**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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| **SECURITIES AND EXCHANGE COMMISSION,**<br><br>**Plaintiff,**<br>**v.**<br><br>**BRENDA SMITH, BROAD REACH CAPITAL, BROAD REACH PARTNERS, LLC, and BRISTOL ADVISORS, LLC, et al,**<br><br>**Defendants.** | **C. A. No. 2:19-cv-17213 (MCA)**<br><br>**Motion Day: April 18, 2022** |

**NOTICE OF FIRST OMNIBUS MOTION OF RECEIVER, KEVIN DOOLEY KENT, FOR ORDER RESOLVING DISPUTED NON-INVESTOR CREDITOR CLAIMS**

**PLEASE TAKE NOTICE** that the undersigned, on behalf of the Receiver, Kevin Dooley Kent, will move before the Honorable Madeline Cox Arleo, U.S.D.J., United States District Court for the District of New Jersey, Martin Luther King Jr. Federal Building and U.S. Courthouse, 50 Walnut Street, Newark, New Jersey 07101, on April 18, 2022, or as soon thereafter as the Court permits, at a date and time to be determined by the Court, for an order resolving disputed non-investor creditor claims submitted through the Receiver's Court-approved creditor claims process.

**PLEASE TAKE FURTHER NOTICE THAT,** in support of this Motion, the undersigned will rely upon the accompanying Memorandum of Law, which is incorporated herein by reference.

**PLEASE TAKE FURTHER NOTICE** that the undersigned requests that the proposed form of Order submitted herewith be entered by the Court.

Respectfully submitted,

*s/ Robin S. Weiss*

Dated: March 14, 2023

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# MEMORANDUM OF LAW IN SUPPORT OF FIRST OMNIBUS MOTION OF RECIVER, KEVIN DOOLEY KENT, FOR ORDER RESOLVING DISPUTED NON-INVESTOR CREDITOR CLAIMS

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Dated: March 14, 2023

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## I. INTRODUCTION[1]

On August 27, 2019, the SEC filed a Complaint against Defendants, Brenda A. Smith ("Brenda Smith" or "Smith"), Broad Reach Capital, LP, Broad Reach Partners, LLC and Bristol Advisors, LLC, alleging that these Defendants raised approximately $105 million from at least forty (40) investors, based upon Brenda Smith's false representations that these funds would be invested in highly liquid securities through various sophisticated and profitable trading strategies with consistently high returns. (ECF No. 1). According to the Complaint, the vast majority of these investments were funneled into unrelated companies, used to pay back other investors, or utilized for personal use; meanwhile, Defendants generated and provided false performance statements and fabricated documents regarding the Fund's assets and valuations, to lull existing and prospective investors. The SEC estimates that Defendants' investors are still owed in excess of $63 million in principal.

Pursuant to the June 29, 2020 Receivership Order, this Court took exclusive jurisdiction and possession of all Receivership Assets including, but not limited to,

[1] This Omnibus Motion addresses disputed claims with eight (8) individual trade creditors, each of which are separately addressed herein. The Receiver recognizes that by combining the majority of disputed claims into a single Omnibus Motion, the Receiver has exceeded the page limit set by Local Rule 7.2. The Receiver believes combining these various disputes into one motion is a more efficient approach and respectfully requests the Court accept this motion notwithstanding the length of this submission.

assets of Broad Reach Capital, LP ("Broad Reach Capital"); Broad Reach Partners, LLC; Bristol Advisors, LLC; BA Smith & Associates LLC; Bristol Advisors LP; CV Brokerage, Inc. ("CV Brokerage"); Clearview Distribution Services LLC; CV International Investments Limited; CV International Investments PLC; CV Investments LLC ("CV Investments") ; CV Lending LLC; CV Minerals LLC; BD of Louisiana, LLC; TA1, LLC ("TA1"); FFCC Ventures LLC; Prico Market LLC; GovAdv Funding LLC; Elm Street Investments, LLC;[2] Investment Consulting LLC; and Tempo Resources LLC (collectively referred to as "Receivership Parties"). Receivership Order, ¶ 1. This includes assets that are (1) attributable to assets derived from investors or clients of Defendants; (2) are held in constructive trust for the Defendants; (3) were fraudulently transferred by the Defendants; and/or (4) may otherwise be included as assets of the estates of the Defendants or Affiliated Entities, including *inter alia*, the assets and accounts set forth in Paragraphs 2 and 3 of the Receivership Order (hereinafter collectively referred to as "Receivership Assets" or "Receivership Estate"). In the same Order, the Court appointed Kevin Dooley Kent as Receiver ("the Receiver") to assume control of, marshal, pursue and preserve the Receivership Assets, and authorized him to seek further Orders that may be "deemed necessary to conserve the Receivership

[2] Upon motion of the Receiver (ECF No. 95), the Receivership Order was amended *nunc pro tunc* on June 24, 2021, to correct the name of Receivership Party Elm Street Investors, LLC to Elm Street Investments, LLC. (ECF No. 96).

Assets, secure the best interests of creditors, investors, and other stakeholders of the Receivership Parties." Receivership Order, ¶¶ 5, 14.

In accordance with the aforementioned duties and obligations, on January 14, 2022 the Receiver filed a motion seeking to establish a Claims Resolution Process for identifying and determining the claim amounts of all known Investor Creditors[3] and Trade Creditors of the Receivership Estate, and a Claims Bar Date after which time no claims could be submitted or disputed. (ECF No. 160). The Court approved the Receiver's proposed Claims Resolution Process on February 22, 2022 (ECF No. 168).

In accordance with the approved procedure, the Receiver provided notice of the Claims Bar Date and Claims Resolution Procedure to all Known Investor Creditors and Trade Creditors, and also published notice of the same in multiple forms of media to provide unknown creditors the opportunity to present claims. Thirty-nine (39) Known Investors were provided with transaction schedules providing a summary of the Receiver's analysis regarding that investor's transactions and, where appropriate, a preliminary assessment of the investor's total net loss.[4] Those investors were asked to respond to the transaction schedule

[3] Investor Creditors are defined as investors in the Receivership Entities that suffered a net loss, i.e., total contributions exceed total withdrawals.

[4] Certain investors whom the Receiver does not recognize as having suffered net losses, but with whom the Receiver had not yet resolved any claw-back claims, were still provided with transaction schedules and the opportunity to respond.

by either confirming or rejecting the Receiver's analysis, and providing additional information where appropriate. Trade Creditors were provided with a claim form and were asked to list all claims to be asserted against the Receivership Estate together will all information in support of the asserted claims. Pursuant to the Claims Procedure Order, non-responding Investor Creditors and Trade Creditors have waived their rights to challenge the Receiver's claim determinations.

The Receiver has received and processed a total of thirty-seven (37) Investor Creditor Claims[5] and fifteen (15) Non-Investor Creditor claims, totaling $156,295,769.40.[6] Of the claims processed, thirty-five (35) Investor Creditor Claims and four (4) Non-Investor Creditor Claims have been fully and finally confirmed by the Receiver. The total amount of confirmed Investor Creditor claims is $54,773,769.53. The total amount of confirmed Non-Investor Creditor claims is $613,549.68. The remaining claims, many of which are presented below, are currently in dispute, and to date have not been resolved through the claims procedure. The total amount of disputed Investor Creditor claims is

[5] For purposes of this Motion, Investor Creditors include investors who invested money in any of the Receivership Parties, not just Broad Reach Capital or TA1. The Receiver reserves the right to amend these classifications and/or differentiate such investors from investors in Broad Reach Capital and TA1, if warranted, in future distribution motions.

[6] This includes a claim from the IRS which the Receiver is treating as part of this claims process for purposes of this motion, as set forth further below. These numbers exclude claims that have been withdrawn prior to the filing of this Motion.

$14,300,000.00, with another $300,000.00 claim only conditionally approved. The total amount of disputed Non-Investor Creditor claims is $86,308,360.19. The Receiver has presented a majority of the disputed Non-Investor Creditor claims below, together with the Receiver's recommendation for an order resolving the claims.[7] The Receiver will present any disputed Investor Creditor claims in a subsequent omnibus motion, to the extent they cannot be resolved. The Receiver will serve this motion on each of the affected parties within five (5) business days of this filing.

## II. NON-INVESTOR CREDITOR DISPUTED CLAIMS

### A. Richard Galvin/Galvin Investment Company, LLC

The Receiver filed a lawsuit against Richard Galvin ("Galvin"), Galvin Investment Company, LLC ("GIC") and various other affiliated entities under Galvin's control, in the matter styled *Kent v. Galvin, et al.*, No. 2:21-cv-13105 ("Kent v. Galvin Matter"), which the Receiver has identified as being the recipients and/or beneficiaries of over $2 million in fraudulently transferred funds

[7] The Receiver is in the process of attempting to resolve his claims against certain related individuals and entities, including Investor Nos. 19 and 31, which have collectively asserted a total of $14,600,000.00 in disputed Investor Creditor claims and a total of $1,990,759.68 in disputed Non-Investor Creditor claims. Given the current posture of negotiations and the Receiver's interest in minimizing expense to the Receivership Estate, the Receiver will file a supplemental motion seeking to resolve these unique and complex claims if they cannot be resolved through a settlement.

and whose conduct in connection with property Receivership Assets paid for in Colorado resulted in nearly $3 million in additional losses to the Receivership Estate. On April 15, 2022, GIC asserted an unrelated $50+ million counterclaim against the Receiver for tortious interference with contract, fraud, promissory estoppel, conversion and unjust enrichment/constructive trust. (Kent v. Galvin Matter, ECF No. 23). Galvin also submitted a $50+ million creditor claim to the Receivership Estate, relating to the counterclaims GIC asserted in the Kent v. Galvin matter (collectively, the "Galvin claims").[8]

The Galvin claims arise from GIC's failed efforts to purchase 350,000 tons of magnetite concentrates from Southern Minerals Group, LLC ("SMG") and GIC's alleged inability to perform on a contract it entered into with SMG to

[8] The Receiver filed a Motion to Dismiss All Counterclaims on May 6, 2022. (Kent v. Galvin Matter, ECF No. 25). The Receiver thereafter filed a Reply in Support of the Motion to Dismiss on June 21, 2022. (Kent v. Galvin Matter, ECF No. 30). The Receiver asserted in his Motion to Dismiss and Reply that the Galvin claims should be adjudicated through the claims process, rather than through ancillary litigation, given that Galvin/GIC did not seek leave from this Court or relief from the stay before asserting the counterclaims, and the factors for a lifting of the stay are not present. The Receiver argued that the fairest and most efficient procedure would be to address the Galvin claims through the claims process, and to dismiss the counterclaims asserted in the Kent v. Galvin Action. On December 7, 2022, the Court entered an order staying GIC's counterclaim (Kent v. Galvin Matter, ECF No. 39). On December 9, 2022, the Receiver filed an application to strike GIC's counterclaim due to GIC's failure to secure substitute counsel after its prior counsel withdrew, and its inability to proceed *pro se* as a corporation (Kent v. Galvin Matter, ECF No. 40). Therefore, these creditor claims are appropriate for adjudication through the claims process.

purchase the magnetite because of Smith's purported failure to pledge a $100,000.00 standby letter of credit on GIC's behalf for the benefit of SMG. (Counterclaim ("Count."), ¶¶ 7-9, 22). Galvin alleges that Smith "assured" him that she would provide that financial backing, and then instead, after he failed to perform and his time for doing so lapsed, she obtained her own separate contract for the purchase of 400,000 tons of magnetite from SMG through CV Investments. (Count., ¶¶ 9-10). Galvin and his affiliated entities seek no less than $50 million in damages, costs, and pre- and post-judgment interest, as well as a disgorgement of all materials acquired by CV Investments, along with all proceeds and profits thereon. Portions of Galvin's claim submission are attached hereto as Exhibit "A".[9] Galvin's supplemental submission is attached hereto as Exhibit "B".[10]

In essence, Galvin claims that: (1) Smith promised to provide a letter of credit that SMG could draw against any time GIC failed to make payment on any invoice for the purchase of magnetite from SMG; (2) that he lost the right to acquire the magnetite after failing to provide the required letter of credit after

[9] Galvin's claim submission included a copy of the Amended Answer with Counterclaims, the Magnetite Concentrates Purchase and Sale Agreement entered into between GIC and SMG, the Magnetite Concentrates Purchase and Sale Agreement entered into between CV Investments and SMG, and various supporting communications. Since the Amended Answer with Counterclaims is publicly available on the docket in the Kent v. Galvin matter at ECF No. 23, that portion of the claim submission is not attached hereto.

[10] The Receiver has been unable to open Exhibit 6 to the supplemental submission, which is purportedly a video, and is unable to attach it to this filing.

multiple extensions; and (3) that Smith, on behalf of CV Investments, entered into her own contract with SMG for the purchase of magnetite after GIC failed to satisfy its obligations. Defendants seek over $50 million in highly speculative damages primarily for lost profits they claim would have been attainable if they had acquired the magnetite and then—using experimental and unproven alchemical processes—extracted precious metals from hundreds of thousands of tons of ore. Although he only seeks $50+ million, according to Galvin's calculations, the gross value of this opportunity exceeded $115 billion, and yet, he was unable to locate anyone other than Brenda Smith willing to provide a letter of credit for this purportedly lucrative business opportunity.

Brenda Smith was similarly interested in the prospect of extracting gold from mundane mineral ores, and as the Galvin claim asserts, purchased magnetite ore on her own in an attempt to do so. But Smith and CV Investments got no benefit from the Receivership Parties' purchase of magnetite concentrates and their dealings with SMG, or from any of the conduct alleged in Galvin claims.

The Receiver recommends that the Court deny the Galvin claims because they are (1) time-barred, (2) barred by the statute of frauds, (3) without merit and fail as a matter of law, (4) factually unsupported, (5) highly speculative, (6) an improper attempt to force the Receivership Estate to answer for Brenda Smith's

alleged personal liabilities, and (7) not the type of claims that should be recognized in these equitable proceedings. These shortcomings are discussed further below.

**1. The Claims are Time-Barred**

The relevant events giving rise to the Galvin claims are alleged to have taken place over five (5) years ago, between March 10, 2017 (the date of final negotiations on GIC's alleged contract with SMG) and April 7, 2017 (the date Smith is alleged to have obtained her own contract for the purchase of magnetite and become the "beneficial owner of the material"). (Count., ¶¶ 7-10). These claims were time-barred before the Receiver was even appointed in this action.

Pursuant to New Jersey's choice-of-law rules, the applicable statute of limitations is governed by the Restatement (Second) Conflict of Laws, § 142. *McCarrell v. Hoffman-La Roche, Inc.*, 153 A.3d 207, 221-22 (N.J. 2017). Under Section 142, where the forum state has no substantial interest in the claim, and the claim would be time-barred under the statute of limitations of a state with a more significant relationship to the parties and occurrences giving rise to the claims, that other state's statute of limitations must apply. *Id.*; *Rigollet v. Kassoff*, No. 221CV15587WJMJSA, 2021 WL 5122074, at *2-3 (D.N.J. Nov. 4, 2021).[11]

[11] The following factors should be considered in determining which state has the most significant relationship to the occurrence and the parties: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties

Galvin is a Colorado resident and GIC is a Colorado company. Galvin's reliance leading to his purported harm occurred in Colorado, and the harm alleged occurred in Colorado. GIC has also previously claimed in prior litigation that Smith's obligations to perform on her purported promises were in Colorado, and that the claims all arose out of or were related to business dealings between GIC and Smith in Colorado. Accordingly, Colorado has the most significant relationship to the Galvin claims and its statute of limitations should apply.

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is centered." R2d Conflict of Laws, § 145 (2). These contacts are evaluated according to their relative importance to the issue at hand. *Id.* Additionally, the following contacts may be relevant under the most significant relationship test for fraudulent misrepresentation claims: "(a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations, (b) the place where the plaintiff received the representations, (c) the place where the defendant made the representations, (d) the domicil, residence, nationality, place of incorporation and place of business of the parties, (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.
R2d Conflict of Laws, § 148 (2). In conducting an analysis under section 148 (2), the plaintiff's principal place of business, if a corporation, is a contact of substantial significance when the loss is pecuniary in nature, "because a financial loss will usually be of greatest concern to the state with which the person suffering the loss has the closest relationship." *Id.*, cmt. i. Additionally, the place where the plaintiff received the representation is not as important a contact as the place where his reliance occurred. *Id.*, cmt. g. Further, where a major part of the plaintiff's reliance take place in one state and a lesser part in another, the first state has a more important connection with the occurrence than the latter. *Id.*, cmt. f.

The Galvin claims are all time-barred by Colorado's statutes of limitations. The tortious interference with contract claim is governed by a two (2) year statute of limitations, C.R.S.A. § 13-80-102 (1)(a), while the fraud, promissory estoppel, conversion and unjust enrichment/constructive trust claims are governed by a three (3) year statute of limitations. C.R.S.A. § 13-80-101 (1)(a, c, h); *see also Bank of Am., N.A. v. Dakota Homestead Title Ins. Co.*, 553 F. App'x 764, 766 (10th Cir. 2013) (discussing the statute of limitations on promissory estoppel claims); *Sterenbuch v. Goss*, 266 P.3d 428, 437 (Colo. App. 2011) (discussing the statute of limitations on unjust enrichment/constructive trust claims).

Given that the latest alleged date on which the Galvin claims could have arisen was April 7, 2017, the statute of limitations on all of these claims expired before this Court's June 29, 2020 Receivership Order—the tortious interference claims by no later than April 7, 2019, and the remaining claims by April 7, 2020, at latest. These claims should therefore be denied.

**2. The Galvin Claims Are Barred by the Statute of Frauds**

The Galvin claims, which are all premised on Smith's purported oral promise to provide a $100,000.00 letter of credit, are barred by the statute of frauds. (Count., ¶¶ 8, 23-24, 32). Pursuant to Colorado law, "no debtor or creditor may file or maintain an action or a claim relating to a credit agreement involving a principal amount in excess of twenty-five thousand dollars unless the credit

agreement is in writing and signed by the party against whom enforcement is sought." *Univex Int'l, Inc. v. Orix Credit All., Inc.*, 902 P.2d 877, 879-80 (Colo. App. 1995), *aff'd*, 914 P.2d 1355 (Colo. 1996) (citing C.R.S.A. § 38-10-124(2)). A "credit agreement" includes: "[a] contract, promise, undertaking, offer, or commitment to lend, borrow, repay, or forbear repayment of money, to otherwise extend or receive credit, or to make any other financial accommodation." *Id.* at 880 (citing C.R.S.A. § 38-10-124(1)(a)). This Section "applies to any agreement to extend credit, regardless of the context in which the agreement was formed, and bars any action or claim relating to a credit agreement, regardless of whether the action is based upon a breach of contract or some other theory of recovery." *Id.* (citing *Northwest Bank Lakewood v. GCC Partnership*, 886 P.2d 299 (Colo. App. 1994); *Pima Fin. Serv. Corp. v. Selby*, 820 P.2d 1124 (Colo. App. 1991)).

Colorado law further provides that "[a] credit agreement may not be implied under any circumstances, including, without limitation, from the relationship, fiduciary or otherwise, of the creditor and the debtor or from performance or partial performance by or on behalf of the creditor or debtor, or by promissory estoppel." *Id.* (citing C.R.S.A. § 38-10-124(3)). This bars promissory estoppel claims as a matter of law. *Id.* at 880-81. Since all of the Galvin claims are based

upon Smith's purported oral promise and failure to provide the $100,000.00 letter of credit, they all fail.[12] These claims should be denied for this additional reason.

### 3. The Galvin Claims Meritless and Fail as a Matter of Law

The Galvin claims also fail for reasons independent of the statute of limitations and statute of frauds, as set forth in detail below.

#### a. The Conversion Claim Fails

Conversion is defined as "any distinct, unauthorized act of dominion or ownership exercised by one person over personal property belonging to another." *Byron v. York Inv. Co.*, 296 P.2d 742, 745 (Colo. 1956). "An action for damages for the conversion of personal property cannot be maintained unless plaintiff had a general or special property in the personalty converted, coupled with possession or

[12] *See, e.g.*, Count., ¶¶ 27 (Tortious Interference) ("Ms. Smith's failure to post the letter of credit was intentional, for purposes of inducing the termination of the SMG Contract, which in turn permitted CV Investments to usurp the contractual rights that belonged to GIC"), 32 (Fraud) ("On or about March 10, 2017, Ms. Smith/CV Investments represented and promised GIC that they in fact would provide the $100,000.00 letter of credit as required under the SMG Contract"), 41 (Promissory Estoppel) (alleging that Smith/CV Investments "clearly and unambiguously promised GIC that she would provide the $100,000.00 letter of credit as required under the SMG Contract"), 53 (Conversion) ("Ms. Smith/CV Investments affected such conversion by failing to provide the letter of credit for the benefit of GIC as she promised to and by surreptitiously negotiating directly with Southern"); 60 (Unjust Enrichment/Constructive Trust) ("CV Investments acquired the contractual right and business opportunity with respect to the magnetite concentrates and approximately 38,000 tons of such concentrates by improper means including tortious interference, misappropriation, conversion and misrepresentation").

the immediate right thereto." *Id.* (citations omitted). To have authority to sue, the plaintiff must have had actual possession, title and constructive possession, or a right to possession of the land from which the property was taken at the time of the alleged conversion. *Id.* at 425-26.

The conversion claim must fail because there was no right to any property taken by CV Investments. At most, GIC can claim that it hoped to acquire rights to purchase minerals, but it never acquired those rights. Its unfulfilled contract with SMG granted GIC the right to purchase certain quantities of magnetite concentrates, *if* GIC provided a $100,000.00 standby letter of credit issued by a major US banking institution, which it was never able to do. (Count., ¶ 22). Smith/CV Investments did not convert this contract. Brenda Smith's failure to obtain a letter of credit for GIC is not an act of conversion. And because GIC never perfected its right to purchase the magnetite from SMG, no conversion occurred when CV Investments entered into its *own* contract with SMG after GIC's contract with SMG terminated due to GIC's inability to perform.

**b. The Unjust Enrichment Claim Fails**

A claim for unjust enrichment requires a showing that (1) the defendant received a benefit, (2) at the plaintiff's expense, (3) under circumstances that would make it unjust for the defendant to retain that benefit without compensation. *Sterenbuch v. Goss*, 266 P.3d 428, 437 (Colo. App. 2011). A constructive trust

prevents a defendant from being unjustly enriched and may attach to property that in equity and good conscience does not belong to the constructive trustee. *Mt. Sneffels Co. v. Est of Scott*, 789 P.2d 464, 466 (Colo. App. 1989).

The Galvin claim for unjust enrichment and creation of a constructive trust fails because any purported benefits received through the purchase of the magnetite was not at GIC's expense.[13] CV Investments did not enter into a contract with SMG or purchase any magnetite until *after* SMG terminated its contract with GIC due to GIC's failure to obtain the necessary letter of credit. (Count., ¶¶ 10-11). GIC did not pay one penny for the magnetite; thus, the purchase was not at its expense.

Further, in reality, the Receivership Parties received no benefit or profits from the purchase of magnetite from SMG. All the Receivership Estate has been left with as a result of these dealings is (a) a creditor claim from SMG for nearly $22 million discussed in Section II(B) *infra* in connection with CV Investments' alleged breach of its own Magnetite Concentrates Purchase and Sale Agreement with SMG; (b) a lawsuit the Receiver was prosecuting against Larry Hooper and Hooper Ranch in connection with their conversion and sale of the magnetite which had been stored at Hooper Ranch in the matter captioned *Kevin Dooley Kent, in his*

[13] "A person confers a benefit by giving the adverse party the possession of, or an interest in personal property by adding to the property of the adverse party or by saving the adverse party expense or loss." *Dove Valley Bus. Park. Assocs., Ltd. v. Bd. of Cty. Commissioners of Arapahoe Cty.*, 945 P.2d 395, 403 (Colo. 1997).

*capacity as Receiver v. Larry Hooper, et al.*, No. 2:22-cv-01876 (D.N.J.), which has since settled with the Court's approval for an amount less than the price Smith paid for the magnetite; and (c) losses totaling several millions of dollars for the purchase, transfer, storage and loss of the magnetite. To the extent GIC seeks to recover benefits the Receivership Parties obtained as a result of Smith's dealings with SMG, there were none.

**c. The Promissory Estoppel Claim Fails**

A promissory estoppel claim requires proof of the following elements: (1) the promisor made a promise to the promisee; (2) the promisor should reasonably have expected that promise would induce action or forbearance by the promisee; (3) the promisee in fact reasonably relied on the promise to the promisee's detriment; and (4) the promise must be enforced to prevent injustice. *Centennial–Aspen II Ltd. Partnership v. City of Aspen*, 852 F.Supp. 1486 (D.Colo.1994). The Galvin claim for promissory estoppel fails for two reasons in addition to those enumerated above.

First, Galvin cannot show reasonable reliance upon Smith's purported promise to "put up the letter of credit required." (Count., ¶ 24). GIC's contract with SMG required that the letter of credit be issued by a "major US banking institution." (Count., ¶ 22). Neither Brenda Smith nor her entities qualify as a

major US banking institution; therefore, they were not qualified to post the letter of credit pursuant to the express terms of the contract. Galvin knew this.

Second, Galvin cannot show that any reliance upon Smith's purported promise was the cause of GIC's alleged injuries. Galvin claims GIC relied upon Smith's purported promise in two ways: (1) by entering into a contract with SMG, and (2) by not seeking to obtain an alternative source for the letter of credit. (Count., ¶ 42). GIC's entering into a contract with SMG did not cause its harm because it was released from any obligation thereunder after it failed to obtain a letter of credit. And the claim that GIC did not seek an alternative source for the letter of credit is false. Galvin's claim submission reveals that Galvin attempted to secure a letter of credit from at least two (2) other individuals or entities prior to the expiration of the extended deadline for producing a letter of credit, and was unable to do so. *See* Ex. "A". Causation is entirely lacking.

**d. The Fraud Claim Fails**

Fraud claims require proof that the defendant made a false representation of a material fact, knowing that representation to be false; that the person to whom the representation was made was ignorant of the falsity; that the representation was made with the intention that it be acted upon; and, that the reliance resulted in damage to the plaintiff." *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59, 66 (Colo. 2005). Further, the reliance on the representation must be justifiable. *Nelson*

*v. Gas Research Inst.*, 121 P.3d 340, 344 (Colo. App. 2005). "Fraud requires more than the mere nonperformance of a promise or the failure to fulfill an agreement to do something at a future time. *State Bank v. States*, 723 P.2d 159, 160 (Colo. App. 1986). Unless the speaker making the representations deliberately falsified his or her intention to induce reliance, statements of future events are not actionable. *See Brody v. Bock*, 897 P.2d 769, 776 (Colo.1995). Promises concerning a future act can only be actionable where there is proof that the defendant had the present intention not to fulfill the promise. *Stalos v. Booras*, 528 P.2d 254, 256 (Colo. App. 1974); *see Kinsey v. Preeson*, 746 P.2d 542 (Colo.1987).

While Galvin/GIC make the barebones assertion that "[a]t the time Ms. Smith made the misrepresentation, she did not intend to fulfill such promise; thus she misrepresented her intentions", there is no evidence to support this. (Count., ¶ 33). In fact, this assertion is belied by e-mails Brenda Smith sent to PNC Bank in which she did, in fact, attempt to get PNC to issue the line of credit on GIC's behalf. Copies of select e-mails are attached hereto as Exhibit "C". Therefore, there is no proof that Ms. Smith misrepresented her intentions at the time the alleged promise was made; on the contrary, the evidence suggests Smith did intend and attempt to secure a letter of credit from PNC even after that date.

Galvin's fraud claim also fails for the same reasons as the promissory estoppel claim – there is no evidence of justifiable reliance or causation, where

Galvin attempted to secure a letter of credit from other sources and was unable to do so. *See* Ex. "A".

**e. Tortious Interference Claims**

The tort of intentional interference with contract is premised on the existence of a contract between a plaintiff and a third party. *Colorado Nat. Bank of Denver v. Friedman*¸846 P.2d 159, 170 (Colo. 1993). Here, Galvin alleges that Smith's failure to post the letter of credit resulted in GIC's inability to perform. (Count., ¶ 28). The Supreme Court of Colorado addressed the theory of intentional interference with another's performance of his own contract in *Westfield Devt. Co. v. Rifle Inv. Assocs.*, 786 P.2d 1112 (Colo. 1990). There, the Court applied Section 766A of the Restatement (Second) of Torts, which provides:

> One who *intentionally* and *improperly* interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

*Westfield*, 786 P.2d at 1117 (citing R2d Torts § 766A).

In order to hold CV Investments liable for tortious interference, Galvin must prove that CV Investments: (1) was aware of the contract between GIC and SMG; (2) that CV Investments intended for GIC to breach the contract; and (3) that CV Investments in fact did induce GIC to breach the contract, or made it impossible for GIC to perform. *Krystkowiak v. W.O. Brisben Cos., Inc.*, 90 P.3d 859, 871

(Colo. 2004). Further, Galvin must prove that the conduct was both intentional and improper in order for liability to attach. *Westfield*, 786 P.2d at 1117-18. "Generally, tortious interference with contractual rights must involve a wrongful act or a legal act performed in an unlawful manner." *Omedelena v. Denver Options, Inc.*, 60 P.3d 717, 721 (Colo. App. 2002) (citing *Int'l Ass'n of Machinists v. Southard*, 459 P.2d 570 (Colo. 1969)).

Determining whether a person acts "improperly" in interfering with a contract depends upon consideration of the following factors: (1) the nature of the person's conduct, (2) the motive, (3) the interests of the other party with which the conduct interferes, (4) the interests sought to be advanced by the person, (5) the social interests in protecting the person's freedom to act as well as the other's contractual interests, (6) the proximity or remoteness of the conduct to the interference, and (7) the relationship between the parties. *Id.* at 1117-18; *W.O. Brisben Cos., Inc. v. Krystkowiak*, 66 P.3d 133, 136-37 (Colo. App. 2002). Further, in the agency context, the analysis focuses on whether the agent acted, at least partly, to serve the corporation's interest or whether the agent was motivated out of personal animus to one or both of the contracting parties. *Krystkowiak*, 66 P.3d at 137. "[A]n agent acts improperly only when he or she is motivated solely by the desire to harm one of the contracting parties or to interfere in the contractual

relations between the parties." *Id.* No liability can attach where the actor had the right to engage in the act complained of. *Omedelena*, 60 P.3d at 721.

Galvin's tortious interference claim fails for multiple reasons. First, it is premised upon *Smith's* alleged failure to post the letter of credit, rather than a failure of CV Investments (against whom the claim is asserted). Second, the purported promise to provide the letter of credit was not even enforceable due to the statute of frauds; therefore, Smith had the legal right not to perform. Third, the failure to post the letter of credit was not motivated solely by a desire to harm or interfere with a contractual relationship. In reality, Smith had a legitimate business interest in *not* providing, extending or financing a letter of credit that exposed her and the Receivership Parties to extremely significant financial risk. The $100,000.00 standby letter of credit required by GIC's contract with SMG would have authorized SMG to draw against it *each and every time* GIC failed to pay any invoice in full. *See* Ex. "A"; (Count., ¶ 22) ("Prior to commencement of this Agreement, but not greater than seven days from the signing of this Agreement, the Purchaser shall provide the Seller with a standby letter of credit in the amount of $100,000.00 issued by a **major US banking institution**, authorizing **seller to draw against it** in the event **Purchaser fails to timely pay <u>any</u> invoice** in full) (emphasis added). Fourth, rather than a failure to post the letter of credit being wrongful or illegal, the posting of the letter of credit and diversion of additional

Receivership Assets in connection therewith would have resulted in additional violations of applicable fraudulent transfer laws. Finally, Smith/CV Investments did not induce GIC to breach the contract or make it impossible for GIC to perform, where GIC in fact tried, and failed, to secure a letter of credit from at least two (2) others. That GIC could not obtain financial backing for this purportedly lucrative business venture is not the fault of CV Investments, and CV Investments did not cause GIC's alleged harm.

**4. The Claims Are Factually Untenable**

As referenced above, neither Smith nor any of the Receivership Parties are a major US banking institution. They were simply not qualified to post the letter of credit as Smith purportedly promised. (Count., ¶ 22). Additionally, Galvin/GIC attempted to secure other sources for the letter of credit before SMG terminated the contract, but were unable to do so. *See* Ex. "A". And CV Investments did not obtain a contract until after GIC's contract with SMG was already terminated and GIC no longer possessed the right to purchase the magnetite. (Count., ¶¶ 9-10, 25-26, 28). Additionally, Brenda Smith ultimately bought under 50,000 tons of the 400,000 tons of magnetite set aside for CV Investments pursuant to its contract with SMG. (Count., ¶¶ 54-55). That left 350,000 tons of available magnetite which Galvin/GIC could have separately pursued had they been able to locate an

alternative funding source. For all these reasons, the elements of causation and damages cannot be satisfied on any of the GIC claims.

