

CV 14-21092CP

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN

JUSHAN INVESTMENTS LIMITED

Plaintiff

and

PENN WEST PETROLEUM LTD., DAVID E. ROBERTS,
MURRAY R. NUNNS, TODD H. TAKEYASU, FRANK POTTER
and JAMES C. SMITH

Defendants

Proceedings under the *Class Proceedings Act, 1992*

NOTICE OF ACTION

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the statement of claim served with this notice of action.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyers or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this notice of action is served on you, if you are served in Ontario.

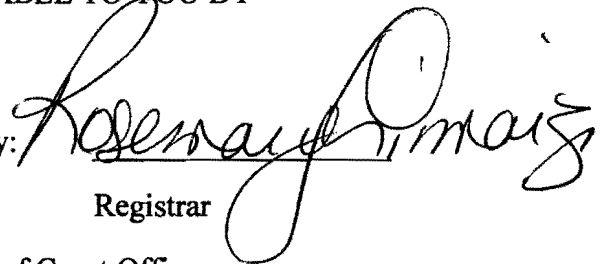
If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: July 31, 2014

Issued by:



Registrar

Address of Court Office:
245 Windsor Avenue
Windsor ON N9A 1J2

TO:
PENN WEST PETROLEUM LTD.
200, 207 - 9th Avenue SW
Calgary, Alberta
T2P 1K3

AND TO:
TODD H. TAKEYASU
c/o PENN WEST PETROLEUM LTD.
200, 207 - 9th Avenue SW
Calgary, Alberta
T2P 1K3

AND TO:
DAVID E. ROBERTS
c/o PENN WEST PETROLEUM LTD.
200, 207 - 9th Avenue SW
Calgary, Alberta
T2P 1K3

AND TO:
FRANK POTTER
175 Cumberland Street
Toronto, Ontario
M5R 3M9

AND TO:
MURRAY R. NUNNS
c/o PENN WEST PETROLEUM LTD.
200, 207 - 9th Avenue SW
Calgary, Alberta
T2P 1K3

AND TO:
JAMES C. SMITH
c/o PENN WEST PETROLEUM LTD.
200, 207 - 9th Avenue SW
Calgary, Alberta
T2P 1K3

CLAIM

DEFINED TERMS

1. The following terms used throughout this notice of action have the meanings indicated below:

- (a) “**ABCA**” means the *Business Corporations Act* (Alberta), R.S.A. 2000, C. B-9, as amended;
- (b) “**Class**” and “**Class Members**” means all persons, other than **Excluded Persons**, who acquired securities of **Penn West** during the **Class Period** and held some or all of those securities at the close of trading on July 29, 2014;
- (c) “**Class Period**” means the period from March 17, 2011 to and including July 29, 2014;
- (d) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (e) “**CPA**” means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
- (f) “**Equivalent Securities Acts**” means, collectively, the *Securities Act*, RSA 2000, c S-4, as amended; the *Securities Act*, RSBC 1996, c 418, as amended; the *Securities Act*, CCSM c S50, as amended; the *Securities Act*, SNB 2004, c S-5.5, as amended; the *Securities Act*, RSNL 1990, c S-13, as amended; the *Securities Act*, SNWT 2008, c 10, as amended; the *Securities Act*, RSNS 1989, c 418, as amended; the *Securities Act*, S Nu 2008, c 12, as amended; the *Securities Act*, RSPEI 1988, c S-3.1, as amended; the *Securities Act*, RSQ c V-1.1, as amended; the *Securities Act, 1988*, SS 1988-89, c S-42.2, as amended; and the *Securities Act*, SY 2007, c 16, as amended;
- (g) “**Excluded Persons**” means **Penn West’s** subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns, and any member of the **Individual Defendants’** families and any entity in which any of them has or had during the **Class Period** any legal or de facto controlling interest;
- (h) “**Financial Statements**” means **Penn West’s** reports to security holders for the year ended December 31, 2010 through 2013, which contained

Penn West's management's discussion and analysis and audited annual financial statements for the same periods;

- (i) "GAAP" means generally accepted accounting principles;
- (j) "Individual Defendants" means David E. Roberts, Murray R. Nunns, Todd H. Takeyasu, Frank Potter and James C. Smith;
- (k) "Jushan" means Jushan Investments Limited;
- (l) "NYSE" means the New York Stock Exchange;
- (m) "OSA" means the *Securities Act*, R.S.O. 1990 c. S.5, as amended;
- (n) "Penn West" means Penn West Petroleum Ltd.;
- (o) "SEDAR" means the System for Electronic Document Analysis and Retrieval which is a filing system developed for the Canadian Securities Administrators; and
- (p) "TSX" means the Toronto Stock Exchange.

