

COURT FILE NUMBER **25-3009380**

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



NB

C22001

COM March 8, 2024

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.

APPLICANTS

ATHABASCA MINERALS INC., AMI SILICA
INC., AMI AGGREGATES INC., AMI
ROCKCHAIN INC., TERRASHIFT
ENGINEERING LTD., 2132561 ALBERTA LTD.,
and 2140534 ALBERTA LTD.

DOCUMENT

**BRIEF OF THE APPLICANTS: APPROVAL
OF SALE AND REVERSE VESTING ORDER**

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I. INTRODUCTION:

1. On November 13, 2023 (the “**Filing Date**”), each of Athabasca Minerals Inc. (“**AMI**”), AMI Silica Inc. (“**Silica**”), AMI Aggregates Inc. (“**Aggregates**”), AMI RockChain Inc. (“**RockChain**”), TerraShift Engineering Ltd. (“**TerraShift**”), 2132561 Alberta Ltd. (“**231**”), and 2140534 Alberta Ltd. (“**214**” and collectively with AMI, Silica, Aggregates, RockChain, TerraShift, and 213 the “**Applicants**” or the “**Companies**”), filed a notice of intention to make a proposal to their creditors (“**NOI**”) pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the “**BIA**”)¹ with the Office of the Superintendent of Bankruptcy (collectively, the “**Proposal Proceedings**”). KSV Restructuring Inc. was appointed as proposal trustee of each of the Applicants (in such capacity, the “**Proposal Trustee**”) respecting the Proposal Proceedings.
2. The commencement of these Proposal Proceedings followed several years of financial difficulties for the Companies and the failure to close a Court-approved plan of arrangement with JMAC Energy Services LLC (“**JMAC**”).² JMAC is AMI’s first secured creditor, 50% joint venture partner in AMI Silica LLC (“**AMIS LLC**”), holds an approximate 20% equity interest in AMI, and its principal, Mr. Jon McCreary, was a former director of AMI, resigning in or about November 2023.³ Additionally, JMAC agreed to act as the Companies’ interim lender and stalking horse bidder in the within Proposal Proceedings, submitting a stalking horse bid in the amount of \$13 million (the “**Stalking Horse Bid**”).
3. On this Application, the Companies are not seeking approval of the Stalking Horse Bid with JMAC, but rather a Superior Bid in the amount of \$29.2 million submitted by Badger Mining Corporation (“**Badger**”) in accordance with and pursuant to the Companies’ Court-approved sales and investment solicitation process (“**SISP**”). The transaction with Badger is more than double JMAC’s Stalking Horse Bid and would result in all of the Companies’ creditors being paid in full, including JMAC, as well as result in returns to the Companies’

¹ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [BIA] [TAB 1].

² Affidavit of John David Churchill, sworn December 6, 2023 at paras 36 -40 [First Churchill Affidavit].

³ First Churchill Affidavit at paras 34 -35.

shareholders of an estimated \$0.15 to \$0.19 cents per share.⁴ Conversely, under the Stalking Horse Bid shareholders could receive up to an estimated \$0.00 to \$0.005 per share, if anything at all.⁵

4. Notwithstanding the significant benefits of the Badger transaction, of which JMAC would also be a beneficiary as a creditor and shareholder of AMI, the Companies understand that JMAC may oppose the requested approval of the Badger transaction. That opposition is based upon an assertion by JMAC that it is entitled to exercise a right of first refusal (“**ROFR**”), triggered by the proposed transaction. The Companies submit that not only is JMAC’s ROFR inapplicable to the proposed transaction, JMAC had the ability to exercise same through its participation in the Auction pursuant to the terms of the Court-approved SISP.
5. Consequently, on this Application, the Applicants seek various heads of relief, including:
 - (a) abridging the time for service of notice of this Application and the supporting materials, if necessary, and deeming service thereof to be good and sufficient;
 - (b) extending the Stay Period for 45 days up to and including April 25, 2024 (the “**Stay Extension**”);
 - (c) approving the transaction for the sale of substantially all of the Companies’ Business and Property via a share transaction (the “**Transaction**”) to Badger Mining Corporation (“**Badger**”) pursuant to a subscription agreement between the Companies and Badger dated February 9, 2024 (the “**Subscription Agreement**”);
 - (d) granting the proposed reverse vesting order (“**RVO**”), on substantially the same terms as those set out in the draft form of order appended to the Companies’ application;
 - (e) approving certain relief pursuant to the RVO, including amongst other things, the addition of a soon to be incorporated private Alberta numbered company

⁴ Affidavit of John David Churchill, sworn February 26, 2024 at para 65 [Third Churchill Affidavit].

⁵ Third Churchill Affidavit at para 65.

(“**ResidualCo**”) as the debtor and Applicant to the within Proposal Proceedings, the appointment of the first director of ResidualCo, and the removal of the Companies from the within Proposal Proceedings;

(f) approving certain releases; and

(g) such further and other relief as counsel may advise and this Honourable Court may permit.

6. The Applicants are supported on this Application by the Proposal Trustee.

II. **FACTS:**

a. **The SISP**

7. Following the commencement of the within Proposal Proceedings, on December 12, 2023, the Companies obtained an order from this Court (the “**First Order**”), which, amongst other things: i) extended the stay of proceedings and time to file a proposal to the Companies’ creditors up to and including January 26, 2024 (the “**Stay Period**”), ii) approved the SISP, iii) authorized the Companies to engage Canaccord Genuity Corp. to act as the sales advisor to the Companies for the purposes of the SISP (the “**Sales Advisor**”), iv) authorized the Companies to enter into an interim financing facility (the “**Interim Financing Facility**”) with JMAC acting as the debtor-in-possession lender, and v) approved several priority charges.

8. Subsequently, on January 26, 2024 this Court granted a further extension of the Stay Period up to and including March 11, 2024 (the “**Second Order**”).

