

Action No.: 1801-10960

Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN
BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity
Plaintiff

and

PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL
OPERATING CORP. AND SUSAN RIDDELL ROSE
Defendants

PROCEEDINGS

Calgary, Alberta
August 15, 2019

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,
2 Alberta

5 August 15, 2019

Afternoon Session

7 The Honourable Mr. Justice B. Nixon

Court of Queen's Bench of Alberta

9 R. De Waal

For the Plaintiff

10 L. Rasmussen

11 D. McDonald, QC

For Perpetual Energy Inc., Perpetual Operating
Trust, Perpetual Operating Corp.

12 P. Chiswell

13 S. Leidl

For Susan Riddell Rose

14 P. Zavala

Court Clerk

15 S. Lea Dormer

Official Court Reporter

18 **Decision**

20 THE COURT:

Good afternoon. Please be seated.

22 This concerns the PricewaterhouseCooper and the Perpetual Energy matter.

24 These are the Oral Reasons For Judgment of myself, Justice Blair Nixon.

26 Before I commence with the oral reasons, I first want to express my appreciation to all
27 counsel for the submissions that they provided in June; June 4th, June 11th, and June 14th in
28 particular. Given the recent jurisprudence that I thought should be addressed, that input was
29 very much appreciated.

31 Insofar as this is an Oral Judgment, I retain the right to review the transcript, and to add in
32 case names and citations.

34 Notwithstanding this is Oral Judgment, I do intend to issue written reasons. I do have a
35 lengthy judgment. I just need to do some refinement and, most importantly, I have certain
36 things like citations checked.

38 In Oral Judgments, it is not my practice to cite legislation, jurisprudence or the Rules of
39 Court in detail, notwithstanding that they have been considered.

41 I turn to the introduction. The plaintiff is the trustee in bankruptcy of the estate of

1 Sequoia Resources. Sequoia Resources was formerly known as Perpetual Energy Operating
2 Corp., and I will simply refer to that as "PEOC".

3
4 The Trustee commenced an action by way of a Statement of Claim. The Trustee seeks an
5 order declaring a particular sale of assets void as against the Trustee. Alternatively, the
6 Trustee seeks judgment against the Defendants for the difference between the alleged
7 consideration given and received by PEOC. The Trustee calculates that difference to be an
8 amount of not less than \$217,507,800.

9
10 On the same day that it filed the Trustee's Statement of Claim, the Trustee filed an
11 application for substantially the same relief as is sought in the Statement of Claim itself.

12
13 The Defendants to the Trustee's Statement of Claim are Perpetual Energy, Perpetual
14 Operating Trust, Perpetual Operating Corp., which I will refer to collectively as the
15 "Perpetual Energy Defendants" and against Ms. Susan Riddell Rose whom I will refer to as
16 "Ms. Rose".

17
18 I have framed the issues as follows in this case:

19
20 First, the *BIA* Claim - Was the asset transaction an arm's length transfer
21 for purposes of section 96(1) of the *BIA*?

22
23 Second, the Oppression Claim - Is the Trustee entitled to bring an
24 oppression claim under section 242 of the ABCA?

25
26 Third, the Public Policy Claim - Should the claim by the Trustee for
27 relief on the grounds of public policy, statutory illegality or equitable
28 rescissions be struck?

29
30 Fourth, the Release Issue - Is the Release a complete bar to the claims
31 against Ms. Rose?

32
33 Fifth and last, Director Claim - Did Ms. Rose breach her fiduciary duty
34 and duty of care owed to PEOC by approving the Asset Transaction?

35
36 I turn to a review of the facts.

37
38 Perpetual Energy is a public company. It holds all of the shares of PEOC, and is the sole
39 beneficiary of the POT. Throughout this oral judgment, I will refer to "PEOC,"
40 notwithstanding that it had a name change.

41

1 PEOC was the trustee of POT until October 1, 2016. Prior to that date, PEOC had no assets
2 or operations, and existed solely to act as the trustee for POT.

3
4 POT held a beneficial interest in various oil and gas properties and related assets. I will refer
5 to those as the "Trust Assets" occasionally. A subset of the Trust Assets were the goodyear
6 assets, which included producing and non-producing oil and gas properties in Alberta. I will
7 refer to those as the "Goodyear Assets".

