

CANADA

SUPERIOR COURT
COMMERCIAL DIVISION

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-11-040900-116

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

KITCO METALS INC.

Petitioner

and

**RICHTER ADVISORY GROUP INC. (formerly
RSM RICHTER INC.)**

Monitor

**MOTION FOR A SIXTH EXTENSION OF THE INITIAL ORDER AND OTHER ORDERS
(Section 11.02 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
("CCAA"))**

**TO THE HONOURABLE MARK SCHRAGER, J.S.C., SITTING IN COMMERCIAL DIVISION,
IN AND FOR THE DISTRICT OF MONTREAL, THE PETITIONER (HEREINAFTER "KITCO")
RESPECTFULLY SUBMITS AS FOLLOWS:**

CONCLUSIONS SOUGHT

1. On June 8, 2011, the Petitioner filed a Notice of Intention to make a proposal under the Bankruptcy and Insolvency Act;
2. On July 7, 2011, this Court issued an initial order (the "**Initial Order**") pursuant to section 11.02 of the CCAA in respect of Kitco;
3. The Initial Order established that the initial "**Stay Period**" (as defined therein) would expire on July 27, 2011;
4. On July 27, 2011, the Stay Period was extended to October 18, 2011, the whole as appears from the Court record;
5. On October 18, 2011, the Stay Period was extended to April 18, 2012;
6. On April 18, 2012, the Stay Period was extended to October 17, 2012;
7. On October 15, 2012, the Stay Period was extended to June 26, 2013;
8. On June 25, 2013 the Stay Period was extended to March 14, 2014;

9. By the present, Kitco seeks an extension of the Stay Period to April 30, 2015;
10. Kitco also seeks the approval of this Honourable Court to conclude certain transactions in connection with the commercial and residential condo space more fully described below;
11. Finally, Kitco seeks an the approval of this Honourable Court to pay a partial dividend to its creditors;

DEVELOPMENTS SINCE THE INITIAL ORDER

12. Kitco's operations and its relationship with its clients have remained generally stable;
13. As appears from the Monitor's Eighteenth Report that will be filed in support of the present motion, the quantity of precious metals held in Kitco's customer pool accounts is consistent with the levels at the commencement of this restructuring;
14. Kitco's customers have continued to demonstrate their confidence in Kitco by depositing significant amounts of cash in Kitco's segregated accounts. The current balance of approximately \$53.5 million is within the range of segregated cash deposit accounts experienced by Kitco since the commencement of the restructuring and is correlated with general market conditions, as well as with Kitco's overall activity levels, the whole as appears from the Monitor's Eighteenth Report;
15. Moreover, as appears from the cash flow projections included with the Monitor's Eighteenth Report, Kitco's cash flow situation is stable and, when excluding the cost of restructuring and the non-reimbursement of sales taxes by l'Agence du Revenu du Québec ("**ARQ**"), Kitco's operations would be cash flow positive for the extension period sought herein;
16. In light of the abovementioned cash flow projections, none of Kitco's creditors will suffer any real prejudice as a result of an extension of the Initial Order to April 30, 2015;
17. Moreover, as appears from the Monitor's Eighteenth Report, Kitco continues to control its administrative costs and, as reflected in said report, there is a positive \$2.7 million variance in cash disbursements for the period ending February 28, 2014;
18. Finally, the Monitor shall continue to file regular quarterly reports and shall continue to make same available to all interested parties;

ALTITUDE TRANSACTIONS

19. As has been brought to the attention of the Court on previous occasions, Kitco has certain commitments to purchase office and residential condo space in the Montreal real estate project known as Altitude; more specifically, floors four (4) to seven (7) representing approximately 20 000 square feet of commercial space (the "**Commercial Space**"), as well as two residential units known as 2903 and 3203;
20. As outlined in the Monitor's Eighteenth Report (and in previous reports), the original total financial commitment in respect of these units is \$16,594,000, with a deposit of approximately \$4.1 million (or 25%) having already been disbursed;

