Badger would be difficult or impossible to unwind, and JMAC's right to prevent this transfer would be irreversibly lost.

COUNT I – BREACH OF CONTRACT

49. JMAC realleges and incorporate the preceding paragraphs for all purposes.

50. The Operating Agreement is a valid and enforceable contract which imposes an obligation on Athabasca not to effectuate a transaction resulting in a change of control of AMI Silica without offering a ROFR to JMAC to purchase AMI Silica on the same terms and conditions as a bona fide third party offer. JMAC has performed its obligations under the Operating Agreement and has otherwise satisfied all conditions precedent to relief.

51. Athabasca has repudiated and/or breached its obligation as set forth above by entering into an agreement to transfer its interest in AMI Silica to Badger.

52. As a direct and proximate result of the above-referenced breaches, JMAC has suffered and will continue to suffer substantial damages and injury in an amount to proven at trial, but is substantially in excess of $75,000.

COUNT II – BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

53. JMAC realleges and incorporates the preceding paragraphs for all purposes.

54. Under N.D.C.C. § 10-32.1-41(4), Athabasca, as a member of AMI Silica, is required to discharge its duties and exercise its rights consistently with the contractual obligation of good faith and fair dealing, including acting in a manner, in light of the Operating Agreement, that is honest, fair, and reasonable.

55. Athabasca has violated the above-referenced obligation by, among other things, deliberately agreeing to convey its membership interest in AMI Silica to a direct competitor of AMI Silica.

56. As a direct and proximate result of the above-referenced breaches, JMAC has suffered and will continue to suffer substantial damages and injury in an amount to proven at trial, but is substantially in excess of $75,000.

COUNT III – INJUNCTIVE RELIEF - ROFR

57. JMAC realleges and incorporate the preceding paragraphs for all purposes.

58. JMAC is entitled under the Operating Agreement to exercise a ROFR to purchase Athabasca's interests in the event Athabasca sells or transfers its interests in AMI Silica.

59. JMAC will be immediately, irreparably, and significantly harmed if Athabasca is not enjoined from selling or transferring its interests in AMI Silica to a third-party without giving JMAC the ROFR to purchase Athabasca's membership interests in AMI Silica.

60. Athabasca will not be harmed if it is enjoined from refusing to give JMAC its ROFR, and in fact, it will be complying with its obligations under the Operating Agreement.

61. JMAC is likely to succeed upon the merits of its action as Athabasca is contractually obligated to give JMAC the right of first refusal to purchase Athabasca's membership units in AMI Silica.

62. The public's interest favors the issuance of an injunction because JMAC will forever lose its bargained-for ROFR and be forced into a business partnership with a third party in violation of the AMI Silica Operating Agreement and without its consent.

63. Accordingly, JMAC seeks temporary and permanent injunctive relief enjoining Athabasca from selling its interests in AMI Silica, without first providing JMAC with the ROFR to purchase Athabasca's AMI Silica interests as required under the Operating Agreement.

COUNT IV – DECLARATORY JUDGMENT - ROFR

64. Plaintiffs reallege and incorporate the preceding paragraphs for all purposes.

65. An actual and justiciable controversy, ripe for judicial determination, has arisen between JMAC and Athabasca regarding their respective rights and obligations under the Operating Agreement, specifically the Operating Agreement's ROFR provisions.

66. Plaintiffs are entitled to declaratory judgment that: (i) Athabasca is obligated to give JMAC a ROFR to purchase Athabasca's membership interest in AMI Silica for the purchase price of $13.1 million as set forth in Badger's bona fide offer pursuant to Article 11 of the Operating Agreement; and (ii) any third party purchaser, including Badger, shall have no right to participate in the management of the business and affairs of AMI Silica or to become a Member without JMAC's written consent.

WHEREFORE, Plaintiff requests the following relief in their favor and against Athabasca:

1. On Counts I and II, a judgment awarding JMAC damages in an amount to be proven at trial.

2. On Count III, a Temporary Restraining Order, Temporary Injunction, and Permanent Injunction enjoining Athabasca from selling its interests in AMI Silica without

first providing JMAC with the ROFR to purchase Athabasca's AMI Silica interests as required under the Operating Agreement.

3. On Count IV, a declaration that: (1) if Athabasca sells its interests in AMI Silica to Badger with first giving JMAC the ROFR to purchase its interest in AMI Silica for the price of $13.1 million as reflected in Badger's bona fide offer, Athabasca will have breached the Operating Agreement, specifically the ROFR provisions in Article 11 of the Operating Agreement; and (2) that any third party purchaser, including Badger, shall have no membership rights unless and until approved by JMAC in writing.

4. As part of any judgment or order in favor of Plaintiff, an award to Plaintiff of their costs, disbursements, prejudgment interest, and attorneys' fees; and

5. Any such other legal or equitable relief as the Court deems just.

Dated: February 27, 2024

FABYANSKE, WESTRA, HART & THOMSON P.A.

By: */s/ Hugh D. Brown*

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ATTORNEYS FOR PLAINTIFF

This is Exhibit "**C**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

A Commissioner for Oaths in and for the
Province of Alberta

Kaitlyn Wong
Barrister & Solicitor
3400, 350 7th Avenue SW
Calgary, Alberta T2P3N9
Ph: 1-403-261-7388

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

JMAC Energy Services LLC,

Plaintiff,

vs.

Athabasca Minerals Inc.,

Defendant.

Case File No: 1:24-cv-037

DECLARATION OF JON MCCREARY

I, Jon McCreary, hereby declare as follows:

1. I am over 18 years of age, of sound mind, and otherwise competent to make this Declaration. This Declaration is based on my personal knowledge.

2. I am the sole Member and Manager of JMAC Energy Services, LLC ("JMAC"), a limited liability company organized under the laws of the State of Delaware. JMAC's principal place of business is located in Williston, North Dakota where it provides oilfield and heavy civil construction services through several subsidiaries. I make this Declaration in support of JMAC's Motion for a Temporary Restraining Order and Preliminary Injunction.

3. JMAC and Athabasca Minerals, Inc. ("Athabasca") each own 50% of the membership interest of AMI Silica LLC ("AMI Silica"), a limited liability company organized under the laws of the State of North Dakota. JMAC and Athabasca formed AMI Silica on or about June 2, 2021. They subsequently entered into an operating agreement executed by on or about July 19, 2021 (the "Operating Agreement") to govern the business and management of AMI Silica. AMI Silica is in the business of mining and supplying silica sand for industrial purposes. A true and correct copy of the Operating Agreement is attached hereto as **Exhibit A**.

4. The Operating Agreement contains provisions that require Athabasca to offer JMAC a right of first refusal ("ROFR") in the event that Athabasca desires to sell, transfer, or otherwise dispose of any or all of its interest in AMI Silica to a third party purchaser, and forbade any other means of transfer of a party's interest. *See* Exhibit A, §§ 11.01-.02. It also gives JMAC the right to approve or disapprove of any third party purchaser's participation in the governance of AMI Silica, and without JMAC's written consent, any third party purchaser of Athabasca's membership interest is limited to an economic interest without governance rights. *Id.* § 11.03.

5. The parties bargained for the mutually applicable ROFR and transfer restrictions in the Operating Agreement because they wished to have the right to choose their future business partner in the event that either wished to sell its interest in AMI Silica at some point in the future. This was important to JMAC because the smooth operation of a 50/50 limited liability company requires a high degree of cooperation, and requires that the commercial interests of the members be aligned.

6. In addition to my membership interest in JMAC, I am also a minority shareholder of Athabasca. Until November 14, 2023, I was also a director of Athabasca.

7. AMI Silica was created specifically in order to purchase, own, and operate certain assets formerly owned by a large international oilfield services company, which was exiting the silica sand mining and supply business. AMI Silica closed the transaction for these assets on or about March 3, 2022.

8. Since that transaction closed, Athabasca's financial situation has been such that JMAC has been required to supply the majority of AMI Silica's capital needs. AMI Silica has had very limited access to capital and limited cashflow. Therefore, the supply of the capital that AMI

Silica has needed to commence and continue its operations has generally been provided by JMAC alone.

9. Accordingly, JMAC has on several occasions offered financial support to Athabasca and AMI Silica without which neither Athabasca nor AMI Silica would have been able to meet their obligations as they became due. Examples include the following:

a. In February 2022 and again in March 2023, JMAC agreed to provide a parent company guarantee necessary for AMI Silica to obtain the bonding necessary to meets its obligations to the seller of the mining assets acquired by AMI Silica. Without JMAC's agreement to be solely responsible for providing the guarantee sought by AMI Silica's surety Trisura, AMI Silica would have been unable to obtain this bonding (and therefore, unable to continue in business), because Athabasca lacked the assets to support its proportionate share of the required guarantee. In exchange, JMAC and Athabasca amended the operating agreement to provide JMAC with a right of first refusal to provide debt or equity financing to AMI Silica. JMAC did this to avoid having third parties obtain any say in the management or control of AMI Silica.

b. In June 2022, JMAC entered into an Accounts Receivable Factoring Agreement, whereby JMAC agreed to factor receivables payable to AMI Silica. "Factoring" refers to the purchase of accounts receivable due to be paid at a future date, at a discount, to eliminate the risk of collection and to provide immediate cashflow to the seller. Through this factoring agreement, JMAC has provided over US$10 million in working capital to AMI Silica.

c. In February 2023, JMAC entered into a Non-Revolving Term Loan Agreement with Athabasca, whereby JMAC extended a C$2 million loan to Athabasca. This loan has been extended on two subsequent occasions to accommodate the dire financial circumstances of AMI until November 2023, when the loan became subject to the stay of proceedings under Canadian bankruptcy law. JMAC extended this loan to Athabasca to allow Athabasca to continue operating while the parties negotiated a purchase of Athabasca by JMAC.

d. After Athabasca entered restructuring under Canadian bankruptcy law as described below, JMAC provided additional financing to Athabasca to maintain the viability of AMI Silica as a going concern.

10. Despite the parties' negotiations referenced above, Athabasca abandoned negotiations with JMAC, and, in March 2023, began a process by which it sought to sell itself. It retained Canaccord Genuity Group, Inc., an investment bank, to generate interest in and to solicit bids for Athabasca. When JMAC became aware of this, it reminded Athabasca of its ROFR rights with respect to AMI Silica, and asserted its right to match any bona fide third party offer received by Athabasca that involved a transfer of Athabasca's membership interest in AMI Silica.

11. In June 2023, Athabasca sold a significant portion of its assets in an agreement for disposition of non-core assets. The disposed assets included five surface mineral leases, two inventory stockpiles, one metallic and industrial minerals lease, and equipment associated with select aggregate pits. The total cash consideration for the sale was C$3.2 million and left very minimal remaining Canadian assets. Athabasca disposed of even more assets in October 2023, when it entered into a settlement agreement with a supplier, by which it transferred five more resource properties to the supplier, along with a cash payment.

12. After this sale, the only asset of Athabasca with any ongoing operations, revenue generation, or significant market value, was its membership interest in AMI Silica. A review of the assets listed on Athabasca's most recent financial statement, a true and correct copy of which is attached hereto as **Exhibit B**, confirms this. The consolidated statement of Athabasca's financial position lists its investment in AMI Silica as C$20,507,629. The other assets have little or no market value, have no ongoing operations, and generate no revenue. The "current assets" listed on the summary page (3) therein (C$3,602,871) are comprised of cash or cash equivalents, none of which represent ongoing operations or revenue-producing assets. Similarly, the "long term deposits" and "restricted cash" (on the same summary page) are also cash or cash equivalents. The "Right-of-use Assets" consist of an office lease and a Xerox lease, neither of which has market value to an entity seeking to acquire Athabasca. The "Intangible Assets" of C$24,433 consists of software.

13. The only remaining "Asset" other than Athabasca's investment in AMI Silica consists of what is described as "Resource properties." This consists of past exploration costs (the same were listed in 2022) on two mines – Montney In-Basin, and Prosvita. However, Athabasca has since failed to make payments necessary to preserve its rights in these mines. These mines also have no ongoing operations, and earn no revenue. Finally, Athabasca's financial statement ascribes no present value to its present rights in these properties. The current status of these projects is as follows:

a. Prosvita: This "asset" consists of capitalized costs to permit a sand mine in Northern Alberta. The economic viability of this project is questionable at best, and has no plans for development. As of the date of the auction, Athabasca is delinquent on

the annual royalty options for this project, in the amount of $120,000, deeming the project of questionable value.

b. Montney In-Basin: this is a prospecting operation attempting to identify economically viable sand for the Montney market. To date, no deposits have been confirmed as economically viable.

Accordingly, the assets listed here have no clear market value and are assets for accounting purposes only. Further, Athabasca's assets are offset by significant liabilities and reclamation obligations, all as set forth in the above-referenced financials.

14. Additional information concerning Athabasca and its financial position is found in the Affidavit of John David Churchill, Chief Financial Officer of Athabasca, in the Court of Kings Bench of Alberta, pertaining to Athabasca's insolvency proceeding. A true and correct copy of excerpts of this affidavit is attached hereto as **Exhibit C**.

15. During this time, Athabasca personnel told me that Athabasca did not wish to sell its interest in AMI Silica separately because it wished to avoid triggering the ROFR, and believed they would be able to obtain a higher price for its interest in AMI Silica if it could avoid having the ROFR apply. In other words, Athabasca wished to avoid its contractual obligation to give JMAC a ROFR in order to increase the sum it could obtain for its interest in AMI Silica.

16. Despite JMAC's request, Athabasca refused to ask prospective purchasers to allocate a portion of the purchase price to its interest in AMI Silica, for the same reason.