8
9 Ms. Rose was a director and shareholder of Perpetual Energy. Prior to October 1, 2016, she
10 was also the sole director of PEOC.

11
12 The legal interests and licences for the Goodyear Assets were held by PEOC, in its capacity
13 as trustee for POT.

14
15 During the first six months of 2016, Perpetual Energy decided to sell the Goodyear Assets. It
16 solicited over ten potential third party buyers in respect of the Goodyear Assets.

17
18 POT entered into confidentiality agreements with four parties. Those confidentiality
19 agreements committed the third parties to conduct due diligence, and review the information
20 in the data room that was established by Perpetual Energy.

21
22 Perpetual Energy provided multiple presentations to prospective buyers. These presentations
23 included: (a) an analysis of recently implemented operating models; (b) a system of
24 abandonment and reclamation activities and results; and (c) workover, recompletion and
25 drilling opportunities with respect to the Goodyear Assets.

26
27 Perpetual Energy and Kailas Capital Corp. entered into a letter agreement dated July 7, 2016.
28 I will refer to that as the "Kailas LOI". The Kailas LOI was non-binding, and was issued by
29 Kailas Capital to Perpetual Energy.

30
31 The Kailas LOI informed Perpetual Energy that Kailas Capital had participated in numerous
32 successful transactions in Canada over the past 12 months, and that it managed producing
33 energy assets in Canada.

34
35 The Kailas LOI also stated that Kailas Capital desired to minimize commodity price risk.
36 Consistent with that expressed desire, the Kailas LOI stipulated that concurrent with the
37 signing of the "Definitive Agreement," Perpetual Energy would enter into commodity price
38 risk management contracts to secure a price protection.

39
40 The sale of the Goodyear Assets from Perpetual Energy to Kailas Capital was effected
41 through the following steps, which I will occasionally refer to as the "Aggregate

1 Transaction".

2

3 First, POT sold its beneficial interest in the Goodyear Assets to PEOC. I
4 will refer to that as the "Asset Transaction". This step combined the
5 legal and beneficial interest in the Goodyear Assets in PEOC.

6

7 Second, except for a 1 percent interest in the legal title to four east
8 Edson wells, PEOC transferred legal title to all the remaining POT
9 assets to POC. This transaction was effected because POC was the new
10 trustee for POT.

11

12 Third, Perpetual Energy sold all of the shares in PEOC to 1986114
13 Alberta Inc. I will refer to that entity as the "198Co," and to the
14 transaction as the "Share Transaction". The Share Transaction was
15 effected through a share purchase and sale agreement dated September
16 26, 2016. I will refer to that as the "Share Purchase Agreement".

17

18 Fourth, Ms. Rose resigned as the sole director of PEOC.

19

20 Fifth, PEOC changed its name to "Sequoia Resources Corp."

21

22 POC requested the transfer of the Retained Assets.

23

24 The Aggregate Transaction was completed on October 1, 2016.

25

26 During the 17 months following the Aggregate Transaction, Sequoia Resources, formerly
27 PEOC, operated the Goodyear Assets.

28

29 On March 23, 2018, PricewaterhouseCoopers was appointed the Trustee of PEOC, being the
30 date on which the corporation assigned itself into bankruptcy.

31

32 I turn to the first issue.

33

34 The *BIA* Claim - Was the Asset Transaction an arm's length transfer for
35 purposes of section 96(1) of the *BIA*?

36

37 Concerning the *BIA* Claim, I am required to assess whether the Defendants have established,
38 with respect to the issues raised by the Trustee's claim, that the record makes it possible to
39 resolve the dispute on a summary basis. In considering this claim, my sole focus is on the
40 arm's length issue, and not on the value.

41

1 As part of this review, I must assess whether the Defendants have demonstrated on the
2 balance of probabilities, that on the facts proven, there is no merit to the Trustee's claim.

3
4 Assuming the Defendants discharge this burden, I must then assess whether the Trustee has
5 nonetheless shown that there is a genuine issue requiring a trial based on the nature of the
6 issue or its merits.

