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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF MANTLE MATERIALS GROUP, LTD.
DOCUMENT	SUPPLEMENTAL BENCH BRIEF OF MANTLE MATERIALS GROUP, LTD.

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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Attention: Tom Cumming / Sam Gabor / Stephen Kroeger

APPLICATION BEFORE THE HONOURABLE ACJ D.B. NIXON
DECEMBER 18, 2023 AT 2:00 PM ON THE CALGARY COMMERCIAL LIST
VIA WEBEX

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PART 1 - INTRODUCTION

1. Mantle Materials Group, Ltd. ("**Mantle**") carries on the business of extracting, processing and selling gravel and other aggregates ("**Aggregate**") from pits (collectively, the "**Aggregate Pits**") that it operates in the Province of Alberta.

2. Travelers Capital Corp. ("**Travelers**") has filed an application seeking to enhance and expand the powers of FTI Consulting Inc. ("**FTI**") as proposed monitor of Mantle (the "**Monitor**") akin to a court appointed receiver in the event the Court grants an order allowing Mantle to continue its proposal proceedings (the "**Proposal Proceedings**") under Division I of Part III of the *Bankruptcy and Insolvency Act* ("**BIA**") as a proceeding under the *Companies' Creditors Arrangement Act* ("**CCAA**", and such proceedings, the "**CCAA Proceedings**"). Mantle opposes Traveler's application.

3. All references to monetary amounts referenced herein are in Canadian dollars, unless otherwise stated.

4. Unless otherwise defined herein, all defined terms shall have the meaning as set out in the Affidavit of Byron Levkulich sworn November 27, 2023 (the "**Levkulich Affidavit**") in support of Mantle's application converting the Proposal Proceedings into the CCAA Proceedings and the Supplemental Affidavit of Byron Levkulich, sworn December 18, 2023 ("**Supplemental Levkulich Affidavit**") in response to the submissions of Travelers in its application.

PART 2 - FACTS

5. The facts forming the background to Mantle's opposition to Traveler's application are set out in more detail in the Levkulich Affidavit, the Supplemental Levkulich Affidavit and the Confidential Affidavit of Byron Levkulich sworn December 18, 2023. Further information with respect to the background of, and developments in, the Proposal Proceedings can be found in the materials filed in the Proposal Proceedings including*, inter alia*, the Affidavits of Mr. Levkulich sworn August 7 and 11, September 15 and November 2, 2023, the Affidavit of Cory Pichota, President and Chief Operating Officer of Mantle, sworn August 8, 2023, and the Proposal Trustee's Reports dated August 4 and 11, September 18, November 3, and December 11, 2023.

PART 3 - LAW AND ARGUMENT

6. The jurisdiction for this Honourable Court to enhance FTI's powers as proposed monitor is derived from Section 11 of the CCAA, which grants the Court the power to make any order that it considers appropriate in the circumstances,[1] and Section 23(k) of the CCAA, which grants the Court the power to authorize a monitor to carry out any other functions in relation to a company that the court may direct.

7. The discretionary authority conferred under section 11 of the CCAA, while broad in nature, is not boundless. The authority must be exercised in furtherance of the remedial objectives of the CCAA. Additionally, the court must keep in mind three "baseline considerations", which Travelers bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith, and (3) that the applicant is acting with due diligence.[2]

8. Four factual scenarios have been identified in which courts have allowed a secured creditor to rely on the CCAA to extend and enhance the powers of a monitor:

   (a) management has resigned, leaving no directors and officers in place,

   (b) management is unfit to conduct a restructuring process in a manner that would be in the best interest of all stakeholders,

   (c) any potential restructuring path available is doomed to fail, and/or that

   (d) management is conflicted, notably because it is participating in the sales process under a CCAA.[3]

9. There are no facts in evidence that fit within the four scenarios above which support the appointment of a super-monitor as being appropriate in the circumstances. The evidence before the Court supports the opposite conclusions and further supports Mantle's submissions below that Travelers has not been acting in good faith and with due diligence.