17. JMAC and Athabasca did enter into an agreement for the purchase of Athabasca by JMAC in the fall of 2023. However, due to the continued deterioration of Athabasca without a corresponding reduction in the purchase price, and significant misstatements by Athabasca which diminished its value, JMAC was forced to back out of the sale.

18. Athabasca's financial position did not subsequently improve, and on or about November 10, 2023, it filed a Notice of Intention to Make a Proposal to its Creditors (the "Notice of Intention"). A Notice of Intention is a process under Canada's Bankruptcy and Insolvency Act that provides for a stay of proceedings and is the first step that corporations or other entities can take to restructure. Subsequently, notwithstanding JMAC's repeated explanation that the ROFR applied to any transaction that involved a change of control of AMI Silica, Athabasca established a process to sell itself through an auction. JMAC asserted that the auction process was inconsistent with its ROFR rights, because, under the ROFR, the first third party offer that Athabasca was willing to accept was required to be submitted to JMAC for acceptance. In other words, the ROFR does not permit Athabasca to solicit successive third party offers.

19. After Athabasca filed the Notice of Intention, JMAC continued to provide financial assistance to Athabasca. When AMI Silica required additional working capital to fund its ongoing operations and approved a capital call to obtain additional funding from its members, JMAC once again provided financing to Athabasca to fund its share of the capital call.

20. On December 5, 2023, JMAC and Athabasca agreed on the terms of a Letter of Intent ("LOI"), whereby JMAC would submit an initial bid (known as a "Stalking Horse" bid) for Athabasca's assets, which would be prima facie accepted subject to being superseded by a superior bid. A true and correct copy of the LOI is attached as **Exhibit D**. The LOI specifically preserved JMAC's right to assert the ROFR, stating: "materials provided to potential purchasers with the SISP shall recognize and include the [ROFR] currently held by JMAC pursuant to the AMI Silica LLC Operating Agreement."

21. Athabasca established a Sales and Investment Solicitation Process ("SISP") whereby it would solicit competing offers to JMAC's Stalking Horse bid. The SISP was submitted

for Court approval on December 12, 2023, which was granted the same day. A true and correct copy of the Court-approved SISP is attached as **Exhibit E**. The SISP, and Court order accepting the SISP expressly preserved JMAC's right to assert that the ROFR in the Operating Agreement applied.

22. Badger Mining Corporation ("Badger") subsequently made an offer to purchase AMI. As part of its offer, it provided a Subscription Agreement setting forth the terms of the proposed sale, and offered a sale price of C$13.1 million. A true and correct copy of Badger's proposed Subscription Agreement is attached as **Exhibit F**. Since this sum exceeded the C$13 million that AMI was prima facie obligated to accept pursuant to the court-approved SISP, it constitutes a bona fide offer within the meaning of the ROFR, and triggered AMI's obligation to submit the offer in writing to JMAC for JMAC to match. JMAC would have exercised its ROFR at this level had it been given the opportunity as required, and is entitled to do so now.

23. Badger is a major competitor of AMI Silica, and its potential acquisition of Athabasca's membership interest in AMI Silica raises serious concerns. If Badger were able to obtain Athabasca's membership interest of AMI Silica, it would gain access to cost and pricing information of one of its direct competitors, as well as access to its relationships with transload operators (transloads are facilities where sand can be offloaded from trains to trucks for transportation to the end user) and customers. This would potentially give Badger: (i) critical pricing information, which it could use to undercut AMI Silica's pricing on bid jobs; (ii) cost information, to help it better target customers and areas in which it can most successfully compete against AMI Silica, and most importantly; (iii) have knowledge of AMI Silica's transload leases. Further, Badger would have a clear financial motivation to use this information to increase its market share to the detriment of AMI Silica. Specifically, Badger would benefit by obtaining

100% of the benefit of shifting volume from AMI Silica to Badger, while losing volume in an entity in which it owns only 50%.

24. JMAC's concern about the effect of Badger ownership of Athabasca's interest in AMI Silica is not mere speculation. In March 2023, Badger was considering making a bid for Athabasca. In the process of doing so, I was contacted by Badger's President, who told me that Badger had set aside a $2 million (denomination unknown) litigation "war chest" to attempt to make changes in the AMI Silica Operating Agreement in the event that it obtained Athabasca's membership interest. The changes referenced would have eliminated concessions achieved by JMAC as consideration for its one-sided financial support of AMI Silica, and would have deprived JMAC of the benefit of agreements it had reached with Athabasca concerning this consideration.

25. JMAC's ability to prevent this through the enforcement of the fiduciary duties that Badger would owe to JMAC and AMI Silica would be limited. Any proprietary knowledge gained by Badger in its position as a member in AMI Silica will provide incalculable advantages in highly competitive markets, and it would be difficult or impossible to prevent Badger from exploiting this knowledge to compete with AMI Silica. Any fiduciary violation from a practical standpoint would be virtually impossible to identify. Further, there is no practical remedy once information becomes known, or relationships are damaged. This is a primary reason why JMAC bargained for the ROFR in the AMI Silica Operating Agreement.

26. On or about January 23, 2024, JMAC's Canadian counsel sent a letter to Athabasca's counsel again expressly preserving JMAC's rights to assert the ROFR and to argue that it applied to Athabasca's proposed sale. A true and correct copy of this letter is attached hereto as **Exhibit G**. Athabasca's Canadian counsel responded on January 25, 2024, acknowledging that JMAC retained the right to assert the ROFR, but disputing that the ROFR applied to the transaction

in question. A true and correct copy of this response is attached hereto as **Exhibit H**. Athabasca's counsel stated that it would place these letters in the data room available to potential bidders, therefore, JMAC was advised that potential bidders, including Badger, have received notice of JMAC's position concerning the ROFR and its intent to assert that position.

27. On February 9, 2024, Athabasca conducted an auction pursuant to the SISP as approved by the Court on December 12, 2023. The auction was conducted according to the rules approved by Badger and JMAC, subject to JMAC's reservation of its right to assert the ROFR. JMAC and Badger were the only bidders. Bidding opened with Badger's January bid of C$13.1 million, and proceeded in increments of C$100,000. Badger made the winning bid, in the amount of C$29,200,000. JMAC participated in the auction, and bid to C$29,100,000, out of concern that Badger would be successful in obtaining control of Athabasca's interest in AMI Silica and use that control to the detriment of AMI Silica.

28. As described in the draft agreement provided by Badger and a subsequent press release, the proposed transaction will take place in the following manner.

29. Athabasca is seeking to sell itself through a bankruptcy restructuring structure available under the Canadian Companies' Creditors Arrangement Act ("CCAA") known as a Reverse Vesting Order ("RVO"). Essentially, in an RVO, the debtor company, in this case Athabasca, transfers liabilities and assets out of the debtor company to a newly created "ResidualCo" that the purchaser, in this case Badger, did not want to purchase/retain. The purchaser then purchases the shares in the debtor company that now includes only the assets and liabilities that the purchaser desired to purchase/retain. In other words, an RVO is, effectively, a form of asset sale in which the purchaser of the debtor company is permitted to pick and choose what assets/liabilities it desires to purchase and purchases only those assets/liabilities.

30. In this case, Schedule B to the Badger Subscription Agreement lays out which assets/liabilities Badger is choosing to purchase and, thus, will remain within Athabasca as well as the assets and liabilities that Badger does not desire to purchase which will be transferred to the "ResidualCo." Importantly, nearly all of Athabasca's current liabilities are being transferred to the "Residual Cos." With respect to assets, Schedule B provides that Badger has the right designate any assets as a "Transferred Asset", meaning Badger will not be purchasing it and it will be transferred to the "ResidualCo" simply by designating an asset as such in writing to Athabasca and the Proposal Trustee prior to the closing. With respect to the assets Badger has agreed to purchase, the "Retained Assets", Badger lists as the very first asset Athabasca's interest in AMI Silica, and then identifies a generic list of cash/cash equivalents and otherwise valueless "assets". The Company then identifies that it will retain some limited liabilities that correlate with the "Retained Assets."

31. In short, the RVO sale structure is effectively an asset sale, wherein Badger is permitted to pick and choose what assets it wishes to purchase, including Athabasca's interests in AMI Silica, while accepting no unwanted liabilities or assets. As such, Athabasca is "selling" or "transferring" its interests in AMI Silica within the meaning of the ROFR to the same extent it would be doing so by selling its interests in AMI Silica as part of a traditional asset sale, which not even Athabasca could deny would trigger JMAC's ROFR rights. The fact that the sale/transfer is being conducted in the form of Canada's novel RVO structure rather than a straightforward traditional asset sale does not permit Athabasca to end-run JMAC's ROFR rights.

32. I have reviewed the Affidavit of John Churchill filed February 26, 2024, attached hereto as **Exhibit I**. Mr. Churchill states that an RVO structure is necessary to permit the transfer of certain agreements, licenses, mineral claims, and permits required to operate its business across

Western Canada and the Western United States. Mr. Churchill acknowledges that AMI itself does not hold any regulatory authorizations in relation to its U.S. interests, and that "The regulatory authorizations in relation to the U.S. interests are held by [AMI Silica]." The RVO is not necessary to preserve any regulatory authorizations required to operate the Hixton mine, because all such regulatory authorizations will remain with AMI Silica, whose underlying form will not change regardless of the structure of the transaction. Mr. Churchill has not provided any specific information which would support his contention that the Land Agreements, and Mineral Claims cannot be transferred. Mr. Churchill has not provided copies of any of the agreements in question. Accordingly, it is impossible to evaluate his suggestion that certain agreements and claims might not transfer under an asset sale or other transaction. However, as I explain above, any such assets are of little or no value in any case.

33. After the auction, JMAC subsequently confirmed in writing that it intended to assert its ROFR. This action followed.

34. If JMAC is permitted by the Court to exercise its contractual right to purchase Athabasca's interest in AMI Silica for C$13.1 million as it is entitled to do, AMI Silica will still represent an excellent investment by Athabasca's shareholders. JMAC's successful offer of the ROFR will result in a purchase price of AMI Silica that represents a significant profit on Athabasca's investment in that business. AMI Silica purchased the current assets of AMI Silica for C$1 million. As Athabasca's financial statement recognizes, AMI Silica "was able to acquire these assets at a bargain purchase, as the seller had made a strategic decision to exit the industry. As the fair value of the assets acquired was significantly higher than the purchase price, a large gain was recognized on the transaction." *See* Exhibit B, at 13. As the table below shows, nearly

C$9 million will be available for distribution to Athabasca's shareholders, all of which is attributable to the AMI Silica investment.

Net to Shareholders[1]	**Value**
Proceeds from ROFR sale	$13,100,000
Cash and cash equivalents	$3,834,694
Total cash available	$16,934,694
less Total liabilities	($7,981,924)
Net available for distribution to shareholders	$8,952,770

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

February 28, 2024

By: */s/ Jon McCreary*
Jon McCreary

[1] These numbers are derived from Athabasca's most recent financial statements.

This is Exhibit "**D**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

A Commissioner for Oaths in and for the
Province of Alberta

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UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

JMAC Energy Services LLC,

Plaintiff,

vs.

Athabasca Minerals Inc.,

Defendant.

Case File No: 1:24-cv-037

DECLARATION OF HUGH D. BROWN IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, Hugh D. Brown, hereby declare as follows:

1. I am a shareholder of the Fabyanske, Westra, Hart & Thomson, P.A. firm and one of the attorneys representing Plaintiff JMAC Energy Services LLC ("JMAC") in this action. This Declaration is based on my personal knowledge.

2. In accordance with Fed. R. Civ. P. 65, I certify that I have provided actual notice to Defendant Athabasca Minerals Inc. ("Athabasca") of JMAC's Motion for Temporary Restraining Order and Preliminary Injunction by emailing copies of JMAC's Summons and Complaint as well as its Motion for Temporary Restraining Order and Preliminary Injunction and the memorandum of law and Declaration of Jon McCreary (with exhibits) supporting the same to Athabasca's counsel, Zachary E. Pelham of the Pearce Durick firm at the following email address: zep@pearce-durick.com.

3. JMAC is also in the process of formally serving the Complaint and its injunction motion papers on Athabasca.

I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct.

Date: February 28, 2024

/s/ Hugh D. Brown
Hugh D. Brown

This is Exhibit "**E**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

A Commissioner for Oaths in and for the
Province of Alberta

Kaitlyn Wong
Barrister & Solicitor
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UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

JMAC Energy Services LLC,

Plaintiff,

vs.

Athabasca Minerals Inc.,

Defendant.

Case File No: 1:24-cv-037

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

In a closely held business, a member's contractual right of first refusal is crucial protection against sharing control with outsiders, particularly competitors. Here, however, Defendant Athabasca Minerals, Inc. ("Athabasca") has disregarded JMAC Energy Services LLC's ("JMAC") right of first refusal, agreeing to sell its 50% interest in their joint business, AMI Silica LLC ("AMI Silica") to a major competitor Badger Mining Corporation ("Badger"). This proposed sale jeopardizes the proprietary information and harmonious management of AMI Silica, benefiting Badger at AMI Silica's expense (and therefore, JMAC's). JMAC brings this action to enforce its first refusal rights and requests a temporary restraining order and preliminary injunction to prevent irreparable harm to its business from the transaction's closure.

JMAC and Athabasca, a Canadian corporation, formed AMI Silica, a North Dakota Limited Liability Company, in the summer of 2021 for the purpose of mining and selling silica sand for industrial purposes. JMAC and Athabasca are, and have always been, the sole members of AMI Silica, each owning 50%. Under AMI Silica's Operating Agreement, JMAC and Athabasca agreed to restrict the transfer of the parties' respective interests in AMI Silica and the

joining of new members in AMI Silica by providing for a right of first refusal ("ROFR") to a non-selling member in the event either JMAC or Athabasca sought to sell their interest in AMI Silica.