7
8 Finally, I must determine whether I am sufficiently confident in a state of the record to
9 exercise my discretion to summarily dismiss some or all of the Trustee's claims in respect of
10 the *BIA* Claim.

11
12 During negotiations, separate teams and their respective counsel represented each of the
13 Perpetual Energy group and the Kailas Capital in respect of the Aggregate Transaction (as a
14 whole) and the asset Purchase Agreement (on its own). I will refer to these respective
15 negotiation teams as the "Vendor Team" and the "Purchaser Team".

16
17 The Aggregate Transaction involved multiple steps, all of which were structured in sequence.
18 That sequence occurred on October 1, 2016. The Asset Purchase Agreement was closed
19 two minutes before the Share Purchase Agreement.

20
21 Concerning the negotiations of the Asset Transaction, the Trustee agreed that Kailas Capital,
22 198Co, Mr. Wang and Mr. Yang, who I will refer to collectively as the "Kailas Group," had
23 an "interest" in knowing what assets were in PEOC. In that regard, the Trustee
24 acknowledged that the Kailas Group exercised "influence" in respect of the Asset Purchase
25 Agreement. Further, the Trustee conceded that the Purchaser Team had influence in the
26 negotiations of the Asset Transaction.

27
28 The threshold issue in respect of the *BIA* Claim in the context of the Summary Dismissal
29 Application concerns the involvement of the Purchaser Team in respect of the Asset
30 Transaction generally, and the degree of influence that the Purchaser Team had over PEOC
31 in particular.

32
33 While I may be able to draw certain inferences, I find that the evidence does not permit me to
34 determine, on the balance of probabilities, that the Purchaser Team established de jure
35 control over the subject transactions. That being the case, I will not summarily dismiss the
36 *BIA* Claim.

37
38 Given that the sole focus of the *BIA* Claim is on the arm's length issue (and not on value), I
39 cannot find that there is no reasonable claim. That being the case, I will not strike the *BIA*
40 Claim either.

41

1 I turn to the Oppression Claim - Is the Trustee entitled to bring an oppression claim under
2 section 242 of the *ABCA*?

3

4 I turn first to some incremental facts.

5

6 The Trustee asserts that the liabilities associated with the Goodyear Assets were in the range
7 of \$229,006,018 on the date of the Asset Transaction. That amount is the aggregate of ARO
8 abandonment costs of \$98,855,218 plus ARO reclamation costs in the amount of \$93,272,056
9 plus ARO facilities costs of \$26,831,000 plus property taxes in the amount of \$10,047,744.

10

11 The Trustee refers to the McDaniel Report which calculates the value of the Goodyear Assets
12 to be \$5,670,200. With some caveats, the Trustee refers in evidence to either the value of
13 that Goodyear Asset being \$5,670,200 or \$5,765,000 as being the value, again, of those
14 assets.

15

16 I turn to my determination in respect of this issue. Before I do that, I'm just going to review
17 briefly the status of a creditor as a complainant.

18

19 Creditors have been able to use the oppression remedy for some time. The authority of
20 creditors to do so was confirmed in 2004 by the Supreme Court of Canada.

21

22 The entitlement of creditors to use the oppression remedy, however, was fenced by that
23 appellate court. In particular, the Supreme Court of Canada stated that creditors could use
24 the oppression remedy to protect their interest from the harmful conduct of directors if they
25 qualified as "proper persons". In making these statements in 2004, the Supreme Court of
26 Canada did not provide guidance on what constituted a proper person. It left that task to the
27 determination and discretion of the lower courts.

28

29 The law in this area has evolved over the years. In one early case that is still authoritative,
30 the court commented that debt actions should not normally be turned into oppression actions.
31 That court went on to state that a complainant status should be refused unless the creditor
32 was in a position analogous to a minority shareholder with some particular legitimate interest
33 in the manner in which the affairs of the company are managed.

34

35 Based on my review of the law, I am of the view that the following questions should be
36 considered in the determination whether a particular person is proper for purposes as being
37 designated as a complainant. This list is not exhaustive. Indeed, I may add a few more to it
38 in my written decision.