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[1] *Companies Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("***CCAA***"), section 11 [**Tab 1**].
[2] *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10, at paras. 49 and 70 [**Tab 2**].
[3] 2019 Annual Review of Insolvency Law - *In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs* - Luc Morin and Arad Mojtehdi, pg. 6 [**Tab 3**].

Mantle's Management has not Resigned

10. While the time devoted by Mantle's management time will be scaled back, and the terms of management's continued relationship with Mantle is still being negotiated, management remains in place. Mantle is seeking consulting arrangements with them that would remain in place until the termination of the CCAA Proceedings in order to manage Mantle's Reclamation Work and complete the liquidation of Mantle's assets.[4]

Mantle's Management is fit to conduct a CCAA process in a manner that is in the best interest of all stakeholders

11. Mantle's management is the most knowledgeable group of individuals with respect to the Aggregate Pits, Reclamation Liabilities, Reclamation Work and the liquidation of its assets, and no evidence exists before the Court that Mantle's management is unfit to continue with those tasks. Mantle and its management have acted in good faith throughout the Proposal Proceedings[5] and will continue to do so in the CCAA Proceeding.

12. Paragraphs 10(a) and (b) and 17 of the Supplemental Levkulich Affidavit summarize the Major Reclamation Work and Assessment Period Reclamation Work for the Inactive Aggregate Pits remains outstanding and must be performed in 2024 and 2025, the Assessment Period, before Mantle is able to obtain reclamation certificates in respect of the Inactive Aggregate Pits. Much of that Reclamation Work is required to address issues that are often arise during the 2 year Assessment Periods, but their scope and the difficulty and cost of addressing them varies. Mantle's management, and in particular Cory Pichota, has significant industry knowledge, experience in managing the reclamation of gravel and aggregate pits, and specific knowledge in relation to Mantle's Active Aggregate Pits and Inactive Aggregate Pits that is required to manage the reclamation process in an efficient and cost effective manner.[6]

13. Mantle's management remains the best fit to conduct the Reclamation Work required to address Mantle's remaining Reclamation Liabilities. The Monitor is not in the best party to manage and

[4] Supplemental Affidavit of Byron Levkulich, sworn December 18, 2023 ("**Supplemental Levkulich Affidavit**"), para 10(h).
[5] Fourth Report of FTI Consulting Canada Inc., in its capacity as Proposal Trustee of Mantle Materials Group Ltd. dated December 11, 2023 at para 40; First Report of FTI Consulting Canada Inc., in its capacity as Proposed Monitor of Mantle Materials Group Ltd. dated December 11, 2023 ("**Fourth Report**"), at para 40.
[6] Supplemental Levkulich Affidavit, at paras 10(a), 10(b) and 17.

control the Reclamation Work and appointing the Monitor as a super monitor will increase costs and risk to the estate, not decrease them based on the following:

Management experience

(a) Since the completion of the Reclamation Work in November of 2023, Mantle has sought cost estimates from its contractors with respect to the remaining Major Reclamation Work that must be completed in the spring of 2024, and the Assessment Period Reclamation Work.[7] Mantle's current management has significant industry knowledge, experience in managing the reclamation of gravel and aggregate pits, and has the specific knowledge of Mantle's Active Aggregate Pits and Inactive Aggregate Pits necessary in order to manage that process in an efficient and cost effective manner.[8]

(b) Mantle has been reducing the number of its employees throughout the Proposal Proceedings as it has gradually wound down its business operations. However, the operations of Mantle include the performance of Reclamation Work and it is not correct to allege that those operations are "minor" have also ceased. While the level of time commitment from a management perspective will reduce, that time commitment, with Mantle's and particularly Mr. Pichota's knowledge and experience, will be critical to its successful, efficient and economic completion.[9] The Monitor does not have this experience and knowledge. Given that FTI does not have the requisite familiarity with the Aggregate Pits, it will have to rely heavily upon environmental consultants and will not have the company to rely upon to help reduce costs.

