M. Darin Hammond, Bar No. 6741
SMITH KNOWLES, P.C.
2225 Washington Blvd., Suite 200
Ogden, UT 84401
Telephone: (801) 476-0303
Email: dhammond@smithknowles.com

Richard K. Stovall, Ohio Registration No. 29978
ALLEN, KUEHNLE STOVALL & NEUMAN LLP
17 South High Street, Suite 1220
Columbus, OH 43215
Telephone: (614) 221-8500
Email: stovall@aksnlaw.com
Pro Hac Vice Admission Anticipated

Attorneys for Utah Minerals Investors, LLC

UNITED STATES BANKRUPTCY COURT

DISTRICT OF UTAH, CENTRAL DIVISION

IN RE:	Case No. 16-24818 WTT
CS MINING, LLC,	Chapter 11
Debtor.	(Filed Electronically)

OBJECTION TO SALE CONDUCTED BY AUCTION ON AUGUST 7, 2017

Utah Minerals Investors, LLC ("UMI"), a prospective purchaser of substantially all of the estate's assets in the above captioned proceeding, by and through its undersigned counsel, hereby submits this objection to the sale (the "Sale") which was conducted by auction on August 7, 2017 (the "Auction") on the bases that (i) UMI was improperly excluded as a "Qualified Bidder", as defined by the Order entered by this Court approving bidding procedures in connection with the

Sale [See Doc. No. 433] (the "Bid Procedures Order"), and (ii) the successful bidder's proposed purchase is in contravention of applicable law.

Background Facts

On October 21, 2016, CS Mining, LLC, the debtor and debtor in possession, (the "Debtor") filed its *Motion of Debtor for Entry of (I) An Order (A) Approving Bidding Procedures in Connection with Sale of Substantially All of the Estate's Assets, (B) Approving Expense Reimbursement, (C) Scheduling an Auction and Hearing to Consider the Proposed Sale, and (D) Approving the Form and Manner of Notice Thereof; (II) An Order (A) Approving the Sale, (B) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases, and (C) Granting Certain Related Relief* [Doc. No. 365] (the "Bid Motion"). On November 18, 2016, the Court granted the Bid Motion by virtue of its Bid Procedures Order [See Doc. No. 433].

The Auction, as contemplated by the Bid Procedures Order, was originally scheduled for February 2, 2017, but was ultimately rescheduled and conducted on August 7, 2017.[1] Pursuant to the *Notice of Auction and Sale Hearing* [Doc. No. 766] filed on July 21, 2017, Qualified Bidders desiring to submit a bid must do so by July 28, 2017, unless the Debtor agrees to extend such deadline. The Debtor did, in fact, provide UMI with additional time to submit a bid through and until July 31, 2017.

On July 31, 2017, UMI submitted its initial bid to purchase substantially all of the assets of the Debtor. UMI submitted a revised bid to the Debtor on August 6, 2017 (the "Bid").

[1] The Auction was conducted over a two-day period, commencing on August 7, 2017, and concluding the next day, August 8, 2017.

On August 8, 2017, UMI was notified that it was rejected as a Qualified Bidder and excluded from participating in the Auction. Upon information and belief, Tamra Mining Company, LLC ("Tamra Mining"), an affiliate of one or more of the entities defined as the "Waterloo Parties" under the Asset Purchase Agreement with Tamra Mining (the "APA"), was selected as the winning bidder for the purchase of the assets at the Auction.[2]

On August 12, 2017, a *Notice of Asset Purchase Agreement in Connection with Notice of Auction Results* [Doc. No. 844] was filed with the Court, which included a copy of the APA.

Objections

1. **The Debtor Was Not Acting Within The Scope of Its Reasonable Business Judgment When It Determined That UMI Was Not A Qualified Bidder.**

UMI submits that the Debtor's rejection of UMI as a Qualified Bidder was outside the scope of its "reasonable business judgment." The Bid Procedures Order sets forth several requirements for a bid to be considered a "Qualified Bid," including "written evidence of an unconditional commitment for financing (by a creditworthy bank or financial institution that shall provide such financing without alteration of conditions or delay) ***or other evidence of ability, as determined in the reasonable business judgment of Debtor***…" See, Bid Procedures Order pp. 3-4. In conjunction with its Bid, UMI provided the Debtor with Subscription Agreements from David W. Houze, and Element Global Mining Group, Inc., ("Element") and Clarinova, Ltd. ("Clarinova"), as well as a financial assurance letter from Element and Clarinova, (attached hereto

[2] Specifically, Tamra Mining is believed to be affiliated with or under common ownership or control by Lippo China Resources Limited ("Lippo").