39

40 First, was the person a creditor when the alleged oppression occurred?

41

1 Second, was the interest of the creditor in the affairs of the transaction
2 too remote?

3
4 Third, was the creditor in a position analogous to that of a minority
5 shareholder at the time of the alleged oppression?

6
7 Fourth, did the creditor have a particular legitimate interest in the
8 manner in which the affairs of the corporation were managed?

9
10 Concerning a contingent claim, the courts have stated that a person who may have a
11 contingent interest in an unascertained claim for unliquidated damages is not a creditor.
12 However, a creditor cannot use the oppression remedy to pursue ordinary debt collection for
13 breach of contract.

14
15 The status of a person as a complainant under the oppression remedy is a prerequisite to the
16 application of the two-step framework that is outlined in the infamous BCE Case. If a
17 creditor is not qualified as a complainant, the quest for an oppression remedy with respect to
18 that person ends.

19
20 I turn to my conclusion in respect of the oppression remedy for the purposes of this oral
21 judgment.

22
23 Given the above analysis, I find that this is a circumstance where the Trustee is not entitled to
24 the status of a "complainant". I exercise my discretion in this regard for reasons that I will
25 itemize more fully in my written decision.

26
27 For purposes of this oral judgment today, I simply note two points. First, that with regards to
28 the alleged ARO, I find that there are neither liabilities nor provable claims outstanding.
29 That being the case, no creditor exists in respect of the alleged ARO obligation. In making
30 this finding, I acknowledge that the Trustee in its June 2019 submission referred to the "any
31 other person" clause as being a basis for justifying "complainant" status. In the
32 circumstances of this case, I find that does not assist the Trustee because it would be granting
33 "complainant" status to a person that does not meet the "proper person" threshold, which I
34 will touch on in greater detail in my written decision. Second, with regard to the alleged
35 debts in respect of property taxes, there is neither evidence of any municipality being in a
36 position analogous to a minority shareholder nor is there any evidence that any municipality
37 had a particular legitimate interest in the manner in which the affairs of the corporation are
38 managed.

39
40 While I am not satisfied that the Oppression issues satisfy the prerequisites for summary
41 dismissal, I am satisfied that it should be struck under Rule 3.68 on the basis that it discloses

1 no reasonable claim. I make that statement because the application for complainant status or
2 the suggestion that there's complainant status in this case goes well beyond what the law
3 currently provides for.

4

5 I turn to the Public Policy Claim - Should the Claim by the Trustee for Relief on the Grounds
6 of Public Policy, Statutory Illegality, and Equitable Rescission be struck?

7

8 Concerning the Public Policy Claim, my task is to determine whether the trustee's Statement
9 of Claim discloses a reasonable claim. The Public Policy Claim is referred to in a single
10 paragraph of the Trustee's Statement of Claim under the heading "Public Policy, Statutory
11 Illegality, and Equitable Rescission". The only claim is that the "transactions" are "void".
12 No other relief is mentioned.

13

14 The Trustee's Statement of Claim asserts that the Transactions are contrary to a public policy.
15 The alleged public policy is not described, except that it is said to be "reflected" in a statute, a
16 regulation and three directives referred to as the "Regulatory Regime".

17

18 The Trustee's Statement of Claim asserts the Transactions are illegal, apparently because they
19 are "expressly or impliedly" prohibited by the Regulatory Regime. There is no explanation
20 as to what aspect the Share Purchase Agreement or the Asset Purchase Agreement is
21 prohibited by what Regulatory Regime.

22

23 The text of the Trustee's Statement of Claim makes no claim for "Equitable Rescission".
24 That phrase only appears in the heading. The claim is based on "equitable grounds". There
25 is no explanation as to what that means. There is only a reference to the "reasons" and the
26 "circumstances" in the Trustee's Statement of Claim.

27

28 Touching on the facts associated with this particular Public Policy Claim, I first turn and
29 address the public policy breaches and the statutory illegality.