9. The Court-approved SISP had a single phase and the deadline for final bids was January 31, 2024 (the “**Bid Deadline**”), with the potential for a run-off Auction to be held on February 9, 2024. JMAC acted as the stalking horse bidder (in such capacity, the “**Stalking Horse Bidder**”) in the SISP. The purchase price under the Stalking Horse Bid was \$13

million, for substantially all of the Companies' Business and Property, including AMI's 50% membership interest in AMIS LLC.⁶

10. The terms of the Stalking Horse Bid were detailed in a non-binding term sheet (the "**Stalking Horse Term Sheet**"), and included an Expense Reimbursement of \$200,000.00, payable to JMAC by the Companies in the event the Stalking Horse Bid was not the Successful Bid in the SISP (the "**Expense Reimbursement**").⁷
11. The SISP was conducted by the Court-appointed Sales Advisor, who undertook extensive efforts to market the Companies' Business and Property.⁸
12. The Sales Advisor received one Superior Bid by the Bid Deadline from Badger. Pursuant to the SISP, JMAC was required to provide definitive documents respecting its Stalking Horse Bid by the Bid Deadline. JMAC failed to do so; however, the Companies, in consultation with the Proposal Trustee and Sales Advisor, waived strict compliance with the SISP requirements in order to create competitive tension in the sales process and progress the matter to an Auction.⁹
13. In the days leading up to the Auction, the Companies progressed and clarified definitive documents with each of Badger and JMAC. In order to meaningfully compare the total consideration offered by each of JMAC and Badger under their respective definitive documents the Companies, in consultation with the Proposal Trustee and the Sales Advisor, developed the concept of a "Bid Value Differential". This concept was necessary given the difficulties experienced by interested parties during the SISP to accurately ascertain the scope of the assumption of liabilities of the Stalking Horse Bidder in their final definitive documents. As compared to JMAC's Stalking Horse Bid, if Badger's bid resulted in an overall lower net value to the Companies' estate due to the treatment of certain claims, then Badger was given the opportunity to either i) revise the structure of its transaction, or ii)

⁶ Third Churchill Affidavit at para 14.

⁷ First Churchill Affidavit at para 94.

⁸ Third Churchill Affidavit at para 15.

⁹ Third Churchill Affidavit at para 16.

commit to providing additional cash consideration equal to the value differential, which was termed the Bid Value Differential.¹⁰

14. Ultimately, Badger was required to provide a Bid Value Differential of up to \$111,000 due to the fact that Badger's bid may result in the creation of employee claims arising from the potential termination of employment for certain employees, whose employment agreements JMAC was willing to assume. Each of Badger and JMAC were advised of this proposed approach prior to the commencement of the Auction and agreed to proceed in this fashion.¹¹
15. On February 9, 2024, the Proposal Trustee held a virtual run-off auction (the "**Auction**") pursuant to the Court-approved SISP and the Auction Rules, as developed by the Proposal Trustee, in consultation with the Companies and Sales Advisor. Each of Badger and JMAC received a copy of the Auction Rules, confirmed their participation in the Auction as Auction Bidders, and agreed to participate in the Auction in accordance with the terms of the Auction Rules and the SISP.¹²
16. The opening bid at the Auction was \$13.1 million. The opening bid was based on the fact that Badger submitted a Superior Bid in the amount of \$13.2 million, which was comprised of a purchase price of \$13 million plus the Expense Reimbursement of \$200,000.¹³
17. The terms of the SISP and Auction Rules required participants to submit bids in an amount equal to the Minimum Bid Increment of \$100,000. The right to bid first in each round alternated between JMAC and Badger.¹⁴
18. In round 161 of the Auction, both JMAC and Badger confirmed their participation to be afforded the right to participate in the next round of bidding and agreed to bid \$29.1 million for substantially all of the Companies' Business and Property.¹⁵

¹⁰ Third Churchill Affidavit at para 19.

¹¹ Third Churchill Affidavit at para 19-20 including Exhibits "E", "F", "H", "I".

¹² Third Churchill Affidavit at para 24 including Exhibits "H", "I".

¹³ Third Churchill Affidavit at para 26.

¹⁴ Third Churchill Affidavit at para 27.

¹⁵ Third Churchill Affidavit at para 29.

19. In round 162 of the Auction, at a bid price of \$29.2 million, JMAC declined to bid first, and then Badger subsequently confirmed its bid at \$29.2 million. At that point, the Proposal Trustee closed the Auction pursuant to the SISP and Auction Rules.¹⁶
20. The last bid submitted by JMAC at the Auction was \$29.1 million.¹⁷
21. Following the conclusion of the Auction, the Proposal Trustee advised the Companies, JMAC and Badger, that Badger's bid of \$29.2 million had been selected as the Winning Bid and JMAC's bid of \$29.1 million would stand as the Back-Up Bid, all pursuant to and in accordance with the terms of the SISP.¹⁸
22. The Successful Bid represents the highest and best offer available pursuant to the terms of the SISP and is at least \$16 million more than the value of the initial bids received from each of JMAC and Badger, being more than double the original value of each initial bid. The Companies now seek approval from this Court of the Transaction.¹⁹

b. The Transaction

23. Following the Auction and conclusion of the SISP, the Companies and Badger, with support from the Proposal Trustee, have been working diligently together to finalize definitive documents respecting the Transaction, which culminated in the execution of the Subscription Agreement.
24. The key terms of the Subscription Agreement are set out in detail at paragraphs 36 to 37 of the Third Churchill Affidavit, and will be further referenced in the relevant portion of the Companies' legal argument below regarding approval of the Subscription Agreement and RVO.

¹⁶ Third Churchill Affidavit at para 30.

¹⁷ Third Churchill Affidavit at para 31.

¹⁸ Third Churchill Affidavit at para 32 including Exhibit "J".

