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C/015/025 Incoming

cc: Dana  
Steve A.

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RECEIVED #3215  
MAY 04 2009

DIV. OF OIL, GAS & MINING

BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH

RECEIVED  
MAY 05 2009

DIV. OF OIL, GAS & MINING

IN THE MATTER OF THE DENIAL OF	:	
THE APPLICATION FOR PERMIT	:	Docket No. 2009-007
TRANSFER OF HIAWATHA COAL	:	
COMPANY, INC. FOR THE BEAR	:	
CANYON MINE C/015/0025, TASK ID	:	
#3215 BY THE DIVISION OF OIL, GAS	:	Cause No. C/015/025B
AND MINING DATED APRIL 2, 2009	:	

**HIAWATHA COAL COMPANY, INC.'S  
REQUEST FOR REVIEW OF DIVISION ACTION**

COMES NOW Hiawatha Coal Company, Inc., a Utah corporation ("Hiawatha")

and pursuant to §40-10-22(3)(a) Utah Code and R645-300-211, Utah Administrative Code requests a review by the Board of the action of the Division of Oil, Gas and Mining (the "Division") in denying that certain permit application filed by Hiawatha for transfer of permit No C/015/0025 for the Bear Canyon Mine from C. W. Mining to Hiawatha Coal Company, Inc (the "Permit Application."). A true and correct copy of the Division's decision denying the Permit Application dated April 2, 2009 (the "Denial of the Permit") is attached hereto as Exhibit "A."

**JURISDICTION**

1. Hiawatha has an interest that will be adversely affected by the Denial of the Permit and has, therefore, standing to bring this action under §40-10-22(3)(a) and R645-300-211, Utah Administrative Code.

**PERTINENT FACTUAL BACKGROUND**

2. Prior to June 24, 2008 the Bear Canyon Mine was operated by C. W. Mining, a permittee of the Division, of which Hiawatha is the successor in interest as contemplated by §40-10-9(2), Utah Code arising from its acquisition of the assets of C. W.

Mining on June 24, 2008.

3. Within 30 days of succeeding to the interests of C. W. Mining on June 24, 2008 and as required by §40-10-9(2), Utah Code, Hiawatha filed its application for a new reclamation permit, and has continuously mined the Bear Canyon Mine until the present, *i.e.*, almost 9 months, under the authority of §40-10-9(2), which states as follows:

A successor in interest to a permittee who applies for a new permit within 30 days after succeeding to the interest and who is able to obtain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until the successor's application is granted or denied.

4. The reclamation bond of C. W. Mining has remained in place during the entire period from June 24, 2008 to the present time, although Hiawatha has attempted to obtain its own reclamation bond coverage.

5. Hiawatha's attempts to secure its own bond coverage have been complicated by the fact that C. W. Mining's creditors forced C. W. Mining into an involuntary Chapter 11 proceeding in the U. S. Bankruptcy Court for the District of Utah styled *In re C. W. Mining Company dba Co-Op Mining Company* and numbered 08-20105, which has now been changed to a Chapter 7 liquidation. (the "Bankruptcy Proceeding").

6. In the Bankruptcy Proceeding the court issued what has been called its "Preservation Order," which has been construed by C. W. Mining's creditors to inhibit any action by Hiawatha to secure its reclamation bond and by the Division to issue a permit to Hiawatha.

7. As a result of the court's Preservation Order, Lyndon, from which Hiawatha seeks to get its bond, has been unwilling to complete the bonding process, presumably out of fear of violating the Preservation Order.

8. The Division prior to April 2, 2009 had likewise been reluctant to finalize the permit process, also presumably because of the pendency of the Preservation Order, although

Hiawatha believes that the Preservation Order cannot limit the Division or enjoin it from the exercise of its regulatory/police powers. Prior to April 2, 2009, the most recent indication from the Division was that it would issue the permit once the reclamation bond was secured by Hiawatha.

9. Hiawatha sought the order of the Bankruptcy Court to allow Hiawatha to complete its bond application, but that request was denied.<sup>1</sup> In the meantime, Hiawatha's hands have been tied concerning the bond because of the Preservation Order and the Division issued its Cessation Order on February 5, 2009 (the "Cessation Order") rather than allow Hiawatha to continue to mine pending the resolution of the peripheral issues surrounding the Preservation Order.

