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COURT	COURT OF QUEENS BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD, LTS RESOURCES PARTNERSHIP, 1863360 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP
DOCUMENT	**REPLY BRIEF OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD AND 1863360 ALBERTA LTD – THRESHOLD ISSUE** To Be Heard November 15 and 16, 2016
PARTY FILING THIS DOCUMENT	LIGHTSTREAM RESOURCES LTD.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BLAKE, CASSELS & GRAYDON LLP** Barristers and Solicitors 3500 Bankers Hall East 855 – 2nd Street SW Calgary, Alberta T2P 4J8 Attention: Michael Barrack/Richard D. Bell/Peter Smiley Telephone No.: 416-863-5280/403-260-9656/416-863-4226 Email: michael.barrack@blakes.com/richard.bell@blakes.com/ peter.smiley@blakes.com Fax No.: 416-863-2653/403-260-9700 File: 89691/8

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I. INTRODUCTION

1. This Reply Brief is submitted by Lightstream Resources Ltd. ("Lightstream") in response to the Bench Brief of Mudrick Capital Management, FrontFour Capital Corp. and FrontFour Capital Group LLC (the "Plaintiffs"), filed on November 8, 2016 with respect to the threshold issue application to be heard on November 15 and 16, 2016. Capitalized terms not otherwise defined will have the same meaning as in Lightstream's original Brief of Argument.

2. Lightstream will not address in this Reply Brief all of the alleged facts and arguments with which it takes issue in the Bench Brief of the Plaintiffs but will address four matters raised by the Plaintiffs:

a. The Plaintiffs' chronology, which is one-sided and incomplete;

b. The allegation that the Indenture in question contained language which prohibited the Secured Notes Transaction;

c. Case law cited by the Plaintiffs, which does not support their position; and

d. The claim that this Honourable Court has the jurisdiction to order that the Plaintiffs participate in the original transaction that they themselves have alleged was unlawful, oppressive and unfairly prejudicial.

II. ARGUMENT

The Plaintiffs' Incomplete Chronology

3. In their Bench Brief at pages 5-17, the Plaintiffs have submitted a chronology of alleged facts and conclusions which they say constitute their case, along with additional facts which also form part of their case.

4. The chronology contains references to the Plaintiffs' record of evidence but not to the records of evidence of the other parties which were provided to the Plaintiffs on October 28, 2016. To assist this Honourable Court, Lightstream has supplemented the Plaintiffs' chronology to include additional evidence available from both its and the Plaintiffs' respective records of evidence for the within threshold hearing. This chronology is provided in redline format to show the additions made by Lightstream and is attached hereto at Tab A.

No Breach of the Indenture

5. In the Facts section of their Bench Brief, the Plaintiffs argue at paragraph 13(h) that particular provisions of the Indenture prohibited the Secured Notes Transaction. Lightstream has already explained in its first Brief of Argument how the Secured Notes Transaction was, to the contrary, expressly authorized by the Indenture. The Indenture further contains no undertaking by Lightstream not to purchase the Unsecured Notes or not to offer to exchange the Unsecured Notes for other securities issued by the Company, or to do so only if all noteholders are given the same opportunity to participate in the particular transaction.

6. In addition, the Offering Memorandum for the Unsecured Notes identified specific risk factors relevant to the Indenture and the Unsecured Notes, including that the Indenture permitted Lightstream to incur substantial additional debt, including secured debt, and that the Unsecured Notes would be effectively junior in right of payment to existing and future secured debt.[1]

7. Lightstream did not previously discuss in its Brief section 3.04(a) of the Indenture, which the Plaintiffs allege in their Bench Brief prohibited the Secured Notes Transaction. The Plaintiffs allege that section 3.04(a) requires a redemption of less than all of the Unsecured Notes to be effected on a pro-rata basis and that the Secured Notes Transaction constituted a "partial redemption" that was therefore required to be offered to all of the Unsecured Noteholders. Even if this is a correct interpretation of section 3.04(a) with respect to note redemptions, it does not apply to the Secured Notes Transaction, which was not a redemption of notes for a percentage redemption price, but a private purchase and exchange of unsecured notes for secured notes. Section 3.04(a) of the Indenture is inapplicable to the present case.[2]

