

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Commercial List)**

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

**AND IN THE MATTER OF A PROPOSED PLAN  
OF COMPROMISE OR ARRANGEMENT OF LYDIAN INTERNATIONAL LIMITED,  
LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION  
LIMITED**

**FACTUM OF THE RESPONDENT,  
CATERPILLAR FINANCIAL SERVICES (UK) LIMITED**

Dated: January 22, 2019

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(UK) Limited

TO: SERVICE LIST

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**FACTUM OF THE RESPONDENT  
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**PART I—OVERVIEW**

1. Caterpillar Financial Services (UK) Limited (“**Caterpillar**”) objects to the stay of proceedings sought by the Applicants (including the related parties, “**Lydian**”) applying to and preventing Caterpillar from executing its rights pursuant to its first-ranking security over the Mobile Mining Equipment.<sup>1</sup>

2. The Mobile Mining Equipment is currently located at the Amulsar gold project in south-central Armenia (the “**Amulsar Project**”). It is sitting idle behind the blockades and has not been appropriately winterized. If the stay of proceedings extends to the Mobile Mining Equipment, Caterpillar will be prevented from realizing on this equipment and it will be left unmaintained and exposed in the elements, risking a serious erosion of value.

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<sup>1</sup> All capitalized terms in this factum that are not defined herein have the meanings set out in the affidavit of Filippo Andrea Veil, sworn January 22, 2020 (“**Caterpillar Affidavit**”), Motion Record of the Respondent, Caterpillar Financial Services (UK) Limited, dated January 22, 2020 (“**Caterpillar Record**”).

3. On the other hand, the Mobile Mining Equipment is not presently being used by Lydian and there is no evidence that it is required as part of the sales process or other restructuring strategies Lydian is pursuing. Indeed, should Lydian succeed in securing a buyer or investor who is able to resume operations at the Amulsar Project, the buyer could be expected to source similar equipment in the timeframe required to address other issues and become operational.

4. Caterpillar has been supportive of Lydian's attempts to find a solution to its issues, and has granted Lydian forbearance agreements for over a year prior to these proceedings. However, with winter upon us and with Lydian acknowledging that it has been unable to winterize or otherwise protect the Mobile Mining Equipment, Caterpillar's recovery is at risk. Caterpillar should not be forced to further delay the exercise of its rights as a secured creditor while the value of its collateral erodes when its collateral is not required for a proposed restructuring.

5. Accordingly, Caterpillar objects to the relief sought by the Applicants at the Comeback Hearing to the extent it stays Caterpillar from exercising its security rights over the Mobile Mining Equipment or grants priority charges over such equipment.

## **PART II—FACTS**

6. The facts with respect to this motion are more fully set out in the affidavit of Filippo Andrea Viel, sworn January 22, 2020.

### **A. Background**

#### ***The Application***

7. On December 23, 2019, the Applicants were granted protection under the *Companies Creditor's Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and a broad stay

of proceedings was granted with respect to Lydian, its Business and Property, including as against certain non-Applicants including Lydian Armenia CJSC (“**Lydian Armenia**”).<sup>2</sup>

8. On January 2, 2020, the stay period was extended until January 23, 2020.<sup>3</sup> As the Initial Order and Stay Extension Order were granted on an *ex parte* basis, a comeback motion was scheduled for January 23, 2020 (the “**Comeback Motion**”).

***Caterpillar Credit Agreement and First-Ranking Security Over the Mobile Mining Equipment***

9. On December 22, 2016, Caterpillar entered into a Credit Agreement with Lydian Armenia pursuant to which Caterpillar agreed to make available a non-revolving multi-draw term facility in a maximum initial principal amount of up to USD \$42 million. The purpose of the Facility was to finance the purchase by Lydian Armenia of certain mobile mining equipment manufactured by Caterpillar Inc. or other suppliers from Zeppelin International AG or Zeppelin Armenia LLC, Armenia with an Equipment Purchase Price of up to USD \$53.85 million in aggregate.<sup>4</sup>

10. Lydian International guaranteed all of the obligations of Lydian Armenia under the Credit Agreement on December 22, 2016 (the “**Guarantee**”)<sup>5</sup> and such obligations were secured by (i) an Ontario Security Agreement granting a security interest to Caterpillar in, among other things, all right, title and interest in the Mobile Mining Equipment; and (ii) an Armenian First Ranking Pledge Agreement, granting a first ranking pledge to Caterpillar of the Mobile Mining Equipment (the “**Armenia Security Agreement**”).<sup>6</sup>

11. On December 22, 2016, Caterpillar entered into an Intercreditor Agreement with Orion Co

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<sup>2</sup> Initial Order issued December 23, 2019, Exhibit “I” to the Caterpillar Affidavit, Caterpillar Record, Tab 2I.

