No. S2110503
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

AND

IN THE MATTER OF OTSO GOLD CORP., OTSO GOLD OY, OTSO GOLD AB, and 2273265 ALBERTA LTD.

PETITIONERS

APPLICATION RESPONSE

Application response of: Petitioners (the "application respondents")

THIS IS A RESPONSE TO the notice of application of Pandion Mine Finance Fund LP, RiverMet Resources Capital LP and PFL Raahe Holdings LP dated January 7, 2022.

Part 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: N/A

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in paragraphs N/A of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in Part 1 of the notice of application, subject to the qualifications and terms below.

Part 4: FACTUAL BASIS

1. The applicants have not delivered notice under s. 244 of the *BIA*. As a consequence, they are not entitled to enforce security over all or substantially all of the property of the Petitioners, and are limited to making an application for the appointment of an interim receiver under s. 47 of the *BIA*.

Amounts owing to Pandion

2. Pandion advanced approximately US$32 million to Otso and it now claims US$95 million although its claim is an apparent attempt by Pandion to "read down" the provisions of the relevant agreement as it knows that they are unenforceable on their plain language. On the face of the Consent and Agreement, the apparent amount owing would be approximately US$118 million. Pandion's claim includes:

   (a) A cash payment in respect of the value of the gold discount that Otso was obliged to pay over time and upon the sale and delivery of gold. That cash payment is not a present value, and not discounted;

   (b) A cash payment in respect of the "upside participation" right by which Pandion was entitled to payments om future sales of gold if the price increased above a certain threshold; and

   (c) Amounts paid in respect of a maintenance loan.

3. On the face of the Consent and Agreement, the underlying debt amount is also repayable, though that amount is not apparently claimed by Pandion.

4. The Petitioners do not accept that Pandion's debt is in the amount claimed:

   (a) First, the Petitioners do not accept that the language of the agreements is unambiguous, such that it is clear that the effect of the Petitioners' insolvency filings was to render the full amounts payable as asserted by Pandion:

      (i) First, the Consent and Agreement suggests that the debt obligations are "recharacterized and consolidated", but on the event of a Deferment Termination Date only the "consolidation" actually terminates, and it does not address the effect of a Deferment Termination Date on the re-characterization of the obligations; and

(ii) Second, on a Deferment Termination Date the "deferment" shall automatically terminate, yet the Deferred Payment Amounts become immediately due and payable; and

(b) Second, even if the agreements do on their face increase the amount owing to Pandion, such contractual provisions amount to an unenforceable penalty clause under New York law. The effect and substance of s. 2.1 of the Consent and Agreement and the underlying Pre-Paid Gold Forward Agreement is to impose payment obligations and, and upon default, to increase the amount payable in a manner consistent with an unenforceable penalty clause in New York). In the case of the Consent and Agreement, the obligation on the Petitioners is to make a payment, and in the case of the Pre-Paid Gold Forward Agreement their obligation is to deliver gold; in either case, if they default in those obligations, then Pandion is purportedly entitled to immediate payment, on a non-discounted basis, of:

(i) All future gold discounts to which it would be entitled; and

(ii) All potential future upside participation based on the price of gold as of the date of breach.

5. Further, the language of the Consent and Agreement (which purports to entitle Pandion to repayment of both the debt amounts and revenue in respect of future amounts) is determinative of that question, and is inconsistent with the amounts that Pandion is actually claiming.

6. The Petitioners have obtained a preliminary opinion from experts in NY with respect to the enforceability of penalty clauses. Once the Petitioners and Pandion have joined issue on the quantum of the indebtedness, the Petitioners anticipate delivering further expert evidence addressing the impact of the Pre-Paid Gold Forward agreement specifically.

7. The Petitioners anticipate taking the position, when the matter arises for determination, that the Pandion debt is limited to $23 million.

8. In the circumstances of this case, there should be no distributions, and no credit bids, until the quantum of Pandion's debt has been determined. Further, as in any bankruptcy or CCAA process, any other stakeholders with an economic interest in the valuation of that claim should be entitled to participate in that process.