21. Pursuant to the *Order for a Fourth Extension of the Initial Order*, Kitco was entitled to solicit offers of financing, lease or sale for both the Commercial Space and the two residential units;
22. With respect to the Commercial Space, real estate brokerage firm, Services Immobiliers Asgaard Inc. ("**Asgaard**"), was mandated in February 2013 to find a buyer or a tenant;
23. An offer to purchase was presented to Kitco via Asgaard on April 22, 2013 but said offer was far too low to merit consideration; it was rejected following consultation with the Monitor. There have been no further written offers to lease or purchase all or part of the Commercial Space;
24. While the residential units continued to be marketed by Altitude and its brokers, Kitco could not appoint its own brokers as they could not market the space on the Multiple Listing Service until Kitco was the actual owner of the units;
25. In its *Motion for a Fifth Extension of the Initial Order*, Kitco stated that it would address the Court in due course to seek the appropriate authorizations or instructions following discussions with Altitude;
26. On January 27, 2014, Altitude's attorneys sent a demand letter to Kitco convening it to a closing for the 29th floor residential unit on February 10, 2014, failing which it would be in default. Kitco did not attend the closing and instead continued discussions with Altitude towards an agreement, the terms of which are summarized in the Monitor's Eighteenth Report;
27. In an effort to preserve Kitco's investment in the Altitude project and as a result of the following, Kitco has been in discussions with Altitude regarding potential solutions:
 - a. Kitco's inability to find purchasers to take over Kitco's investment in the residential and office condominiums;
 - b. Kitco's inability to find third party financing to complete the transaction (which is attributed to Kitco's current CCAA proceedings); and
 - c. Altitude's position that the project is complete and Kitco must proceed to closing in respect of the Units;
28. These discussions have resulted in Kitco and Altitude entering into various agreements (the "**Altitude Transactions**"), the whole as more fully appears from the following documents to be filed in support hereof under confidential seal:
 - a. Agreement with Altitude dated as of March 11, 2014, **Exhibit R-1** (the "**Altitude Agreement**");
 - b. Loan Agreement with Groupe Daca Inc. ("**Daca**") dated as of March 11, 2014, **Exhibit R-2** (the "**Altitude Loan**");
 - c. Hypothec in favour of Daca dated as of March 11, 2014, **Exhibit R-3** (the "**Altitude Hypothec**");

29. The essential elements of the proposed Altitude Transactions, as set out in the documents listed above, are summarized in the Monitor's Eighteenth Report and include the following key points:
- a. Kitco's purchase of the Commercial Space and unit 3203 is to be completed within ten (10) business days following the receipt of Court approval;
 - b. The offer to purchase unit 2903 will be cancelled and the deposit that Kitco has paid on this unit will be applied to the purchase price of the Commercial Space and unit 3203;
 - c. Kitco does not have sufficient liquidity to complete the purchase of the Commercial Space and unit 3203 and, as noted above, was unable to secure third-party financing. The balance of the purchase price for the Commercial Space and unit 3203 will thus be paid as follows:
 - i. Financing in the amount of \$4.725 million to be provided by Dacca pursuant to the Altitude Loan and Altitude Hypothec. It is Kitco's understanding that Dacca is a related party to Altitude;
 - ii. As more fully outlined in the Monitor's Eighteenth Report, Kitco will pay the balance of the purchase price of \$4.75 million by using:
 - 1. cash on hand;
 - 2. a \$3 million partial repayment of an intercompany loan from Kitco's parent company, 3609979 Canada Inc. (the "**360 Repayment**");
30. Kitco will only proceed with the Altitude Transactions if it is permitted to use the 360 Repayment so as not to deplete cash on hand by more than approximately 2,000,000;
31. Kitco will place both the Commercial Space and unit 3203 for rent and/or sale and Kitco authorizes Altitude to do the same;
32. The Altitude Transactions are in the best interest of Kitco and the various stakeholders as they allow Kitco to preserve its investment in the Altitude project and will have a positive impact on cash flow once the Commercial Space and unit 3203 have been leased, as set out in the Monitor's Eighteenth Report;
33. Kitco thus seeks an order approving the Altitude Transactions and allowing it to enter into the Altitude Agreement, Altitude Loan and Altitude Hypothec;
34. Furthermore, the Altitude Agreement sets out certain conditions whereby unit 3203 and portions of the Commercial Space could be sold. In order to facilitate negotiations with potential buyers and limit the time and cost associated with bringing motions to the Court, Kitco also seeks an order allowing it to conclude the sale of any commercial or residential unit subject to the approval of the Monitor but without the requirement of any further Court order approving such sale, insofar as the sale price for any given unit is equal to or higher than 90% of the original cost to Kitco;