Athabasca has experienced significant financial difficulties and its only asset of significant value is its interests in AMI Silica. As a result of these financial difficulties, Athabasca has commenced bankruptcy proceedings in Canada. As part of that process, Athabasca is seeking to sell itself, which is effectively only a sale of its interests in AMI Silica, to Badger, a Wisconsin corporation. Badger is a direct competitor of AMI Silica and JMAC and in the course of previous attempts to gain control of AMI Silica, has threatened JMAC with litigation unless it abandons certain of its management prerogatives in AMI Silica. However, in an effort to maximize the amount it can obtain for its membership interest in AMI Silica, Athabasca has repeatedly refused to recognize and permit JMAC to exercise its ROFR with respect to the proposed sale of Athabasca and its interests in AMI Silica to Badger.

JMAC now seeks an immediate temporary restraining order ("TRO") and, after hearing, a preliminary injunction barring Athabasca from selling its interests in AMI Silica to Badger without affording JMAC its ROFR.

FACTUAL BACKGROUND

Formation of AMI Silica

JMAC and Athabasca formed the North Dakota Limited Liability Company AMI Silica on or about June 2, 2021. (Declaration of Jon McCreary ("McCreary Decl."), ¶ 3.) AMI Silica is in the business of mining and supplying sand for industrial purposes. (*Id.*) JMAC and Athabasca each own 50% of the membership interest of AMI Silica LLC. (*Id.*) On or about July 19, 2021, they executed an operating agreement (the "Operating Agreement") to govern the business and

management of AMI Silica. (*Id.*) AMI Silica was created to purchase, own, and operate assets formerly owned by a large oilfield services company. (*Id.*, ¶ 7.)

Right of First Refusal

The Operating Agreement requires that each party offer the other a ROFR if either decides to sell, transfer, or otherwise dispose of any or all of its interest in AMI Silica to a third party, and forbade any other means of transfer of a party's interest. (*Id.*, ¶ 4.) It provides:

> 11.01 General. **Except as otherwise specifically provided herein neither a Member nor an Economic Interest Owner shall have the right to**:
>
> (a) **sell, assign, pledge, hypothecate, transfer, exchange or otherwise transfer for consideration (collectively, "sell")**,
>
> (b) gift, bequeath, or otherwise transfer for no consideration (whether or not by operation of law except in the case of bankruptcy) all or any part of its Membership Interest or Economic Interest.
>
> 11.02 Right of First Refusal.
>
> (a) In the event a Selling Member desires to sell all or any portion of its Membership Interest or Economic Interest in the Company to a third party purchaser, the Selling Member shall first obtain from such third party purchaser a bona fide written offer to purchase such interest, stating the terms and conditions upon which the purchase is to be made and the consideration offered therefor. The Selling Member shall give written notification to the remaining Members, . . . of its intention to so transfer such interest, furnishing to the remaining Members a copy of the aforesaid written offer to purchase such interest.
>
> (b) **The remaining Members, and each of them shall, on a basis pro rata to their Capital Interests . . . have the right to exercise a right of first refusal to purchase all (but not less than all) of the interest proposed to be sold by the Selling Member upon the same terms and conditions as stated in the aforesaid written offer to purchase** by giving written notification to the Selling Member within twenty (20) days after receiving written notice from the Selling Member.

(*Id.*, Ex. A at §§ 11.01-.02 (emphasis added).) The Operating Agreement also gives each party the right to approve any third party purchaser's participation in the governance of AMI Silica.[1] JMAC and Athabasca bargained for the ROFR and related rights because they wished to have the right to choose their future business partner. (*Id.*, ¶ 5.) This was important to JMAC because the smooth operation of a 50/50 limited liability company requires a high degree of cooperation and requires that the commercial interests of the members be aligned. (*Id.*)

JMAC Financial Support

Since formation of AMI Silica, Athabasca's financial situation has grown more and more uncertain. (*Id.*, ¶¶ 8-9.) Accordingly, JMAC has on several occasions offered financial support to Athabasca and AMI Silica without which neither company would have been able to meet its obligations as they came due. (*Id.*, ¶ 9.) Specifically, JMAC provided the guarantee necessary for AMI Silica to obtain bonding, has provided working capital through invoice factoring, has extended a $2 million loan to Athabasca, and provided additional financing after Athabasca commenced the Notice of Intention. (*Id.*) JMAC took all of these steps in order to maintain the viability of AMI Silica, while avoiding third party participation in AMI Silica's affairs. (*Id.*)[2] And

[1] (*Id.*, § 11.03 ("if all of the remaining Members do not **approve by unanimous written consent** the proposed sale or gift of the Transferring Member's Membership Interest or Economic Interest to a transferee or donee which is not a Member immediately prior to the sale or gift, then the proposed transferee or donee shall have no right to participate in the management of the business and affairs of the Company or to become a Member) (emphasis added).).

[2] In fact, JMAC and Athabasca did enter into an agreement for the purchase of Athabasca by JMAC in the fall of 2023. However, due to the continued deterioration of Athabasca without a corresponding reduction in the purchase price, and significant misstatements by Athabasca which diminished its value, JMAC was forced to back out of the sale. (*Id.*, ¶ 17.)

in the case of the loan, JMAC extended it to allow Athabasca to continue operating while the parties negotiated a purchase of Athabasca by JMAC. (*Id.*)

Athabasca's financial situation remained precarious, and in March, 2023, despite the negotiations between JMAC and Athabasca for a sale of Athabasca to JMAC, it began a process by which it sought to sell itself to a third party. (*Id.*, ¶ 10.) It retained an investment bank, to generate interest in and to solicit bids for Athabasca. (*Id.*) When JMAC learned of this, it reminded Athabasca of its ROFR, and asserted its right to match any bona fide third party offer received by Athabasca. (*Id.*)

Through 2023, Athabasca disposed of nearly all of its Canadian assets in asset sales and other agreements. (*Id.*, ¶ 11.) Subsequently, its only asset with any ongoing operations, revenue generation, or significant market value, was its membership interest in AMI Silica. (*Id.*, ¶ 12.) A review of the assets listed on Athabasca's most recent financial statement confirms this. (*Id.*, ¶ 12-13.) The consolidated statement of Athabasca's financial position lists its investment in AMI Silica as $20,507,629. (*Id.*, ¶ 12, Ex. B at 3.) The other assets have minimal or no market value, and generate no revenue. (*Id.*, ¶ 12-13, Ex. B at p.3.)[3] All of Athabasca's cashflow and nearly all of its assets are in AMI Silica. (*Id.*) Even those assets which remain in Athabasca (other than

[3] The current assets therein ($3,602,871) are comprised of cash or cash equivalents, none of which represent ongoing operations or revenue-producing assets. (*Id.*, ¶ 12, Ex. B at 3.) Similarly, the long term deposits and restricted cash are also cash or cash equivalent. (*Id.*) The "Right-of-use Assets" consist of an office lease and a Xerox lease, neither of which has any market value. (*Id.*) The "Intangible Assets" of $24,433 consists of Software. (*Id.*, Ex. B at 3, 17.) The only remaining "Asset" other than Athabasca's investment in AMI Silica consists of what is described as "Resource properties." (*Id.*, ¶ 13, Ex. B at 3.) This consists of *past* exploration costs (the same were listed in 2022) on two mines – Montney In-Basin, and Prosvita. (*Id.*, ¶ 13, Ex. B at 3, 17) However, Athabasca has since failed to make payments necessary to preserve its rights in these mines. (*Id.*, ¶ 13.) Nor do the mines have any ongoing operations, or revenue. (*Id.*) Finally, Athabasca's financial statement ascribes no present value to its present rights in these properties. (*Id.*)

AMI Silica) are more than outweighed by the nearly $8 million in total liabilities held by Athabasca. (*Id.*, ¶ 34.)

Athabasca's Notice of Intention

Athabasca's financial position continued to deteriorate, and on or about November 10, 2023, Athabasca filed a Notice of Intention to Make a Proposal to its Creditors (the "Notice of Intention"). (*Id.*, ¶ 18.) A Notice of Intention is a process under Canada's Bankruptcy and Insolvency Act which provides for a stay and is the first step that companies can take to restructure. (*Id.*) Subsequently, Athabasca established a process to sell itself through an auction. (*Id.*) JMAC asserted that the auction process was inconsistent with its ROFR rights, because, under the ROFR, the *first* offer that Athabasca was willing to accept was required to be submitted to JMAC for acceptance. (*Id.*) Though JMAC sought to work collaboratively with Athabasca, it consistently reserved its right to assert the ROFR in the event that Athabasca sought to sell to third party.[4]

Badger Mining Corporation's Bid

Badger subsequently made an offer to purchase Athabasca, thereby earning the right to participate in the auction. (*Id.*, ¶ 22.) It provided a Subscription Agreement setting forth the terms of the proposed sale, and offered a sale price of $13.1 million. (*Id.*, ¶ 22, Ex. F.) Since this sum exceeded the $13 million which Athabasca was prima facie obligated to accept, it constitutes a bona fide offer within the meaning of the ROFR, and triggered Athabasca's obligation to submit

[4] On December 5, 2023, JMAC and Athabasca agreed on the terms of a Letter of Intent ("LOI"), whereby JMAC would become the Stalking Horse bidder for Athabasca's assets, which would be prima facie accepted subject to being superseded by a superior bid. (*Id.*, ¶ 20, Ex. D.) The LOI preserved JMAC's right to assert the ROFR. (*Id.*) Athabasca established a Sales and Investment Solicitation Process ("SISP") whereby it would solicit competing offers to JMAC's Stalking Horse bid. (*Id.*, ¶ 21.) The SISP was submitted for Court approval on December 12, 2023, which was granted the same day. (*Id.*, ¶ 21, Ex. E) The SISP, and Court order accepting the SISP expressly preserved JMAC's right to assert that the ROFR in the Operating Agreement applied. (*Id.*, ¶ 21, Ex. E, ¶ 44.)

the offer in writing to JMAC for JMAC to match. (*Id.*, ¶ 22.) JMAC would have exercised its ROFR had it been given the opportunity as required. (*Id.*)

Badger is a major competitor of AMI Silica, and its potential acquisition of Athabasca's membership interest in AMI Silica raises serious concerns. (*Id.*, ¶ 23.) If Badger were able to obtain Athabasca's membership interest in AMI Silica, it would gain access to cost and pricing information of one of its direct competitors, as well as access to its transload and customer relationships. (*Id.*) Badger would have a clear financial motivation to use this information to increase its market share to the detriment of AMI Silica. (*Id.*) Specifically, Badger would benefit by obtaining 100% of the benefit of shifting volume from AMI Silica to Badger, while losing volume in an entity in which it owns only 50%. (*Id.*) JMAC's ability to prevent this would be limited. (*Id.*, ¶ 25.) This is a primary reason why JMAC bargained for the ROFR. (*Id.*)

And JMAC's concern about Badger's participation in AMI Silica management is not just idle speculation. (*Id.*, ¶ 24.) In March 2023, Badger was considering making a bid for Athabasca, and contacted JMAC's owner Jon McCreary to demand changes to the AMI Silica Operating Agreement. (*Id.*) Badger's President stated that Badger had set aside a $2 million litigation "war chest" to attempt to make changes in the Operating Agreement. (*Id.*) The changes referenced would have eliminated concessions achieved by JMAC as consideration for its one-sided financial support of AMI Silica, and would have deprived JMAC of the benefit of agreements it had reached with Athabasca concerning this consideration. (*Id.*)

Auction

On February 9, 2024, Athabasca conducted an auction between JMAC and Badger, subject to JMAC's reservation of its right to assert the ROFR. (*Id.*, ¶ 27.) Bidding opened with Badger's January bid of $13.1 million. (*Id.*) Badger made the winning bid, in the amount of $29,200,000.

(*Id.*) JMAC subsequently confirmed in writing that it intended to assert its ROFR, which rights apply to the $13.1 million bona fide offer made by Badger. (*Id.*, ¶ 33.)

JMAC's successful assertion of the ROFR will result in a purchase price of AMI Silica that represents a significant profit on Athabasca's investment in AMI Silica. (*Id.*, ¶ 33.) AMI Silica purchased the current assets of AMI Silica for $1 million, which Athabasca recognizes as "a bargain purchase, as the seller had made a strategic decision to exit the industry. (*Id.*, ¶ 34, Ex. B at 13.) "As the fair value of the assets acquired was significantly higher than the purchase price, a large gain was recognized on the transaction." (*Id.*, ¶ 34, Ex. B at 13.) At a purchase price of $13.1 million, nearly $9 million will be available for distribution to Athabasca's shareholders, *all* of which is attributable to the AMI Silica investment. (*Id.*, ¶ 34.)

Despite JMAC's continued assertion of its ROFR rights, Athabasca has continued to deny that the Operating Agreement's ROFR provisions apply to Athabasca's proposed sale. Consequently, JMAC has commenced this action and now moves for a temporary restraining order and a preliminary injunction barring Athabasca from closing on the proposed sale to Badger while JMAC's rights under the ROFR are determined.