10. Hiawatha has sought review of the Division's actions concerning the issuance of the Cessation Order and the Division's refusal to alter or amend it on the basis that the Cessation Order was illegally or improvidently issued, which is now pending before this Board *sub nom* IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF HIAWATHA COAL COMPANY, INC., PETITIONER, FOR REVIEW OF THE CESSATION ORDER OF THE DIVISION OF GAS, OIL AND MINING OF FEBRUARY 5, 2009 FOR THE BEAR CANYON MINE , Docket No. 2009-006 and Cause No. C/015/0025A (the "Initial Appeal.")

11. The Initial Appeal was originally scheduled for hearing before the Board on April 22, 2009, but shortly after the hearing was set, the Division on April 2, 2009 issued the Denial of the Permit, which made the Initial Appeal moot. Accordingly, Hiawatha sought, and was granted, a continuance of the hearing of the Initial Appeal without date so that Hiawatha

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<sup>1</sup>Because the Division action and any action taken by this Board are within its police powers to regulate, Hiawatha believes that the Division and this Board are not bound by any order of the Bankruptcy Court, as discussed in more detail below.

could appeal the Division's Denial of the Permit and then consolidate this appeal with the Initial Permit and then Appeal.

#### ARGUMENT

12. As the following discussion will show, Hiawatha believes that the following discussion will show Denial of the Permit was based upon inaccurate facts and a misunderstanding on the part of the Division of the legal effect of the Bankruptcy Court's "Memorandum Decision" of March 18, 2009 as well as a misunderstanding of the effect of the Memorandum Decision upon the Division.<sup>2</sup>

13. The Denial of the Permit contains the following language pertinent to this appeal:

On March 18, 2009 the bankruptcy court issued its Memorandum Decision in which it determined that the purported June 24, 2008 sale to Hiawatha was in violation of the court's prior Orders and that the assets of C. W. Mining, including the operating agreement and the permit, are property of the bankruptcy estate and subject to the trustee's rights to liquidate the assets of C. W. Mining and/or to assume or transfer the operating agreement and permit.

It is no longer possible for Hiawatha to complete the sale and transfer of the assets and mine permit pursuant to application submitted in furtherance of the June 24, 2008 sale agreement. Accordingly the Division does hereby deny the application for transfer of the Bear Canyon permit #C/015/0025 from C. W. Mining to Hiawatha.

13. First, for the sake of clarity, the "Memorandum Decision" referred to by the Division actually consists of 2 separate Memorandum Decisions, to-wit: the Memorandum Decision Denying COP Coal Development Company's Motion to Require the Trustee to Assume

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<sup>2</sup>In the Initial Appeal Hiawatha submitted authorities and argument which support Hiawatha's position that the Division is not subject to the Bankruptcy Court's orders in the first place insofar as they might inhibit or interfere with the Division's exercise of its police powers and, consequently, that the Division should not be influenced by such an order. So as not to unduly lengthen or clutter this appeal, Hiawatha incorporates those arguments and authorities herein by this reference.

or Reject Lease, and Granting Trustee's Motion to Extend Time for Trustee to Assume or Reject Executory Contracts or Unexpired Leases of the Debtor (the "COP Memorandum Decision") and the Memorandum Decision Denying the Motion of Hiawatha Coal Company, Inc. for Relief from the Automatic Stay to Complete Utah Division of Gas, Oil and Mining Reclamation Permit Requirements (the "Hiawatha Memorandum Decision"). Copies of each of those decisions are attached as Exhibits "B" and "C," respectively.

14. Before discussing what the memorandum decisions actually said, it is important to note that the only issues before the court for decision at the time were those raised by COP and Hiawatha. COP's motion was "to require the Trustee immediately to assume or reject any unexpired lease between COP and the debtor." (Docket #398) Hiawatha's Motion was to attempt to obtain court authority "to complete the requirements of a reclamation permit . . . ." (Docket #432) The Court's orders (as opposed to the memorandum decisions) admittedly denied those 2 motions, but did not go beyond the issues framed by the motions, as the Division seems to believe, nor could they, because they were not before the court for decision in the first place.