<sup>3</sup> Stay Extension Order issued January 2, 2020, Exhibit “J” to the Caterpillar Affidavit, Caterpillar Record, Tab 2J. .

<sup>4</sup> Caterpillar Affidavit at para. 7, Caterpillar Record, Tab 2.

<sup>5</sup> Caterpillar Affidavit at para. 10, Caterpillar Record, Tab 2.

<sup>6</sup> Caterpillar Affidavit at para. 11, Caterpillar Record, Tab 2.

IV (ED) Limited (the “**Intercreditor Agreement**”) in which the parties agreed that between Caterpillar and the Senior Creditors, Caterpillar will have a first ranking and senior lien in, among other things, the Mobile Mining Equipment.<sup>7</sup>

12. As of November 30, 2019, the principal amount outstanding under the Facility is USD \$23.6 million, exclusive of accrued interest and fees.<sup>8</sup>

***Defaults and Previous Forbearance Agreements***

13. Lydian Armenia has been in default under the Credit Agreement since October 2018.<sup>9</sup>

14. On October 31, 2018, Lydian Armenia and the Applicants entered into a Forbearance Agreement with Caterpillar and other lenders in which Lydian Armenia acknowledged the Events of Default committed under the Credit Agreement included failing to pay principal and interest when due, failing to comply with numerous covenants under the Credit Agreement and putting the Amulsar Project on care and maintenance and suspending construction and development at the Amulsar Project for greater than 3 months.<sup>10</sup>

15. The Forbearance Agreement was subsequently amended and restated on four occasions, most recently on October 14, 2019. The Forbearance Agreement expired December 20, 2019.<sup>11</sup>

16. The expiry of the Forbearance Agreement means that, but for the operation of any CCAA stay, Caterpillar would be entitled to realize upon all or any part of its security, including taking possession of the Mobile Mining Equipment and taking such steps as it considers desirable to

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<sup>7</sup> Caterpillar Affidavit at para. 15, Caterpillar Record, Tab 2.

<sup>8</sup> Caterpillar Affidavit at para. 17, Caterpillar Record, Tab 2.

<sup>9</sup> Caterpillar Affidavit at para. 23(a), Caterpillar Record, Tab 2.

<sup>10</sup> Caterpillar Affidavit at paras. 21-22, Caterpillar Record, Tab 2.

<sup>11</sup> Caterpillar Affidavit at para. 21, Caterpillar Record, Tab 2.

maintain, preserve or protect that collateral.

## **B. The Mobile Mining Equipment**

17. The Mobile Mining Equipment was purchased for construction and operation activities at the Amulsar Project. The Mobile Mining Equipment consists of 19 Caterpillar mining machines, comprised of 9 x 789 large mining trucks, 2 x 773 mining trucks, 1 x 6040 front shovel, 2 x 16M motor graders, 1 x 994 large wheel loader, 1 x 834 wheel loader, 1 x D9R dozer and 1 x 242B3 small wheel loader, all of those machines are for primary use to excavate, mine and transport ore and waste material at the planned mine.<sup>12</sup>

18. Construction activities at the Amulsar Project commenced in 2016 and the Mobile Mining Equipment was used on the site. However, as a result of the blockades and other negative impacts on the Amulsar Project, the Mobile Mining Equipment is not presently in use by Lydian Armenia.<sup>13</sup>

19. Moreover, despites covenants in both the Credit Agreement and Forbearance Agreement providing for the care and maintenance of the Mobile Mining Equipment, due to its inability to access the Amulsar Project, Lydian has not been able to carry out maintenance or repair work on the Mobile Mining Equipment. Specifically, Lydian was not able to complete any winterizing of the Mobile Mining Equipment prior to the onset of winter.<sup>14</sup>

20. As a result of this failure, there is a real and significant risk that the Mobile Mining Equipment will deteriorate over the course of the winter in Armenia, which has the potential to

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<sup>12</sup> Caterpillar Affidavit at para. 28, Caterpillar Record, Tab 2.

