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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-WTT  
Chapter 11  
Hon. William T. Thurman

**CROSS-MOTION OF CLARITY COPPER, LLC AND SKYE MINERAL INVESTORS,  
LLC TO STAY THE MOTION OF TAMRA MINING COMPANY, LLC TO ENFORCE  
SALE ORDER AND ENJOIN AND/OR DISMISS PURCHASED CLAIMS**

Cross-Movants, Clarity Copper, LLC (“CC”) and Skye Mineral Investors, LLC (“SMI”), respectfully move the Court for entry of an Order staying the Motion of Tamra Mining Company, LLC (“Tamra”) to Enforce Sale Order and Enjoin and/or Dismiss Purchased Claims (the “Motion to Enforce”) pending the Delaware courts’ construction of the claims filed in the

Delaware Court of Chancery (the “Delaware court”) and currently pending in the United States Bankruptcy Court for the District of Delaware (the “Delaware Claims”).<sup>1</sup> In support of its motion, Cross-Movants respectfully state as follows:

1. The Court should stay the Motion to Enforce because it is predicated on Tamra’s unfounded prediction that the Delaware court will permit double derivative claims (that the Delaware plaintiffs have not even asserted) brought on behalf of CS Mining to be litigated in that forum. Rather than rely on unfounded predictions, motions should be based on facts. The Delaware court should be permitted to state for itself what it is prepared to do before this Court (based on Tamra’s say-so) considers whether anything the Delaware court is doing somehow implicates this Court’s jurisdiction and is inconsistent with something this Court has directed. That is particularly necessary here, for two reasons: (i) Tamra has not yet even asked the Delaware court to construe those claims as being brought on behalf of CS Mining, and certainly the Delaware court has rendered no ruling on the issue, and (ii) in fact, Cross-Movants and the plaintiffs in the Delaware Action (the “Delaware Plaintiffs”) neither have attempted to bring any double derivative claims on behalf of CS Mining, nor do they have any interest in doing so.

2. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). In

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<sup>1</sup> The arguments herein pertaining to the Delaware Claims apply also to SMI and CC’s Counterclaims in the related Adversary Proceeding (No. 16-02118). Those Counterclaims largely are coextensive with some of the Delaware Claims and were filed only in an abundance of caution, to avoid any claims of waiver if, it turns out, the defendants in the Delaware action seek to dismiss some or all of the claims in the Delaware court based on the pendency of that Adversary Proceeding, and the Delaware court grants such relief.

evaluating whether to stay proceedings, a court “must weigh competing interests and maintain an even balance.” Id. at 254–55. In implementing their discretion as to whether to stay proceedings, courts analyze the following factors: “(1) whether a stay would promote judicial economy; (2) whether a stay would avoid confusion and inconsistent results; and (3) whether a stay would unduly prejudice the parties or create undue hardship.” Solid Q Holdings, LLC v. Arenal Energy Corp., No. 2:15–CV–00419–DN, 2015 WL 6681016, at \*2 (D. Utah Oct. 30, 2015) (quoting Gale v. Brinker Int’l Payroll Co., No. 1:09–CV–129 TS, 2010 WL 3835215, at \*1 (D. Utah Sept. 29, 2010)).

3. A stay of the Motion to Enforce pending the Delaware court’s construction of the Delaware Claims is both efficient and non-prejudicial. Tamra’s Motion to Enforce is predicated on issues arising under Delaware corporate law – i.e., what constitutes a double derivative claim – that the Delaware court has not yet decided, and permitting that forum to decide those issues would reduce this Court’s burden and likely obviate the Motion to Enforce entirely.

4. The core premise of Tamra’s motion is that, if the allegations in the Delaware Action asserted by “SMI and Clarity Copper are correct, they have pled claims and causes of action belonging to the Debtor and its bankruptcy estate, which claims and causes of action were purchased by Tamra as part of the sale process and which are barred by the Sale Order.” (Docket No. 1120 at 2.) In other words, Tamra’s position reduces to the premise that the Delaware Court has decided that the wrongdoing alleged in the Delaware Action gives rise *exclusively* to claims that CS Mining held.<sup>2</sup> Tamra is wrong.

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<sup>2</sup> This presupposition also is the linchpin to Tamra’s mistaken assertion that this Court has exclusive jurisdiction over the issues raised in its Motion to Enforce. However, as discussed below, unless the Delaware court decides that the Delaware Plaintiffs can pursue claims that

5. Tamra's position amounts to a transparent attempt to somehow pigeonhole the Delaware Claims into the terms of what was sold under the Sale Order. As a threshold matter, the Delaware Court has not decided anything and, in fact, SMI and CC did not even attempt to plead claims on behalf of CS Mining, by bringing double derivative claims or otherwise. Indeed, CS Mining is not even a *party* to the action (as a plaintiff or a nominal defendant), and the Complaint seeks damages only on behalf of SMI, CC, and SMP – *not* CS Mining. (See *id.* at 431, 462-476, ¶¶ 110, 116, 121, 126, 131, 138, 145, 149, 155, 161, 166, 171, 176, 184, 187.) The face of the pleading belies Tamra's meritless claim that the Delaware court has permitted litigation of claims that belong to CS Mining.