15. As a review of the memorandum decisions will reveal, there is no finding of fact, conclusion of law or order in either Memorandum Decision which even purports to foreclose Hiawatha's right to operate the Bear Canyon mine. Neither is there any language that supports the Division's conclusion that "the purported June 24, 2008 sale to Hiawatha was in violation of the court's prior Orders . . . ." Again, there is no finding or conclusion or order which supports that statement. The Court's Preservation Order of August 8, 2008 (Attached hereto as Exhibit "D") did not find the June 24, 2008 sale invalid or illegal, and its reach was only prospective. Neither did the Memorandum Decision hold "that the assets of C. W. Mining, including the operating agreement and the permit, are property of the bankruptcy estate and

subject to the trustee's rights to liquidate the assets of C. W. Mining and/or to assume or transfer the operating agreement and permit" as the Division letter states.

16. Hiawatha of course recognizes that the court in the COP Memorandum Decision (pp. 20-21) found that because the cure period under the 1997 agreement did not expire until close of business on January 8, 2008, and the involuntary petition was filed the same date at 3:36 p.m. [prior to the close of business], "any of the Debtor's legal or equitable interests in the Agreement became property of the estate under §541(a)" because of the time overlap. However, the court did not identify what such legal or equitable interests were, if in fact there were any at all. Furthermore, Hiawatha's current leasehold interest in the Bear Canyon Mine is based upon a coal operating agreement between Hiawatha and C. O. P. Coal Development Company dated June 23, 2008 (See Exhibit "E" attached), and not the 1997 Coal Operating Agreement, which was terminated on January 8, 2008. It is Hiawatha's position that its rights to occupy and mine the Bear Canyon Mine under the June 23, 2008 Operating Agreement are superior to any rights that could be asserted by the Trustee, whether or not the Trustee bases such claims upon the 1997 Operating Agreement or otherwise, and those issues have yet to be determined by the Court.

17. A review of the Court's findings in the COP Memorandum Decision under the heading "Current Operation of the Bear Canyon Mine" reveals the history of Hiawatha's mining operations; the Cessation Order from DOGM; Hiawatha's continuing attempts to secure a bond from Cumberland/Lyndon; and the testimony of Joe Kingston and Rachel Young that they will not lease the Bear Canyon Mine to any entity other than Hiawatha, but there is nothing in the findings that relates to or purports to limit in any way Hiawatha's continuing operation of the Bear Canyon Mine. The Court's Conclusions of Law, which begin on page 16 of the COP Memorandum Decision, reflect the court's position that the 1997 Operating Agreement is not a personal services contract (COP Memorandum Decision, p. 18); that it did not irrevocably

terminate by its own terms (COP Memorandum Decision, p. 19); and that the automatic stay memorandum Decision prevented the termination of the 1997 Operating Agreement by preventing action to terminate it Operating Agreement (COP Memorandum Decision, p. 22) The balance of the COP Memorandum Decision relates to the Court's decision to extend the Trustee's time to accept or reject the 1997 Operating Agreement. Nowhere does the COP Memorandum Decision even purport to make a finding of fact or conclusion of law, much less an order, which would in any way limit Hiawatha's rights to continue to operate the Bear Canyon Mine.<sup>3</sup>

18. A review of the Hiawatha Memorandum Decision likewise fails to uncover any evidence of a finding of fact, conclusion of law or order which limits Hiawatha's rights under the June 23, 2008 Operating Agreement to continue to operate the Bear Canyon Mine. While the Court acknowledged Hiawatha's difficulties insofar as the DOGM permit and reclamation bond are concerned, there is nothing in the decision which purports to limit the rights of Hiawatha in any way to operate the mine.

19. Hiawatha believes that this Board may take the action requested by Hiawatha because the Court lacks jurisdiction to make rulings which might interfere in the regulatory process of the Division of Gas, Oil and Mining or the Board in the exercise of its police powers. For example, in *Bickford v. Lodestar Energy, Inc.*, 310 B.R. 70 (E.D.Ky. 2004), a coal mining case with facts very similar to the facts in this case, the district court reversed the bankruptcy court conclusion that the enforcement of certain reclamation bonding requirements by the state agency charged with that obligation was a violation of the automatic stay. The district court concluded at 78-79 that the bonding requirement "serves the purpose of protecting the citizens of the Commonwealth against the dangers posed by land that is not reclaimed and

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<sup>3</sup>It is important to note that Hiawatha also continues to mine the Bear Canyon Mine under the authority of DOGM's Cessation Order, which allows continued operation until the "current longwall panel" is completed, which has not yet occurred.

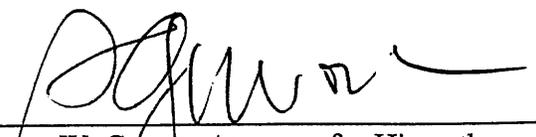
proceedings to enforce the bonding requirements are not subject to the automatic stay."

