UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -v- PLATINUM MANAGEMENT (NY) LLC; PLATINUM CREDIT MANAGEMENT, L.P.; MARK NORDLICHT; DAVID LEVY; DANIEL SMALL; URI LANDESMAN; JOSEPH MANN; JOSEPH SANFILIPPO; and JEFFREY SHULSE, Defendants.	:	No. 16-cv-6848 (BMC)

REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION OF MELANIE L. CYGANOWSKI, AS RECEIVER, FOR ENTRY OF AN ORDER APPROVING THE SALE OF THE RECEIVERSHIP'S RIGHTS IN AND TO A GOLD TAILINGS POND KNOWN AS "ABDALA" AND AUTHORIZING HER TO PAY THE FEES AND EXPENSES OF PLATINUM'S BRAZILIAN COUNSEL

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In further support of the Sale Motion,[1] Melanie L. Cyganowski, as Receiver, through her counsel, Otterbourg P.C., respectfully states as follows:

PRELIMINARY STATEMENT

The three objections to the Sale Motion [Dkt. Nos. 364-1,-2 & -3], both individually and collectively, fail to make out even a *prima facie* showing sufficient to defeat the Receiver's business judgment in accepting (after an eight month-long sale process spearheaded by a leading investment bank) the bid of $27.5 million in cash at closing, plus later additional and potentially highly-valuable consideration, from a buyer (Centerbridge) with an established track record in mining and Brazilian investment. Such later, additional consideration is reasonably expected to generate for the estate another $3 million in cash royalty advances within approximately six months after closing (if gold content is validated to exceed a realistic threshold of 9 g/t), plus a 7.5% royalty on cash revenues if the purchaser achieves a 3.0x multiple of invested capital.

None of the objectors takes issue with the Receiver's business judgment in concluding that, at the end of the sales process, the acceptance of Centerbridge's bid was in the best interests of the estate. That is, no investor is complaining that the sale process failed to achieve the asset's fair value. Indeed, the persons with the most insight into the asset's value – Platinum's insiders (*i.e.,* the defendants) – assert no objection to the Receiver's acceptance of Centerbridge's bid whatsoever. Rather, each of the three objections on file is procedural in nature.

One objection (the "***Keilson Opp.***") – from a single investor who, by his own accounting, made a total investment in Platinum of $800,000 – objects to *any* present sale of the asset. Rather, he seeks to resuscitate the "throw the dice" approach of investing Receivership funds

[1] The "***Sale Motion***" refers to the July 27, 2018 Motion of Melanie L. Cyganowski, as Receiver, for Entry of an Order Approving the Sale of the Receivership's Rights in and to a Gold Tailings Pond Known as "Abdala" and Authorizing Her to Pay the Fees and Expenses of Platinum's Brazilian Counsel and all supporting papers. [Dkt. No. 357.] All capitalized terms not defined herein shall have the meanings ascribed by the Sale Motion. The Sale Motion includes a request for relief to pay the Receiver's Brazilian counsel from the proceeds of any sale of Abdala. That relief is unopposed.

"into an asset that could potentially change the playing field" that the Court already rejected in approving the retention of Houlihan to conduct the sale process. The Court should once again reject any investor's call (quite literally, in this case) for a "Hail Mary play."

The next objection (the "***Independent Investors Opp.***") reflects a new and reformulated attack on the sale of Abdala by a group of so-called "***Independent Investors***" (representing a total of approximately 6% of PPCO's investor pool) – who earlier opposed the retention of Houlihan in favor of the Receiver's investment of additional funds in what they believed was "PPCO's most valuable asset, worth between $50 and $550 million." [Dkt. No.277] Having lost on that objection and lacking any factual basis to assert that Abdala should be sold for a higher price, the Independent Investors now claim for the first time that the disposition of Abdala is a sale of real property that needs to, but has not, satisfied the requirements of 28 U.S.C. §2001. This newfound objection, based on an inapplicable statute, fails as a matter of law.