RELIEF CLAIMED

- 2. Jushan claims on its behalf and on behalf of the other Class Members:
 - (a) an order pursuant to the *CPA* certifying this action as a class proceeding and appointing it as the representative plaintiff;
 - (b) a declaration that the defendants made a misrepresentation during the Class Period by representing that Penn West's Financial Statements were prepared in accordance with GAAP and/or International Financial Reporting Standards;
 - (c) a declaration that Penn West and the Individual Defendants made the misrepresentation negligently;
 - (d) an order granting leave to amend this notice of action and amending this notice of action to assert the causes of action set out in Part XXIII.1 of the *OSA* and the analogous provisions of the Equivalent Securities Acts *nunc pro tunc* to the date this action was commenced;

- (e) a declaration that Penn West is vicariously liable for the acts and/or omissions of the Individual Defendants and its other officers, directors and employees;
- (f) special damages, general damages and the costs of notice and of administering the plan of distribution of the recovery in this action plus applicable taxes, in the sum of \$400 million or such other sum as this court finds appropriate at the trial of the common issues or at a reference or references;
- (g) an order directing a reference or giving such other directions as may be necessary to determine issues not determined in the trial of the common issues;
- (h) prejudgment interest and postjudgment interest, compounded, or pursuant to ss. 128 and 129 of the *CJA*;
- (i) costs of this action on a full indemnity basis, or in an amount that provides substantial indemnity, plus pursuant to s. 26(9) of the *CPA* the costs of notice and of administering the plan of distribution of the recovery in this action; and
- (j) such further and other relief as to this Honourable Court seems just.

THE PARTIES

3. Jushan is a corporation incorporated pursuant to the laws of Ontario and purchased shares of Penn West during the Class Period and held some or all of those shares at the close of trading on July 29, 2014.

4. Penn West is a corporation amalgamated under the *ABCA* and maintains its head office in the City of Calgary, Alberta.

5. Penn West is one of the largest conventional oil and natural gas producers in Canada. Penn West operates a portfolio of opportunities with a dominant position in light oil in Canada. Penn West operates throughout western Canada on a land base encompassing approximately five million acres.

6. The common shares of Penn West are listed for trading on the TSX under the symbol "PWT", on the NYSE under the symbol "PWE", and on alternative trading markets in Canada. The common shares of Penn West are also listed on a number of European and international stock exchanges.

7. Since June 19, 2013, David E. Roberts has been the President and Chief Executive Officer of Penn West and a member of its Board of Directors.

8. Between February 8, 2008 and June 19, 2013, Murray R. Nunns was the President of Penn West. From August 9, 2011 to June 19, 2013 he was also the Chief Executive Officer of Penn West. From February 8, 2008 to August 9, 2011 he was the Chief Operating Officer of Penn West. At all material times he was a member of Penn West's Board of Directors.

9. Between February 8, 2008 and May 1, 2014, Todd H. Takeyasu was the Executive Vice President and Chief Financial Officer of Penn West.

10. At all material times, James C. Smith was a member of Penn West's Board of Directors and the Chairman of Penn West's Audit Committee.

11. During all material times and until June 4, 2014, Frank Potter was a member of Penn West's Board of Directors and a member of Penn West's Audit Committee.

THE EVENTS

12. During the Class Period, Penn West issued the Financial Statements and filed them with SEDAR.

13. Each of the Individual Defendants signed, authorized, permitted and/or acquiesced in the release of some or all of the Financial Statements.

14. In each of the Financial Statements, Penn West improperly recorded operating expenses as capital expenditures and/or royalty expenses, and thereby materially understated its operating expenses and overstated its assets and earnings during the Class Period.

15. On July 29, 2014, after the financial markets closed, Penn West issued and filed with SEDAR a press release entitled "Penn West Announces Management-

Initiated Internal Review of Accounting Practices and Decision to Restate Certain

Historical Financial Statements". The press release announced for the first time that:

- (a) Penn West's management identified an issue with certain operating expenses in the 2012 and 2013 financial statements which had been improperly classified as property, plant and equipment capital expenditures without sufficient support or documentation, totaling approximately \$70 million for fiscal year 2013 and \$111 million for fiscal year 2012;
- (b) Penn West's management identified an issue with certain operating expenses in historical financial statements which had been improperly classified as royalty expenses without sufficient support or documentation, totaling approximately \$100 million for each of fiscal years 2013 and 2012;
- (c) as a result of these issues, Penn West's management intended to restate some of its financial statements including at least those statements covering fiscal years 2012, 2013 and for the first quarter of 2014 and that, contrary to earlier representations, those financial statements did not present fairly, in all material respects, the financial position of Penn West and should not be relied upon;
- (d) as a result of the identified accounting practices, Penn West may not be in compliance with certain covenants under its unsecured, revolving syndicated bank facility or with the terms of its senior unsecured notes; and
- (e) Penn West's accounting practices which led to the improper classification of operating expenses in fiscal years 2013 and 2012 appear to have existed in prior years, necessitating a review of all financial statements issued for fiscal years 2010 to 2014.