[emphasis added] The point here, of course, is that the State's regulatory powers to enforce the bonding requirement are an exception to the automatic stay at 11 USC §362(b)(4) and not within the court's power to enjoin. See also *In re Yellow Cab Co-Op. Ass'n*, 132 F.3d 591, 599 ¶34 (10<sup>th</sup> Cir. 1997) (State administrative agency's action to reduce the scope of an operating certificate "was governmental action" exempted from the automatic stay by §362(b)(4)); and *In re Commerce Oil Co.*, 847 F.2d 291, 295 (6<sup>th</sup> Cir. 1988) ("Congress clearly intended for the police power exception to allow governmental agencies to remain unfettered by the bankruptcy code in the exercise of their regulatory powers.")

#### CONCLUSION

20. Based upon the foregoing, it is Hiawatha's position that the Division's action is entirely unsupported in law and fact, and its conclusion that "[i]t is no longer possible for Hiawatha to complete the sale and transfer of the assets and mine permit pursuant to application submitted in furtherance of the June 24, 2008 sale agreement" is unsupported in fact or law and/or is clearly erroneous.

DATED this 4<sup>th</sup> day of May, 2009.

  
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JON M. HUNTSMAN, JR.  
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GARY R. HERBERT  
Lieutenant Governor

# State of Utah

## DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER  
Executive Director

### Division of Oil, Gas and Mining

JOHN R. BAZA  
Division Director



MICHAEL R. STYLER  
Executive Director

April 2, 2009

April 2, 2009

### CERTIFIED RETURN RECEIPT REQUESTED

7004 2510 0004 1824 9689

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SUBJECT: Decision regarding application for Permit Transfer for the Bear Canyon Mine  
C/015/0025, Task ID #3215

Dear Sirs:

On August 4, 2008, the Division received an application from Hiawatha Coal Company, Inc. (Hiawatha) for transfer of C.W. Mining's permit No. C/015/0025 (Bear Canyon Mine) to Hiawatha Coal Company. Notice of the intent to transfer the permit was made in the Emery County Progress on July 1, 2008, which was well before the Division received the transfer application. Thereafter, on August 8, 2008 the Division was advised of a bankruptcy proceeding and of the issuance of an order from the bankruptcy court restricting C.W. Mining from taking further actions to complete the transfer prior to notice and further hearings by the court.



# EXHIBIT "A"

While the bankruptcy proceedings continued, the Division proceeded to review Hiawatha's application. After several iterations, the required ownership and control information was provided. Since November 20, 2008, or earlier Hiawatha was advised that it must obtain a bond prior to Division approval and transfer of the permit. Despite numerous demands and extensions, no bond was provided and consequently Cessation Order #10034 was issued on February 5, 2009.

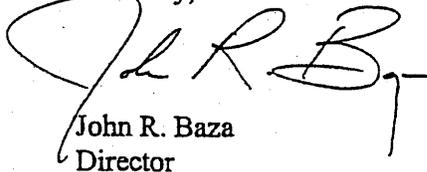
The Cessation Order allowed for abatement by Hiawatha in the event that it was able to provide the required surety, and if the Division approved transfer of the permit. The CO provided that such an approval of the transfer by the Division, if any, would be subject to all further orders of the bankruptcy court granting or denying approval of transfer of the permit from C. W. Mining Co. to Hiawatha.

On March 18, 2009 the bankruptcy court issued its Memorandum Decision in which it determined that the purported June 24, 2008 sale to Hiawatha was in violation of the court's prior Orders and that the assets of C.W. Mining, including the operating agreement and the permit, are property of the bankruptcy estate and subject to the trustee's rights to liquidate the assets of C.W. Mining and/or to assume or transfer the operating agreement and permit.

It is no longer possible for Hiawatha to complete the sale and transfer of the assets and mine permit pursuant to application submitted in furtherance of the June 24, 2008 sale agreement. Accordingly the Division does hereby deny the application for transfer of the Bear Canyon permit # C/015/0025 from C.W. Mining to Hiawatha.

You have the right to appeal this decision denying the transfer of the permit pursuant to Utah Code §40-10-30(1) and R645-300-211 Utah Administrative Code by filing a request for agency action in accordance with the Rules of the Board within 30 days of the notice of this decision.

Sincerely,



John R. Baza  
Director

The below described is **SIGNED**.