as Exhibit A) all of which supported UMI's ability to finance the purchase of the assets, for a purchase price of ***seven million dollars more*** than Tamra Mining.[3]

In light of the strong policy favoring competitive bidding in sales of bankruptcy estate assets,[4] UMI should have been deemed a Qualified Bidder, particularly given the strength of its bid and financial documents presented to the Debtor. The Debtor's purported issue with UMI's Bid was that it's funding was based upon funding received by Element and Clarinova from UBS. Anticipating this concern, UMI provided to the Debtor the financial assurance letter from Element and Clarinova, which confirms its funding, to be used, in part, to fund the purchase of the Debtor's assets. Element and Clarinova's commitment to Utah Minerals is subject only to the clerical requirement of issuance of a CUSIP number as stated therein, assured CS Mining that their commitment was binding and unconditional, and that this administrative matter would be cleared in advance of the August 31 closing date. Further, even if UMI did not fulfill its binding commitments due to a lack of funding from its subscribers, the Debtor could have closed upon the backup bid and taken the deposit (which UMI offered to increase to $1,000,000), therefore increasing recovery to the estate—the entire purpose of the non-refundable deposit and backup bid..The Debtor apparently believed that UMI's supporting financial documentation was insufficient, and on this basis, rejected UMI from bidding on the assets. UMI submits that the

[3] Further, UMI's Bid did not contain a release of the valuable fiduciary claims held by the estate against any third party, including the Waterloo Parties [See Section 2, below], making UMI's bid even more financially "better and higher" than Tamra Mining's bid.

[4] *See, In re Psychrometric Systems, Inc.* 367 B.R. 670, 676 (Bankr. D. Colo 2007).

Debtor's determination was not based upon credible reasoning, and was certainly outside the scope of its reasonable business judgment.

2. **The Debtor Lacked Authority to Assign, Sell, or Release Certain Fiduciary Claims**.

Notwithstanding UMI's objection that it was improperly disqualified from bidding on the assets, the proposed terms of the sale to Tamra Mining is in contravention of applicable law. The sale to Tamra Mining contemplates the purchase of valuable breach of fiduciary duty claims against the "Waterloo Parties"—assets for which the Debtor did not obtain approval by the Debtor's Board of Managers to sell. See APA Sec. 2.1(u).[5] As a result of the prior resolutions and clarifications thereto of the Board of Managers of the Debtor, any sale, assignment, or release of fiduciary claims requires Board approval. Yet, the Debtor, through its sale to Tamra Mining, is attempting to sell or assign these fiduciary claims without first seeking approval from the Board of Managers of the terms of such sale or assignment. The Board of Managers basis for such required approval was a concern for proper analysis and valuing of such claims with respect to all parties, including the claims against the Waterloo Parties as defined in the Tamra Mining Asset Purchase Agreement. As was discovered and laid out in plain detail in initial discovery with respect to the Waterloo Parties, they (excluding Tamra Mining, which did not yet exist at such time) 1) embarked upon a plan in October 2015 to acquire the Noble Americas Corp. loan using inside information obtained from Board of Managers meetings and several hundred days on site at

[5] Moreover, the model APA submitted by the Debtor and approved by this Court in conjunction with the Bid Motion clearly contemplated that fiduciary claims held by the estate were to be excluded from the "Purchased Assets". See, Sec. 2.2 of Model APA, which excludes "any and all claims of Seller or (including, without limitation, any claims for loans or advances or claims for breach of fiduciary duty) against any of the officers, directors, or shareholders of Seller or Seller's parent company, Skye Mineral Partners."

CS Mining, 2) use it as a leverage point to drive the Company into bankruptcy, and 3) acquire the assets of CS Mining cheaply. The PacNet guaranty and Waterloo debt that was used as part of the Tamra Mining bid was obtained as part of this plan. Lippo is, upon approval and closing of the Tamra Mining APA, on the cusp of successfully executing this illegal plan, and being absolved of liability to the Debtor in connection therewith through their "purchase" of the claims against the Waterloo Parties. The resolution of these claims without proper consideration, or a full and proper analysis by the Debtor, in a manner like that being proposed in the Tamra Mining APA was apparently a fundamental reason of the Board withholding approval of the sale or transfer of the Debtor's fiduciary claims in its consents.