The last objection (the "***Zanhav Opp.***") is from a spurned bidder, Zanhav Holding LLC ("***Zanhav***") – an Ezra Merkin entity which, after participating from the outset in the eight month-long sale process, had the opportunity to submit its last and best offer prior to the Receiver's acceptance of the Centerbridge bid, but instead held out until after it saw the winning bid in an effort to squeak by it after the close of bidding.[2] While Zanhav takes issue with the "flawed and poorly implemented auction process," it is Zanhav's conduct – in deciding to treat like its own personal stalking horse process the competitive bidding process in which it agreed to participate – that is flawed. Moreover, the bid that it now tenders as "superior" is not even valid and binding: It is expressly conditioned on a condition precedent (*i.e.,* the invalidation of Centerbridge's break-up fee) that Zanhav has not even attempted to demonstrate is capable of

[2] Zanhav is joined in its objection by its affiliate, Piping Brook LLC ("***Piping Brook***"), an investment vehicle owned by Mr. Merkin's wife, who invested a total of $1 million in Platinum in 2008 and, thus, gave the Merkins familiarity into the asset even prior to the commencement of the sale process.

being satisfied. Moreover, the Receiver has considered Zanhav's new bid, as if it were valid and binding, and, in her business judgment, has concluded that it is *not* superior to Centerbridge's winning bid. In the absence of any valid objection, and in view of the SEC's full throated support [Dkt. No. 358], the Sale Motion should be granted.

REPLY TO THE KEILSON OPPOSITION

The Keilson Opp. [Dkt. No. 364-1] consists of a brief e-mail seeking to revive arguments that already have been considered and rejected by this Court. [Dkt. No. 285] Keilson, a self-described "small fish in a very large pond," advocates for the "only Hail Mary play" that he believes is available: "[i]f . . . ABDALA is the crown jewel then why not 'throw the dice' [and "invest relatively small monies into an asset that could potentially change the playing field"] – you will [be] no worse off than you are presently." *Id.* Under any circumstance, that is hardly sound business judgment (and appears to be the kind of faulty logic that resulted in Platinum's receivership). In the context of this receivership, as this Court noted in approving Houlihan's retention over the objection of the similarly-minded Independent Investors [Dkt. No. 285], it is especially *unsound* business judgment: "The time to gamble is over; all that is left is to prudently secure what value remains in the Receivership Assets." [3] In short, any objection to selling Abdala, and instead continuing to speculate on it, already has been overruled.

REPLY TO THE INDEPENDENT INVESTORS OPPOSITION

Having learned from the Court's ruling on the Houlihan retention that (in Keilson's words) a "Hail Mary play" is not an alternative to, or legitimate attack upon, the Receiver's business judgment, the Independent Investors attempt another line of attack to kibosh the Abdala sale. [Dkt. No. 364-2] They now argue, for the first time, that Abdala, which they described in

[3] Memorandum Opinion dated November 21, 2017, Dkt. No. 285 (the "***Houlihan Retention Opinion***") at p. 5 and 6. *See also*, Memorandum in Support of Melanie Cyganowski, as Receiver, for Entry of an Order Approving the Sale of the Receivership's Rights in and to a Gold Tailings Pond Known as "Abdala" and Authorizing her to Pay the Fees and Expenses of Platinum's Brazilian Counsel, Dkt. No. 357-4 (the "***Sale Motion MOL***") at p. 6.

prior filings as "a 10-year mining right over the 'tailings dam' of a gold operation," is, in actuality, *both* "mineral rights *and* a leasehold interest." [Dkt. No. 364-2] According to the Independent Investors, therefore, "the process leading to the proposed sale of Abdala does not comply with requirements under 28 U.S.C. §2001, which prescribes the appraisal and sale requirements for the disposition of interests in real estate held in a federal receivership." *Id.* The Independent Investors' new argument is fatally flawed: The Receiver is *not* seeking approval of the sale of real estate; rather, she is seeking to sell equity in a company that owns, among other things, a lease. The Independent Investors' reliance on 28 U.S.C. §2001, therefore, is misplaced.

