

CANADA

SUPERIOR COURT
COMMERCIAL DIVISION

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

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

RSM RICHTER INC.

Monitor

MOTION FOR A SECOND EXTENSION OF THE INITIAL ORDER
(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 July 7, 2011, this Court issued an initial order (the "**Initial Order**") pursuant to section 11.02 of the CCAA in respect of Kitco;
2. The Initial Order established that the initial "**Stay Period**" (as defined therein) would expire on July 27, 2011;
3. On July 27, 2011, the Stay Period was extended to October 18, 2011, the whole as appears from the Court record;
4. By the present, Kitco seeks an extension of the Stay Period to April 18, 2012;
5. Kitco also seeks the permission of this Court to fulfill its obligations pursuant to certain promises to purchase entered into in 2010 and pursuant to which installments shall become due in or around December 2011 and January 2012, the whole as more fully described hereafter;

DEVELOPMENTS SINCE THE INITIAL ORDER

6. Kitco's operations and its relationship with its clients are now generally stable;
7. As appears from the Monitor's Fourth Report that will be filed in support of the present motion, the quantity of precious metals held in Kitco's customer pool accounts are currently about only 4% down from their June 8, 2011 levels, versus an average decline of 6% to 14% from mid-June to mid-September. Kitco continues to experience increased demand for precious metals as investors react to current financial market conditions;
8. Kitco's customers have continued to demonstrate their confidence in Kitco by depositing significant amounts of cash in Kitco's segregated accounts, the whole as appears from the FOA Balance included with the Monitor's Fourth Report;
9. Moreover, as appears from the cashflow projections included with the Monitor's Fourth Report, Kitco's cashflow 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 would be profitable for the extension period sought herein;
10. In light of the abovementioned cashflow projections, none of Kitco's creditors will suffer any real prejudice as a result of an extension of the Initial Order to April 18, 2012;
11. Moreover, the recently hired CFO continues to review Kitco's operations and processes to identify potential profit improvement initiatives, if needed;
12. As reflected in the Monitor's Fourth Report, for the period ended October 7, 2011, actual expenses were lower than projected by \$0.5 million;
13. Finally, the Monitor shall continue to file monthly reports pursuant to the Initial Order and shall continue to make same available to all relevant parties;

SIGNIFICANT METAL TRANSACTION

14. On September 27, 2011, Kitco entered into a transaction with a corporate customer in the United States whereby Kitco is to acquire gold and silver bullion for refining and resale;
15. The amount of the transaction is significantly larger than normal day to day purchases of metals currently undertaken by Kitco but the payment of the purchase price by Kitco is conditional upon the resale of the metals by Kitco and the receipt of payment for same;
16. As a result, Kitco assumes only out-of-pocket expenses but no market risk or liability;

17. To date, about 50% of the metals, which were located outside North America, have been imported to Canada, refined and resold by Kitco. Payment was received by Kitco for such resale on October 12, 2011;
18. On October 13, 2011, Kitco paid the purchase price due to its corporate customer. The balance of the transaction is expected to be completed by mid-November 2011;

EXISTING EMPLOYEE INCENTIVE PROGRAM

19. As appears from the cashflow set out in the Monitor's Fourth Report, a \$1.1 million provision has been made for the payment of employee incentives on a company wide basis, which is up from the \$0.5 million provision set out in the Monitor's First Report. This \$1.1 million incentive payment represents approximately 11.5% of the forecasted payroll for calendar 2011, which is consistent with payments in prior years;
20. Over the past five (5) years, such incentive payments have ranged from \$0.3 million to \$1.2 million (namely 10.5% to 16.4% of gross payroll);
21. Incentive payments are based on financial goals to be achieved and calculated based on historical results and forecasts. The increase in the provision for the current year's incentive payments is a result of recent months having been significantly more profitable than the projections used to estimate the original provision;

REAL ESTATE TRANSACTIONS

22. In April and September 2010, thus prior to the notices of assessment issued by ARQ in the fall of 2010, Kitco entered into four (4) promises to purchase with respect to residential and commercial space in the "Altitude Montreal" condo project, which is currently under construction on a lot directly adjacent to the building in which Kitco's offices are currently located;
23. Until recently, the approximately \$3.3 million paid by Kitco in deposits for said units had been accounted for by mistake in Kitco's parent corporation, 3609979 Canada Inc., which resulted in a \$3.3 million loan payable to Kitco;
24. Given that the beneficiary of these promises to purchase is Kitco, not 3609979 Canada Inc., Kitco's current financial statements have been adjusted and the loan payable owing from 3609979 Canada Inc. to Kitco has been reduced accordingly;
25. Of the promises to purchase in question, three (3) are regarding residential condo units purchased as investments and one (1) is regarding 20,000 square feet of commercial office space purchased in part as an investment but primarily to fulfill Kitco's expansion requirements;
26. In light of the fact that Kitco has been informed that it cannot lease any additional space in its current building, the purchase of office space will allow it to expand as required and, in the interim, lease any excess space to third parties as an additional source of revenue;
27. Kitco will be physically linking its current offices with the new space;