**5. The Claims are Highly Speculative and Unsubstantiated**

While the damages sought in the counterclaims of "no less than $50 million" would swallow up the current assets in the Receivership Estate six times over, Galvin/GIC purposefully understate their damages to mask the pure absurdity of their claim. According to the Galvin claim, GIC was going to purchase 350,000 tons of magnetite concentrates, at a price of $80 per ton. (Count., ¶¶ 7, 20, 21). Galvin/GIC assert that the gross value of the precious metals to be realized from the extraction of the material is $330,000.00 per U.S. short ton. (Count., ¶ 12). For 350,000 tons, that amounts to a gross value of $115,500,000,000.00. It is surprising that Defendants could not find another source for a letter of credit for such a purportedly lucrative business opportunity, and that their only hope for obtaining this letter of credit was from Brenda Smith.[14]

However, even if the letter of credit had been obtained, it is apparent that Defendants did not have the billions of dollars in capital necessary to purchase,

[14] This begs a rather obvious question – if Galvin was really capable of converting $80 of ore into $330,000 of precious metals, why didn't he simply purchase three tons of ore for $240, extract $990,000 from it, and then scale his operations from there?

transport, store and process the magnetite in order to realize these highly speculative profits.

Pursuant to GIC's contract with SMG, had it been able to secure a letter of credit, GIC would have been obligated to purchase a minimum of 2,000 tons of magnetite per month from commencement, at a price of $80.00 per ton for the first 200,000 tons purchased, for a minimum of $160,000.00 per month. The purchase of all 350,000 tons of magnetite—the final 150,000 tons at a price of $75.00 per ton—would have cost $27,250,000.00. *See* GIC's SMG Contract, attached to Exhibit "A". And the cost for processing, estimated on the low end at $35,000.00 per ton, would have been $12,250,000,000.00.[15] There also would have been significant costs involved in storing and transporting the magnetite. It defies logic that Galvin and his entities would have been able come up with the funds necessary to purchase, transport, process/extract and store the magnetite, all of which were required to realize any profits, when they were unable to satisfy much smaller debts and obligations and relied upon Brenda Smith/the Receivership Parties to help fund their various business operations, as alleged in the Receiver's Complaint against them.

In their supplemental claim submission, Galvin/GIC submitted a few documents regarding purported financing available through Cornerstone Private

[15] *See* Declaration of Richard Mittasch, attached hereto as Exhibit "D".

Capital Group ("Cornerstone"), a purported Bahamian entity. *See* Ex. "B". However, none of those documents specifically reference the magnetite project, or indicate that the use of funds for that particular project had been approved. Further, on March 29, 2017, the Securities Commission of the Bahamas issued a public notice regarding Cornerstone, advising that neither the company, nor its agents or consultants, were registrants of the Securities Commission of the Bahamas, and, to the extent they were holding themselves out as a bona fide entity operating in or from the Bahamas, they were committing an offense and liable for criminal prosecution and/or regulatory sanctions under Bahamas law. The Securities Commission strongly urged individuals and/or companies conducting business with Cornerstone "to exercise the utmost caution and to conduct full and proper due diligence before engaging in transactions" with the entity, its agents and consultants. *See* https://www.scb.gov.bs/wp-content/uploads/2019/02/Public-Notice-Cornerstone-Private-Capital-Group-Ltd-final-pdf.pdf. Further, while the e-mail address for Cornerstone was identified as info@cornerstonepcg.com, the website for domain name cornerstonepcg.com has been associated with a church located in Cleburne, Texas since at least 2004. *See* https://www.cornerstonepcg.com/ and https://web.archive.org/web/20040324193449/http://cornerstonepcg.com/.

Additionally, in exchange for the financing, Galvin was required to post $1.2 billion worth of collateral, consisting of "barrels" allegedly worth $975 million and cash security in the form of a $225 million bond, and any indications of a default risk could result in immediate seizure of the collateral as well as all outstanding projects borrowed funds were used to finance.

Finally, although GIC was going to be obligated to purchase 2,000 tons of magnetite per month, the Texas facility he was planning to rent which could allegedly process the magnetite could only process approximately 1 ton per day, or at most 22 tons ***per month***, if it ran continuously, 24-hours per day, five days per week. *See* Ex. "D". If Galvin had succeeded in purchasing the 350,000 tons of magnetite ore, it would have taken him well over 1,000 years to process based on the experimental capabilities in place at the time.

All of these factors demonstrate that the Galvin claims are highly speculative and should not be recognized or accepted by this Court.

### 6. The Galvin Claims Attempt to Require the Receivership Estate to Answer for Brenda Smith's Personal Liabilities

Over three (3) years ago, GIC filed a lawsuit containing the same claims against Brenda Smith personally in the United States District Court for the District of Colorado, styled *Galvin Investment Company, LLC v. Smith*, No. 1:19-cv-

00796-RBJ (D. Colo.) ("GIC v. Smith Action").[16] Smith was the only named defendant in that case. Galvin and GIC's admissions and sworn statements in that case assert that the alleged tortious conduct giving rise to these claims was the conduct of Smith personally on her own behalf, rather than that of her entities. Even with regard to the contract Smith entered into with SMG in the name of CV Investments, GIC alleged that Ms. Smith acquired the contract in the name of an entity that "serves only as her nominee" and that she acquired the magnetite for "her own use and benefit". (GIC v. Smith Action, ECF No. 1, ¶¶ 78-79).

Defendants are now attempting to seek redress for Brenda Smith's personal liabilities by asserting claims against the Receivership Estate. But Brenda Smith is not a Receivership Party. The Receiver has not been appointed as Receiver for Ms. Smith in her personal capacity, and is not authorized to address claims for her personal liabilities. The Galvin claims should be denied for this additional reason.

**7. For Policy Reasons, the Galvin Claims Should be Denied**

Galvin and GIC were not entitled to receive the benefit of funds fraudulently transferred by the Receivership Parties. Richard Galvin was the sole member of GIC, so the extension of the letter of credit, and any payments in connection therewith, would not have provided reasonably equivalent value to Brenda Smith

[16] The GIC v. Smith Action was dismissed because the Court found it could not exercise personal jurisdiction over Brenda Smith. (GIC v. Smith Action, ECF No. 40).

or the Receivership Parties. Further, any payments under the letter of credit made with Receivership Assets would have been inconsistent with the trading strategies Broad Reach investors had authorized Smith to pursue with their money and therefore made with an intent to defraud Broad Reach's investors. Had the letter of credit been extended, and any payments made thereunder, the Receiver would be seeking to recoup such payments as fraudulent and voidable transfers. Even payments made in accordance with an agreement between the parties can be fraudulent and voidable. *See, e.g., In re EBC I, Inc.*, 356 B.R. 631, 640 (Bankr. D. Del. 2006) ("A transfer may be fraudulent even if it is made in accordance with the terms of a contract between the parties") (citing *In re R.M.L., Inc.*, 92 F.3d 139, 148 (3d Cir. 1996)). Accordingly, the Receivership Estate should not be bound by, or liable for, Smith's purported promise to provide the letter of credit.

Additionally, for the reasons set forth in Section II (B)(3) *infra*, equity requires that the highly speculative Galvin claims be denied in their entirety because they primarily seek to recover lost profits, rather than actual out-of-pocket losses, which places Galvin and GIC on significantly different footing than investors and Non-Investor Creditors.

**B. Southern Minerals Group**

SMG has submitted a trade creditor claim for $21,929,259.00. A copy of SMG's claim submission is attached hereto as Exhibit "E". SMG's claim is based

on an alleged breach of contract in which Brenda Smith, acting on behalf of CV Investments, agreed to purchase 400,000 tons of magnetite ore from SMG, to be delivered in 4,000-ton monthly shipments. Smith paid for and took delivery of approximately 38,000 tons of Magnetite before she stopped ordering further deliveries. Smith paid more than $3.9 million to SMG for the ore she received, which was sufficient to cover 49,000 tons of ore, despite the fact she received only 38,000 tons.[17] As a result, Smith caused CV Investments to pay $900,000 to SMG for ore that was never delivered, an obvious benefit to SMG. SMG is not asserting a claim for any material or services it provided that were not paid for (because there were none), and has not identified any out-of-pocket losses it suffered in connection with the transactions at issue. Rather, SMG's claim is based on Brenda Smith's breach of her agreement to purchase an additional 351,000 – 362,000 tons of ore, and the profit SMG would have otherwise earned if Smith completed this purchase. For the reasons described in greater detail below, the Receiver fundamentally disagrees that this claims procedure is intended to recognize claims for lost-profits, particularly where those profits would have been earned on transactions that were being funded with money stolen from investors.

[17] *See* Receiver's May 28, 2021 letter filed in the above-referenced matter (ECF No. 90)

### 1. The Transaction at Issue

The SMG transaction is a prime example of one of the ways Brenda Smith carelessly spent her investors' money on bizarre business prospects that defy rational explanation. On April 7, 2017, Smith entered into a purchase and sale agreement ("PSA") with SMG on behalf of CV Investments. Pursuant to the PSA, Smith agreed to purchase 400,000 tons of magnetite ore in 4,000 monthly increments at a price of $80 per ton, beginning in June 2017. Smith was apparently taken in by individuals who claimed to have a process that could extract gold, platinum, and other rare-earth minerals from magnetite ore. While the technology was commercially unproven, Smith decided to divert millions in investor funds toward the purchase of a massive amount of ore from SMG that would have required a huge industrial operation to process.[18] Some context to illustrate the absurdity of the transaction is helpful:

- According to SMG's principal, Clovis Hooper, Smith had agreed to purchase half of all the ore SMG could access through its New Mexico mining operations, an amount that otherwise would have taken SMG 20 years to sell. A copy of the Verified Statement of Clovis Hooper is attached hereto as Exhibit "F". *See* Ex. "F", p. 5 ("SMG will likely have to extend its operating period over 20 years to sell the same volume of magnetite concentrate").

- SMG and CV Investments contracted with Runyan Construction to haul the magnetite using semi-trailer trucks which were capable of

[18] The diversion of Investor funds for this purpose was completely at odds with the stated purpose of Broad Reach Capital, which was intended to pursue securities trading strategies that Smith alleged she was uniquely situated to execute.

> carrying 20-22 tons at a time. In other words, it would have taken **20,000** "big rig" semi-trailer trucks to haul and deliver the full 400,000 tons of ore that Smith agreed to purchase from SMG.

When Smith agreed to purchase this massive amount of ore, she had no place to store it, let alone an operation that could process it within any human time-scale.[19] Because Smith never identified a place to deliver the ore she purchased, SMG began shipping truckloads of ore to a ranch owned by Clovis Hooper's parents, where it continued to build up and—according to his father—caused environmental damage. After delivering approximately 38,000 tons of magnetite to the Hooper Ranch, in 2018 Smith began to fall behind in payments for future deliveries. As a result, Smith and SMG agreed to suspend deliveries for a year to allow Smith time to make quarterly payments to SMG, which payments were intended to build up a "security deposit against future sales" before SMG would resume deliveries in 2019. (Ex. "F", Hooper Statement at pg. 3). Smith made a number of payments, which cleared up all arears for prior deliveries and began to build up the security deposit for future purchases. The Receiver believes this agreement explains the $900,000 paid to SMG for ore that was never delivered. Smith stopped making the quarterly security payments as of October 2018. (*Id.*)

[19] Had Smith utilized the Texas facility Richard Galvin was considering, it would have taken her well over 1,000 years to process the 400,000 tons of magnetite ore based on the experimental capabilities purportedly in place at the time. *See* Ex. "D".

According to SMG, CV Investments was obligated to resume its purchases in March of 2019, and was required under an amended PSA to pay $3,840,000 for monthly deliveries of ore over the following 12 months. Smith did not resume her purchases as of March 2019 and ultimately stopped communicating with SMG. As a result, SMG did not deliver any additional ore to Smith / CV Investments. There is no dispute that SMG has been paid for all the magnetite ore that it did deliver.

**2. The Arbitration Award**

Before this Court's order establishing the Receivership and issuing a stay of all litigation against Receivership Entities, SMG initiated an arbitration on September 20, 2019 asserting a breach of contract claim against CV Investments. The arbitration was conducted through the American Arbitration Association (AAA) pursuant to the arbitration provisions within SMG's contract with CV Investments. When SMG initiated the arbitration, Smith had already been arrested, indicted for Securities Fraud, and was simultaneously named as a defendant in the above-captioned SEC civil enforcement action. Smith submitted a handwritten letter from prison to the arbitrator requesting a stay, which was denied. SMG issued requests for admission to Smith, who did not respond. As a result, all requests for admission propounded by SMG were deemed admitted by the arbitrator. Based upon those deemed admissions, the arbitrator issued an award to SMG on May 29, 2020, awarding $21,929,259 plus 15% pre-judgement and post-

judgment interest. The award includes the following components: (1) $4,215,000 in "liquidated damages"[20]; (2) $14,090599 in "lost profits"; (3) $3,600,000 in punitive damages; and (4) $23,660 in arbitration costs. SMG's arbitration award is attached hereto as Exhibit "G". SMG did not have this award confirmed in court and reduced to a judgment prior to the June 29, 2020 Receivership Order which stayed all litigation against Receivership Entities.[21]

**3. SMG's Claim is Inequitable to Creditors with Actual Losses**

Brenda Smith and CV Investments paid SMG for all the magnetite ore that was actually delivered. Additionally, to protect itself when Smith stopped accepting deliveries, SMG required CV Investments to pay significant amounts in advance of any further purchases. Brenda Smith caused CV Investments to pay more than $900,000 to SMG to secure future purchases, which purchases never occurred. Accordingly, SMG realized an almost $1 million windfall for ore it was never required to deliver. Moreover, SMG has not submitted anything to the Receiver indicating that it suffered out-of-pocket costs with respect to the

[20] This was not pursuant to a "liquidated damages" provision in SMG's contract. Rather, this amount represents the fixed sum Brenda Smith would have paid to SMG for the delivery of magnetite ore she was required to take (but did not) between March 2019 and February 2020.

[21] After his appointment SMG did inquire of the Receiver whether he would consent to a motion by SMG to lift the stay for the limited purpose of confirming its award in court. The Receiver advised SMG that he would oppose such a request.

magnetite ore that CV Investments did not purchase. Except for the nominal costs of the arbitration itself, SMG's claim is based exclusively on a "lost profits" damages analysis. There is no dispute that SMG still has access to the ore Brenda Smith did not purchase and the ability to sell it to other customers—however it will likely never find a purchaser willing to purchase the outlandish amount Brenda Smith agreed to purchase (with other people's money) and for such a high price, other than Richard Galvin.[22]

SMG's arbitration award was obtained without opposition and was largely predicated on deemed admissions based on Smith's failure to respond to SMG's Statement of Claim and to discovery requests served while Smith was incarcerated. The arbitrator did so, despite Brenda Smith submitting a *pro se* letter requesting a stay because of her ongoing criminal prosecution. The arbitrator denied that request on the basis that Smith's request for stay was "indeterminate" and that even without access to company records, "there was no suggestion that Smith lacked sufficient knowledge to participate." The Receiver believes this decision was made with a manifest disregard of the law given that the arbitrator did not analyze any of the relevant factors required to address a request for stay pending criminal

[22] Documents submitted by SMG in the arbitration confirmed that Smith had agreed to pay a higher price for its ore than other customers, with the exception of Richard Galvin/GIC. In fact, it seems that if SMG and Richard Galvin just agree to enter into another contract for GIC's purchase of magnetite concentrates at the price they agreed to in 2017, this would eliminate both of their claims entirely.

proceedings of a criminal defendant. *See In re Adelphia Commc'ns Sec. Litig.*, 2003 WL 22358819, at *3 (E.D. Pa. May 13, 2003); *Keesee v. Dougherty*, 230 A.3d 1128, 1133 (Pa. Super. 2020) (adopting same).

Had a stay been issued in the arbitration, the matter would not have resulted in the entry of an award predicated on the deemed admissions of Brenda Smith. While SMG's claim could still be submitted in this claims process, it would need to be established on its own merits and without reliance on an unopposed arbitration award. Regardless, because the award has not been confirmed, the Receiver does not believe it is entitled to preclusive effect in the Receivership claims process. *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 292 (1984) (finding that res judicata and collateral estoppel do not apply to an unconfirmed arbitration award in a § 1983 action, noting that "arbitral factfinding is generally not equivalent to judicial factfinding."); *N.L.R.B. v. Yellow Freight Sys., Inc.*, 930 F.2d 316, 319 (3d Cir. 1991) (Reasoning that "Section 1738 [Full Faith and Credit] does not by its terms apply to the findings of an arbitrator" and that a different analysis applies "[w]hen a state court has affirmed an arbitration award… because then the issue is the preclusive effect to be given to a state court judgment.")

Given the circumstances in which the award was entered and the nature of the relief awarded, the Receiver does not believe SMG has established a valid claim. The Receivership claims process is an equitable proceeding. The fact that

SMG's claim is one for lost profits places SMG on a different footing than other creditors who are seeking to recover actual out-of-pocket losses. For example, the Receiver would not accept claims from investors seeking profits supposedly earned on their principal investments, and the Receiver has consistently demanded net winner investors to return profits earned on their principal investments.[23] The Receiver believes that equity requires the same approach here.

It is true that SMG's claim seeks the classic measure of contract damages, asking the Receiver to place it in the position it would have been in if Brenda Smith and CV Investments fully complied with their contract to purchase 400,000 tons of SMG's magnetite ore.[24] However, doing so ignores the context of the transaction and the purpose of the Receivership. Brenda Smith stole the money from her investors that she used to purchase magnetite ore from SMG. While that is not SMG's fault, SMG suffered no actual losses and was paid for all the magnetite it supplied plus nearly $1 million more. As a result, SMG is in a far better position than other trade creditors who were not paid for their labor, or investor creditors who invested with Smith and lost everything. Recognizing a claim that is inherently predicated on placing SMG in the position of profiting

[23] With regard to Trade Creditors, examples of out-of-pocket claims that the Receiver has accepted include service providers who performed services but were not paid for their work.

[24] In fact, SMG is seeking to be put in a better position as its award provides for punitive damages and interest, and also allows it to keep the magnetite.

from Smith's fraudulent conduct (and earning profits that by SMG's own calculations would have otherwise taken SMG 20 years to realize) is not equitable under the circumstances.

Moreover, the Receiver also does not agree that it is appropriate to include interest and punitive damages in a receivership claim, which were both included in SMG's arbitration award. No other creditor is entitled to interest on amounts owed and the Receiver does not believe that SMG's arbitration award requires a different approach. Similarly, punitive damages are entirely inappropriate for a receivership claim since by definition they are a windfall intended to punish a wrongdoer. No creditor of the Receivership is entitled to a windfall, and here the "punishment" would be visited upon the victims of Brenda Smith's fraud and paid from assets that would otherwise be available for distribution to victims. Accordingly, the Receiver recommends that the Court reject SMG's claim so that the Receiver's assets may be used to repay victims that suffered actual losses as opposed to alleged lost opportunities to profit.

### C. William McCormack[25]

William McCormack was employed as a securities trader by Brenda Smith and CV Brokerage. Mr. McCormack submitted a claim seeking $560,063.50 in legal fees alleging a right of common law indemnification in connection with various legal proceedings. Mr. McCormack also submitted a claim for $776,244.45 for allegedly unpaid commissions earned on his trading activity with CV Brokerage. A copy of William McCormack's initial claim submission is attached hereto as Exhibit "H".[26] A copy of William McCormack's supplemental claim submission is attached hereto as Exhibit "I". The Receiver recommends that the Court reject both claims and will address each separately below.

#### 1. Mr. McCormack's Claim for Common Law Indemnification Should be Denied

Mr. McCormack seeks common law indemnification from the Receiver and has submitted legal invoices related several matters identified as: (1) "Surefire

[25] Mr. McCormack passed away on February 16, 2023. His counsel filed a Notice of Suggestion of Death of Estate Creditor on February 24, 2023. (ECF No. 231). In the Suggestion of Death, his counsel indicated that they were in the process of ascertaining the identity of those administering Mr. McCormack's personal estate. *Id.* Accordingly, it is presently unclear whether these claims will be pursued by Mr. McCormack's estate.

[26] Mr. McCormack's original claim submission included several pages of attachments consisting of legal invoices with all time designations redacted, which the Receiver has excluded from this exhibit.

litigation[27]"; (2) McCormack v. Eric Seeley Arbitration ("Seeley Arbitration"); (3) "FINRA Investigation"; (4) "PA Litigation"; (5) "SEC and DOJ Matters"; (6) "FINRA Arbitration"; and (7) "White Collar Defense." Except for the "Surefire litigation" and the "Seeley Arbitration," Mr. McCormack provided very little detail concerning the nature of these matters.

It is undisputed that Mr. McCormack had no employment agreement with CV Brokerage or any other Receivership Party. A right of indemnification arises under Pennsylvania law in limited circumstances: either by contract, or by operation of common law. Mr. McCormack has not submitted an employment contract or any other agreement that would entitle him to indemnification for legal fees incurred in connection with any litigation related to his employment with CV Brokerage. Accordingly, the Receiver understands Mr. McCormack to be submitting a claim based on a common law indemnification theory. Mr. McCormack was employed in Pennsylvania to trade securities on the Philadelphia Stock Exchange. Accordingly, the Receiver believes Pennsylvania law applies to his claim. In *Builders Supply Co. v. McCabe*, 77 A.2d 368 (Pa. 1951), the leading

[27] The Receiver is familiar with this litigation because he has intervened in the lawsuit initiated by Surefire Dividend Capture in federal court for the Eastern District of Pennsylvania. That case is captioned *Surefire Dividend Capture, LP v. Brenda Smith, et al.*, Civ No. 19-cv-04088-BMS (EDPA).

case in Pennsylvania on common law indemnity, the Pennsylvania Supreme Court explained the right of common law indemnification as follows:

> The right of indemnity rests upon the difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. **It is a right that inures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another**, and for which he himself is only secondarily liable.

*Builders Supply Co.*, 77 A.2d at 370 (bold added); *see also Eastern Elec. Corp. of N.J. v. Rumsey Elec. Co.*, 2010 WL 2788294, at *1 (E.D. Pa. July 14, 2010) ("Under Pennsylvania law, indemnity is available only in the following circumstances: (1) where primary versus secondary or vicarious liability is present or (2) where there is an express contract to indemnify."). The law in New Jersey similarly requires the employee seeking common law indemnification to be without fault with respect to the alleged injury. *Ramos v. Browning Ferris Indus. of S. Jersey, Inc.*, 510 A.2d 1152, 1159 (N.J. 1986) ("to be entitled to indemnification as one who is secondarily or vicariously liable, a party must be without fault."); *Cartel Cap. Corp. v. Fireco of New Jersey*, 410 A.2d 674, 683 (N.J. 1980) ("It is

settled that indemnity may not ordinarily be obtained by a party who has been at fault."). [28]

By its very definition, common law indemnification applies to "damages" that someone is obligated to pay solely because of a legal relationship with another. In other words, it covers ***judgments*** that a defendant may be obligated to pay solely because of his/her legal relationship with another. Common law indemnification does not apply to attorney fees incurred in defense of a claim, which is what Mr. McCormack is seeking. And even if common law indemnification could be extended to cover attorney fees (it cannot), it certainly does not apply to claims where the purported indemnitee (here, Mr. McCormack) is alleged to have been at fault. The Receiver is not aware of any litigation in which Mr. McCormack is alleged to have been only secondarily or vicariously liable for the actions of his employer, CV Brokerage, and where he was otherwise

[28] The claim form submitted by Mr. McCormack references a right of indemnification under Michigan law, presumably because CV Brokerage is incorporated there. Because none of the conduct or transactions giving rise to Mr. McCormack's indemnity claim occurred in Michigan, the Receiver does not agree that Michigan law is applicable to his claim. But even if the indemnity claim was governed by Michigan law, the result would be the same because Michigan law is consistent with both Pennsylvania and New Jersey in requiring the person seeking indemnity to be without fault. *See Botsford Continuing Care Corp. v. Intelistaf Healthcare, Inc.*, 807 N.W.2d 354, 361 (Mich. Ct. App. 2011) ("It has long been held in Michigan that the party seeking [common law] indemnity must plead and prove freedom from personal fault. This has been frequently interpreted to mean that the party seeking indemnity must be free from active or causal negligence.")

without fault. The Receiver is also not aware of any legal theory that holds employees responsible for the actions of their employers if they otherwise did nothing wrong. While employers can be legally responsible and held vicariously liable for the conduct of their employees under the doctrine of *respondeat superior*, there is no doctrine that works in reverse. And the Receiver is not aware of any litigation in which a third party seeks to pierce the corporate veil or hold Mr. McCormack vicariously liable for the actions of his employer or Brenda Smith.

For example, "Surefire litigation" Plaintiff Surefire alleged that Mr. McCormack made knowingly false representations to induce its investment and that he is liable for his own conduct in assisting Brenda Smith with her fraudulent scheme. The Receiver is not aware of any theory under which common law indemnity would cover legal fees incurred by an employee alleged to have actively participated in a fraudulent scheme. Mr. McCormack has asserted that the claims asserted by Surefire are meritless and that he is being subjected to frivolous claims only because he worked for Brenda Smith. But common law indemnification does not create an obligation for an employer to cover an employee's legal expenses when the employee is alleged to have engaged in wrongdoing associated with his job. Nor is it an obligation that depends on the merits of the claim. It is a doctrine that creates a right where one is made liable to another as a matter of law, solely because of a legal relationship. Therefore, it is the Receiver's position that there is

no indemnification obligation arising from the Surefire litigation under any applicable law.

Mr. McCormack's request for indemnification in connection with the Seeley arbitration is even more tenuous. On April 15, 2021, *Mr. McCormack initiated a FINRA arbitration* against another former employee of CV Brokerage alleging that this employee stole Mr. McCormack's clients. The Receivership Parties were not parties to the proceeding — Mr. McCormack asserted purely personal claims against the Respondent. The FINRA arbitration panel determined that Mr. McCormack's claims were frivolous and ordered him to pay the legal fees of the Respondent. Simply stated, the Receiver has no legal obligation to insure Mr. McCormack against the adverse consequences of his own personal legal proceedings.

Finally, Mr. McCormack has provided no explanation for the legal fees related to the other five matters referenced on his legal invoices and no support for his request that his former employer reimburse him for those costs. Accordingly, the Receiver recommends the Court deny Mr. McCormack's creditor claim for legal fees.

### 2. Mr. McCormack's Claims for Unpaid Compensation Should be Denied

Mr. McCormack was the lead securities trader for CV Brokerage. Mr. McCormack concedes he had no written employment agreement and relies on an

alleged oral agreement with Brenda Smith in which he would be paid an 85/15 split on all commissions earned on his trading activity. Mr. McCormack originally submitted a claim for unpaid commissions in the amount of $260,000 with no supporting information, which the Receiver denied on the basis that the claim was unsupported. (*See* Ex. "H" - Original McCormack Claim). Mr. McCormack submitted a supplemental response asserting that he did not receive over $776,000 in commissions he was owed during a limited and specific time: April – October of 2017. In support of these claims, Mr. McCormack relies on an expert report, which in turn relies on an analysis of internal CV Brokerage spreadsheets as well as bank records obtained from the Receivership's document repository (*See* Ex. "I" - McCormack Supplemental Response). These documents purportedly demonstrate a pattern and practice of payments made to Mr. McCormack consistent with an 85/15 commission split. Mr. McCormack's expert appears to conclude that Mr. McCormack is owed all the money that was deposited into the Awootton Consulting, LLC bank account between May and October 2017, totaling $776,244.45.[29] Mr. McCormack's expert concludes that he is not aware of other payments made to Mr. McCormack during this time and that the Awooton deposits

[29] The Receiver previously filed a motion to determine ownership of the Awootton Consulting, LLC bank account, which contains additional background information on the history, funding sources, and uses of the account. (See ECF No. 180). This Court granted the Receiver's motion, determining that the funds contained in the account belong to the Receivership.

are reasonably consistent with internal CV Brokerage documents reflecting that Mr. McCormack was owed between $746,852 and $796,285 during the same time that the deposits were made.

As an initial matter, Mr. McCormack and his expert are simply incorrect that Mr. McCormack did not receive payments other than through Awootton Account deposits between April and October of 2017. From a review of bank records the Receiver's forensic accountant has identified $437,724,23 in payments from CV Brokerage directly to Mr. McCormack between April and October of 2017, and an additional $136,848.61 in November and December. (See Ex "J" - schedule of McCormack payments). The Receiver notes that it is unlikely that commissions would be earned and paid in the same month, and that it is therefore likely that at least some of the payments Mr. McCormack received in November and December of 2017 relate to the April – October time frame that he challenges. Moreover, Mr. McCormack's expert ignores that Mr. McCormack controlled the Awootton Account during the relevant time period, and that the Receiver has determined that Mr. McCormack directed the use of $267,044.95 from the account for personal and business expenses as well as ATM cash withdrawals. (*See* ECF No. 180 at pg. 3; ECF No. 180-4 (schedule of sources and uses of Awootton Account)). Totaling the direct payments made by CV Brokerage to Mr. McCormack together with Mr. McCormack's use of the Awooton Account, Mr. McCormack received more than

$841,000 in compensation from Brenda Smith / CV Brokerage during the time he claims to have received nothing.

Lastly, the Receiver notes that Mr. McCormack is claiming not to have been compensated for a 7-month period during 2017. Notably, Mr. McCormack continued working for CV Brokerage after this time up through (and after) Brenda Smith's arrest in August of 2019. The Receiver has not seen any correspondence or documents suggesting that Mr. McCormack had ever complained to Brenda Smith that he had not been paid in the nearly two years that he worked for CV Brokerage *after* the time-period for which he claims he was not compensated. Based on all the foregoing information, the Receiver recommends that the Court deny Mr. McCormack's claim for unpaid compensation as unsubstantiated.

**D. Scott Koppenheffer**

Scott Koppenheffer is another former employee of CV Brokerage who has been personally sued by Broad Reach investors. Mr. Koppenheffer makes a virtually identical claim as Mr. McCormack for common law indemnification in the amount of $141,052.56, which amount purportedly represents attorney fees incurred in defending the lawsuits brought against him. A copy of Mr. Koppenheffer's initial claim submission is attached hereto as Exhibit "K".[30] A

[30] Mr. Koppenheffer's original claim submission included several pages of attachments consisting of legal invoices with all time designations redacted, which the Receiver has excluded from this exhibit.

copy of Mr. Koppenheffer's supplemental response in support of his claim submission is attached hereto as Exhibit "L". Mr. Koppenheffer is not named in any judgments, nor has he been required to make payment in connection with a judgment entered against any third party associated with his employment with CV Brokerage. Mr. Koppenheffer is also not the subject of any lawsuits in which he is alleged to be without fault and solely responsible to another based on his legal relationship with CV Brokerage and/or Brenda Smith. For the reasons set forth in more detail in response to Mr. McCormack's indemnification claim in Section II (C)(1) *supra*, these facts preclude Mr. Koppenheffer's right to indemnification. The Receiver incorporates by reference the argument in response to Mr. McCormack's common law indemnification claim and requests the Court deny Mr. Koppenheffer's claim for all the same reasons.

### E. Industrial and Commercial Bank of China Financial Services LLC

ICBCFS is asserting a claim in the amount of $1,429,174 based on an asserted right of indemnification that includes a right to recover defense costs in several matters, identified by ICBCFS as: (1) "Bydalek Claim"; (2) "Alpha Capital Claim"; (3) "SureFire Litigation"; and (4) "CV Brokerage Investigation."[31]

[31] ICBSFS' claim asserts that its "Liquidated Indemnity Claim" is based on legal fees incurred in defending the "CV Brokerage Related Actions" described in Exhibit B to its Claim Submission. However, the Receiver notes that included in the "liquidated" amount are fees incurred in an unidentified category described as

ICBCFS's claim further purports to reserve the right to increase its claim as it continues to incur attorney fees defending itself in the CV Brokerage Related Actions" or any new actions that may be filed. Finally, ICBCFS acknowledges that is currently maintaining $444,213.08 in two CV Brokerage accounts (hereafter "the Disputed Accounts") and claims that it maintains a first-priority security interest in the Disputed Accounts based on its setoff rights, which ICBCFS maintains it may exercise in partial satisfaction of its indemnification claim. A copy of ICBC's claim submission is attached hereto as Exhibit "M".