<sup>13</sup> Affidavit of Edward Sellers, sworn December 22, 2019 at para. 7 (“**Sellers Affidavit**”), Application Record of the Applicants, dated December 22, 2019 (“**Lydian Application Record**”), Tab 2.

<sup>14</sup> Sellers Affidavit at para. 9, Lydian Application Record, Tab 2.

have a significant adverse impact on the value of the Mobile Mining Equipment.<sup>15</sup>

### **PART III—ISSUES**

21. At issue on this motion is whether the stay of proceedings should apply to prevent Caterpillar from exercising its rights against the Mobile Mining Equipment. Caterpillar respectfully submits that it is inappropriate for the stay of proceedings to apply to its collateral given the prejudice to Caterpillar of leaving its collateral exposed and unmaintained when it is not integral to the Applicants' restructuring efforts.

### **PART IV—LAW & ARGUMENT**

#### **A. Application of the Stay**

22. A comeback hearing is a *de novo* hearing in which the Applicants have the onus to justify the continuation of the provisions in the Initial Order as well as the additional relief sought.<sup>16</sup>

23. On this Comeback Motion, Lydian seeks, among other relief, a broad stay of proceedings up to and including February 25, 2020. The requested order extends the application of the stay to Lydian Armenia, although no recognition of the CCAA orders has been sought in Armenia nor does there appear to be an intention to seek recognition there.

24. Section 11.02(3) of the CCAA, permits the court to exercise its discretion to extend the stay of proceedings; however, the court must not make the order unless the Applicants satisfy the court that:

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<sup>15</sup> Caterpillar Affidavit at para. 34, Caterpillar Record, Tab 2.

<sup>16</sup> *League Assets Corp., Re*, 2013 BCSC 2043 at para. 18, Brief of Authorities of Caterpillar Financial Services (UK) Limited, dated January 22, 2020 ("Caterpillar BOA") Tab 1; *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 at para 21, Caterpillar BOA Tab 2.

- (a) circumstances exist that make the order appropriate; and
- (b) the Applicants have acted, and are acting, in good faith and with due diligence during the CCAA proceedings.<sup>17</sup>

25. In determining whether circumstances exist that make the order appropriate, the court must be satisfied that the relief sought will further the purposes of the CCAA.<sup>18</sup>

26. In this case, while Caterpillar has serious concerns about the need for CCAA proceedings and the viability of any potential plan, at this time Caterpillar does not object to the stay of proceedings generally but rather objects to the stay preventing it from exercising its security over the Mobile Mining Equipment.

27. In determining whether a party should be exempt from the application of the stay in the context of a lift stay motion, the court considers whether there are sound reasons for granting that relief consistent with the objectives of the CCAA, including a consideration of:

- (a) the balance of convenience;
- (b) the relative prejudice to the parties; and
- (c) where relevant, the merits of the proposed action.<sup>19</sup>

28. The three components of the lift stay test “are interrelated in the sense that the overriding question is whether the moving party has shown that it is in the interests of justice to grant a

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<sup>17</sup> *U.S. Steel Canada Inc., Re*, 2016 ONSC 3106 at para. 2, Caterpillar BOA, Tab 3.

<sup>18</sup> *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 at paras. 12-15, Caterpillar BOA, Tab 4.

<sup>19</sup> *Re Nortel Networks Corporation et al*, 2015 ONSC 1354 at para. 15, Caterpillar BOA, Tab 5; *Canwest Global Communications Corp., Re*, 2011 ONSC 2215 at para. 27, Caterpillar BOA, Tab 6 [*Canwest*]; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* 2007 SKCA 72 at para. 68, Caterpillar BOA, Tab 7.

stay.”<sup>20</sup>

29. The court in *Canwest Global Communications Corp., Re* described numerous situations in which the court has lifted a stay, which include the following situations that apply in this case:<sup>21</sup>

- a) the party seeking relief from the stay shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);<sup>22</sup>
- b) the party seeking relief from the stay would be significantly prejudiced by a refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors<sup>23</sup>; and
- c) it is necessary to permit the party seeking relief from the stay to take steps to protect a right that could be lost by the passage of time.<sup>24</sup>

### ***Prejudice to Caterpillar***

30. The relative prejudice that will be suffered by Caterpillar exceeds the relative prejudice to the applicants and the remaining stakeholders.