8. With respect to section 4.06(a) of the Indenture, the Plaintiffs acknowledge that this section in fact allows Lightstream to further incur "Permitted Debt". Such indebtedness is permitted under the Indenture provided that a fixed charge coverage ratio is satisfied.[3] The Plaintiffs argue that one type of "Permitted Debt" is "Permitted Refinancing Indebtedness", which debt must have a final maturity date or redemption date no earlier than the Unsecured Notes. However, Lightstream did not rely upon the "Permitted Refinancing Indebtedness"

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1 Lightstream Statement of Defence (FrontFour action) at paras. 15-17; Offering Memorandum excerpts, Lightstream Production L000277, attached at Tab B hereto.

2 Secured Notes Indenture dated January 30, 2012, Plaintiffs' Record Tab 3, p. 83.

3 Lightstream Statement of Defence (FrontFour action), at para. 6, attached at Tab B hereto; Unsecured Notes Indenture dated January 30, 2012, Plaintiffs' Record Tab 3, p. 86.

provision to effect the Secured Note Transaction but rather on the "Credit Facility" provision under section 4.06(b)(i) of the Indenture, which permits Lightstream to incur further indebtedness in the form of, *inter alia*, notes, debentures, bonds or other securities or instruments, up to a specified amount.[4] As such, the "Permitted Refinancing Indebtedness" provision in the Indenture is also irrelevant to the within matter.

Plaintiffs' Authorities Do Not Support Their Position

9. At paragraphs 24-28 of their Bench Brief, the Plaintiffs cite three authorities in support of the proposition that this Honourable Court has the jurisdiction to grant, and would grant, the remedy sought by the Plaintiffs, namely the Plaintiffs' participation in and variance of the Secured Notes Transaction. These authorities, however, do not support such a proposition and are readily distinguishable from the facts of the within case.

10. In *Paul v. 1433925 Ontario Limited*[5], the issue was a dispute between shareholders in which the majority shareholder, as a manager of the business, paid himself high management fees, removed one minority shareholder as a director and manager and squeezed out both minority shareholders by having the company adopt a resolution to issue scrip certificates that rendered their common shares worthless. The plaintiffs brought a dissent and appraisal application, as well as a claim for an oppression remedy.

11. The Ontario Superior Court of Justice refused to find oppression with respect to the removal of the minority shareholder as a director and manager, finding that this was an issue of business judgment for the company rather than oppressive conduct. The Court confirmed that: "It is trite law that the courts should not interfere with business decisions in these types of cases."[6] The Court cited prior authorities in confirming that oppression is conduct, *inter alia*, that is "coercive or abusive" or which demonstrates a "lack of a valid corporate purpose for the transaction" or "a plan or design to eliminate the minority shareholder."[7] In this light, the Court also refused to find oppression with respect to the majority shareholder's decision to pay himself high management fees.[8]

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[4]Lightstream Statement of Defence (FrontFour action) at paras. 8-10, attached at Tab B hereto; Unsecured Notes Indenture dated January 30, 2012, s. 4.06(b)(i), Plaintiffs' Record Tab 3, p. 86.
[5] 2013 ONSC 7002, Plaintiffs' Authorities, Tab 10.
[6] *ibid* at para. 107.
[7] *ibid* at paras. 103-104.
[8] *ibid* at para. 116.

12. With respect to the corporate resolution to issue the scrip certificates, the Court was willing to find oppressive conduct on the basis that the real purpose of the resolution was to squeeze out the minority shareholders and that it was unclear how this resolution was in the best interests of the company. In the present case, by contrast, there is substantial evidence to show that the Secured Notes Transaction was considered to be, and in fact was, in the best interests of Lightstream at the time and was undertaken in a legitimate effort to reduce debt and interest payments. There is also no evidence whatsoever of any nefarious purpose to the Secured Notes Transaction or of any conduct that was intended to harm FrontFour or Mudrick.