For the reasons that follow, the Receiver does not agree that ICBCFS has established a valid indemnification claim. The Receiver further disputes that ICBCFS may exercise a right of setoff against the Disputed Accounts even if its claim is deemed valid pursuant to the Claims Procedure. In the event the ICBCFS indemnification claim is deemed valid (it should not be), ICBCFS may not exercise setoff rights unless and until creditor priority is established as part of a Court-approved distribution process, which is not at issue in this Claims Procedure Motion to Resolve Disputed Claims.

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"CV Brokerage Investigation" for which no description has been provided and which does not appear to flow from the defense costs of any particular case. While the Receiver rejects that a right to indemnification has been established with respect to any matter for the reasons described herein, the Receiver separately rejects the indemnification claim for $289,526.50 in connection with the "CV Brokerage Investigation" on the basis that no information has been provided to explain the nature of these costs.

As an initial matter, the Receiver cannot accept ICBCFS' open-ended claim for unknown future defense costs. ICBCFS purports to reserve the right to increase its claim in connection with existing and any potential litigation that may arise in the future. In this Court's February 22, 2022 Claims Procedure Order, the Court established a Claims Bar Date of April 25, 2022. The Court ordered that "All claims or demands against the Receivership that are not submitted to the Receiver on or before The Claims Bar Date shall be barred from recovery." (Feb. 22, 2022 Order at ¶ 2). The Claims Bar Date was established to finalize the total liabilities of the Receivership Estate so that the Receiver can recommend an orderly process for distributing the Estate's limited assets. As a practical matter, if claims are permitted to continue to accrue beyond the Claims Bar Date, the Receiver could never distribute the assets of the Receivership to creditors because he would need to maintain sufficient funds to cover future claims that may arise. Allowing new or supplemental claims to be submitted beyond the Claims Bar Date would frustrate a core purpose of the Receivership. Accordingly, the Receiver does not recommend that the Court allow ICBCFS to assert an "Unliquidated Indemnity Claim" for unspecified amounts that may continue to accrue for an indeterminate amount of time, potentially years into the future.

With respect to the "Liquidated Indemnity Claim," the Receiver does not believe that ICBCFS has established its right to indemnification in connection with

the "CV Brokerage Actions." In each of these actions ICBCFS is alleged to have engaged in intentional conduct that caused injury to the Plaintiff/Claimant, and that if proven would also demonstrate injuries to CV Brokerage. For example, the Surefire complaint asserts claims for aiding and abetting fraud and aiding and abetting breach of fiduciary duty based on allegations that ICBCFS was aware of, and turned a blind eye toward, voluminous and frequent suspicious transactions, and that in some instances ICBCFS personnel flagged particularly concerning transactions for Brenda Smith to help her avoid regulatory inquiries. Surefire also alleges that ICBCFS permitted Smith to transfer funds between accounts without proper documentation and in frequencies and amounts that constituted "red flag" transactions. Surefire alleges that ICBCFS obtained marketing material from Smith pursuant to its "know your customer" obligations that put it on notice that Broad Reach Capital's representations to its investors were inconsistent with the balances and trading activity within its brokerage accounts. Finally, Surefire alleges that ICBCFS failed to take necessary precautions to protect CV Brokerage assets from Smith when it was notified by one of Smith's clients that she was engaged in theft and fraud. The Bydalek[32] and Alpha Capital Claims allege similar conduct.

Under New York law, indemnification agreements are unenforceable to the extent the loss flows from the intentional conduct of the indemnitee. *See Gibbs-*

[32] Bydalek is in the process of dismissing his FINRA Action.

*Alfano v. Burton*, 281 F.3d 12, 21 (2d Cir. 2002) ("Indemnification agreements are unenforceable as violative of public policy only to the extent that they purport to indemnify a party for damages flowing from the intentional causation of injury.") (*citing Austro v. Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 676, 487 N.E.2d 267 (1985)). As a result, if any of the CV Brokerage Actions are successful in demonstrating ICBCFS aided and abetted Brenda Smith's fraudulent conduct, public policy would prohibit its right to seek indemnity from the Receivership. Given the uncertain status of the claims, the Receiver does not believe it would be equitable to accept a claim that may later be determined to violate public policy. At most, the Receiver should be required to recognize ICBCFS's liquidated claim as contingent, pending the outcome of the cases against it.

Finally, ICBCFS has asserted that it maintains a security interest in funds currently held in a Receivership account with ICBCFS. ICBCFS further claims that as a result of its security interest in the account, it may exercise a right of self-help to seize the account in partial satisfaction of its indemnity claim. The Receiver has advised ICBCFS that he has not yet recommended a distribution plan to the Court, which would necessarily include a recommended determination of creditor priority. Despite its purported security interest, there may be reasons that this Court would determine ICBCFS does not have priority over other creditors and may not seize the Receivership account that it maintains. But that is a question for another

day. To the extent this Court is inclined to recognize ICBCFS's liquidated claim (it should not), the Court should make clear that recognition of its claim does not grant ICBCFS the right to sweep the Receivership account it currently maintains to satisfy that claim.

**F. CMCC Development Group, LLC**

CMCC Development Group, LLC ("CMCC") has submitted a creditor claim seeking damages for breach of contract and for depreciated stock in connection with CV Investments' purported breach of a January 29, 2018 Letter of Intent. A copy of CMCC's creditor claim submission is attached hereto as Exhibit "N". CMCC seeks damages of $5,000,000.00 for CV Investments' purported breach, in addition to $500,000.00 in direct damages and $2,400,000.00 in consequential damages resulting from the alleged depreciated sale of stock following CV Investments' purported breach.

CMCC's claims arise from a tentative agreement between CMCC and CV Investments (referred to in the agreement as "CVI") for CMCC to assign, sell and transfer to CVI its right to purchase 75% of the outstanding shares of DataPlanet, N.V. for a price of $16,500,000.00 (the "Transaction"). The January 29, 2018 Letter of Intent ("LOI") provides that "CVI and CMCC *intend* to negotiate, execute and deliver a definitive agreement (the 'Definitive Agreement') with respect to the Transaction based on the preliminary terms set forth herein." LOI, ¶

1 (emphasis added). The LOI further states that CVI was *willing* to pursue a Transaction relating to the purchase of 75% of the outstanding DataPlanet shares. *Id.*, ¶¶ 1-2. Paragraph 5 of the LOI provides:

> As **compensation for consummating** a purchase of 75% of the outstanding shares of DataPlanet, **CVI shall pay CMCC** $5,000,000 (the "Consideration"). The Consideration shall be paid as follows**: $5,000,000 due upon closing of the purchase of the DataPlanet shares, less any payments made to CMCC prior to closing**. Payment of the Consideration is **expressly conditioned upon (i) CVI obtaining financing for the Transaction, (ii) negotiation of the Definitive Agreement or Purchase Agreement** and (iii) strict adherence to all terms set forth in this Letter of Intent by CMCC, its members and its principal, George Kearns. CVI Shall provide proof of funds within 30 days of the date of this Agreement. Notwithstanding the foregoing, CVI shall pay to CMCC the following: **(i) $75,000 upon execution of this Agreement, [(ii)] $175,000 upon [DataPlanet, N.V.'s parent company] United Telecommunication Services N.V.'s [("UTS")] acceptance of the assignment or a Purchase Agreement for the exclusive right to purchase 75% of the outstanding shares of DataPlanet for a purchase price of $16,500,000, and (iii) an additional $250,000 paid thirty (30) days thereafter**, provided however, ***in the event that CVI fails to obtain financing for the Transaction, or fails to close the Transaction, all monies paid to CMCC shall be applied to equity in CMCC on behalf of CVI at the rate of $250,000 per Unit***. In the event CVI closes the Transaction, all monies paid to CMCC shall be credited against the Consideration.

*Id.*, ¶ 5 (emphasis added). Three things are clear from the language of the LOI: (1) CVI's purchase of 75% of the outstanding shares of DataPlanet was subject to contingencies, including the ability to obtain financing, and was therefore not guaranteed or required; (2) CMCC was only entitled to receive a total of $5,000,000.00 if the deal was consummated, and that amount was to be reduced by

payments already received; and (3) most significantly, CMCC was not entitled to any compensation if the deal did not close; instead, any and all payments CVI made to CMCC pursuant to the LOI were to be converted to equity in CMCC at the rate of $250,000.00 per unit.

The Receiver recommends that these claims be rejected in their entirety for the following reasons: (1) CV Investments was not required to close the transaction that would have resulted in the payment of $5,000,000.00 to CMCC; (2) there is no proof that UTS accepted the assignment, which was a necessary precursor to payment of the majority of interim payments due under the LOI; (3) any interim payments would have been converted to an equity interest for CVI in CMCC when the Transaction failed to close; (4) CMCC has failed to provide sufficient evidence in support of its claim for consequential damages; and (5) for the reasons set forth *supra* in Section II (B)(3), these are not the types of damages that should be recognized in an equitable proceeding such as this.

The Receiver notified CMCC of his position and set forth the above-referenced deficiencies in the claim by letter dated May 25, 2022, and provided CMCC with the opportunity to provide additional information in support of its claims by June 8, 2022. CMCC never responded or provided additional material in support. The Receiver therefore recommends that the Court reject CMCC's claims

in their entirety. The grounds for denial of these claims are discussed in further detail below.

**1. $5,000,000.00 Claim for CVI's Purported Breach of the LOI**

CMCC claims it is entitled $5,000,000.00 for CVI's purported breach of the LOI. However, this payment was never guaranteed. Under the express terms of the LOI, since financing was never obtained and the Transaction was never consummated, CMCC was never entitled to receive the $5,000,000.00. Further, this claim is duplicative of CMCC's $500,000.00 direct damage claim, because CMCC was only entitled to receive a **total** of $5,000,000.00 if the Transaction closed, which would have been reduced by the $500,000.00 in interim payments made under the LOI.

**2. $500,000.00 Claim for Direct Damages Arising from CVI's Purported Breach of the LOI**

At *most*, the obligations of CVI are limited to $500,000.00 under the LOI. However, while CMCC claims that UTS accepted the assignment, it has not provided any evidence or proof of UTS's purported acceptance, which was necessary to trigger $425,000.00 worth of CVI's obligations under the LOI. Since these payments were contingent on the acceptance of the assignment, they were not guaranteed. Further, any payments made under the LOI would have simply been converted to an equity interest in CMCC since the deal did not close, suggesting that, without such equity provided in exchange, there would have been no

consideration given for these payments. Accordingly, there is no basis for requiring the Receivership Estate to make these interim payments to CMCC.

### 3. $2,400,000.00 Claim for Consequential Damages Arising from CVI's Purported Breach of the LOI

CMCC claims that "[a]s a result of Ms. Smith's breach of this agreement, CMCC was required to lower its stock price from $250,000 to $50,000 per share in order to sell 12 shares of CMCC stock in rapid fashion in order to meets its obligations[,]" resulting in alleged consequential damages of $2,400,000.00. This claim is wholly lacking in support.

First, as noted above, Smith was never required to complete the Transaction. CVI cannot be responsible for consequential damages for failing to complete a purchase that it was not contractually obligated to perform. If CMCC's financial condition was such that it needed to sell stock in rapid-fire fashion in order to come up with a flow of cash after a contingent deal failed to close, that is not CVI's fault.

Second, CMCC has not provided any proof or documentation in support of these claimed consequential damages. The Receiver finds this particularly concerning where the $250,000.00 purchase price appeared to only apply to Brenda Smith and her affiliates, and no one else.

Prior to the execution of the LOI, Investment Consulting made two payments totaling $175,000.00 to CMCC in 2016 ($100,000.00 on 5/23/16 and $75,000.00 on 6/29/16), for personal loans to CMCC's owner, George Kearns.

Those payments were to be converted to an ownership interest in CMCC for Brenda Smith, pursuant to a December 22, 2017 Ownership Interest Purchase Agreement ("OIPA"). A copy of the OIPA is attached hereto as Exhibit "O". The OIPA provided that Mr. Kearns agreed to sell, transfer and convey a 1% ownership interest, being one unit out of 100 total units in CMCC, for a purchase price of $250,000.00. OIPA, ¶¶ 1-2. The transfer of Mr. Kearns' interest was contingent upon the complete satisfaction of the purchase price through a $75,000.00 payment. *Id.*, ¶ 3. Investment Consulting, LLC made another payment to CMCC on 12/22/17 in the amount of $75,000.00, in accordance with OIPA, thereby completing the purchase of one share of CMCC for a purchase price of $250,000.00.

According to the List of Members attached the Second Amended Operating Agreement for CMCC dated September 19, 2017—which was never amended to reflect Brenda Smith's 1% ownership interest—Robert Bray has or had a 4% ownership interest in CMCC based on an initial capital contribution of $100,000.00, and Andrew Mason has or had a 1% ownership interest in CMCC based on an initial capital contribution of $25,000.00. This suggests that, at least at one point, the value of one share in CMCC was only $25,000.00. At some other point in time, CCZ Holdings, LLC purchased a 7% interest in CMCC for $850,000.00, suggesting a cost of $121,428.57 per share at the time of their

purchase. By contrast, Brenda Smith received only one share in exchange for the $250,000.00 paid by Investment Consulting. CMCC has provided no objective evidence that these shares were ever worth $250,000.00, or that the $50,000 for which the twelve (12) shares were each allegedly sold represented a sale at below fair market value.

#### 4. CMCC's Claim is Inequitable as Compared to Creditors Who Suffered Out-of-Pocket Losses

CMCC is essentially seeking to recover damages for lost profits and inability to sell shares at the inflated rate for which Brenda Smith agreed to purchase them. Much like SMG and for the reasons set forth in Section II(B)(3) *supra*, this places CMCC on different footing from other creditors who are seeking to recover actual out-of-pocket losses. CMCC is asking to be placed in the position it would have been in if Brenda Smith & CVI fully complied with the terms of a LOI which was replete with contingencies. Brenda Smith stole money from her investors to make payments to CMCC, and would have done the same to purchase shares from DataPlanet. Her investments in CMCC and/or DataPlanet was not an authorized use of funds by Smith, who raised funds by advertising highly specific and specialized securities trading strategies to unsuspecting investors. Recognizing a claim that is inherently predicated on Smith's theft of investor funds would not be equitable to investor victims who are already not likely to recover more than a small percentage of their actual losses.

### G. Alpha Capital Trading Group

Alpha Capital Trading Group LLC ("Alpha Capital") submitted a claim form seeking $250,000.00 in connection with a $4 million deposit with CV Brokerage that Alpha Capital was able to partially redeem through several withdrawals totaling $3.75 million.[33] Alpha Capital supplied a spreadsheet detailing its funding and withdrawal activity with CV Brokerage to support this claim. A copy of Alpha Capital's claim submission is attached hereto as Exhibit "P".

It is the Receiver's understanding that Alpha Capital alleges that the purpose of the deposits with CV Brokerage was to establish a segregated trading account within CV Brokerage so that Alpha Capital could utilize its available margin with ICBCFS. Alpha Capital has filed pleadings in which it alleged that after establishing the $4 million account, it actively traded within its account for six months before Smith froze its ability to conduct further trades. The Receiver is unaware whether that trading activity resulted in gains or losses to Alpha Capital. As a result, the Receiver is concerned that the diminution in value of the account may be a result of Alpha Capital's trading activity as it is unlikely that Alpha Capital's starting and ending balance would remain exactly $4 million despite its

[33] Alpha Capital filed a FINRA Complaint in connection with these transactions as well, which is currently stayed.

own admitted six months of trading activity within the account. Additionally, the Receiver's forensic accountant has reviewed the submitted transaction history with Alpha Capital and has identified that none of its deposits into CV Brokerage were sourced from accounts held by Alpha Capital, but rather were transfers from unknown entities. Similarly, all withdrawals initiated by Alpha Capital were transferred from CV Brokerage to unknown third parties. Accordingly, on May 25, 2022, the Receiver sent a letter to Alpha Capital, advising that he cannot accept the claim based on the information presently known, and advised that if Alpha Capital had any additional support that would address those concerns, the Receiver would reevaluate the claim. The Receiver requested that Alpha Capital advise by June 8, 2022 whether it had additional information to support the claim, or whether it intended to dispute the Receiver's determination.

Alpha Capital provided a responsive letter on June 3, 2022, but failed to provide any supplemental information or documentation purporting to establish that the $250,000.00 was not diminished through trading activity. The Receiver spoke with counsel for Alpha Capital and requested further support demonstrating that Alpha Capital's trading activity did not impact the balance of segregated account with CV Brokerage. Alpha Capital provided an additional letter on July 31, 2022 which provided similar explanations as the prior June 3 letter, but did not provide any documentary support for its position. The Receiver responded with

specific requests for documents that the Receiver believes should exist and that would address his concerns. As of the time of this filing, the Receiver has not received a response to those requests. Accordingly, based upon the limited information provided, the Receiver recommends that the Court reject this claim.

### H. Internal Revenue Service

The Receiver has been attempting to address claims asserted by the Internal Revenue Service ("IRS") against the Receivership Estate regarding the Receiver's obligation to submit pre-appointment returns for Receivership Parties and the willingness of the IRS to submit to the creditor claims process and have its claims subordinated to those of investor creditors for over one (1) year. The Receiver still does not have clarity on the IRS' formal position with respect to these issues.

Initially, the Receiver notified the IRS of his appointment through the submission of IRS Form 56's for each of the Receivership Parties within the first two (2) weeks of his appointment.

The Receiver subsequently contacted the IRS on July 14, 2021, requesting to speak with the appropriate contact regarding tax return obligations for the Receivership Parties, including the scope of the returns that would need to be filed and the applicable time periods, as well as the IRS' position regarding potential future distributions to investors and/or other creditors. The Receiver noted his position, from the outset, that filing returns for periods prior to his appointment

would not be appropriate or practicable, and that any arguable tax obligations should be subordinated to investor victim claims. The Receiver expressed his desire to address these issues with the IRS soon, given that he did not anticipate there would be sufficient recoveries to make investor victims whole.

In response to this communication, the Receiver was put in touch with a bankruptcy specialist at the IRS assigned to the Receivership. The Receiver spoke with that representative by telephone on August 2, 2021, setting forth the position outlined above. The IRS requested additional information regarding the Receivership Parties, as well as the link for purposes of filing a creditor claim with the Receivership Estate. The Receiver sent the IRS a copy of the Receivership Order on August 4, 2021, and sent an organizational chart and further information regarding the Receivership Parties, along with a link to the creditor claim form, by e-mail on August 6, 2021. The Receiver again reiterated his position regarding the significant expense and difficulties that would be involved in created pre-appointment tax returns for the Receivership Parties, and that any arguable tax obligations of the Receivership Parties should, at a minimum, be subordinated to victim claims.

On September 10, 2021, the IRS sent a Notice ("Notice") of tax obligations to the Receiver, asserting that the Receivership Parties owe approximately $1,331,807.00 to the IRS, that is comprised of penalties for late and/or unfiled tax

returns of $416,020, estimated corporate income taxes of $899,050, and estimated unpaid payroll taxes of $26,737 for various tax years ranging from 2010 to 2020. The Receiver informed the IRS that, for purposes of this Motion, the Receiver is treating the IRS' September 10 Notice as its claim submission.

Following a November 2021 follow-up call regarding the Notice, the Receiver, through his Accountants, responded to this letter in writing on January 4, 2022, arguing that the filing of returns for periods prior to the Receiver's appointment is neither appropriate nor practical and will result in significant expense and cost to the Receivership at the expense of victim investors, and again asserting that any arguable tax obligations should be subordinated to victim claims. The Receiver highlighted that completing returns for the Receivership Parties for pre-appointment time periods would add substantial expense to the Receivership due the additional forensic accounting that would be involved, which would reduce funds available for distribution to victims, and that the preparation of such tax returns would be extremely problematic because of the nature and size of the fraud and the inability to verify the accuracy of many transactions given their murky nature.

The Receiver expressed that where victims are not expected to be made whole, using Receivership assets to pay late filing penalties for unfiled partnership returns and/or purported "estimated" taxes of a C corporation within the

Receivership Estate (for which no supportable basis had been provided and in which the victim investors held no economic interest) conflicts with the objectives set forth in the IRS Penalty Handbook.

Assessing penalties under the Internal Revenue Code does not serve the underlying purposes for using this power. Specifically, imposing late filing penalties on Receivership Parties would serve as further punishment to the investors of Smith's elaborate scheme. The Penalty Handbook provisions — IRM 20.1.1.2 (11-21-2017) — state that, "Penalties exist to encourage voluntary compliance by supporting the standards of behavior required by the Internal Revenue Code." The IRM further provides that, "Although penalties support and encourage voluntary compliance, they also serve to bring additional revenues into the Treasury and indirectly fund enforcement costs. However, these results are not reasons for creating or imposing penalties." See IRM 20.1.1.2.1 (11-25-11). Lastly, the IRM provides that, "Voluntary compliance is achieved when a taxpayer makes a good faith effort to meet the tax obligations defined by the Internal Revenue Code." See IRM 20.1.1.2.1 (11-25-11).

Although the Receiver acknowledges and respects the importance of taxpayer compliance and the IRS's role in enforcing the tax law, the affected investors in good faith placed reliance on and expected Ms. Smith to fully perform her duties which did not occur. Subordination of the IRS' claim for assessment of

penalties would be the most fair and equitable course of action under the facts and circumstances.

The Receiver expressed similar concerns about any claim related to purported corporate income tax and payroll taxes due for CV Brokerage, Inc., a C corporation under the Receivership. The Notice reflects "estimated" corporate income taxes for tax years 2018 through 2020, and "estimated" payroll taxes for the last quarter of 2019 and all four quarters of 2020. No returns for such tax periods have been filed with the IRS by the Taxpayer or any representative. Thus, there is particular concern about the methodology used to determine the amounts due. Specifically, the corporate income taxes for 2018 through 2020 were estimated solely based on the gross tax liability reported by the corporation on its 2017 return. Given the extent of Ms. Smith's fraudulent activity, the 2017 tax return was likely prepared, at least in part, using fraudulent financial information and could overstate this entity's tax liability for this period.

The payroll taxes were estimated based on the payroll taxes due for the third quarter of 2019. It is worth emphasizing that the Receiver has not located any books or other financial information of the corporation for 2018 through 2020 suitable for tax reporting purposes and would need to update the forensic accounting in order for the tax liability, if any, to be properly assessed for these periods. Further, CV Brokerage, Inc.'s membership with FINRA was cancelled as

of October 2019, and it is believed that CV Brokerage, Inc. has not done any business since approximately August 2019. Its registered brokers left to join another broker-dealer, taking its clients with them, while CV Brokerage was left with hundreds of thousands of dollars worth of unpaid bills and obligations—including a $100,000.00 fine imposed by FINRA on July 2, 2019, and nearly $400,000.00 owed to its executing broker, exclusive of fees, interest and other charges, for charges incurred through September 2019. In light of the foregoing, the Receiver does not believe that these purported taxes due have any supportable basis upon which to present a claim against the Receivership.

Under the circumstances of this case, an attempt by the IRS to assess the aforementioned penalties and taxes against the Receivership would unduly cause further harm to victims, hindering the Receiver's attempts and purpose of recovering and distributing the stolen funds. Accordingly, the Receiver requested that the IRS reconsider both the amount and type of claims it is submitting against the Receivership Estate. To date the, IRS has not done so.

On or about May 16, 2022, the Receiver sent an e-mail to the IRS about the IRS' claim against the Receivership, advising that he was working through the claims process and had to provide responses to claimants by May 25, 2022. He requested a conversation to discuss the parties' respective positions to see if some of their differences could be resolved or minimized prior to that date. This was

followed-up by phone call on that same date, during which the Receiver advised the IRS that his plan is to treat the Notice as the IRS' claim in the claims process. This plan was based on prior communications which led the Receiver to understand that the IRS wanted its claim addressed in the claims process. The Receiver advised the IRS that he needed to know if it was confirming that the IRS is participating in the Court's claims process as a claimant, or taking the position that it is not doing so. The Receiver's communications with the IRS are driven by a desire to expedite the claims process and any subsequent distribution process by resolving any claimed personal liability of the Receiver for making any distributions to investors / creditors but as to which the IRS may claim it has priority. See *SEC v. Credit Bancorp*, 297 F.3d 127 (2d Cir. 2003).

Having not received a substantive follow-up response, the Receiver sent a follow-up letter to the IRS on May 25, 2022 reiterating his previously stated positions and concerns regarding the IRS' claim and requesting that the IRS consult with its internal counsel as soon as possible and confirm by no later than June 8, 2022 whether the IRS is willing to reconsider or revise its claims and for clarity on its position regarding participation in the claims process.

On June 28, 2022, the Receiver and his Accountants spoke with the IRS representative again by phone. Having not received a substantive response to his prior inquiries, the Receiver advised the IRS representative that he intended to

submit the IRS Notice as a claim submission for purposes of the creditor claims process. The Receiver followed-up with an e-mail attaching (1) the Department of Justice Tax Division Directive No. 137, Tax Claims Against Embezzlers, Swindlers, etc. v. Recovery by Investors, Dupes, and Victims, etc. (providing that where the tax claim and claim of the victim or investor arise from the same transaction and the victim or investor can trace its property to the fund in issue, the Tax Division will recognize the priority of the claim of the investor or victim), and (2) an article from the Department of Justice Tax Division titled "Tax Claims Against Embezzlers, Swindlers, Etc. v. Recovery By Investors, Dupes and Victims" (providing that in accordance with Tax Division Directive 137, the United States "will cede its federal tax claim to the victim's claim when" the tax claim and the victim's claim arise from the same transaction and the funds or property at traceable to the fraud or wrongdoing).

At this juncture, the Receiver respectfully requests the Court's assistance in directing a response from the IRS to confirm whether or not it intends its September 2021 detailed outline of taxes it believes are due as a claim to be adjudicated through the creditor claims process, which will allow the Receiver to have clarity regarding priority of claims and enable him to make distributions to investors without having to wait for the IRS' position outside of the claims process. The Receiver is cognizant of the caselaw from other circuits involving the

IRS and, absent consent or waiver, the arguably limited scope of District Court jurisdiction over tax claims in receivership matters. So to be prudent, at this time the Receiver is simply asking that the Court issue an order requesting that the IRS respond regarding its position on whether any tax claims can or should be adjudicated in the claims process. See, e.g., *SEC v. Credit Bancorp*, 297 F.3d 127 (2d Cir. 2003) (addressing interplay between Receiver claims motions and jurisdiction over IRS).[34]

## III. CONCLUSION

For all the foregoing reasons, Receiver, Kevin Dooley Kent requests entry of the proposed order attached hereto.

Respectfully Submitted,

Date: March 14, 2023

*s/ Robin S. Weiss*

Robin S. Weiss, Esq.
Andrew S. Gallinaro, Esquire
Clark Hill PLC
Two Commerce Square
2001 Market Street, Suite 2620
Philadelphia, PA 19102
Phone: 215-864-8086
Fax: 215-523-9714
rsweiss@clarkhill.com
agallinaro@clarkhill.com
*Attorneys for Receiver, Kevin Dooley Kent*

[34] To the extent the IRS' claims cannot be determined through the claims process, and there are substantial open questions about the scope of potential liability, it may lead to substantial delay of material distributions to investors and/or trade creditors.

# Exhibit A

# SEC v. BRENDA SMITH, et al., Civ. No. 2:19-cv-17213 (D.N.J.)

## CREDITOR CLAIM FORM

**Name of Creditor:**

Richard C. Galvin, Galvin Investment Company LLC, Galvin Investments, LLC, Galvin Investment Group, Galvin Metals Company, LLC, Gilman Metals Company, LLC, and RCG Coastal LLC.

**Name and Address Where Notices Should be Sent:**

Richard G. Galvin
[redacted]

-and-

Thomas E. Butler
White and Williams LLP
7 Times Square, Suite 2900
New York, New York 10036

**Email Address:**

butlert@whiteandwilliams.com

**Telephone No.:**

Tom Butler: (212) 714-3070

**Date(s) of Claim:**

The claims arose from tortious conduct that occurred between 2016 and 2019 as more fully set forth in the counterclaims asserted by the creditors in the Amended Answer and Counterclaims in the action entitled *Kent v. Richard C. Galvin, et. al.*, United States District Court of New Jersey, Case No. 21-cv-13105 (the "Action"). A copy of the Amended Answer and Counterclaims is attached hereto as Exhibit A.

**Amount of Claim:**

Damages in an amount of not less than $50 million.

**Please attach copies of all invoices relating to your claim. Do not send original documents. Copies of the documents provided to the Receiver will not be returned to the creditor. You must maintain the original documents as the Receiver may ultimately request them for verification.**

The Action is in its infancy and discovery has not yet begun. Creditors will supplement this claim as documents and information become available during the course of discovery, but, initially, Creditors include the documents affixed hereto as Exhibit B.

# Exhibit B

**Magnetite Concentrates**
**Purchase and Sale Agreement**

Southern Minerals Group, LLC of P. O. Box 535 Silver City, NM 88062 as "**Seller**," and Galvin Investment Company, LLC of 4645 East Lake Avenue, Centennial, CO 80121 as "**Purchaser**," agree as follows:

1. Seller has the exclusive right to access approximately 800,000 tons of magnetite concentrates (this is an estimate of the size and should not be relied upon as a definition of resource), a treated by-product of copper mining and milling operations conducted at the Mine site formerly operated by Freeport-McMoRan located in Grant County, New Mexico, and has in place contracts or purchase orders to sell approximately one-half of that inventory to other purchasers. The Purchaser will ensure that it does not undertake any activities that impact on the Seller's rights to the magnetite concentrates. Should, for any reason, the Sellers right to access this material be terminated, then on the day that access is terminated this Agreement will terminate, without further recourse to Buyer and Seller other than amounts already outstanding or breaches of Agreement occurring up to that date.

2. Seller hereby agrees to sell to Purchaser and Purchaser hereby agrees to purchase from Seller up to of 350,000 tons of such magnetite concentrates for the price of $80.00 per ton for the first 200,000 tons purchased and sold, and for the price of $75.00 per ton for tonnage in excess of 200,000. These prices include Seller loading the concentrates into Purchasers' trucks with Seller's equipment and equipment operators, and Seller shall bear all costs associated with such loading operations. The Purchaser undertakes to purchase a minimum of 2,000 tons per month from commencement of this Agreement.

3. Purchaser shall provide the trucks and truck operators to haul the concentrates and shall bear all costs associated with such hauling operations. The Purchaser shall ensure that representatives of the Purchaser (including truck drivers) shall conduct its activities in a good and professional manner and in accordance with the reasonable directions (if any) given to it by the Seller from time to time.

4. Seller shall maintain accurate certified weighing facilities and will weigh the Purchaser's trucks on entrance and exit, unloaded and loaded, and provide the net weights of each load to Purchaser as each loaded truck exits the site, and provide appropriate Material Safety Data Sheets. The Seller shall not be liable for loss or damage suffered or incurred by the Purchaser due to any failure or interruption of equipment due to the need for repair or alteration or breakdown but, the Seller will assist the Purchaser in minimizing any losses that the Purchaser may incur.

5. Purchaser shall make payment for all concentrates purchased on a monthly basis within ten days after being presented with an invoice from Seller. Prior to commencement of this Agreement, but not greater than seven days from signing of thisAgreement, the Purchaser



CH

shall provide the Seller with a standby letter of credit in the amount of $100,000.00 issued by a major US banking institution authorizing seller to draw against it in the event Purchaser fails to timely pay any invoice in full. Should purchases during the month exceed 2,000 tons, the Seller will have the right to require the Purchaser to provide additional standby letter of credit increasing as follows:

| Tonnage Being Sourced Per Month | Additional Required Letter of Credit |
|---|---|
| 0 to 2,000 | ------- |
| 2,001 to 3,000 | $ 50,000 |
| 3,001 to 4,000 | $100,000 |
| 4,001 to 5,500 | $150,000 |

6. Purchaser acknowledges and is aware that local governmental regulations limit the total tonnage of concentrates that may be removed from the mine site to 11,000 tons per month, and that Seller's other existing commitments presently utilize up to approximately one-half of that amount, leaving only approximately 5,500 tons per month now available to Purchaser. Seller agrees to inform Purchaser if and when other purchasers fail to purchase their entire committed amount so as to allow Purchaser the opportunity to acquire a larger amount in any particular month.