Dated: March 18, 2009



JUDITH A. BOULDEN  
U.S. Bankruptcy Judge



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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

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In re:

C.W. MINING COMPANY, a Utah  
corporation,

Debtor.

Case No. 08-20105

Chapter 7

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**MEMORANDUM DECISION DENYING COP COAL DEVELOPMENT COMPANY'S  
MOTION TO REQUIRE THE TRUSTEE TO ASSUME OR REJECT LEASE, AND  
GRANTING TRUSTEE'S MOTION TO EXTEND TIME FOR TRUSTEE TO ASSUME  
OR REJECT EXECUTORY CONTRACTS OR UNEXPIRED LEASES OF THE  
DEBTOR**

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Before the Court are two motions: (1) C.O.P. Coal Development Company's (COP) Motion to Require the Trustee to Assume or Reject Lease (Assumption Motion); and (2) the chapter 7 trustee's Motion to Extend Time for Trustee to Assume or Reject Executory Contracts or Unexpired Leases of Debtor (Extension Motion).

The parties have briefed the legal issues and presented evidence and argument to the Court. Following four days of evidence concluded shortly before the expiration of the time limit

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March 18, 2009

Entered On Docket: 03/18/2009

**EXHIBIT "B"**

case on November 13, 2008. After a disputed election, on January 8, 2009 the Court ordered that the interim trustee Kenneth A. Rushton (Trustee) serve as the trustee in the chapter 7 case.

### The Agreement

The Assumption Motion and Extension Motion relate to certain real property and other executory contracts and leases. The real property lease, designated as the Coal Operating Agreement (Agreement), was executed in March of 1997 by Ben Stoddard, as president of the Debtor, and Joe Kingston, as president of COP. Under the Agreement, COP as owner granted the Debtor as operator, among other things, the exclusive right to mine and remove coal from various tracts of land, including the Bear Canyon Mine, for a period of 25 years. The Debtor operated the Bear Canyon Mine under this Agreement from 1997 forward. Between late 2003 and 2005, a contract dispute arose between the Debtor and Aquila that resulted in the \$24 million judgment. Sometime in late 2007, the Debtor changed its mining method from continuous mining to longwall mining in an attempt to increase production and revenue.

On November 9, 2007, Joe Kingston on behalf of COP sent a letter to Charles Reynolds (Reynolds), president of the Debtor since 2004, informing him that the Debtor was in default under the terms of the Agreement, spelling out the specific defaults including delinquent royalty payments and accounting for coal removed, and explaining the steps that the Debtor needed to take to cure those defaults (Default Notice). The default provision of the Agreement states:

If [Debtor] shall not comply with any of the provisions, or covenants, or agreements herein written and contained, and such default shall continue for a period of 60 days after service of written notice, by certified or registered mail, by [COP] identifying the default and specifying with reasonable particularity the nature and extent thereof, then and in such event this Agreement may be terminated and all of the rights of the [Debtor] shall cease and be wholly

determined and [COP] may at once take possession of any or all of the properties herein described.<sup>2</sup>

The Debtor and COP apparently considered that the Default Notice triggered the commencement of the 60-day cure period under the Agreement.

Aquila considered the Agreement to be a valuable asset from which it could collect its judgment and was concerned that the Debtor might attempt to transfer its assets or terminate the Agreement to prevent Aquila from executing and recovering its judgment. At Aquila's request, on December 19, 2007, the USDC entered a Supplemental Order in Aid of Enforcement of Judgment (Supplemental Order) in support of Aquila's \$24 million judgment. The Supplemental Order precludes the Debtor from taking "any action that may result in the termination of [the Agreement]."

The Supplemental Order was forwarded to Carl Kingston, who was the Debtor's attorney in the USDC litigation. Carl Kingston was the registered agent for the Debtor and COP. He is also Joe Kingston's cousin.<sup>3</sup> During the latter part of 2007 and into early 2008, Carl Kingston had several meetings with Reynolds about the status of the Agreement and COP's Default Notice. He also was in contact with Paul Kingston, one of the Debtor's shareholders, regarding the status of the Agreement and the delinquent royalty payments.<sup>4</sup>

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<sup>2</sup> The Agreement was modified in 2000, but the amendment did not impact this provision of the Agreement.

