Clerk's Stamp

COURT FILE NUMBER & 25-3009380

BANKRUPTCY ESTATE

NUMBER

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 APPLICATION BY ATHABASCA

MINERALS INC. FOR APPROVAL OF REPLACEMENT INTERIM FINANCING

ADDRESS FOR SERVICE Fasken Martineau DuMoulin LLP

AND Attn: Robyn Gurofsky / Jessica Cameron

CONTACT 3400 First Canadian Centre

INFORMATION OF 350-7 Avenue SW PARTY FILING THIS Calgary, AB T2P 3N9

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File No. 318938.00024

#### NOTICE TO RESPONDENTS: SEE SERVICE LIST ATTACHED AS SCHEDULE "A"

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date March 8, 2024 Time 10:00 am

Where Edmonton Courts Centre, Edmonton Alberta

https://albertacourts.webex.com/meet/virtual.courtroom86

Before Whom The Honourable Justice J.S. Little

Go to the end of this document to see what else you can do and when you must do it.

#### Remedy claimed or sought:

All capitalized terms used but not otherwise defined herein shall have the meaning given to them
in the Applicants' previously filed application on February 26, 2024 (the "Transaction Approval
Motion").

- 2. The Applicants seek an order that,
  - (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) dismisses the cross-application filed by JMAC Energy Services LLC ("JMAC") seeking a stay of the Companies' application previously filed on February 26, 2024 (the "Transaction Approval Motion"), seeking various forms of relief, including approval of the Transaction to Badger by way of the Subscription Agreement and form of RVO;
  - (c) dismisses the cross-application filed by JMAC seeking to lift the stay of proceedings imposed by the within Proposal Proceedings, to allow JMAC to pursue the US Litigation (as defined below) commenced against the Applicant, AMI;
  - (d) establishes a litigation schedule respecting the Companies' Transaction Approval Motion, which motion will also include a determination on the merits of JMAC's cross-application seeking declaratory relief that a right of first refusal ("ROFR") is triggered by the Transaction;
  - (e) authorizes AMI to obtain new 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");

- (f) authorizes repayment in full of the amounts owing to JMAC under the Interim Financing Term Sheet approved by this Court on December 12, 2023 (the "First Order");
- (g) amends the Interim Lender's Charge provided in the First Order, by replacing JMAC with Badger as the Interim Lender and beneficiary of the Interim Lender's Charge, and increasing the amount of the Interim Lender's Charge to \$5,300,000.00; and
- (h) grants such further and other relief as the Companies may request and this Honourable Court may deem just.

#### Grounds for making this application:

#### **Procedural Background**

- 3. The debtor companies in the within proceeding (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.
- 4. Pursuant to the terms of the First Order, in these proceedings, the Court approved, among other things,
  - (a) a stalking horse sale and investment solicitation process ("SISP");
  - (b) interim financing for the Companies in accordance with the terms of the Interim Financing

    Term Sheet advanced by JMAC (the "Interim Financing Facility"); and
  - (c) an Interim Lender's Charge, granted in favour of JMAC to secure the Interim Financing Facility.
- 5. At the time that the First Order was granted, the Companies anticipated repaying the Interim Financing Facility from proceeds realized from a sale or investment generated through the SISP.
- 6. The Maturity Date for the Interim Financing Loan is March 12, 2024, at which time, all amounts owing under the Interim Financing Loan are due and payable to JMAC.
- 7. The SISP concluded on February 9, 2024, following the conclusion of the Auction. 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 the Applicants' Transaction Approval Motion.

#### **Dismissal of the Cross-Application**

- 8. JMAC opposes the Companies' Application to approve the Transaction. 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 Litigation") 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.
- 9. 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. No hearing date has been set with respect to JMAC's motion for a TRO or injunctive relief in the US Proceedings.
- 10. JMAC seeks to stay the Companies' Transaction Approval Motion, and in effect these Canadian insolvency proceedings, in favour of resolving its claims through the US Litigation.
- 11. While the LLC Operating Agreement, the operative document containing the ROFR, is governed by the laws of North Dakota, there is no attornment clause, no jurisdiction clause, and no venue selection clause. This Court has jurisdiction to hear and determine JMAC's declaratory relief in relation to the ROFR, in the context of the Companies' pending Transaction Approval Motion.
- 12. This Court has the jurisdiction and is the appropriate forum to hear and determine this dispute. This matter involves approval of a share transaction of a publicly traded Canadian company, who, together with its six Canadian subsidiaries, are subject to insolvency proceedings in Canada, including being subject to the benefit of a stay of proceedings. Moreover, there is already a pending application before this Court that can determine these issues. In order to avoid a multiplicity of proceedings, and in furtherance of the single proceeding model inherent in Canadian insolvency law, this Court should assert jurisdiction over the matter.