30

31 Concerning the alleged "public policy breaches" and the alleged "statutory illegality," there is
32 nothing in the Trustee's Statement of Claim which provides any particulars concerning the
33 allegations that the Aggregate Transaction:

34

- 35 a. is prohibited by the Regulatory Regime;
- 36 b. is expressly or by necessary implication rendered illegal; or
- 37 c. could conceivably bring an agreement to transfer corporate shares
38 within any of the recognized categories of agreements that are contrary
39 to public policy. Those categories are (i) contracts that injurious to the
40 state, (ii) injurious to the system of justice, (iii) encouraging immorality,
41 (iv) affecting marriage, (v) in restraint of trade, and (vi) restrictive of

1 personal liberties.

2
3 I find the absence of particulars to exist even if I assume everything in the Statement of
4 Claim is true.

5
6 If what is intended as being illegal or contrary to public policy is the alleged objective of the
7 Retained Interest Agreement to support the LLR rating for PEOC to allow the Transaction to
8 be completed without regulatory intervention, I am not aware of anything that would make
9 that objective, expressly or by necessary inference, prohibited.

10
11 I turn to equitable rescission or equitable grounds.

12
13 Concerning the "equitable rescission" an "equitable grounds" claims, there is an absence of
14 the necessary facts in the Trustee's Statement of Claim. Given that gap, neither the court nor
15 the Defendants know the contentions of the Trustee.

16
17 The phrase "equitable rescission" is only referred to in a heading of the pleadings. As
18 mentioned before, that heading is phrased as "Public Policy, Statutory Illegality and
19 Equitable Rescission".

20
21 The phrase "equitable rescission" is not referred to in the actual pleadings, outside of that
22 heading. Instead, the pleadings state that the Transactions are void on "equitable grounds".

23
24 Assuming for purposes of this discussion that "equitable rescission" was pled, it is "a remedy,
25 not a cause of action". That remedy is predicated on the plaintiff alleging the contract
26 resulted from some fraud (and was mistakenly entered into), on the basis of a
27 misrepresentation, or was obtained by some unconscionable act. The Trustee has not made
28 any of those claims or alleged any facts that would support such claims. What is stated in the
29 pleadings is of key importance.

30
31 In any event, to obtain equitable rescission, "it must be possible to restore the parties
32 substantially to their precontract position". I'm not sure that is possible in this case.

33
34 I also note that it is not possible for the Trustee to seek partial rescission. As far as I know,
35 no such remedy is known at common law or in equity.

36
37 Rescission is only available between parties to a contract. Sequoia was not a party to the
38 Share Purchase Agreement. This is a fatal bar to the Trustee seeking rescission of the
39 "Transactions". 198Co was a party to the Share Purchase Agreement. It is not a party to this
40 action. If the Trustee intended to claim relief that would affect 198Co, then 198Co would
41 have to be an essential player to this action.

1
2 Given the above facts and analysis, I strike the Public Policy Claim under Rule 3.68 on the
3 basis that it discloses no reasonable claim.

4
5 I turn to the Release -- Is the Release a complete bar to the claims against Ms. Rose?

6
7 Touching on the incremental facts, the Share Purchase Agreement was negotiated between
8 sophisticated parties. Each of those parties were represented by sophisticated legal counsel.

9
10 The Trustee does not challenge or seek to set aside the Share Purchase Agreement.

11
12 The Share Purchase Agreement set out the closing deliverables of Perpetual Energy in its
13 capacity as the vendor.

14
15 The Share Purchase Agreement also set out the closing deliverables of 198Co in its capacity
16 as the purchaser.

17
18 The term "Claim" is defined in the Share Purchase Agreement. That term is defined broadly
19 as "any claim, demand, lawsuit, proceedings, arbitration or governmental investigation, in
20 each case, whether asserted, threatened pending or existing".

21
22 198Co, Perpetual Energy and PEOC negotiated at arm's length and agreed to a written form
23 of "Resignation & Mutual Release". I will refer to that document as the "Release". As
24 provided for in the Share Purchase Agreement, the new directors of PEOC signed on behalf
25 of PEOC. Those individuals being under the new ownership of 198Co

26
27 Ms. Rose was released by PEOC and Perpetual Energy from any Claims relating to her
28 having acted as a director and officer of PEOC.