<sup>3</sup> Carl Kingston is a member of the Davis County Cooperative Society, Inc. The Board of Directors of that entity are Wendell Owen, Marvin Kingston, John Brown, John Gustafson and Bill Stoddard. Paul Kingston is the Trustee in Trust. Carl Kingston indicated that this position is akin to a Chief Executive Officer. The Debtor's Statement of Financial Affairs shows that John Gustafson also acted as the Debtor's vice president.

<sup>4</sup> There was testimony that Rachel Young, Paul Kingston, and Joe Kingston are all shareholders in COP, although Rachel Young testified that she is no longer a shareholder.

On January 3, 2008, Joe Kingston on behalf of COP sent a letter to the Debtor that provided: "You are hereby notified that as per the terms of the [Agreement] between [COP] and [the Debtor], the [Agreement] will be canceled at the end of the notice period unless the default is cured prior to the end of the 60 day notice period." Sixty days after service of the Default Notice was January 8, 2008. In response to this letter, Reynolds contacted COP to seek a resolution by which the Debtor could avoid termination of the Agreement. Joe Kingston on behalf of COP then sent letters dated January 5, 2008 and January 6, 2008 to Reynolds in which COP sets forth lists of terms that the Debtor would have to comply with in order to continue mining. Both letters required the Debtor to acknowledge that the Agreement would terminate at the close of business on January 8, 2008, and that the Debtor would have no more rights, title, claim or interest under the Agreement. In spite of the Supplemental Order that precluded the Debtor from taking any action that might result in the termination of the Agreement, and the fact that the default period had yet to expire, Reynolds agreed to the terms of these letters. COP and the Debtor then purported to enter into a new Coal Operating Agreement on January 6, 2008 (New Coal Operating Agreement) under which the Debtor would continue to have the right to mine coal at the Bear Canyon Mine.

#### **The Involuntary Filing and Sale**

On January 8, 2008, prior to the close of business, Aquila and other petitioning creditors filed an involuntary bankruptcy petition against the Debtor. After this date, the Debtor continued to operate the Bear Canyon Mine under § 303(f) of the Bankruptcy Code. The Debtor maintains that its authorization to conduct mining operations arose under the New Coal Operating Agreement, not under the Agreement. On May 9, 2008, the Debtor received another letter (May

9<sup>th</sup> Letter) from Joe Kingston on behalf of COP reminding Reynolds that the Agreement had been terminated, asserting that the Debtor had failed to meet the conditions to accept the New Coal Operating Agreement, and notifying the Debtor that unless all terms of acceptance were met by June 5, 2008 the Debtor must vacate the Bear Canyon Mine by July 5, 2008. It was shortly after receipt of the May 9<sup>th</sup> Letter that Reynolds began contemplating a sale of the Debtor's assets to a third party.

Reynolds testified that by May 2008, the Debtor was unable to meet its contractual and payroll obligations as well as payments to many of its trade creditors.<sup>5</sup> Reynolds, therefore, decided that he would attempt to sell the Debtor's assets and rights to the Bear Canyon Mine. Reynolds testified that he looked into financing and investment options before attempting to sell the Debtor's assets, but that no party was interested based on the commencement of the involuntary case against the Debtor. As a result, Reynolds contacted Elliot Finley (Finley), the president of Hiawatha Coal Company, Inc. (Hiawatha), in late May 2008. Hiawatha, which occupied a mine permit area adjacent to the Bear Canyon Mine, had previously mined coal from above-ground slurry residue, but did not begin underground coal mining until June 2008. Finley, who worked in computer programming and network design before June 2008, had worked at one time as a miner for the Debtor, but had not been employed in a management level position and had no longwall mining experience. Finley's brother Nate, who is Hiawatha's vice president, did not work full time for Hiawatha and maintained outside employment before June 2008. Mark Reynolds, Charles Reynolds' brother and Hiawatha's mining engineer, worked as a compliance

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<sup>5</sup> It is unclear, however, if that circumstance occurred because the Debtor continued to pay pre rather than postpetition debt, because the Debtor made payments to COP under the New Coal Operating Agreement rather than the Agreement, or because of adverse operational circumstances.

officer for the Debtor and now performs that function for Hiawatha. Prior to June 2008, Hiawatha contracted with the Debtor to do its compliance work. The Finleys and the Reynolds are all members of the Davis County Cooperative Society, Inc.