¹⁹ Third Churchill Affidavit at para 33.

c. JMAC's Asserted ROFR

25. As noted above, JMAC may oppose the approval of the Transaction and Subscription Agreement by this Court on the basis they are asserting a contractual ROFR. The ROFR is contained at Article 11.02(b) of the Operating Agreement dated July 19, 2021, between AMI and JMAC and which Operating Agreement forms the constating document for AMIS LLC.²⁰ As it currently stands, AMI and JMAC each own a 50% equity and membership interest in AMIS LLC.
26. Since the commencement of the within Proposal Proceedings, JMAC has expressly reserved its rights with respect to the ROFR. JMAC has advised that it is its position that a corporate transaction for the sale of the shares of AMI triggers its right to exercise the ROFR and the current circumstances include such a transaction. The ROFR states it applies to a sale of AMI or JMAC's Membership Interest or Economic Interest (as defined in the Operating Agreement) in AMIS LLC.²¹
27. The Companies have consistently maintained and advised JMAC throughout these Proposal Proceedings that a transaction for the sale of shares of AMI would not trigger the ROFR as no sale of the Membership Interest or Economic Interest at the AMIS LLC level was involved.²²
28. On January 23, 2024, just prior to the Bid Deadline, JMAC through its legal counsel reiterated its position regarding the applicability of the ROFR to the Companies and demanded that their correspondence outlining the same be included in the VDR. On January 25, 2024, the Companies replied through their legal counsel outlining their position that the ROFR did not apply in the given circumstances. Both JMAC and AMI's letters were included in the VDR.²³

²⁰ Third Churchill Affidavit at para 59 and Exhibit "L".

²¹ Third Churchill Affidavit at para 60 including Exhibit "L" .

²² Third Churchill Affidavit at para 60.

²³ Third Churchill Affidavit at para 63 including Exhibits "M" and "N".

29. Following the announcement of Badger as the Winning Bidder, the Companies, through their legal counsel, contacted legal counsel to JMAC to request confirmation of their formal position on the application of the ROFR to the Transaction with Badger. JMAC responded that they maintained their position on the ROFR and believed the ROFR should be exercised at a purchase price of \$13.1 million, and not the Winning Bid price of \$29.2 million, which is an approximately \$16.1 million difference in value, and \$13 million less than what JMAC bid at the Auction.²⁴
30. Despite JMAC's assertion that they would commence legal proceedings against the Companies in the State of North Dakota in regard to the applicability of the ROFR to the Transaction, JMAC has not initiated such proceedings to date.

III. ISSUES:

31. The issues to be considered on this Application are whether:
- (a) It is appropriate to approve the Transaction and the Subscription Agreement between the Companies and the Purchaser;
 - (b) It is appropriate and reasonably necessary to issue the RVO;
 - (c) The proposed releases should be granted; and
 - (d) The Stay Extension up to and including April 25, 2024 is appropriate and necessary.

IV. LAW & ANALYSIS:

a. BIA General Principles

32. The BIA is remedial legislation, which should be given a broad and liberal interpretation.²⁵ The purpose of the BIA proposal provisions is to enable companies to compromise or otherwise restructure their debts to avoid the devastating social and economic effects of

²⁴ Third Churchill Affidavit at para 64.

²⁵ 9354-9186 *Québec Inc v Callidus Capital Corp*, 2020 SCC 10 at para 40 [*Callidus*] [TAB 2]; *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at paras 1, 15 [*Century Services*] [TAB 3].

insolvency, by preserving its business in a manner that is intended to cause the least amount of harm to the company, its stakeholders, and the communities in which it carries on business.²⁶ Further, with parallel restructuring regimes now an accepted feature of the insolvency law landscape, to the extent possible, insolvency laws should be given a harmonious interpretation.²⁷

b. The Transaction and the Subscription Agreement Should be Approved

33. The Court possesses express statutory authority to authorize a sale or disposition of a company's assets under section 65.13 of the BIA.²⁸ The Court further possesses the discretionary power to override federal or provincial law to authorize a sale even in the absence of shareholder approval.²⁹ In the CCAA context, the courts have stated that liquidation provides innovative solutions for the benefit of stakeholders, whether through the sale of the company as a going-concern, an "en bloc" sale of assets, a partial liquidation, or a piecemeal sale of assets.³⁰
34. Section 65.13(4) of the BIA sets out the relevant factors to be considered by the courts in their approval of a sale transaction:
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the Proposal Trustee approved the process leading to the proposed sale or disposition;
 - (c) whether the Proposal Trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which creditors were consulted in the process;

²⁶ *Callidus, supra* at paras 40-42 [TAB 2].

²⁷ *Century Services, supra* at para 24 [TAB 3].

²⁸ BIA, *supra* s 65.13 [TAB 1].

²⁹ BIA, *supra* s 65.13(1) [TAB 1].

³⁰ *Callidus, supra* at para 43 [TAB 2].

- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account the market value of the assets.³¹
35. The factors listed are not intended to form an exhaustive list nor create a checklist to be followed by the courts in every transaction.³² The criteria established by the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp* continue to be relevant in the determination of whether to approve a sale.³³ The *Soundair* factors are as follows:
- (a) whether the Court-appointed officer has made sufficient efforts to get the best price and has not acted improvidently;
 - (b) the interests of all parties;
 - (c) the efficacy and integrity of the process undertaken to obtain the offer; and
 - (d) whether the process involved unfairness.³⁴
36. The Transaction and the Subscription Agreement satisfy the above factors as follows:
- (a) the SISP was commercially reasonable and conducted in accordance with the First Order, which provided for a single phase sales process that allowed the market to be appropriately canvassed and allowed all interested parties time to perform their own due diligence;³⁵
 - (b) the SISP utilized the Stalking Horse Bid to set the floor price for the Companies' Business and assets and to create a competitive process. Further, the Companies waived strict compliance with the SISP requirements for JMAC, generating further

³¹ BIA, *supra* s 65.13(4) [TAB 1].