PAYMENT TO TRADE CREDITORS

35. Since the onset of these CCAA proceedings, Kitco has made it clear that it would not have required protection from its creditors were it not for the dispute with ARQ;
36. The Stay Period has resulted in Kitco being prevented from paying numerous creditors with valid, provable claims;
37. As outlined below in the section of this Motion entitled "Dispute with ARQ", said dispute will most likely remain ongoing for a significant period of time;
38. As a result, Kitco seeks the approval of this court for the payment of a partial dividend as follows. Naturally, Kitco will not pay any portion of the claim that is subject to the dispute with ARQ:
 - a. Payment of 100% of proven claims under \$20,000, which is estimated at thirty (30) claims totalling \$160,000;
 - b. Payment of 50% of proven claims between \$20,000 and \$100,000, which is estimated at seven (7) claims totalling \$210,000; thus resulting in a partial payment of approximately \$105,000;
 - c. Payment of 35% of proven claims over \$100,000, which include the claims of G4S International Logistics (USA), Inc. and Heraeus Metals New York LLC totalling approximately \$5.471 million; thus resulting in a partial payment of approximately \$1.914 million;
39. The total cost of the intended partial dividend would be approximately \$2.2 million and has already been factored into the cash flow projections provided in support of the Monitor's Eighteenth Report;
40. It is Kitco's intention to pay all proven claims in full when it becomes possible and appropriate to do so. To be clear, payments of 35% and 50% referred to above represent partial payments, not final settlements of the targeted claims;
41. Kitco will only proceed with the partial dividend if it is permitted to use the \$1.7 million currently held in trust at Woods LLP (which funds arose from the sale of its Platinum business in July, 2013) so as not to deplete cash on hand by more than approximately \$500,000;
42. Kitco has advised ARQ and the Canada Revenue Agency ("**CRA**") of its intention to seek the Court's approval to pay the partial dividend set out above and is awaiting their position in this regard;
43. The payment of a partial dividend causes no prejudice to ARQ and CRA in that, amongst other factors, ARQ and CRA have been paying themselves for some time by withholding tax reimbursements from Kitco to the detriment of Kitco and its creditors. This issue is the subject of Kitco's *Motion to enforce the initial order, to declare illegal certain rights of set-off exercised by the Agence du revenu du Québec and the Attorney General of Canada, to declare inapplicable, invalid, inoperative, unconstitutional or of no force and effect certain provisions of certain tax statutes of the province of Quebec and of Canada*

and to condemn l'Agence du Revenu du Québec and the Attorney General of Canada to pay to the petitioner the input tax credits and the input tax refunds to which it is entitled (the "Set-off Motion");

DISPUTE WITH ARQ

44. Kitco has been working diligently to advance the proceedings with respect to its dispute with ARQ;
45. As appears from the letter from Kitco's tax counsel to the Monitor dated as of March 7, 2014 and filed as an exhibit to the Monitor's Eighteenth Report (the "**Tax Letter**"), the dispute between Kitco and ARQ will not be resolved by April 30, 2015;
46. Since the previous extension of the Initial Order, both Kitco and Mr. Bart Kitner have become the subject of statements of offense issued under the *Tax Administration Act* and the subject of summons pursuant to the *Excise Tax Act*. They filed not guilty pleas at a hearing before the penal division of the Court of Quebec on February 24, 2014, at which time the case was postponed pro forma to April 28 2014 in order to allow the ARQ to fulfill its obligation to disclose all the evidence given that, to date, there has been no disclosure (see paragraph 55 of the Tax Letter);
47. In light of recent events involving Heenan Blaikie LLP, ARQ is now represented by its in-house counsel, Laverrière Meunier. As such, the debate regarding Heenan Blaikie LLP's ability to act on behalf of ARQ against Kitco has become moot;
48. The debate regarding the confidentiality of documents is still ongoing and its current status is summarized in paragraphs 12 to 35 of the Tax Letter;
49. Kitco's *Motion to Institute Proceedings in Damages and to Obtain Remedies Pursuant to the Canadian Charter of Rights and Freedoms and Charter of Human Rights and Freedoms* remains suspended until March 25, 2014 (see paragraphs 40 to 44 of the Tax Letter). Kitco must amend these proceedings in order to complete the damages portion and will likely seek an additional three (3) to four (4) month suspension in order to do so;
50. As mentioned at paragraph 45 and following of the Tax Letter, the debate of the validity of the Notices of Assessment cannot be held while Kitco and Mr. Kitner remain subject to penal proceedings;
51. Finally, given that Heenan Blaikie LLP's ability to act is no longer an issue, Kitco respectfully submits that it would be appropriate to proceed with case management of the Set-Off motion;