Reynolds testified that after his initial contact with Finley, he contacted Joe Kingston on behalf of COP to determine if COP would be amenable to the sale of the Debtor's assets to Hiawatha. Finley, Reynolds, Paul Toscano (bankruptcy counsel for the Debtor) (Toscano), and Carl Kingston gave inconsistent testimony about their respective involvement in the negotiation, preparation, and execution of the Purchase and Sale Agreement between the Debtor and Hiawatha (Sale Agreement). For example, according to Reynolds, his involvement in the negotiations was limited to setting up meetings and coordinating things between Finley and Joe Kingston. Both Carl Kingston and Finley recalled that Reynolds had more involvement in the negotiations and preparation of the Sale Agreement than Reynolds admitted to while testifying. Carl Kingston's testimony shows that he drafted the Sale Agreement, but was taking drafting suggestions from others including Paul Kingston. Carl Kingston also acknowledged that no attorney represented Hiawatha in negotiating the sale.

Toscano testified that he counseled the Debtor to conduct an arms' length transaction when it decided to sell its assets.<sup>6</sup> It is clear that Toscano's admonition to the Debtor was not followed. For example, the Sale Agreement contemplated a sale with no cash consideration but instead the alleged assumption of secured debts owed to various entities including World Enterprises, ABM, Inc., and Security Funding, Inc. that have familial ties to the shareholders and

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<sup>6</sup> A review of the Debtor's Corporate Ownership Statement reveals that Paul Kingston, Rachel Young, and John Gustafson are shareholders of the Debtor. Paul Kingston is also a shareholder of COP.

officers of Debtor, COP, and Hiawatha.<sup>7</sup> The Debtor also contemplated a sale to an entity whose president (Finley) had no managerial experience in underground mining and was not experienced in longwall mining.

There was also inconsistent testimony regarding the Debtor's alleged voluntary relinquishment of its coal mining leases. Reynolds testified that the Debtor voluntarily relinquished its interest in any coal mining lease it had with COP so that COP could enter into a new coal mining lease with Hiawatha and that this decision was discussed at a meeting where Toscano was present. The decision was purportedly memorialized in a letter Reynolds sent to COP on June 23, 2008. Toscano and Carl Kingston both testified that they did not see a copy of this letter until it was faxed to them on or about July 8, 2008. And despite being counsel to the Debtor, Toscano never recalled a meeting where this voluntary relinquishment was discussed.

The testimony explaining the execution of the Sale Agreement is sketchy at best. The Sale Agreement and Bill of Sale bearing a date of June 24, 2008, was signed by Finley for Hiawatha and Reynolds for the Debtor. It is unclear when or where the signing of the documents took place because it was not at Toscano's office as indicated in the Sale Agreement. Section 1.02 of the Sale Agreement titled "Proprietary Information, Permits, Good Will Improvement and Intangibles" states that the Debtor sells to Hiawatha "[a]ll proprietary information permits and intangibles, including but not limited to trade marks, trade names, copyrights and othr [sic] intellectual property, water rights and agreements, rights of way, permits, customer lists . . . . The

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<sup>7</sup> Finley testified that Hiawatha is owned by its shareholders. Some of those shareholders are Finley, Paul Kingston, and Earl Johnson. World Enterprises employs Rachel Young and she also acts as its Secretary Treasurer. She services notes for ABM, Inc. and also does at least enough work for Security Funding, Inc. that this entity authorized her to file a proof of claim on its behalf.

transfer of assets listed in this paragraph shall include but not be limited to the permits listed on Exhibit 'B' attached hereto and will be subject to any required approvals of third parties." The permit by which the Debtor is authorized by the Utah State Division of Oil, Gas and Mining (DOGM) to conduct mining operations is included in Exhibit B to the Sale Agreement.

When or if the sale was actually consummated is difficult to determine. After the end of June 2008, the majority of the Debtor's employees went to work for Hiawatha including Charles and Mark Reynolds. The Bear Canyon Mine continued to be mined using the equipment previously used by the Debtor (and which are the subject of some of the other executory contracts and leases at issue in the Extension Motion) employing the longwall mining method. The account name for at least one of the vendors continued to show the Debtor's name. Hiawatha continued to lease water under contracts between the Debtor and Rachel Young (Joe and Paul Kingston's sister) and the Debtor and Joe Kingston. The Debtor's on-road vehicles were never retitled to Hiawatha. Hiawatha allegedly paid the purchase price of \$14,075,007.69 through an assumption of the Debtor's secured debt owed to World Enterprises, Security Funding, Inc., and ABM, Inc. and Finley eventually executed assumption agreements with these three entities. However, Hiawatha did not pay any amounts to these three entities and in December 2008 Rachel Young filed proofs of claim against this estate on behalf of World Enterprises, Security Funding, Inc. and ABM, Inc. for both the secured amounts Hiawatha assumed and unsecured amounts. Although the Sale Agreement provided for Hiawatha's assumption of the Debtor's debt as consideration for the sale, Rachel Young testified that Hiawatha's assumption of the Debtor's secured obligations was not intended to relieve the Debtor of its secured debts. Instead, the parties intended both the Debtor and Hiawatha to remain liable for those secured claims after the sale. The Sale Agreement did not include an assumption of the judgment that the Debtor owed to Aquila.

