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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

In re: CS MINING, LLC, Debtor.	Bankruptcy Case No. 16-24818 (Chapter 11) Hon. William T. Thurman
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**OBJECTION OF DIP LENDERS TO DEBTOR'S MOTION PURSUANT TO
BANKRUPTCY RULE 9019 TO APPROVE SETTLEMENT BY AND
BETWEEN CS MINING, LLC AND WATERLOO STREET LIMITED**

Durham Jones & Pinegar, P.C. ("DJP"), attorneys for the debtor-in-possession lenders (the "DIP Lenders") who have advanced postpetition financing to CS Mining, LLC (the "Debtor"), hereby object to the Debtor's motion (the "Waterloo Motion") for approval of a settlement agreement (the "Waterloo Settlement") between itself and Waterloo Street Limited ("Waterloo") based on a supposedly "irrevocable" offer for the purchase of the Debtor's assets, but which is subject to a significant and ill-advised condition requiring that the Court setting certain ground rules favorable to Waterloo in the pending process involving the sale of the Debtor's assets (the "Sale Process") and restricting the rights of certain other parties who will

submit a bid for those assets. In support of this objection, the DIP Lenders respectfully state as follows.

1. The DIP Lenders have provided DIP financing to the Debtor under two facilities approved by this Court (the “DIP Facilities”). The original principal amounts advanced were \$7,675,000 and \$2,650,000 and the current amount owing to the DIP Lenders under the facilities, with interest and costs is approximately \$11,250,000.

2. The DIP Lenders anticipate being part of at least one bid for the Debtor’s assets aligned with David J. Richards, LLC dba Western US Mineral Investors, LLC (“WUMI”), a prepetition secured lender of the Debtor with whom the Debtor entered into a settlement agreement signed May 12, 2017 (the “WUMI Settlement”), which contains certain terms inconsistent with the Waterloo Settlement. The Debtor’s motion for approval of the WUMI Settlement (the “WUMI Motion”) was filed May 15, 2017 (dkt. no. 625). The WUMI Settlement was approved by the governing board of the Debtor, which is the board of directors of Skye Mineral Properties, LLC (“Skye”), the Debtor’s parent, with a majority of the board voting to authorize the Debtor to enter into the WUMI Settlement. The Debtor states in the WUMI Motion that the WUMI Settlement is in the best interests of the Debtor’s estate. WUMI Motion at ¶¶ 4, 20, 24. The WUMI Motion was originally scheduled for hearing on July 5, 2017, but the Debtor continued hearing on the WUMI Motion until Monday, July 17, 2017 in light of the “irrevocable” bid from Waterloo’s affiliate and Waterloo’s insistence that the Debtor withdraw the WUMI Motion and that WUMI not be permitted to credit bid.

3. The DIP Lenders will credit bid or assign their credit bidding rights to a bidder or bidders in the Sale Process. No one has raised any question or dispute about the DIP Lenders’

ability to credit bid amounts owing to them under the DIP Facilities and the DIP Lenders believe their rights to credit bid are clear under the DIP Facilities and Orders of this Court approving those DIP Facilities.

4. The WUMI Settlement provides for the compromise of WUMI's prepetition secured claim and the Debtor's adversary proceeding involving WUMI's secured claim and liens by reducing the amount of WUMI claims by \$23,000,000. Upon the validation of WUMI's secured claim as agreed to by the Debtor, the WUMI Settlement also permits WUMI to credit bid its compromised secured claim in the amount of \$23,000,000.

5. As the DIP Lenders understand the Waterloo Settlement (given that no signed version of either the settlement with Waterloo has been filed and no signed asset purchase agreement between the parties has yet been filed, that today is the objection deadline, and that Monday is the continued hearing on the WUMI Motion and the hearing on the Waterloo Motion), the Waterloo Settlement requires as a condition to the "irrevocable" offer to purchase the Debtor's assets that the Debtor's estate release Waterloo and a host of affiliates, including individuals who have served on the Skye board and against whom the DIP Lenders understand there are claims held by the Debtor (and perhaps others) for breach of fiduciary duty and other claims, and that the Debtor not proceed to seek approval of the WUMI Motion or Settlement. Further, the Waterloo Settlement requires as a condition to its affiliate's "irrevocable" offer to purchase the Debtor's assets that WUMI be prohibited from credit bidding its secured claims, whether or not the Court approves a compromise which includes an allowed WUMI secured claim.

6. The Waterloo Motion states that the Debtor's chief restructuring officers ("CRO's") believe that the Waterloo settlement and related affiliate bid will provide for payment of certain claims, will "promote the competitiveness and transparency of the sale process," and, apparently, most important, will "ensure a qualified bid for the auction." Tellingly, the CRO's hedge on whether the Waterloo settlement and bid is in the "best interests of the estate" "absent any other bid for the Debtor's assets." Waterloo Motion at ¶ 4. The Debtor's motion repeats this hedge in paragraph 9 – "the CRO's, in the exercise of their business judgment and fiduciary duties . . . have determined, *absent any other competing bids for the Debtor's assets*, . . . will be fair and equitable and in the best interest of the estate. *Id.* at ¶ 9.