³² *Target Canada Co (Re)*, 2015 ONSC 1487 at para 16 [*Target*] [TAB 4].

³³ *Royal Bank of Canada v Soundair Corp*, 1991 CanLII 2727 (ONCA) at para 16, 83 DLR (4th) 76 [*Soundair*] [TAB 5].

³⁴ *Soundair*, *supra* at para 16 [TAB 5].

³⁵ Third Churchill Affidavit at paras 13, 15.

competitive tension in the process through the Auction in order to receive the highest price possible;³⁶

- (c) the Sales Advisor ran the SISP in consultation with the Companies and under the supervision of the Proposal Trustee;³⁷
- (d) the Successful Bid is sufficient to pay out all of the Companies' creditors and anticipated to make residual distributions to the Companies' shareholders, the latter of which would be unlikely to occur under the Stalking Horse Bid or in a liquidation scenario;³⁸
- (e) the Transaction presents a going concern solution for the Companies' Business and assets as it contemplates the continuation of the Companies' operations;³⁹
- (f) the Proposal Trustee has indicated that they do not believe that spending further time and resources marketing the Company's assets will result in a superior transaction;
- (g) the Interim Financing Facility has a maturity date of March 12, 2024 (the "**Maturity Date**"). The Companies require the funds received from closing the Transaction to repay their indebtedness to JMAC under the Interim Financing Facility in full by this date; and
- (h) the Proposal Trustee expressed its support for the Transaction and that the terms and conditions of the Subscription Agreement are commercially reasonable.

37. For the above noted reasons, the Applicants submit that the Transaction and the Subscription Agreement should be approved.

³⁶ Third Churchill Affidavit at paras 14, 16.

³⁷ Third Churchill Affidavit at para 15.

³⁸ Third Churchill Affidavit at para 35.

³⁹ Third Churchill Affidavit at para 44.

c. The Reverse Vesting Order Should be Granted

38. “Reverse vesting order” or “RVO” transactions differ from traditional asset sales and vesting orders, as the former allows certain excluded assets and liabilities to be vested “out” of the debtor company and into a residual company (often referred to as a residualco) or residual trust. The debtor company is then left with only desired assets and liabilities which are acquired by the purchaser pursuant to a corporate transaction whereby the shares of the debtor company are purchased. At the conclusion of the insolvency proceedings, the residual company or trust is typically put into a bankruptcy.⁴⁰
39. Courts possess a well-established authority to approve RVO transactions pursuant to sections 65.13 and 183 of the BIA when the circumstances warrant such an order to be made and have approved such orders in recent Proposal Proceedings.⁴¹ Further, Canadian courts routinely approve RVO transactions in insolvency proceedings under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (the “CCAA”).⁴² On application to approve an RVO transaction, the relevant question before the courts is then whether the relief sought is appropriate in the given circumstances and whether stakeholders are treated reasonably and fairly to the extent they can be in such circumstances.⁴³
40. The courts have cautioned that granting RVOs should not be considered the norm in insolvency proceedings and each case should be scrutinized to determine whether the circumstances present are appropriate for an RVO transaction.⁴⁴ Conversely, the courts

⁴⁰ *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354 at para 27 [*Just Energy*] [TAB 6].

⁴¹ BIA, *supra* ss 65.13(7), 183 [TAB 1]; Order of the Honourable Justice Walker, granted May 10, 2023, *In the Matter of the Notice of Intention to Make a Proposal of Payslate Inc*, Supreme Court of British Columbia in Bankruptcy and Insolvency Court No. B-220504, paras 3-5 [*Payslate Order*] [TAB 7]; Order of the Honourable Justice Conway, granted March 1, 2022, *In the Matter of the Notice of Intention to Make a Proposal of Ayanda Cannabis Corporation*, Ontario Superior Court of Justice [Commercial List] Court File No. BK-22-02802344-0035, para 5 [*Ayanda Order*] [TAB 8]; Order of the Honourable Justice Penny, granted December 17, 2021, *In the Matter of the Notice of Intention to Make a Proposal of Junction Craft Brewing Inc*, Ontario Superior Court of Justice [Commercial List] Court File No. 31-2774500, para 5 [*Junction Order*] [TAB 9].

⁴² *Quest University Canada (Re)*, 2020 BCSC 1883 at paras 40, 157 [*Quest*] [TAB 10]; *Just Energy*, *supra* at para 29 [TAB 6]; *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828 at para 85 [*Blackrock*] [TAB 11].

⁴³ *Quest*, *supra* at para 157 [TAB 10]; *Harte Gold Corp (Re)*, 2022 ONSC 653 at para 29 [*Harte Gold*] [TAB 12].

⁴⁴ *Just Energy*, *supra* at para 34 [TAB 6].

have recognized that, notwithstanding their cautions, RVOs are commonly used for the sale of businesses in highly regulated industries, such as energy, cannabis, and mining.⁴⁵

41. While in the context of CCAA proceedings, McEwan J noted in *Just Energy* that an RVO should be granted where:
- (a) the debtor operates in a highly regulated environment where existing permits, licenses, or other rights would be difficult or impossible to reassign to a purchaser;
 - (b) the debtor is party to certain key agreements that would be difficult to reassign to a purchaser; and
 - (c) where maintaining the existing legal entity preserves certain tax attributes that would otherwise be lost in a traditional vesting order transaction.⁴⁶
42. In determining whether an RVO is appropriate in the given circumstances, the courts are to consider the *Soundair* principles detailed above, as well as the salient factors outlined by the Ontario Superior Court in *Harte Gold*, which are specific to the context of the RVO transaction (the “**Harte Gold Factors**”). The Harte Gold Factors are:⁴⁷
- (a) Why is the RVO necessary in the present case?
 - (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
 - (c) Is any stakeholder worse off under the RVO structure than they would be under any other viable alternative?