13. Additionally, JMAC has not satisfied the requisite onerous legal requirements to justify the granting of either a stay of the Transaction Approval Motion or lifting of the stay of proceedings. Such relief set-out in JMAC's cross-application should therefore be dismissed and a litigation plan established with respect to the ultimate merits of the dispute, being: i) the applicability of JMAC's asserted ROFR to the Transaction, and ii) approval of the Transaction itself, by way of the Subscription Agreement and RVO.

#### **Replacement Interim Financing**

- 14. In light of the foregoing, the Transaction will not close before the Maturity Date.
- 15. The Companies require interim financing to repay the existing Interim Financing Loan by the Maturity Date and to fund ongoing operational expenses, including professional fees, until it can close a transaction.
- 16. The Companies did not request an extension to the Maturity Date or provision of additional interim financing from their existing interim lender, JMAC, due to various factors, chief amongst them being the litigation commenced against the Companies by JMAC.
- 17. Instead, 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.
- 18. The terms of the Second Interim Financing Facility are similar to the terms of the existing Interim Financing Term Sheet that were approved by the Court in the First Order.
- 19. Further, one of the permitted uses of the Second Interim Financing Facility is the repayment in full of the Companies' obligations to JMAC under the existing Interim Financing Facility. Based upon JMAC's own evidence, if it is permitted to exercise its ROFR and pursue its own transaction, all of the Companies' creditors will be repaid in full, including itself as both a secured and unsecured creditor. There is therefore no prejudice to JMAC by the granting of the Second Interim Financing Facility, or any other stakeholder.
- 20. AMI believes that obtaining the Second Interim Financing Facility from Badger represents the best option available to them taking into account the Companies' financial position and circumstances, in particular, considering that Badger is the proposed purchaser of the Companies' business under the Transaction.

21. AMI is of the view that the funding made available under the Second Interim Financing Facility is in the best interests of the Companies' stakeholders.

#### Material or evidence to be relied on:

- 22. Affidavit No. 4 of John David Churchill, sworn March 4, 2024.
- 23. Affidavit No. 3 of John David Churchill, sworn February 26, 2024.
- 24. The Third Report of the Proposal Trustee, dated February 29, 2024.
- 25. The pleadings and materials previously filed in these Proposal Proceedings; and
- 26. Such further and other material or evidence as indicated by counsel and permitted by this Honourable Court.

#### **Applicable rules:**

- 27. Alberta Rules of Court, AR 124/2010.
- 28. Bankruptcy and Insolvency General Rules, CRC, c 368.
- 29. Such further and other rules as indicated by counsel and permitted by this Honourable Court.

#### **Applicable Acts and regulations:**

30. Bankruptcy and Insolvency Act, RSC 1985, c B-3, and in particular ss. 4.2, 50.6, and 69.

#### Any irregularity complained of or objection relied on:

31. None.

#### How the application is proposed to be heard or considered:

32. In person at the Edmonton Courts Centre, before the Honourable Justice J.S. Little, with the option for parties to appear virtually via WebEx: https://albertacourts.webex.com/meet/virtual.courtroom86.

#### WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

# Schedule "A": Service List

## **SERVICE LIST**

COURT FILE NO. **25-3009380** 

COURT Court Of King's Bench Of Alberta

In Bankruptcy And Insolvency

JUDICIAL CENTRE Calgary

PROCEEDING In the Matter of the Notice of Intention to make A Proposal of

Athabasca Minerals Inc., 2132561 Alberta Ltd., 2140534 Alberta Ltd., AMI Aggregates Inc., AMI RockChain Inc., AMI Silica Inc.

and TerraShift Engineering Ltd.

