

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

GLOBAL RESOURCE FUND

Applicant

- and -

TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.

Respondents

**FACTUM OF THE RECEIVER
Motion for Approval and Authorization Order
Returnable January 30, 2019**

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PART I. INTRODUCTION

1. This factum is filed by KSV Kofman Inc. (“**KSV**”), in its capacity as Court-appointed receiver (the “**Receiver**”) of Tamerlane Ventures Inc. (“**Tamerlane**”) and Pine Point Holding Corp. (together with Tamerlane, the “**Company**”), for an Order (the “**Approval and Authorization Order**”), *inter alia*:

- (a) approving the assignment transaction (the “**Transaction**”) pursuant to which Tamerlane’s rights in certain causes of action commenced in Peru (the “**Causes of Action**”) regarding ownership of Peruvian mining interests denominated as El Pino, Los Pinos No. 1 and Los Pinos No. 6 (collectively, the “**Concessions**”) will be assigned to Ingenieria, Minería Y Construcción, Contratistas Generales S.A.C. (“**IMICON**”) for total cash consideration of US\$1.5 million;

- (b) authorizing the entering into of certain transaction documents to complete and give effect to the Transaction;
- (c) authorizing and directing the Receiver to distribute to Global Resource Fund (“**GRF**”), the Company’s senior secured creditor, the proceeds of the Transaction upon their release to the Receiver from escrow; and
- (d) approving the Fourth Report of the Receiver dated January 22, 2019 (the “**Fourth Report**”) and the actions, conduct and activities of the Receiver described therein.¹

2. The Company has undertaken an extensive sale and investment solicitation process (the “**SISP**”) – initially commenced in 2013 while the Company was under CCAA protection and subsequently continued by the Receiver during these proceedings – to maximize the value of the Company’s business and assets, including the Concessions. The SISP did not result in any executable transactions for an outright sale of the Concessions, primarily as a result of an ownership dispute with respect to the Concessions that is the subject of long-running litigation in Peru. As a result, the Receiver has pursued other potential transaction structures to achieve a realization in respect of the Concessions for the benefit of the Company and its senior secured creditor, the only party with an economic interest.

3. The Receiver has had ongoing discussions with IMICON since October 2014 based on IMICON’s interest in acquiring the Concessions. The proposed Transaction agreed to by the parties in January 2019 will result in IMICON taking an assignment of Tamerlane’s rights in the Causes of Action. IMICON will continue to negotiate with other parties to the litigation with a view to resolving matters and obtaining ownership of the Concessions; the Receiver is not involved in these other negotiations and the Transaction is not conditional on their outcome. The Receiver has determined that the Transaction is the best realization alternative in respect of the Concessions at this time given the complex ownership dispute and the ongoing legal proceedings in Peru, including an injunction that prohibits an outright sale of the Concessions until the civil actions are resolved.

¹ Capitalized terms used and not defined herein have the meanings given to them in the Fourth Report.

4. The Transaction will generate aggregate cash proceeds of US\$1.5 million and eliminate the ongoing and substantial costs and challenges associated with maintaining the Concessions and pursuing the civil actions in Peru. The Transaction has been structured to address various Peruvian legal requirements and to significantly reduce closing risk. The Transaction is supported by GRF, the Company's senior secured creditor and the only party with an economic interest in the Transaction proceeds.

5. The Receiver is of the view that: the Transaction is the best and only available option to achieve a realization in respect of the Concessions; the consideration under the Transaction is fair and reasonable; and completion of the Transaction is in the best interests of the Company and its stakeholders with an economic interest. Accordingly, the Receiver respectfully requests that this Court grant the Approval and Authorization Order.

PART II. THE FACTS

6. The facts supporting the Receiver's motion – including a description of the Concessions and the Causes of Action, the results of the SISP, and a summary of the Transaction – are set out extensively in the Fourth Report.

The SISP and the Development of the Transaction

7. The Concessions consist of a copper deposit in Peru. The Concessions are an exploration property with no active mining operations. Since 2008, the Concessions have been the subject of an ownership dispute between Tamerlane and Alexander Vidaurre, a former employee of the Tamerlane Group.