⁴⁵ See e.g., *Arrangement relatif à Nemaska Lithium Inc*, 2020 QCCA 1488 [TAB 13]; *Just Energy*, *supra* at para 34 [TAB 6]; *Harte Gold*, *supra* at para 29 [TAB 12]; *Blackrock*, *supra* at para 85 [TAB 11]; *Fire & Flower Holdings Corp et al*, 2023 ONSC 4934 [TAB 14].

⁴⁶ *Just Energy*, *supra* at para 34 [TAB 6].

⁴⁷ *Harte Gold*, *supra* at para 38 [TAB 12]; See also *In the Matter of the Companies’ Creditors Arrangement Act and In the Matter of CannaPiece Group Inc*, 2023 ONSC 841 at para 58 [TAB 15]; *Just Energy*, *supra* at para 33 [TAB 6]; *PaySlate Inc (Re)*, 2023 BCSC 608 at para 107 [PaySlate] [TAB 16]; *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at para 12 [TAB 17].

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licenses, permits, and any other intangible assets being preserved under the RVO structure?

i. The RVO is Necessary in the Present Case

43. The most significant factor in favour of the completion of the Transaction through an RVO structure is the importance of preserving the Land Agreements, Licenses, Mineral Claims and Permits required to continue the Companies' aggregate and industrial mineral operations. The Companies currently hold 11 Land Agreements, 4 Licenses, 6 Mineral Claims, and 9 Permits critical for such operations in Western Canada. Additionally, AMIS LLC holds numerous regulatory permits and approvals for operating the Companies' interests in the United States.
44. The RVO would allow for the complete preservation of these regulatory authorizations and would avoid any delays, costs, or unnecessary risks to the completion of the Transaction from having to transfer the same to the Purchaser in the absence of the RVO. This is of particular importance in this case as whether all of these interests would successfully transfer without the RVO structure is questionable. Further, the numerous regulatory authorizations required for the operation of the Hixton mine held by AMIS LLC would be preserved in the RVO structure, as AMI's 50% interest in AMIS LLC is a Retained Asset.
45. First, certain of the Mineral Claims are held by AMI in the Montney region of British Columbia, which region is currently subject to a moratorium on any new mineral claims put in place by the Government of British Columbia. While AMI's Mineral Claims were grandfathered, as they held such Mineral Claims prior to the moratorium taking effect, it is no longer possible for new mineral interests to be granted on those lands. As such, if AMI had to transfer those Mineral Claims, it may not be possible and the interests might revert back to the Province of British Columbia.⁴⁸
46. Additionally, five of AMI's Land Agreements pertain to Option to Purchase Agreements for the Prosvita Sand Project and AMI understands that the counterparty to such

⁴⁸ Third Churchill Affidavit at para 40.

agreements is unlikely to consent to a transfer of the options to the Purchaser, which could decrease the Companies' overall value.⁴⁹

47. The Companies also currently have approximately \$18.3 million in tax attributes (the “**Tax Attributes**”), which cannot be transferred to the Purchaser under a traditional asset purchase. The RVO structure allows for the preservation of the Tax Attributes to increase the value of the estate.

48. As stated in *Just Energy* and as noted in the B.C. Supreme Courts' second decision in the proposal proceedings of PaySlate Inc., preservation of tax attributes favours approval of an RVO structure.⁵⁰

49. Approval of the RVO is a condition to closing the Transaction, and the Purchaser will not pursue the Transaction through any other alternative structure.⁵¹

50. It is notable that the Stalking Horse Bid also required the use of an RVO structure.⁵²

51. The Companies do not have sufficient time to complete the Transaction through a proposal to their creditors prior to the Maturity Date under the Interim Financing Facility.⁵³ The proposed RVO maintains the benefits associated with a proposal to creditors, while providing increased certainty and decreased costs, risk, and instability to stakeholders.

ii. The RVO Produces a Favourable Economic Result

52. In the absence of the RVO, there would be a significant delay in transferring the Land Agreements, Licenses, Mineral Claims, and Permits to the Purchaser. The granting of the RVO is a material condition of the Transaction Documents and therefore vital to the closing of the Transaction.⁵⁴

⁴⁹ Third Churchill Affidavit at para 39.

⁵⁰ *Just Energy, supra* at para 34 [TAB 6]; *PaySlate Inc (Re)*, 2023 BCSC 977 at paras 4, 11 [TAB 18].

⁵¹ Third Churchill Affidavit at para 46.

⁵² Third Churchill Affidavit at para 47.

⁵³ Third Churchill Affidavit at para 45.

⁵⁴ Third Churchill Affidavit at para 37(j), 42.

53. Based on the above reasons, there does not appear to be a viable alternative that would produce a more favourable economic result than the proposed RVO. The RVO is the best available option as evidenced by the Purchaser's insistence on the use of the RVO transaction.⁵⁵
54. Unlike most RVO transaction approval motions, where the only alternative option available to a debtor company is a complete liquidation, the Company has an alternative transaction in the form of the Stalking Horse Bid. However, rather than the \$29.1 million Back-up Bid, the Stalking Horse Bidder has advised that it is of the position that it should be entitled to exercise the ROFR in the AMIS LLC Operating Agreement and to pursue its transaction at the purchase price of \$13.1 million, which price was the opening bid at the Auction. Exercising the ROFR at the Stalking Horse Bid price would result in a direct decrease in value to the estate of approximately \$16.1 million less than the Transaction. It is also \$13 million less than JMAC itself was willing to bid at the Auction. Very clearly, the Transaction, including approval of the RVO, produces the most favourable economic result for the Companies and its stakeholders in these circumstances.⁵⁶

iii. No Stakeholders are Worse Off Under the RVO

55. The Proposal Trustee is of the view that no stakeholder will be prejudiced or materially worse off by the issuance of the RVO, particularly as the expected realization under the Transaction is sufficient to pay out all of the Companies' creditors in full.⁵⁷ In fact, stakeholder realizations are estimated to be higher under the RVO as the Transaction is estimated to provide returns to shareholders of approximately \$0.15 to \$0.19 cents per share, compared at the up to \$0.00 to \$0.005 per share estimated returns under the Stalking Horse Bid.⁵⁸ Notably, the Stalking Horse Bid also contemplates implementing its transaction through a corporate acquisition and RVO.⁵⁹

⁵⁵ Third Churchill Affidavit at para 47.

