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August 10, 2018

VIA ECF

Hon. Brian M. Cogan, United States District Judge
United States District Court for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

PAUL CURRAN KINGSBERY

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Re: *Securities and Exchange Commission v. Platinum Management (NY) LCC, et al.*,
Case No. 1:16-cv-06848-BMC

Dear Judge Cogan:

I write on behalf of objectors Zanhav Holding LLC (“Zanhav”) and Piping Brook LLC (“Piping Brook” and with Zanhav, the “Objectors”) in connection with the Receiver’s Motion for Entry of an Order Approving the Sale of the Receivership’s Rights in and to the Gold Tailings Pond Known as “Abdala” (ECF No. 357) (the “Sale Motion”).

The Objectors respectfully request (i) a hearing on their objection to the Sale Motion (ECF No. 364-3), (ii) a pre-motion conference in connection with their motion to intervene for purposes of the Sale Motion and (iii) a pre-motion conference in connection with their right to take limited discovery in advance of the hearing on the Sale Motion. The Objectors’ counsel conferred in good faith with the Receiver’s counsel regarding these requests, including an initial telephone conference on August 7, 2018 and a telephonic meet-and-confer on August 10, 2018, but have been unable to resolve these issues. Specifically, the Receiver’s counsel has advised that the Receiver does not believe a hearing on the Sale Motion is necessary, that the Receiver objects to the Objectors’ proposed motion to intervene, and that the Receiver will not engage in any discovery in connection with the Sale Motion.

This Court should not approve the sale of the Receivership’s most valuable asset without first carefully scrutinizing the proposed terms of sale as well as the competing bids (including Zanhav’s clearly superior proposal) that the Receiver has either rejected or failed even to consider and giving all interested parties a fair opportunity to object based on a full record. The Objectors’ participation in this action is necessary to protect their own interests, to ensure the integrity of the Receivership process and to maximize sale proceeds for the benefit of all Platinum creditors and investors.

The Objectors’ Interests in this Proceeding

The principals of Zanhav are J. Ezra Merkin and Daniel Posen. Mr. Posen has extensive experience in both the mining and commodities business, including as the founder of Trafigura Group Pte Ltd., one of the world’s leading largest mineral and commodities companies. Mr. Posen has successfully completed dozens of corporate transactions in Brazil, the country in which the Abdala Tailings Project is located.

Zanhav and its affiliates participated in the nearly eight-month long Abdala Tailings Project bidding process, during which they incurred more than \$500,000 in costs. Zanhav was one of the two bidders who submitted bids in the final round and, as the Receiver has acknowledged, “continued to significantly improve their bids” after the initial deadline. (See Receiver Decl. ¶ 23, ECF No. 357-1 at 11.) On July 20, 2018, Zanhav offered to acquire the Abdala Tailings Project for, at the option of the Receiver: (i) \$30 million in up-front cash; or (ii) \$20 million in cash at closing plus a royalty equal to 7.5% of gold mined



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from Abdala above a threshold equal to approximately two times Zanhav's invested capital, with the additional right of the Receiver to put the contingent consideration to Zanhav for \$10 million in cash at any time within one year of the closing.¹ After receiving notice of the Sale Motion, Zanhav submitted an improved bid that offered \$30 million in up-front cash and a higher royalty advance than the "winning" Centerbridge bid. (*See* ECF No. 364-3 at Ex. 2.)

Piping Brook is an investment vehicle owned by the wife of Mr. Merkin and certain trusts for the benefit of members of the Merkin family. Piping Brook invested \$1 million in the Platinum Credit Opportunities Fund in April 2008, and as of March 2016, that investment was reported to have been worth nearly \$2.4 million. Piping Brook became a creditor of Platinum by virtue of its request to redeem the entirety of its investment have matured without being paid prior to the commencement of the Receivership. As a Platinum creditor, Piping Brook opposes the Receiver's acceptance of the Centerbridge bid because that bid fails to maximize the value of the Abdala Tailings Project.

Zanhav and Piping Brook should be granted leave to intervene pursuant to Rule 24(a)(2) of the Rules of Federal Procedure or, alternatively, pursuant to Rule 24(b)(1)(B), for the limited purpose of being heard with respect to the Sale Motion. In determining whether to grant intervention as of right or permissive intervention, the court "considers substantially the same factors . . ." *SEC v. Callahan*, 193 F. Supp. 3d 177, 201 (E.D.N.Y. 2016). These factors are: (1) timeliness; (2) an interest relating to the property or transaction that is the subject of the action; (3) impairment of the movant's ability to protect its interest without intervention; and (4) an interest that is not adequately protected by the existing parties to the suit. *See id.* at 200 (citing *MasterCard Int'l v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006)). Zanhav and Piping Brook easily meet these requirements:

- **Timeliness.** Zanhav and Piping Brook timely served their objection to the Sale Motion pursuant to this Court's Order Adopting Protocols for Parties in Interest to be Heard on Receiver Motions (ECF No. 271), and are promptly seeking to intervene.
- **Interest.** Each of Zanhav and Piping Brook has a clear interest in the "property or transaction that is the subject of the action." Zanhav participated in the bidding process and submitted a bid superior to the "winning" bid selected by the Receiver. As a Platinum investor, Piping Brook has a direct and tangible interest in ensuring that the assets of the Receivership Estate are maximized by any sale of its most valuable asset.
- **Impairment of Interest.** Should the Court approve the Sale Motion, neither Zanhav nor Piping Brook will have any legal remedy to correct the Receiver's acceptance of an inferior bid.
- **Protection of Interests by Existing Parties.** Finally, while the Receiver is charged with maximizing the value of the assets in the receivership, the crux of Zanhav and Piping Brook's objection is that the Receiver and her professionals designed and implemented a flawed sale process that failed to engage Zanhav appropriately so as to maximize the bids received for the Abdala Tailings Project. Specifically, (i) both the Receiver's motion and the SEC's Statement in Support of the Sale Motion fail entirely to explain why the Centerbridge bid was preferable to the consideration offered by Zanhav on July 20, 2018, and (ii) the Receiver has failed to engage with

¹ *See* Email from A. Weiss to Richard Saltzman of Houlihan Lokey dated July 20, 2018, a true and accurate copy of which is included herein as Exhibit A. This communication was inadvertently omitted from Exhibit 1 to the Gabriel Capital Objectors' Objection dated August 3, 2018. (*See* ECF No. 364-3 at Ex. 1.)