28. As appears from the Monitor's Fourth Report, the firm of Cushman Wakefield has provided its expert opinion on the value of the units in question and has reached the conclusion that the current market value is in the range of the purchase prices agreed to in the promises to purchase;
29. Kitco has recently advised "Altitude Montreal" that it would be willing to sell its rights in two (2) of the three (3) residential units, insofar as it can do so without suffering a loss;
30. Pursuant to the promises to purchase, Kitco undertook to pay deposits in the amount of 25% of the purchase price and, to date, 20% has already been paid;
31. The remaining 5% shall become due upon the issuance of a certificate confirming that the project is 50% complete, which certificate is expected to be signed in or around December 2011 or January 2012;
32. Pursuant to the terms of the promises to purchase, if Kitco fails to pay the required deposits, it shall lose its rights to the units and forfeit the approximately \$3.3 million already paid in deposits;
33. Therefore, Kitco seeks the permission of this Court to proceed to pay the deposits that shall become due in or around December 2011 and January 2012, the whole in the amount of approximately \$825,000, which amount is already provided for in the cashflow and would decrease in the event that buyers are found for the two (2) residential units referred to above;

FORWARD CONTRACTS WITH HERAEUS

34. Pursuant to a forward contract entered into with Heraeus Precious Metals Inc. ("**Heraeus**") in the fall of 2010, Kitco was to repurchase 4,000 ounces of Rhodium from Heraeus on July 25, 2011 for a total price of approximately \$9.3 million;
35. As Kitco did not have the liquidity to make this purchase, Heraeus proceeded to liquidate the Rhodium, which resulted in the recovery of approximately \$7.4 million;
36. Heraeus also proceeded to apply an amount of \$1.5 million received from Kitco on May 26, 2011 as a deposit against this contract, thereby reducing its claim to \$375,600;
37. As appears from the reports of the Monitor, Heraeus has been informed that the facts surrounding the payment of the \$1.5 million deposit shall be reviewed by the Monitor in order to determine if the payment itself can be reviewed and, if not, whether Heraeus had valid security on this deposit;
38. Heraeus' remaining claim against Kitco is subject to the Stay Period and will be analyzed, assessed and dealt with within the context of the present restructuring and in accordance with the CCAA;
39. Moreover, Kitco International Limited ("**KIL**"), a company related to Kitco, was also party to forward contracts with Heraeus;
40. Following KIL's inability to repurchase 15,000 ounces of Rhodium for approximately \$33 million on June 29 and August 18, 2011, Heraeus liquidated the Rhodium between

41. July 20 and August 23, 2011 and claims to have suffered a loss of approximately \$4.5 million;
42. Heraeus claims that it is entitled to hold approximately \$1.5 million of Kitco pool inventory as collateral; Kitco contests Heraeus' attempt to hold inventory belonging to its customers as collateral;
43. Unless the parties reach an agreement regarding the foregoing, this question will likely have to be submitted to this Honourable Court;

FORWARD CONTRACT WITH STANDARD BANK

44. Pursuant to a forward contract entered into with Standard Bank PLC ("**Standard**"), Kitco was initially obligated to repurchase 1,200 ounces of Rhodium for \$2.6 million on August 15, 2011;
45. As mentioned in the *Motion for a First Extension of the Initial Order* and in the Monitor's First Report, Kitco had included a provision in its cash flow projections sufficient to cover the cost of renewing this forward contract based on the price of Rhodium at the time;
46. On the August 15th deadline, Kitco proceeded to release 500 ounces of Rhodium and agreed to a ninety (90) day extension of the forward contract for the remaining 700 ounces, the whole at a cost of approximately \$300,000, including the loss incurred on the sale of the 500 ounces and the cost of extending the contract for the remaining 700 ounces;
47. The extended contract for the remaining 700 ounces shall come to term on November 15, 2011, at which time Kitco shall determine, based on market conditions and the current spot price of Rhodium, whether or not to extend the forward contract for an additional ninety (90) days;