7. Seller warrants and covenants to and with Purchaser that it can provide good and marketable title to the subject concentrates, that they are by-products of lawful mining operations, have been properly severed from the realty from which they came, are free and clear of any liens or claims of any kind or nature, and will be free and clear of any liens or claims of any kind or nature when conveyed to Purchaser.

8..1 If a Force Majeure Event affecting a Party precludes that party ("Precluded Party") partially or wholly from complying with its Obligations (except its payment obligations) under this Agreement then:

(a) as soon as reasonably practicable after that Force Majeure Event arises, the Precluded Party must notify the other Party of

(i) the Force Majeure Event;

(ii) which obligations the Precluded Party is precluded from performing ("Affected Obligations");

(iii) the extent to which the Force Majeure Event or its consequences preclude the Precluded Party from performing the Affected Obligations ("Precluded Extent"); and

(iv) the expected duration of the delay arising directly out of the Force Majeure Event or in consequence of it;



CH

(b) the Affected Obligations will, to the Precluded Extent, be suspended for the duration of the actual delay arising directly out of the Force Majeure Event ("Actual Delay"); and

(c) the other Party's Obligations which are dependent on the Affected Obligations will be suspended until the Precluded Party resumes performance.

8.2 The Precluded Party must, as soon as reasonably practicable after cessation of a Force Majeure Event, resume performance of the Affected Obligations.

8.3 The Precluded Party must use reasonable endeavours to overcome or remove a Force Majeure Event as quickly as possible, but "reasonable endeavours" does not require a Party to pay money in an attempt to overcome the event or to settle any industrial dispute against its wishes.

9. To prevent possible confusion Seller and Purchaser agree that this Agreement is to be applied in accordance with the laws of the State of New Mexico other than its conflicts of laws principles. Should any disagreement occur – arbitration would be the first means to resolve the issues.

10. Either Party may terminate this Agreement on a serious breach of Agreement after giving 30 days notice ("Notice Period") to the other Party to rectify the breach and that breach is not rectified within the Notice Period. The termination of this Agreement shall not affect the rights of the aggrieved party in seeking damages in relation to the Agreement being terminated.

Seller and Purchaser have executed this Agreement effective as of the 10th day of March, 2017.

Southern Minerals Group, LLC

By: Clovis Hooper 3/10/17
Clovis Hooper,
President
Southern Minerals Group LLC

Galvin Investment Company, LLC

By: 3/10/17
Richard C. Galvin,
Managing Member
Galvin Investment Company LLC

**Magnetite Concentrates**
**Purchase and Sale Agreement**

Southern Minerals Group, LLC of P. O. Box 535 Silver City, NM 88062 as "**Seller**," and CV Investments LLC 200 Four Falls Corp. Ctr. Suite 211, Conshohocken, PA 19428 and affiliates as "**Purchaser**," agree as follows:

1. Seller has the exclusive right to access approximately 800,000 tons of magnetite concentrates (this is an estimate of the size and should not be relied upon as a definition of resource), a treated by-product of copper mining and milling operations conducted at the Mine site formerly operated by Freeport-McMoRan located in Grant County, New Mexico, and has in place contracts or purchase orders to sell approximately one-half of that inventory to other purchasers. The Seller will ensure that it does not undertake any activities that impact on the Purchases rights to the magnetite concentrates. Should, for any reason, the Sellers right to access this material be terminated, then on the day that access is terminated this Agreement will terminate, without further recourse to Purchaser and Seller other than amounts already outstanding or breaches of Agreement occurring up to that date.

2. Seller hereby agrees to sell to Purchaser and Purchaser hereby agrees to purchase from Seller up to of 400,000 tons of such magnetite concentrates for the price of $80.00 per ton. These prices include Seller loading the concentrates into Purchasers' trucks with Seller's equipment and equipment operators, and Seller shall bear all costs associated with such loading operations. The Purchaser undertakes to purchase a minimum of 4,000 tons per month from ~~commencement of this Agreement~~, June 1, 2017. BS CH

3. Purchaser shall provide the trucks and truck operators to haul the concentrates and shall bear all costs associated with such hauling operations. The Purchaser shall ensure that representatives of the Purchaser (including truck drivers) shall conduct its activities in a good and professional manner and in accordance with the reasonable directions (if any) given to it by the Seller from time to time.

4. Seller shall maintain accurate certified weighing facilities and will weigh the Purchaser's trucks on entrance and exit, unloaded and loaded, and provide the net weights of each load to Purchaser as each loaded truck exits the site, and provide appropriate Material Safety Data Sheets. The Seller shall not be liable for loss or damage suffered or incurred by the Purchaser due to any failure or interruption of equipment due to the need for repair or alteration or breakdown but, the Seller will assist the Purchaser in minimizing any losses that the Purchaser may incur.

5. Purchaser shall:

(i) provide a deposit of $10,000 to the Southern Minerals Group, LLC bank account within one business day of signing of this Agreement, as advised. BS CH

(ii) Prior to commencement of this Agreement, but not greater than seven days from signing of this Agreement, the Purchaser shall provide the Seller with a standby letter of credit in the amount of $250,000.00 issued by a major US banking institution authorizing the seller to draw against it in the event Purchaser fails to timely pay any invoice in full or provide, in solicitor's trust, a deposit of $250,000 with instructions that this is to be released to SMG on the provision by SMG that there has been a default on payment under the Agreement. This notification is to be given at SMG's sole discretion and the solicitor has to be irrevocably instructed to act on any such notice.

(iii) make payment for all concentrates purchased on a monthly basis within ten days after being presented with an invoice from Seller.

6. Purchaser acknowledges and is aware that local governmental regulations limit the total tonnage of concentrates that may be removed from the mine site to 11,000 tons per month, and that Seller's other existing commitments presently utilize up to approximately one-half of that amount, leaving only approximately 5,500 tons per month now available to Purchaser. Seller agrees to inform Purchaser if and when other purchasers fail to purchase their entire committed amount so as to allow Purchaser the opportunity to acquire a larger amount in any particular month.

7. Seller warrants and covenants to and with Purchaser that it can provide good and marketable title to the subject concentrates, that they are by-products of lawful mining operations, have been properly severed from the realty from which they came, are free and clear of any liens or claims of any kind or nature, and will be free and clear of any liens or claims of any kind or nature when conveyed to Purchaser.

8.1 If a Force Majeure Event affecting a Party precludes that party ("Precluded Party") partially or wholly from complying with its Obligations (except its payment obligations) under this Agreement then:

(a) as soon as reasonably practicable after that Force Majeure Event arises, the Precluded Party must notify the other Party of

(i) the Force Majeure Event;

(ii) which obligations the Precluded Party is precluded from performing ("Affected Obligations");

(iii) the extent to which the Force Majeure Event or its consequences preclude the Precluded Party from performing the Affected Obligations ("Precluded Extent"); and

(iv) the expected duration of the delay arising directly out of the Force Majeure Event or in consequence of it;

(b) the Affected Obligations will, to the Precluded Extent, be suspended for the duration of the actual delay arising directly out of the Force Majeure Event ("Actual Delay"); and

(c) the other Party's Obligations which are dependent on the Affected Obligations will be suspended until the Precluded Party resumes performance.

8.2 The Precluded Party must, as soon as reasonably practicable after cessation of a Force Majeure Event, resume performance of the Affected Obligations and must use reasonable

endeavours" does not require a Party to pay money in an attempt to overcome the event or to settle any industrial dispute against its wishes.

9. To prevent possible confusion Seller and Purchaser agree that this Agreement is to be applied in accordance with the laws of the State of New Mexico other than its conflicts of laws principles.

10. Parties agree that any dispute or controversy arising out of or relating to this agreement or the interpretation thereof, shall be settled by arbitration, held in a mutually acceptable location to the parties, in accordance with the rules, then in effect, of the American Arbitration Association.

11. Either Party may assign this agreement, upon written notice, provided such assignment is to a commonly controlled affiliate.

12. Either Party may terminate this Agreement on a serious breach of Agreement after giving 30 days notice ("Notice Period") to the other Party to rectify the breach and that breach is not rectified within the Notice Period. The termination of this Agreement shall not affect the rights of the aggrieved party in seeking damages in relation to the Agreement being terminated.

13. Southern Mineral Group, and its affiliates agree not to use the name CV Investments in any public media without Purchasers written permission unless required by law, BBCH

Seller and Purchaser have executed this Agreement effective as of the 7 day of April, 2017.
CH HO

Southern Minerals Group, LLC

By: Clovis Hooper

Clovis Hooper,
President
Southern Minerals Group LLC

CV Investments LLC

By: Brenda Smith

Brenda Smith,
Managing Member
CV Investments LLC

From: 6098@zianet.com,
To: rbutler691@aol.com, bsmith@bristoladv.com,
Subject: LOC
Date: Thu, Mar 30, 2017 1:23 pm

---

Hello Richard,

I hope this finds you well.

I wanted to touch base. According to the contract the LOC was to be in place 7 days after signing the contract.

As a publicly listed company, if we don't receive it soon, we will have to announce this fact and terminate the contract.

Please advise. I am currently out at the mine and can't receive calls but will be back in cell range at about 6:30 this evening.

Regards,
Clovis

From: 6098@zianet.com,
To: rbutler691@aol.com,
Cc: bsmith@bristoladv.com, 6098@zianet.com,
Subject: Galvin contract
Date: Fri, Mar 31, 2017 5:47 am

---

Good morning Richard,

As per the email and the phone conversations late yesterday I look forward to seeing the LOC today. I understand you have everything in place.

Please understand, if this is not in place today we reserve the right to terminate the contract solely at our discretion.

Regards,
Clovis

**From:** rbutler691@aol.com,
**To:** michael.strachan2@gmail.com, rbutler691@aol.com,
**Subject:** Fwd: Galvin contract
**Date:** Fri, Mar 31, 2017 10:21 am

---

Mike you can see she circumventing & pushing hard to steal this deal ..Please don't let her and post the LOC today ..Please call and text me when done at the bank.. Thanks

Best ,
Richard C. Galvin
PH # 303-257-3077 / 303-740-8318
LEGAL NOTICE:
——Original Message——
From: Clovis Hooper <6098@zianet.com>
To: Richard Galvin <rbutler691@aol.com>
Cc: Brenda Smith <bsmith@bristoladv.com>; Clovis Hooper <6098@zianet.com>
Sent: Fri, Mar 31, 2017 5:47 am
Subject: Galvin contract

Good morning Richard,

As per the email and the phone conversations late yesterday I look forward to seeing the LOC today. I understand you have everything in place.

Please understand, if this is not in place today we reserve the right to terminate the contract solely at our discretion.

Regards,
Clovis

From: 6098@zianet.com,
To: rbutler691@aol.com,
Cc: jdlegal@earthlink.net,
Subject: Re: From Credit Susale bankers today
Date: Mon, Apr 3, 2017 7:15 pm

---

Richard,

I received your note. My managing director is currently on "holidays " and has given close of business on Thursday to be the absolute deadline.

Regards,
Clovis

On Apr 3, 2017, at 8:56 AM, Richard C Galvin <rbutler691@aol.com> wrote:

> Hi Clovis just in from my bankers ....Where getting it done this morning all signature at the bank ,so lets talk when you can today
>
> [4/2/2017 5:45:19 PM] Anthony: Hey Rich fund letter is being signed should have LOC in the AM
> [8:06:28 AM] Anthony: Hey Rich
> [8:06:36 AM] Anthony: At the bank now getting LOC finalized
> [8:06:43 AM] Anthony: Fund letter is getting last signature now
> [8:06:58 AM] Anthony: Will revert to you when in hand and will call when done here at the bank
>
> Best ,
> Richard C. Galvin
> PH # 303-257-3077 / 303-740-8318
> LEGAL NOTICE: This communication including any attached files or pages is an unofficial response to a prior request for private, legally privileged confidential information for educational purposes only. Disclosure, reproduction, transmission or use of this communication for any other purpose is prohibited. If you are not the intended recipient, please be aware that interception of e-mail is a crime under the Electronic Communications Privacy Act, 18 U.S.C. 2510-2521 and 2701-2709. If you have received this communication in error, please immediately notify the sender by e-mail, fax and/or telephone and destroy this communication without reading or saving any of it in any manner. This communication contains trade secrets as defined by H.R. 3723 signed by the President of the USA on October 11,1996 and is not to be redistributed without specific authorization. The content of this communication is believed to be accurate and reliable but is subject to change without notice. Information VOID where prohibited by law. This communication is not intended to be, and must not be construed to be any form of solicitation of investment funds, securities offering, or a request to engage in any transaction involving the purchase or sale of registered securities. Nothing in this communication should be interpreted as a digital or electronic signature that can be used to authenticate a contract or other legal document. No statement herein should be construed in any way as advice or commitment. The author is not a licensed broker/dealer, registered financial advisor, attorney or accountant, and recommends that any party intending to participate in any financial transaction seek competent independent review and professional counsel prior to engaging in any such activity.
> click on my disclaimer http://www.ftc.gov/privacy/glbact/glbsub1.htm

From: 6099@zianet.com,
To: rbutler691@aol.com,
Subject: Notice of Termination
Date: Fri, Apr 7, 2017 4:34 pm

---

Richard,

As requested, I had a chance to speak with my Managing Director and the Notice of Termination is final. As to the public notice, we will put out the notification as required for a publicly listed company.

Regards,
Clovis

NOTICE OF TERMINATION OF CONTRACT

On 10 March, you, on behalf of Galvin Investment Company ("Galvin"), signed a contract with Southern Minerals Group ("SMG") for the purchase of 350,000 tons of magnetite. Galvin's failure to provide a Letter of Credit within 7 days of the signing of the contract, as required under Clause 5 of the contract, has provided SMG the right to terminate this contract without recourse and SMG hereby notifies Galvin that it is terminating this contract effective from receipt of this email. A copy of this email will also be sent by ordinary mail to Galvin's nominated address of 4645 East Lake Avenue, Centennial, CO 80121.

It is noted that Galvin has been previously notified of this breach of the contract and has been provided Galvin ample time to rectify this breach. Galvin has failed to do rectify the breach and, accordingly, SMG exercises its right to terminate the contract without recourse.
Regards

Clovis Hooper
President
Southern Minerals Group, LLC

7 April 2017

Regards,
Clovis

# Exhibit B

**Stuart J. Wells** | Counsel

7 Times Square, Suite 2900 | New York, NY 10036-6524
Direct 212.631.1255 | Fax 212.631.4434
wellss@whiteandwilliams.com | whiteandwilliams.com

June 17, 2022

**VIA EMAIL**

Andrew S. Gallinaro, Esq.
Conrad O'Brien
Centre Square West Tower
1500 Market Street, Suite 3900
Philadelphia, PA 19102-2100

RE: *SEC v. Smith, et. al.*, Civ. No. 2:19-cv-17213-MCA (D.N.J.) (the "Smith Action")

Dear Andrew:

We are the attorneys for Richard C. Galvin, Galvin Investment Company, LLC, Galvin Investments, LLC, Galvin Investment Group, Galvin Metals Company, LLC, Gilman Metals Company, LLC and RCG Coastal LLC (collectively, "GIC"). We write in response to your letter dated May 25, 2022 (the "Claims Letter") wherein you advised that you will recommend that the Court deny GIC's claims (the "Claims") for damages of not less than $50 million.

GIC disagrees with your position and objects to your attempt to adjudicate the Claims as part of a summary claims process rather than litigate them as counterclaims (the "Counterclaims") in the pending matter entitled *Kent v. Galvin, et. al.*, No. 2:21-cv-13105 (D.N.J.) (the "Galvin Action"). Resolution of the Claims and the identical Counterclaims requires witness and expert testimony and documentary evidence that can only be obtained through the discovery process. The claims procedure order (Smith Action, ECF No. 168) does not provide for discovery or any means by which the parties can obtain the information necessary to resolve the parties' factual disputes, many of which are highlighted in the Claims Letter.

**1. The Claims and Counterclaims are not barred by the Statute of Limitations.**

For the reasons set forth in GIC's Opposition to the Receiver's Motion to Dismiss (Galvin Action, ECF No 29, the "Opposition"), the Claims and Counterclaims are not barred by the statute of limitations. Contrary to your assertions, the applicable statute of limitations is New Mexico's four-year statute of limitation, N. M. Stat. Ann. § 37-1-4. That statute was tolled by operation of the Receivership Order (Smith Action, ECF No. 22) and N.M. Stat. Ann. § 37-1-12. At the very least, as set forth in the Opposition, facts exist that refute your conclusory assertions that the shorter limitations period of Colorado and/or Pennsylvania apply to the Claims and

Counterclaims. (*See* Opposition, pp. 32-33), and these questions of fact must be resolved before any determination with regard to the statute of limitations. Thus, as further set forth in the Opposition. resolution of these factual issues is not appropriate through the summary claims process.

**2. GIC is not seeking to hold Brenda Smith personally liable.**

While Mr. Kent may not have been appointed as Receiver for Ms. Smith in personal capacity, he has been appointed as the Receiver over all of Ms. Smith's assets (Receivership Order, ¶ 2), making the Receiver the appropriate party for resolution and recovery asserted against Mrs. Smith. Regardless, the Claims and Counterclaims are not asserted directly against Ms. Smith, but rather, they are asserted against Receivership Entities, most notably, CV Investments LLC ("CV Investments").

The Receiver's reliance upon allegations in *Galvin Investment Company, LLC v. Smith*, No. 1:19-cv-00796 (D.Colo) (the "Colorado Action") is misplaced. As I am sure that you know, the Colorado Action was dismissed for lack of personal jurisdiction. Had dismissal been denied, nothing would have prevented GIC from amending its pleadings to add CV Investments or any other Receivership Entity as a defendant and nothing in the Colorado court's decision prevents GIC from asserting its claims here. The decision to bring claims against Ms. Smith, one culpable party, does not prevent the assertion of claims against other culpable parties. As alleged in the Counterclaims, Ms. Smith was acting on behalf of CV Investments and CV Investments was the party that tortiously interfered with GIC's business relationship with Southern Minerals Group ("SMG") by failing to fund the letter of credit required by GIC's contract with SMG (the "SMG Contract") and then immediately entering into its own contract with SMG, just one day after the SMG and GIC contract expired. (*See* CV Investments Contract, attached hereto as Exhibit 1). Your self-serving characterization of CV Investment as a nominal party is not supported by the allegations in the Claims, the Counterclaims or the documentary evidence. At the very least, determining CV Investments' responsibility for the harm caused requires findings of fact making such determination inappropriate as part of the claims process or on a motion to dismiss.

**3. GIC's claims are not highly speculative and unsupported.**

The assertion that GIC's claims are highly speculative and unsupported is once again a bald assertion of fact that is inappropriate for determination in a summary proceeding. Further, it is simply wrong. Ample evidence exists to establish GIC's damages, and we maintain that discovery will only bolster GIC's position.

**a. The mineral extract is valuable.**

The value of the ore extract is established by a report from an expert retained by the Receivership Entities. In August 2016, CV Brokerage, Inc. ("CV Brokerage") retained Richard Mittasch of MSH to audit the process by which GIC would extract the precious metals from a sample of ore taken from the mine in Silver City, New Mexico and to conduct a Value

Determination and Refining Assessment of the ore. (*See* Initial Assessment Report (the "MSH Report"), attached hereto as Exhibit 2). After processing the ore through a plasma unit at a facility in Fort Worth, Texas (the "Texas Facility"), and testing the extracted `product, Mr. Mittasch valued the ore at $351,233.75 per ton. *Id.* at p.1. Less estimated production costs of $35,000-$40,000 per ton, the MSH Report establishes that GIC's ore had a net value of more than $300,000 per ton. *Id.* at p. 2. As part of the audit process, CV Brokerage performed a detailed analysis of the processing costs at the Texas Facility, and consistent with the MSH Report, determined that it would cost approximately $42,000 per ton to process the ore. (*See* Excel Spreadsheet (the "CV Audit") attached hereto as Exhibit 3). At $300,000 per ton, the MSH Report and CV Brokerage's own analysis support the conclusion that had CV Investments not interfered with the opportunity, GIC could have earned well more than $55 million. GIC believes that Mr. Mittasch's testimony, as well as that of other experts in the field, will only further support what is evident from the documents. Defendants should not be deprived of the opportunity to obtain and present such evidence.

**b. The operating facilities.**

The valuable minerals were to be extracted using plasma arc technology. On or about December 12, 2016, GIC entered into a Tolling and Post Processing Agreement (the "PED Agreement") with Plasma Energy Design, LLC ("Plasma Energy"), a company founded by two engineers, Jonathan Reed and Dr. Mark Shuey, each with expertise in plasma technology. Pursuant to the PED Agreement, Plasma Energy agreed to process GIC's ore through its existing thermal plasma system located at the Texas Facility. (*See* PED Agreement, attached hereto as Exhibit 4). On behalf of the Receivership Entities, Mr. Mittasch inspected the Texas Facility in August 2016 and it was fully operational as indicated in the MSH Report. Attached hereto as Exhibits 5 and 6 are pictures of the Texas Facility which Mr. Galvin advises were taken in or about August 2016 and a video of the plasma system in operation during the same time period. According to the specifications for the system, the Texas Facility could process 17.5 tons per month. (*See* CV Audit, Exhibit 3). Hence, far from being unproven, the technology existed and was in place to process the ore under the SMG Contract. Again, at the very least, questions of fact exist with regard to the viability of the technology.

**c. The availability of funds to perform.**

Contrary to your bald assertions, had CV Investments funded the letter of credit, GIC would have had more than sufficient funds to perform under the SMG Contract. As even the Claims Letter acknowledges, at the time of the SMG Contract, GIC was in the process of obtaining funding from other sources. GIC had retained the services of an investment banker, Michael Strachan from Cornerstone Private Capital Group ("Cornerstone"). In May 2016, Mr. Strachan reported that he was negotiating with "4 Family Offices/Funds" to obtain capital secured by barrels of ore stored by GIC with an estimated value of almost $1 billion. (*See* Letter dated May 5, 2016 Letter (the "May 5 Letter), attached hereto as Exhibit 7). The May 5 Letter goes on to state that the Funds/Family Offices will form a special purpose vehicle to complete the transaction. *Id.*

By letter dated March 25, 2017 (the "March 25 Letter", attached hereto as Exhibit 8), Mr. Strachan advised that additional funds were necessary to cover attorney fees, regulatory filings and analytic work which would take approximately 3-5 weeks to close. *Id.* GIC sent its required share of these additional funds. After obtaining an extension until April 6, 2017 for CV Investments to post the letter of credit required by the SMG Contract with GIC, the Private Funds Corporation (Cayman) Ltd. wrote to GIC on April 3, 2017 and advised that it was the special purpose vehicle formed by the four family offices for the "sole purpose" of jointly investing in projects with GIC, including the SMG Contract, and further, that it was completing the final processes to begin funding GIC, just as Mr. Strachan had stated in the March 25 Letter. (*See* April 3, 2017 Letter, attached hereto as Exhibit 9).

After GIC reported to Mr. Strachan that the letter of credit had not been provided by CV Investments, it having instead usurped GIC's business opportunity with SMG just one day after the SMG contract expired, the funding arranged by Cornerstone simply cratered, thereby preventing GIC from otherwise taking advantage of its relationship with SMG or purchasing magnetite after the Receivership Entities had defaulted under the CV Investment Contract.

Once again, this history refutes the conclusory assertions made by the Receiver and illustrates again that at the very least, the Receiver's position raises issues of fact that need to be resolved, rendering this Claim inappropriate for summary disposition.

**4. The Receivership Entities received a benefit.**

Your categorical assertion that the Receivership Entities failed to realize upon the business opportunity stolen by CV Investments is self-serving and, even if material, does nothing more than further demonstrate questions of fact exist that preclude resolution of the Claims and Counterclaims in a summary proceeding. The fundamental assertion here is that CV Investments stole a key opportunity from GIC, with the potential for a substantial return. That CV Investments and Mrs. Smith may have mismanaged the opportunity with SMG has no bearing on whether the Receivership Entities received a benefit from their conduct. They clearly did, even if they failed to realize the full potential of that benefit. It likewise has no bearing on whether GIC has been harmed by their conduct. The ore subject to the SMG Contract had substantial value which, as demonstrated herein, GIC had been in position to realize upon. CV Investments plainly saw a benefit because it proceeded to purchase more than 38,000 tons. The conduct alleged in the Counterclaims prevented GIC from seizing upon that opportunity and the measure of its damages is amply supported by the documents submitted herein and by the anticipated testimony and further documentary evidence that will be revealed by the discovery to be conducted in the Galvin Action.

Similarly, the Receiver's efforts to analogize GIC to an investor seeking to recover profits is misplaced. GIC has been harmed by the Receivership Entities' conducting of business in the ordinary course, and it is entitled to recover damages against those entities for their conduct. It is not seeking to profit from Mrs. Smith's fraudulent conduct vis-a-via other investors as implied by the Receiver's analogy.

**5. The Claims and Counterclaims do not otherwise fail as a matter of law.**

For the reasons set forth in the Opposition, GIC's allegations in the Counterclaims amply support the relief it seeks. We see no need to further respond to your sweeping conclusion that the Counterclaims are "legally deficient" and we refer you to the Opposition for a complete recitation of the facts and law supporting our position.

Regards,
WHITE AND WILLIAMS LLP

Stuart J. Wells

29046983v.1

# Exhibit 1

**Magnetite Concentrates**
**Purchase and Sale Agreement**

Southern Minerals Group, LLC of P. O. Box 535 Silver City, NM 88062 as "**Seller,**" and CV Investments LLC 200 Four Falls Corp. Ctr. Suite 211, Conshohocken, PA 19428 and affiliates as "**Purchaser,**" agree as follows:

1. Seller has the exclusive right to access approximately 800,000 tons of magnetite concentrates (this is an estimate of the size and should not be relied upon as a definition of resource), a treated by-product of copper mining and milling operations conducted at the Mine site formerly operated by Freeport-McMoRan located in Grant County, New Mexico, and has in place contracts or purchase orders to sell approximately one-half of that inventory to other purchasers. The Seller will ensure that it does not undertake any activities that impact on the Purchases rights to the magnetite concentrates. Should, for any reason, the Sellers right to access this material be terminated, then on the day that access is terminated this Agreement will terminate, without further recourse to Purchaser and Seller other than amounts already outstanding or breaches of Agreement occurring up to that date.

2. Seller hereby agrees to sell to Purchaser and Purchaser hereby agrees to purchase from Seller up to of 400,000 tons of such magnetite concentrates for the price of $80.00 per ton. These prices include Seller loading the concentrates into Purchasers' trucks with Seller's equipment and equipment operators, and Seller shall bear all costs associated with such loading operations. The Purchaser undertakes to purchase a minimum of 4,000 tons per month from ~~commencement of this Agreement~~ June 1, 2017. PBS CH

3. Purchaser shall provide the trucks and truck operators to haul the concentrates and shall bear all costs associated with such hauling operations. The Purchaser shall ensure that representatives of the Purchaser (including truck drivers) shall conduct its activities in a good and professional manner and in accordance with the reasonable directions (if any) given to it by the Seller from time to time.

4. Seller shall maintain accurate certified weighing facilities and will weigh the Purchaser's trucks on entrance and exit, unloaded and loaded, and provide the net weights of each load to Purchaser as each loaded truck exits the site, and provide appropriate Material Safety Data Sheets. The Seller shall not be liable for loss or damage suffered or incurred by the Purchaser due to any failure or interruption of equipment due to the need for repair or alteration or breakdown but, the Seller will assist the Purchaser in minimizing any losses that the Purchaser may incur.

5. Purchaser shall:

(i) provide a deposit of $10,000 to the Southern Minerals Group, LLC bank account within one business day of signing of this Agreement, as advised. PBS CH

(ii) Prior to commencement of this Agreement, but not greater than seven days from signing of this Agreement, the Purchaser shall provide the Seller with a standby letter of credit in the amount of $250,000.00 issued by a major US banking institution authorizing the seller to draw against it in the event Purchaser fails to timely pay any invoice in full or provide, in solicitor's trust, a deposit of $250,000 with instructions that this is to be released to SMG on the provision by SMG that there has been a default on payment under the Agreement. This notification is to be given at SMG's sole discretion and the solicitor has to be irrevocably instructed to act on any such notice.

(iii) make payment for all concentrates purchased on a monthly basis within ten days after being presented with an invoice from Seller.

6. Purchaser acknowledges and is aware that local governmental regulations limit the total tonnage of concentrates that may be removed from the mine site to 11,000 tons per month, and that Seller's other existing commitments presently utilize up to approximately one-half of that amount, leaving only approximately 5,500 tons per month now available to Purchaser. Seller agrees to inform Purchaser if and when other purchasers fail to purchase their entire committed amount so as to allow Purchaser the opportunity to acquire a larger amount in any particular month.

7. Seller warrants and covenants to and with Purchaser that it can provide good and marketable title to the subject concentrates, that they are by-products of lawful mining operations, have been properly severed from the realty from which they came, are free and clear of any liens or claims of any kind or nature, and will be free and clear of any liens or claims of any kind or nature when conveyed to Purchaser.

8.1 If a Force Majeure Event affecting a Party precludes that party ("Precluded Party") partially or wholly from complying with its Obligations (except its payment obligations) under this Agreement then:

(a) as soon as reasonably practicable after that Force Majeure Event arises, the Precluded Party must notify the other Party of

(i) the Force Majeure Event;

(ii) which obligations the Precluded Party is precluded from performing ("Affected Obligations");

(iii) the extent to which the Force Majeure Event or its consequences preclude the Precluded Party from performing the Affected Obligations ("Precluded Extent"); and

(iv) the expected duration of the delay arising directly out of the Force Majeure Event or in consequence of it;

(b) the Affected Obligations will, to the Precluded Extent, be suspended for the duration of the actual delay arising directly out of the Force Majeure Event ("Actual Delay"); and

(c) the other Party's Obligations which are dependent on the Affected Obligations will be suspended until the Precluded Party resumes performance.

8.2 The Precluded Party must, as soon as reasonably practicable after cessation of a Force Majeure Event, resume performance of the Affected Obligations and must use reasonable

endeavours to overcome the event or to settle any industrial dispute against its wishes. "reasonable endeavours" does not require a Party to pay money in an attempt to overcome the

9. To prevent possible confusion Seller and Purchaser agree that this Agreement is to be applied in accordance with the laws of the State of New Mexico other than its conflicts of laws principles.

10. Parties agree that any dispute or controversy arising out of or relating to this agreement or the interpretation thereof, shall be settled by arbitration, held in a mutually acceptable location to the parties, in accordance with the rules, then in effect, of the American Arbitration Association.

11. Either Party may assign this agreement, upon written notice, provided such assignment is to a commonly controlled affiliate.

12. Either Party may terminate this Agreement on a serious breach of Agreement after giving 30 days notice ("Notice Period") to the other Party to rectify the breach and that breach is not rectified within the Notice Period. The termination of this Agreement shall not affect the rights of the aggrieved party in seeking damages in relation to the Agreement being terminated.

13. Southern Mineral Group, and its affiliates agree not to use the name CV Investments in any public media without Purchasers written permission unless required by law, HB CH

Seller and Purchaser have executed this Agreement effective as of the 7 day of April, 2017.
CH HB

Southern Minerals Group, LLC

By: Clovis Hooper

Clovis Hooper,
President
Southern Minerals Group LLC

CV Investments LLC

By: Brenda Smith

Brenda Smith,
Managing Member
CV Investments LLC

# Exhibit 2

# INITIAL ASSESSMENT REPORT

Brenda Smith
CV Brokerage Inc.
200 Four Falls Suite 211
1001 Conshohcken State Rd
West Conshohcken, PA 1 9428

Dear Ms. Smith

As instructed, I met with Mr. Galvin in Denver. I took possession of two buckets of his ore from his warehouse; approximately 75 pounds. Later that night, I began testing material on the Xcalibur XRF to build a profile of material. I then shipped the two buckets to a pilot plasma plant in Fort Worth Texas named Nu Way Solutions LLC. There the ore was thermally processed and subsequently tested to determine the post processing value of the material. While I was at the facility we discussed a processing agreement with the owners of the facility and Dr. Mark Shuey who has considerable experience processing and selling the metal from the Galvin ore. The results are as follows:

## GALVIN ORE TEST RESULTS

The buckets that I sent from Denver to Fort Worth Texas arrived and were unbroken and fully sealed. I removed the 10 pound quantity of the material and with the help of the staff at the Nu Way facility, we loaded it into their plasma processor. The facility has categorized the Galvin ore as ore number 37, they've also categorized the current run of their equipment as run 70 all subsequent tests will be labeled as 70.1, 70.2 etc. The results are as follows:

**Table 1. Average or value calculation (Ore 37)**

| Valued Metal | Troy Ounces per ton | Value per ton* |
|---|---|---|
| Gold | 58.33 | $77,971.25 |
| Platinum | 160.42 | $185,762.50 |
| Iridium | 175.0 | $87,500.00 |
| | | |
| | Total value per ton | $351,233.75 |

***Metal prices were as of August 5, 2016**

The material was loaded in and fed by Auger into the 35kva pilot plasma unit. The ore went through the unit only once. Silica was added to help the operation of the unit in addition to different value inert fluxes to aid in liberating the precious metals. Operation of the unit and the flux formulas were provided by Dr. Mark Shuey.