Choses in Action

9. If a receiver is appointed, then the receiver should not be appointed over choses in action, or claims by any of the Petitioners against any of Pandion Mine Finance Ltd., PFL Raahe Holdings LP, Lionsbridge Capital Pty. Ltd., Westech International Pty. Ltd., and any of the Petitioners' former directors or officers.

10. There is evidence that Pandion and the Petitioners' former directors were working together, and that the Petitioners' former directors were working in a manner to favour the interests of Pandion in a manner inconsistent with their obligations to act in the best interests of the companies. The Petitioners have a potential claim against Pandion and Lionsbridge in respect of these actions.

11. Further, the Petitioners' largest shareholder Brunswick Gold Limited ("BGL") has commenced proceedings against Pandion, Lionsbridge, and Westech in respect of disclosure made by the Petitioners in connection with BGL's investment. They may also commence a claim against the Petitioners in respect of that same disclosure. In that case, the Petitioners would also have a potential claim the individuals responsible for such faulty disclosure.

12. The Petitioners have claims worthy of investigation, and which may generate a return for stakeholders. Pandion may have motivation to compromise those claims by putting them in the hands of a receiver.

13. To the extent a receiver is to be appointed, claims and potential claims of the Petitioners against Pandion Mine Finance Ltd., PFL Raahe Holdings LP, Lionsbridge Capital Pty. Ltd., Westech International Pty. Ltd., and any of the Petitioners' former directors or officers should be excluded from the property of the Petitioners over which the receiver is appointed.

Part 5: LEGAL BASIS

1. The Petitioners rely on sections 243 and 244 of the *BIA*.

2. The Pandion loan documentation is governed by New York law. The Petitioners have adduced evidence that, under New York law, the provision of the Consent and Agreement requiring payment of funds in excess of $23 million constitutes a penalty clause and is thus unenforceable.

3. There is authority that claims against the secured lender should be from the property secured by way of a security agreement:

> I accept the submissions of the plaintiff that security agreements must be interpreted in accordance with general principles of contractual interpretation and, as commercial contracts, must be interpreted so as to avoid commercial absurdity. Buildevco Ltd. v. Monarch Construction Ltd. 1990 73 O.R. (2nd) 627 (H.C.); Chitty on Contract (27th ed.) at 583; McLaren "Secured Transactions in Personal Property in Canada" (2nd ed.) volume 2 at 2-12. In keeping with this principle, if a security agreement gives the lender the right, upon default, to pursue causes of action belonging to the debt-or, it should be interpreted to apply to causes of action against third parties and not causes of action against the lender itself. To interpret it as including causes of action against the lender itself would be absurd and manifestly unfair as it would grant lenders an absolute shield in their dealings with debtors with whom they have entered into a general security agreement and would have the effect of precluding virtually all lender liability actions where the lender holds a general security agreement.

1239745 Ontario Ltd. v. Bank of America Canada, [1999] O.J. No. 3178, 90 A.C.W.S. (3d) 562, (Ont. S.C.J.)

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #5 of Thomas Dillenseger, sworn January 12, 2022.

2. Affidavit #1 of Dan Andersson, sworn January 11, 2022.

3. Affidavit #1 of James McGuire, sworn January 11, 2022.

The application respondents estimate that the application will take 10 minutes.

☒ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Dated: January 13, 2022

Signature

☒ Lawyer for application respondents

Tim Louman-Gardiner

THIS APPLICATION RESPONSE is prepared and delivered by Rebecca Morse & Tim Louman-Gardiner of the firm Farris LLP, Barristers & Solicitors, whose place of business and address for service is 2500 – 700 West Georgia Street, Vancouver, British Columbia, V7Y 1B3. Telephone: (604) 684-9151. **Attention: Rebecca Morse & Tim Louman-Gardiner**. Email: rmorse@farris.com, tlg@farris.com