ARGUMENT

I. LEGAL STANDARD

Federal courts in the Eighth Circuit, including the District of North Dakota, consider four factors in determining whether to grant temporary injunctive relief: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. *EZ Blockchain LLC v. Blaise Energy Power, Inc*., 589 F. Supp. 3d 1102, 1108 (D.N.D. 2022) (quoting *Dataphase Systems, Inc. v. C L Systems, Inc*., 640 F.2d 109,

113 (8th Cir. 1981)). Although "no single factor is determinative," the probability of success on the merits "is the most significant factor." *Id.*

II. JMAC IS LIKELY TO SUCCEED ON THE MERITS

JMAC is likely to succeed on the merits of its claims for breach of contract as well as injunctive and declaratory relief. In determining the likelihood of success on the merits, courts should not "apply the probability language with mathematical precision." *Calvin Klein Cosmetics Corp. v. Lenox*, 815 F.2d 500, 503 (8th Cir. 1987). In analyzing this factor, a movant does not need to prove with certainty that it "will ultimately win." *PCTV Gold, Inc. v. SpeedNet, LLC.*, 508 F.3d 1137, 1143 (8th Cir. 2007). Instead, the movant "must simply show a fair chance of prevailing." *Jet Midwest Intl. Co., Ltd v. Jet Midwest Group, LLC*, 953 F.3d 1041, 1045 (8th Cir. 2020).

A. This Transaction Fits Within the ROFR

The plain terms of the parties' contracts explicitly require Athabasca to afford JMAC the ROFR to purchase Athabasca's interests in AMI Silica.

i. The ROFR Encompasses the Proposed Transaction

When interpreting any contract, courts must ascertain and effectuate the parties' intent. *Hallin v. Inland Oil & Gas Corp.*, 903 N.W.2d 61, 64 (N.D. 2017). The North Dakota Supreme Court has explained that the intent and purpose behind ROFR provisions in close corporations, much like a two member 50/50 LLC, is to "protect the corporation and its stockholders from its competitors and from other undesirable outside influences." *Sorlie v. Ness*, 323 N.W.2d 841, 845 (N.D. 1982). Courts should not interpret ROFR provisions to defeat such intent. *Id.*

Both the plain language and the intent of the operating agreement encompasses the transaction at issue here. As discussed, the Operating Agreement provides that "**except as otherwise specifically provided herein**, neither a Member nor an Economic Interest Owner shall

have the right to: (a) sell, assign, pledge, hypothecate, transfer, exchange or otherwise transfer for consideration (collectively, "sell")" their Membership or Economic Interest in AMI Silica. (McCreary Decl., Ex. A, §§ 11.01 (emphasis added).) Critically, the **only way** the Operating Agreements provides for either JMAC or Athabasca to "sell" their interests in AMI Silica is by providing the other the ROFR. (*Id.*, §§ 11.01-.02.) Simply put, the plain language of the Operating Agreement is extremely broad – JMAC and Athabasca agreed that ***any*** time they chose to "sell" their interests in any manner, they would provide the other party a ROFR. And to "sell" is defined to mean to sell *or transfer for consideration in any way*, which is what would happen if Athabasca conveys its own stock to Badger for consideration, thereby giving Badger control over AMI Silica. And this is exactly how the proposed transaction is intended to work.

That is consistent with both the parties' specific intent in including the ROFR provisions in the Operating Agreement (McCreary Decl., ¶ 5) and the generally recognized intent behind ROFR provisions in businesses like AMI Silica, *i.e.* to prevent the intrusion of an uninvited outsider into a two member 50/50 LLC. Interpreting the ROFR provisions as not encompassing the sale of AMI to Badger would defeat this intent, as Badger is a direct competitor of AMI Silica and JMAC. (*Id.*, ¶ 23.) The parties further evidenced this intent by requiring unanimous consent by remaining Members to any transferee having a role in the management of AMI and requiring a majority of the Members to approve any new Members. (*Id.*, Ex. A at § 11.03.) JMAC also acted consistently with this intent by supplying capital support to Athabasca and AMI Silica to prevent outsider influence in AMI Silica, whether it be by third party debtors or holders of equity.

Athabasca's proposed sale without affording JMAC its ROFR subverts this intent. Athabasca received a written offer from Badger to purchase Athabasca for $13.1 million which it

was willing to accept.[5] Badger's proposed purchase includes Athabasca's interests in AMI Silica, which constitutes effectively all of Athabasca's value. (McCreary Decl., ¶¶ 12-13.) The purchase would involve a "transfer" of Athabasca (albeit by Athabasca) to Badger. As such, Badger's $13.1 million written offer was a bona fide offer to purchase Athabasca's interests in AMI Silica, thereby triggering JMAC's ROFR rights to purchase Athabasca's interests in AMI Silica for that same price.[6] Athabasca's refusal to recognize JMAC's ROFR rights is a breach of the plain language of the Operating Agreement's transfer and ROFR provisions.

ii. The Fact that Athabasca is Selling its Stock, not Just its Interests in AMI Silica, is a Distinction Without a Difference

JMAC anticipates that Athabasca will argue that JMAC's ROFR is not triggered by a sale of Athabasca, because Athabasca is not directly selling its interests in AMI Silica.

That would be to ignore the nature of the proposed Badger sale, which fits well within the class of transactions the parties intended to be subject to the ROFR. Though the proposed sale to Badger would be accomplished by an issuance of new Athabasca stock to Badger, the transaction structure is nothing like an actual stock sale wherein a party simply purchases stock in a company,

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[5] Had Badger not submitted its $13.1 million bid, Athabasca would have been required to accept JMAC's $13 million stalking horse bid.

[6] Courts have explained that in the context of a ROFR, a bona fide offer is as follows:

> For an offer to be considered a bona fide offer, it must be shown with reasonable certainty that [the] offeror possessed the financial ability to comply with the terms of the contract. Proof which indicates that the offeror is operating on a shoestring speculation or attractive probabilities falls short of reasonable certainty.

SunAmerica Hous. Fund 1050 v. Pathway of Pontiac, Inc., 33 F.4th 872, 879 (6th Cir. 2022) (collecting cases discussing the definition of "bona fide offer" in the context of a ROFR). There is no doubt that Badger possessed both the intent and ability to purchase Athabasca for $13.1 million on the terms contained in its written offer. And, as discussed, Badger has subsequently expressed its intent and ability to purchase Athabasca for $29.2 million.

thereby assuming all assets and liabilities of a company "as is." Rather, the proposed transaction is in essence an asset sale in which assets alone are sold,. Were Athabasca to sell its interest in AMI Silica in a traditional asset sale, it would *directly* sell and transfer to Badger its interest in AMI Silica. Such an asset sale falls plainly within definition of "sell" in the Operating Agreement and, thus, would undoubtedly trigger JMAC's ROFR rights.[7]

Here, the proposed Badger sale as set out in the Badger Subscription Agreement is set up as a Reverse Vesting Order ("RVO") transaction, which is a novel sale structure available in exceptional circumstances under the Canadian Companies' Creditors Arrangement Act. (McCreary Decl., ¶¶ 29-31, Ex. F at 12-14 and Schedule A-B.)[8] In an RVO sale, a debtor company, like Athabasca, transfers liabilities and assets out of the debtor company to a newly created "ResidualCo" that the purchaser, in this case Badger, does not want to purchase/retain. (*Id.*, ¶ 29.)

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[7] A critical difference between a "stock sale" and an "asset sale" is that in a stock sale, a party effectively acquires all assets and liabilities of the purchased company whereas in an asset sale, the purchaser gets to cherry pick the assets and, if any, liabilities it wishes to purchase:

> Assuming all of the stock of the target is acquired, the target becomes a wholly owned subsidiary of the acquiring company. This means that the acquiring company **effectively acquires all of the assets and all of the liabilities of the target**…
>
> ***
>
> Legally, the distinction between a merger and an asset transfer is monumental. With the former, the acquiring entity has no choice in selecting among the target's assets and liabilities. The acquirer succeeds to the amalgam of the two original entities. With the latter, however, the **acquiring entity can selectively choose which assets and which, if any, liabilities it wants to acquire.**

See, e.g., John H. Matheson, *Successor Liability*, 96 Minn. L. Rev. 371, 376, 381 (2011) (emphasis added).

[8] *See also* Frank Spizzirri & Sheldon J. Title, *Reverse Vesting Orders: The Effectiveness of This Canadian Restructuring Tool*, 41 Am. Bankr. Inst. J. 26, 62 (October 2022) (discussing and citing Canadian caselaw providing that RVO structures should "remain the exception and not the rule").

The purchaser then purchases the shares in the debtor company that now includes only the assets and liabilities that the purchaser desired to purchase/retain.[9] (*Id.*) In other words, an RVO is, effectively, a form of asset sale in which the purchaser of the debtor company is permitted to pick and choose what assets/liabilities it desires.[10] (*Id.*)

In this case, the Badger Subscription Agreement shows that nearly all of Athabasca's current liabilities are being transferred to the "ResidualCo." (*Id.*, ¶ 30, Ex. F at Schedule B.) With respect to assets, Schedule B provides that Badger has the right to designate any assets as a "Transferred Asset", meaning Badger will not be purchasing it and it will be transferred to the "ResidualCo" simply by designating an asset as such in writing prior to the closing. (*Id.*) With respect to the assets Badger has agreed to purchase, the "Retained Assets", Badger lists as the first asset Athabasca's interest in AMI Silica, and then identifies a generic list of cash/cash equivalents and otherwise valueless "assets". (*Id.*) In short, the RVO sale structure is effectively an asset sale, wherein Badger is permitted to pick and choose what assets it wishes to purchase, including Athabasca's interests in AMI Silica, while accepting no unwanted liabilities or assets.[11] As such,

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[9] *See Reverse Vesting Orders: The Effectiveness of This Canadian Restructuring Tool*, at 26 (explaining general nature of RVO transactions); *see also* https://www.nortonrosefulbright.com/en-us/knowledge/publications/5507aa9a/the-reverse-vesting-order-is-here-to stay (same, and providing "Essentially, an RVO allows for the transfer of liabilities/unwanted assets out of the debtor companies into a newly created "ResidualCos", rather than transferring purchased assets out of the insolvent debtor into a newly formed entity.")

[10] In fact, in analyzing whether an RVO structure is appropriate, Canadian courts must analyze the same factors used when analyzing whether an asset sale is appropriate. *Reverse Vesting Orders: The Effectiveness of This Canadian Restructuring Tool*, at 62.

[11] Athabasca's own trustee in its Canadian proceedings, KSV, even describes the RVO structure as being effectively an asset sale flipped on its head:

> **Vesting Orders have been the historical norm to convey title to assets free and clear of liabilities**, with the sale proceeds standing in place of the conveyed assets.

Athabasca is "selling" its interests in AMI Silica within the meaning of the ROFR to the same extent it would be doing so by selling its interests in AMI Silica as part of a traditional asset sale. Athabasca cannot now avoid JMAC's ROFR rights by doing the exact same thing as a traditional asset sale, *i.e.* picking and choosing the assets and liabilities to sell to Badger, but then selling its stock to complete that purchase rather than transferring the assets themselves directly to Badger via Canada's novel RVO structure.

JMAC anticipates Athabasca will argue that the RVO structure is necessary to preserve certain assets and agreements it currently holds. But as it admits, the RVO structure is entirely unnecessary to sell its interest in AMI Silica. All assets, agreements, and regulatory approvals relevant to AMI Silica's business are held by AMI Silica itself. And it is purely speculative that any other valuable agreements or approvals exist that cannot be transferred, or are still relevant to any ongoing business of AMI Silica.

Finally and relatedly, it is significant that the sale of Athabasca, as discussed above, is really just the sale of Athabasca's interests in AMI Silica – all other assets are either cash or cash-equivalents or have no value. Indeed, prior to engaging in the sale process, Athabasca sold numerous of its other assets, leaving its interests in AMI Silica as the only asset of value remaining to be sold. (*Supra* at 5.) Interpreting the ROFR as not applying to this sale structure would permit Athabasca to end-run the ROFR and inject not only an uninvited stranger into the Membership of

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> Provided the Court being asked to issue the Order is satisfied that the consideration offered is fair and reasonable, the purchaser of those assets obtains clean title.
>
> **RVOs took that concept and flipped it, allowing a purchaser to acquire the debtor legal entity, while unwanted assets and/or liabilities are vested out to a newco (sometimes referred to as a "garbageco").**

https://www.ksvadvisory.com/insights/article/reverse-vesting-orders-expanding-their-utility (emphasis added).

AMI Silica, but a direct competitor. This would destroy the intent of the parties behind the ROFR provisions. Such an interpretation must be rejected.

B. Courts Across the Country Prohibit Structuring Transactions to Circumvent ROFR Rights

Moreover, courts that have dealt with broad ROFR provisions like the ROFR provisions in the Operating Agreement have consistently held that a party like Athabasca cannot, under the covenant of good faith and fair dealing, avoid ROFR requirements by selling the company as a whole instead of just the interests that the ROFR attaches to. Here, Athabasca has impermissibly sought to circumvent the ROFR in violation of the covenant of good faith and fair dealing, and should not be permitted to succeed.

For example, in *Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon Ltd. Partn.*, a partnership was owned by four partners, each with a 25% interest. 840 F. Supp. 770, 7726 (D. Or. 1993), *aff'd,* 76 F.3d 1003 (9th Cir. 1996). The partnership agreement contained a ROFR clause, providing that before any partner "sells, exchanges, transfers, or assigns all or any part" of its partnership interest, the selling partner must give the other partners a ROFR. *Id.* at 773. A dispute arose when a parent corporation that owned one of the partners as well as a different subsidiary that held a 51% interest in said partner sought to sell the partnership interest. *Id.* at 773-74. To avoid the ROFR, the parent proposed selling both subsidiaries, rather than the partnership interest itself, claiming that such a sale did not trigger the ROFR. *Id.* at 773-74. The parent corporation argued, much like JMAC anticipates Athabasca will argue, that the sale of the affiliates holding the partnership interests did not constitute a "sale" or "transfer" of the interests since the affiliates, in name, would continue to exist and hold the partnership interests, just controlled by a different parent company. *Id* at 773. The court rejected this argument.