As is clear from the PSRA[4], which the Receiver submits on reply, PPCO owns all of the membership interests in a limited liability company called West Ventures LLC, which in turn owns all of the equity interests in Sul Real XXXII Participações Ltda. ("***Sul Real***"), which, in turn, holds the contractual rights to extract gold from the Abdala tailings pond and to process them on a nearby property that it leases. If consummated, the proposed sale to Centerbridge would transfer *equity* in Sul Real, *not* its assets. *No* case cited in the Independent Investor Opp. suggests, let alone holds, that the requirements of 28 U.S.C. §2001 apply to the sale of equity interests in a company holding a lease. Rather, every single case on which the Independent Investors rely instead involved the receivership's sale of a specific parcel of real property, where the entire purpose of the receivership was to maintain and dispose of that specific parcel -- with one exception, involving a receivership holding more than one parcel of domestic land.[5]

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[4] *See* Purchase, Sale and Royalty Agreement between Platinum Partners Credit Opportunities Master Fund LP, West Ventures LLC, CB Midas Holdings, LLC and CB Midas Brazil Participações Ltda. Dated as of July 24, 2018 (the "***PSRA***"), annexed as Exhibit 1 to the Reply Declaration of Melanie L. Cyganowski in Further Support of the Sale Motion ("***Cyganowski Rep. Dec***.").

[5] *See, e.g., SEC v. Am. Capital Invts*., 98 F.3d 1133 (9th Cir. 1996) (foreclosure of a federal tax lien on a single private home); *SEC v. Schooler*, 2018 WL 3618490 (S.D. Cal. July 30, 2018) (sale of specific limited real properties); *SEC v. Fujinaga*, 2017 WL 4369467 (D.Nev. Oct. 2, 2017) (sale of a single private home); *SEC v. Bivona*, 2016 WL 5899288 (N.D.Cal. Oct. 11, 2016) (includes statute in a receivership order, but does not apply it to an actual asset disposition of any kind); and *U.S. Bank Nat'l Assoc. v. Armstrong Tuckerton*, LLC, 2013 WL 12303202 (D.N.J. Oct. 7, 2013) (sale of a specific piece of land).

Recognizing the inapplicability of 28 U.S.C. §2001, as enacted, to the proposed sale at issue, the Independent Investors attempt to expand the statute by stretching the definition of real property referenced therein to include mineral rights. The objectors' sole support for this radical transformation of the statute's scope is a series of inapposite and non-precedential cases interpreting the law of states having no nexus to the proposed sale.[6] Even if these cases stood for the proposition that 28 U.S.C. §2001 applies to the sale of membership interests in a company owning mining rights (which none of them do), the Independent Investors' reliance on them reflects a fundamental misunderstanding of Sur Real's primary asset: a pile of slurry that has been extracted from an adjacent mine and sits atop the ground awaiting transportation to a processing plant. Cyganowski Rep. Dec. ¶4. Thus, even if the case law cited by the Independent Investors' were applicable to mezzanine interests in mining rights, the mining rights at issue do not give rise to rights in *real* property; rather, they give rise to rights in *personal* property. For any number of reasons, therefore, 28 U.S.C. §2001 is inapplicable.

Even putting aside the fact that the Receiver is under no statutory or other obligation to obtain the sort of "appraisals" that the Independent Investors now demand, the idea of pre-conditioning the sale of Abdala on the procurement of appraisals is unsound. Appraising the value of the leased land on which the gold processing site is planned to be built would be a waste of time and estate resources: The land is located in the middle of Brazil and has no significant value other than its proximity to the Abdala tailings pond. Not only would the appraisal of barren land on another continent thousands of miles away shed little or no light on the value of the tailings pond that the Receiver is seeking to sell, but it would be highly impractical. *See* Cyganowski Rep. Dec. ¶5. In short, a land would accomplish would be counter-productive.

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[6] *See In re Davis,* 503 B.R. 609 (Bankr. M.D. Pa. 2013); *White v. Zini*, 39 Ark. App. 83 (1992); *Barela v. Locer*, 103 N.M. 395, 398 (1985); *Batzley v. Wiseman*, 28 N.C. App. 678 (1976); *Texas Co. v. Beall*, 3 S.W.2d 524 (Tex. Civ. Cit. App. 1927) (all cited at Independent Investors Opp., at p. 2 n.1).