7. Given that the bid deadline in the Sale Process is not until July 28 and that the DIP Lenders believe at least one significant competing bid (in which they will participate) will be made if WUMI is permitted to credit bid, the CRO's' hedge is unusually dangerous. It appears that Waterloo is attempting to make competing bids more difficult to make, hardly something that will "promote the competitiveness" of the Debtor's sale process. The failure to file a signed settlement agreement until just before or even after the objection deadline to the Waterloo Motion hardly represents "transparency" in the sale process.

8. Waterloo and other parties in the Debtor's case have had ample opportunity to review the WUMI Settlement, to conduct discovery with respect to it, and to respond to it. The DIP Lenders and others have had insufficient notice, no realistic opportunity for review of the Waterloo Settlement or associated bid, and no opportunity for discovery.

9. The most prominent provision of the Waterloo Settlement is not about Waterloo at all – it is about restricting the Debtor from completing a well-advised compromise regarding

WUMI's secured claim and about restricting WUMI's bidding rights. For whatever reason (and the DIP Lenders assume there is a reason at the heart of Waterloo's insistence that certain parties not be permitted to credit bid, though they are concerned that it is not a good-faith reason), Waterloo insists on having its secured claim allowed but does not want to credit bid that claim and insists that WUMI not be permitted to bid. Waterloo may choose not to credit bid, but it should not be given the right to restrict others from doing so to benefit itself in the Sale Process by chilling other bids. Waterloo is attempting to prevent the compromise the WUMI secured claim and to make sure that that claim is not used in a credit bid. The Court should not countenance that.

10. The rule in bankruptcy sales is that secured creditors are permitted to credit bid their secured claims unless the court finds that there is sufficient cause to permit a sale without protecting this important right. 11 U.S.C. § 363(k). The United States Supreme Court, in addressing a sale free and clear pursuant to a plan of reorganization reiterated the importance of permitting secured creditors to credit bid. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 132 S.Ct. 2065 (2012). As the Supreme Court noted, "[t]he ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan." *Id.* 2070n.2. Here, the only cause that has been shown for restricting WUMI from its right to credit bid its compromised secured claim is Waterloo's insistence that the Debtor not proceed with its settlement with WUMI and that WUMI not be permitted to credit bid. The rationale is that,

unless Waterloo has its way, it will not bid \$22 million cash for the purchase of the Debtor's assets and perhaps no one else will bid.

11. The Court should not countenance such creditor manipulation. The DIP Lenders are participating in one (and may participate in other, third-party, bids if asked) that will provide sufficient funding for payment of priority claims as contemplated by the Court-approved bidding procedures and the DIP Facility credit agreement and for an agreed distribution to general unsecured creditors that will be at least as good as the purported "irrevocable" offer of Waterloo's affiliate. Moreover, the releases that have been agreed to by the Debtor and WUMI are substantially less broad than those insisted on by Waterloo and will permit the Debtor or a liquidation trust to pursue those claims with the aim of higher recoveries for the benefit of unsecured creditors.

12. Moreover, it is dangerous for the Court to countenance settlements not approved by the governing body of the Debtor or settlements for which there has been slight opportunity for notice or review by creditors that require withdrawal of other settlements that were not hastily negotiated and which the governing board of the Debtor has approved. What the Debtor and its estate deserve is a robust auction with the highest likelihood of obtaining the best recovery for creditors and which leaves other means of recovery for creditors at the same time being protected in sufficient cash funds to pay administrative expense claims and some recovery for general unsecured creditors. The Waterloo Settlement and affiliate bid do not contribute to such a robust sale proceeding and in fact chill it, while an auction at which secured creditors with compromised claims credit bid will require third-party bidders to pay more if they want to have a chance at being successful at prevailing in an auction.

13. The Waterloo Settlement recites that it is the result of “good-faith negotiations,” but the basis for submitting the Waterloo Settlement is the bid by Waterloo’s affiliate. There is no allegation that that proposed sale is in good faith and the DIP Lenders believe there is a substantial cloud over that question, given Waterloo’s insistence on terms that do not facilitate a robust Sale Process. Such a proof of good faith is required for a sale outside the ordinary course of business. *In re Medical Software Solutions dba Perfect Practice, M.D.*, 286 B.R. 431, 445 (Bankr. D. Utah, 2002).

14. The Debtor in the Waterloo Motion states that it will withdraw the Waterloo Motion if events arise “that make approval of the [Waterloo] Settlement Agreement no longer in the best interests of the Debtor’s bankruptcy estate.” The DIP Lender submit that the Waterloo Settlement never was in the best interests of the Debtor’s estate, but that it certainly is not now.

WHEREFORE, the DIP Lenders respectfully request that the Court deny the Waterloo Motion, that the Court facilitate a robust sale process by approving the WUMI Motion, and that the Court grant such other and further relief as it deems just and equitable.

DATED this 13th day of July, 2017.

DURHAM JONES & PINEGAR, P.C.

By: /s/ Kenneth L. Cannon II
Kenneth L. Cannon II

Attorneys for the DIP Lenders

CERTIFICATE OF SERVICE- BY NOTICE OF ELECTRONIC FILING (CM/ECF)

I hereby certify that on July 14, 2017, I electronically filed the foregoing **OBJECTION OF DIP LENDERS TO DEBTOR'S MOTION PURSUANT TO BANKRUPTCY RULE 9019 TO APPROVE SETTLEMENT BY AND BETWEEN CS MINING, LLC AND WATERLOO STREET LIMITED** with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system. I further certify that the parties of record in this case, as identified below, are registered CM/ECF users.

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