The court reasoned that this "indirect" sale of the partnership interests was mere "subterfuge" intended to avoid the ROFR clause and the clear intent of the parties to keep the partnership interests within the partners' respective family of companies, and constituted a breach of the duty of good faith and fair dealing. *Id.* at 774-76. The court also explained that interpreting the ROFR clause to permit this type of "indirect" transfer would render the clause illusory because any partner would have been able to create a subsidiary holding company to hold the partnership assets and then simply sell the holding company rather than the partnership assets directly and thereby avoid the ROFR. *Id.* at 776.

Similarly, in *Bruns v. Rennebohm Drug Stores, Inc.*, a close corporation was owned 50/50 by Richard and Ernest Bruns ("Bruns") and Rennebohm Drug Stores, Inc. and others affiliated with Rennebohm ("Rennebohm"). 442 N.W.2d 591, 593 (Wis. App. 1989). The parties executed a stock alienation restriction agreement with respect to their shares in the close corporation which provided both parties with a ROFR if either party "for any reason whatsoever determines to **sell a part or all of the shares which he may own**" in the close corporation. *Id.* at 593, n.1 (emphasis added). Rennebohm's then merged with a subsidiary of Walgreen Co., but did not afford the Bruns a right of first refusal to purchase Rennebohm's shares in the close corporation. *Id.* at 594.

The Bruns argued that the ROFR was triggered. The Rennebohm's argued that the ROFR was not triggered because the shares were not "sold", Walgreen's merely obtained control of the shares as a result of the merger. *Id.* The court rejected this argument. In doing so, the court explained that the "paramount reason" behind the ROFR was to "insure that the 'harmony and balance' of the business organization will not be disturbed by the unwelcome intrusion of strangers." *Id.* This intent, the court explained, would be violated as: "the result of the transfer of the [close corporation] stock to Walgreen will bring a stranger into [the close corporation's]

corporate fold, a result not intended by the parties to the Stock Alienation Restriction Agreement and a result plainly contrary to the purpose of such agreements generally." The court then emphasized that, when interpreting the ROFR rights in the context of the merger transaction, "substance controls over form," and, thus, although Rennebohm's did not directly "sell" their shares in the close corporation, the merger constituted a sale for purposes of the Bruns' ROFR. Courts in other jurisdictions have reached conclusions similar to *Castle Rock* and *Bruns* under similar circumstances.[12]

Here too, the sale of Athabasca via RVO transaction, (primarily, if not exclusively, due to the value AMI Silica), triggers the ROFR. To say this is anything more than a sale of Athabasca's

[12] *See, e.g.*, *Casco Tel. Co. v. Lakefield Commun., Inc.*, 1995 WL 117029, at *5 (Wis. App. 1995) (holding that "the sale of the entire company effects a transfer in control of the partnership interest under the plain language of the contract, thereby triggering the rights of first refusal" and explaining that the "purpose of restrictions on transfers of corporate stock are to insure that the harmony and balance of the business organization will not be disturbed by the unwelcome intrusion of strangers") (quotation marks omitted); *In re Asian Yard Partners*, 95-333-PJW, 1995 WL 1781675, at *7 (Bankr. D. Del. Sept. 18, 1995) (interpreting anti-transfer and ROFR provision as "encompass[ing] a situation where there is a transfer of a controlling interest in a partner entity, because such a transaction effectively transfers a partner interest to the control of the party acquiring the controlling interest in the partner entity"); *H-B-S Partn. v. Aircoa Hosp. Services, Inc.*, 114 P.3d 306, 314 (N.M. App. 2005) (holding that transfer of stock of a general partner's corporate great-great-grandparent triggered ROFR provision under partnership agreement); *EIG Glob. Energy Partners, LLC v. TCW Asset Mgt. Co.*, CV 12-7173 CAS MANX, 2012 WL 5990113, at *6-7 (C.D. Cal. Nov. 30, 2012) (holding that sale of member of LLC by indirect parent company violated restriction on transfer of LLC membership interest in LLC absent supermajority approval); *Williams Gas Processing--Wamsutter Co. v. Union P. Resources Co.*, 25 P.3d 1064, 1072 (Wyo. 2001) (providing that a "sale is made for purposes of a right of first refusal when there is a transfer of value of a significant interest in the subject property to a stranger who thereby gains substantial control over the subject property" and holding based on that definition that a sale of a subsidiary holding co-owner's interest in a gas plant and gathering system would trigger the other co-owner's right of first refusal and that such a "sale" was "transparently [ ] calculated to attempt to do indirectly that which the governing agreements would not all [co-owner] to do directly."); *Contl. Cablevision of New Eng., Inc. v. United Broad. Co.*, 873 F.2d 717, 719 (4th Cir. 1989) (agreeing with trial court that "it would be 'illogical' not to consider a transfer of the parent as an indirect transfer of the wholly-owned subsidiary's controlling capital stock interest" triggering right of first refusal to purchase subsidiary's controlling capital stock).

interests in AMI Silica - its sole valuable asset - is "mere subterfuge." In fact, as noted, Athabasca sold off its valuable Canadian assets through 2023. But when it came to its interest in AMI Silica, Athabasca's own representatives admitted that they were choosing to not individually sell Athabasca's interests in AMI Silica interests because they believed they could get a higher offer for the AMI Silica interests if they structured the transaction in a manner that, in their opinion, would not trigger the ROFR. (McCreary Decl., ¶ 15.) Accordingly, it packaged AMI Silica with remaining junk held by Athabasca and sought to dispose of it all together to avoid the ROFR.

In other words, the sale to Badger via RVO structure is an attempt by Athabasca to do indirectly that which it cannot do directly, *i.e.* engage in an asset sale whereby it sells only the assets/liabilities Badger chooses to purchase. This transaction structure is being utilized specifically to avoid triggering the ROFR and is no different in substance from a traditional asset sale with respect to the ROFR provisions. Under the caselaw cited above, Athabasca cannot avoid its ROFR obligations by engaging in a transaction that is designed to avoid triggering the ROFR and is substantively equivalent to a transaction that undoubtedly triggers ROFR rights.

Moreover, any interpretation of the ROFR provisions as not being triggered by the sale of Athabasca via RVO structure would render the ROFR provisions illusory, as the court explained in *Oregon RSA*. Such an interpretation would mean both JMAC and Athabasca could, for example, simply transfer all of their assets to a different entity, leaving their only asset as their AMI Silica interests, and then sell themselves to avoid the ROFR clause. Indeed, that is effectively what Athabasca is doing given its only asset valuable asset is its interest in AMI Silica and it previously sold off its other assets of value prior to engaging in its current sale process. (*Supra* at 5.)

For each of the above reasons, the fact that Athabasca is proposing to sell itself to Badger via RVO structure rather than simply selling its interests in AMI Silica to Badger in a traditional asset transfer does not avoid Athabasca's obligation to give JMAC the ROFR.

III. JMAC WILL BE IRREPARABLY HARMED IF THE COURT DOES NOT ENJOIN ATHABASCA

Courts find that "[i]rreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *EZ Blockchain LLC*, 589 F. Supp. 3d at 1109. District courts, however, "can presume irreparable harm if the movant has a likelihood of success on the merits." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 303 F. Supp. 3d 964, 984 (D.N.D. 2018), *aff'd*, 932 F.3d 1125 (8th Cir. 2019).

"Because complex business transactions cannot be simply unwound, bargained for rights to prevent changes in business structure and ownership are irreversibly lost after a transaction breaching those rights occurs." *EIG Glob. Energy Partners, LLC v. TCW Asset Mgt. Co.*, No. CV 12-7173 CAS MANX, 2012 WL 5990113, at *9 (C.D. Cal. Nov. 30, 2012). If this Court does not issue a TRO and, subsequently, a preliminary injunction, JMAC will be irreparably harmed by losing forever its negotiated ROFR. Courts have regularly held that the loss of a ROFR constitutes irreparable harm and an injunction is warranted to preserve the right. *EIG*, 2012 WL 5990113, at *9 ("The Court finds that plaintiff is likely to suffer irreparable harm if the acquisition goes forward in apparent violation of the LLC Agreement."); *Foxboro Co., Inc. v. Soft Sys. Engr., Inc.*, 894 F. Supp. 48, 52 (D. Mass. 1995) (holding that loss of right of first refusal constitutes irreparable harm sufficient to support injunctive relief); *Miller v. LeSea Broad., Inc.*, 896 F. Supp. 889, 894 (E.D. Wis. 1995) (same); *Mercedes-Benz USA, LLC v. Star Automobile Co.*, 3:11-CV-73 CAR, 2011 WL 2175037, at *3 (M.D. Ga. June 3, 2011) (same).

IV. ATHABASCA WILL NOT BE HARMED BY THE INJUNCTION

"Once the court has determined that there is a threat of irreparable harm to the moving party, it must balance this harm with any injury an injunction would inflict on other interested parties." *Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers*, 826 F.3d 1030, 1039 (8th Cir. 2016). This factor "requires consideration of the balance between the harm to the movant and the injury the injunction's issuance would inflict on other interested parties*." Kodiak*, 303 F. Supp. 3d at 984. This factor favors JMAC.

Simply put, JMAC is merely seeking to enforce its contractual rights – Athabasca can suffer no harm by being forced to comply with its legal obligations. Even assuming *arguendo* that an injunction eventually turned out to be wrongful, JMAC has every incentive to ensure the health of Athabasca's only significant asset – AMI Silica – and no harm would result from the delay in closing the transaction. This factor also favors JMAC.

V. PUBLIC POLICY FAVORS JMAC

"For the court to grant an injunction, the moving party must establish that the entry of the relief would serve public interest." *North Dakota v. E.P.A.*, 127 F.Supp.3d 1047, 1059 (D.N.D. 2015). The final factor, the effect of an injunction on the public interest, also favors JMAC. JMAC seeks the enforcement of the terms of a negotiated contract, which serves the public interest. *See, e.g., Sleep No. Corp. v. Young*, 33 F.4th 1012, 1019 (8th Cir. 2022) (public interest in enforcing contractual obligations); *PCTV Gold, Inc. v. SpeedNet, LLC.*, 508 F.3d 1137, 1145 (8th Cir. 2007) (public interest in enforcing contractual rights); *La Calhene, Inc. v. Spolyar*, 938 F. Supp. 523, 531 (W.D. Wis. 1996) ("The public interest favors enforcement of contracts and the protection of trade secret information gathered and developed by a company").

CONCLUSION

For each of the foregoing reasons, this Court should immediately issue a TRO enjoining Athabasca from selling its interests in AMI Silica to Badger without first giving JMAC its ROFR. Similarly, after a hearing on the matter, the Court should also grant JMAC a preliminary injunction enjoining Athabasca from the same conduct until the resolution of this action.

Dated: February 27, 2024

FABYANSKE, WESTRA, HART & THOMSON P.A.

By: */s/ Hugh D. Brown*

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ATTORNEYS FOR PLAINTIFF

This is Exhibit "**F**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

A Commissioner for Oaths in and for the
Province of Alberta

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

JMAC Energy Services LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 1:24-cv-00037**
	)	
Athabasca Minerals Inc.,	)	
	)	
Defendant.	)	

DEFENDANT ATHABASCA MINERALS INC.'S PRELIMINARY RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendant Athabasca Minerals Inc., by and through the undersigned counsel, respectfully submits this preliminary response in opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction ("Motion for TRO"). With this preliminary response, Athabasca provides notice that it opposes the Motion for TRO because *inter alia* (1) the ROFR only applies to a sale of membership interests of AMI Silica LLC; the proposed sale transaction involves the sale of shares of stock in Athabasca (a Canadian corporation separate and distinct from AMI Silica LLC); under these circumstances, the majority view is that the ROFR does not apply;[1] and (2) this dispute concerns a sale transaction pending before the Alberta Courts, in Canadian insolvency proceedings, involving shares of a publicly traded Canadian company, and six of its wholly owned

[1] *See Waldron v. Huber (In re Huber)*, Nos. 11-41013, 12-04171, 2013 Bankr. LEXIS 4981, at *15-20 (Bankr. W.D. Wash. Nov. 25, 2013) and cases cited therein including *Elm Road Development Co. v. Buckeye Retirement Co., L.L.C. (In re Hake)*, 419 B.R. 328. 332 (6th Cir BAP 2009); *United States Cellular Inv. Co. of Los Angeles, Inc. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 935 (9th Cir. 2002); *Ne. Commc'ns of Wis., Inc. v. CenturyTel, Inc.*, 516 F.3d 608 (7th Cir. 2008); *Engel v. Teleprompter Corp.*, 703 F.2d 127, 134-35 (5th Cir. 1983).

Canadian subsidiaries, all of whom are presently subject to restructuring proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, and a statutorily imposed stay of proceedings; not only does the Plaintiff's Complaint and request for a TRO violate the Canadian stay of proceedings imposed respecting Athabasca, under principles of comity, this dispute should be addressed by the Canadian court system.[2] Further, contrary to the Plaintiff's submission, there is nothing novel about the use of a "Reverse Vesting Order" ("RVO") transaction in Canadian insolvency proceedings. This structure is being employed not to nefariously defeat any ROFR, but in order to preserve, among other corporate attributes, Athabasca's various mineral claims, some of which have been granted on lands in the resource rich Montney region of Northern British Columbia, where the Government of British Columbia has since granted a moratorium on issuing new mineral claims. In fact, the alternative bid put forward by the Plaintiff in the Canadian insolvency proceedings also took the form of an RVO in part, for these very same reasons. Just as the Plaintiff alleges the RVO is an attempt to do an "end-run" around its alleged ROFR, these proceedings themselves are an attempt to do an end-run around the Canadian insolvency regime, and deprive Athabasca's Canadian creditors and stakeholders the benefit of a Transaction totaling $29.2 million, resulting in over $16 million more in value to the estate than what the Plaintiff claims should occur. The Court should find that Plaintiff has failed to satisfy the grounds for

[2] *See Allstate Life Insurance Company v. Linger Group Limited*, 994 F.2d 996, 998 (2d Cir. 1993) (Observing "comity is particularly appropriate where, as here, the court is confronted with foreign bankruptcy proceedings."); *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de CV*, 412 F.3d 418, 424 (2d Cir. 2005) ("[The Second Circuit has] repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding.... In such cases, deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and ... do not contravene the laws or public policy of the United States."); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) ("American courts have long recognized the particular need to extend comity to foreign bankruptcy proceedings.").

emergency or preliminary injunctive relief because Plaintiff has not established sufficient grounds for such extraordinary relief under the *Dataphase* factors. Athabasca anticipates filing a memorandum to provide additional background and legal analysis regarding its opposition to the Motion for TRO. Athabasca's memorandum will be filed as soon as possible, but no later than March 6, 2024.