29
30 The release includes exclusion. It does not apply if the Claim is based on fraud, criminal
31 conduct or deceit.

32
33 The Trustee's claims against Ms. Rose do not allege any fraud, criminal conduct or deceitful
34 conduct.

35
36 The evidence before me is that the Release was negotiated at arm's length between
37 Perpetual Energy and 198Co. The evidence before me is that the Release was signed on
38 behalf of PEOC by the new directors appointed by 198Co.

39
40 I turn to the application of the law to the facts in respect of releases.

41

1 It is standard industry practice to release outgoing directors in a change of control
2 circumstance. It would be highly unusual for a director not to seek protection in the form of a
3 release.

4
5 As I understand the Trustee's argument, it seeks monetary damages from Ms. Rose,
6 apparently on the theory that she caused Perpetual Energy to require 198Co to agree to the
7 Release. I find on the balance of probabilities that this allegation is without merit. I make
8 this finding primarily because there is no evidence that Ms. Rose caused Perpetual Energy to
9 do anything. Indeed, the evidence is to the contrary.

10
11 Ms. Rose was the sole director of PEOC before its shares were sold to 198Co. Presumably
12 because of that status, the Trustee alleges that Ms. Rose breached her duties to PEOC by
13 causing Perpetual Energy to require 198Co to agree that, as a condition of closing the Share
14 Transaction, 198Co would deliver to Perpetual Energy releases executed by PEOC's new
15 directors, purporting to release Ms. Rose from any claims by PEOC related to her conduct as
16 a director of PEOC, contrary to section 122(3) of the *ABCA*.

17
18 The Release confirmed that Ms. Rose acted as a director and officer of PEOC at the request
19 of Perpetual Energy. Perpetual Energy is a public company. It has its own board of
20 directors. Ms. Rose did not control Perpetual Energy. Further, counsel for the Trustee
21 conceded in court that "[t]his was Perpetual Energy doing this transaction through a
22 subsidiary".

23
24 I find on the balance of probabilities that Ms. Rose was not the "directing mind" of PEOC.
25 Concerning this point, her evidence was that PEOC was a special-purpose corporation that
26 was a wholly owned subsidiary of Perpetual Energy.

27
28 Based on the evidence before me, I also find that Ms. Rose took her responsibilities as a
29 director and officer of PEOC seriously, considered the best interests of PEOC, its
30 stakeholders, and then exercised her business judgment to the best of her ability. Her
31 evidence was to the effect that the ultimate decision to enter into the Aggregate Transaction
32 was that of Perpetual Energy and its board of directors.

33
34 The terms of the Release acknowledged that the parties have been provided with sufficient
35 opportunity to consider all factors related to the execution of that document. Also, the parties
36 specifically acknowledged a full awareness of its consequences and its voluntary execution.

37
38 198Co was a sophisticated arm's length party. It negotiated all aspects of the Aggregate
39 Transaction with the assistance of sophisticated legal counsel. I find no evidence that
40 198Co was forced or "required" to agree to anything in respect of the Release.

41

1 The Trustee alleges that Ms. Rose breached her duties to PEOC by causing Perpetual Energy
2 to require, as mentioned above, 198Co to agree, as a condition of closing the Share
3 Transaction, that it would deliver to Perpetual Energy releases executed by PEOC's new
4 directors.

5
6 Concerning this argument, the Statement of Claim provides no particulars regarding its
7 position in relation to section 122(3) of the *ABCA*. The Darby Affidavit is silent on this
8 issue. The Rose Statement of Defence pleads the Release, and the Trustee did not reply.

9
10 Section 122(3) of the *ABCA* embodies the principle that officers and directors may not
11 contract out of existing duties owed to the corporation. The object of that section is to ensure
12 that existing directors of the corporation comply with their duties to the corporation while
13 they are in office.