**REFINING ASSESSMENT**

After the testing was completed we had discussions with the facility owner regarding renting out the facility for processing Galvin's ore. They are very interested in moving forward with a processing agreement for the ore. Besides the plasma processing unit, the Nu Way plant also has a significant wet chemistry and hydro-metallurgical equipment which can be used for post processing the material into a product that can be brought to a refiner. The technology and staff training will be provided by Plasma Energy Design LLC (PEDL) represented by Dr. Mark Shuey. The facility that we are renting would be owned by Nu Way Solutions LLC. Based on the conversations with the facility owner and with PEDL, I feel confident that a continuous production of 1 ton a day can be processed at this facility. We also reviewed a number of refining techniques. An early estimate total cost of processing a ton of material is $35-$40,000 per ton. This would include post processing chemical costs, incourting with either copper or nickel, and preparing the material for shipping to a refiner or a storage facility.

**CONCLUSION**

Based on the value revealed in the material and the processing cost of the material it is my conclusion that processing Galvin's ore (Ore 37) is a profitable venture. Additional information is needed from whatever refiner we choose to ship the ore to. We will need to determine what their testing procedures are so that we can assure quality of the material. In addition, the refiner needs to provide us the form they would prefer the material in; whether we incourt with copper, nickel or leave it as an iron concentrate. We would also need to determine if they're looking for it in bar form, or as a powder to be put into super sacks. Once it is up and running in the Nu Way Solutions LLC facility I believe that the ore can be optimized to bring out the highest value, and the extraction methods can be simplified increasing profitability in the long-term.

# Exhibit 3

ATTACHMENT "A" BUDGET

# TEXAS OPERATION BUDGET AND FINANCIALS

Note: Cells in **blue** are formulas. PLEASE DO NOT CHANGE.

## Time Constants

| | | | | |
|---|---|---|---|---|
| Min / Hr | | 60 | minutes | Please do not change **blue** cells - contain formulas |
| Hrs / Day | | 24 | hours | |
| Calendar days / mo | | 30 | days | |

## Precious Metals Data

| | | | | |
|---|---|---|---|---|
| 1 short ton | = | 2000 | lbs | Please do not change **blue** cells - contain formulas |
| 1 lb | = | 14.58322 | OzT | |
| 1 short ton | = | 29,166.67 | Troy Oz | |
| Refiner Charge | | 10% | Refiner share + broker / buyer fees. | |
| PM value / ton | | $360,000.00 | per ton (Audit for Brend Smith ) | |
| Ore Cost | | $150 | per ton of ore. | |

## Production Variables

| | | | |
|---|---|---|---|
| Work Days / Week | 5 | days | Please do not change **blue** cells - contain formulas |
| Number of shifts | 3 | shift(s) | |
| Hrs / Shift | 8 | hours | |
| Work Days / Month | 22 | days | |
| Uptime | 85% | percent of shift that machine is producing metal | |
| Production Hours / Day | **20.4** | | |
| Production Hours / Mo | **448.8** | | |
| Production Hours / ton of Plasma Product | **28.57** | | |
| Reduction of ore | 10% | of ore weight is eliminated in transition to plasma product | |
| Plasma Product output / hr | **70** | lbs / hr | |
| plasma Product output / month | **15.7** | tons | |
| Ore consumption / month | **17.5** | tons | |
| Secure outbound logistics / ton | $300 | [ROUGH ESTIMATE] per ton of plasma Product delivered from plant to refiner | |

## Consumables Variables

Please do not change **blue** cells - contain formulas

| | | |
|---|---|---|
| Number of torches in production | 1 | |

### NaOH

| | | | |
|---|---|---|---|
| NaOH Concentration | | 50.0 | % Solution |
| NaOH Cost per gallon | $ | 2.600 | $ / gallon |
| NaOH total for one month | | **5.0** | Gallons used |
| NaOH costs per month | | $13 | estimate |

### Crucible

| | | |
|---|---|---|
| Crucible cost each | 280 | cost per crucible |
| Crucible used per day | 2 | Machine Graphite |
| Crucibles used per month | **132** | Crucible used |
| Crucible cost per month | $36,960 | estimate |

ATTACHMENT "A" BUDGET

**Ellectricity**

| | | | |
|---|---|---|---|
| Electricity consumption (torches) | 100 | kWh per torch plus Induction | |
| Electricty consumption (support) | 25 | kWh | Estimate (Cooling water circuit, controls, gas delivery circuit) |
| Electricity use for entire plant | **125.0** | kWh | |
| Electricity Cost | $0.60 | $ /kWh | |
| Electricity Cost for plant | $75.00 | $ / hr | |
| Electricuty costs per month | $ 39,600 | | |

## Direct Labor

| | | | |
|---|---|---|---|
| Average hourly rate | $ 25.00 | | |
| Direct labor per shift | **3** | people | laborers, torch tech, feed tech, offgas tech, maintenance |
| Payroll Taxes | 6.75% | SSDI, Medicare | |
| Unemployement Insurance | 5.00% | of payroll estimate | |
| Worker's Comp. Insurance | 5.70% | of payroll | |
| Profit sharing | 15.00% | of payroll | |
| Retirement Contribution | 4.50% | of payroll | |
| Overtime rate | 10% | | |
| Overtime premium | 1.5 | | |
| Group Insurance | $ 2,500 | per mo. Health, dental, disability, life | |
| Straight time hours / mo -worker | 1,584 | hours | |
| Overtime hrs / mo -worker | 158 | hours | |
| | | | |
| Total Wages / mo -worker | $ 45,540 | | |
| Total Benefits / mo -worker | $ 19,327 | | |

## Management Labor

| | | | |
|---|---|---|---|
| Supervisors per shift | **1** | | |
| Average hourly rate | $ 40.00 | | |
| Payroll Taxes | 6.75% | SSDI, Medicare | |
| Unemployement Insurance | 5.00% | of payroll | estimate |
| Worker's Comp. Insurance | 5.70% | of payroll | |
| Profit sharing | 20.00% | of payroll | |
| Retirement Contribution | 4.50% | of payroll | |
| Overtime rate | 10% | | |
| Overtime premium | 1.5 | | |
| Group Insurance | $ 2,500 | per mo. Health, dental, disability, life | |
| Straight time hours / mo -worker | 528 | hours | |
| Overtime hrs / mo -worker | 53 | hours | |
| | | | |
| Total Wages / mo-supervisor | $ 24,288 | | |
| Total Benefits / mo-supervisor | $ 12,689 | | |

| | | |
|---|---|---|
| TEXAS LABOR ONLY | $ 101,843.85 | |
| TEXAS EXPENSES PER MONTH | $ 178,416.85 | (AT $42,000 A TON X 5.2 TONS = $ 218,400.00 ) |

ATTACHMENT "A" BUDGET

| | | | | |
|---|---|---|---|---|
| ARCH ENETERPRISES REFINING 10%FEE | $ 628,320.00 | | | |
| VALUE FOR ONE TON | $ 360,000.00 | | | |
| GROSS INCOME PER MONTH | $ 6,283,200.00 | | | |
| PROFIT PER MONTH | $ 5,476,463.15 | $ | 5,436,480 | (IF PROCESSING CHARGE IS $218,400) |

# Exhibit 4

# TOLLING AND POST PROCESSING AGREEMENT

This Tolling and Post Processing Agreement ("Agreement") is made on or about this 12 day of December 2016, by Plasma Energy Design LLC, a Virginia limited liability company with an office at 1859 Thomas-Kelley Road, Sanford, NC 27330 ("PED"), and Galvin Investment Company, LLC, located at 4645 East Lake Avenue, Centennial, CO 80121, a Colorado limited liability company ("GIC"):

## BACKGROUND

Richard C. Galvin of GIC has reported to PED that it has substantial ore ("Ore" or "ore") concentrates known as # 37 Ore that contain substantial precious metals. PED has the ability to process this ore ("Ore product", "ore composition", "blend") through thermal plasma in order for the product of plasma to be put in a form and sold to a precious metal refiner such as Arch Enterprises LLC having offices in Mexico, Missouri.

GIC desires that PED toll process this ore through plasma to a form where precious metals can be extracted therefrom in a post processing procedure at a location of PED's choice, and PED is willing to do so in accordance with the Terms and Provisions set forth below:

## TERMS AND PROVISIONS

1. The fee to process the # 37 Ore is $40,000 per US Ton (2000 lbs) fed. The amount paid per ton processed shall be re-evaluated after the second month in order to seek reduction by up to 50% of the paid value per ton.

1(a). PED will receive 10% of value of metals sold or stored plus a management fee of $50,000 per month to compensate for post processing as long as 20 tons of ore are processed during that month or mutually agreed upon quantity of ore by parties.

2. Prior to the commencement of processing, an initial payment to secure the thermal plasma system will be required at the equivalent of five (5) tons of processed ore or $200,000. There will be no additional charge for the first five (5) tons processed. All subsequent tonnage processed will be

charged $40,000 per ton and paid for upon acceptance by GIC or its representative. The acceptance method will be mutually agreed upon.

3. GIC will be responsible for shipping the ore to and from the plasma processing facility and bear all costs including copper or other collector metal if used. GIC may call upon PED to help facilitate shipping such as scheduling, loading, unloading and storing (at facility site or otherwise agreed upon location).

4. PED with GIC, will establish a quality control program that will track each Lot and barrel of ore and enable GIC to remotely observe the processing as mutually agreed upon.

5. PED agrees to toll and post process the ore product using its best know-how, technology and expertise. Upon completion of toll processing PED will invoice GIC at the rate of $40,000.00 per ton of Ore fed, which GIC agrees to promptly pay. If payment is not made within 90 calendar days the plasma processed ore product in the amount of unpaid balances reverts to PED.

7. PED will do its best effort to meet a minimum value of $200,000 per ton of Ore #37 composition, or other ore in PED's inventory, processed, in a mutually agreed upon lot size. Owing to the compositional variation of ore, the value may be greater or less than $200,000. PED will notify GIC should the value be less than $200,000.

8. The post plasma processed product from the ore will be in particulate form, and will be dried and put in mutually agreed upon containers.

9. **Confidentiality.** This Agreement does not provide a license or access to intellectual property of any kind. To the contrary, all parties agree to use their utmost efforts to protect and keep confidential any trade secrets, know how, machinery, methods, and all intellectual property of whatever kind PED may use in its processing, and shall protect and defend against any claims that it wrongfully disclosed them. GIC and its individual personnel shall agree to and sign PED's confidentiality and non-disclosure Agreements prior to commencement of work. Cameras, cell phones, computers, and recording or transcription devices of any kind shall remain outside the processing area in the building and not be used to record plant operation unless both parties agree. Likewise, this Agreement and its

terms shall be kept confidential by the parties, their principals, and their agents, except as otherwise required by its provisions or for enforcement, in as confidential a manner as possible for arguably protected information and technology. Each Party agrees that it is authorized and not prohibited from entering into this Agreement.

13. **Assurances.** An audit may be conducted by an agreed-on third-party independent accounting and law firm in order to assure confidentiality for PED and assurance for GIC that costs are as agreed. The party requesting the audit shall cover the costs of the audit itself.

14. **Independent Contractors.** PEG and GIC are independent contractors under this Agreement. No partnership, employment, joint venture or other relationship is intended nor shall be construed to be created by this Agreement.

15. Additional Provisions:

a) **Acts of God.** Neither PED nor GIC shall be liable for damages for failure to perform this Agreement, in so far as either Party may be prevented from doing so by strikes, unavoidable accidents, Acts of God, force majeure, or public enemy, or such other cause as is beyond the control of the Parties.

b) **Warranties and Projections.** PED has processed ore known as # 37 Ore and this Ore shall be processed by Team personnel on a price per ton basis. PED has processed # 37 Ore in the past and was successful in selling the metal product to a Refiner. PED has disclosed this information to GIC. PED believes this can be done again by processing the Ore in a thermal plasma system using its know-how along with PED's expertise. PED provides no guarantees regarding product of processing quality by another refiner because often what a refiner does is unknown to PED and GIC. PED further states that any projections are based on data provided to PED and GIC by independent laboratories and, may be used for planning. They cannot be predictive for these and other reasons: variables including but not limited to the value of ore, the art and science of processing, availability of inputs, refiner's work, market conditions, and other variables, of which some are unknown, will affect or determine outcomes. Past results may not indicate future results, as every case, along with its variables, including processing, is unique. The foregoing shall be the case for PED and its personnel or

associates in this and any other agreement or use. PED also states no guarantee with its own projections.

c) **Copies.** A signed electronic copy of this Agreement shall be treated as an original document and as binding and enforceable.

d) **Assignments.** Neither Party shall have the right to assign this Agreement or any right hereunder without the written consent of the other Party. Any voluntary or involuntary assignment of this Agreement by either Party without such consent shall, at the option of the other Party, exercised in writing, terminate this Agreement.

e) **Commissions.** Neither Party to this Agreement shall receive a commission for the sale or marketing of the recovered precious metals.

f) **Term.** This Agreement shall be in full force and effect in accordance with its terms, and subject to that, for a term of 6 months commencing from the date of the execution of this Agreement. The Parties may agree to renew the Agreement for an additional 6 month, and then at 1 year intervals thereafter.

g) **Recitals.** Recitals are incorporated into the Agreement by reference, and bound by consideration.

h) **Entire Agreement.** This Agreement constitutes the entire Agreement between the Parties. No amendments are permitted unless stated specifically in writing and agreed to by the respective boards. At any time and by its sole discretion, according to this agreement, PED may end this agreement by sending a breach letter to GIC to be cured in 10 days; if not cured, this agreement is terminated.

i) **No license.** This Agreement and the relation of the parties cannot and does not convey a license or ownership or right of any kind in the trade secrets, know how, or intellectual property of whatever kind , that may be disclosed by PED. License for the Furnace may be granted in accordance with a separate agreement

j) **Writings.** The notices, payments, reports and other communications between the Parties, as well as any additional agreements, shall be in writing to the Parties at the addresses stated at the head of this Agreement, or those noticed as successor addresses from time to time in writing.

k) **Binding.** The terms and conditions of this Agreement shall inure to the benefit of and shall be binding on the Parties to this Agreement and their respective successors and/or assigns, if any.

l) **Jurisdiction.** GIC has reached out to PED, a Virginia LLC, for assistance. This Agreement shall be construed in accordance with the laws of Virginia, excepting its choice of laws

provisions. Jurisdiction and venue shall be solely in the jurisdiction and venue of PED's charter state and registered agent location.

m) **Titles.** Section headings or titles are for convenience only and shall not be used in the construction or interpretation of the document.

n) **Certificates.** Certificate of analysis and MSDS of ore provided GIC shall not be withheld by one Party from the other and must be available for all personnel who work with the ores.

o) **Implementation.** Implementation of this Agreement is based upon GIC's demonstration to provide down payment for the first five (5) tons to be processed at the thermal processing facility in Fort Worth, Texas.

**IN WITNESS WHEREOF,** the Parties have executed this Agreement on the day and year first above written.

**Plasma Energy Design LLC**

**By:** _____
Jonathan Reed, COO

**Galvin Investment Company, LLC**

**By:** _____
Richard C. Galvin, CEO

# Exhibit 5


HYPERTHERM

# Exhibit 7

CORNERSTONE
PRIVATE CAPITAL GROUP

**PRIVATE & CONFIDENTAL B. SMITH ONLY**

**PRIVATE AND CONFIDENTIAL CV BROKERAGE ONLY**

**Brenda Smith**
**Chief Executive Officer**
**CV Brokerage Inc.**

**May 5, 2016**

**RE: Galvin Investments Line of Credit**

Good Day Brenda,

As promised we are writing this letter to provide you with a summary synopsis regarding the ongoing credit line negotiations for Richard Galvin and his related companies.

We have been in negotiation with 4 Family Offices/Funds in providng the capital needed. Currently the barrels have a decreased value of $975 Million Dollars at current average levels. Based in this below is the broad strokes if the deal:

Galvin Barrels held as partial collateral -$975 Million Dollars
Cash Security in form of bond held at back valuing $225 Million
Total Collateral $1.2 Billion USD

Funds/Family Offices providing funds for credit line

CRF Family Office (Brazil) $1 Billion Dollars
Vanguard Family Trust (Cayman Islands) : $1 Billion Dollars
Roush Rothstein Funds (Monaco): $1.3 Billion Dollars
TPPG Private Family Trust (Channel Islands) 1.25 Billion Dollars

Highlights of Agreement

The above family offices will form a joint ICON vehicle to be administered in the Bahamas for the sole purpose of the fund.

Fund administrators will manage all outflows generated by the credit line.

Credit line is for an intital period of 3 years revolving with an interest rate of 4.75%

First payments due 30 days after initial drawdon

Galvin will be responsible for the management fees associated with fund accountants and analysts to be employed by fund administrators and managers.

All projects must be approved by board appointed by the ICON fund owners

All fund managers must sign off on closing and drawdown cycle dates

Fund accounting committee to meet every 30 days to monitor performance of the credit line.

1 Bay Street, Nassau, The Bahamas
Centre of Commerce
1 (242) 455-7004
info@cornerstonepcg.com

CORNERSTONE
PRIVATE CAPITAL GROUP

**PRIVATE & CONFIDENTAL B. SMITH ONLY**

Any indication of default risk can result in funds immediate seizure of collateral and outstanding projects where borrowed funds were used to finance.

All assets purchased using borrowed money must be declared and approved before purchase is conducted.

Credit Suisse is the bank facilitator of this deal meaning they are only acting as the bank that will house the joint funds and conduct banking transactions per the funds instructions.

Upon closing we have already approved a drawdown of $125 Million Dollars a portion of which to be set aside and managed by CV Brokerage.

I hope this helps.

Best Regards

Michael A. Strachan
Managing Director
Cornerstone Private Capital Group

1 Bay Street, Nassau, The Bahamas
Centre of Commerce
1 (242) 455-7004
info@cornerstonepcg.com

# Exhibit 8

March 25, 2017

Richard C. Galvin
Galvin Investment Co. Ltd
ATTN: Richard Galvin

Dear Richard,

Please be advised that this agreement is between Galvin Investment Co. & Cornerstone Advisors a division of The Cornerstone Group.

The funds required for the completion of the present financing exercise in the amount of $70,000 are being sent and appropriated by Richard Galvin only and not the responsibility of The Cornerstone Group, are to be used for the sole purpose of completion regulatory filings, legal fees and analytical work associated with the completion of financing in progress for Galvin Investments involving a consortium of Funds and Family Offices to fund expansion and new projects.

We anticipate once this process is started there will be 3-5 weeks until closing of the financing. The costs associated with this have been calculated at $300,000 of which Galvin is responsible for $70,000.

Any financial borrowings related to the completion of work are the sole responsibility of Galvin Investments and this agreement covers only the completion of works in progress as stated previously.

Please remit a signed copy to us at info@cornerstonepcg.com for our records.

Best Regards,

Trevor Mackey
President
The Cornerstone Group

Signed:

Richard C Galvin

Richard Galvin
President
Galvin Investments

Signed:

Michael Strachan
Senior Advisor
The Cornerstone Group

# Exhibit 9

# PRIVATE FUNDS CORPORATION (CAYMAN) LTD.

April 3, 2017

Richard C. Galvin
Galvin Investments Limited
Centennial, CO, USA

RE: Confirmation of Credit Line

Dear Richard,

We are writing this letter to inform you to reaffirm our groups commitment to providing you and your co-guarantors with the negotiated credit facility valued at $3.88 Billion Dollars in United States Currency. We have been informed that the necessary processes to close this deal are being put in place and once completed and turned over to us we will begin our closing as a group which we look forward to.

***About us***

Private Funds Corporation is a Cayman Islands formed Special Purpose Vehicle founded by a group of four family offices. The sole purpose of this structure is to jointly invest in projects that our team and directors feel are viable and solid investment. Currently we have joint assets of over $33 Billion and cash balances as at December 31, 2016 totaling $9.2 Billion Dollars.

Per request of your group we will issue you a statement of assets to be viewed by you only. Your signature at the bottom will act as agreement to not share this information with any parties not approved.

We look forward to closing this transaction and wish you the best in your endeavors.

Best Regards,

Ryan Lockhart, CFA, MCSI
Managing Director
Private Funds Corporation

Acknowledged:

Richard C Galvin

Richard C. Galvin

# Exhibit C

**Weiss, Robin S.**

**From:** Brenda Smith
**Sent:** Wednesday, March 15, 2017 2:11 PM
**To:** D'Abruzzo, Joan E
**Cc:** Ketterman, Allegra
**Subject:** RE: Letter of Credit
**Attachments:** document20170315134503.pdf

The LOC relates to the attached contract and is for the purchase of magnetite concentrate. It will be for Galvin Investment Company. If you want to use the existing account, that is fine. Requested sample LOC from Southern Minerals. Brenda

---

**From:** D'Abruzzo, Joan E [mailto:joan.d'abruzzo@pnc.com]
**Sent:** Wednesday, March 15, 2017 1:30 PM
**To:** Brenda Smith <bsmith@bristoladv.com>
**Cc:** Ketterman, Allegra <allegra.ketterman@pnc.com>
**Subject:** RE: Letter of Credit

Brenda, We can begin the process but I will need to put the funds into a separate account to hold it as collateral Please send a sample letter of credit so we know what the beneficiary wants to see.
Which entity is establishing the letter of credit and what is its purpose. Is it Galvin Investment Company ?

Thank you

Joan

Joan D'abruzzo,
Senior Vice President
PNC Bank, NA
1000 Westlakes Dr. Ste 300
Berwyn, Pa. 19312
joan.d'abruzzo@pnc.com
610-407-0168

---

**From:** Brenda Smith [mailto:bsmith@bristoladv.com]
**Sent:** Wednesday, March 15, 2017 1:14 PM
**To:** D'Abruzzo, Joan E <joan.d'abruzzo@pnc.com>
**Cc:** Tomko, Patricia R <patricia.tomko@pnc.com>
**Subject:** Letter of Credit

Joan –
I need to establish a $100,000 letter of credit for the Beneficiary below. I would like to move $100,000 into the Galvin Investment Co account at PNC account number [redacted] so you can create the LOC. Does that work? As usual, time is of the essence. Let me know how to proceed. Thanks, Brenda

---

**From:** Clovis Hooper [mailto:6098@zianet.com]
**Sent:** Tuesday, March 14, 2017 10:26 PM
**To:** Brenda Smith <bsmith@bristoladv.com>

**Cc:** juliewhite.smg@gmail.com; Richard D Mittasch <Rmittasch@gcggold.com>; christianc.brock@gmail.com
**Subject:** Re: Quick Questions

Brenda,

My apologies for getting back to you so late. Please see the bank details below. I have also listed my contact details. If you need anything further, please let me know.

Clovis Hooper
Cell: 575-544-7025
Email: 6098@zianet.com

Beneficiary Name: Southern Minerals Group LLC
Address: PO Box 934
City: Silver City
State: NM
Zip: 88062
Contact Name: Clovis Hooper

Beneficiary Bank Details
ABA/RTN: [redacted]
Bank Name: Washington Federal
Address: 425 Pike Street
City: Seattle
State: Washington
Zip: 98101
Account Number: [redacted]
Account Type: Checking
SWIFT/BIC: [redacted]
Correspondent Bank SWIFT Code=Wells Fargo
SWIFT: [redacted]

Kind regards,
Clovis

On Mar 14, 2017, at 11:05 AM, Brenda Smith <bsmith@bristoladv.com> wrote:

> Clovis and /or Julie –
>
> This is Brenda Smith and I need to make the arrangement for the LOC and pick up magnetite concentrates this week. Would you please tell me bank coordinates for the $100,000 line of credit? Also, would you please send me the exact address for the site? I am on a plane so I have to use email only. My contact information is below. Thanks, Brenda
>
> Brenda Smith
> 200 Four Falls, Suite 211
> 1001 Conshohocken State Road
> West Conshohocken, PA 19428
> Office: 610.862.0880 ext 202 * Mobile: 610.310.8936 * Fax: 484-351-8093

# Exhibit D

**DECLARATION OF RICHARD M. MITTASCH**

1. My name is Richard M. Mittasch. I am of full legal age and competent to make this Declaration. I have personal knowledge of the facts set forth herein.

2. I currently work at the at the Cross and Caribou mines in Boulder County, Colorado, as the V.P of operations. They have also been known as the Calais mine. I have been familiar with that mining operation since 2011 and in 2016 I was vice-president for its operations.

3. I have known Richard Galvin since 2006 and of his interest in minerals and precious metals concentrates. In early 2016 I began discussions with him about the need of funding for the Calais mining operation. He was interested in investing into it and he introduced me by telephone to Brenda Smith who he had met earlier in 2016 and with whom he was negotiating for funding for several of his ventures. In some subsequent conversations with her she indicated some interest in the mine.

4. I met Brenda Smith face-to-face for the first time in July 2016 at a meeting hosted by Richard Galvin at a restaurant in Greenwood Village, Colorado. I had further discussions with her then about the Calais mine and my background and about Mr. Galvin's interest in precious metals and mineral projects. A day or two after that meeting Mr. Galvin brought her to the Calais mine, which is near Nederland Colorado, and I gave her a tour of it. She expressed interest to me of desiring to invest into it in some way with Mr. Galvin.

5. After that meeting she contacted me about Mr. Galvin's precious metals concentrates and asked me to collect some samples, keep track of them and send them to a facility in Fort Worth for testing and evaluation. I did do that as she instructed and met with Mr. Galvin at his warehouse in Denver, Colorado, took the samples from his ore and sent them



EXHIBIT C

to the facility in Fort Worth. I reported the results to her in my Initial Assessment Report dated August 8, 2016. A true copy of it is attached hereto.

6. After that time I continued discussions with Mr. Galvin and Ms. Smith as to the mine operation. I did not know what the agreement was between Mr. Galvin and Ms. Smith but just that they were working together in some way. She expressed interest in the Calais mine and I communicated further with her and sent her further information she requested. Attached are true copies of my emails to her of December 8, 2016, regarding financial estimates and plans (without the attachments) and of February 27, 2017, regarding the final 43-101. The 43-101 is a highly technical engineering report evaluating minerals and mines made to satisfy strict Canadian securities laws.

7. I was present at the March 2017 meeting in Silver City, New Mexico, when Mr. Galvin signed the contract to purchase the mining tailings there. Also, two of my employees, Ms. Smith and representatives of Southern Minerals were there. Before Mr. Galvin signed the contract, Ms. Smith did say words to him to the effect of go ahead and sign it Rich, I will put up the letter of credit.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 22, 2019.

Richard M. Mittasch

# INITIAL ASSESSMENT REPORT

Brenda Smith
CV Brokerage Inc.
200 Four Falls Suite 211
1001 Conshohcken State Rd
West Conshohcken, PA 1 9428

Dear Ms. Smith

As instructed, I met with Mr. Galvin in Denver. I took possession of two buckets of his ore from his warehouse; approximately 75 pounds. Later that night, I began testing material on the Xcalibur XRF to build a profile of material. I then shipped the two buckets to a pilot plasma plant in Fort Worth Texas named Nu Way Solutions LLC. There the ore was thermally processed and subsequently tested to determine the post processing value of the material. While I was at the facility we discussed a processing agreement with the owners of the facility and Dr. Mark Shuey who has considerable experience processing and selling the metal from the Galvin ore. The results are as follows:

## GALVIN ORE TEST RESULTS

The buckets that I sent from Denver to Fort Worth Texas arrived and were unbroken and fully sealed. I removed the 10 pound quantity of the material and with the help of the staff at the Nu Way facility, we loaded it into their plasma processor. The facility has categorized the Galvin ore as ore number 37, they've also categorized the current run of their equipment as run 70 all subsequent tests will be labeled as 70.1, 70.2 etc. The results are as follows:

**Table 1. Average or value calculation (Ore 37)**

| Valued Metal | Troy Ounces per ton | Value per ton* |
|---|---|---|
| Gold | 58.33 | $77,971.25 |
| Platinum | 160.42 | $185,762.50 |
| Iridium | 175.0 | $87,500.00 |
| | | |
| | Total value per ton | $351,233.75 |

***Metal prices were as of August 5, 2016**

The material was loaded in and fed by Auger into the 35kva pilot plasma unit. The ore went through the unit only once. Silica was added to help the operation of the unit in addition to different value inert fluxes to aid in liberating the precious metals. Operation of the unit and the flux formulas were provided by Dr. Mark Shuey.

## REFINING ASSESSMENT

After the testing was completed we had discussions with the facility owner regarding renting out the facility for processing Galvin's ore. They are very interested in moving forward with a processing agreement for the ore. Besides the plasma processing unit, the Nu Way plant also has a significant wet chemistry and hydro-metallurgical equipment which can be used for post processing the material into a product that can be brought to a refiner. The technology and staff training will be provided by Plasma Energy Design LLC (PEDL) represented by Dr. Mark Shuey. The facility that we are renting would be owned by Nu Way Solutions LLC. Based on the conversations with the facility owner and with PEDL, I feel confident that a continuous production of 1 ton a day can be processed at this facility. We also reviewed a number of refining techniques. An early estimate total cost of processing a ton of material is $35-$40,000 per ton. This would include post processing chemical costs, incourting with either copper or nickel, and preparing the material for shipping to a refiner or a storage facility.

## CONCLUSION

Based on the value revealed in the material and the processing cost of the material it is my conclusion that processing Galvin's ore (Ore 37) is a profitable venture. Additional information is needed from whatever refiner we choose to ship the ore to. We will need to determine what their testing procedures are so that we can assure quality of the material. In addition, the refiner needs to provide us the form they would prefer the material in; whether we incourt with copper, nickel or leave it as an iron concentrate. We would also need to determine if they're looking for it in bar form, or as a powder to be put into super sacks. Once it is up and running in the Nu Way Solutions LLC facility I believe that the ore can be optimized to bring out the highest value, and the extraction methods can be simplified increasing profitability in the long-term.

-----Original Message-----
From: Richard Mittasch <Rmittasch1@verizon.net>
To: 'Brenda Smith' <bsmith@cvinv.com>; rbutler691 <rbutler691@aol.com>
Sent: Thu, Dec 8, 2016 11:36 am
Subject: Calais presentation and perform

Team
I put together a new presentation for Calais, when timelines and estimates, as well as I created a pro forma based on our current budget, where we would build one mill in 2017 and another mill underground in 2018
I put together a PDF of the summary page, and of course so we could tweak and work the model I've included the Excel version mind you this is still a draft and I'm putting a few illogic dates in on mining equipment utilization and life expectancy.

Please give any comments or make any necessary changes

Regards

Richard

-----Original Message-----
From: Richard Mittasch <rmittasch@gcggold.com>
To: 'Brenda Smith' <bsmith@cvinv.com>; Alfred F. Gerriets II < afg_288@verizon.net>; Richard C. Galvin <rbutler691@aol.com>
Sent: Mon, Feb 27, 2017 4:50 pm
Subject: Caribou final - Phase 1 NI 43-101

Team
here is the final 43-101 for this phase it has all the corrections, and draft has been removed from all pages it also has all the seals from the geologists
so this one is ready to fly

Regards

Richard

# Exhibit E

# SEC v. BRENDA SMITH, et al., Civ. No. 2:19-cv-17213 (D.N.J.)

## CREDITOR CLAIM FORM

**Name of Creditor:** Southern Minerals Group, LLC

**Name and Address Where Notices Should be Sent:** Daniel M. Jaffe
Slover & Loftus LLP (counsel for Southern Minerals Group, LLC)
1224 17th St., NW
Washington, DC 20036

**Email Address:** dmj@sloverandloftus.com

**Telephone No.:** 202-347-7170 (Office), 202-288-4341 (Cell)

**Date(s) of Claim:** SMG's Claim was set by an arbitration award of the Honorable Mark I. Bernstein (Ret.) dated May 29, 2020, in *Southern Minerals Group, LLC v. CV Investments LLC*, AAA Case 01-19-0002-9998. The applicable contract, Magnetite Concentrates Purchase and Sale Agreement, is dated as of April 7, 2017, and amended as of June 8, 2018.