Dated March 1, 2024.

Pearce Durick PLLC

By: *__/s/ Quinn P. Fylling_____*

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ATTORNEYS FOR DEFENDANT ATHABASCA MINERALS INC.

This is Exhibit "**G**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

A Commissioner for Oaths in and for the
Province of Alberta

Kaitlyn Wong
Barrister & Solicitor
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Ph: 1-403-261-7388

From: Hugh D. Brown <HBrown@fwhtlaw.com>
Sent: Thursday, February 29, 2024 9:32 AM
To: Zachary E. Pelham <zep@pearce-durick.com>; Alexander B. Athmann <AAthmann@fwhtlaw.com>
Cc: Quinn P. Fylling <qpf@pearce-durick.com>
Subject: RE: JMAC v. AMI [IMAN-ACTIVE.FID1458239]

Zack,

Thank you for your email, and it's good to meet you electronically. I appreciate your agreeing to waive service. We will prepare a waiver and send it over to you.

We are looking into the conflict question you raised, and I will get back to you on that subject as soon as we have done so.

Sincerely,

Hugh

Hugh D. Brown
Attorney

612.359.7663

From: Zachary E. Pelham <zep@pearce-durick.com>
Sent: Wednesday, February 28, 2024 4:07 PM
To: Hugh D. Brown <HBrown@fwhtlaw.com>; Alexander B. Athmann <AAthmann@fwhtlaw.com>
Cc: Quinn P. Fylling <qpf@pearce-durick.com>
Subject: JMAC v. AMI

Good afternoon gentlemen:

I represent Athabasca Minerals Inc. I understand you represent JMAC Energy Services LLC. As to the action JMAC filed with the U.S. District Court for the District of North Dakota yesterday, AMI is willing to waive service of the summons. Please provide me with an appropriate waiver.

AMI does not consent, and would not consent if asked, to any waiver of a conflict of interest for your firm representing JMAC against AMI in the action JMAC filed with the court yesterday. As you know, AMI Silica LLC (AMIS) is an entity that is jointly owned by AMI and JMAC. Interpreting the operating agreement of AMIS is the primary issue in the action your client filed with the court yesterday—and our respective clients take differing views on the non-application of the ROFR provision in the operating agreement. Indeed, your firm is presently engaged with AMI in a bonding matter (AMI just communicated on 2/27/24 with FWHT). Please advise whether you will be withdrawing as counsel for JMAC in its action against AMI.

Nothing in this email should be construed as an admission or waiver of any available claims and defenses of AMI and AMI reserves all defenses and claims available to it.

Thank you.
Sincerely,
Zack

Zachary Pelham | Attorney
Pearce Durick PLLC
314 E. Thayer Avenue
Bismarck, ND 58502
Main 701.223.2890 | **Fax** 701.223.7865
www.pearce-durick.com

This is Exhibit "**H**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

JMAC Energy Services LLC, Plaintiff, vs. Athabasca Minerals Inc., Defendant.	Case No. 1:24-cv-00037

ORDER TO SHOW CAUSE REGARDING SUBJECT MATTER JURISDICTION

[¶1] THIS MATTER comes before the Court *sua sponte* on the issue of whether this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 (diversity jurisdiction) regarding the citizenship of the Plaintiff, JMAC Energy Services LLC ("JMAC"). For the reasons set forth below, Plaintiffs are **ORDERED TO SHOW CAUSE** why this case should not be dismissed without prejudice for lack of subject matter jurisdiction.

DISCUSSION

[¶2] The Complaint inadequately alleges the citizenship of JMAC, which needs clarification before the Court can exercise jurisdiction over the matter. See Mt. Healthy City Sch. Dist. Bd. Of Educ. V. Doyle, 429 U.S. 274, 278 (1977) (noting federal courts have a duty to consider, *sua sponte*, whether they have subject matter jurisdiction over the controversy before allowing the case to continue); Barclary Square Properties v. Midwest Federal Sav. And Loan Ass'n of Minneapolis, 893 F.2d 968, 969 (8th Cir. 1990) ("Federal courts are courts of limited jurisdiction and the threshold requirement in every federal case is jurisdiction.").

[¶3] The Complaint alleges "JMAC is a Delaware limited liability company with its principal office address in Wenatchee, Washington." Doc. No. 1, ¶ 5. The Declaration of Jon McCreary ("McCreary") contradictions this description, stating McCreary is "the sole Member and Manager of [JMAC], a limited liability company organized under the laws of the State of Delaware. JMAC's principal place of business is located in Williston, North Dakota." Doc. No. 6, ¶ 2.

[¶4] In determining the citizenship of an LLC, the Court looks to the states of citizenship of the LLC's individual members, not the place of incorporation. GMAC Com. Credit LLC v. Dillard Dep't Stores, Inc., 357 F.3d 827, 829 (8th Cir. 2004) ("Holding an LLC's citizenship is that of its members for diversity jurisdiction purposes, we are unable, form this record, to determine the citizenship of GMAC's members."). If a member of the LLC is another unincorporated entity such as an LLC or LP, the citizenship of the members of those unincorporated entities must be alleged. See Torie Bauer v. Equinor Energy LP, 2023 WL 9595357, *1 (D.N.D. June 27, 2023) (quoting Niemann v. Carlsen, 2023 WL 22038 at *1 (E.D. Mo. Jan. 3, 2023) ("[I]f any member is itself a partnership or limited liability company, then the identity of each member of each of these entities must be traced until we reach a corporation or natural person"); 818 Partners, LLC v. Blue Holdco 440, LLC, 2023 WL 8716881, *2 (D. Minn. Nov. 15, 2023) (holding federal courts must ascertain the citizenship of sub-members, sub-sub-members, and so on until the citizenship of induvial people are known and alleged).

[¶5] Because the record is unclear as to the citizenship of JMAC. There is no allegation noting the citizenship of each member—if more than just McCreary. JMAC needs to clarify its citizenship before the Court can exercise jurisdiction over this case. Counsel can do this by submitting a supplement containing the required information to establish the citizenship—not residency—of each of JMAC's members. See Hargett v. RevClaims, LLC, 854 F.3d 962, 965 (8th Cir. 2017)

(noting "citizen" means something different than "resident" under 28 U.S.C. § 1332 because "citizenship requires permanence" while "[r]esidency is a more fluid concept" and "does not require an intent to make a place a home," whereas citizenship does).

CONCLUSION

[¶6] The Court has an obligation to ensure it has proper subject matter jurisdiction to hear the dispute before it. Sanders v. Clemco Indus., 823 F.2d 214, 216 (8th Cir. 1987) (noting courts must "be attentive to a satisfaction of jurisdictional requirements in all cases"). As it stands with the Complaint and the record, the citizenship of JMAC is unclear. Absent clarification, the Court may lack jurisdiction over this case.

[¶7] Accordingly, the Plaintiff is **ORDERED TO SHOW CAUSE** why this case should not be dismissed for lack of subject matter jurisdiction by **March 6, 2024**. This can be accomplished by filing a response to this Order curing the defects to the Parties' citizenship allegations in the Amended Complaint. If there are allegations already contained in the record, Plaintiff may simply point to the record for the clarification. In addition, the Court will not consider the Motion for Temporary Restraining Order (Doc. No. 3) filed on February 28, 2024, until such time as the Court is satisfied it has jurisdiction over this matter. Counsel is encouraged to act promptly.

[¶8] **IT IS SO ORDERED.**

DATED February 28, 2024.

Daniel M. Traynor, District Judge
United States District Court

This is Exhibit "**I**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

A Commissioner for Oaths in and for the
Province of Alberta

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UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

JMAC Energy Services LLC,

Plaintiff,

vs.

Athabasca Minerals Inc.,

Defendant.

Case File No: 1:24-cv-037

PLAINTIFF'S RESPONSE TO ORDER OF FEBRUARY 28, 2024

Plaintiff JMAC Energy Services LLC ("JMAC") submits this response to the Court's February 28, 2024 Order to Show Cause Regarding Subject Matter Jurisdiction. In that Order, the Court noted that the Complaint inadequately alleged the citizenship of JMAC, and that therefore, the Court was unable to determine the citizenship of JMAC or to determine whether diversity existed. As set forth below, JMAC is a citizen of the state of Washington. As such, diversity exists between JMAC and Defendant Athabasca Minerals Inc. ("Athabasca"), which is a citizen of Canada.

As the Court stated in its Order, the citizenship of an LLC for purposes of diversity jurisdiction under 28 U.S.C. § 1332 is determined by looking to the citizenship of the LLC's members. Doc No. 7, ¶ 4. JMAC's sole member is Jon McCreary. Doc. No. 6, ¶ 2. JMAC now states and alleges that Mr. McCreary is a citizen of the state of Washington for purposes of § 1332, as he maintains his personal residence and domicile in Wenatchee, Washington and intends to remain there. Therefore, for purposes of diversity jurisdiction, JMAC is a citizen of Washington. As Athabasca is a citizen of Canada (Doc. No. 1, ¶¶ 6-7), diversity exits.

Counsel apologizes for the oversight in failing to initially plead Mr. McCreary's citizenship. If this Court requires anything additional to assure itself of jurisdiction in this matter, counsel will act promptly to supply it.

Dated: February 29, 2024

FABYANSKE, WESTRA, HART & THOMSON P.A.

By: */s/ Hugh D. Brown*

Hugh D. Brown (#390969)
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ATTORNEYS FOR PLAINTIFF

This is Exhibit "**J**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

A Commissioner for Oaths in and for the
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From: Douglas Nishimura
To: Jessica Cameron
Cc: Andrew Basi; Michael Selnes
Subject: [EXT] Re: AMI - Interim Financing Pay-out Statement Request [FMD-CANADA.FID12789198]
Date: March-01-24 7:54:57 AM

{CAUTION: This email originated from outside of Fasken. Exercise care before clicking links or opening attachments.}

I have passed on the request.

Get Outlook for iOS

From: Jessica Cameron <jcameron@fasken.com>
Sent: Friday, March 1, 2024 7:01:23 AM
To: Douglas Nishimura <DNishimura@fieldlaw.com>
Cc: Andrew Basi <abasi@ksvadvisory.com>; Michael Selnes <SelnesM@bennettjones.com>
Subject: RE: AMI - Interim Financing Pay-out Statement Request [FMD-CANADA.FID12789198]

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good Morning Doug,

Just following up on the email below and the request for a payout statement effective March 12, 2024. Thanks in advance.

Jessica Cameron (She/Her)
Partner

T +1 403 261 9468 | **jcameron@fasken.com**
Fasken Martineau DuMoulin LLP

From: Jessica Cameron
Sent: Wednesday, February 28, 2024 7:53 PM
To: Douglas Nishimura <DNishimura@fieldlaw.com>
Cc: Andrew Basi <abasi@ksvadvisory.com>; Michael Selnes <SelnesM@bennettjones.com>
Subject: AMI - Interim Financing Pay-out Statement Request [FMD-CANADA.FID12789198]

Good Evening Doug,

Further to the upcoming maturity date under the Interim Financing Facility between Athabasca Minerals Inc. and JMAC Energy Services LLC, can you please provide me with a pay-out statement effective March 12, 2024 (Maturity Date)? Thanks in advance.