⁵⁶ Third Churchill Affidavit at para 47.

⁵⁷ Third Churchill Affidavit at para 35(f).

⁵⁸ Third Churchill Affidavit at para 65.

⁵⁹ Third Churchill Affidavit at para 47.

56. The Companies' overall realizations will also be greater without the necessity of concluding a creditors' meeting to vote on a proposal offering 100 cents on the dollar for creditor claims.

iv. The Consideration Being Paid Reflects the Importance and Value of the Permits and Licenses

57. The critical factor in support of the RVO structure is the preservation of the value of the Land Agreements, Licenses, Mineral Claims, Permits, and Tax Attributes. The Sales Advisor, in consultation with both the Companies and the Proposal Trustee, extensively marketed these assets through a comprehensive process using the Stalking Horse Bid, which increased the competitiveness of the process. The Companies' decision to waive strict compliance with the SISP bid requirements for JMAC after the Bid Deadline allowed the SISP to proceed to the Auction, which resulted in a significantly higher Purchase Price.⁶⁰ The importance and value of the Land Agreements, Licenses, Mineral Claims, Permits, and Tax Attributes were key considerations in the Purchase Price offered by the Purchaser and generated value to benefit all stakeholders of the Companies.⁶¹

58. The Applicant respectfully submits that the RVO should be granted, particularly as the Companies operate in a highly regulated environment, creditors are expected to be paid out in full, and the Companies' shareholders are anticipated to receive distributions as a result of the Transaction.

d. Retained Contracts, Land Agreements, and Licenses

59. Certain contracts (the "**Retained Contracts**"), Land Agreements, Mineral Claims, Licenses and Permits, will continue with the Retained Assets after the Transaction closes and pursuant to the Subscription Agreement and the RVO. The counterparties to the Retained Contracts, Land Agreements, Mineral Claims, Licenses and Permits will receive the benefit of having an ongoing counterparty.⁶² The RVO further provides restrictions on

⁶⁰ Third Churchill Affidavit at para 17.

⁶¹ Third Churchill Affidavit at para 37(f).

⁶² Third Churchill Affidavit at para 42.

the termination of the Retained Contracts, and regulatory authorizations following the closing of the Transaction.⁶³

60. In similar circumstances, the courts have noted the extent to which notice is required to be provided to all parties whose contracts will be affected by the proposed RVO. The B.C. Supreme Court in *PaySlate* found that certain counterparties to contracts being retained pursuant to the sales transaction had not been provided notice of the hearing for the same despite the fact that their contractual rights could be affected.⁶⁴
61. Prior to the hearing of this Application, the Companies served all counterparties to the Retained Contracts, Land Agreements, and Licenses, in addition to the primary service list and all registrants on the personal property security registries.

e. ResidualCo and the Appointment of the First Director

62. The Court possesses the necessary authority to add ResidualCo as the debtor and the Applicant to these Proposal Proceedings and appoint the first director of ResidualCo. While section 64(1) of the BIA expressly permits directors of a corporation to be removed from their position pursuant to a court order, it is silent on the ability to appoint.⁶⁵ As there is no explicit statutory prohibition against the appointment of directors under the BIA, this Court has the authority to draw upon its inherent jurisdiction preserved by section 183(1) of the BIA to make the requested appointments.⁶⁶
63. The terms of the RVO provide that the Transferred Assets and the Transferred Liabilities will vest in ResidualCo upon closing of the Transaction. ResidualCo will replace the Companies to become the debtor company and Applicant through to the end of these Proposal Proceedings upon deliverance of the Proposal Trustee's certificate confirming the

⁶³ Third Churchill Affidavit at para 42.

⁶⁴ *PaySlate*, *supra* at paras 73-77 [TAB 16].

⁶⁵ BIA, *supra* s 64(1) [TAB 1].

⁶⁶ BIA, *supra* at s 183(1) [TAB 1]; Sam Babe, "Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring" (2020) 12 ARIL 1 at 2 [TAB 19]; Justice Georgina R Jackson & Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" (2007) 3 ARIL 1 at 23-5 [TAB 20].

Transaction closed.⁶⁷ At such time, the Companies will cease to be parties to these Proposal Proceedings and will emerge as a going concern business.

64. A residualco may be an applicant in Proposal Proceedings if it satisfies the definition of an “insolvent person” contained in the BIA, which term includes a person, “who has ceased paying his current obligations in the ordinary course of business as they generally become due”.⁶⁸ ResidualCo will cease to pay its obligations as they come due in the ordinary course of business given the nature of these Proposal Proceedings. The continued and proper administration of the estate could take months to complete following the granting of the proposed RVO, including the evaluation and resolution of potential claims. The addition of ResidualCo to these Proposal Proceedings provides a structure for such administration to produce certainty, efficiency, and decrease costs for creditors who continue to participate in this process.
65. Further, no stakeholders will be materially prejudiced by the addition of ResidualCo to the within Proposal Proceedings as such proceedings were commenced under the protections afforded by the BIA to debtors and the Companies do not intend for ResidualCo to commence operations.
66. John David Churchill, AMI’s Chief Financial Officer, has agreed to act as the first director (the “**First Director**”) of ResidualCo as required for the incorporation of ResidualCo. Mr. Churchill agreed to assume this role upon certain conditions, including receipt of certain protections pursuant to the RVO, such as the release discussed further below.⁶⁹
67. Pursuant to section 106(2) of the *Business Corporations Act*, RSA 2000, c B-9, a director named in the articles of incorporation holds office until the first meeting of the shareholders.⁷⁰ The Companies anticipate that Mr. Churchill will resign from his role as First Director prior to the anticipated bankruptcy of ResidualCo, and the Companies seek this Court’s authorization of same. Similar relief was recently granted notwithstanding the

⁶⁷ Third Churchill Affidavit at para 37.