31. Caterpillar is unique amongst the secured creditors in that it has, pursuant to the Intercreditor Agreement, a first-ranking interest in the Mobile Mining Equipment. As a result, the deterioration of that collateral disproportionately affects Caterpillar’s chances of recovery.

32. The value of the Mobile Mining Equipment is presently at risk. The equipment is idle and is not being properly maintained or winterized. Continued delay in allowing Caterpillar to seize and winterize the equipment further threatens the value of the Caterpillar security.

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<sup>20</sup> *Essar Steel Algoma Inc. (Re)*, 2016 ONCA 138 at para. 60 [*Essar*], Caterpillar BOA, Tab 8.

<sup>21</sup> *Canwest* at para. 26, citing R.H. McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy* (looseleaf) (Aurora: Carswell, 1994-) at 3.3450, Caterpillar BOA, Tab 6.

<sup>22</sup> See e.g. *Alberta-Pacific Terminals Ltd., Re*, 1991 CarswellBC 494 at para. 26 (SC), Caterpillar BOA, Tab 9.

<sup>23</sup> See e.g. *Essar*, BOA Tab 8; *Humber Valley Resort Corp., Re*, 2008 NLTD 174, Caterpillar BOA, Tab 10.

<sup>24</sup> See e.g. *PSInet Ltd. (Re)* (2002), 33 CBR (4<sup>th</sup>) 284, Caterpillar BOA Tab 12.

***No Evidence of Resulting Prejudice on Lydian, Other Creditors and the Proposed Restructuring***

33. Conversely, there is no evidence that permitting Caterpillar to execute its rights would prejudice Lydian, other creditors, or Lydian's restructuring plans, which appear to involve determining whether a sale or financing option is available and/or commencing an arbitration as against the Government of Armenia.

34. First, if Caterpillar were able to exercise its security against the Mobile Mining Equipment now, it would have no impact on the present operations of Lydian Armenia nor the Applicants as such equipment is presently sitting unused on the blockaded Project Amulsar site.

35. Second, identifying a sale or investment in Project Amulsar will be, at minimum, highly challenging. In 2018 and early 2019, the Applicants conducted a sales process with the assistance of BMO Nesbitt Burns Inc. to canvass potential refinancing or sale options with respect to Lydian Armenia. As the Applicants have conceded, the process that ran from 2018 to early 2019 did not produce "any meaningful offers that could be executed upon".<sup>25</sup> The Applicants then conducted a further process beginning in October 2019 that produced only "limited interest", and "any interest that did surface was significantly impacted given the ongoing blockades and situation in Armenia."<sup>26</sup> The Applicants have produced no evidence to suggest that the process would be any different in these CCAA proceedings.

36. Third, even if the Applicants were able to succeed in identifying a buyer or obtaining financing with respect to the Amulsar Project, the significant challenges that the Applicants have

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<sup>25</sup> Sellers Affidavit at para. 86, Lydian Application Record, Tab 2.

<sup>26</sup> Sellers Affidavit at para. 87, Lydian Application Record, Tab 2.

faced would still need to be addressed by the party intending to operate the Amulsar Project. This includes addressing the blockade and numerous permit and other issues, which will take time.

37. The Mobile Mining Equipment is not unique. It is construction and mining equipment such as mining trucks, shovels, graders and loaders. If a party can be identified that intends to operate the Amulsar Project, that party could replace the Mobile Mining Equipment. Given the significant challenges to restarting the project, any such party should have time to source the equipment in roughly the timeframe in which the equipment would be needed.

38. Fourth, including the Mobile Mining Equipment in the overall sale process is unlikely to impact the price obtained in a manner that would impact any other creditor. Given the serious impediments to the transaction in the form of the blockade and permitting issues, if Caterpillar is able to realize on the collateral now, it will likely be able to obtain a higher and better value than if the collateral is included in a sale or investment process for the business as a whole.