Jessica Cameron (She/Her)
Partner

T +1 403 261 9468 | **jcameron@fasken.com**
Fasken Martineau DuMoulin LLP

This is Exhibit "**K**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

A Commissioner for Oaths in and for the
Province of Alberta

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Athabasca Minerals Inc., 2132561 Alberta Ltd., 2140534 Alberta Ltd.,
AMI Aggregates Inc., AMI RockChain Inc., AMI Silicia Inc., TerraShift Engineering Ltd.
Cash Flow Forecast
March 04, 2024 to June 02, 2024

For the week ending, In CAD	Notes	*Forecast* Week 1 10-Mar-24	*Forecast* Week 2 17-Mar-24	*Forecast* Week 3 24-Mar-24	*Forecast* Week 4 31-Mar-24	*Forecast* Week 5 7-Apr-24	*Forecast* Week 6 14-Apr-24	*Forecast* Week 7 21-Apr-24	*Forecast* Week 8 28-Apr-24	*Forecast* Week 9 5-May-24	*Forecast* Week 10 12-May-24	*Forecast* Week 11 19-May-24	*Forecast* Week 12 26-May-24	*Forecast* Week 13 2-Jun-24	Total
Opening cash balance	*1*	985,168	650,668	702,668	682,168	560,421	468,381	13,381	45,381	45,381	381	381	381	381	985,168
Cash Receipts															
Cash Collections	*2*	104,500	19,000	-	-	23,460	-	-	-	-	-	-	-	-	146,960
		104,500	19,000	-	-	23,460	-	-	-	-	-	-	-	-	146,960
Cash Disbursements															
Operating Expenses															
Wages, salaries, and benefits	*3*	2,000	57,000	-	57,000	-	-	53,000	-	53,000	-	-	-	-	222,000
Utilities	*4*	500	-	1,500	-	500	-		-	-	-	-	-	-	2,500
Other operating expenses	*5*	19,500	30,000	19,000	49,887	15,000	-	15,000	-	15,000	-	-	-	-	163,387
Rent	*6*	-	-	-	14,860	-	-	-	-	-	-	-	-	-	14,860
		22,000	87,000	20,500	121,747	15,500	-	68,000	-	68,000	-	-	-	-	402,747
Other Disbursements															
AMI Silica LLC - funding	*2*	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Total other disbursements	*7*	50,000	-	-	-	-	330,000	-	-	-	-	-	-	-	380,000
Anticipated capital expenditures	*8*	-	-	-	-	-	-	-	-	-	-	-	-	-	-
		50,000	-	-	-	-	330,000	-	-	-	-	-	-	-	380,000
Debt Repayment															
Interest & principal	10	-	2,980,000	-	-	-		-	-	-	-	-	-	-	2,980,000
Total disbursements		72,000	3,067,000	20,500	121,747	15,500	330,000	68,000	-	68,000	-	-	-	-	3,762,747
Professional Costs	9														
Company counsel legal fees		297,000	-	-	-	-	225,000	-	-	277,000	-	-	-	-	799,000
Trustee fees		60,000	-	-	-	60,000	-	-	60,000	-	-	-	-	-	180,000
Trustee's counsel fees		10,000	-	-	-	40,000	-	-	40,000	-	-	-	-	-	90,000
Total Professional Costs		367,000	-	-	-	100,000	225,000	-	100,000	277,000	-	-	-	-	1,069,000
Net cash flow		**(334,500)**	**(3,048,000)**	**(20,500)**	**(121,747)**	**(92,040)**	**(555,000)**	**(68,000)**	**(100,000)**	**(345,000)**	**-**	**-**	**-**	**-**	**(4,684,787)**
Interim financing															
Interim financing advances / (repayments)	*10*	-	3,100,000	-	-	-	100,000	100,000	100,000	300,000	-	-	-	-	3,700,000
Closing cash (operating line) balance		**650,668**	**702,668**	**682,168**	**560,421**	**468,381**	**13,381**	**45,381**	**45,381**	**381**	**381**	**381**	**381**	**381**	**381**

Management of Athabasca Minerals Inc., 2132561 Alberta Ltd., 2140534 Alberta Ltd., AMI Aggregates Inc., AMI RockChain Inc., AMI Silicia Inc., TerraShift Engineering Ltd. (collectively "**AMI**" or the "**Companies**") has prepared this forecasted cash-flow statement (the "**Cash Flow Forecast**") based on probable and hypothetical assumptions detailed in Notes 1 to 10. The Cash Flow Forecast has been prepared on a consolidated basis, as the Companies have been granted a consolidation order by the Court. The Cash Flow Forecast has been prepared solely for the purpose of supporting the Notice of Intention to Make a Proposal ("**NOI**") filed by each of the Companies on November 13, 2023. As such, readers are cautioned that it may not be appropriate for their purposes. The Cash Flow Forecast of the Companies is prepared in accordance with the provisions of the *Bankruptcy and Insolvency Act* and should be read in conjunction with the Trustee's Report on the Cash-flow Statement. Statement.

Dated at the City of Calgary in the Province of Alberta, this 4th day of March 2024.

Athabasca Minerals Inc., 2132561 Alberta Ltd., 2140534 Alberta Ltd.,
AMI Aggregates Inc., AMI RockChain Inc., AMI Silicia Inc., TerraShift Engineering Ltd.
Per:

David Churchill
Chief Financial Officer

KSV Restructuring Inc.

Per:

Andrew Basi, CPA, CA, CIRP, LIT
Managing Director

Athabasca Minerals Inc., 2132561 Alberta Ltd., 2140534 Alberta Ltd.,
AMI Aggregates Inc., AMI RockChain Inc., AMI Silicia Inc., TerraShift Engineering Ltd.
Notes to the Cash Flow Forecast
March 04, 2024 to June 02, 2024

Note 1
Consolidated cash balance for all Athabasca entities. Please note only the following entities have bank accounts: Athabasca Minerals Inc., AMI RockChain Inc. (formerly Aggregates Marketing Inc.), AMI Silica Inc. , TerraShift Engineering Ltd 2132561 Alberta Ltd. and 2140534 Alberta Ltd. The following entities do not have bank accounts: AMI Aggregates Inc. The Cash Flow Forecast assumes that the Transaction will close by April 30, 2024, however the actual closing date may be prior to or later than this forecasted dated. The Cash Flow Forecast does not reflect any cash transactions related to ResidualCo.

Note 2
Athabasca Minerals Inc. owns a 50% interest in AMI Silica LLC. The only cash flow for AMI is through monthly management fees and reimbursement of expenses from AMI Silica LLC. Monthly management fees are not being paid due to insufficient working capital in the AMI Silica LLC. AMI Silica LLC is currently experienced working capital shortfall that has been funded with a cash call by its two equity holders in December 2023. Cash is being very tightly managed in the LLC

Note 3
Athabasca Minerals Inc. has 9 employees. The other entities do not have employees. Payroll is mid month and month end.
Employee benefits are through Equitable Life and are paid at month end.

Note 4
Utilities are for EPCOR and Direct Energy for the Edmonton office. Calgary office utilies are included in rent

Note 5
Other operating expenses are as follows:Third party IT support, office supplies, water for office, Xerox for photocopier in Edmonton office, Telus mobilty, Shaw internet, Shaw phone, Website management,fuel for company vehicles, janitorial services for the Edmonton office.

Note 6
Rent for both office leases in Calgary and Edmonton. Property taxes are included in the monthly lease payments.

Note 7
Other disbursements include amounts for D&O run-off insurance that will need to be paid 7 days before closing. A Prosvita Land option payment of $50,000 is required to be paid in March which is required to retain the asset.

Note 8
Capital expenditures are required to maintain the in-basin sand development project leases in Montney BC.

Note 9
Trustee fees to KSV Restructuring and their legal counsel, Bennett Jones and to Fasken as AMI counsel and its US counsel with respect to US legal matters.

Note 10
AMI reached an agreement with JMAC Energy Services LLC to advance a DIP facility in the amount of $2,850,000 less $25,000 as a DIP facility fee. This was advanced in December 2023 and repayment of principal and accrued interest is due March 12, 2024. The Companies have entered into a new interim lending agreement with Badger that will provide new interim financing up to $5,300,000. AMI will initially draw $3,100,000 with proceeds used fully repay the JMAC DIP loan and interest expenses

This is Exhibit "**L**"

Referred to in the Affidavit of

JOHN DAVID CHURCHILL

Sworn before me this 4th day of

March, 2024

A Commissioner for Oaths in and for the
Province of Alberta

Kaitlyn Wong
Barrister & Solicitor
3400, 350 7th Avenue SW
Calgary, Alberta T2P3N9
Ph: 1-403-261-7388

INTERIM FINANCING TERM SHEET
(the "Agreement")

1.	**Borrowers:**	ATHABASCA MINERALS INC., TERRASHIFT ENGINEERING LTD., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., 2140534 ALBERTA LTD., and 2132561 ALBERTA LTD (individually a "**Borrower**" and collectively the "**Borrowers**")
2.	**Lender:**	BADGER MINING CORPORATION (the "**Lender**")
3.	**Principal Amount:**	Up to $5,300,000 (the "**Loan**")
4.	**Interest:**	The Loan shall bear interest at the fixed rate of 18% per annum calculated daily and paid monthly, on the last business day of each month, to be accrued.
5.	**Fee:**	A Structuring Fee will be paid to the Lender at the closing of the Loan in the amount of $25,000 and shall be deducted from the Loan.
6.	**Instrument:**	Debtor in possession loan, in the form of a non-revolving facility, subject to an order (the "**DIP Order**") of the Court of King's Bench of Alberta (the "**Court**"), satisfactory to the Lender in the restructuring proceedings of the Borrowers under the *Bankruptcy and Insolvency Act* (Canada) (the "**Proceeding**"), approving the Loan and granting the Lender a super-priority charge securing all the obligations of the Borrowers under this Agreement and any related loan documents, in the amount of $5,300,000 (the "**DIP Charge**"), over all of the Borrowers' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including the Borrowers' 50% membership interest in AMI Silica LLC and including all proceeds thereof (collectively, the "**Property**"), subject only to the Administration Charge in the amount of $350,000, securing the fees of counsel to the Borrowers, KSV Restructuring Inc. (the "**Proposal Trustee**"), and counsel to the Proposal Trustee, or such further amount as the Borrowers may request, the Lender may agree, and the Court may grant from time to time (the "**Administration Charge**").
7.	**Joint and Several Liability**	Each Borrower agrees that they shall be jointly and severally liable for all obligations described herein.
8.	**Drawdown:**	The Loan may be drawn in multiple advances (each an "**Advance**"). Advances will require the receipt of a drawdown request in form and substance satisfactory to the Lender and each Advance shall be subject to the Conditions Precedent. The Borrowers shall be permitted to obtain one or more Advances provided that: (a) any Advance made from time to time shall be in a multiple of $100,000, provided that the sum of all Advances shall not exceed the Loan; (b) the Borrowers shall provide the Lender at least two business days prior written notice of an Advance being requested, with such notice setting out the amount of the requested Advance and, in reasonable detail, the purposes for which the Borrowers will use such Advance. For the purpose of this notice, a business day

shall mean a business day in each of the state of Wisconsin and the province of Alberta (a "**Business Day**");

(c) no Event of Default as described herein shall have occurred or would result from any such Advance; and

(d) all Advances shall be deposited into a bank account controlled directly and solely by Athabasca Minerals Inc.

Notwithstanding the foregoing, the Lender understands and agrees that the Borrowers may make a drawdown request prior to the Closing Date, but any such Advance shall only be made after the granting of the DIP Order and at least 2 Business Days after such request has been made.

9. Use of Proceeds: To provide working capital for the Borrowers in accordance with the Borrowers Forecast (as defined below), including to:

(a) satisfy the Borrower's obligations under the previously approved Interim Financing Term Sheet between Athabasca Minerals Inc. and JMAC Energy Services LLC;

(b) satisfy any cash calls, whether for equity or debt financing from its members, made by AMI Silica LLC to the Borrowers or Borrower, as applicable;

(c) pay the Borrowers' ongoing operating costs; and

(d) pay ongoing professional fees incurred by the Borrowers in relation to their ongoing restructuring proceedings.

10. Closing Date: March 8, 2024.

11. Maturity: The Loan, including any outstanding principal, interest and fees, shall become fully due and payable on the earliest of the occurrence of any of the following (such earliest date being the "**Maturity Date**"):

(a) the date on which the Lender demands repayment after the occurrence of an Event of Default;

(b) the implementation of a proposal within the Proceeding, which has been approved by the requisite majorities of the Borrowers' respective creditors and by an order made by the Court;

(c) the sale of all or substantially all of the Property;

(d) the termination of the Proceeding;

(e) the complete or partial lifting of the stay of proceedings in the Proceeding; or

(f) April 30, 2024, or such other later date as may be communicated in writing by the Lender, in its sole and unfettered discretion, and otherwise agreed to by the Borrowers.

12. Events of Default: Events of Default shall include the following:

(a) if the DIP Order has been vacated, stayed or otherwise caused to be ineffective or is otherwise amended in a manner not approved by the Lender, in its sole discretion;

(b) any person successfully challenges the DIP Order or the validity, enforceability or priority of the DIP Charge in favour of the Lender;

(c) the Borrowers or any of them shall be deemed or adjudged a bankrupt or a receiver, interim receiver, or other similar official is appointed in respect of a Borrower;

(d) the Court grants a super-priority charge that is senior to or *pari passu* with the DIP Charge, other than the Administration Charge;

(e) the Borrowers or any of them seeks or obtains an increase to the Administration Charge without the prior written consent of the Lender;

(f) the Borrowers or any of them breaches any representation, warranty, or covenant described herein;

(g) unless waived by the Lender in writing, there is a material negative variance reported in the Borrowers' or AMI Silica LLC's cash flow reports, as described herein, in excess of 20% of any of the projected receipts, disbursements, or net cash flow, as applicable, in any two week period or on a cumulative basis;

(h) AMI Silica LLC makes a further cash call on its partners that the applicable Borrower or Borrowers are unable to satisfy;

(i) the applicable Borrower or Borrowers ceases to control at least a 50% interest in AMI Silica LLC;

(j) an order is entered by the Court without the Lender's consent which adversely effects the Lender or its rights hereunder or under the DIP Order;

(k) AMI Silica LLC becomes subject to any insolvency, bankruptcy, receivership, or reorganization proceedings, including under chapter 7 or chapter 11 of the U.S. *Bankruptcy Code,* or chapter 128 of Wisconsin state law;

(l) AMI Silica LLC, whether voluntarily or involuntarily, including by operation of law, sells, exchanges, leases, licenses, hypothecates, gifts, transfers, or is divested of any material portion of its assets and properties, whether such property is tangible, intangible, real, personal, or otherwise; and

(m) AMI Silica LLC incurs any indebtedness except in the ordinary course of business and as contemplated by the LLC Forecast.

13. Pre-Payment: The Borrowers may pre-pay the Loan, in full, at any time.

14. Security: The Security shall include:

(a) The DIP Charge covering all the Property. Unless ordered by the Court or otherwise agreed to in writing by the Lender, all other court-ordered charges, with the exception of the Administration Charge, shall be subordinated to the Loan and DIP Charge; and

(b) such other certificates, opinions, documents, agreements or instruments that the Lender may reasonably require.

