

ALBERTA SECURITIES COMMISSION

Citation: Re West High Yield (W.H.Y.) Resources Ltd., 2018
ABASC 187

Docket: ENF-011632
Date: 20181219

SETTLEMENT AGREEMENT

West High Yield (W.H.Y.) Resources Ltd.
("WHY" or the "Company")

Agreed Facts

Background

1. Staff of the Alberta Securities Commission (**Staff** and **Commission**, respectively) conducted an investigation into certain activities of the Company to determine if Alberta securities laws had been breached.
2. Solely for securities regulatory purposes in Alberta and elsewhere, and as the basis for the settlement terms referred to in paragraph 32 and for no other use or purpose, the Company agrees to the facts and consequences set out in this Settlement Agreement (this **Settlement**).
3. The investigation confirmed, and the Company admits, that it breached those sections of the *Securities Act*, R.S.A. 2000, c. S-4, as amended, (*Act*), referred to in this Settlement, and that it acted contrary to the public interest.
4. Terms used in this Settlement have the same meaning as provided in the Alberta securities laws, a defined term in the *Act*.

Parties

5. The Company is a publicly traded junior mining exploration company with a head office in Calgary, Alberta. At all material times WHY was listed for trading on the TSX Venture Exchange (**TSXV**).

Circumstances

6. On or about October 5, 2017, WHY entered into an agreement (the **Agreement**) with Gryphon Enterprises, LLC (**Gryphon**). The Agreement contemplated a proposed transfer of mining assets owned by WHY to Gryphon.
7. The Agreement included the following term:

2.2.2. On or before the date of execution of this Agreement, the Purchaser shall have provided to the Seller the Proof of Financial Capability in a form acceptable to the Seller, acting reasonably.

8. The Agreement specifically defined “Proof of Financial Capability” as follows:

1.1.44 “Proof of Financial Capability” shall mean correspondence from a reputable financial institution confirming a commitment, contingent only upon successful completion of standard practice due diligence, to provide the financial resources to the Purchaser required to satisfy the Purchase Price, such Proof of Financial Capability to be in a form acceptable to the Seller, acting reasonably.

9. On or about October 5, 2017, WHY publicly issued a news release (the **October 5 News Release**) which included the following statements about the Agreement:

West High Yield (W.H.Y.) Resources Ltd. (TSX VENTURE: WHY) (the “Company”) is pleased to announce that it has signed a definitive arm's length purchase and sale agreement (the “Agreement”) to sell 100 per cent of its right, title and interest in its Record Ridge South, Midnight and O.K. mineral properties (the “Assets”) to Gryphon Enterprises LLC, a company based in Maryland, United States, for a purchase price of US\$750- million.

The Agreement includes representations and warranties to each party customary in a transaction of this nature and is subject to a number of conditions including, without limitation, the following: (i) on or before the closing date, the Company shall have entered into a take and pay agreement(s) in the form and on terms and conditions acceptable to the Purchaser, acting reasonably; and (ii) all director, shareholder, securities and regulatory approvals and acceptances (as required) and all third party consents (as required) having been obtained including, without limitation, the approval of the TSX Venture Exchange. In addition, the Purchaser has agreed to provide the Company with the sum of US\$500,000 within 30 days from the date of execution of the Agreement as a good faith, non-refundable deposit (the “Deposit”).

...

The closing of the purchase and sale of the Assets is expected to occur on or before the date that is 90 days from the date a take and pay agreement(s) is entered into by the Company in the form and on terms and conditions acceptable to the Purchaser.

10. The October 5 News Release also stated that a full copy of the Agreement would be available for review on the Company’s website at www.whyresources.com and on its SEDAR profile at www.sedar.com. Soon after the October 5 News Release was issued, a copy of the Agreement was posted publicly on the SEDAR website.
11. At the time of the October 5 News Release, the following information was true and was known to the Company (collectively, the **Undisclosed Facts**):

- 11.1 Gryphon was not capable of fulfilling the Agreement using its own financial resources.
 - 11.2 Gryphon did not have in place third-party financing, or a firm commitment to provide financing, as at the date of the Agreement or the date of the October 5 News Release.
 - 11.3 The Agreement was unlikely to be completed if Gryphon did not obtain third-party financing sufficient to meet the financial requirements of the purchase.
 - 11.4 Gryphon had provided WHY with a letter purporting to be from McDonald Financial Corporation (**McDonald**), dated September 25, 2017 (the **McDonald Letter**), containing a “loan proposal” that was subject to significant contingencies, including “... the consummation of acceptable investment grade take-or-pay contracts” (the **take-or-pay contracts condition**).
 - 11.5 McDonald was not capable of funding a loan to Gryphon using its own financial resources, and the McDonald Letter contained no evidence of any commitment by a reputable financial institution to provide Gryphon with the financial resources required to fulfil the Agreement.
 - 11.6 The inclusion of the take-or-pay contracts condition and the McDonald Letter’s omission of any evidence of a commitment by a reputable financial institution to provide Gryphon with the financial resources required to fulfil the Agreement meant that the McDonald Letter did not fulfil the Proof of Financial Capability term in the Agreement, and that the risk of not closing the transaction contemplated by the Agreement was materially higher than if the Proof of Financial Capability term had been fulfilled at the time the Agreement was executed.
 - 11.7 At no point was WHY provided with “Proof of Financial Capability” in terms required by the Agreement.
12. Although the October 5, 2017 News Release included specific references to the requirement for WHY to enter into take-and [sic]-pay agreement(s) and to the as-yet-unpaid purchase deposit, the Company did not state in the October 5 News Release, nor otherwise disclose on or about October 5, 2017, any of the Undisclosed Facts.