39. As a result, this is not a situation in which the collateral that Caterpillar seeks to secure is critical to the ongoing business during the restructuring process. Instead, this is a situation in which Caterpillar's security is at risk and subjecting Caterpillar to the stay will likely further reduce the value of the Caterpillar collateral when there is no evidence that collateral is required for the ongoing operations or proposed restructuring.

40. Such a situation is akin to cases in which the court has declined to maintain the stay of proceedings where a secured creditor's security is at risk. For example, in *Shire International Real Estates Investments Ltd., Re*, the court stated:

9 Having regard to the objectives of the CCAA, the large number of unsecured investors is, or more properly, was an appropriate consideration in granting CCAA

protection. However, that cannot trump the interests of secured creditors when the facts show that continuing CCAA proceedings is putting their security at risk. That is so particularly in circumstances where there is a strong likelihood that continuing CCAA proceedings will do nothing to enhance the value of the properties and thereby increase the potential for return to the investors. I find that this is the situation here.<sup>27</sup>

41. In this case, continuing to permit Lydian to retain the Mobile Mining Equipment puts Caterpillar's security at risk and does not enhance either the prospects of a sale or Lydian's chances in an arbitration with the Government of Armenia.

42. Accordingly, the balance of convenience and the relative prejudice to the parties favours Caterpillar and it is in the interests of justice to exclude Caterpillar from the stay and permit it to take steps to enforce its security as against the Mobile Mining Equipment.

***Caterpillar Should Have the Opportunity to Access the Equipment***

43. Finally, any suggestion that Caterpillar will be unable to enforce its security due to the ongoing blockade is beside the point. Caterpillar believes that it may have greater success in obtaining access to the Amulsar Project for the purpose of maintaining and/or removing the Mobile Mining Equipment from the site. The ongoing blockades have been directed at Lydian Armenia and its employees, contractors and suppliers and towards the goal of preventing further construction activities from occurring at the Amulsar Project. An action by Caterpillar to preserve equipment that is unrelated to the contemplated mining operations at the Amulsar Project is not inconsistent with the objective of these blockaders. As a result, whether or not Caterpillar faces challenges enforcing its security on a practical level, it should be permitted to try to do so rather than being forced to watch its collateral decline in value without any intervention.

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<sup>27</sup> *Shire International Real Estate Investments Ltd., Re*, 2010 ABQB 84 at para. 9, Caterpillar BOA, Tab 11.

**PART V—RELIEF REQUESTED**

44. For the reasons set out above, Caterpillar requests that this Court limit the relief sought by the Applicants in the Comeback Motion to permit Caterpillar to exercise its security as against the Mobile Mining Equipment.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of January 2020**



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McCarthy Tétrault LLP  
Lawyers for the Applicant

## **SCHEDULE A – LIST OF AUTHORITIES**

### **CASE LAW**

1. *League Assets Corp., Re*, 2013 BCSC 2043
2. *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14.
3. *U.S. Steel Canada Inc., Re*, 2016 ONSC 3106
4. *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758
5. *Re Nortel Networks Corporation et al*, 2015 ONSC 1354
6. *Canwest Global Communications Corp., Re*, 2011 ONSC 2215
7. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* 2007 SKCA 72
8. *Essar Steel Algoma Inc. (Re)*, 2016 ONCA 138
9. *Alberta-Pacific Terminals Ltd., Re*, [1991] B.C.J. No. 1065
10. *Humber Valley Resort Corp., Re*, 2008 NLTD 174
11. *Shire International Real Estates Investments Ltd., Re*, 2010 ABQB 84
12. *PSInet Ltd. (Re)* (2002), 33 CBR (4<sup>th</sup>) 284

## **SCHEDULE B – STATUTORY REFERENCES**

### ***Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended***

#### **General power of court**

**11** Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

#### **Rights of suppliers**

**11.01** No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

#### **Stays, etc. — other than initial application**

**11.02(2)** A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

#### **Burden of proof on application**

**(3)** The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

**Court may order security or charge to cover certain costs**

**11.52 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

**Priority**

**(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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Proceeding commenced at Toronto

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