15. Covenants: The Borrowers shall:

(a) comply with the provisions of any Court order made in or in connection with the Proceeding;

(b) provide bi-weekly (every two weeks) cashflow variance analysis reporting in respect of the Borrowers and AMI Silica LLC, as described further below;

(c) conduct all activities in accordance with the Borrowers Forecast as attached hereto as Appendix "A", unless such forecast is revised in accordance with this Agreement and such revision is approved by the Lender;

(d) keep the Lender informed of the Borrowers' activities and consult the Lender for important decisions that could affect its position or security, including with respect to the Borrowers' 50% interest in AMI Silica LLC, provided that the Borrowers shall not be required to follow any instructions in this regard;

(e) keep all payroll, taxes and all other similar priority obligations current;

(f) maintain all material contracts of the Borrowers;

(g) provide the Lender's counsel with draft court materials, including service list, as soon as reasonably practical for the Lender's review and comment, and such material shall be reasonably satisfactory to the Lender;

(h) provide notice to the Lender of any event that may lead to an Event of Default;

(i) carry on business of the Borrowers in the ordinary course, subject only to any statutory or court ordered restrictions imposed in connection with the Proceeding;

(j) not enter into any amendment, restatement, or other modification of the Operating Agreement of AMI Silica LLC and maintain its 50% membership interest therein;

(k) not borrow from any party other than the Lender or incur any indebtedness except in the ordinary course of business and as contemplated by the Forecasts; and

(l) keep detailed books and records of any intercompany borrowings or other transactions completed by or between the Borrowers or any of them.

16. Cash Flow Reporting

The Borrowers shall:

(a) provide the Lender with a cash flow forecast of the Borrowers, on a consolidated basis, which shall be attached hereto as Appendix "A" and reviewed for reasonableness by the Proposal Trustee (the "**Borrowers Forecast**"); and

(b) provide the Proposal Trustee with a cash flow forecast of AMI Silica LLC, which shall be reviewed for reasonableness by the Proposal Trustee (the "**LLC Forecast**", and together with the Borrowers Forecast, the "**Forecasts**").

The Forecasts shall cover the 8-calendar week period following the date of this Agreement and shall set out all expected receipts and expenditures of the Borrowers and AMI Silica LLC, inclusive of all operating disbursements, capital expenditures, and anticipated cash calls to be made by AMI Silica LLC to the Borrowers or any of them.

On a bi-weekly basis:

(a) the Borrowers shall provide the Lender a reporting package, the format and content of which shall be mutually agreed by the Borrowers and the Lender, each acting reasonably, which shall include the following reports for the Borrowers:

(i) a report showing the actual cash receipts and expenditures for each line item in the Borrowers Forecast for the preceding two-week period which: (i) compares actual amounts with forecasted amounts, and (ii) provides qualitative analysis of the variances between the actual and forecasted amounts; and

(ii) a report showing the cumulative cash receipts and expenditures for each line item in the Borrowers Forecast through to the date of the report which: (i) compares actual cumulative amounts with forecasted cumulative amounts, and (ii) provides qualitative analysis of the variances between the actual and forecasted amounts.

(b) the Borrowers shall provide the Proposal Trustee a reporting package, the format and content of which shall be mutually agreed by the Borrowers and the Proposal Trustee, each acting reasonably, which shall include the following reports to the Proposal Trustee:

(iii) a report showing the actual cash receipts and expenditures for each line item in the LLC Forecast for the preceding two-week period which: (i) compares actual amounts with forecasted amounts, and (ii) provides qualitative analysis of the variances between the actual and forecasted amounts; and

(iv) a report showing the cumulative cash receipts and expenditures for each line item in the LLC Forecast through to the date of the report which: (i) compares actual cumulative amounts with forecasted cumulative amounts, and (ii) provides qualitative analysis of the variances between the actual and forecasted amounts.

(c) the Proposal Trustee shall provide the Lender a report confirming whether, during the preceding two-week period, (i) AMI Silica LLC has operated in accordance with the LLC Forecast, (ii) there has been a material change to the financial or operating circumstances of AMI Silica LLC, and (iii) AMI Silica LLC has suffered a material negative variance as described at paragraph 12(g) hereof.

To the extent there are any material changes to the financial or operating circumstances of the Borrowers or AMI Silica LLC, the Borrowers shall prepare, in consultation with the Proposal Trustee, revised forecasts in form and detail acceptable to the Lender and the Proposal Trustee, as applicable, and in a manner consistent with the Forecasts. The revised forecasts shall not constitute an amendment to, or replace, the Forecasts unless otherwise agreed to by the Lender.

17. Conditions Precedent:

In addition to the matters described elsewhere in this Agreement, the completion of this Agreement and each drawdown of the Loan will be subject to the following conditions:

(a) Court approval of this Agreement and issuance of the DIP Order, in form and substance satisfactory to the Lender in its sole

discretion, which DIP Order shall, among other things, grant the DIP Charge in favour of the Lender, which DIP Charge shall rank in priority to all liens and encumbrances, including any court-approved charges over the Property, other than the Administration Charge; and

(b) payment of all of the Lender's reasonable professional fees, including legal fees, due diligence fees and expenses related to the Loan, all of which shall be accrued and added to the Principal Amount.

18. Representations and Warranties: The Borrowers hereby represent and warrant to the Lender, upon which the Lender relies in entering into this Agreement, and subject to the DIP Order, that:

(a) the transactions contemplated by this Agreement,

(i) are within the powers of the Borrowers;

(ii) have been duly authorized by all necessary corporate approval;

(iii) have been duly executed and delivered by or on behalf of the Borrowers;

(iv) upon the granting of the DIP Order, constitute legal, valid and binding obligations of the Borrowers, enforceable in accordance with their terms;

(v) upon the granting of the DIP Order, do not require the consent or approval of, registration or filing with, or any other action by, any governmental authority; and

(vi) will not violate the charter documents or by-laws of the Borrowers or any applicable law relating to the Borrowers;

(b) the business operations of the Borrowers have been and will continue to be conducted in material compliance with all laws of each jurisdiction in which business has been or is carried on;

(c) the Borrowers have obtained and maintains all licenses and permits, if any, required for the operation of its business which licenses and permits remain in full force and effect and no proceedings have been commenced or threatened to revoke or amend any such licenses or permits;

(d) the Borrowers do not maintain a pension plan;

(e) the Borrowers have filed all tax returns and paid all taxes owing for all prior fiscal periods, except taxes that are being contested in good faith by appropriate proceedings and for which adequate cash reserves are being maintained;

(f) the Borrowers maintain and shall continue to maintain adequate insurance coverage, of such type, in such amounts and against such risks as is prudent for a business of its nature with reputable insurers and contain coverage and scope acceptable to the Lender;

(g) other than i) as stayed pursuant to the provisions of the Proceeding and ii) the proceedings commenced by JMAC Energy Services LLC against Athabasca Minerals Inc. before the United States District Court, District of North Dakota, the Borrowers are not aware of any now pending or, to the knowledge of any of the

senior officers or directors of the Borrowers, threatened against the Borrowers, nor have the Borrowers received notice in respect of, any claim, potential claim, litigation, action, suit, arbitration or other proceeding by or before any court, tribunal, governmental entity or regulatory body, which would be reasonably likely to result in, individually or in the aggregate, a material adverse change; and

(h) no Event of Default has occurred and is continuing.

19. Remedies on Default: Upon the occurrence and during the continuance of an Event of Default, the Lender may immediately terminate the Loan, demand the repayment of same and, on notice to the Borrowers:

(a) apply to the Court for leave to exercise any and all of the rights and remedies of the Lender against the Borrowers or the Property under or pursuant to this Agreement, the DIP Order, or the DIP Charge, including without limitation:

(i) expanding the scope and nature of the powers of the Proposal Trustee;

(ii) appointing a receiver, receiver and manager, or interim receiver; or

(iii) obtaining a bankruptcy order against the Borrowers or one or more of their subsidiaries and for the appointment of a trustee in bankruptcy; and

(b) exercise all such other rights and remedies available at law or in equity or otherwise.

No single or partial exercise by the Lender of any right, power or remedy precludes or otherwise affects the exercise of any other right, power, or remedy to which the Lender may be entitled.

20. No Brokers: The Borrowers represent and warrant that no commissions or other payments shall be due to any broker, consultant or any other third party in connection with the Loan.

21. Credit Bid: The Borrowers acknowledge and agree that the Lender may, in its sole discretion, credit bid all amounts, or a portion thereof, owing in connection with this Loan, inclusive of Principal, Interest, and Fees, in connection with any transaction for the purchase and sale of all or a portion of the Property, including, without limitation, the transaction contemplated by the Subscription Agreement between Athabasca Minerals Inc. and Badger Mining Corporation dated February 9, 2024.

22. Further Assurances: The Borrowers will, at its expense, do, execute, acknowledge and deliver or will cause to be done, executed, acknowledged and delivered all and every such further and other acts, agreements, instruments, registrations, filings and assurances as the Lender may require for the purpose of giving effect to this Agreement.

23. Governing Law: This Agreement and all related agreements shall be governed by and construed in accordance with the laws of the Province of Alberta and the laws of Canada applicable therein.

24. Approval: The Loan is subject to obtaining the DIP Order in the Proceeding, which shall be sought by the Borrowers at no expense to the Lender. If the

DIP Order is not obtained, then neither the Borrowers nor the Lender shall have any further obligation with respect to the Loan.

25. Entire Agreement / Waiver: This Agreement represents the entire agreement between the Borrowers and the Lender (the "**Parties**") in respect of the matters provided for in this Agreement, and any changes, variations, waivers, or consents made to this Agreement are only effective if made in writing, including by way of e-mail, and, if applicable, approved by the Court. No course of conduct, indulgence or election not to act shall constitute or deemed to be a waiver.

26. Assignment: This Agreement shall enure to the benefit of and be binding upon the Parties and their respective successors and assigns. The Borrowers may not assign any of its right or obligations herein without the prior written consent of the Lender and approval of the Court. The Lender may, upon providing notice to the Borrowers, assign all or part of its rights or obligations under this Agreement to a related party, provided the Lender remains liable for its obligations hereunder.

27. Counterparts and Electronic Execution: This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Delivery by electronic transmission of an executed counterpart of a signature page to this Agreement shall be effective as delivery of an original executed counterpart of this Agreement. The words "execution," "execute", "signed," "signature," and words of like import in or related to any document to be signed in connection with this Agreement shall be deemed to include electronic signatures, or the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature or the use of a paper based recordkeeping system, as the case may be.

28. Notices: Any demand, notice or other communication to be given in connection with this Agreement shall be given in writing and shall be given by personal delivery or by electronic means of communication addressed to the recipients as follows:

TO THE BORROWERS:

ATHABASCA MINERALS INC
Canada Place, Suite 1730
407 2nd Street SW, Calgary AB T2P 2Y3
Attention: David Churchill / Dana Archibald
Phone: (403) 862 5231 / (780) 668 3366
E-mail: david.churchill@athabascaminerals.com /
dana.archibald@athabascaminerals.com

With a copy to:

Fasken Martineau DuMoulin LLP
Counsel to the Borrowers
350 7th Avenue SW, Suite 3400,
Calgary, Alberta T2P 3N9

Attention: Robyn Gurofsky / Jessica Cameron
Phone: (403) 261 9469 / (403) 261 9468
E-mail: rgurofsky@fasken.com / jcameron@fasken.com

TO THE LENDER:

BADGER MINING CORPORATION
409 South Church Street, Berlin, WI 54923
Attention: Adam Katz
Phone: (715) 896-6859
E-mail: AKatz@badgerminingcorp.com

With a copy to:

Blake, Cassels & Graydon LLP
Counsel to the Lender
855 2 Street SW, Suite 3500
Calgary Alberta, T2P 4J8

Attention: Linc Rogers / Christopher Keliher
Phone: (416) 863 4168 / (403) 260 9760
E-mail: linc.rogers@blakes.com / christopher.keliher@blakes.com

AND TO THE PROPOSAL TRUSTEE

KSV Restructuring Inc.
1165, 324 - 8th Avenue SW
Calgary, Alberta, T2P 2Z2

Attention: Andrew Basi
Phone: (403) 819 0111
E-mail: abasi@ksvadvisory.com

With a copy to:

Bennett Jones LLP
Counsel to the Proposal Trustee
4500 Bankers Hall East
855 2 Street SW
Calgary, AB T2P 4K7

Attention: Michael Selnes / Keely Cameron
Phone: (403) 298 3311
E-mail: SelnesM@bennettjones.com / CameronK@bennettjones.com

[*remainder of the page left intentionally blank; signature page follows*]

The Parties have executed this Agreement as of this 4th day of March, 2024.

BADGER MINING CORPORATION

Name: Adam Katz
Title: Chief Commercial Officer

I have authority to bind the corporation.

ATHABASCA MINERALS INC.

Name: Dana Archibald
Title: Chief Executive Officer

I have authority to bind the corporation.

TERRASHIFT ENGINEERING LTD.

Name: Dana Archibald
Title: Director

I have authority to bind the corporation.

AMI SILICA INC.

Name: Dana Archibald
Title: Director

I have authority to bind the corporation.

AMI AGGREGATES INC.

Name: Dana Archibald
Title: Director

I have authority to bind the corporation.

AMI ROCKCHAIN INC.

Name: Dana Archibald
Title: Director

I have authority to bind the corporation.

2140534 ALBERTA LTD.

Name: Dana Archibald
Title: Director

I have authority to bind the corporation.

2132561 ALBERTA LTD.

Name: Dana Archibald
Title: Director

I have authority to bind the corporation.