**Amount of Claim:** $21,929,259 exclusive of applicable pre-judgment and post-judgment interest. The damages are allocated as follows by the arbitration award: (1) $4,215,000 in liquidated damages as of March 1, 2020; (2) $14,090,599 in lost profits; (3) $3,600,000 in punitive damages; and (4) $23,660 in arbitration costs. The arbitration award granted pre-judgment and post-judgment interest at a rate of 15% as provided for under New Mexico law, which interest totals approximately $531,650 in pre-judgment interest and $6.01 million in post-judgment interest.

**Please attach copies of all invoices relating to your claim. Do not send original documents. Copies of the documents provided to the Receiver will not be returned to the creditor. You must maintain the original documents as the Receiver may ultimately request them for verification.**

Documents attached:

1. Arbitration Award
2. Magnetite Concentrates Purchase and Sale Agreement
3. Petition for Order Confirming Arbitration Award

Note: On June 5, 2020, SMG filed a Petition for Order Confirming Arbitration Award in the United States District Court for the Eastern District of Pennsylvania, *Southern Minerals Group, LLC v. CV Investments LLC* (2:20-cv-02643). The Petition is stayed by the broad litigation freeze order of the Court in this matter.

**AMERICAN ARBITRATION ASSOCIATION**

**Commercial Arbitration under AAA Commercial Rules and Mediation Procedures**
**Amended and effective October 1, 2013**

---

AAA Case 01-19-0002-9998

Southern Minerals Group, LLC

Represented by Daniel Jaffe, Esq. and A. Rebecca Williams of Slover & Loftus LLP

v.

CV Investments, LLC

ex parte

---

## FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement dated April 7, 2017 and entered into between Claimant, and Respondent, and having been duly sworn, and having duly reviewed the proofs and allegations of Southern Minerals Group, LLC, and CV Investments LLC having failed to submit proofs and allegations after due notice by mail in accordance with the Commercial arbitration Rules of the American Arbitration Association, hereby, AWARD as follows:

## Decision and Opinion

An award is entered in favor of claimant Southern Minerals Group, LLC and against respondent CV Investments LLC in the amounts set forth below.

## Procedure

Pursuant to the agreement between the parties dated April 7, 2017 as amended June 6, 2018, claimant filed this action on September 20, 2019. Apparently, respondent's principal had been indicted by Federal Authorities and at the time of filing its primary representative was incarcerated in Federal custody.

On December 4, 2019, Hon. Mark I. Bernstein (Ret.) was selected to be the AAA arbitrator for this matter under the Large Complex procedures of the Commercial Arbitration Rules as amended. Given the claim amount, the Procedures for Large, Complex Commercial Disputes specifies the number of arbitrators to be three. The parties' arbitration provision was silent as to the number of arbitrators. Pursuant to the applicable rules, expecting to be required to pay all costs of arbitration, petitioner requested that the number of arbitrators be reduced to a single arbitrator. According to the rules the first arbitrator determines whether to proceed with a single arbitrator or if three shall be appointed. Since Respondent's representative was only able to communicate via US Mail, it was directed that all communication was to be made in writing.

On, November 11, 2019, Brenda Smith, respondent's representative, submitted a handwritten letter request an indeterminate stay alleging an inability to respond because company records had been seized and had been retained by Federal authorities. Respondent offered no suggestion as to how or when this situation would change, such that the matter could resume. Most significantly, as claimant stated in their response there was no suggestion that Smith lacked sufficient knowledge to participate. Claimant further claimed that had this matter been amenable to court filing, a default judgment, unavailable in AAA arbitration,

would have been entered and claimant would earlier have had a judgment to collect upon if respondent did not participate.

Respondent requested a hearing by three arbitrators. Claimant responded that no right existed and since claimant would be paying for all costs of arbitration requested the matter be decided by one arbitrator in accord with the AAA rules. By Order dated December 14, the arbitrator ruled that one arbitrator would decide the matter and that the preliminary hearing would be held by written submission.

On January 8, 2020, the arbitrator received Claimant's written preliminary hearing statement and respondent's written letter which did not contain any substantive preliminary hearing statement and merely asked for a 6-month extension, but offered no explanation as to how anything would change 6 months hence. On January 9 claimant responded in writing to the requested extension.

By Order dated January 31, 2020 the arbitrator ruled that this matter would proceed and set a schedule for discovery and hearing through written submissions.

By submission dated March 20, 2020, as required by the January 8, 2020 Order, claimant submitted its affirmative case memorandum containing procedural background, statement of material facts, and memo of law. Attached thereto were the verified statements of John Peter and Clovis Hooper and a statement of damages.

Claimant also advised that by correspondence dated February 20, 2020 they had submitted Requests for Admissions, Interrogatories, and Requests for Production of Documents and had received no substantive responses but had received a handwritten letter dated March 20, 2020 which was attached.

Respondent's letter stated that although she was unable to retain papers but could have access to a thumb drive.

Accordingly, On April 8, the arbitrator Ordered a thumb drive be provided to respondent and that thereafter, respondent would have 10 days to respond to Claimants discovery requests, or the Request for Admissions would be deemed admitted.

On April 20 Claimant Southern Mineral Group, submitted a memorandum entitled "Rebuttal of Claimant" in which it pointed out that no substantive response whatever had been received from respondent as to the claim and renewed its request for damages.

Claimant sent a thumb drive to respondent on April 27. Since there has been no response by respondent, the Requests for Admissions are deemed admitted.

All required due process was afforded to both sides through the impartial application of the Arbitration Rules agreed to by the parties in their agreement. All reasonable accommodation was made for the parties. No in person or even telephonic conferences were required and all submissions could be made in writing. Handwritten submissions were accepted, considered, and evaluated. No substantive responses were ever received from respondent.

The record was properly closed on May 13, 2020.

## Factual Findings

On April 7, 2017 Mr. Clovis Hooper, President of Claimant Southern Minerals Group, LLC (hereinafter SMG) negotiated a Magnetite Concentrates Purchase and Sale Agreement ("PSA") between SMG and Respondent CV Investments LLC ("CVI")

This agreement was subsequently amended on June 6, 2018. Under that agreement, CVI committed to purchasing 400,000 tons of magnetite from SMG at a price of $80.00 per ton at a rate of 4,000 per month beginning in June 2017. This agreement was amended in mid-2018. However, beginning in October 31, 2018 CVI began a pattern of failure of performance followed by representations and promises which were never fulfilled. (see verified statements of Mr. John Peters and Clovis Hooper) CVI has made no payments to SMG since October 2018 (Request for Admission No. 1). CVI breached the PSA. (Request for Admission No. 3). CVI's Smith was arrested on August 27, 2019. As of March 1, 2020, SMG's liquidated damages are in the amount of $4,215,000, exclusive of interest. (Request for Admission No. 2).

Mr. John Peters is the Managing Director of Strategic Minerals PLC, parent company of Southern Minerals Group, LLC ("SMG"). Together with SMG's President, Mr. Clovis Hooper, Mr. Peters negotiated with CVI the Magnetite Concentrates Purchase and Sale Agreement ("PSA") referred to above which was executed on April 7, 2017. This agreement was amended on June 6, 2018. CVI's sole representative was Ms. Brenda Smith ("Smith").

SMG has exclusive access to a magnetite stockpile and operates a magnetite sales operation from the Cobre Mine in New Mexico. SMG's access rights to the magnetite is limited to 800,000 tons. Pursuant to the PSA contract CVI was obligated to purchase 400,000 tons of concentrates with minimum monthly purchases of 4,000 tons. SMG committed access to those tons exclusively to CVI. This commitment by SMG amounted to 50% of its total access to magnetite. Throughout the term of the agreement SMG was able to provide the full 400,000

tons to CVI in accordance with the PSA's monthly purchase schedule. SMG's staffing and costs increased to accommodate the commitment to CVI. CVI took only a total of 38,414 tons of magnetite concentrate from the initiation of the PSA in June 2017. Most of this volume was taken in the first few months. All but one of the shipments was moved, at CVI's request, to property in New Mexico.

CVI defaulted on its required payments. By the end of 2017, CVI was $642,000 in arrears. All CVI shipments were made by truck as required under the PSA. However, when CVI had no named destination for the delivery of the magnetite concentrates CVI requested storage in New Mexico. CVI made 19 payments to SMG for magnetite between June 19, 2017 and October 31, 2018. At various points in 2018, CVI paid some of its outstanding balance but $371,000 was owing when the Parties negotiated the First Amendment in June 2018. SMG generously reduced the outstanding amount owed by over $215,000, conditioned on CVI's payment of the reduced balance. That amended agreement required CVI to make quarterly deposits in lieu of taking the 4,000-ton minimum.

Despite assurances, CVI repeatedly failed to make these required payments. CVI's regular monthly obligations were to resume beginning March 1, 2019. The last CVI payment to SMG was in October 2018. Despite ceasing to make payments, CVI's Smith repeatedly assured SMG that CVI was about to sell a bond and receive a major infusion of cash. Smith reassured that SMG would be paid what was owed when that sale closed. CVI repeatedly claimed that the closing was delayed by forces outside its control. Smith continued her reassurances until August 2019 when she was arrested for allegedly engaging in a Ponzi scheme and CVI assets were seized. SMG's obligations under the PSA and CVI's excuses, delays and

diversions precluded SMG from pursuing other potential purchasers of the magnetite concentrate.

A detailed spreadsheet of SMG's transactions with CVI under the PSA was attached as Exhibit No. 1 to the statement of Mr. Hooper.

Under the amended agreement, CVI's monthly obligations restarted March 1, 2019. CVI failed to make any required payments, these required payments equaled $3,840,000 for the 12 months between March 2019 and February 2020. Consequently, as of March 2020, CVI's liquidated damages owed to SMG equaled $4,215,000, exclusive of interest. In addition to the liquidated damages CVI's breach of the PSA has resulted in SMG incurring direct and consequential damages. CVI's PSA represented a commitment to purchasing half of SMG's magnetite inventory. The volume committed to, and the expected revenue from, CVI under the PSA far exceeds the volume purchased by, and revenue earned from, all other SMG customers combined. Thus, in 40 months, SMG expected to realize significant profits associated with CVI exclusive access to their magnetite rights.

To determine lost profits, the damages calculation has three complementary analyses. The first analysis assumes that CVI performed as required under the PSA. SMG expected to realize over $45.6 million in total revenues during the approximately 8 years of the PSA (2019 – 2027). Of that $45.6 million, SMG expected that CVI purchases would account for $28.9 million, or 63% of all revenues. During that same period, SMG has known and estimated unit costs. SMG's calculation of $21.1 million in expenses is a conservative analysis representing the expenses that SMG might have incurred. Thus, SMG expected to

earn $24.5 million of net profit over the balance of the PSA. To determine the net present value ("NPV") of the expected profit, SMG applied a discount rate of 2%. The NPV calculation yields a current value of reasonably expected profits of **$22.7** million.

SMG's second analysis accurately assumes that CVI made no further purchases from January 1, 2019 thru the remainder of the PSA. In this analysis, SMG's expected profits drop dramatically because SMG will likely have to extend its operating period by 20 years to sell the same volume of magnetite concentrate, and revenues are likewise impacted because certain customers pay less per ton than CVI. Critically, the extended period means SMG will incur additional recurring and fixed expenses with fewer sales. SMG's calculation is again, very conservative. The second analysis shows that over the 20-year period, SMG would earn $41.2 million in revenue and incur approximately $36.0 million in expenses over the same period. The second analysis shows that SMG expected to earn $5.2 million net profit over the 20-year period. Consistent with the first analysis, SMG applied a discount rate of 2% to determine the NPV of the expected profit. The NPV calculation yields a current value of $**4.4** million.

SMG's third analysis calculates the difference between these conservative analyses. The third analysis shows that the difference in the NPV of the expected profits between the first and second analysis is $18.3 million. Thus, SMG submits that its total damages attributable to CVI's breach of the PSA is $18.3 million. However, as $4,215,000 of the damages is already a known and liquidated value, SMG calculated it lost $14,090,599 in profit damages and $4,215,000 million in

liquidated damages. The arbitrator finds this analysis to be reasonable, conservative, and accurate.

## Detailed Findings of Bad Faith

CV Investments LLC ("CVI") is owned, controlled, and operated by Ms. Brenda Ann Smith. Ms. Smith stands charged by the U.S. Attorney for the District of New Jersey with five (5) criminal counts, including four (4) counts of wire fraud and one (1) count of securities fraud. On the same day as criminal charges were lodged, the U.S. Securities and Exchange Commission ("SEC") filed a civil complaint in the U.S. District Court for the District of New Jersey against Smith and her various corporate entities for violations of securities laws. On September 10, 2019, the assets and bank accounts of several the named defendants were frozen.

SMG has the exclusive right to access approximately 800,000 tons of magnetite concentrates. Under the PSA, CVI was obligated to purchase 400,000 tons of such magnetite concentrates for the price of $80.00 per ton with a required minimum of 4,000 tons per month beginning June 1, 2017. In return, SMG was required to "ensure that it does not undertake any activities that impact the Purchases [sic] rights to the magnetite concentrates." Given commitments to other customers and local regulations, SMG was prohibited from providing more than 5,500 tons of magnetite concentrates per month to CVI. SMG requested, and CVI provided, "a deposit of $10,000" to SMG. Likewise, SMG requested, and CVI provided, a "standby letter of credit in the amount of $250,000.00 issued by a major US banking institution" or a cash deposit in the same amount to be held "in solicitor's trust."

CVI's monthly purchases of magnetite ore began June 1, 2017, and shipments of the material began on or around July 1, 2017. Between June 2017 and October 30, 2017, CVI met its contractual obligations under the PSA by purchasing the required minimum of 4,000 tons of magnetite ore each month and promptly payed for those purchases. Beginning with the SMG invoice dated October 31, 2017, CVI's payments fell into arrears. In January 2018, CVI paid its outstanding balance of $642,572.80. Immediately following its January 2018 payment, CVI again fell into arrears, and by March 2018, CVI owed SMG $521,404. In March 2018, CVI notified SMG that it was "unable to take delivery of the minimum volume" of the magnetite ore due to delays in "obtaining environmental approvals." To continue their contractual relationship the parties entered the First Amendment dated June 6, 2018. The First Amendment suspended CVI's obligation to purchase a minimum of 4,000 tons per month "for the period March 1, 2018 through May 31, 2018; provided, however, that such waiver is contingent on [CVI] meeting its obligations as otherwise required in the PSA and this Amendment." The referenced obligations included CVI paying the amount then in arrears, $371,404, according to a detailed payment schedule. If CVI failed to meet that payment schedule it would "forgo[] any right to take the remaining balance of the Prepaid Quantity for the applicable calendar quarter . . . ." CVI agreed to "resume its obligation to undertake to purchase a minimum of 4,000 tons per month at $80 per ton," beginning March 1, 2019. CVI failed to make the payments required.

On June 15, 2018, SMG invoiced CVI for the first quarterly prepayment of $375,000 in accordance with Section 4 of the First Amendment. Payment was due June 25, 2018. On July 10, 2018, CVI paid that invoice. On September 1, 2018,

SMG invoiced CVI for the second quarterly Prepayment due September 11, 2018. CVI failed to make that payment.

On September 13, 2018, SMG provided notice to CVI that it must rectify its past due amounts of over $600,000 otherwise SMG would consider CVI in default,

On Monday, October 8, 2018, SMG again wrote to CVI regarding the outstanding balance of $371,404 and offered to reduce the outstanding balance by $217,431.20 to reflect the 2,717.89 tons of the 4,000 ton minimum that CVI did not take physical delivery of in February 2018. This offer was contingent upon CVI paying the remaining balance in three installments and CVI release to the $250,000 security deposit CVI had previously made. On October 11, 2018, CVI made a counteroffer that accepted the structure of SMG's proposal but extended the time for the installment payments. SMG agreed to CVI's counteroffer. Nonetheless, CVI failed to make the initial installment payment on the agreed upon due date of October 22, 2018 but did make two payments totaling $53,972.80 on October 31, 2018. CVI subsequently missed the two remaining $50,000 installment payments due November 5 and November 19, 2018. Likewise, CVI never paid the outstanding balance by December 11, 2018 as required.

CVI has not made any further payments to SMG. On December 29, 2018, SMG sought further payment, requesting that CVI pay its outstanding balance of $475,000 before the end of 2018.

On December 29, 2018, CVI offered to pay the $475,000 in the first week of January 2019. SMG suggested CVI agree to release to SMG $100,000 from CVI's security deposit; pay the remaining $375,000 owed to SMG in the first week of January 2019; and replenish the amount of the security deposit released to SMG.

On December 30, 2018, CVI agreed to SMG's proposal and consented to the $100,000 transfer from the security deposit to SMG. CVI never paid the remaining $375,000 due to SMG, nor did it ever replenish the deposit. Instead, CVI began a series stalling tactics.

**January:**

- On January 4, 2019, CVI's Smith stated that SMG should have the funds the "following week."
- On January 9, 2019, CVI's Smith stated that the funding should be approved "[b]y end of day tomorrow"
- On January 17, 2019, CVI's Smith claimed "3 deals to close today or tomorrow. My funds from deal payout within one week."
- On January 17, 2019, CVI's Smith claimed she has the "financial instrument in hand to fund."
- On January 22, 2019, Smith claimed that closing would occur the following day (January 23, 2019) and informed SMG's Peters that she sent him "a confidential copy" of the "actual financial instrument,". Nonetheless, no payment was forthcoming.

**February:**

- On February 8, 2019, Smith said that she "was just told my wire leaves at 9 am tomorrow London time. Of course, I have to wait for banks to open here. I fully expect to be able to send $475,000 tomorrow. I will be happy to discuss future plans early next week."
- Yet again, on February 16, 2019, CVI's Smith claimed to "have taken control of the entire transaction and spent the day working out

details. I now have direct contact with the buyer of my bond and his banker. . . . I fully expect a wire on Monday and am not relying on anyone in between." CVI's Smith further assured SMG of CVI's ability to secure funding for payment, stating "BTW [by the way], this is real, I will close" and blaming the delay on a number of things, including the time difference and that the "buyer trader was delayed in [the] subway."

- On February 27, 2019, CVI's Smith claimed that an "[i]nstrument [was] delivered last night at 22:00 by my trade desk."

**March:**

- Beginning March 1, 2019, SMG resumed invoicing CVI for its monthly minimum purchases of 4,000 tons of magnetite concentrates, pursuant to Section 4(b)(ii) of the parties' First Amendment. Yet on March 1, 2019 Smith claimed that the "buyer bank downloaded the message / instrument today. Waiting for buyer account to get credit for instrument and then funds are released. Unfortunately, I am told that could take up to 5 days from transmission which was Tuesday."
- On March 8, 2019, SMG's Peters notified CVI's Smith that he needed to update his Board of Directors on the "expected timing of payment and plans to address the existing contract . . . ." On March 9, 2019, CVI's Smith responded, "still not closed & no production,"
- On March 13, 2019, SMG's Peters again inquired as to the timing of payment, to which CVI's Smith again responded with the claim that she was "[t]rying to close this week."

- On March 29, 2019, SMG requested an update from CVI's Smith by close of business regarding CVI's overdue payments, including a $50,000 wire transfer that CVI supposedly sent to SMG the prior week.
- On March 30, 2019, CVI's Smith claimed her banker had moved their scheduled meeting, and she would have to confirm with him when her transactions would be final and would check on the "outgoing wire."

April

- On April 3, 2019, CVI's Smith again claimed her "banker delayed the meeting until April 8." And that she had "pending transactions that will close this month," but "do[es] not have substantial cash on hand until closing."
- On April 11, 2019, CVI's Smith stated that she did not "have the funds" to pay, but that the "funds are closing on Tuesday April 16."

May:

- On May 15, 2019, Smith, provided a purportedly "internally generated balance sheet" for CVI showing over $59 million in assets.
- On May 21, 2019, CVI's Smith responded to an email from SMG's Peters requesting an update, again claiming that she "expect[ed] to receive funds by close of business" the next day. on
- May 23, 2019, SMG's Peters again asked CVI's Smith via text message if the bonds had settled. CVI's Smith claimed she "should have funds tomorrow." On that same day SMG's Peters asked CVI's Smith to

formally agree to undertake certain actions to avoid legal proceedings, as follows: I was able to get my UK Directors and Alan this morning and I have got them to agree that, provided, on behalf of CV Investments, you undertake to pay SMG, within two weeks, the $375,000 December payment and top up the existing deposit with SMG by $3,690,000 they will hold all actions for those two weeks. . . . . Please provide, on behalf of CV Investments, agreement to these arrangements." CVI's Smith responded "Agreed. Thank you very much. Brenda.".

- When SMG attempted to memorialize the parties' new agreement in a Second Amendment to the PSA, CVI did not execute the Second Amendment, despite having already agreed to the terms. On May 25, 2019, SMG's Peters again asked CVI's Smith via text message if CVI had secured its funds yet. Responding that same day, CVI's Smith again put off SMG's Peters, claiming it would be "first thing Tuesday am [morning]"
- On May 29, 2019 , after the date CVI's Smith claimed the funds would be available, SMG's Peters asked CVI's Smith via text message: "has Merrill released the funds" and, if not, "what are your expectations." CVI's Smith only responded with "tomorrow."
- On May 30, 2019, SMG's Peters asked CVI's Smith to "please update the position with CVI." CVI's Smith responded that same day, stating "Not yet. Still working hard on it."

June:

- On June 3, 2019, CVI's Smith emailed SMG's Peters that the funds would be available in two days, citing issues with the bankers.
- On June 6, 2019, CVI's Smith stated that the buyer "changed delivery," and it would "[p]robably" take an additional day. Later that day, CVI's Smith stated she had "tried to be direct [and] honest" and was "doing everything possible to fund by Friday".
- SMG's Peters then asked CVI's Smith if CVI could at least provide SMG with $100,000 on Friday, June 7, 2019, along with supporting paperwork for the bond funds that Peters could show to SMG's Board of Directors. Id. CVI's Smith responded that it would provide SMG with the requested $100,000 and paperwork by Friday June 7, 2019 but then failed to do so.
- On June 7, 2019, the supposed bond sale did not settle despite CVI's Smith claiming that the bankers were "working on it."
- On June 8, 2019, CVI's Smith claimed she was "[j]ust off [the] phone with [the] Buyer" and that they were working it, but there would be "[n]o wire today but it will go out Monday."
- On June 11, 2019, CVI's Smith again suggested that funds "may" be available "tomorrow" if the bankers can move the process along.
- On June 14, 2019, Peters sent Smith a text message requesting a telephone conference. Smith claimed she was sick. Later that day, when asked for an update on the bonds, Smith responded "[w]orking with bankers now".

- On June 20, 2019, Peters again asked Smith for an update, to which Smith responded "[t]rying to receive one transfer today. Still waiting on email from banker."
- On June 23, 2019, Smith claimed she was "[w]aiting on confirmation of transfer."
- On June 24, 2019 Smith did not respond to Peters request for status.
- On June 26, 2019, Peters asked Smith if CVI was "any firmer on timing of cash payment to SMG," and was told "[e]xpect [F]riday".
- On June 28, 2019, the new expected payment date, CVI failed to make payment.
- On June 30, 2019, CVI's Smith said: "I can make that payment based on drawing down the bond," .

July:

- On a July 13, 2019 telephone conference, Peters and Smith discussed an option, whereby CVI would borrow against a supposed LOC for ninety (90) days to pay SMG while CVI awaited its supposed bond settlement.
- On July 14, 2019, Peters asked CVI's Smith whether CVI had considered the option, but CVI's Smith did not answer the question and instead suggested she was "trying."
- On July 14, 2019, Smith purported to send SMG details of the bond issuance.
- On July 18, 2019, alarmed by reports that FINRA had cited and subsequently barred Smith from "associating with any FINRA

member" for rules violations, Peters text messaged Smith asking about the matter. CVI's Smith claimed the FINRA violations were not related to her trading and said she could "explain on [the] phone."

- On July 24, 2019, Smith stated that she should have confirmation that the bond had settled that day.
- On July 26, 2019, Smith claimed her banker "says I will have bank statement showing 100 mm tomorrow & it will be available to disburse next Wednesday" (July 31, 2019).
- On July 27, 2019, Smith said: "I do not have statement yet. I give up. Sue me" . She later stated she was still waiting for an update from the banker, but funds should come through "this week for sure."

August:

- Throughout the month of August 2019, the "deal" was supposedly imminent, but then CVI ceased all communication.
- On August 9, 2019, SMG's Peters emailed Smith asking why she had "stopped communicating." Smith responded, claiming that her "banker now says I should have some funds on Tuesday [August 13, 2019]. He says [C]credit Suisse is wrapping up monetization. Can we wait until Tuesday?"
- On August 14, 2019, Smith claimed: "I talked to my banker this morning and he said the 'monetizer' has accepted the instrument, Credit Suisse has completed their process and agreed to start disbursements. He says funding is imminent." Despite these claims, no funds were ever disbursed to SMG.

- On August 16, 2019 Smith said she was waiting "for my banker to schedule." And then said: "[t]turning phone off."
- Throughout the remainder of August Peters and Smith exchanged several emails wherein Smith avoided a personal meeting or telephone conference and suggested instead "sue me or something." And then suggested that her "usa [sic] banker says I am still getting [the] advance this week but I don't have it yet."
- On August 26, 2019, Smith assured that she would sign a note for $4.065 million .
- On August 27, 2019, Smith was arrested by the FBI on charges that she had been running a Ponzi scheme. The federal indictment lodged against Smith and several of her corporate entities states that the behavior with CVI was done to many different victims.

## Conclusions:

The arbitrator draws no conclusion from the unproven allegations of the indictment. A defendant has a presumption of innocence and no conclusion can be drawn from the allegations. It is clear however, that CVI cannot now and will not in the future fulfill the requirements of the PSA.

From the submissions that form the record in this claim including the uncontested Demand for Arbitration and the exhibits attached thereto, affirmed in the statements of Mr. Peters and Hooper, the additional information provided by those statements, the unanswered and therefore admitted Request for Admissions, it is clear that CVI entered into a binding agreement, subsequently

amended, made substantial reassurances and additional promises over an eight month period and materially breached that contract, the PSA. CVI made no payments to SMG under the PSA after October 2018. Agreed upon purchases were not made. Neither was the balance due of $375,000 ever paid. Under the PSA and CVI's written assurances of payment, the amount of $4,215,000 is owing as of March 1, 2020. SMG is entitled to liquidated damages in the amount of $4,215,000. SMG is also entitled to lost profits in the amount of as set forth in exhibit 2 of Mr. Hooper's verified statement.

That verified statement explained in detail the methodology used to calculate loss. Mr. Hooper reasonably calculated the net profits expected if CVI had fulfilled its agreement over the 8 years remaining to the PSA. This lost profit was 22.7 Million dollars . He then calculated the profits expected from the sale of the same quantity of magnetite over a longer period given the failure of CVI to fulfill its agreement. This would yield 5.2 million in profits, a mitigating factor in the damages calculation. Subtracting the profits reasonably expected over the longer period due to the failure from the expected profit if the contract had been fulfilled resulted in a total profit loss of $14,090,599. Within the amount of this loss is the lost profit as of March 1, 2020 which had already been calculated and awarded as liquidated damages. Subtracting the award for liquidated damages yields a net future loss of profit at $14,090,599. In all these calculations the profit analysis had been reduced by a reasonable 2% discount rate. Mr. Hooper conservatively estimated the damages which "arise naturally and necessarily" from the breach in accordance with New Mexico Law,

## Law

The agreement requires that the law of New Mexico apply. Under New Mexico law the claim has been timely presented. NMSA 1978 §37-1-3(A) provides for a 6-year statute of limitations for contractual claims. Damages recoverable and proven herein are the damages which "arise naturally and necessarily" from the breach in accordance with New Mexico Law (Sunnyland Farms, Inc. v Cent. N.M. Elec. Co-op Inc., 301 P. 3rd 387 (N.M.2013).

Under New Mexico Law, punitive Damages are recoverable "for breach of contract whenever defendant's conduct was malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the plaintiff's rights." The defendant repeatedly made false reassurances about imminent performance, and intentionally misled the plaintiff about its intention and ability to perform. As detailed above, there can be no question that the continual bogus reassurances and purportedly detailed explanations of the imminent receipt of funds to pay the debt owed, were both malicious and "committed recklessly with a wanton disregard for the plaintiff's rights". Accordingly, punitive damages are warranted and awarded.

The purpose of punitive damages is to punish the defendant and deter others from similar conduct. The compensatory award entered herein, if collected, shall make plaintiff whole and shall allow plaintiff to recover profits reasonably but conservatively expected under the contract. Accordingly, to punish this bad faith behavior and to deter others from similar conduct, in addition to the compensatory award and in accord with New Mexico law, the arbitrator awards punitive damages in the amount of $3,600,000.

New Mexico law permits pre and post-judgment interest (NMSA 1978 §2004. Accordingly, pre-judgment interest on the liquidated damages awards of $4,215,000 is ordered. Post-Judgment interest is awarded from the date of entry of judgment. Since judgment is awarded based on the bad faith and intentional acts of defendant, interest is by law to be computed in the amount of 15% per annum.

Since SMG has been forced to bear all costs of this arbitration, and CVI has not participated in any meaningful way other than to request extensions, costs are awarded to plaintiff. New Mexico law does not permit the award of attorney fees except where the behavior of the defendant occurs "before the court or in direct defiance of the court's authority"(see state ex rel. N.M. State Highway and Transp. Dep't v. Baca 896 P.2d 1148 (1995), there is no authority to award attorney fees for private contractual claims even where defendant has acted in bad faith and even where the intent of the bad faith actions were intended to defer and dissuade resort to legal (or AAA arbitration) action.

## Judgement and Decision

The arbitrator awards Claimant SMG against respondent CVI the following amounts:

Liquidated damages: $4,215,000

Lost Profit: $14,090,599

Punitive Damages: $3,600,000

Prejudgment Interest at 15% on liquidated damages of $4,215,000

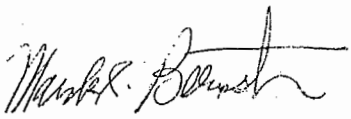
Post judgment Interest at 15%

Costs: The Administrative fees and expenses of the AAA totaling $12,200.00 are to be borne $12,200.00 by CV Investments, LLC. The Compensation and expenses of Arbitrator totaling $11,460.00 are to be borne $11,460.00 by CV Investments, LLC. Therefore, CV Investments, LLC has to pay Southern Minerals Group, LLC, an amount of $23,660.00.

This Final Award is in full and complete settlement and satisfaction of any and all claims that were submitted to the jurisdiction of this Arbitrator in connection with the present dispute. All claims, arguments or issues not specifically addressed in this Final Award and not reserved for further disposition, are rejected and denied with prejudice.

By the Arbitrator:

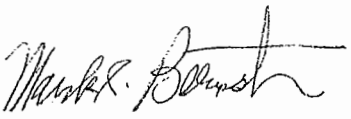
Dated: May 29, 2020



Hon. Mark I. Bernstein (Ret)

Sole Arbitrator

I, Hon. Mark I. Bernstein (Ret), do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Decision and Final Award in this Arbitration.



Hon. Mark I. Bernstein (Ret) Sole Arbitrator

**Magnetite Concentrates**
**Purchase and Sale Agreement**

Southern Minerals Group, LLC of P. O. Box 535 Silver City, NM 88062 as "**Seller**," and CV Investments LLC 200 Four Falls Corp. Ctr. Suite 211, Conshohocken, PA 19428 and affiliates as "**Purchaser**," agree as follows:

1. Seller has the exclusive right to access approximately 800,000 tons of magnetite concentrates (this is an estimate of the size and should not be relied upon as a definition of resource), a treated by-product of copper mining and milling operations conducted at the Mine site formerly operated by Freeport-McMoRan located in Grant County, New Mexico, and has in place contracts or purchase orders to sell approximately one-half of that inventory to other purchasers. The Seller will ensure that it does not undertake any activities that impact on the Purchases rights to the magnetite concentrates. Should, for any reason, the Sellers right to access this material be terminated, then on the day that access is terminated this Agreement will terminate, without further recourse to Purchaser and Seller other than amounts already outstanding or breaches of Agreement occurring up to that date.