Sales Negotiations

(c) Mr. Pichota has been negotiating the terms of the sale of the Active Aggregate Pits with two bidders and two definitive asset purchase agreements are being discussed. Negotiations are at a sensitive stage and displacing management of Mantle would not be helpful to such negotiations and only detriment stakeholders. While FTI is being consulted with respect to these negotiations, FTI is not directly involved.[10]

[7] *Supra* note 6.
[8] Supplemental Levkulich Affidavit, para 10(a) and (d).
[9] Supplemental Levkulich Affidavit, para 10(g).
[10] Supplemental Levkulich Affidavit, para 10(f).

Key Personnel and Increased Costs

(a) Mr. Pichota has significant industry knowledge, experience in managing the reclamation of gravel and aggregate pits, and has the specific knowledge of Mantle's Active Aggregate Pits and Inactive Aggregate Pits necessary in order to manage that process in an efficient and cost effective manner.[11]

(b) Given the nature of the Reclamation Work, the cost of this work can be difficult to predict. Mr. Pichota received updated cost estimates from contractors and consultants for the remaining Major Reclamation Work and Assessment Period Reclamation Work in respect of the Inactive Aggregate Pits. Mr. Pichota is in the process of reviewing and negotiating the estimates with the contractors.[12]

(c) Mr. Pichota is in discussions to obtain alternative employment starting in January of 2024. However, because of his professional relationship with Mantle and its directors, he has indicated he is negotiating to continue to provide management services to Mantle during the CCAA Proceeding, and Mantle is in discussions with Mr. Pichota with respect to the terms of that arrangement. Mr. Pichota is only prepared to provide those services where Mantle's directors are involved.[13]

(d) If Mr. Pichota is not prepared to continue to make himself available to manage the completion of the remaining Major Reclamation Work and Assessment Period Reclamation Work for the Inactive Agreement Pits, the costs will increase significantly because environmental consultants and the Monitor will have to directly provide those management services and would have to essentially learn and replicate Mr. Pichota's knowledge with respect to the Aggregate Pits.[14]

Mantle's Reclamation Work can Succeed

14. The dual reclamation and liquidation paths which Mantle has been pursuing in the Proposal Proceedings and which it intends to continue in the CCAA Proceeding is moving forward, notwithstanding significant obstacles from Travelers, as discussed below. Mantle has made *bona fide*, good faith and significant efforts to address its Reclamation Liabilities and liquidate its assets

[11] *Supra* note 8.
[12] Supplemental Levkulich Affidavit, paras 10(a) and (d).
[13] Supplemental Levkulich Affidavit, para 10(h).
[14] Supplemental Levkulich Affidavit, para 10(c).

throughout the Proposal Proceedings. Mantle continues to work with the AEPA and its stakeholders in doing so.[15]

Traveler's Burden to Mantle's Estate

15. Notwithstanding Mantle's best efforts to move forward diligently with the Proposal Proceedings, Travelers has filed several applications and appeals in relation to the Supreme Court of Canada's decision in *Redwater* which have placed undue and unnecessary expense and burden on Mantle and its stakeholders, including by significantly increasing Mantle's and the Monitor's professional fees. Travelers has prejudiced not only Mantle's stakeholders, including the general public, but also itself through its litigation. This prejudice includes the following:

(a) Travelers contested Mantle's application of August 8, 2023 to extend the time within which a proposal must be filed, to approve the Interim Facility to fund Mantle's restructuring activities and Reclamation Work, to grant the Interim Financing Charge to secure the Interim Facility (the "**Interim Facility**"), to grant an Administrative Charge to secure the fees and expenses of the Proposal Trustee, of counsel for the Proposal Trustee, and counsel for Mantle, and to grant an indemnity in favour of the officers and directors of Mantle secured by the D&O Charge;

(b) Mantle's application was adjourned to August 15, 2023, and in the interim period Mantle filed supplemental affidavits and a supplemental brief, the Proposal Trustee filed a supplemental report, and Travelers filed a supplemental brief;

(c) at the end of the hearing of the application on August 15, 2023, the Honourable Justice Feasby invited the parties to file by August 18, 2023 written submissions of up to three pages to address new issues argued by Travelers in the application that were not reflected in its materials, and counsel for Mantle, the AEPA and Travelers filed supplemental submissions;

(d) following the release of the decision of the Honourable Justice Feasby on August 28, 2023, Travelers applied to the Court of Appeal for an order confirming they had an appeal of

[15] Supplemental Levkulich Affidavit, paras 10, 17.