Fourth Report at Sections 3.0(1) and (3); Motion Record, Tab 2.

8. As set out in detail in the Fourth Report, the Concessions are subject to a number of civil actions in Peru, which the Receiver's Peruvian counsel indicates will still take several years to resolve. There is an injunction in Peru preventing the sale of the Concessions until the civil actions are resolved.

Fourth Report at Sections 3.0(4) and (5); Motion Record, Tab 2.

9. The Company and its professional advisors undertook an extensive SISP to market the Company's assets and properties, including the Concessions. KSV (or its predecessor) has been involved throughout the process, first as Court-appointed monitor in the CCAA proceedings and subsequently as Receiver after the CCAA proceedings were terminated in January 2014. The SISP resulted in four expressions of interest for the Concessions, but no executable transactions were ultimately identified given the contested ownership and legal issues relating to the Concessions.

Fourth Report at Section 4.1(3); Motion Record, Tab 2.

10. The Receiver commenced negotiations with IMICON in October 2014 regarding a potential transaction, leading IMICON in May 2015 to submit a letter of intent (the "**LOI**") for the Concessions and to pay a US\$100,000 deposit to the Receiver. The LOI expired in September 2015 after an exclusivity and diligence period, but the parties have continued to negotiate a transaction since that time. Since 2016, the Receiver and IMICON have developed and negotiated a transaction construct involving the assignment of Tamerlane's interests in the Causes of Action. In January 2019, the parties finalized the Transaction Documents, which are subject to Court approval as the first in a series of steps that are necessary to complete the Transaction.

Fourth Report at Sections 4.2(2) and (3); Motion Record, Tab 2.

Terms of the Transaction

11. The Transaction is summarized in detail in Section 5 of the Fourth Report. The key elements of the Transaction include:

- (a) Consideration – Total cash consideration of US\$1.5 million, consisting of the US\$100,000 deposit previously paid by IMICON and a second payment of US\$1.4 million (the "**Second Payment**") to be paid by IMICON into escrow on the signing of the Assignment Agreement as a private contract in Peru;

- (b) Transaction Documents – The transaction will be effected pursuant to the following principal documents:
- (i) a Power of Attorney to be provided by the Receiver to David Lewis, Chief Executive Officer of GRF, to enable Mr. Lewis to execute and have the Assignment Agreement notarized in Peru, both as a private contract and a public deed;
 - (ii) an Assignment Agreement assigning the rights of Tamerlane in the Causes of Action to IMICON; and
 - (iii) an Escrow Agreement among IMICON, the Receiver, and Goodmans LLP, as Escrow Agent;
- (c) Timing for Closing – Provided that this Court grants the Approval and Authorization Order, the Power of Attorney must be registered in Peru before the Assignment Agreement is signed and the balance of the Transaction steps can be completed. Peruvian counsel has advised it may take some months for the registration of the Power of Attorney. Once the Power of Attorney is registered, it is expected that closing will occur shortly thereafter. Closing of the Transaction is *not* conditional on completion of an assignment of the rights of Vidaurre or others in the Causes of Action or the transfer of the Concessions to IMICON; and
- (d) Release of Escrow Funds – The Escrow Agreement provides for the release of the Second Payment to the Receiver² on the earlier of (i) final Peruvian court approval of the procedural succession set out in the Assignment Agreement, and (ii) 185 days following the date the Escrow Agent confirms receipt of the Second Payment, with a one-time 30-day extension option at the discretion of IMICON. The only circumstance in which the Second Payment is not released to the Receiver (and is released to IMICON) is if Mr. Lewis, the principal of GRF, who is the Power of Attorney and who represents the only party (GRF) with an

² The US\$100,000 deposit is also correspondingly irrevocably released to the Receiver.

economic interest in these proceedings, does not return before the Peruvian notary to sign the Assignment Agreement as a public deed.

Fourth Report at Section 5.01(2); Motion Record, Tab 2.

