

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.

Monitor

**AMENDED MOTION FOR A TENTH EXTENSION OF THE INITIAL ORDER AND FOR
AUTHORISATION TO PAY A PARTIAL DIVIDEND**

(Section 11.02 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
("CCAA"))

TO THE HONOURABLE MARIE-ANNE PAQUETTE, J.S.C., SITTING IN COMMERCIAL
DIVISION, IN AND FOR THE DISTRICT OF MONTREAL, THE PETITIONER (OR "KITCO")
RESPECTFULLY SUBMITS AS FOLLOWS:

INTRODUCTION

1. On June 8, 2011, the Petitioner filed a Notice of Intention to make a proposal under the Bankruptcy and Insolvency Act (the "**NOI**");
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. The Stay Period has since been extended on nine previous occasions and expires on May 31, 2016, the whole as appears from the Court record;
5. By the present, Kitco seeks an extension of the Stay Period to May 31, 2017 as well as authorisation to pay a partial dividend to its trade creditors, as set out below;

STATUS OF THE BUSINESS SINCE THE PREVIOUS EXTENSION

6. Kitco's operations and its relationship with its clients have remained generally stable;
7. The quantity of precious metals held in Kitco's customer pool accounts is consistent with the levels at the commencement of this restructuring;
8. Moreover, as appears from the cash flow projections reproduced in the Monitor's Twenty-Eighth Report, Kitco's cash flow situation is stable and, in spite of the cost of restructuring, Kitco's operations would be cash flow positive for the extension period sought herein were it not for the Upstream Loan issue described below, and Kitco's intention to pay an additional partial dividend, also as described below;
9. Kitco's stakeholders will not suffer any real prejudice as a result of an extension of the Initial Order to May 31, 2017;

ALTITUDE TRANSACTIONS

10. Kitco, as well as the Monitor through its reports, has regularly kept the Court informed of developments surrounding its efforts to sell approximately 20,000 square feet of commercial condo space that it owns in the Montreal real estate project known as Altitude; more specifically, floors 4 to 7;
11. On December 12, 2014, Kitco changed real estate brokers and mandated Royal LePage Heritage, the whole as appears from previous reports of the Monitor;
12. That mandate expires on June 30, 2016 but will be extended;
13. Kitco is in compliance with all the terms of its mortgage in respect of the commercial condo;

DISPUTE WITH ARQ

Settlement Discussions

14. Kitco, the Agence du Revenu du Québec ("**ARQ**") and the Attorney General of Canada ("**AGC**") have continued the serious settlement discussions previously underway in hopes of coming to a global resolution of this matter;
15. The nature and content of these discussions still remains highly confidential and protected by settlement privilege but Kitco can report that progress has been made;
16. If an agreement can be reached in a timely manner, Kitco believes it may be in a position to file a plan of arrangement before the expiry of the extension sought herein;
17. In any event, it is clear that no settlement can be reached prior to the expiry of the current Stay Period on May 31, 2016;

Proceedings

18. Despite the ongoing settlement discussions, Kitco has been working diligently to advance the proceedings with respect to its dispute with the ARQ;
19. As appears from the letter from Kitco's tax counsel to the Monitor dated as of May 16, 2016 and filed as an exhibit to the Monitor's Twenty-Eighth Report (the "**Tax Letter**"), unless an agreement is reached, the dispute between Kitco and the ARQ will not be resolved by May 31, 2017, despite Kitco's efforts;
20. 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* has been suspended, by consent of the parties involved, until the earlier of (1) March 31, 2017, or (2) final judgment on the disclosure of evidence in the files currently pending before the Criminal and Penal Division of the Court of Québec. The reasons for same are more fully set out in paragraphs 44.2 and following of the Tax Letter;
21. As appears from paragraphs 45 and following of the Tax Letter, the debate of the validity of the Notices of Assessment cannot be held while Kitco and Mr. Bart Kitner, President of Kitco, remain subject to penal proceedings;
22. While the penal proceedings are advancing, the ARQ has refused to communicate a number of important documents that it claims are privileged. The privilege issue will be debated before the Court of Québec on June 27, 2016 and Kitco filed its arguments in this regard on April 30, 2016. The ARQ must do the same by the end of May;

The Set-off Motion

23. On October 23, 2013, Kitco filed its *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**");
24. The Set-off Motion was heard on December 8, 9 and 10, 2015 and judgment was rendered in Kitco's favour on February 1, 2016 (the "**Set-Off Judgment**");
25. On March 15, 2016, the Court of Appeal granted the ARQ and the AGC leave to appeal the Set-off Judgment and the appeal is scheduled to be heard on November 8, 2016;
26. On May 11, 2016, the Canadian Association of Insolvency and Restructuring Professionals was granted intervener status by the Court of Appeal;

PAYMENT OF PARTIAL DIVIDEND TO TRADE CREDITORS

27. On April 17, 2014, this Honourable Court granted Kitco permission to issue a partial dividend to its trade creditors as follows:

- a. Payment of 100% of proven claims under \$20,000, for a total of approximately thirty (30) claims and \$180,000;
 - b. Payment of 50% of proven claims between \$20,000 and \$100,000, for a total of approximately five (5) and \$191,000; thus resulting in a partial dividend of approximately \$96,000;
 - c. Payment of 35% of proven claims over \$100,000, which include the claims of G4S International Logistics (USA), Inc. ("**G4S**") and Heraeus Metals New York LLC ("**Heraeus**") totalling approximately \$5.471 million; thus resulting in a partial dividend of approximately \$1.914 million;
28. 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 the ARQ;
29. As mentioned above and below, and as more fully appears from the Tax Letter, unless a settlement can be reached, that dispute will be ongoing for a significant period of time;
30. As a result, Kitco seeks authorization to pay the following partial dividend on or prior to August 15, 2016:
- a. 100% of all remaining proven claims under \$100,000 for a total of approximately \$85,000;
 - b. \$126,940 to G4S, which would reduce this creditor's claim to \$200,000;
 - c. \$1,229,412 to Heraeus, which would reduce this creditor's claim to \$2 million;
31. The total cost of the intended partial dividend would be approximately \$1,441,352 and has already been factored into the cash flow projections reproduced in the Monitor's Twenty-Eighth Report;
32. Should the Set-Off Judgment be upheld by the Court of Appeal, Kitco intends to seek authorization to pay the balance of the claims of G4S and Heraeus using the approximately \$2 million that would be remitted to the Monitor by the ARQ and AGC;
33. Kitco does not seek authorization to pay a dividend to related parties, the ARQ and AGC;

KITCO'S INTENTIONS FOR THE EXTENSION PERIOD SOUGHT

Re-opening of the Refining Business

34. As more fully set out in the Set-Off Motion, Kitco had essentially shut down its metal refining operations as a result of the set-off being carried out by the ARQ and AGC;
35. As a result of the Set-Off Judgment, this set-off has ceased, at least pending the outcome of the appeal. Paragraph 12 of the Court of Appeal decision granting leave to appeal the Set-Off Judgment confirms the undertaking by the ARQ and AGC to stop setting off;

36. Kitco intends to seize this opportunity to resume its refining operations, which it believes will increase revenue and improve the cash flow situation for the benefit all stakeholders;
37. In view of resuming its refining operations, Kitco has submitted documents to the ARQ regarding those operations and intends to await the ARQ's instructions prior to resuming, the whole in order to ensure that the ARQ will refund all input tax credits and input tax refunds;
38. Kitco believes it will be in a position to resume its refining operations within two (2) weeks following receipt of the required instructions;

Upstream Loan

39. Kitco and Kitco International Limited ("KIL") are both wholly owned subsidiaries of 3609979 Canada Inc. ("**360**");
40. Kitco and 360 were incorporated in Canada, while KIL was incorporated in Barbados and is considered a resident of that country for tax purposes;
41. Between February 2010 and the filing of Kitco's NOI in June 2011, KIL loaned an amount of nearly \$8.4 million to Kitco (the "**Upstream Loan**"), the whole in an effort to improve Kitco's cash flow situation (...);
42. Pursuant to subsection 90(6) of Canada's *Income Tax Act* ("**ITA**"), 360 must include in computing income the amount of the Upstream Loan;
43. That said, pursuant to paragraph 90(8)(a), subsection 90(6) does not apply if the indebtedness is repaid within two (2) years of the day the loan is made;
44. As a result of changes made to the ITA in 2014, for purposes of the application of the exemption rule at paragraph 90(8)(a) ITA, the Upstream Loan is deemed to have been made on August 20, 2014 and therefore, if such loan is repaid before August 19, 2016, section 90(6) will not apply. The relevant provisions of the ITA are filed in support hereof as **Exhibit R-1**;
45. While the issue remains under review, the practical implications appear to be as follows:
 - a. If Kitco does not reimburse the Upstream Loan, 360 would face an income tax assessment in the range of approximately \$4 million that it would be unable to pay, possibly rendering 360 insolvent and forcing it to seek creditor protection;
 - b. If Kitco does reimburse the Upstream Loan, it appears the funds could flow through KIL and into 360, which would allow 360 to pay income taxes in the amount of approximately \$2.4 million that it cannot otherwise pay. 360 could then remit the balance to Kitco;
46. In short, Kitco, KIL and 360 are presently analyzing the viability of a transaction whereby Kitco's cash flow would suffer an impact in the amount of about \$2.625 million, while tax authorities would be allowed to recover approximately \$2.4 million from 360 that they would not otherwise recover if Kitco did not reimburse the Upstream Loan. The potential

impact on Kitco's cash flow is reflected in the cash flow projections attached to the Monitor's Twenty-Eighth Report;

47. Kitco has discussed the Upstream Loan situation with the ARQ and hopes to reach an agreement with stakeholders on how best to address it;
48. It is possible that Kitco may address this issue with the Court over the course of the Summer so that a decision can be made prior to the August 19th deadline for reimbursement of the Upstream Loan;

GENERAL

49. The Monitor, as indicated in its Twenty-Eighth Report, supports the extension of the Stay Period sought in the present motion;
50. Kitco has discussed the partial dividend payment with the ARQ and the ARQ has confirmed its consent to same;
51. 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 the ARQ, which is at the basis of this restructuring process;
52. In light of the nature of the dispute with the ARQ, additional time is required in order to negotiate and, if necessary, litigate;
53. If an agreement can be reached, it is likely that a plan of arrangement may be filed before the expiry of the extension sought herein;
54. If no agreement is reached in the short term and litigation with the ARQ continues, it is 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 this 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 May 31, 2017;

DECLARE that the Initial Order shall remain otherwise unchanged;

AUTHORIZE and ORDER Kitco Metals Inc. to pay the following partial dividend on or prior to August 15, 2016:

- a. 100% of all remaining proven claims under \$100,000 for a total of approximately \$85,000;
- b. \$126,940 to G4S International Logistics (USA), Inc.;
- c. \$1,229,412 to Heraeus Metals New York LLC;

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, May 25, 2016

(S) GOWLING WLG (CANADA) LLP

GOWLING WLG (CANADA) LLP

Lawyers for Petitioner

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