Misleading Statements

13. Without stating any of the Undisclosed Facts, publication of the October 5 News Release would reasonably be expected to lead readers, including prospective investors, to believe that Gryphon’s ability to finance the purchase was not a material risk to completion of the Agreement.
14. Without stating some or all of the Undisclosed Facts, publication of the October 5 News Release and the Agreement would reasonably be expected to lead readers, including prospective investors, to believe that a reputable financial institution had committed,

contingent only upon successful completion of standard practice due diligence, to provide the financial resources to the Purchaser required to satisfy the Purchase Price.

15. The Company acknowledges that it ought reasonably to have known that without stating some or all of the Undisclosed Facts, publication of the October 5 News Release together with the publication of the Agreement was misleading.
16. Further, the Company acknowledges that without stating some or all of the Undisclosed Facts, publication of the October 5 News Release, together with the publication of the Agreement, would reasonably have been expected to have a significant effect on the market price or value of WHY securities.

Market Impact

17. The average public trading price for WHY common shares in the week (approximately) prior to the October 5 News Release was between \$0.30 and \$0.40.
18. On October 5, 2017, following the October 5 News Release, WHY shares traded at \$1.18 to \$3.80, with the volume-weighted average price being \$2.11.
19. Trading of WHY shares was halted before TSXV market opening on October 6, 2017.
20. On November 3, 2017, following inquiries from Commission Staff, WHY issued a news release providing additional information regarding the Agreement. This additional information included clarification that Gryphon did not have firm commitments or arrangements in place to fund the purchase specified in the Agreement.
21. On November 7, 2017, WHY issued another news release announcing that it had terminated the Agreement after no deposit was received from Gryphon by the deadline specified in the Agreement.
22. TSXV lifted its trading halt for WHY on November 9, 2017.
23. The volume weighted average trading price of WHY shares for the one month period following November 9, 2017 returned to more usual historical levels, being less than \$0.40.

Admitted Breaches of Alberta securities laws (Admitted Breaches)

24. On the basis of the above agreed facts, the Company admits that it breached section 92(4.1) of the Act.

Circumstances Relevant to Settlement

25. Reporting issuers are required to comply with the disclosure obligations under Alberta securities laws, including ensuring that public disclosures are not misleading. This ensures that investors have reliable information on which to make investment decisions and to ensure fair and orderly trading of its securities.

26. During the investigation, Staff did not find any evidence that the Company or its directors and officers intentionally made any misleading statements, or actually knew that statements in the October 5 News Release were misleading.
27. Staff did not find any evidence that the Company or any of its directors or officers personally received financial gain, or acted with an intention to receive financial gain, directly or indirectly, in connection with the statements in the October 5 News Release.
28. The Company and its directors and officers cooperated with Staff during the Investigation.
29. None of the Company or its directors and officers has previously been sanctioned by the Commission.
30. The Settlement has saved the Commission the time and expense associated with a contested hearing under the Act.
31. The Company is receiving partial credit for cooperation under ASC Policy 15-601 *Credit for Exemplary Cooperation in Enforcement Matters* in the terms of this Settlement.

Settlement Terms

32. Based on the Agreed Facts and Admitted Breaches, the Company:
 - 32.1 agrees to pay to the Commission a monetary settlement of \$200,000, inclusive of costs; and
 - 32.2 undertakes to ensure that officers and directors of the Company are provided with training in best practices for public company governance and disclosure, as approved by the Executive Director of the Commission, within one year of the date of this Settlement.

Administration

33. The Company acknowledges that it received independent legal advice and has voluntarily entered into and made the admissions in this Settlement.
34. The Company waives any right existing under the Act, or otherwise, to a hearing, review, judicial review or appeal of this matter.
35. The Company acknowledges and agrees that the Commission may enforce this Settlement in the Court of Queen's Bench or in any other court of competent jurisdiction.
36. The Company understands and acknowledges that this Settlement may form the basis for securities-related orders in other jurisdictions in Canada. The securities laws of some other Canadian jurisdictions may allow for provisions of a settlement agreement made in this matter to be given parallel effect in those other jurisdictions automatically, without further notice to it. The Company understands and acknowledges that it should contact the

securities regulator of any other jurisdiction in which the Company may intend to engage in any securities-related activities.

37. Execution and fulfillment of the terms of this Settlement by the Company resolves all issues involving the Company and its directors and officers relating to the conduct described above, and Staff will take no further steps against them arising from these facts.
38. This Settlement may be executed in counterparts.

Signed by the duly authorized signatory)
of WEST HIGH YIELD (W.H.Y.))
RESOURCES LTD. at Calgary, Alberta)
this 19 day of December, 2018, in the)
presence of:)

WEST HIGH YIELD (W.H.Y.)
RESOURCES LTD.

Ross O. Drysdale)
WITNESS NAME)

"original signed by")
SIGNATURE)

Per: "original signed by"
Frank Marasco
President

Signed on behalf of the Alberta Securities)
Commission at Calgary, Alberta, this 19)
day of December, 2018.)

ALBERTA SECURITIES COMMISSION

"original signed by"
David C. Linder, Q.C.
Executive Director