PART III. ISSUES AND THE LAW

A. COURT APPROVAL OF THE TRANSACTION

The Receivership Order and the Soundair Principles

12. The Receivership Order authorizes the Receiver to, *inter alia*: (i) execute, assign and endorse documents of whatever nature in respect of any of the Company's Property, and (ii) sell, convey, transfer or assign the Property or any part thereof out of the ordinary course of business, with the approval of the Court in respect of any transaction in which the aggregate purchase price exceeds \$500,000.

Receivership Order dated January 30, 2014 at paras. 3(h) and 3(m); Motion Record, Tab 2(c).

13. As the Transaction is an assignment of Tamerlane's interests in the Causes of Action (which constitute Property for purposes of the Receivership Order) for proceeds in excess of \$500,000, the Receiver is seeking the Court's approval of the Transaction.

14. Courts have approved the assignment or sale of the causes of action of a debtor company to generate proceeds for the debtor's estate. There are many ways that a receiver can effectuate a sale of an asset; where the asset is an unusual one, the court should be open to creative processes to maximize recovery for the estate.

Fifth Third Bank v. MPI Packaging Inc., 2010 ONSC 73 [*MPI Packaging*] at para. 26; Book of Authorities, Tab 1.

Bank of Montreal v. Calgary West Hospitality Inc., 2011 ABQB 293 at paras. 31 and 35; Book of Authorities, Tab 2.

15. As Pepall J. (as she then was) noted in *MPI Packaging*, the Court should consider the principles set out in *Royal Bank v. Soundair Corp.* when determining whether to approve a receiver's motion to assign a debtor's interest in a cause of action or lawsuit.

MPI Packaging, supra at para. 14; Book of Authorities, Tab 1.

16. *Soundair* sets out the following principles for a court to consider in the context of approving a sale or other transaction in a receivership context:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.

Royal Bank v. Soundair Corp., 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.)
[*Soundair*] at para. 16; Book of Authorities, Tab 3.

17. The appropriateness of a particular process is dependent on the nature of the asset being sold and the pool of potential purchasers. Where it is highly unlikely that a commercially viable sale can be made to anyone other than a very limited number of purchasers, the receiver acts wisely and reasonably when it negotiates only with such limited number of purchasers. In the context of the sale or assignment of a cause of action, it is reasonable for a receiver to negotiate only with parties that are likely to have an interest in acquiring the debtor's rights in the cause of action.

Soundair, supra at para. 18; Book of Authorities, Tab 3.

MPI Packaging, supra at para. 15; Book of Authorities, Tab 1.

18. The support of a secured creditor with an economic interest in the proceeds of a transaction is an important factor in determining whether the transaction should be approved:

[W]here there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e. where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc. would possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver.

Soundair, supra at para. 73; Book of Authorities, Tab 3.

19. The court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should assume that the receiver is acting properly unless the contrary is clearly shown. The court should be reluctant to second-guess the considered business decisions made by its receiver.

Soundair at para. 14; Book of Authorities, Tab 3.

The Transaction Satisfies the Soundair Principles and Should be Approved

20. The Receiver submits that Transaction satisfies the *Soundair* principles and that approval of the Transaction is warranted because, among other things:

- (a) the Concessions were extensively marketed starting in 2013 on a basis consistent with the SISP approved in the Company's CCAA proceedings. The Company's financial advisor contacted over 300 strategic and financial parties to solicit interest in Tamerlane's assets, including the Concessions. Four expressions of interest were received in respect of the Concessions, but did not result in any executable transaction. The Receiver continued to market the Concessions since the termination of the CCAA proceedings and the Receiver's appointment in January 2014. Despite the broad canvassing of market interest in the Concessions, the SISP did not identify any executable transactions in respect of the Concessions;
- (b) the Concessions are subject to competing ownership claims and long-standing and uncertain litigation in Peru. There is an injunction in Peru preventing the sale of the Concessions until the civil actions are resolved. Given the ownership dispute and other considerations, the Receiver, with the advice of Peruvian legal counsel, has determined that an outright sale of the Concessions is not feasible;
- (c) IMICON is the only realistic purchaser of the Causes of Action at this time having regard to the nature of the asset and the history of this case. IMICON has devoted significant effort over many years to undertaking due diligence, developing the transaction structure with the Receiver, and negotiating with the Receiver, Vidaurre and others to acquire their respective rights in the Causes of Action;