An appraisal of the value of the tailings' gold contents also would be counter-productive. As set forth in her moving declaration, the Receiver considered the approach and, in the exercise of her sound business judgment, rejected it. Any meaningful appraisal of Abdala's gold content would require compliance with National Instrument 43-101, which compliance would cost 6 – 12 months in time and up to $1 million in expense. Delaying the sale in order to conduct and await the outcome of such testing also would result in additional costs to the Receivership of approximately $50,000 per month in protecting and maintaining the asset during the interim. In other words, the appraisals advocated by the Independent Investors could cost the receivership over $1.5 million, with nothing more than speculative benefits to show for it. Cyganowski Rep. Dec. ¶6. In fact, the results of the appraisal could be detrimental: An appraisal showing gold concentrations lower than market expectations would irreparably *depress* the value of the asset and, thus, be *contrary* to the Receivership's best interests.

Finally, the Independent Investors – who have been in ongoing contact with the Receiver throughout this receivership -- should not be heard to complain that the sale process violated the requirements of 28 U.S.C. §2001 *now*, when it failed to raise any such objection at any time prior to or during the sale process. The Independent Investors' sole objection to Houlihan's retention was based on their inflated view of Abdala's value and their belief in continuing to invest in the asset, *not* 28 U.S.C. §200. In short, the Independent Investors Opp. should be rejected.

REPLY TO THE ZANHAV OPPOSITION

Finally, the Zanhav Opp. [Dkt. No. 364-3] should be dismissed for what it is: An untimely effort by a spurned bidder to roil the sale by floating a 13th hour trial-balloon bid (the "***Zanhav Bid***") by which it is not even bound.

Zanhav's assertion that the new Zanhav Bid "is clearly superior to the sale terms proposed in the Receiver's motion" (Zanhav Opp., at 5) is unsustainable: On its face, the Zanhav Bid was never valid and binding. The bid was expressly "conditioned on the Centerbridge Superior Offer Termination Fee or any other break-up fee arrangement being disallowed." (Zanhav Opp., Ex. 2) Yet Zanhav has not even attempted to show that the condition precedent to its offer is capable of being satisfied. It cites not a single case invalidating a break-up fee in the context of a receivership. Rather, such provisions (in any number of contexts) routinely are enforced – in order to prevent against this very scenario, where a bidder seeks to gain an unfair advantage by waiting to see the winning bid before coming forward with its own last minute offer that is purposely designed to edge out the winner. In fact, Zanhav's own submission demonstrates the implausibility of its bid's condition ever coming to pass. In order for the condition precedent to be realized, Zanhav would have to invalidate as it appears in the Centerbridge PSRA virtually the exact same Superior Offer Termination Fee that *Zanhav itself included* in *its* mark up of the Receiver's form of PSRA. (Zanhav Opp. Ex. 1, at p. 13, 46-47) The notion that Zanhav would insist on the inclusion of a break-up fee in *its* PSRA that it did not have confidence would be enforced is inconceivable. Because Zanhav gave itself the ability to withdraw, modify or lower its bid in the likely event that Centerbridge's break-up fee is enforced, its bid is not binding. Given that its bid is nugatory, it cannot, as a matter of law, be considered superior to the winning Centerbridge bid.

Even if the Zanhav Bid were valid and binding (and it is not), it would *not* – in the considered business judgment of the Receiver – be superior to the Centerbridge offer. Indeed, the very fact that the Zanhav Bid is expressly conditioned on the break up fee in the Centerbridge PSRA being *invalidated* is a tacit admission that, if the break up fee *were* properly considered, the Zanhav Bid would *not* be better than Centerbridge's. The Receiver's analysis is to the same

effect. According to her professionals' modeling (see below), when factoring in the break-up fee that would be due to Centerbridge in the event the Zanhav Bid were accepted, the Zanhav Bid is marginally worse than or equal to Centerbridge's offer if Abdala's gold concentration is at the low-range of reasonableness, marginally better than Centerbridge's offer if Abdala's gold concentration is at the mid-range of reasonableness, and clearly inferior to Centerbridge's offer if Abdala's gold concentration is at the high end of reasonableness:

Average Gold Concentration	**Centerbridge**	**Zanhav (After Break Up Fee)**
4 grams per ton	$27.5 million	$27 million
6 grams per ton	$27.5 million	$27.8 million
9 grams per ton	32.2 million	$33.2 million
12 grams per ton	39.8 million	$38.8 million
15 grams per ton	47.2 million	$44.4 million

See Cyganowski Rep. Dec. ¶ 10. Zanhav's labeling of its bid as "clearly superior" to Centerbridge's winning bid, therefore, is not supported by the figures.