Further, even if the Board of Managers approved the sale or assignment of such claims, UMI submits that these valuable fiduciary duty claims are not assignable under applicable Delaware state law. Where a tort claim is not assignable under state law, it likewise cannot be assigned in bankruptcy. *See, Integrated Solutions, Inc. v. Service Support Specialties, Inc.* 124 F.3d 487, 495 (3d Cir. 1997). To the extent these claims are derivative in nature, the right to assert such claims "and benefit from any recovery is a property right associated with the shares. By default, that property right travels with the shares." *In re Activision Blizzard, Inc. Stockholders Litig.*, 124 A.2d 1025, 1044 (Del. Ch. 2015). Tamra Mining, as the proposed purchaser of these claims, would have no right to pursue such claims on behalf of the Debtor because a derivative plaintiff must either (i) have been a member at the time of the transaction at issue; or (b) its status as a member or assignee "devolved upon the plaintiff by operation of law or pursuant to the terms of a limited liability company agreement from a person who was a member or an assignee… at the

time of the transaction." 6 Del. C. § 18-1002; *see also* 8 Del. C. § 327. Under this provision, Tamra Mining lacks standing to bring a derivative action based upon the claims it is attempting to acquire through the § 363 sale process. In reality, the Waterloo Parties, through Lippo and subsequently Tamra Mining, are using the sale process to leverage their positions as possible defendants in litigation to release themselves of fiduciary duty claims that could result in a significant recovery to the Debtor and this estate. Given the heightened scrutiny the Court must undertake in its assessment of the sale process when asked to bless a sale to an insider—in this case, Tamra Mining—the sale should not be approved on this basis alone.

The assignment of claims is likewise contrary to Delaware public policy. Under Delaware law, where a corporation merges into another, its shareholders lose standing to bring a derivative action. This situation is analogous in that the sale of claims will deprive members of the Debtor and Skye Mineral Partners, LLC of their ability to bring a derivative action. Delaware courts have created an exception to the rule that shareholders lose standing in a merger, "where the merger itself is…being perpetrated merely to deprive shareholders of their standing to bring the derivative action." *Arkansas Teacher Ret. Sys. v. Countrywide Fin. Corp.*, 75 A.3d 888, 897 (Del. 2013).

The underlying policy likely applies here based upon UMI's belief that Lippo, the an affiliate of Tamra Mining, took various actions in bad faith in an effort to sabotage the Debtor in order to buy its assets in bankruptcy at a significant discount. The acquisition of the Debtor's tort claims is being undertaken specifically to avoid liability for those actions. To the extent that Tamra Mining, the new Lippo entity, asserts that it is not a party to the misconduct, Delaware law prohibits champerty, and bars the assignment of such claims. The rule against champerty bars

arrangements where the owner of a claim and a third-party agree that the third party will take over the claim and will divide the proceeds with the owner. *Street Search partners, L.P. v. Ricon Int'l LLC*, 2006 WL 1313859, at *3-4 (Del. Super. May 12, 2006) (holding that assignment was unenforceable as potentially champertous).

Furthermore, other state law tort claims owned by the Debtor, such as claims for tortious interference, are governed by Utah law, and are not assignable based upon Utah law's strict limitations on the assignment of tort claims. A tortious interference claim is not assignable unless it seeks to recover a specific property interest. *Gilbert v. DHC Dev., LLC*, 2013 WL 4881492, at *10-11 (D. Utah Sept. 12, 2013).

For the reasons stated herein, Utah Mineral Investors, LLC, objects to the proposed sale of substantially all of the Debtor's assets to Tamra Mining, LLC.

DATED this 14th day of August, 2017.

SMITH KNOWLES, P.C.

/s/ M. Darin Hammond
M. Darin Hammond
Attorneys for Utah Minerals Investors, LLC

- and –

Richard K. Stovall, Ohio Registration No. 29978
ALLEN, KUEHNLE STOVALL & NEUMAN LLP
17 South High Street, Suite 1220
Columbus, OH 43215
Telephone: (614) 221-8500
Email: stovall@aksnlaw.com
Pro Hac Vice Admission Anticipated

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

I hereby certify that on the 14th day of August, 2017, I electronically filed the foregoing, **OBJECTION TO SALE CONDUCTED BY AUCTION ON AUGUST 7, 2017,** 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 and will be served through the CM/ECF system:

- **James W. Anderson** jwa@clydesnow.com, jritchie@clydesnow.com
- **Troy J. Aramburu** taramburu@swlaw.com, nharward@swlaw.com;docket_slc@swlaw.com
- **J. Thomas Beckett** tbeckett@parsonsbehle.com, ecf@parsonsbehle.com;brothschild@parsonsbehle.com;kstankevitz@parsonsbehle.com
- **Darwin H. Bingham** dbingham@scalleyreading.net, cat@scalleyreading.net
- **Stephen T. Bobo** sbobo@reedsmith.com
- **Kyle A. Brannon** kbrannon@nexsenpruet.com
- **Scott S Bridge** sbridge@keslerrust.com
- **Martin J. Brill** mjb@lnbyb.com
- **Mona Lyman Burton** mburton@hollandhart.com, intaketeam@hollandhart.com;slclitdocket@hollandhart.com;lcpaul@hollandhart.com
- **Keith A. Call** kcall@scmlaw.com, hae@scmlaw.com
- **Kenneth L. Cannon** kcannon@djplaw.com, khughes@djplaw.com
- **Laurie A. Cayton tr** laurie.cayton@usdoj.gov, James.Gee@usdoj.gov;Lindsey.Huston@usdoj.gov;Suzanne.Verhaal@usdoj.gov
- **Patricia W. Christensen** pchristensen@parrbrown.com
- **Christopher B. Chuff** chuffc@pepperlaw.com
- **Joanna J. Cline** clinej@pepperlaw.com
- **Joseph M.R. Covey** calendar@parrbrown.com
- **P. Matthew Cox** bankruptcy_pmc@scmlaw.com
- **Robert T. Denny** rtd@scmlaw.com, ajm@scmlaw.com
- **Andres' Diaz** courtmail@adexpresslaw.com
- **Timothy D. Ducar** tducar@azlawyers.com, orders@azlawyers.com
- **Victoria B. Finlinson** vbf@clydesnow.com
- **Philip A. Gasteier** pag@lnbyb.com
- **Christopher Grivakes** cg@agzlaw.com
- **Robert W. Hamilton** rwhamilton@jonesday.com
- **M. Darin Hammond** dhammond@smithknowles.com, astevenson@smithknowles.com
- **George B. Hofmann** ghofmann@cohnekinghorn.com, dhaney@cohnekinghorn.com;jthorsen@cohnekinghorn.com
- **Paul C. Huck** paulhuck@jonesday.com, ramoncastillo@jonesday.com
- **David W. Hunter** davidh@fisherhunterlaw.com

- **Evan L. James** elj@cjmlv.com, kbc@cjmlv.com;ljw@cjmlv.com
- **Pedro A. Jimenez** pjimenez@jonesday.com
- **Michael R. Johnson** mjohnson@rqn.com, docket@rqn.com;dburton@rqn.com
- **Peter J. Kuhn tr** Peter.J.Kuhn@usdoj.gov, James.Gee@usdoj.gov;Lindsey.Huston@usdoj.gov;Suzanne.Verhaal@usdoj.gov
- **Brian R. Langford** brian@mhmlawoffices.com, brian@mhmlawoffice.com
- **David H. Leigh** dleigh@rqn.com, dburton@rqn.com;docket@rqn.com
- **David E. Leta** dleta@swlaw.com, wkalawaia@swlaw.com;csmart@swlaw.com
- **Andrew C. Lillie** andrew.lillie@hoganlovells.com
- **Jessica Black Livingston** jessica.livingston@hoganlovells.com
- **Ralph R. Mabey** rmabey@kmclaw.com
- **Adelaide Maudsley** amaudsley@kmclaw.com, tslaughter@kmclaw.com
- **Steven J. McCardell** smccardell@djplaw.com, khughes@djplaw.com
- **Scott O. Mercer** som@keslerrust.com
- **Krikor J. Meshefejian** kjm@lnbyb.com
- **Elijah L. Milne** emilne@djplaw.com, pbricker@djplaw.com
- **Matt Munson** matt@mamunsonlaw.com, chris@mamunsonlaw.com
- **Sherilyn A. Olsen** solsen@hollandhart.com, slclitdocket@hollandhart.com;intaketeam@hollandhart.com;cfries@hollandhart.com
- **Ellen E Ostrow** eeostrow@hollandhart.com, mkthurgood@hollandhart.com;intaketeam@hollandhart.com
- **A.M. Cristina Perez Soto** cperezsoto@jonesday.com
- **Lester A. Perry** lap@hooleking.com, apb@hooleking.com
- **David L. Pinkston** bankruptcy_dlp@scmlaw.com
- **George W. Pratt** gpratt@joneswaldo.com
- **Adam H Reiser** areiser@cohnekinghorn.com
- **Walter A Romney** war@clydesnow.com
- **John H. Schanne** schannej@pepperlaw.com, henrys@pepperlaw.com;molitorm@pepperlaw.com
- **Chris L. Schmutz** chrisschmutz.pc@gmail.com, hillaryschmutz@yahoo.com;r60588@notify.bestcase.com
- **Jeremy C. Sink** jsink@mbt-law.com
- **Stephen Styler** steve@stylerdaniels.com
- **Richard C. Terry** richard@tjblawyers.com, cbcecf@yahoo.com
- **Jeff D. Tuttle** jtuttle@swlaw.com, jpollard@swlaw.com;docket_slc@swlaw.com
- **United States Trustee** USTPRegion19.SK.ECF@usdoj.gov
- **Jessica P Wilde** jwilde@joneswaldo.com
- **Mark W Williams** mwilliams@shermanhoward.com, dfouts@shermanhoward.com;efiling@sah.com;bmcalister@shermanhoward.com
- **Kim R. Wilson** bankruptcy_krw@scmlaw.com
- **Laura J. Wolff** ljw@cjmlv.com
- **Lee E. Woodard** lwoodard@harrisbeach.com