⁶⁸ BIA, *supra* at s 2 [TAB 1].

⁶⁹ Third Churchill Affidavit at para 51.

⁷⁰ *Business Corporations Act*, RSA 2000, c B-9 at s 106(2) [TAB 21].

analogous provisions of the *Business Corporations Act*, RSO 1990, c B.16, in the Ontario CCAA/Receivership proceedings of Validus Power Corp.⁷¹

f. The Releases in the RVO Should be Granted

68. The RVO provides that the following parties are to be released from the Released Claims (as defined in the RVO):

- (a) KSV Restructuring Inc., in its capacity as the Proposal Trustee, and its legal counsel and representatives;
- (b) the Companies and their respective current directors, officers, employees, legal counsel, and representatives;
- (c) the Purchaser and its respective current directors, officers, employees, legal counsel, and representatives;
- (d) Canaccord Genuity Corp., in its capacity as the Sales Advisor, and its representatives; and
- (e) Mr. Churchill in his capacity as First Director of ResidualCo,

(collectively, the “**Released Parties**”).

69. The claims proposed to be released pursuant to the RVO include any claims arising from the Companies’ Business, assets, operations, and affairs during the pendency of these Proposal Proceedings or the Transaction, as further described in the proposed form of RVO, but exclude, among other things, any claim that is prohibited from being released under sections 50(13) and 50(14) of the BIA (the “**Released Claims**”).⁷²

⁷¹ *Validus Power Corp et al and Macquarie Equipment Finance Limited*, 2024 ONSC 250; Order of the Honourable Justice Osborne, granted January 4, 2024, *In the Matter of a Plan of Compromise or Arrangement Involving Validus Power Corp et al*, Ontario Superior Court of Justice [Commercial List] Court File No. CV-23-00705215-00CL, para 37 [TAB 22].

⁷² BIA, *supra* s 50(13)-(14) [TAB 1].

70. The use of releases in favour of directors, officers, the Proposal Trustee, and other advisors to a debtor company participating in Proposal Proceedings is common. On several occasions the courts have approved such releases even in the absence of a proposal to creditors in both contested and uncontested proceedings, and in the context of RVO transactions. The Ontario Superior Court outlined the factors to be considered when granting releases in *Re Lydian International Limited* and such factors have been reiterated in *Harte Gold* as follows:
- (a) whether the parties to be released from claims were necessary and essential to the restructuring efforts of the debtor;
 - (b) whether the claims to be released were rationally connected to the purpose of the plan of arrangement and necessary for it;
 - (c) whether the plan of arrangement could succeed without the releases;
 - (d) whether the parties being released contributed to the plan of arrangement; and
 - (e) whether the release benefits the debtors as well as creditors more broadly.⁷³
71. The Released Parties have been integral to these Proposal Proceedings, including the conduct of the SISP and the negotiation and implementation of the Transaction.⁷⁴ The Purchaser requires the proposed releases as a condition of the Transaction, which as previously noted provides for the highest and best realization of the Companies' Business and assets for the benefit of all stakeholders. Mr. Churchill has also requested a release in his favour in connection with his role as the First Director, a role which is being fulfilled solely to facilitate this Transaction.⁷⁵
72. The Companies submit that the scope of the Released Claims is reasonable in the present circumstances as, among other things:

⁷³ *Harte Gold, supra* at paras 80-86 [TAB 12]; *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54 [*Lydian*] [TAB 23].

⁷⁴ Third Churchill Affidavit at para 56.

⁷⁵ Third Churchill Affidavit at para 56.

- (a) the proposed releases are fair and reasonable in the circumstances and rationally connected to the Transaction and RVO;⁷⁶
- (b) the Released Parties were necessary to the Companies' restructuring and contributed materially to the conduct of the SISP, which culminated in the Auction;⁷⁷
- (c) as a result of the Released Parties' efforts during these Proposal Proceedings, the Companies obtained the highest and best value for their assets. Given the pivotal role of the proposed releases in both the Transaction and the RVO, if the releases are not granted there is a risk that the Purchaser does not proceed to closing or reduces the Purchase Price;⁷⁸ and
- (d) at this time, the Released Parties are not aware of any claims against them or their advisors in relation to the within Proposal Proceedings.⁷⁹ Given the lack of pending claims, the Companies' creditors are unlikely to be materially prejudiced if the releases are granted.

73. The releases of the claims noted above in favour of the Released Parties will assist in the closing of the Transaction and completion of the administration of the estate for which reserves or charges might otherwise be required.

g. The Stay Extension Should be Granted

74. The Companies filed notices under the BIA on November 13, 2023. This Court subsequently granted two extensions of the Stay Period, with the current Stay Period extended up to and including March 11, 2024, pursuant to the Second Order.

75. Section 50.4(8) of the BIA requires Companies to file a proposal with the official receiver within 30 days of the initial filing date (the "**Proposal Period**"), unless they otherwise

⁷⁶ Third Churchill Affidavit at para 57.

⁷⁷ Third Churchill Affidavit at para 56-57.

⁷⁸ Third Churchill Affidavit at para 56.