13. Notwithstanding that the Court in *Paul* did find oppressive conduct with respect to the defendant's conduct in squeezing out the minority shareholders, it was also prepared only to award damages to the plaintiffs. It also found that such damages were minimal, as the plaintiffs had exercised their dissent rights under the legislation and as such had pursued the other available claims process. The Court limited the damages to the interest that the plaintiffs had already been paid.[9]

14. In *Alharayeri v Black*[10], the plaintiff claimed oppression on the basis that the defendant company president had failed to convert the plaintiff's preferred shares to common shares and had diluted the plaintiff's common shares by carrying out a private placement which had been approved by the company's Board.

15. The Quebec Superior Court found oppression on some claims but not on others. With respect to the dilution claim, as highlighted by FrontFour and Mudrick, the Court refused to find oppression given that the private placement had also provided a rapid and substantial injection of capital into the business, notwithstanding that it also involved the issuance of an additional 96,100,000 common shares that reduced the plaintiff's share capital from 25.8% to 1.5%. The Court found that this was a business decision that was justified in the circumstances.[11] This was also not a case with respect to the proper treatment of unsecured notes pursuant to the terms of an indenture. Rather, it was a private placement created and effected by the Board. There was no indenture to guide the reasonable expectations of the plaintiffs. With respect to an appropriate remedy for the dilution of the plaintiff's shares, as in *Paul*, the Court was only prepared to award damages.

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[9] *ibid* at paras. 126-127.
[10] 2014 QCCS 180, Plaintiffs' Authorities Tab 8.
[11] *ibid* at para. 141.

16. Finally, in *BCE Inc. v 1976 Debentureholders*,[12] the issue was a plan of arrangement regarding the purchase of the shares of BCE Inc., in which the company's Board approved a leveraged buyout which thereby increased the company's debt and was opposed by a group of debenture holders, who claimed oppression when the value of their debentures fell as a result of the deal.

17. The Supreme Court of Canada held that there was no oppression. The Court stated that the primary question was whether, in all of the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations. Among other things, the Court further stated that, where it is impossible to please all stakeholders, it will be irrelevant that the directors failed to pursue alternative transactions that were no more beneficial for the company than the chosen one.[13]

18. The Court further held that the debenture holders did not have a reasonable expectation that BCE's directors would put forward a plan of arrangement that would maintain the value of their debentures, and that the plaintiffs could have protected themselves against a drop in the market value of their debentures by negotiating appropriate contractual terms at the outset. The Court confirmed the principle that deference should be accorded to the business decisions of directors acting in good faith and performing the functions that they were elected to perform, which the directors fulfilled by honouring the contractual terms of the debentures but nothing more. There was no obligation to structure the purchase in a way that provided a satisfactory price to shareholders but also preserved the market value of the debentures. The possibility of a leveraged buyout that substantially increased the company's debt should not have been outside the contemplation of the debenture holders as a potential market reality.[14]

19. In sum, the cases cited by the Plaintiffs are readily distinguishable and do not support their claim for oppression or the remedy that they seek.

The Requested Remedy is Unavailable to the Plaintiffs

20. At paragraphs 36-38 of their Bench Brief, the Plaintiffs argue that their requested remedy of participation in the Secured Notes Transaction is appropriate in these proceedings. The Plaintiffs state that their loss was the opportunity to participate in that transaction and to acquire

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[12] 2008 SCC 69, Plaintiffs' Authorities Tab 7

[13] *ibid* at paras. 82-83.