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Zanhav concerning the further improved and superior August 2, 2018 proposal.² (See ECF No. 358.)

The Need for a Hearing on the Sale Motion and Limited Discovery

To approve the Sale Motion, “the Court must expressly find from the evidence presented before the Court at the hearing a good business reason to grant such an application.” *Lawsky v. Condor Capital Corp.*, 154 F. Supp. 3d 9, 22 (S.D.N.Y. 2015). In addition to showing “sound business reasons for selling [the] asset[],” the Receiver must show that there are “sound business reasons for . . . accepting the offer [she] selected.” *Id.* The Receiver has failed to meet that standard because she does not explain – other than by repeating the conclusions of a secret analysis supposedly done by her professional advisors – how the “winning bid” is superior to the other bids offered by Zanhav or any other bidder nor can she do so with respect to the Zanhav August 2, 2018 proposal, which on its face is \$4.5 million superior to the Centerbridge bid and even when limited to the Closing payment alone is \$2.5 million superior. These alone should be fatal to the Receiver’s request for approval of the proposed sale.

The Objectors served a narrowly tailored set of document requests that seek information relating to the bidding process and the undisclosed terms of the proposed sale. The Objectors also anticipate conducting no more than two depositions in advance of the hearing. The Receiver’s counsel has advised that the Receiver does not intend to produce any documents in response to the document requests based on counsel’s expectation that the Court will approve the Sale Motion on the papers that have been submitted, without holding a hearing. The Objectors respectfully submit that a hearing is required under New York and federal receivership law. In advance of such hearing, the Receiver should be directed to comply with the targeted requests that have been served, and the Objectors should be permitted to take up to two depositions to ensure that the hearing affords them a fair opportunity to present their objections and affords the Court the opportunity to consider fully the Sale Motion.

* * *

For all the foregoing reasons, the Court should refuse to endorse the sale of the Receivership’s most valuable asset without a full and fair hearing. The Objectors request that the Court schedule such a hearing and grant them leave to intervene for the limited purpose of objecting to the Sale Motion.

² The Receiver has belatedly filed a copy of the proposed Purchase, Sale and Royalty Agreement (“PRSA”) with Centerbridge in connection with her reply papers. The plain language of the contract provides that Seller’s obligations under the PRSA are subject to Court approval and that the purported breakup fee (which has never been authorized by the Court) would not be payable if the PRSA terminated due to failure to obtain Court approval. Objectors are continuing to evaluate other terms in the PRSA and respectfully request the opportunity to supplement their Objection on or before August 15, 2018. Moreover, while the Receiver argues that Zanhav’s August 2 bid is still not superior to the Centerbridge bid (assuming a breakup fee would be payable to Centerbridge in the event of termination, which as noted above it would not) based on her summary of the conclusions of an analysis purportedly undertaken by her professionals, she nevertheless fails to include the actual analysis upon which she relies for the Court’s consideration and refuses to subject it to Objectors’ scrutiny by engaging in discovery and producing a copy. The Court should therefore give zero weight to that analysis.



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Respectfully submitted,

DECHERT LLP

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cc: All Counsel of Record, *via ECF*

Exhibit A

From: Andre Weiss <andre.weiss.riverside@gmail.com>
Sent: Friday, July 20, 2018 4:18 PM
To: Saltzman, Richard
Cc: 'Merkin, J. Ezra'; 'Sanabria, Paul'; 'Stern, Joseph'
Subject: Re: Project Midas - Zanhav Revised Binding Proposal

This email confirms my telephone call with you stating Zanhav's amended proposal, revising its proposal of July 17, 2018 transmitted in the email below.

Zanhav is offering the Seller a choice of (i) a \$30 million payment at Closing with zero Royalty Consideration or (ii) a \$20 million payment at Closing with a 7.5% Royalty Consideration (and a Threshold Amount of 49,000 ounces). Zanhav is also offering the Seller, as part of (ii) above, a \$10 million put of the Royalty Consideration one year after the Closing payable in cash.

This proposal expires at 5 PM New York time on Monday July 23, 2018.

Except as expressly amended or modified hereby, all of the terms and provisions of the July 17 Zanhav proposal shall remain unchanged and in effect in accordance with its terms.

Please let me know if you would like to discuss.

From: Andre Weiss <andre.weiss.riverside@gmail.com>
Date: Tuesday, July 17, 2018 at 6:54 PM
To: "Saltzman, Richard" <RSaltzman@hl.com>
Cc: "'Merkin, J. Ezra'" <JEMerkin@gabrielcapital.com>, "'Sanabria, Paul'" <psanabria@hl.com>, "'Stern, Joseph'" <JLStern@HL.com>
Subject: Project Midas - Zanhav Revised Binding Proposal

Dear Rich,

On behalf of Zanhav Holding LLC please find attached Zanhav's final revised proposal letter. We kindly ask you to confirm the receipt of this e-mail.

Please do not hesitate to contact us should you have any questions.

We look forward to hearing from you.

Best