⁷⁹ Third Churchill Affidavit at para 58.

obtain an extension of time from the Court.⁸⁰ Any extension or further extensions of the Proposal Period may not exceed, in aggregate, five months after the expiry of the initial 30 day Proposal Period.⁸¹ The Companies currently seek a further Stay Extension, which in aggregate with the Stay Extensions granted pursuant to the First Order and the Second Order, does not exceed the five month time limitation to file a proposal.

76. Section 50.4(9) of the BIA provides that, before the expiry of the Proposal Period, a debtor in Proposal Proceedings may apply to the Court for an order extending the time within which it may file a proposal by a maximum of 45 days. The section further provides that for a Court to grant such an extension, it must be satisfied that:

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.⁸²

77. To close the Transaction for the benefit of all of their creditors and stakeholders, the Applicants are seeking a 45 day stay extension from the current deadline of March 11, 2024, up to and including April 25, 2024.

78. The Applicants submit that they have satisfied the statutory prerequisites for the Stay Extension, and that it is reasonable and appropriate to grant the extension in the circumstances, as:

- (a) since the commencement of these Proposal Proceedings, the Applicants have been acting, and are acting, in good faith and with due diligence to advance a viable restructuring. In the short time since their filings, the Applicants have, amongst other things,

⁸⁰ BIA, *supra* s 50.4(8) [TAB 1].

⁸¹ BIA, *supra* s 50.4(9) [TAB 1].

⁸² BIA, *supra* s 50.4(9) [TAB 1].

- (i) entered into the Interim Financing Facility;
 - (ii) negotiated the Stalking Horse Term Sheet;
 - (iii) developed the KERP; and
 - (iv) concluded the SISP resulting in the Transaction,
- all in consultation with the Proposal Trustee;

- (b) the requested extension will not materially prejudice any creditor, and the Applicants' Cash Flow Forecast indicates that all post-filing operational expenses, with one exception, will be paid. That exception is that certain royalty payments in relation to the Prosvita sand project are being deferred until the closing of the Transaction;⁸³ and
- (c) the requested extension will provide the Applicants with the additional time they require to further advance their restructuring efforts by closing the Transaction and increase the likelihood that value will be maximized for all stakeholders. The additional time will allow the Applicants to implement and close the Transaction.

79. For those reasons, the Applicants submit that this Court should grant the requested Stay Extension.

V. CONCLUSION:

80. Since commencing the within Proposal Proceedings, the Applicants have been acting in good faith and with due diligence in order to stabilize their business and pursue a restructuring of their business in order to maximize value for all of their stakeholders, including shareholders.

81. The Transaction is the result of the Court-approved SISP, achieved after the conduct of the Auction by the Proposal Trustee where after 162 rounds of bidding, Badger was selected as the Winning Bidder with a Purchase Price in excess of \$29.2 million, more than double

⁸³ Third Churchill Affidavit at Exhibit "R".

the initial Stalking Horse Bid of \$13 million. The Transaction represents the highest and best price that could be achieved for the Companies' Business and assets, and is in the best interests of all of the Companies' stakeholders.

82. The relief requested by the Applicants is intended to facilitate the Transaction, and is part and parcel of the Applicant's overall value maximization strategy. Accordingly, for the aforementioned reasons, the Applicants submit that it is necessary and appropriate in the given circumstances to grant the requested relief as set out in the proposed form of order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26TH DAY OF FEBRUARY, 2024.

FASKEN MARTINEAU DUMOULIN LLP

Per: 

R. Gurofsky/J. Cameron
Solicitors for the Applicants

LIST OF AUTHORITIES

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
2. *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10.
3. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60.
4. *Target Canada Co (Re)*, 2015 ONSC 1487.
5. *Royal Bank of Canada v Soundair Corp*, 1991 CanLII 2727 (ONCA), 83 DLR (4th) 76.
6. *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354.
7. In the Matter of the Notice of Intention to Make a Proposal of Payslate Inc, Supreme Court of British Columbia in Bankruptcy and Insolvency Court No. B-220504, Order of the Honourable Justice Walker, granted May 10, 2023.
8. In the Matter of the Notice of Intention to Make a Proposal of Ayanda Cannabis Corporation, Ontario Superior Court of Justice [Commercial List] Court File No. BK-22-02802344-0035, Order of the Honourable Justice Conway, granted March 1, 2022.
9. In the Matter of the Notice of Intention to Make a Proposal of Junction Craft Brewing Inc, Ontario Superior Court of Justice [Commercial List] Court File No. 31-2774500, Order of the Honourable Justice Penny, granted December 17, 2021.
10. *Quest University Canada (Re)*, 2020 BCSC 1883.
11. *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828.
12. *Harte Gold Corp (Re)*, 2022 ONSC 653.
13. *Arrangement relatif à Nemaska Lithium Inc*, 2020 QCCA 1488.
14. *Fire & Flower Holdings Corp et al*, 2023 ONSC 4934.
15. *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of CannaPiece Group Inc*, 2023 ONSC 841
16. *PaySlate Inc (Re)*, 2023 BCSC 608
17. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314
18. *PaySlate Inc (Re)*, 2023 BCSC 977
19. Babe, Sam, "Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring" (2020) 12 ARIL 1.

20. Jackson, Justice Georgina R & Sarra, Janis, “Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters” (2007) 3 ARIL 1.
21. *Business Corporations Act*, RSA 2000, c B-9
22. *Validus Power Corp et al and Macquarie Equipment Finance Limited*, 2024 ONSC 250; In the Matter of a Plan of Compromise or Arrangement Involving Validus Power Corp et al, Ontario Superior Court of Justice [Commercial List] Court File No. CV-23-00705215-00CL, Order of the Honourable Justice Osborne, granted January 4, 2024.
23. *Lydian International Limited (Re)*, 2020 ONSC 4006.