14
15 If the Trustee's position is that section 122(3) of the *ABCA* precludes a corporation from
16 entering into a mutual release with a former director, that would be exceptional. I make that
17 comment for at least four reasons. First, the use of a mutual release by business people in
18 transactions is common practice. If I accept the position advanced by the Trustee, it will
19 displace decades of business convention. I am not prepared to go down that path in the
20 circumstances of this case. Second, the implication inherent in the position of the Trustee is
21 that directors can never be released in transactions that involve an acquisition of control. If
22 that was the law, directors would be exposed to liability for an indeterminate length of time.
23 Third, there are books written on the use of releases. In my review of that literature and
24 indeed the case law, I find nothing that would support the proposition that's been advanced by
25 the Trustee. Fourth, there is a need for finality. But for releases, a director may never
26 achieve finality. That is an important element of the law in a number of circumstances.

27
28 As a contractual note, the proposition advanced by the Trustee would be highly ironic insofar
29 as it was PEOC that negotiated and signed the Release. The implication of the Trustee's
30 apparent position would be that Sequoia could walk away from that bargain. That cannot be.

31
32 In summary, if the Release is not set aside, I find that there can be no damages against
33 Ms. Rose. Since the Trustee's Statement of Claim does not seek to set aside the relevant
34 documents, the Release continues to speak and Ms. Rose is shielded from financial exposure.

35
36 I turn to my conclusions with respect to the Release. The Trustee's claims against Ms. Rose
37 are solely in relation to her having acted as a director of PEOC. I find this to be directly
38 contrary to the express terms in the Release.

39
40 The Trustee's segregation of the Asset Transaction from the Aggregate Transactions puts it in
41 an unusual position of conceding the Release is part of the negotiated deal but somehow

1 disconnected from the Asset Transaction. This inconsistency makes no sense to me.

2

3 Given the above facts and analysis, I find that the Release is a complete bar to the claim
4 against Ms. Rose.

5

6 I turn last to the Director Claim - Did Ms. Rose breach her fiduciary duty and duty of care
7 owed to PEOC by approving the Asset Transaction?

8

9 Given my findings and conclusions above, it may not be strictly necessary to deal with this question.
10 However, for completeness I will address it.

11

12 The Trustee asserts that Ms. Rose failed, as a director of PEOC, to consider the implications
13 of ARO as a liability of PEOC.

14

15 As I understand her position, Ms. Rose asserts that the claims against her are moot because
16 the ARO does not equate to a liability as that term is understood in law.

17

18 As I read *Redwater*, the ARO associated with PEOC is not a liability. Indeed, in the course
19 of oral argument, the Trustee conceded to me that the ARO associated with PEOC is not a
20 liability.

21

22 Given the facts and the analysis above, I find Ms. Rose owed no duties to PEOC in relation to
23 the ARO as a liability.

24

25 That concludes my Oral Reasons For Judgment. As mentioned, I will be issuing written
26 reasons that fill out much of what I've glossed over today.

27

28 Is there any other business that we need to deal with?

29

30 **Discussion**

31

32 MR. MCDONALD: Not today, My Lord. I think we need to reflect
33 on your oral judgment, and without wanting to put any pressure on you, if you could give
34 us any indication when written reasons would be available, that, too, might be helpful.

35

36 THE COURT: I anticipated that, Mr. McDonald.

37

38 MR. MCDONALD: I drew the short straw.

39

40 THE COURT: That's fine. I'm going to get them out in the
41 next two or three weeks. My only limitation is the lack of resources I have that I'm able

1 to call on, and I'm in another long trial right now. But I am going to strive for the benefit
2 of all parties, all stakeholders in this room, to have it in the next let's say couple of weeks.
3 So I'll leave it at that.

4
5 MR. LEITL: Just for the record, My Lord, can we reserve the
6 right to speak to costs after that?

7
8 THE COURT: Sure.

9
10 MR. LEITL: Thank you.

11
12 THE COURT: Any other business? There being none, I'll ask
13 madam clerk to adjourn. Thank you.

14
15 _____

16
17 PROCEEDINGS CONCLUDED

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19 _____

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1 **Certificate of Transcript**

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I, Sandra Lea Dormer, certify that the foregoing pages are a complete and accurate transcript of the proceedings, taken down by me in shorthand and recorded by a sound-recording machine and transcribed from my shorthand notes to the best of my skill and ability.

Sandra Lea Dormer, Court Reporter

Dated: August 30, 2019