DOCUMENT <u>SERVICE LIST</u>

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		Ltd., 2140534	
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Attention:	Jessica Cameron	AMI RockChain	
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Ellian.	<u>Jeanneron(w) tasken.com</u>		
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BLAKE, CAS 199 Bay St #40 Toronto, ON I Attention: Email: Attention: Email:		Counsel to Interested Party (Badger Mining Corporation)	Email
BLAKE, CAS 199 Bay St #40 Toronto, ON 1 Attention: Email:		Counsel to Auditors to Debtors (Grant Thornton)	Email

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		Insurance Provider (Umbrella, CGL, Contents, Crime Coverage – AMI)	Email
		Insurance Provider (Excess D&O Coverage – AMI)	Email
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ALLIED WO		Insurance Provider (D&O Coverage – AMI)	Email

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ENVIROSHR 4378 116 Aver Calgary, AB 7 Attention: Email:	nue SE	Unsecured Creditor	Email
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102004623 SA 624 Rideau Ro Calgary, AB T Attention: Email:		Royalty Holder  (Prosvita Project 2140534 Alberta Ltd.)	Email
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Calgary Munic 12 <sup>th</sup> Floor, 800 I Calgary, AB T2 Email: <u>law.rece</u>	Macleod Trail SE G 2M3  eption@calgary.com 68-4634  Address: Station M	Unsecured Creditor	Email
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ISN SOFTWA c/o Lockbox 3 PO Box 578, S Calgary, AB T	Stn M	Unsecured Creditor	Courier
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		Purchase Program Contract – AMI RockChain)	Email
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	h Petroleum Plaza		
9915 – 108 Str			
Edmonton, AE	3 T5K 2G8		
Attention:	Marie Maingat		
Fax:	780-427-1029		
	NVIRONMENT AND PARKS	Surface Mineral	Courier
Operations Div		Lease - SML	
Provincial Pro	9	130021 (Firebag)	
	provals Section		
	h Petroleum Plaza		
9915 – 108 Str			
Edmonton, AE	3 13K 2G8		
Attention:	Jane Fletcher		
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AI REDTA E	NVIRONMENT AND PARKS	Licence of	Courier
Operations Div		Occupation –	Courier
Provincial Pro		DLO220117	
Provincial App		(Firebag)	
	h Petroleum Plaza	(Theoag)	
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Edmonton, AE			
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PO Box 167		(temporary	Courier
Arras, BC V10	C 1 B0	workspace agmt –	
	3-7612 or 1-250-219-4556	Montney)	
		,	
Attention:	Robert Marshall		
RALPH & RA	ALPH FARMS	Landowner	Courier
RR 1 Station L		(temporary	
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Attention:	George Joseph Ralph		

	SERVICE RECIPIENT	RECIPIENT STATUS	SERVICE VIA
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Tel: 1-250-843	x, BC V1G 4E7	workspace agmt – Montney)	
101. 1-230-642	5-7703	(Monutey)	
Attention:	Frances Margaret Adams		
DONNA LEE	KANE	Landowner	Email
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Rolla, BC V10	G 2G0	workspace agmt –	
	D I I	Montney)	
Attention: Email:	Donna Lee Kane		
Email:	dkane@pris.ca		
SHANNON G	GAIL McKINNON	Landowner	Email
238 Mountain	Park Drive SE	(temporary	
Calgary, AB T	<sup>2</sup> 2Z 2K3	workspace agmt -	
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CHERYL LY	NN McKENZIE	Landowner	Email
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Attention:	Cheryl Lynn McKenzie	,	
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Attention: Email:	Rick Reeson rreeson@millerthomson.com		

### **SERVICE LIST**

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1.	Canada Revenue Agency
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1.	EPCOR 2000-10423 101 Street NW Edmonton, AB T5H 0E8
2.	ISN SOFTWARE CANADA LTD. c/o Lockbox 310390 PO Box 578, Stn M Calgary, AB T2P 2J2
3.	ROBERT DALE MARSHALL PO Box 167 Arras, BC V1C 1 B0
4.	FRANCES MARGARET ADAMS RR1 Station LCD Dawson Creek, BC V1G 4E7
5.	RALPH & RALPH FARMS RR 1 Station LCD Dawson Creek, BC V1G 4E7
6.	ALBERTA ENVIRONMENT AND PARKS Operations Division Provincial Programs Branch Provincial Approvals Section 5th Floor, South Petroleum Plaza 9915 – 108 Street Edmonton, AB T5K 2G8