[14] *ibid* at paras. 96-100, 104-108 and 112.

secured status for their Unsecured Notes. The Plaintiffs argue that the Secured Notes Transaction was discriminatory in elevating certain noteholders in status while the rest remained unsecured.[15]

21. A fundamental problem for the Plaintiffs' proposed remedy, however, lies with respect to their assertion that this alleged breach of the Indenture and the alleged oppressive conduct (assuming for the purposes of argument that these claims can ultimately be proven and are supportable at law) should result in the Plaintiffs being inserted into the prior Secured Notes Transaction. To be clear, Lightstream asserts that there was no breach of the Indenture whatsoever and no conduct that can be said to have been oppressive to the Plaintiffs. However, the Plaintiffs allege that the Secured Notes Transaction was unlawful and oppressive to the Unsecured Noteholders, and that it was a breach of the Indenture. Having taken this position, the Plaintiffs now ask this Honourable Court to allow them to partake in the same allegedly unlawful and oppressive conduct.

22. If, as the Plaintiffs allege, the Secured Notes Transaction was unlawful and oppressive to all Unsecured Noteholders (including FrontFour and Mudrick), it would not become any less unlawful and oppressive to all of the remaining Unsecured Noteholders if FrontFour and Mudrick were to partake in it. The Plaintiffs seek to have this Honourable Court exercise an equitable remedy under the ABCA and CCAA for an alleged breach of contract by having it create a further alleged breach of contract.

[15] See, for example, Plaintiffs' Bench Brief at para. 29(f), p. 25.

23. Moreover, the allegation that the Plaintiffs are somehow seeking relief on behalf of all Unsecured Noteholders in this matter is disingenuous at best. No other Unsecured Noteholder is a party to the litigation, and none is before this Honourable Court in the CCAA proceedings. The Plaintiffs have been clear throughout that they are only seeking an Order allowing themselves alone to participate in the Unsecured Notes Transaction on the same terms as Apollo and GSO, as can be seen, for example, in the Statements of Claim filed by both Plaintiffs[16], the Affidavit of David Kirsch filed on August 3, 2016[17] and the initial demand letter from counsel to FrontFour to Lightstream, which stated that FrontFour found the Secured Notes Transaction to be "attractive" and that FrontFour would be prepared to finalize documentation on an expedited basis to permit FrontFour to participate, failing which it would initiate legal proceedings.[18]

24. The additional number of issued and outstanding Unsecured Notes of Lightstream is significant. Lightstream initially issued US$900,000,000 of Unsecured Notes in 2012. It repurchased US$100,000,000 of the notes in 2014, leaving a total of US$800,000,000, which Unsecured Notes subsequently traded on the secondary market. Excluding the purchases made by FrontFour and Mudrick and accounting for the exchange of the Unsecured Notes by Apollo, GSO and the noteholders who sought to participate in the follow-on exchanges in August of 2015, there remains a total amount of US$153,618,000 of Unsecured Notes which are held by other parties. This represents approximately 19.2% of all of the Unsecured Notes that existed after 2014 and is more than the total amount of FrontFour's and Mudrick's Unsecured Notes put together.[19]

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[16] FrontFour Statement of Claim, Plaintiffs' Record Tab 2 and Mudrick Statement of Claim, Plaintiffs' Record Tab 1.

[17] Affidavit of David Kirsch filed August 3, 2016, Plaintiffs' Record at Tab 3(H), p. 215.

[18] Correspondence from Norton Rose Fulbright to Lightstream Resources Ltd. dated July 6, 2015, Lightstream Production L001826, attached at Tab C hereto.

[19] See Tab A attached hereto and entries for January 20, 2012, 2014, January 22, 2015, February 2, 2015 and October 23, 2015 – May 5, 2016.

III. CONCLUSION

As set out in Lightstream's Brief of Argument filed on October 28, 2016, there is no jurisdiction in this Honourable Court to award the remedies sought by the Plaintiffs, or in the event that there is such jurisdiction, it would not be appropriate to award such remedies to the Plaintiffs in this case. This is particularly so in light of the full record of evidence filed by both sides to these proceedings, in light of the provisions of the Indenture, in light of the cases cited by the Plaintiffs which do not support the remedy being claimed and in light of the unique equitable remedy which the Plaintiffs are seeking from this Honourable Court, which the Plaintiffs themselves claim amounts to oppression, unfair prejudice and unfair disregard of the Unsecured Noteholders of the company.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF NOVEMBER, 2016

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