2. Seller hereby agrees to sell to Purchaser and Purchaser hereby agrees to purchase from Seller up to of 400,000 tons of such magnetite concentrates for the price of $80.00 per ton. These prices include Seller loading the concentrates into Purchasers' trucks with Seller's equipment and equipment operators, and Seller shall bear all costs associated with such loading operations. The Purchaser undertakes to purchase a minimum of 4,000 tons per month from ~~commencement of this Agreement~~; June 1, 2017. BJS CH

3. Purchaser shall provide the trucks and truck operators to haul the concentrates and shall bear all costs associated with such hauling operations. The Purchaser shall ensure that representatives of the Purchaser (including truck drivers) shall conduct its activities in a good and professional manner and in accordance with the reasonable directions (if any) given to it by the Seller from time to time.

4. Seller shall maintain accurate certified weighing facilities and will weigh the Purchaser's trucks on entrance and exit, unloaded and loaded, and provide the net weights of each load to Purchaser as each loaded truck exits the site, and provide appropriate Material Safety Data Sheets. The Seller shall not be liable for loss or damage suffered or incurred by the Purchaser due to any failure or interruption of equipment due to the need for repair or alteration or breakdown but, the Seller will assist the Purchaser in minimizing any losses that the Purchaser may incur.

5. Purchaser shall:

(i) provide a deposit of $10,000 to the Southern Minerals Group, LLC bank account within one business day of signing of this Agreement, as advised. BJS CH

(ii) Prior to commencement of this Agreement, but not greater than seven days from signing of this Agreement, the Purchaser shall provide the Seller with a standby letter of credit in the amount of $250,000.00 issued by a major US banking institution authorizing the seller to draw against it in the event Purchaser fails to timely pay any invoice in full or provide, in solicitor's trust, a deposit of $250,000 with instructions that this is to be released to SMG on the provision by SMG that there has been a default on payment under the Agreement. This notification is to be given at SMG's sole discretion and the solicitor has to be irrevocably instructed to act on any such notice.

(iii) make payment for all concentrates purchased on a monthly basis within ten days after being presented with an invoice from Seller.

6. Purchaser acknowledges and is aware that local governmental regulations limit the total tonnage of concentrates that may be removed from the mine site to 11,000 tons per month, and that Seller's other existing commitments presently utilize up to approximately one-half of that amount, leaving only approximately 5,500 tons per month now available to Purchaser. Seller agrees to inform Purchaser if and when other purchasers fail to purchase their entire committed amount so as to allow Purchaser the opportunity to acquire a larger amount in any particular month.

7. Seller warrants and covenants to and with Purchaser that it can provide good and marketable title to the subject concentrates, that they are by-products of lawful mining operations, have been properly severed from the realty from which they came, are free and clear of any liens or claims of any kind or nature, and will be free and clear of any liens or claims of any kind or nature when conveyed to Purchaser.

8.1 If a Force Majeure Event affecting a Party precludes that party ("Precluded Party") partially or wholly from complying with its Obligations (except its payment obligations) under this Agreement then:

(a) as soon as reasonably practicable after that Force Majeure Event arises, the Precluded Party must notify the other Party of

(i) the Force Majeure Event;

(ii) which obligations the Precluded Party is precluded from performing ("Affected Obligations");

(iii) the extent to which the Force Majeure Event or its consequences preclude the Precluded Party from performing the Affected Obligations ("Precluded Extent"); and

(iv) the expected duration of the delay arising directly out of the Force Majeure Event or in consequence of it;

(b) the Affected Obligations will, to the Precluded Extent, be suspended for the duration of the actual delay arising directly out of the Force Majeure Event ("Actual Delay"); and

(c) the other Party's Obligations which are dependent on the Affected Obligations will be suspended until the Precluded Party resumes performance.

8.2 The Precluded Party must, as soon as reasonably practicable after cessation of a Force Majeure Event, resume performance of the Affected Obligations and must use reasonable

endeavours to overcome or remove a Force Majeure Event as quickly as possible, but "reasonable endeavours" does not require a Party to pay money in an attempt to overcome the event or to settle any industrial dispute against its wishes.

9. To prevent possible confusion Seller and Purchaser agree that this Agreement is to be applied in accordance with the laws of the State of New Mexico other than its conflicts of laws principles.

10. Parties agree that any dispute or controversy arising out of or relating to this agreement or the interpretation thereof, shall be settled by arbitration, held in a mutually acceptable location to the parties, in accordance with the rules, then in effect, of the American Arbitration Association.

11. Either Party may assign this agreement, upon written notice, provided such assignment is to a commonly controlled affiliate.

12. Either Party may terminate this Agreement on a serious breach of Agreement after giving 30 days notice ("Notice Period") to the other Party to rectify the breach and that breach is not rectified within the Notice Period. The termination of this Agreement shall not affect the rights of the aggrieved party in seeking damages in relation to the Agreement being terminated.

13. Southern Mineral Group, and its affiliates agree not to use the name CV Investments in any public media without Purchasers written permission unless required by law, HBCH

Seller and Purchaser have executed this Agreement effective as of the 7 day of April, 2017.
CH HB

Southern Minerals Group, LLC

By: Clovis Hooper

Clovis Hooper,

President

Southern Minerals Group LLC

CV Investments LLC

By: Brenda Smith

Brenda Smith,

Managing Member

CV Investments LLC

# FIRST AMENDMENT TO
# MAGNETITE CONCENTRATES PURCHASE AND SALE AGREEMENT

This First Amendment ("Amendment") to Magnetite Concentrates Purchase and Sale Agreement is made as of this sixth day of June 2018, among **Southern Minerals Group, LLC,** P.O. Box 535 Silver City, **NM** 88062 **("Seller")** and **CV Investments, LLC** and affiliates, 200 Four Falls Corp. Ctr. Suite 211, Conshohocken, PA 19428.

WHEREAS, Seller and Purchaser are parties to that certain Magnetite Concentrates Purchase and Sale Agreement dated April 7, 2017 ("PSA"), providing for the sale of magnetite concentrates, a treated by-product of copper mining and milling operations conducted at a mine in Grant County, New Mexico; and

WHEREAS, Shipments of magnetite concentrates began on or around July 1, 2017 in accordance with the PSA; and

WHEREAS, the Purchaser has notified the Seller that it is unable to take delivery of the minimum volume of 4,000 tons per month required under Section 2 of the PSA due to delays in the Purchaser obtaining environmental approvals; and

WHEREAS, Seller and Purchaser desire to revise the Purchaser's volume obligation under the PSA as set forth in this Amendment.

NOW, THEREFORE, in consideration of the premises, mutual covenants and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Seller and Purchaser agree as follows:

1. Seller waives Purchaser's obligation under Section 2 of the SA to purchase a minimum of 4,000 tons a month for the period March 1, 2018 through May 31, 2018; provided, however, that such waiver is contingent on Purchaser meeting its obligations as otherwise required in the PSA and this Amendment.

2. Purchaser agrees to pay Seller the "Outstanding Amount" under the PSA of $521,404 as of March 31, 2018 in accordance with the following schedule:

| CVI Investments Outstanding Amount Payment Schedule | | |
|---|---|---|
| Monday , 20 April 2018 | $50,000 | Paid |
| Monday, 4 May 2018 | $50,000 | Paid |
| Monday, 18 May 2018 | $50,000 | Paid |
| Monday, 1 June 2018 | $50,000 | |
| Monday, 15 June 2018 | $50,000 | |
| Monday, 29 June 2018 | $50,000 | |
| Monday, 13 July 2018 | $50,000 | |
| Monday, 27 July 2018 | $50,000 | |
| Monday, 10 August 2018 | $50,000 | |
| Monday, 24 August 2018 | $71,404 | |
| | | |
| **Total** | **$521,404** | |

3. Upon Purchaser's full payment of the Outstanding Amount, Purchaser shall be entitled to 2,717.89 tons for which Purchaser was invoiced in February 2018 and which Purchaser has not yet taken delivery. Purchaser's option to take 2,717.89 tons shall expire on November 30, 2018 and no refund shall issue if the material is not taken by that date.
4. Section 2 of the PSA is amended as follows :

    a. The last sentence of Section 2 is deleted in its entirety and replaced as follows:

        i. "The Purchaser undertakes to purchase a minimum of 4,000 tons per month from June 1, 2017 to February 28, 2018."

    b. The following new paragraphs are added to the end of Section 2:

        i. "Prepayment Period (June 1, 2018 - February 1, 2019): On June 15, 2018, September 1, 2018, and December 1,2018 Seller will invoice Purchaser in advance for 4,685.50 tons per quarter ("Prepaid Quantity") and the Purchaser will pay a non-refundable amount of $375,000 ("Prepayment") in relation to sales for that quarter (the Prepayment is in addition to the payments made in satisfaction of the Outstanding Amount under Section 2 of this Amendment) in accordance with the terms of the PSA. If Purchaser does not take the Prepaid Quantity within 12 months of the invoice date, Purchaser forgoes any right to take the remaining balance of the Prepaid Quantity for the applicable calendar quarter and Seller retains all prepayments made by Purchaser. If Purchaser ships

4,000 or more tons in any month during the Prepayment Period or there after then the "Outstanding Prepayment" which is the sum of all Prepayments made by Purchaser less the value of any material delivered, shall be reduced by a maximum of $125,000 in that month and the Purchaser will be deemed to have been delivered 1,562.50 tons of material."

ii. "Beginning on March 1, 2019, Purchaser shall resume its obligation to undertake to purchase a minimum of 4,000 tons per month at $80 per ton."

5. Section 1 of the PSA is amended as follows:

a. The last sentence of Section 1 is deleted in its entirety and replaced as follows:

i. "Should, for any reason, Seller's right to access this material is terminated, then on the day that access to the material is terminated this Agreement will terminate without further recourse to Purchaser and Seller. Upon termination, Seller has no obligation to refund any Outstanding Prepayment Amount, nor provide any additional material, nor provide material that the Purchaser has paid for but has not yet been delivered."

The Seller and the Purchaser have executed this First Amendment to the Magnetite Concentrates Purchase and Sale Agreement effective as of the sixth day of June, 2018.

Southern Minerals Group LLC

Clovis Hooper
President Southern Minerals Group LLC

CV Investments LLC

Brenda Smith
Managing Member CV Investments LLC

JS 44 (Rev. 02/19)

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

## I. (a) PLAINTIFFS

Southern Minerals Group, LLC

**(b)** County of Residence of First Listed Plaintiff Grant (NM)
*(EXCEPT IN U.S. PLAINTIFF CASES)*

**(c)** Attorneys *(Firm Name, Address, and Telephone Number)*
Lisa Carney Eldridge, Clark Hill Plc
Two Commerce Square, 2001 Market St., Suite 2620,
Philadelphia, PA 19103 Phone: (215) 640-8514

## DEFENDANTS

CV Investments, LLC

County of Residence of First Listed Defendant Montgomery (PA)
*(IN U.S. PLAINTIFF CASES ONLY)*
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

## II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

## III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
*(For Diversity Cases Only)*

| | PTF | DEF | | PTF | DEF |
|---|---|---|---|---|---|
| Citizen of This State | ☐ 1 | ☒ 1 | Incorporated *or* Principal Place of Business In This State | ☐ 4 | ☒ 4 |
| Citizen of Another State | ☒ 2 | ☐ 2 | Incorporated *and* Principal Place of Business In Another State | ☒ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

## IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

**CONTRACT**
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

**REAL PROPERTY**
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

**TORTS**

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

**CIVIL RIGHTS**
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

**PRISONER PETITIONS**

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

**FORFEITURE/PENALTY**
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

**LABOR**
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

**IMMIGRATION**
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

**BANKRUPTCY**
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

**PROPERTY RIGHTS**
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark

**SOCIAL SECURITY**
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

**FEDERAL TAX SUITS**
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

**OTHER STATUTES**
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☒ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

## V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 U.S.C. Section 1332(a)(1)

Brief description of cause:
Petition to Confirm Arbitration Award

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

## VIII. RELATED CASE(S) IF ANY

*(See instructions):* JUDGE _____ DOCKET NUMBER _____

DATE 06/05/2020

SIGNATURE OF ATTORNEY OF RECORD X _____

**FOR OFFICE USE ONLY**

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| **SOUTHERN MINERALS GROUP, LLC**<br><br>**Applicant,**<br><br>**and**<br><br>**CV INVESTMENTS LLC**<br><br>**Respondent.** | **Case No. _____** |

**ORDER CONFIRMING ARBITRATION AWARD**

Pursuant to its Petition for Order Confirming Arbitration Award ("Petition"), filed June 4, 2020, Applicant Southern Minerals Group, LLC has petitioned this Court for confirmation of the Final Award filed as Exhibit No. 1 to its Petition. This Court has jurisdiction over this matter under 28 U.S.C. § 1332(a)(1). Venue attaches under 9 U.S.C. § 9 and 28 U.S.C. § 1391.

Under 9 U.S.C. § 9, the Court must confirm the Final Award "unless the award is vacated, modified, or corrected" under §§ 10 and 11 of the Federal Arbitration Act, 9 U.S.C. §§ 10 and 11. The Final Award has not been vacated, modified, or corrected, so entry of an Order confirming the Final Award is appropriate.

It is **ORDERED** that Applicant's petition is **GRANTED** and that the May 29, 2020 Final Award is confirmed; and

It is **FURTHER ORDERED** that Final Judgment is entered on the Award.

**SO ORDERED** this _____ day of June 2020.

_____
United States District Judge

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| **SOUTHERN MINERALS GROUP, LLC**<br>**P.O. Box 535**<br>**Silver City, New Mexico 88062**<br><br>**Applicant,**<br><br>**and**<br><br>**CV INVESTMENTS LLC**<br>**200 Four Falls Corp. Center, Suite 211**<br>**Conshohocken, Pennsylvania 19428**<br><br>**Respondent.** | **Case No. _____** |

**PETITION FOR ORDER CONFIRMING ARBITRATION AWARD**

Pursuant to 9 U.S.C. §§ 9 and 13 (the Federal Arbitration Act, or "FAA"), Southern Minerals Group, LLC ("SMG"), respectfully petitions this Court for an Order confirming the May 29, 2020 Final Award of the Hon. Mark I. Bernstein (Ret.) ("Arbitrator") in the matter of the arbitration between SMG and CV Investments LLC ("CVI") (collectively with SMG, the "Parties") (copy of the Final Award attached hereto as Exhibit No. 1). In support of this petition, SMG states the following:

**THE PARTIES**

1. SMG is a limited liability company organized under the laws of the State of Nevada with its principal place of business located near Bayard, New Mexico. SMG has as its sole member Ebony Iron Pty Ltd., a foreign corporation organized under the laws of the Commonwealth of Australia, with its principal place of business in Sydney, Australia. SMG operates a magnetite ore

sales operation within the Cobre Mine complex, which is located about three (3) miles northeast of Bayard, New Mexico. SMG's mailing address is P.O. Box 535 Silver City, New Mexico 88062.

2. CVI is a Pennsylvania limited liability company with its principal place of business located at 200 Four Falls Corp. Center, Suite 211, Conshohocken, Pennsylvania 19428. CVI and its related entities are owned, controlled and operated by Ms. Brenda Ann Smith ("Smith"). On August 27, 2019, Smith was arrested by the Federal Bureau of Investigation for allegedly operating a Ponzi scheme and was subsequently charged by the U.S. Attorney for the District of New Jersey with five (5) criminal counts, including four (4) counts of wire fraud and one (1) count of securities fraud. *See United States v. Smith*, Mag. No. 19-3377 (D.N.J. Aug. 27, 2019). Contemporaneously with the Department of Justice's action, the U.S. Securities and Exchange Commission ("SEC") filed a civil complaint in the U.S. District Court for the District of New Jersey against Smith and a number of her various corporate entities for violations of securities laws. *See SEC v. Smith, et al.*, Civ. A. No. 17213 (D.N.J. Aug. 27, 2019). On September 10, 2019, the District Court Judge issued an order freezing the assets and bank accounts of Smith and the various entities she controlled, including CVI. Smith remains incarcerated pending the outcome of her criminal proceeding but can, and did, accept service and filings at the correctional facility where she has been held throughout the arbitration and in the other suits lodged against her and various entities she controls.

## JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1332(a)(1) (diversity). SMG and CVI are citizens of different States, and the amount in controversy, exclusive of interest and costs, exceeds the sum or value of $75,000.

4. The Award arises under a contract involving interstate commerce and is subject to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*.

5. Under the FAA, unless the parties have agreed otherwise, venue is proper in the district where the award was made, or in any district proper under the general venue statute. *See, e.g.*, *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 195 (2000). The Parties' Agreement does not include a forum selection clause for proceedings to confirm any arbitration awards thereunder. However, the arbitration took place in Philadelphia, Pennsylvania.

6. The Eastern District of Pennsylvania is also an appropriate venue because CVI is subject to personal jurisdiction here, and it is the district in which a substantial part of the events or omissions giving rise to the claim occurred. 28 U.S.C. § 1391(b).

**THE SUBJECT ARBITRATION**

7. SMG and CVI were parties to a Magnetite Concentrates Purchase and Sale Agreement ("PSA") dated April 7, 2017, as amended by the First Amendment dated June 6, 2018, whereby CVI "agrees to purchase from Seller up to [] 400,000 tons of such magnetite concentrates for the price of $80.00 per ton." PSA § 2 (attached hereto as Exhibit No. 2); *see also* First Amendment to the PSA ("First Amendment") (attached hereto as Exhibit No. 3).

8. The PSA provides that "any dispute or controversy arising out of or relating to this agreement or the interpretation thereof, shall be settled by arbitration, held in a mutually acceptable location to the parties, in accordance with the rules, then in effect, of the American Arbitration Association." Ex. 2 at § 10.

9. SMG filed its Demand for Arbitration ("Demand") with the American Arbitration Association ("AAA") on September 20, 2019. The AAA docketed SMG's Demand as AAA Case No. 01-19-0002-9998. SMG's Demand sought an arbitral award against CVI:

(i) finding CVI materially breached the PSA;

(ii) finding CVI breached the implied covenant of good faith and fair dealing;

(iii) finding SMG is entitled to damages, inclusive of interest, for liquidated amounts owned to SMG;

(iv) finding SMG is entitled to lost profit damages;

(v) finding SMG is entitled to punitive damages;

(vi) awarding SMG its attorneys' fees and costs, including but not limited to, all costs of the arbitration;

(vii) awarding SMG any and all other relief determined appropriate by the Arbitrator.

10. On December 6, 2019, the AAA announced the appointment of the Hon. Mark I. Bernstein (Ret.) as the Arbitrator. At SMG's request, and given CVI's circumstances, the Arbitrator determined that a single arbitrator was sufficient for purposes of the arbitration, in accordance with the discretion afford to him under the procedures for Large, Complex Commercial Disputes of the AAA Commercial Arbitration Rules as amended. American Arbitration Association, Commercial Arbitration Rules & Mediation Procedures ("AAA Rules"), Rule L-2(b) (2013).

11. On January 31, 2020, the Arbitrator established a schedule for the proceeding and determined that the proceeding would be adjudicated through written filings only.

12. In accordance with the Arbitrator's January 31 order, SMG propounded a limited set of Requests for Admissions, Interrogatories, and Requests for Production of Documents to CVI on February 20, 2020. SMG filed its Affirmative Case on March 20, 2020 and its Rebuttal on April 20, 2020. CVI made no responsive pleadings, nor did CVI respond to discovery requests despite being afforded additional time by the Arbitrator to do so. By order dated May 13, 2020, the Arbitrator closed the record in the case.

13. The Arbitrator issued his Final Award on May 29, 2020. *See* Exhibit No. 1. Therein, the Arbitrator found that "[a]ll required due process was afforded to both sides through the impartial application of the Arbitration Rules agreed to by the parties in their agreement." *Id.* at 4. The Arbitrator further found that SMG is entitled to relief in its favor. Specifically, the arbitrator found that: (i) CVI materially breached the PSA; (ii) CVI breached the covenant of good faith and fair dealing; (iii) CVI's bad faith acts warranted punitive damages under New Mexico law; (iv) CVI's bad faith acts warranted the application of the maximum interest rate available under New Mexico law; and (v) CVI must bear the cost of the arbitration. *Id.* at 19-22. The Arbitrator awarded damages and costs as follows: (i) $4,215,000 in liquidated damages as of March 1, 2020; (ii) $14,090,599 in lost profits; (iii) $3,600,000 in punitive damages; (iv) $23,660 in arbitration costs; (v) prejudgment and post-judgment interest of 15% is applicable to the liquidated damages; and (vi) post-judgment interest of 15% is applicable to all other damages and costs. The Arbitrator declined to award attorneys' fees as requested by SMG.

14. The Final Award is a final award subject to confirmation in this Court. *Id.* at 23.

**CONFIRMATION OF THE AWARD**

15. The Court should confirm the Final Award under Section 9 of the FAA, 9 U.S.C. § 9, for the following reasons.

16. Under Section 9 of the FAA, application for confirmation of an award may be made to a court in which jurisdiction exists at any time within one year after the award is made. 9 U.S.C. § 9. Such an application must be granted "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [9 U.S.C.]." *Id.*

17. The Parties have agreed to the application of the AAA Rules under the PSA. *See* Ex. 1 at § 10. Under AAA Rule R-52(c), "[p]arties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof."

18. Since the PSA does not include a forum selection clause, "application may be made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9. The Final Award was made in Philadelphia, Pennsylvania.

19. This Petition is made well within the one-year deadline, as the Final Award was made on May 29, 2020. Furthermore, no action has been taken to vacate, modify or correct the Final Award under Sections 10 or 11 of the FAA. 9 U.S.C. §§ 10, 11. Thus, the Final Award is ripe for confirmation by this Court.

20. Section 13 of the FAA directs that a judgment be entered on a confirmed award. 9 U.S.C. § 13. Such a judgment "shall be docketed as if it was rendered in an action." *Id.*

21. SMG submits contemporaneously herewith a proposed Order Confirming Arbitration Award and entering judgment thereon.

WHEREFORE, SMG respectfully petitions this Court to enter an order confirming the Arbitrator's Final Award of May 29, 2020, and enter judgment thereon.

**CLARK HILL PLC**

Dated: June 5, 2020

/s/ Lisa Carney Eldridge
Lisa Carney Eldridge, Esquire (PA ID #62794)
Two Commerce Square
2001 Market Street, Suite 2620
Philadelphia, PA 19103
Phone: (215) 640-8500
Fax: (215) 640-8501
leldridge@clarkhill.com

Of Counsel:

Dated: June 5, 2020

/s/ Daniel M. Jaffe
Daniel M. Jaffe, Esquire
A Rebecca Williams, Esquire
SLOVER & LOFTUS LLP
1224 17th St., N.W.
Washington, DC 20036
202-347-7170
dmj@sloverandloftus.com
* *Pro Hac Vice applications shall be submitted*

*Attorneys* for *Southern Minerals Group, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that this 5th day of June 2020, I have caused true and correct copies of the foregoing **Petition to Confirm Arbitration Award** to be served upon Respondent CV Investments LLC by U.S.P.S. Overnight Mail:

CV Investments LLC
200 Four Falls Corp. Center, Suite 211
Conshohocken, PA 19428

A courtesy copy of the foregoing petition to be served via United States Postal Service, overnight mail, upon non-party Brenda A Smith, designated as defendant CVI's "Authorized Representative" in the underlying Arbitration as follows:

Brenda A. Smith
Permanent ID 2019-339640
CCIS# 07-571432
U.S. Marshalls Number 72832-050
Essex County Correctional Facility
354 Doremus Avenue
Newark, NJ 07105

**CLARK HILL PLC**

Dated: June 5, 2020

*/s/* Lisa Carney Eldridge
Lisa Carney Eldridge, Esquire (PA ID #62794)
Two Commerce Square
2001 Market Street, Suite 2620
Philadelphia, PA 19103
Phone: (215) 640-8500
Fax: (215) 640-8501
leldridge@clarkhill.com

*Attorneys for Southern Minerals Group, LLC*

# EXHIBIT 1

**AMERICAN ARBITRATION ASSOCIATION**

**Commercial Arbitration under AAA Commercial Rules and Mediation Procedures**
**Amended and effective October 1, 2013**

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AAA Case 01-19-0002-9998

Southern Minerals Group, LLC

Represented by Daniel Jaffe, Esq. and A. Rebecca Williams of Slover & Loftus LLP

v.

CV Investments, LLC

ex parte

---

## FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement dated April 7, 2017 and entered into between Claimant, and Respondent, and having been duly sworn, and having duly reviewed the proofs and allegations of Southern Minerals Group, LLC, and CV Investments LLC having failed to submit proofs and allegations after due notice by mail in accordance with the Commercial arbitration Rules of the American Arbitration Association, hereby, AWARD as follows:

## Decision and Opinion

An award is entered in favor of claimant Southern Minerals Group, LLC and against respondent CV Investments LLC in the amounts set forth below.

## Procedure

Pursuant to the agreement between the parties dated April 7, 2017 as amended June 6, 2018, claimant filed this action on September 20, 2019. Apparently, respondent's principal had been indicted by Federal Authorities and at the time of filing its primary representative was incarcerated in Federal custody.

On December 4, 2019, Hon. Mark I. Bernstein (Ret.) was selected to be the AAA arbitrator for this matter under the Large Complex procedures of the Commercial Arbitration Rules as amended. Given the claim amount, the Procedures for Large, Complex Commercial Disputes specifies the number of arbitrators to be three. The parties' arbitration provision was silent as to the number of arbitrators. Pursuant to the applicable rules, expecting to be required to pay all costs of arbitration, petitioner requested that the number of arbitrators be reduced to a single arbitrator. According to the rules the first arbitrator determines whether to proceed with a single arbitrator or if three shall be appointed. Since Respondent's representative was only able to communicate via US Mail, it was directed that all communication was to be made in writing.

On, November 11, 2019, Brenda Smith, respondent's representative, submitted a handwritten letter request an indeterminate stay alleging an inability to respond because company records had been seized and had been retained by Federal authorities. Respondent offered no suggestion as to how or when this situation would change, such that the matter could resume. Most significantly, as claimant stated in their response there was no suggestion that Smith lacked sufficient knowledge to participate. Claimant further claimed that had this matter been amenable to court filing, a default judgment, unavailable in AAA arbitration,

would have been entered and claimant would earlier have had a judgment to collect upon if respondent did not participate.

Respondent requested a hearing by three arbitrators. Claimant responded that no right existed and since claimant would be paying for all costs of arbitration requested the matter be decided by one arbitrator in accord with the AAA rules. By Order dated December 14, the arbitrator ruled that one arbitrator would decide the matter and that the preliminary hearing would be held by written submission.

On January 8, 2020, the arbitrator received Claimant's written preliminary hearing statement and respondent's written letter which did not contain any substantive preliminary hearing statement and merely asked for a 6-month extension, but offered no explanation as to how anything would change 6 months hence. On January 9 claimant responded in writing to the requested extension.

By Order dated January 31, 2020 the arbitrator ruled that this matter would proceed and set a schedule for discovery and hearing through written submissions.

By submission dated March 20, 2020, as required by the January 8, 2020 Order, claimant submitted its affirmative case memorandum containing procedural background, statement of material facts, and memo of law. Attached thereto were the verified statements of John Peter and Clovis Hooper and a statement of damages.

Claimant also advised that by correspondence dated February 20, 2020 they had submitted Requests for Admissions, Interrogatories, and Requests for Production of Documents and had received no substantive responses but had received a handwritten letter dated March 20, 2020 which was attached.

Respondent's letter stated that although she was unable to retain papers but could have access to a thumb drive.

Accordingly, On April 8, the arbitrator Ordered a thumb drive be provided to respondent and that thereafter, respondent would have 10 days to respond to Claimants discovery requests, or the Request for Admissions would be deemed admitted.

On April 20 Claimant Southern Mineral Group, submitted a memorandum entitled "Rebuttal of Claimant" in which it pointed out that no substantive response whatever had been received from respondent as to the claim and renewed its request for damages.

Claimant sent a thumb drive to respondent on April 27. Since there has been no response by respondent, the Requests for Admissions are deemed admitted.

All required due process was afforded to both sides through the impartial application of the Arbitration Rules agreed to by the parties in their agreement. All reasonable accommodation was made for the parties. No in person or even telephonic conferences were required and all submissions could be made in writing. Handwritten submissions were accepted, considered, and evaluated. No substantive responses were ever received from respondent.

The record was properly closed on May 13, 2020.

## Factual Findings

On April 7, 2017 Mr. Clovis Hooper, President of Claimant Southern Minerals Group, LLC (hereinafter SMG) negotiated a Magnetite Concentrates Purchase and Sale Agreement ("PSA") between SMG and Respondent CV Investments LLC ("CVI")

This agreement was subsequently amended on June 6, 2018. Under that agreement, CVI committed to purchasing 400,000 tons of magnetite from SMG at a price of $80.00 per ton at a rate of 4,000 per month beginning in June 2017. This agreement was amended in mid-2018. However, beginning in October 31, 2018 CVI began a pattern of failure of performance followed by representations and promises which were never fulfilled. (see verified statements of Mr. John Peters and Clovis Hooper) CVI has made no payments to SMG since October 2018 (Request for Admission No. 1). CVI breached the PSA. (Request for Admission No. 3). CVI's Smith was arrested on August 27, 2019. As of March 1, 2020, SMG's liquidated damages are in the amount of $4,215,000, exclusive of interest. (Request for Admission No. 2).

Mr. John Peters is the Managing Director of Strategic Minerals PLC, parent company of Southern Minerals Group, LLC ("SMG"). Together with SMG's President, Mr. Clovis Hooper, Mr. Peters negotiated with CVI the Magnetite Concentrates Purchase and Sale Agreement ("PSA") referred to above which was executed on April 7, 2017. This agreement was amended on June 6, 2018. CVI's sole representative was Ms. Brenda Smith ("Smith").

SMG has exclusive access to a magnetite stockpile and operates a magnetite sales operation from the Cobre Mine in New Mexico. SMG's access rights to the magnetite is limited to 800,000 tons. Pursuant to the PSA contract CVI was obligated to purchase 400,000 tons of concentrates with minimum monthly purchases of 4,000 tons. SMG committed access to those tons exclusively to CVI. This commitment by SMG amounted to 50% of its total access to magnetite. Throughout the term of the agreement SMG was able to provide the full 400,000

tons to CVI in accordance with the PSA's monthly purchase schedule. SMG's staffing and costs increased to accommodate the commitment to CVI. CVI took only a total of 38,414 tons of magnetite concentrate from the initiation of the PSA in June 2017. Most of this volume was taken in the first few months. All but one of the shipments was moved, at CVI's request, to property in New Mexico.

CVI defaulted on its required payments. By the end of 2017, CVI was $642,000 in arrears. All CVI shipments were made by truck as required under the PSA. However, when CVI had no named destination for the delivery of the magnetite concentrates CVI requested storage in New Mexico. CVI made 19 payments to SMG for magnetite between June 19, 2017 and October 31, 2018. At various points in 2018, CVI paid some of its outstanding balance but $371,000 was owing when the Parties negotiated the First Amendment in June 2018. SMG generously reduced the outstanding amount owed by over $215,000, conditioned on CVI's payment of the reduced balance. That amended agreement required CVI to make quarterly deposits in lieu of taking the 4,000-ton minimum.

Despite assurances, CVI repeatedly failed to make these required payments. CVI's regular monthly obligations were to resume beginning March 1, 2019. The last CVI payment to SMG was in October 2018. Despite ceasing to make payments, CVI's Smith repeatedly assured SMG that CVI was about to sell a bond and receive a major infusion of cash. Smith reassured that SMG would be paid what was owed when that sale closed. CVI repeatedly claimed that the closing was delayed by forces outside its control. Smith continued her reassurances until August 2019 when she was arrested for allegedly engaging in a Ponzi scheme and CVI assets were seized. SMG's obligations under the PSA and CVI's excuses, delays and

diversions precluded SMG from pursuing other potential purchasers of the magnetite concentrate.

A detailed spreadsheet of SMG's transactions with CVI under the PSA was attached as Exhibit No. 1 to the statement of Mr. Hooper.

Under the amended agreement, CVI's monthly obligations restarted March 1, 2019. CVI failed to make any required payments, these required payments equaled $3,840,000 for the 12 months between March 2019 and February 2020. Consequently, as of March 2020, CVI's liquidated damages owed to SMG equaled $4,215,000, exclusive of interest. In addition to the liquidated damages CVI's breach of the PSA has resulted in SMG incurring direct and consequential damages. CVI's PSA represented a commitment to purchasing half of SMG's magnetite inventory. The volume committed to, and the expected revenue from, CVI under the PSA far exceeds the volume purchased by, and revenue earned from, all other SMG customers combined. Thus, in 40 months, SMG expected to realize significant profits associated with CVI exclusive access to their magnetite rights.