DISPUTE WITH ARQ

48. Kitco has been working diligently to advance the proceedings with respect to its dispute with ARQ;
49. To summarize the next steps in Kitco's dispute with ARQ, it appears that the period covered by the extension of the Stay Period sought herein will be essentially dedicated to a debate regarding the privileged nature of documents seized by the ARQ and the identification and recuperation of the evidence seized by the ARQ, to which Kitco requires access in order to prepare its case;
50. To date, Kitco's attorneys have reviewed approximately 800 boxes of documents seized by ARQ at Kitco's places of business and have remitted all confidential documents to a third party, independent attorney;
51. This independent attorney has analyzed the documents and has prepared an inventory of all documents deemed confidential and likely privileged;

52. This inventory, which is itself 258 pages long, shall serve as the basis for the debate regarding the privileged nature of certain documents seized by ARQ;
53. Finally, an expert is currently working to segregate all confidential files stored on Kitco's harddrive, which was also seized by ARQ. These files will be subject to a similar inventory and debate as the hard-copy files already inventoried;
54. On a related note and as alluded to in the Monitor's reports, ARQ has been withholding all sales tax reimbursements from Kitco, alleging that it has a right to invoke compensation up to the amount of its claim against Kitco;
55. Nearly one month ago, Kitco requested that ARQ confirm its position regarding the possibility of consenting to the reimbursement of sales taxes as of the date of the Initial Order; ARQ has yet to respond to this request;
56. Kitco is of the view that ARQ does not have the right to invoke compensation and, in the event that no response is received imminently, or that a negative response is received, a motion shall be brought to the Court by Kitco in order to request the reimbursement of all sales taxes withheld by ARQ since the Initial Order, as well as all sales taxes going forward;
57. ARQ's decision to withhold sales tax reimbursements does not only have a significant impact on cashflow but also makes it impossible for Kitco to operate its scrap gold business profitably;
58. Failing a quick resolution or settlement of this issue, Kitco is also contemplating the possibility of transferring the scrap gold business to a new corporation;

GENERAL

59. The Monitor has indicated that it will be filing its Fourth Report, which shall support the present motion;
60. 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;
61. In light of the nature of the dispute with ARQ, additional time is required in order to litigate and/or negotiate with ARQ and it is likely that the dispute will not be resolved by the end of the extension sought herein;
62. Kitco has served the present motion upon all relevant parties;
63. Kitco submits that the notices given of the presentation of the present motion are adequate and sufficient;
64. The extension sought herein will not cause any prejudice to Kitco's stakeholders;
65. A lengthier extension will reduce the cost associated with regular motions for extension of delays and is even more appropriate in the circumstances since, as stated above, the

66. Monitor shall continue to report on a monthly basis and make said reports available to creditors;
67. 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 18, 2012;

ALLOW Kitco to pay the final deposits on the units that it has promised to purchase in the "Altitude Montreal" condo project, the whole in the amount of \$825,000, subject to adjustment;

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, October 14, 2011


GOWLING LAFLEUR HENDERSON LLP
Attorneys for Petitioner

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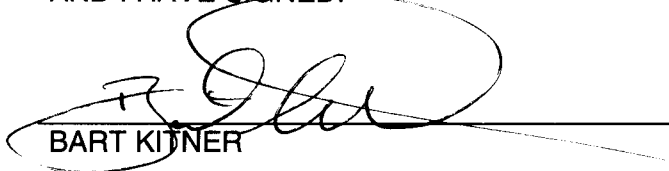
Monitor

AFFIDAVIT OF BART KITNER

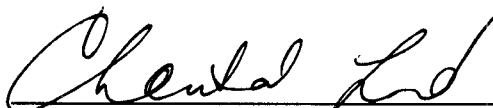
I, the undersigned, Bart Kitner, businessman, domiciled and residing at 5550, King Edward, Côte St-Luc, district of Montreal, province of Quebec, solemnly declare as follows:

1. I am a the president of Petitioner Kitco Metals Inc.;
2. All the facts alleged in the present *Motion for a second extension of the initial order* are true.

AND I HAVE SIGNED:


BART KITNER

SWORN TO before me in Montreal
this October 14, 2011



Commissioner for Oaths for the province of Quebec



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NOTICE OF PRESENTATION

TO: Me Gary Rivard
-and-
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NOTICE OF PRESENTATION

TAKE NOTICE that the present *Motion for a second 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 October 18, 2011 in room 16.12 of the Courthouse located at 1 Notre-Dame St. East, Montreal, at 9:15 am or so soon as counsel may be heard

DO GOVERN YOURSELVES ACCORDINGLY.

MONTREAL, October 14, 2011


GOWLING LAFLEUR HENDERSON LLP
Attorneys for Petitioner