Economic forecasts, however, are not the sole factor that the Receiver can or should consider in exercising her business judgment. She can and should consider other factors concerning the nature and character of the operator from whom the Receivership would be owed ongoing obligations, as well. Indeed, the PSRA (Cyganowski Rep. Dec. Ex. 1) defines "***Superior Offer***" as:

> a bona fide binding written acquisition offer that the Receiver determines in good faith (after consultation with Receiver's counsel and financial advisor), taking into account all legal, financial, timing and other aspects of such proposal and the identity of the competing offeror making the offer (a) is reasonably likely to be consummated on the terms proposed, (b) is more favorable from a financial point of view to Sellers than the terms of the transaction contemplated [in the PSRA] and (c) is otherwise on terms that the Receiver has determined to be superior to the transaction contemplated [by the PSRA].

Given, among other things, that (a) the Zanhav Bid is *not* a binding offer because it is based on the nugatory condition precedent that Centerbridge's break-up fee is invalid, (b)

Zanhav has twice ignored written bid deadlines, and (c) Zanhav is now aggressively litigating with the Receivership, the Receiver has concluded, and is within her sound discretion to conclude, that Zanhav is not a suitable business partner moving forward.

Zanhav's complaint that the sale process in which it elected and continued to participate from start to finish was "flawed and poorly implemented" also is unsustainable. Zanhav Opp., at p. 2. According to Zanhav, "at no time did the Receiver's advisors undertake standard and customary diligence concerning the Zanhav bids," and "at not time did those advisors suggest what the Receiver wanted from Zanhav." *Id.*, at p. 3. Yet Zanhav's unfounded complaints ring hollow in the face of its continued participation in the supposedly "faulty process." Zanhav's ongoing participation, moreover, was subject to a clear set of ground rules, including that: "[t]he Receivership Entities reserve the right to negotiate with one or more prospective buyers at any time or to enter into a definitive agreement without prior notice to any of the interested parties"; "[t]his process does not create any legal rights of any nature whatsoever in favor of any prospective buyer"; "[y]our Proposal should include your highest and best bid and should be submitted by the Submission Time"; "[y]ou should not assume that you will be given the opportunity to rebid or increase the amount of your Proposal"; and "[a]ny Proposal, whether or not it represents the highest proposed consideration, may be rejected in the sole and absolute discretion of the Seller." *See* Cyganowski Rep. Dec. ¶ 13.

More to the point, the Zanhav Opp. itself demonstrates that no supposed flaws in the sales process prevented it from presenting its last and best offer *earlier*, *before* the Receiver accepted the Centerbridge bid. The last and best offer that Zanhav made before knowing Centerbridge's bid was $30 million in cash. (*See* Zanhav Opp., at p. 3) Zanhav now comes forward with the exact same proposal *plus* future, additional consideration. (*Id.*, Ex. 2) *Nothing* prevented Zanhav from *adding more* consideration -- in whatever form -- to its prior $30 million

cash offer *before* the Receiver accepted the Centerbridge bid. In short, Zanhav's failure to *timely* submit its last and best offer before the Receiver accepted another bid resulted from its own strategic decision making, not any flaws in the sales process. Because Zanhav's arguments – premised on an untimely and non-binding bid and on unfounded procedural complaints that are belied by Zanhav's own conduct – do not raise any material question of fact, its requests for discovery and a hearing are unwarranted and should be rejected.

The totality of the submissions filed in connection with the Sale Motion leave no room for reasonable doubt that the Centerbridge bid achieved Abdala's fair value after a robust sale process -- conducted over the course of eight months (not including pre-marketing activities), beginning with a list of 258 prospective buyers, and consisting of multiple rounds of marketing and bidding, with onsite visits, and months of negotiations and legal work in the U.S. and Brazil. It remains the Receiver's considered business judgment that the sale to Centerbridge represents the best disposition for the benefit of the Receivership estate of Abdala. None of the objections presents any of the requisite grounds for overturning her judgment in that regard.

CONCLUSION

For these reasons, this Court should: (a) approve the sale of Abdala; (b) authorize the payment of Chediak Advogados's fees and expenses from the Abdala sale proceeds; and (c) grant the Receiver such other and further relief as the Court deems appropriate.

Dated: New York, New York
August 10, 2018

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