Justice Feasby's decision as of right under section 193(c) of the BIA or in the alternative for leave to appeal the decision under section 193(e);

(e) on October 18 2023, Justice de Wit released his decision dismissing Travelers' application;

(f) Travelers thereafter again applied to the Justice de Wit for leave to appeal his decision before a panel of the Court of Appeal; and

(g) on November 27, 2023, Justice de Wit again dismissed Travelers' application;[16]

(collectively, the "**Travelers' Applications**").

16. In addition, in connection with Travelers' Applications, there was one additional hearing by Webex before this Honourable Court, one hearing by Webex before the Court of Appeal, and one desk application before the Court of Appeal. Furthermore, Travelers' counsel questioned Mr. Levkulich on his affidavits for a total of approximately 8 hours, which questionings required significant time for Mr. Levkulich and Mantle's counsel in preparation, in attendance and in answering undertakings.[17]

17. Between August 9, 2023 and November 27, 2023, the total professional fees of Gowling WLG attributable to the Travelers' Applications was approximately **$230,000,** which does not include the aforementioned questioning or responding to their applications served on December 14, 2023. The Proposal Trustee and its counsel also had professional fees attributable to the Travelers' Applications, including attending the questionings.[18]

18. In addition, Travelers's opposition to the August 8, 2023 application resulted in delays in putting the Interim Facility in place. Mantle did not have sufficient cash without the Interim Facility to fund the Reclamation Work, the payment of its employees or the payment of contractors. Hence, all of these activities were delayed by Travelers' opposition. The negative consequences to the Proposal Proceedings, Mantle and its stakeholders included the following:

[16] Supplemental Levkulich Affidavit, para 7. See *Mantle Materials Group, Ltd. v Travelers Capital Corp*, 2023 ABCA 339; See Tabs 4 and 5 of Traveler's Book of Authorities for the decision of Justice Feasby dated August 28, 2023 and the initial Court of Appeal decision of Justice de Wit dated October 23, 2023.
[17] Supplemental Levkulich Affidavit, para 8.
[18] Supplemental Levkulich Affidavit, para 8.

(a) the commencement of Reclamation Work was delayed, with the effect that some Reclamation Work could not be completed in 2023 and will need to be completed in spring 2024;

(b) important activities such as the collection of accounts receivable, the sale of inventory and the collection of the equipment subject to Travelers' security (the "**Travelers Equipment**") in one safe location were all delayed; and

(c) Mantle was unable to take steps to market and sell the Travelers Equipment and the Active Aggregate Pits.[19]

19. Traveler's has further taken the position that it has lost faith in Mantle on the basis that Mantle has "used the Proposal Proceedings to leverage the security of other creditors to apportion the cost of the proceedings and the costs to complete the Reclamation Work pursuant to the Interim Facility super priority charge".[20] There is no basis for such a position. The Travelers' loan was advanced in the fall of 2021, over a year and a half before the Proposal Proceedings were commenced, and the evidence in the Proposal Proceedings is that Mantle made great efforts to build its business in order to make it viable. In addition, RLF Lender also provided financing to Mantle in 2022.[21] Travelers' prior counsel made a very similar argument in the application before the Honourable Justice Feasby, and that argument was not accepted.

