Form 27
Rule 6.3, 10.52(1)

JUDICIAL CENTRE OF EDMONTON
FILED
MAR 11 2020
Clerk of the Court

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| COURT FILE NO. | 1803 22289 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | EDMONTON |
| PLAINTIFF | ATB FINANCIAL |
| DEFENDANT | D.L.M. OILFIELD ENTERPRISES LTD. |
| DOCUMENT | **APPLICATION BY BOND MEZZANINE Capital III Limited Partnership ("Bond")** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | Darren R. Bieganek, QC<br>Barrister & Solicitor<br>Phone: 780.441.4386<br>Fax: 780.428.9683<br>File # 204-201271 |

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**NOTICE TO RESPONDENT:**

This application is made against you. You are a Respondent. You have the right to state your side of this matter before the Master/Judge.

To do so, you must be in Court when the application is heard as shown below:

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|---|---|
| Date: | March 20, 2020 |
| Time: | 10:00 a.m. |
| Where: | Edmonton Law Courts Building |
| Before Whom: | Mr. Justice M. J. Lema |

Go to the end of this document to see what else you can do and when you must do it.

**Remedy claimed or sought:**

1. A declaration that in respect of priorities as between Bond and ATB Financial ("ATB") with respect to the proceeds of assets secured to ATB with respect to the ATB Operating Line indebtedness, the priorities to payment of proceeds in the hands of the Receiver is as follows:

(a) First ATB Financial respecting its Operating Line indebtedness;

(b) Second to Bond regarding its subordinate lender advance; and

(c) Third to Bond in relation to the Bond Indebtedness respecting the balance of the proceeds from the non-ATB Equipment Loan security (defined by the Receiver as the "Schedule J") assets.

2. An order directing that payment to Bond of the sum of $113,069.01 from the balance held for the benefit of ATB.

3. Such further and other orders and directions as the Court considers appropriate in the circumstances.

**Grounds for making this application:**

4. There are two separate loan facilities which ATB held in respect of the Defendant D.L.M. Oilfield Enterprises Ltd. ("DLM") notably:

   (a) An operating loan (the "ATB Operating Loan"); and

   (b) A number of specific equipment loans (the "ATB Equipment Loans").

5. ATB was not the original proposed operating lender for DLM. That operating loan was originally to be provided by PNC Bank Canada ("PNC").

6. Originally, Bond entered into an Inter-Credit Agreement with PNC respecting its operating line.

7. When ATB subsequently became the operating lender, it entered into its own Inter-Creditor and Subordination Agreement with Bond but utilized the virtually identical form entered into between Bond and PNC utilizing the similar nomenclature and definitions.

8. The first Inter-Creditor and Subordination Agreement between ATB and Bond dated August 25, 2015 respecting the ATB Operating Loan refers to a Commitment Letter of July 9, 2015 between the Borrower and ATB. It is from that specific Commitment Letter from which all definitions under the Inter-Creditor and Subordination Agreement, and subsequent iterations thereof, flow.

9. Under the terms of the Operating Loan Inter-Creditor and Subordination Agreement ("OLSA"), the word "Obligations" is not defined. However, the OLSA refers to the Senior Credit Agreement, as being the Commitment Letter of July 9, 2015. No other commitment letter is referred to for that definition.

10. The July 9, 2015 Commitment Letter between ATB and the Borrower is not in evidence. It remains unclear as to whether it was referred to by the Receiver or its counsel in reaching its opinions.

11. The OLSA does not refer to the ATB Equipment Loans or a subordination of Bond's position to the ATB Equipment Loans in respect of any security held by ATB in relation to the ATB Operating Loan.

12. While ATB may have attempted to cross collateralize the ATB Operating Loan security with the ATB Equipment Loan Security, at no time did Bond enter into an agreement with ATB whereby Bond agreed to allow ATB to utilize the additional security ATB obtained in respect of the ATB Operating Loan to cover any deficiency ATB might experience in relation to the ATB Equipment Loans.

13. Further, after repayment of the ATB operating line indebtedness, Bond is entitled to receive monies in repayment of the subordinate lender advance from the proceeds of sale of the balance of collateral, taking into account the current asset values as they existed at the time of the Receiver's appointment.

14. In respect of the proceeds of sale of the Schedule "J" assets, Bond stands in second position after the ATB Operating Loan is paid in full and, is entitled to receive the balance of the proceeds from the Schedule "J" assets.

15. Further, ATB has an obligation pursuant to sections 66(1) of the *Personal Property Security Act* (Alberta) (the "PPSA") to exercise its rights, duties and obligations under its security agreement, under the PPSA and under any other applicable law in good faith and in a commercially reasonable manner.

16. Since the entry into the first Forbearance Agreement with DLM, ATB was in essence managing the operating accounts of DLM and allowed the payments to be made on the various ATB Equipment Loans and at the same time increase the ATB Operating Loan without DLM's consent or approval and without notice to Bond. This activity had a material impact and influence on the outcome of priorities and must be taken into account in assessing the positions of ATB and Bond as between them.

17. Further, ATB caused a payment to Bond to be stopped and reversed without provision of a Payment Blockage Event notice to Bond in breach of the OLSA and the PPSA. The amount of that payment in the amount of $113,069.01 ought to be paid to Bond.

18. Such further and other grounds as counsel may advise and the Court may permit.

**Material or evidence to be relied on:**

19. Affidavit of Corry Silbernagel filed December 11, 2019.

20. Such further and other material and evidence as counsel may advise and this Court permits.

**Applicable rules:**

21. Part 1 and Rule 6.3 of the Alberta Rules of Court.

**Applicable Acts and regulations:**

22. *Personal Property Security Act* and in particular section 40 and section 64(1) thereof.

**Any irregularity complained of or objection relied on:**

23. None.

**How the application is proposed to be heard or considered:**

24. In person before Mr. Justice M. J. Lema.

**WARNING**

If you do not come to Court either in person or by your lawyer, the Court may give the Applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the Applicant(s) a reasonable time before the application is to be heard or considered.