6. In addition, Tamra simply ignores away the indisputable fact that the Delaware Plaintiffs asserted various *direct* claims. Tamra's tactic is transparent: It acts as if those claims do not exist because Tamra has no argument as to how such claims could possibly have been sold by the Debtor. The Delaware Plaintiffs have asserted fraud claims, for example, asserting that defendants Cooper, Noronha, PacNet and DXS defrauded SMI and CC in various ways in an effort to, *inter alia*, convince them to contribute additional, out-of-pocket funds to the Company. Such fraud claims are plainly direct claims. (Docket No. 1120 at 474-75, ¶¶ 172-176); *see, e.g., In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1056 (Del. Ch. 2015) (noting that fraud is a "quintessential" example of a personal claim); *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1139–41 (Del. 2016) (finding on a certified question of law from the Second Circuit that shareholders claims for fraud and false misrepresentation were direct, not derivative

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belong to CS Mining, then they are *not* subject to the Sale Order, and Tamra's strawman jurisdictional argument falls apart.

claims). Similarly, SMI and CC allege that certain defendants breached multiple sections of the Third Amended and Restated Limited Liability Agreement of Skye Mineral Partners, LLC. (Docket No. 1120 at 468-469, ¶¶ 132-38; *id.* at 475-76, ¶¶ 177-184.) Tamra cannot reasonably contend that a claim for a breach of *SMP*'s operating agreement brought by SMI, CC, or SMP is somehow a claim held by *CS Mining*, as *SMP*'s subsidiary.

7. Further, under Delaware law, a parent corporation [here, *SMP*] has independent standing to directly bring *its own* claims (i.e., not as a double derivative suit) against its fiduciaries for breaches of fiduciary duties that harm the value of the parent's shares in its subsidiary [here, *CS Mining*]. *See, e.g., Case Financial v. Alden*, 2009 WL 2581873, at \*7 (Del. Ch. Aug. 21, 2009) (holding that the plaintiff corporation could maintain a direct claim for breach of fiduciary duty against a former director, where the alleged damages were the diminution in value of the plaintiff corporation's shares of its subsidiary, reasoning that, "because [the former director] owed this duty to the [plaintiff corporation] directly, [the plaintiff's] ability to pursue a suit against [the former director] directly [did] not depend ... on whether the entirety of the damage was sustained directly by [the plaintiff] or derivatively through [the subsidiary]").

8. Thus, notwithstanding whether *CS Mining* sold *its* claims pursuant to the Sale Order, *SMP* has *its own* direct claims for breaches of fiduciary against *its* fiduciaries that are, by definition, not subject to the Sale Order. Consistent with that authority, the Delaware Action includes claims brought on behalf of *SMP* against *its* fiduciaries for breaches of their fiduciary duties, along with those who aided and abetted such breaches. (Docket No. 1120 at 462-66 ¶¶ 105-126.)

9. Setting aside these plain flaws in Tamra's position, at bottom there is no reason for this Court to consider issuing an advisory opinion on these issues of Delaware law: it should consider any such arguments once the Delaware court – known as one of the preeminent corporate law courts in the nation – determines what claims the Delaware Plaintiffs are seeking to pursue, for at least three reasons.

10. **First**, a stay would promote judicial economy. To the extent Tamra disputes any of the foregoing arguments, facts, or Delaware legal propositions, then it will presumably raise those issues as a basis for moving to dismiss claims asserted in the Delaware Action, in response to which the Delaware Court will decide the gating issues of Delaware law on which Tamra's Motion to Enforce relies. If the Delaware Court rules in SMI's and CC's favor, Tamra's Motion to Enforce would be mooted – that court would be confirming that the foundational premise of Tamra's motion (its prediction about the claims the Delaware court will permit to move forward) is false. If the Delaware court rules in Tamra's favor and nevertheless allows the Delaware Claims to proceed, then the Motion to Enforce would be ripe and this Court could then decide whether the Delaware court's construction of the claims somehow warrants relief from this Court – without having to construe claims *sub judice* in another forum and under foreign state law, based on unfounded predictions that Tamra has invented.

11. **Second**, for similar reasons, a stay would avoid confusion and inconsistent results. The parties and both courts already are confronted with two separate actions, and Tamra has complicated that by asking this Court to opine on the legal significance of the Delaware Claims, including claims not before this Court. As long as neither action is stayed, there is an ongoing risk of confusion, inconsistent results, and the duplicative use of party and judicial resources

across the two actions. By staying the Motion to Enforce, this Court would obviate the inherent problems of parallel litigation until the Delaware court can resolve the threshold legal issues that underpin Tamra's motion.

12. ***Third***, a stay would not cause any undue hardship or prejudice to any party. There is no reason why Tamra's Motion to Enforce needs to be decided before the Delaware court determines the motion's predicate legal issues – and in fact the opposite makes more sense. Indeed, in moving to expedite the Motion to Enforce, Tamra failed even to attempt to assert any basis for why that motion needs to be determined on an accelerated timeline, or how the pendency of the Delaware action meaningfully affects its interest in that motion, or why this Court should determine the Delaware legal propositions raised by the Delaware Action instead of the Delaware court. (See Objection of Counterclaimants to *Ex Parte* Motion to Shorten Time and Set Hearing and Objection Deadline on Motion of Tamra Mining Company, LLC to Enforce Sale Order and Enjoin And/Or Dismiss Purchased Claims, Docket No. 1153.)

13. A stay would thus allow the Delaware Court to determine the threshold issues of Delaware law on which Tamra's Motion to Enforce is premised, while reducing the burden on this Court, the parties, and causing no prejudice or undue hardship.

WHEREFORE, Cross-Movants respectfully request that the Court enter an order staying the Motion to Enforce pending a determination in the Delaware Action as to whether the Delaware Claims are claims held by CS Mining and subject to the Sale Order, and granting such further relief as it deems necessary and proper under the circumstances.

DATED this 22nd day of February, 2018.

Respectfully Submitted,

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

I hereby certify that on February 22, 2018, I electronically filed the foregoing **CROSS-MOTION OF CLARITY COPPER, LLC AND SKYE MINERAL INVESTORS, LLC TO STAY THE MOTION OF TAMRA MINING COMPANY, LLC TO ENFORCE SALE ORDER AND ENJOIN AND/OR DISMISS PURCHASED CLAIMS** 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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