20. Travelers asserts that the directors of Mantle are not objective because they may have personal liability for Reclamation Liabilities, and this is illustrated by RLF Lender's advances under the Interim Facility, and Travelers' speculation that the directors may have reporting obligations to investors and regulators, and that this explains RLF Lender's motivation to provide the Interim Facility and attempt to ensure the Reclamation Liabilities are addressed. These type of assertions and speculations are improper – they suggest Mantle and its directors are acting in a nefarious manner. The primary obligor for the Reclamation Liabilities is Mantle, not the directors, who have available due diligence defences in many circumstances. Further, there is no judicial or statutory authority to the effect that an interim financing facility cannot fund the payment of priority obligations of a debtor company in an insolvency proceeding if the directors have a potential statutory liability for that obligation. Nor is there any authority that an interim lender that is related to a debtor company cannot obtain a first priority charge to secure its interim facility. Finally,

[19] Supplemental Levkulich Affidavit, at para 9.
[20] Travelers' Enhanced Monitor Application, at para 18.
[21] Levkulich Affidavit, at para 57.

neither Travelers nor any other party, other than RLF Lender, were prepared to provide interim financing to Mantle.

21. It is submitted that Traveler's application for a super monitor and its position is a collateral attack on the decisions of Justice Feasby and Justice de Wit (x2) and a fourth attempt to side step the Supreme Court of Canada's decision in *Redwater*[22] and the Alberta Court of Appeal's decision in *Manitok*[23] which provide that environmental reclamation and mediation obligations take priority over general creditor claims, and the assets of an insolvent debtor's estate must be used to pay for environmental reclamation before general creditors receive distributions.

22. The rule against collateral attack seeks to ensure that a litigation step or proceeding that challenges, directly or indirectly, a prior court decision or result, is not permitted. Collateral attacks are generally prohibited and an abuse of process.[24]

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.[25]

23. Justice Feasby found that Travelers conducted due diligence prior to entering the financing arrangement with Mantle. Among the materials available to Travelers as part of that due diligence process were documents indicating the existence of Mantle's environmental Reclamation Liabilities and the security posted by Mantle with AEPA. Prior to entering the financing arrangement, Travelers had the opportunity to assess the risk of doing business with Mantle, make an informed decision whether to do business with Mantle, and to negotiate a cost of borrowing that reflected the risk inherent in Mantle's business.[26]

24. Travelers is a commercially sophisticated lender that contracted with Mantle and included terms in its agreements to attempt to mitigate the risk in providing financing to Mantle. Travelers' is not proceeding in good faith and with due diligence in seeking the appointment of a super-monitor as

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[22] *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5 at paras 159, 160, 161 [**Tab 4**].
[23] *Manitok Energy Inc (Re)*, 2022 ABCA 117 at para 41 [**Tab 5**].
[24] *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 28 [**Tab 6**]. See also *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 at para 33 [**Tab 7**].
[25] *R. v. Wilson*, [1983] 2 SCR 594 at para 8 [**Tab 8**].
[26] *Re Mantle Materials Group, Ltd,* 2023 ABKB 488, para 42 [**Tab 9**].

doing so continues to increase the costs to Mantle's estate to the detriment of its stakeholders, including the general public and Travelers itself, and its actions constitute a collateral attack against the *Redwater* principles and the decisions of Justice Feasby and Justice de Wit.

25. Travelers continues to disregard its own security and loan documentation reflecting the due diligence it performed when providing financing to Mantle and continues to knowingly rely on the position that Mantle has purposefully used its collateral to fund the cost to complete the Reclamation Work which is unsupportable given its loan was entered into two years prior to the Proposal Proceedings, and well after the Supreme Court of Canada released its decision in *Redwater*.[27] Traveler's position has now been rejected three times by the Alberta Court of King's Bench and Court of Appeal. It is submitted that during the Proposal Proceedings and now, Travelers has take steps to impede Mantle's good faith and reasonable efforts to perform its Reclamation Liabilities.