To determine lost profits, the damages calculation has three complementary analyses. The first analysis assumes that CVI performed as required under the PSA. SMG expected to realize over $45.6 million in total revenues during the approximately 8 years of the PSA (2019 – 2027). Of that $45.6 million, SMG expected that CVI purchases would account for $28.9 million, or 63% of all revenues. During that same period, SMG has known and estimated unit costs. SMG's calculation of $21.1 million in expenses is a conservative analysis representing the expenses that SMG might have incurred. Thus, SMG expected to

earn $24.5 million of net profit over the balance of the PSA. To determine the net present value ("NPV") of the expected profit, SMG applied a discount rate of 2%. The NPV calculation yields a current value of reasonably expected profits of **$22.7** million.

SMG's second analysis accurately assumes that CVI made no further purchases from January 1, 2019 thru the remainder of the PSA. In this analysis, SMG's expected profits drop dramatically because SMG will likely have to extend its operating period by 20 years to sell the same volume of magnetite concentrate, and revenues are likewise impacted because certain customers pay less per ton than CVI. Critically, the extended period means SMG will incur additional recurring and fixed expenses with fewer sales. SMG's calculation is again, very conservative. The second analysis shows that over the 20-year period, SMG would earn $41.2 million in revenue and incur approximately $36.0 million in expenses over the same period. The second analysis shows that SMG expected to earn $5.2 million net profit over the 20-year period. Consistent with the first analysis, SMG applied a discount rate of 2% to determine the NPV of the expected profit. The NPV calculation yields a current value of $**4.4** million.

SMG's third analysis calculates the difference between these conservative analyses. The third analysis shows that the difference in the NPV of the expected profits between the first and second analysis is $18.3 million. Thus, SMG submits that its total damages attributable to CVI's breach of the PSA is $18.3 million. However, as $4,215,000 of the damages is already a known and liquidated value, SMG calculated it lost $14,090,599 in profit damages and $4,215,000 million in

liquidated damages. The arbitrator finds this analysis to be reasonable, conservative, and accurate.

## Detailed Findings of Bad Faith

CV Investments LLC ("CVI") is owned, controlled, and operated by Ms. Brenda Ann Smith. Ms. Smith stands charged by the U.S. Attorney for the District of New Jersey with five (5) criminal counts, including four (4) counts of wire fraud and one (1) count of securities fraud. On the same day as criminal charges were lodged, the U.S. Securities and Exchange Commission ("SEC") filed a civil complaint in the U.S. District Court for the District of New Jersey against Smith and her various corporate entities for violations of securities laws. On September 10, 2019, the assets and bank accounts of several the named defendants were frozen.

SMG has the exclusive right to access approximately 800,000 tons of magnetite concentrates. Under the PSA, CVI was obligated to purchase 400,000 tons of such magnetite concentrates for the price of $80.00 per ton with a required minimum of 4,000 tons per month beginning June 1, 2017. In return, SMG was required to "ensure that it does not undertake any activities that impact the Purchases [sic] rights to the magnetite concentrates." Given commitments to other customers and local regulations, SMG was prohibited from providing more than 5,500 tons of magnetite concentrates per month to CVI. SMG requested, and CVI provided, "a deposit of $10,000" to SMG. Likewise, SMG requested, and CVI provided, a "standby letter of credit in the amount of $250,000.00 issued by a major US banking institution" or a cash deposit in the same amount to be held "in solicitor's trust."

CVI's monthly purchases of magnetite ore began June 1, 2017, and shipments of the material began on or around July 1, 2017. Between June 2017 and October 30, 2017, CVI met its contractual obligations under the PSA by purchasing the required minimum of 4,000 tons of magnetite ore each month and promptly payed for those purchases. Beginning with the SMG invoice dated October 31, 2017, CVI's payments fell into arrears. In January 2018, CVI paid its outstanding balance of $642,572.80. Immediately following its January 2018 payment, CVI again fell into arrears, and by March 2018, CVI owed SMG $521,404. In March 2018, CVI notified SMG that it was "unable to take delivery of the minimum volume" of the magnetite ore due to delays in "obtaining environmental approvals." To continue their contractual relationship the parties entered the First Amendment dated June 6, 2018. The First Amendment suspended CVI's obligation to purchase a minimum of 4,000 tons per month "for the period March 1, 2018 through May 31, 2018; provided, however, that such waiver is contingent on [CVI] meeting its obligations as otherwise required in the PSA and this Amendment." The referenced obligations included CVI paying the amount then in arrears, $371,404, according to a detailed payment schedule. If CVI failed to meet that payment schedule it would "forgo[] any right to take the remaining balance of the Prepaid Quantity for the applicable calendar quarter . . . ." CVI agreed to "resume its obligation to undertake to purchase a minimum of 4,000 tons per month at $80 per ton," beginning March 1, 2019. CVI failed to make the payments required.

On June 15, 2018, SMG invoiced CVI for the first quarterly prepayment of $375,000 in accordance with Section 4 of the First Amendment. Payment was due June 25, 2018. On July 10, 2018, CVI paid that invoice. On September 1, 2018,

SMG invoiced CVI for the second quarterly Prepayment due September 11, 2018. CVI failed to make that payment.

On September 13, 2018, SMG provided notice to CVI that it must rectify its past due amounts of over $600,000 otherwise SMG would consider CVI in default,

On Monday, October 8, 2018, SMG again wrote to CVI regarding the outstanding balance of $371,404 and offered to reduce the outstanding balance by $217,431.20 to reflect the 2,717.89 tons of the 4,000 ton minimum that CVI did not take physical delivery of in February 2018. This offer was contingent upon CVI paying the remaining balance in three installments and CVI release to the $250,000 security deposit CVI had previously made. On October 11, 2018, CVI made a counteroffer that accepted the structure of SMG's proposal but extended the time for the installment payments. SMG agreed to CVI's counteroffer. Nonetheless, CVI failed to make the initial installment payment on the agreed upon due date of October 22, 2018 but did make two payments totaling $53,972.80 on October 31, 2018. CVI subsequently missed the two remaining $50,000 installment payments due November 5 and November 19, 2018. Likewise, CVI never paid the outstanding balance by December 11, 2018 as required.

CVI has not made any further payments to SMG. On December 29, 2018, SMG sought further payment, requesting that CVI pay its outstanding balance of $475,000 before the end of 2018.

On December 29, 2018, CVI offered to pay the $475,000 in the first week of January 2019. SMG suggested CVI agree to release to SMG $100,000 from CVI's security deposit; pay the remaining $375,000 owed to SMG in the first week of January 2019; and replenish the amount of the security deposit released to SMG.

On December 30, 2018, CVI agreed to SMG's proposal and consented to the $100,000 transfer from the security deposit to SMG. CVI never paid the remaining $375,000 due to SMG, nor did it ever replenish the deposit. Instead, CVI began a series stalling tactics.

**January:**

- On January 4, 2019, CVI's Smith stated that SMG should have the funds the "following week."
- On January 9, 2019, CVI's Smith stated that the funding should be approved "[b]y end of day tomorrow"
- On January 17, 2019, CVI's Smith claimed "3 deals to close today or tomorrow. My funds from deal payout within one week."
- On January 17, 2019, CVI's Smith claimed she has the "financial instrument in hand to fund."
- On January 22, 2019, Smith claimed that closing would occur the following day (January 23, 2019) and informed SMG's Peters that she sent him "a confidential copy" of the "actual financial instrument,". Nonetheless, no payment was forthcoming.

**February:**

- On February 8, 2019, Smith said that she "was just told my wire leaves at 9 am tomorrow London time. Of course, I have to wait for banks to open here. I fully expect to be able to send $475,000 tomorrow. I will be happy to discuss future plans early next week."
- Yet again, on February 16, 2019, CVI's Smith claimed to "have taken control of the entire transaction and spent the day working out

details. I now have direct contact with the buyer of my bond and his banker. . . . I fully expect a wire on Monday and am not relying on anyone in between." CVI's Smith further assured SMG of CVI's ability to secure funding for payment, stating "BTW [by the way], this is real, I will close" and blaming the delay on a number of things, including the time difference and that the "buyer trader was delayed in [the] subway."

- On February 27, 2019, CVI's Smith claimed that an "[i]nstrument [was] delivered last night at 22:00 by my trade desk."

March:

- Beginning March 1, 2019, SMG resumed invoicing CVI for its monthly minimum purchases of 4,000 tons of magnetite concentrates, pursuant to Section 4(b)(ii) of the parties' First Amendment. Yet on March 1, 2019 Smith claimed that the "buyer bank downloaded the message / instrument today. Waiting for buyer account to get credit for instrument and then funds are released. Unfortunately, I am told that could take up to 5 days from transmission which was Tuesday."
- On March 8, 2019, SMG's Peters notified CVI's Smith that he needed to update his Board of Directors on the "expected timing of payment and plans to address the existing contract . . . ." On March 9, 2019, CVI's Smith responded, "still not closed & no production,"
- On March 13, 2019, SMG's Peters again inquired as to the timing of payment, to which CVI's Smith again responded with the claim that she was "[t]rying to close this week."

- On March 29, 2019, SMG requested an update from CVI's Smith by close of business regarding CVI's overdue payments, including a $50,000 wire transfer that CVI supposedly sent to SMG the prior week.
- On March 30, 2019, CVI's Smith claimed her banker had moved their scheduled meeting, and she would have to confirm with him when her transactions would be final and would check on the "outgoing wire."

April

- On April 3, 2019, CVI's Smith again claimed her "banker delayed the meeting until April 8." And that she had "pending transactions that will close this month," but "do[es] not have substantial cash on hand until closing."
- On April 11, 2019, CVI's Smith stated that she did not "have the funds" to pay, but that the "funds are closing on Tuesday April 16."

May:

- On May 15, 2019, Smith, provided a purportedly "internally generated balance sheet" for CVI showing over $59 million in assets.
- On May 21, 2019, CVI's Smith responded to an email from SMG's Peters requesting an update, again claiming that she "expect[ed] to receive funds by close of business" the next day. on
- May 23, 2019, SMG's Peters again asked CVI's Smith via text message if the bonds had settled. CVI's Smith claimed she "should have funds tomorrow." On that same day SMG's Peters asked CVI's Smith to

formally agree to undertake certain actions to avoid legal proceedings, as follows: I was able to get my UK Directors and Alan this morning and I have got them to agree that, provided, on behalf of CV Investments, you undertake to pay SMG, within two weeks, the $375,000 December payment and top up the existing deposit with SMG by $3,690,000 they will hold all actions for those two weeks. . . . . Please provide, on behalf of CV Investments, agreement to these arrangements." CVI's Smith responded "Agreed. Thank you very much. Brenda.".

- When SMG attempted to memorialize the parties' new agreement in a Second Amendment to the PSA, CVI did not execute the Second Amendment, despite having already agreed to the terms. On May 25, 2019, SMG's Peters again asked CVI's Smith via text message if CVI had secured its funds yet. Responding that same day, CVI's Smith again put off SMG's Peters, claiming it would be "first thing Tuesday am [morning]"
- On May 29, 2019 , after the date CVI's Smith claimed the funds would be available, SMG's Peters asked CVI's Smith via text message: "has Merrill released the funds" and, if not, "what are your expectations." CVI's Smith only responded with "tomorrow."
- On May 30, 2019, SMG's Peters asked CVI's Smith to "please update the position with CVI." CVI's Smith responded that same day, stating "Not yet. Still working hard on it."

June:

- On June 3, 2019, CVI's Smith emailed SMG's Peters that the funds would be available in two days, citing issues with the bankers.
- On June 6, 2019, CVI's Smith stated that the buyer "changed delivery," and it would "[p]robably" take an additional day. Later that day, CVI's Smith stated she had "tried to be direct [and] honest" and was "doing everything possible to fund by Friday".
- SMG's Peters then asked CVI's Smith if CVI could at least provide SMG with $100,000 on Friday, June 7, 2019, along with supporting paperwork for the bond funds that Peters could show to SMG's Board of Directors. Id. CVI's Smith responded that it would provide SMG with the requested $100,000 and paperwork by Friday June 7, 2019 but then failed to do so.
- On June 7, 2019, the supposed bond sale did not settle despite CVI's Smith claiming that the bankers were "working on it."
- On June 8, 2019, CVI's Smith claimed she was "[j]ust off [the] phone with [the] Buyer" and that they were working it, but there would be "[n]o wire today but it will go out Monday."
- On June 11, 2019, CVI's Smith again suggested that funds "may" be available "tomorrow" if the bankers can move the process along.
- On June 14, 2019, Peters sent Smith a text message requesting a telephone conference. Smith claimed she was sick. Later that day, when asked for an update on the bonds, Smith responded "[w]orking with bankers now".

- On June 20, 2019, Peters again asked Smith for an update, to which Smith responded "[t]rying to receive one transfer today. Still waiting on email from banker."
- On June 23, 2019, Smith claimed she was "[w]aiting on confirmation of transfer."
- On June 24, 2019 Smith did not respond to Peters request for status.
- On June 26, 2019, Peters asked Smith if CVI was "any firmer on timing of cash payment to SMG," and was told "[e]xpect [F]riday".
- On June 28, 2019, the new expected payment date, CVI failed to make payment.
- On June 30, 2019, CVI's Smith said: "I can make that payment based on drawing down the bond," .

<u>July:</u>

- On a July 13, 2019 telephone conference, Peters and Smith discussed an option, whereby CVI would borrow against a supposed LOC for ninety (90) days to pay SMG while CVI awaited its supposed bond settlement.
- On July 14, 2019, Peters asked CVI's Smith whether CVI had considered the option, but CVI's Smith did not answer the question and instead suggested she was "trying."
- On July 14, 2019, Smith purported to send SMG details of the bond issuance.
- On July 18, 2019, alarmed by reports that FINRA had cited and subsequently barred Smith from "associating with any FINRA

member" for rules violations, Peters text messaged Smith asking about the matter. CVI's Smith claimed the FINRA violations were not related to her trading and said she could "explain on [the] phone."

- On July 24, 2019, Smith stated that she should have confirmation that the bond had settled that day.
- On July 26, 2019, Smith claimed her banker "says I will have bank statement showing 100 mm tomorrow & it will be available to disburse next Wednesday" (July 31, 2019).
- On July 27, 2019, Smith said: "I do not have statement yet. I give up. Sue me" . She later stated she was still waiting for an update from the banker, but funds should come through "this week for sure."

<u>August:</u>

- Throughout the month of August 2019, the "deal" was supposedly imminent, but then CVI ceased all communication.
- On August 9, 2019, SMG's Peters emailed Smith asking why she had "stopped communicating." Smith responded, claiming that her "banker now says I should have some funds on Tuesday [August 13, 2019]. He says [C]credit Suisse is wrapping up monetization. Can we wait until Tuesday?"
- On August 14, 2019, Smith claimed: "I talked to my banker this morning and he said the 'monetizer' has accepted the instrument, Credit Suisse has completed their process and agreed to start disbursements. He says funding is imminent." Despite these claims, no funds were ever disbursed to SMG.

- On August 16, 2019 Smith said she was waiting "for my banker to schedule." And then said: "[t]turning phone off."
- Throughout the remainder of August Peters and Smith exchanged several emails wherein Smith avoided a personal meeting or telephone conference and suggested instead "sue me or something." And then suggested that her "usa [sic] banker says I am still getting [the] advance this week but I don't have it yet."
- On August 26, 2019, Smith assured that she would sign a note for $4.065 million .
- On August 27, 2019, Smith was arrested by the FBI on charges that she had been running a Ponzi scheme. The federal indictment lodged against Smith and several of her corporate entities states that the behavior with CVI was done to many different victims.

## Conclusions:

The arbitrator draws no conclusion from the unproven allegations of the indictment. A defendant has a presumption of innocence and no conclusion can be drawn from the allegations. It is clear however, that CVI cannot now and will not in the future fulfill the requirements of the PSA.

From the submissions that form the record in this claim including the uncontested Demand for Arbitration and the exhibits attached thereto, affirmed in the statements of Mr. Peters and Hooper, the additional information provided by those statements, the unanswered and therefore admitted Request for Admissions, it is clear that CVI entered into a binding agreement, subsequently

amended, made substantial reassurances and additional promises over an eight month period and materially breached that contract, the PSA. CVI made no payments to SMG under the PSA after October 2018. Agreed upon purchases were not made. Neither was the balance due of $375,000 ever paid. Under the PSA and CVI's written assurances of payment, the amount of $4,215,000 is owing as of March 1, 2020. SMG is entitled to liquidated damages in the amount of $4,215,000. SMG is also entitled to lost profits in the amount of as set forth in exhibit 2 of Mr. Hooper's verified statement.

That verified statement explained in detail the methodology used to calculate loss. Mr. Hooper reasonably calculated the net profits expected if CVI had fulfilled its agreement over the 8 years remaining to the PSA. This lost profit was 22.7 Million dollars . He then calculated the profits expected from the sale of the same quantity of magnetite over a longer period given the failure of CVI to fulfill its agreement. This would yield 5.2 million in profits, a mitigating factor in the damages calculation. Subtracting the profits reasonably expected over the longer period due to the failure from the expected profit if the contract had been fulfilled resulted in a total profit loss of $14,090,599. Within the amount of this loss is the lost profit as of March 1, 2020 which had already been calculated and awarded as liquidated damages. Subtracting the award for liquidated damages yields a net future loss of profit at $14,090,599. In all these calculations the profit analysis had been reduced by a reasonable 2% discount rate. Mr. Hooper conservatively estimated the damages which "arise naturally and necessarily" from the breach in accordance with New Mexico Law,

## Law

The agreement requires that the law of New Mexico apply. Under New Mexico law the claim has been timely presented. NMSA 1978 §37-1-3(A) provides for a 6-year statute of limitations for contractual claims. Damages recoverable and proven herein are the damages which "arise naturally and necessarily" from the breach in accordance with New Mexico Law (Sunnyland Farms, Inc. v Cent. N.M. Elec. Co-op Inc., 301 P. 3rd 387 (N.M.2013).

Under New Mexico Law, punitive Damages are recoverable "for breach of contract whenever defendant's conduct was malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the plaintiff's rights." The defendant repeatedly made false reassurances about imminent performance, and intentionally misled the plaintiff about its intention and ability to perform. As detailed above, there can be no question that the continual bogus reassurances and purportedly detailed explanations of the imminent receipt of funds to pay the debt owed, were both malicious and "committed recklessly with a wanton disregard for the plaintiff's rights". Accordingly, punitive damages are warranted and awarded.

The purpose of punitive damages is to punish the defendant and deter others from similar conduct. The compensatory award entered herein, if collected, shall make plaintiff whole and shall allow plaintiff to recover profits reasonably but conservatively expected under the contract. Accordingly, to punish this bad faith behavior and to deter others from similar conduct, in addition to the compensatory award and in accord with New Mexico law, the arbitrator awards punitive damages in the amount of $3,600,000.

New Mexico law permits pre and post-judgment interest (NMSA 1978 §2004. Accordingly, pre-judgment interest on the liquidated damages awards of $4,215,000 is ordered. Post-Judgment interest is awarded from the date of entry of judgment. Since judgment is awarded based on the bad faith and intentional acts of defendant, interest is by law to be computed in the amount of 15% per annum.

Since SMG has been forced to bear all costs of this arbitration, and CVI has not participated in any meaningful way other than to request extensions, costs are awarded to plaintiff. New Mexico law does not permit the award of attorney fees except where the behavior of the defendant occurs "before the court or in direct defiance of the court's authority"(see state ex rel. N.M. State Highway and Transp. Dep't v. Baca 896 P.2d 1148 (1995), there is no authority to award attorney fees for private contractual claims even where defendant has acted in bad faith and even where the intent of the bad faith actions were intended to defer and dissuade resort to legal (or AAA arbitration) action.

## Judgement and Decision

**The arbitrator awards Claimant SMG against respondent CVI the following amounts:**

**Liquidated damages: $4,215,000**

**Lost Profit: $14,090,599**

**Punitive Damages: $3,600,000**

**Prejudgment Interest at 15% on liquidated damages of $4,215,000**

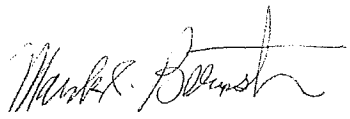
**Post judgment Interest at 15%**

**Costs:** **The Administrative fees and expenses of the AAA totaling $12,200.00 are to be borne $12,200.00 by CV Investments, LLC. The Compensation and expenses of Arbitrator totaling $11,460.00 are to be borne $11,460.00 by CV Investments, LLC. Therefore, CV Investments, LLC has to pay Southern Minerals Group, LLC, an amount of $23,660.00.**

This Final Award is in full and complete settlement and satisfaction of any and all claims that were submitted to the jurisdiction of this Arbitrator in connection with the present dispute. All claims, arguments or issues not specifically addressed in this Final Award and not reserved for further disposition, are rejected and denied with prejudice.

**By the Arbitrator:**

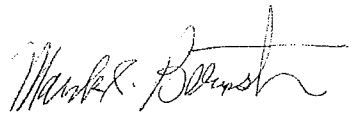
Dated: May 29, 2020



Hon. Mark I. Bernstein (Ret)

Sole Arbitrator

I, Hon. Mark I. Bernstein (Ret), do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Decision and Final Award in this Arbitration.



Hon. Mark I. Bernstein (Ret) Sole Arbitrator

# EXHIBIT 2

**Magnetite Concentrates**
**Purchase and Sale Agreement**

Southern Minerals Group, LLC of P. O. Box 535 Silver City, NM 88062 as "**Seller**," and CV Investments LLC 200 Four Falls Corp. Ctr. Suite 211, Conshohocken, PA 19428 and affiliates as "**Purchaser**," agree as follows:

1. Seller has the exclusive right to access approximately 800,000 tons of magnetite concentrates (this is an estimate of the size and should not be relied upon as a definition of resource), a treated by-product of copper mining and milling operations conducted at the Mine site formerly operated by Freeport-McMoRan located in Grant County, New Mexico, and has in place contracts or purchase orders to sell approximately one-half of that inventory to other purchasers. The Seller will ensure that it does not undertake any activities that impact on the Purchases rights to the magnetite concentrates. Should, for any reason, the Sellers right to access this material be terminated, then on the day that access is terminated this Agreement will terminate, without further recourse to Purchaser and Seller other than amounts already outstanding or breaches of Agreement occurring up to that date.

2. Seller hereby agrees to sell to Purchaser and Purchaser hereby agrees to purchase from Seller up to of 400,000 tons of such magnetite concentrates for the price of $80.00 per ton. These prices include Seller loading the concentrates into Purchasers' trucks with Seller's equipment and equipment operators, and Seller shall bear all costs associated with such loading operations. The Purchaser undertakes to purchase a minimum of 4,000 tons per month from ~~commencement of this Agreement;~~ June 1, 2017. BJS CH

3. Purchaser shall provide the trucks and truck operators to haul the concentrates and shall bear all costs associated with such hauling operations. The Purchaser shall ensure that representatives of the Purchaser (including truck drivers) shall conduct its activities in a good and professional manner and in accordance with the reasonable directions (if any) given to it by the Seller from time to time.

4. Seller shall maintain accurate certified weighing facilities and will weigh the Purchaser's trucks on entrance and exit, unloaded and loaded, and provide the net weights of each load to Purchaser as each loaded truck exits the site, and provide appropriate Material Safety Data Sheets. The Seller shall not be liable for loss or damage suffered or incurred by the Purchaser due to any failure or interruption of equipment due to the need for repair or alteration or breakdown but, the Seller will assist the Purchaser in minimizing any losses that the Purchaser may incur.

5. Purchaser shall:

(i) provide a deposit of $10,000 to the Southern Minerals Group, LLC bank account within one business day of signing of this Agreement, as advised. BJS CH

(ii) Prior to commencement of this Agreement, but not greater than seven days from signing of this Agreement, the Purchaser shall provide the Seller with a standby letter of credit in the amount of $250,000.00 issued by a major US banking institution authorizing the seller to draw against it in the event Purchaser fails to timely pay any invoice in full or provide, in solicitor's trust, a deposit of $250,000 with instructions that this is to be released to SMG on the provision by SMG that there has been a default on payment under the Agreement. This notification is to be given at SMG's sole discretion and the solicitor has to be irrevocably instructed to act on any such notice.

(iii) make payment for all concentrates purchased on a monthly basis within ten days after being presented with an invoice from Seller.

6. Purchaser acknowledges and is aware that local governmental regulations limit the total tonnage of concentrates that may be removed from the mine site to 11,000 tons per month, and that Seller's other existing commitments presently utilize up to approximately one-half of that amount, leaving only approximately 5,500 tons per month now available to Purchaser. Seller agrees to inform Purchaser if and when other purchasers fail to purchase their entire committed amount so as to allow Purchaser the opportunity to acquire a larger amount in any particular month.

7. Seller warrants and covenants to and with Purchaser that it can provide good and marketable title to the subject concentrates, that they are by-products of lawful mining operations, have been properly severed from the realty from which they came, are free and clear of any liens or claims of any kind or nature, and will be free and clear of any liens or claims of any kind or nature when conveyed to Purchaser.

8.1 If a Force Majeure Event affecting a Party precludes that party ("Precluded Party") partially or wholly from complying with its Obligations (except its payment obligations) under this Agreement then:

(a) as soon as reasonably practicable after that Force Majeure Event arises, the Precluded Party must notify the other Party of

(i) the Force Majeure Event;

(ii) which obligations the Precluded Party is precluded from performing ("Affected Obligations");

(iii) the extent to which the Force Majeure Event or its consequences preclude the Precluded Party from performing the Affected Obligations ("Precluded Extent"); and

(iv) the expected duration of the delay arising directly out of the Force Majeure Event or in consequence of it;

(b) the Affected Obligations will, to the Precluded Extent, be suspended for the duration of the actual delay arising directly out of the Force Majeure Event ("Actual Delay"); and

(c) the other Party's Obligations which are dependent on the Affected Obligations will be suspended until the Precluded Party resumes performance.

8.2 The Precluded Party must, as soon as reasonably practicable after cessation of a Force Majeure Event, resume performance of the Affected Obligations and must use reasonable

endeavours to overcome the event as quickly as possible, but "reasonable endeavours" does not require a Party to pay money in an attempt to overcome the event or to settle any industrial dispute against its wishes.

9. To prevent possible confusion Seller and Purchaser agree that this Agreement is to be applied in accordance with the laws of the State of New Mexico other than its conflicts of laws principles.

10. Parties agree that any dispute or controversy arising out of or relating to this agreement or the interpretation thereof, shall be settled by arbitration, held in a mutually acceptable location to the parties, in accordance with the rules, then in effect, of the American Arbitration Association.

11. Either Party may assign this agreement, upon written notice, provided such assignment is to a commonly controlled affiliate.

12. Either Party may terminate this Agreement on a serious breach of Agreement after giving 30 days notice ("Notice Period") to the other Party to rectify the breach and that breach is not rectified within the Notice Period. The termination of this Agreement shall not affect the rights of the aggrieved party in seeking damages in relation to the Agreement being terminated.

13. Southern Mineral Group, and its affiliates agree not to use the name CV Investments in any public media without Purchasers written permission unless required by law, CH HB

Seller and Purchaser have executed this Agreement effective as of the 7 day of April, 2017.
CH HB

Southern Minerals Group, LLC

By: Clovis Hooper

Clovis Hooper,

President

Southern Minerals Group LLC

CV Investments LLC

By: Brenda Smith

Brenda Smith,

Managing Member

CV Investments LLC

# EXHIBIT 3

# FIRST AMENDMENT TO
# MAGNETITE CONCENTRATES PURCHASE AND SALE AGREEMENT

This First Amendment ("Amendment") to Magnetite Concentrates Purchase and Sale Agreement is made as of this sixth day of June 2018, among **Southern Minerals Group, LLC,** P.O. Box 535 Silver City, **NM** 88062 **("Seller")** and **CV Investments, LLC** and affiliates, 200 Four Falls Corp. Ctr. Suite 211, Conshohocken, PA 19428.

WHEREAS, Seller and Purchaser are parties to that certain Magnetite Concentrates Purchase and Sale Agreement dated April 7, 2017 ("PSA"), providing for the sale of magnetite concentrates, a treated by-product of copper mining and milling operations conducted at a mine in Grant County, New Mexico; and

WHEREAS, Shipments of magnetite concentrates began on or around July 1, 2017 in accordance with the PSA; and

WHEREAS, the Purchaser has notified the Seller that it is unable to take delivery of the minimum volume of 4,000 tons per month required under Section 2 of the PSA due to delays in the Purchaser obtaining environmental approvals; and

WHEREAS, Seller and Purchaser desire to revise the Purchaser's volume obligation under the PSA as set forth in this Amendment.

NOW, THEREFORE, in consideration of the premises, mutual covenants and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Seller and Purchaser agree as follows:

1. Seller waives Purchaser's obligation under Section 2 of the SA to purchase a minimum of 4,000 tons a month for the period March 1, 2018 through May 31, 2018; provided, however, that such waiver is contingent on Purchaser meeting its obligations as otherwise required in the PSA and this Amendment.

2. Purchaser agrees to pay Seller the "Outstanding Amount" under the PSA of $521,404 as of March 31, 2018 in accordance with the following schedule:

| CVI Investments Outstanding Amount Payment Schedule | | |
|---|---|---|
| Monday , 20 April 2018 | $50,000 | Paid |
| Monday, 4 May 2018 | $50,000 | Paid |
| Monday, 18 May 2018 | $50,000 | Paid |
| Monday, 1 June 2018 | $50,000 | |
| Monday, 15 June 2018 | $50,000 | |
| Monday, 29 June 2018 | $50,000 | |
| Monday, 13 July 2018 | $50,000 | |
| Monday, 27 July 2018 | $50,000 | |
| Monday, 10 August 2018 | $50,000 | |
| Monday, 24 August 2018 | $71,404 | |
| | | |
| **Total** | **$521,404** | |

3. Upon Purchaser's full payment of the Outstanding Amount, Purchaser shall be entitled to 2,717.89 tons for which Purchaser was invoiced in February 2018 and which Purchaser has not yet taken delivery. Purchaser's option to take 2,717.89 tons shall expire on November 30, 2018 and no refund shall issue if the material is not taken by that date.
4. Section 2 of the PSA is amended as follows :

    a. The last sentence of Section 2 is deleted in its entirety and replaced as follows:

        i. "The Purchaser undertakes to purchase a minimum of 4,000 tons per month from June 1, 2017 to February 28, 2018."

    b. The following new paragraphs are added to the end of Section 2:

        i. "Prepayment Period (June 1, 2018 - February 1, 2019): On June 15, 2018, September 1, 2018, and December 1,2018 Seller will invoice Purchaser in advance for 4,685.50 tons per quarter ("Prepaid Quantity") and the Purchaser will pay a non-refundable amount of $375,000 ("Prepayment") in relation to sales for that quarter (the Prepayment is in addition to the payments made in satisfaction of the Outstanding Amount under Section 2 of this Amendment) in accordance with the terms of the PSA. If Purchaser does not take the Prepaid Quantity within 12 months of the invoice date, Purchaser forgoes any right to take the remaining balance of the Prepaid Quantity for the applicable calendar quarter and Seller retains all prepayments made by Purchaser. If Purchaser ships

4,000 or more tons in any month during the Prepayment Period or there after then the "Outstanding Prepayment" which is the sum of all Prepayments made by Purchaser less the value of any material delivered, shall be reduced by a maximum of $125,000 in that month and the Purchaser will be deemed to have been delivered 1,562.50 tons of material."

ii. "Beginning on March 1, 2019, Purchaser shall resume its obligation to undertake to purchase a minimum of 4,000 tons per month at $80 per ton."

5. Section 1 of the PSA is amended as follows:

a. The last sentence of Section 1 is deleted in its entirety and replaced as follows:

i. "Should, for any reason, Seller's right to access this material is terminated, then on the day that access to the material is terminated this Agreement will terminate without further recourse to Purchaser and Seller. Upon termination, Seller has no obligation to refund any Outstanding Prepayment Amount, nor provide any additional material, nor provide material that the Purchaser has paid for but has not yet been delivered."

The Seller and the Purchaser have executed this First Amendment to the Magnetite Concentrates Purchase and Sale Agreement effective as of the sixth day of June, 2018.

Southern Minerals Group LLC

Clovis Hooper
President Southern Minerals Group LLC

CV Investments LLC

Brenda Smith
Managing Member CV Investments LLC