NEGLIGENT MISREPRESENTATION

16. The defendants owed a duty of care to Jushan and the Class Members because they were in a relationship of proximity and it was reasonably foreseeable that

the Class Members would rely upon the misrepresentation and would suffer damages as a result.

17. The Financial Statements contained the misrepresentation.

18. Penn West made the misrepresentation by issuing the Financial Statements.

19. The Individual Defendants made the misrepresentation by signing, authorizing, permitting and/or acquiescing in the release of the Financial Statements.

20. The defendants breached the standard of conduct expected in the circumstances and were negligent.

21. Jushan and the Class Members reasonably relied upon the misrepresentation in making their decision to purchase Penn West securities. The defendants intended that the Class Members rely upon the misrepresentation.

22. Jushan and the Class Members also reasonably relied upon the misrepresentation by the act of purchasing Penn West securities during the Class Period.

23. Jushan and the Class Members who purchased and held Penn West securities suffered damages and loss as a result of relying on the misrepresentation and

purchasing and holding Penn West securities. Penn West and the Individual Defendants, or any one or more of them, are liable to pay damages to those Class Members.

NEGLIGENCE

24. The defendants owed a duty of care to Jushan and the Class Members who purchased Penn West securities during the Class Period because they were in a relationship of proximity and it was reasonably foreseeable that the Class Members would suffer damages as a result of purchasing the securities at prices that were artificially inflated because of their negligence.

25. The defendants failed to meet the required standard of conduct in the circumstances because, amount other things:

- (a) they failed to maintain appropriate internal controls to ensure that the Financial Statement adequately and fairly presented the financial position of Penn West;
- (b) they failed to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances as required by law; and
- (c) the Individual Defendants authorized, permitted and acquiesced in the preparation and dissemination of the Financial Statements when they knew or ought to have known that they did not adequately and fairly present the financial position of Penn West.

26. The reasonable standard of care expected in the circumstances required Penn West and the Individual Defendants to act fairly, reasonably, honestly, candidly and with due care in the course of compiling and disseminating the Financial Statements.

PART XXIII.1 OF THE OSA

27. Jushan intends to deliver a notice of motion seeking leave under s. 138.8(1) of the *OSA* to amend this notice of action and file a statement of claim to plead the causes of action set out in Part XXIII.1 of the *OSA* and the analogous provisions in the Equivalent Securities Acts *nunc pro tunc* to the date this action was commenced.

VICARIOUS LIABILITY OF PENN WEST

28. Penn West is vicariously liable for the acts and omissions of the Individual Defendants and its other officers, directors and employees because their acts and omissions with respect to the misrepresentation were carried out while they were engaged in the management, direction and control of the business affairs of Penn West.

REAL AND SUBSTANTIAL CONNECTION WITH ONTARIO

29. Jushan that this action has a real and substantial connection with Ontario because, among other things:

- (a) Penn West is a reporting issuer in Ontario;
- (b) Class Members resident in Ontario acquired Penn West securities and suffered damage and loss;
- (c) the securities of Penn West trade on the TSX, which is located in Ontario;
- (d) Frank Potter resides in Ontario; and

- (e) it is incorporated pursuant to the laws of Ontario.

SERVICE OUTSIDE OF ONTARIO

30. This originating process may be served without court order outside

Ontario in that the claim is:

- (a) in respect of damages sustained in Ontario arising from a tort wherever committed (rule 17.02(h));
- (b) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario (rule 17.02(o)); and
- (c) against a person ordinarily resident or carrying on business in Ontario (rule 17.02 (p)).

RELEVANT LEGISLATION

31. Jushan pleads and relies on the *CJA*, *CPA*, *OSA* and the Equivalent Securities Acts.

PLACE OF TRIAL

32. Jushan proposes that this action be tried in the City of Windsor, in the Province of Ontario.

July 31, 2014

KOSKIE MINSKY LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

KIRK BAERT
LSUC #: 309420
Tel: 416.595.2117
Fax: 416.204.2889

SUTTS, STROSBERG LLP
Lawyers
600 - 251 Goyeau Street
Windsor, ON N9A 6V4

JAY STROSBERG
LSUC #: 47288F
Tel: 519.561.6285
Fax: 519.561.6203

Lawyers for the plaintiff

JUSHAN INVESTMENTS LIMITED
Plaintiff

v. PENN WEST PETROLEUM LTD. et al.
Defendants

Court File No. CV14-21092C.P.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED AT WINDSOR

NOTICE OF ACTION

KOSKIE MINSKY LLP

20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

KIRK BAERT

LSUC #: 309420
Tel: 416.595.2117
Fax: 416.204.2889

SUTTS, STROSBERG LLP

Lawyers
600 - 251 Goyeau Street
Windsor, ON N9A 6V4

JAY STROSBERG

LSUC#: 47288F
Tel: 519.561.6285
Fax: 519.561.6203

Lawyers for the plaintiff