- **Beth Ann R. Young** bry@Lnbyb.com
- **P. Matthew x2Cox** bankruptcy_pmc@scmlaw.com
- **Gale K. x6Francis** txbk13@utah.gov

CERTIFICATE OF SERVICE
BY MAIL, OTHER

I hereby certify that on the 14th day of August, 2017, I caused to be served a true and correct copy of the foregoing, **OBJECTION TO SALE CONDUCTED BY AUCTION ON AUGUST 7, 2017**, as follows:

Mail Service – By regular first class United States mail, postage fully pre-paid, addressed to:

Donald J. Detweiler
Pepper Hamilton, LLP
Hercules Plaza, Suite 5100
1313 North Market Street
P.O. Box 1709
Wilmington, DE 19899-1709

Epiq Bankruptcy Solutions, LLC
777 Third Ave, 12th Floor
New York, NY 10017

FTI Consulting, Inc.
Attn: David Beckman
1001 17th St. #1100
Denver, CO 80202

Francis J. Lawall
Pepper Hamilton
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799

Levene, Neale, Bender, Yoo & Brill L.L.P.
10250 Constellation Blvd.
Suite 1700
Los Angeles, CA 90067

/s/ M. Darin Hammond
M. Darin Hammond
Attorneys for Utah Minerals Investors, LLC

EXHIBIT "A"

BLOOM HERGOTT DIEMER ROSENTHAL LAVIOLETTE FELDMAN SCHENKMAN & GOODMAN, LLP

ATTORNEYS AT LAW

150 SOUTH RODEO DRIVE, THIRD FLOOR
BEVERLY HILLS, CALIFORNIA 90212

JACOB A. BLOOM
ALAN S. HERGOTT
CANDICE S. HANSON
JOHN D. DIEMER
STUART M. ROSENTHAL
LEIGH BRECHEEN
STEPHEN F. BREIMER
JOHN LAVIOLETTE
DAVID B. FELDMAN
ERIC M. BROOKS

MICHAEL L. SCHENKMAN
PATRICK M. KNAPP
CARLOS K. GOODMAN
RICHARD D. THOMPSON
GREGORY L. SLEWETT
JENNIFER L. GRAY
WILLIAM A. JACOBSON
PATRICK M. RAGEN
ASHLEY L. SILVER

THOMAS P. POLLOCK
FOUNDING PARTNER
THROUGH 1986

DIRECT DIAL NUMBER
(310) 859-6805
DIRECT FAX
(310) 860-6805
EMAIL
jsl@bhdrl.com

August 5, 2017

Utah Mineral Investors, LLC:

As an officer of and counsel to Element Global Mining Group, Inc. I wanted to confirm the following with respect to our commitment to fund Utah Mineral Investors, LLC, including the initial $35,000,000 subscription agreement.

1. UBS has agreed to provide to our financial company, Clarinova Limited, a credit facility on the full €600,000,000 total bond issue starting with an initial draw on the first €100,000,000 face value pursuant to executed documentation. UBS has agreed to purchase the balance of €500,000,000 within 7 banking days from the initial settlement.

2. The bonds are insured by Best Meridian Insurance ("BMI") which has an A- rating with Standard and Poor's and all collateral documents from BMI have been executed.

3. Clarinova Limited's bonds are now listed on Bloomberg and Euroclear with ISIN 0624. UBS has secured its own secondary bond as additional collateral behind the Clarinova Bond and is awaiting a CUSIP number to be issued to have the bond live in the DTC system. This item is what caused the delay and UBS has assured Clarinova that this item will be completed no later than Wednesday August 9th. This is the only item remaining before funding.

4. UBS has provided assurance that the above-referenced funds will be available on or before August 14, 2017.

Please contact me with any questions.

Sincerely,

John S. LaViolette

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