26. As referenced by the British Columbia Supreme Court in *Otso Gold Corp. (Re)*, this Honourable Court should not be persuaded by Traveler's intent on rejecting every restructuring step Mantle proposes for the benefit of its creditors in order that it may immediately attempt to foreclose on its security. Traveler's does not have a veto over Mantle's attempts to address its Reclamation Liabilities or the legal principles set by the Supreme Court of Canada under *Redwater,* the Alberta Court of Appeal in *Manitok* and the decisions of Justice Feasby and Justice de Wit in the Proposal Proceedings.[28]

Interim Facility At Risk

27. Mantle previously obtained the Interim Facility from RLF Lender to allow both the Reclamation Work and the other steps necessary in the Proposal Proceeding to proceed. The funding under the Interim Facility was provided to Mantle on the basis that Mantle remained debtor-in-possession during its insolvency proceedings. The Order sought by Travelers pursuant to Travelers' Enhanced Monitor Application detrimentally impacts the Interim Facility and Mantle's ability to continue to address its Reclamation Liabilities:

    (a) Under section 7.1(h) of the Interim Financing Agreement, it is an Event of Default if an Order is made which is not in form and substance acceptable to RLF Lender, acting

[27] *Otso Gold Corp. (Re)*, 2021 BCSC 2531, at para. 18 and 19 [**Tab 10**].
[28] *Ibid*, at para. 19 [**Tab 10**].

reasonably. Under section 7.1(i), it is an Event of Default if there is any event or occurrence that has a Material Adverse Effect on Mantle, its business or property.[29]

(b) The Order sought by Travelers in Travelers' Enhanced Monitor Application is not acceptable to RLF Lender because it will be significantly more expensive for FTI to carry out the Reclamation Work than Mantle, given that FTI does not have the requisite familiarity with the Aggregate Pits, will not be able to utilize the expertise, experience and knowledge of Mr. Pichota, and will have to rely heavily upon environmental consultants.[30]

(c) Further, based upon the Cash Flow Projections, Mantle does not currently have the ability to repay the Interim Facility. Mantle has cash in the amount of $1,592,248 and the $2,200,000 Interim Facility has been fully drawn upon. While the sale of the Travelers Equipment should permit the repayment of the Interim Facility, that assumes that the sales of the Active Aggregate Pits are completed, which remains uncertain.[31]

28. Mantle remaining debtor-in-possession will be the most beneficial for Mantle's stakeholders. Mantle has sufficient cash reserves to continue carrying forward with the Reclamation Work and selling the Aggregate Pits which will provide potential recovery for Mantle's stakeholders. While there is potential for there to be at least some recovery for creditors, the actions of Travelers, and those of the AEPA described below, will continue to erode that potential.[32]

29. There is no evidence before the Court of any other lender, including Travelers, is willing to provide interim financing in order for Mantle to complete the Reclamation Liabilities or to fund a receiver of Mantle.

Mantle's Management is Not Conflicted

30. Mantle's management, including Mr. Levkulich, is not conflicted. None of Mantle's management is bidding on the sale of Mantle's assets either directly or indirectly. Furthermore, there is no evidence before the Court that Mr. Levkulich or the other directors of Mantle are faced with "significant" personal exposure in these proceedings.[33] The fact that Mantle's directors' personal liability is tied to Mantle's ability to satisfy the Reclamation Liabilities ahead of any other liabilities

[29] Supplemental Levkulich Affidavit, para 11(a).
[30] Supplemental Levkulich Affidavit, para 11(b).
[31] Supplemental Levkulich Affidavit, para 11(c).
[32] Supplemental Levkulich Affidavit, para 16.
[33] Bench Brief of Travelers, para 6, 82-83.

is coincidental and entirely due to the provisions of provincial legislation. It is routine in insolvency matters that directors may be or become statutorily liable; for example, GST and employee withholdings obligations.

31. Mantle and its directors have been focussed on maximizing the realizations from Mantle's assets, reducing operating costs as quickly as possible, and addressing the liabilities and debts for which Mantle is responsible to the extent possible and in accordance with Canadian law. All payments and actions taken by Mantle have been in accordance with the cash flow projections which were prepared during those proceedings and reviewed by FTI in its capacity as Proposal Trustee. No amounts were paid by Mantle, or will be paid by Mantle, that were not necessary in the Proposal Proceedings and contemplated by the cash flow projections.[34] Specifically, in authorizing the performance of the Reclamation Work, the directors are not preferring their interests over Mantle's creditors by paying amounts that do not have to be paid in priority to other creditors. Based on the principles in *Redwater* and *Manitok*, as confirmed by the Honourable Justice Feasby, Mantle must perform those obligations before any distributions are made to creditors. Indeed, if the directors did not permit Mantle to address its Reclamation Liabilities, that would be contrary to the interests of the public, the creditors and other stakeholders.