GENERAL

52. The Monitor, as indicated in its Eighteenth Report, supports the present motion;
53. Since the issuance of the Initial Order, Kitco has acted and continues to act in good faith, with due diligence and towards the resolution of its dispute with ARQ, which is at the basis of this restructuring process;

54. In light of the nature of the dispute with ARQ, additional time is required in order to litigate with ARQ and it has become clear that the dispute will not be resolved by the end of the extension sought herein;
55. Kitco has served the present motion upon all interested parties;
56. Kitco submits that the notice given of the presentation of the present motion is adequate and sufficient;
57. The extension sought herein will not cause any prejudice to Kitco's stakeholders;
58. A lengthier extension will reduce the costs associated with regular motions for extension of delays and is even more appropriate in the circumstances, namely in light of the stability demonstrated by Kitco since the Initial Order;
59. The present motion is well founded in fact and in law;

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present motion;

DECLARE that the notices given of the presentation of the present motion are adequate and sufficient;

ORDER that the Stay Period as defined in the Initial Order be extended by this Court up to and including April 30, 2015;

APPROVE the Altitude Transactions and **ALLOW** Kitco to enter into the Agreement with Altitude dated as of March 11, 2014 (the "**Altitude Agreement**"), the Loan Agreement with Groupe Daca Inc. dated as of March 11, 2014 and the Hypothec in favour of Groupe Daca Inc. dated as of March 11, 2014,

ALLOW Kitco to conclude the sale of any commercial or residential unit in the Altitude project subject to the approval of the Monitor but without the requirement of any further Court order approving such sale, insofar as the sale price for any given unit is equal to or higher than 90% of the original cost to Kitco;

ALLOW Kitco to proceed with the payment of a partial dividend to its creditors, with the exception of ARQ and CRA, in the amount of approximately \$2,200,000 as follows:

- a. Payment of 100% of proven claims under \$20,000, which is estimated at thirty (30) claims totalling \$160,000;
- b. Payment of 50% of proven claims between \$20,000 and \$100,000, which is estimated at seven (7) claims totalling \$210,000; thus resulting in a partial payment of approximately \$105,000;
- c. Payment of 35% of proven claims over \$100,000, which include the claims of G4S International Logistics (USA), Inc. and Heraeus Metals New York LLC totalling approximately \$5,471,000; thus resulting in a partial payment of approximately \$1,914,000;

DECLARE that the Initial Order shall remain otherwise unchanged;

ORDER the provisional execution of the Order notwithstanding any appeal without the need to furnish any security;

THE WHOLE without costs except if contested.

MONTREAL, March 11, 2014


GOWLING LAFLEUR HENDERSON LLP
Attorneys for Petitioner

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PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

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**RICHTER ADVISORY GROUP INC. (formerly
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NOTICE OF PRESENTATION

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and

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NOTICE OF PRESENTATION

TAKE NOTICE that the present *Motion for a sixth extension of the initial order* will be presented for adjudication before one of the honourable Judges of the Superior Court of Quebec, sitting in practice division, on **March 13, 2014** in room 16.12 of the Courthouse located at 1 Notre-Dame St. East, Montreal, at 9:15 pm or so soon as counsel may be heard

DO GOVERN YOURSELVES ACCORDINGLY.

MONTREAL, March 11, 2014


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