- (d) the Transaction represents the only definitive opportunity to effect a realization in respect of the Concessions in the foreseeable future;
- (e) the process leading up to the Transaction has been efficacious and there has been no unfairness in the process;
- (f) the Receiver believes that the consideration under the Transaction is fair and reasonable in the circumstances;
- (g) the Transaction has been structured to reduce closing risk and achieve the release of the consideration from escrow as soon as possible having regard to the legal processes required in Peru to effect the transfer of the Causes of Action. The Transaction is not conditional on IMICON reaching agreement with Vidaurre, among others, to ultimately have the Concessions transferred to IMICON. The only circumstance in which the balance of the purchase price (being the US\$1.4 million Second Payment) would not be released to the Receiver is if Mr. Lewis, a representative of GRF who is the proposed Power of Attorney for the Receiver, does not return before the Peruvian Notary to execute the Assignment Agreement as a public deed;
- (h) the cost of pursuing the Causes of Action and paying administrative costs to maintain the Concessions has been significant. Peruvian legal counsel has advised the Receiver that the Peruvian legal proceedings are expected to continue for many years. Completion of the Transaction will eliminate these costs on a go-forward basis and thereby maximize the value of Tamerlane's estate;
- (i) as the Concessions are the last material asset of the Company, completion of the Transaction will facilitate the ultimate conclusion of these receivership proceedings and the attendant costs being borne directly by GRF; and
- (j) GRF is the only party with an economic interest in the proceeds of the Transaction and supports approval of the Transaction and the granting of the Approval and Authorization Order.

Fourth Report, Sections 3.0(5), 3.05(6) and 5.2(1), Motion Record, Tab 2.

21. In addition to approving the Transaction, the proposed Approval and Authorization Order authorizes the Receiver to grant the Power of Attorney and for Tamerlane, the Receiver or the Power of Attorney, on behalf of Tamerlane, to execute and deliver the Assignment Agreement and the Escrow Agreement. The execution and delivery of these Transaction Documents is necessary to effectuate the Transaction in accordance with Peruvian legal requirements. Accordingly, the Receiver submits that the authorizations contained in the proposed Order are appropriate in the circumstances.

B. DISTRIBUTION OF TRANSACTION PROCEEDS

22. The proposed Approval and Authorization Order authorizes the Receiver to distribute the net proceeds of the Transaction to GRF as soon as possible after the filing of the Receiver's Certificate confirming the release of the Escrow Amount to the Receiver pursuant to the Escrow Agreement.

23. GRF is the Company's primary secured creditor and is owed approximately US\$10 million, plus interest and costs which continue to accrue. The Receiver's counsel reviewed GRF's security at the outset of these proceedings and the Receiver is not aware of any claims that rank in priority to the secured claims of GRF. The Receiver has previously made several distributions to GRF during these proceedings.

Fourth Report at Sections 6.0(1), (2) and (3); Motion Record, Tab 2.

24. This Court has held that it is appropriate for the Court to authorize a receiver to make distributions of sale proceeds concurrently with the approval of such sale in order to "maximize efficiency and to avoid the need for an additional motion to seek approval for a distribution".

GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc., 2014 ONSC 1173 at para. 53; Book of Authorities, Tab 4.

25. Accordingly, the Receiver requests the Court's authorization to distribute the net proceeds from the Transaction to GRF promptly following the release of the escrow funds to the Receiver.

PART IV. ORDER REQUESTED

For the reasons set out above, the Receiver requests that this Court grant the Approval and Authorization Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 25, 2019

Goodmans LLP

Goodmans LLP

**SCHEDULE “A”
LIST OF AUTHORITIES**

- 1 *Fifth Third Bank v. MPI Packaging Inc.*, 2010 ONSC 73
- 2 *Bank of Montreal v. Calgary West Hospitality Inc.*, 2011 ABQB 293
- 3 *Royal Bank v. Soundair Corp.*, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.)
- 4 *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173

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