32. In addition, the fact that Mantle`s directors have personal liability for the Reclamation Liabilities does not permit Traveler`s to side step the *Redwater* principles and receive the proceeds from the sale of its equipment without the Reclamation Liabilities having first been satisfied. The requirement for Mantle to satisfy the Reclamation Liabilities does not change whether Mantle is in bankruptcy, receivership or CCAA proceedings.

33. Travelers also continues to ignore the legal principles established in *Redwater* that environmental obligations are public duties, and that the public is the priority stakeholder in any insolvency proceedings in respect of environmental remediation obligations. It is not a conflict if directors of an insolvent debtor ensure that those obligations are satisfied because so long as those obligations are public duties, they must be satisfied. Furthermore, the directors' potential personal liability benefits an insolvent debtor`s stakeholders as it creates incentive for management to remain with the debtor company and ensure environmental remediation does in fact occur as opposed to abandoning the insolvent debtor.

[34] Supplemental Levkulich Affidavit, para 12.

Sealing the Confidential Affidavit is Appropriate

34. Mantle requests a sealing order with respect to the Confidential Affidavit of Byron Levkulich sworn December 18, 2023, until the administration of the conclusion of these CCAA Proceedings or further order of the court.

35. Part 6 Division 4 of the Alberta *Rules of Court*[35] provides that the Court may order that a document filed in a civil proceeding is confidential, may sealed and not form part of the public record of the proceedings.

36. The test to obtain a sealing order was set out by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*[36] and revised by the Supreme Court in *Sherman Estate v Donovan:*

> "The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects."
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments."[37]

37. In this case, the Confidential Affidavit attaches a letters of intent from prospective purchasers of certain pits operated by Mantle ("**LOI Pits**"), setting out the offer price and other economic terms that prospective purchasers are prepared to offer for purchase of the LOI Pits. It summarizes the

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[35] *Rules of Court*, Alta Reg 124/2010, Part 6 Division 4 [**Tab 11**].
[36] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, at para 53 [**Tab 12**].
[37] *Sherman Estate v Donovan*, 2021 SCC 25, at para 35 [**Tab 13]**

potential results of realization of different classes of assets. It also contains a spreadsheet of the estimated reclamation costs for the LOI Pits.

38. Mantle is of the opinion that the information summarized above is highly sensitive, relates to the assets Mantle is seeking to sell, and its disclosure could hamper Mantle's ability to resell assets in the event that it has to re-market them.[38] This would have a potentially material and negative effect on Mantle's ability to maximize the proceeds of sale of the LOI Pits, which would prejudice the stakeholders of Mantle.

39. Mantle therefore submits that the salutary effects of a sealing order until the conclusion of these CCAA Proceedings, or in the case of the information relating to letters of intent and draft sale agreements for the LOI Pits, until the completion of the sale transaction, outweighs any negative effects to the open court principle.

PART 4 - CONCLUSION AND RELIEF SOUGHT

40. Based on the foregoing, Mantle submits that Travelers has not met its burden that the Order it is seeking is appropriate in the circumstances. Mantle is best positioned to perform the Reclamation Work which provides the best opportunity for Mantle's general creditors to receive distributions. Mantle respectfully requests that this Honourable Court grant an Order substantially in the form of the Draft Initial Order attached to the Notice of Application filed November 27, 2023.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of December, 2023.

GOWLING WLG (CANADA) LLP

Per: _____
Tom Cumming/Sam Gabor/Stephen Kroeger
Counsel for Mantle Materials Group, Ltd.

[38] Supplemental Levkulich Affidavit, para 29.

TABLE OF AUTHORITIES