Again, when and if the sale was actually consummated is difficult to determine, but what is clear from the evidence presented is that some of the sale documentation was not completed and executed in late June 2008, including the documentation necessary to cause various governmental authorities, including DOGM, to transfer the Debtor's right to mine coal to Hiawatha.

### **The Preservation Order**

Shortly after June 24, 2008, Aquila filed the Motion of Aquila, Inc. for Order Preserving and Protecting Assets of Bankruptcy Estate and Requesting Notice and Hearing in Connection With Debtor's Purported Sale of Substantially All Operating Assets to a Related Entity (Preservation Motion). After an evidentiary hearing, this Court entered its Memorandum Decision Denying in Part and Granting in Part Motion of Aquila, Inc. for Order Preserving and Protecting Assets of Bankruptcy Estate and Requesting Notice and Hearing in Connection With Debtor's Purported Sale of Substantially All Operating Assets to a Related Entity and an accompanying Order (collectively "Preservation Order"). In its Preservation Order, the Court ordered,

that from this point forward any use, transfer, or disposition of any of the Debtor's assets outside the ordinary course of the Debtor's business is subject to the provisions of § 363 of the Bankruptcy Code. If the Debtor wants to transfer, sell, or seek approval of the transfer or sale of its assets to Hiawatha or any other party outside the ordinary course of the Debtor's business, a motion must be filed, set for hearing, and properly noticed out to all parties pursuant to the Bankruptcy Code and Bankruptcy Rules. This order applies to any portion of the Sale Agreement or any other post-petition transfer that has not yet been consummated including the approval of the sale by various governmental agencies and regulatory agencies or commissions.

Since the issuance of the Preservation Order, the parties have attempted to consummate the sale. By document with an effective date of October 30, 2008, Reynolds and Finley executed a Transfer and Assumption Agreement with John Deere related to a John Deere 320 Skid Steer

Loader used at the Bear Canyon Mine. The Debtor and Hiawatha have attempted to persuade the Debtor and  
DOGMA to reissue the permit to mine the Bear Canyon Mine, and to transfer the Debtor's  
reclamation bond into Hiawatha's name.

#### Trustee's Actions

Once appointed, the Trustee began investigating assets that may be available for  
distribution to creditors, including recovery of transferred assets under a variety of legal theories.  
The Debtor has complicated this process by filing an incomplete Statement of Financial Affairs  
and Schedules, and by filing late its list of creditors. The Trustee has spent much of his early  
months coming up to speed on the numerous motions filed by various parties. Additionally,  
access to the Debtor's books and records, including production reports, has been complicated by  
restricted access to the Bear Canyon Mine. But the Trustee has retained Carl Pollastro  
(Pollastro) and Michael Weigand, through Norwest Corporation, to provide expert advice and  
opinions regarding the characteristics of the Bear Canyon Mine, its coal reserves, operating  
conditions and equipment, and the marketability of its assets.

After visiting the mine, reviewing the Debtor's records, other state and federal agency  
information and general statistics, and interviewing various individuals, the experts issued a report  
in which they expressed concern about the Debtor's and Hiawatha's ability to effectively manage  
the operation of the mine, to comply with the numerous safety and regulatory requirements, and  
to cost effectively extract the coal using the longwall mining method. Pollastro encountered some  
resistance from the former employees of the Debtor when trying to investigate the Bear Canyon  
Mine. Initially, he and the Trustee were denied access to the mine without a court order.

Norwest requested information about historical costs and production, coal quality, and other data  
from the Debtor's former employees. The former employees initially denied him access to the

Debtor's computers and records and delayed the production of the data. When the data was and deliver the information provided, it was incomplete and did not provide the level of detail requested within a time frame not provide the level to be useful in the expert report. Despite these road blocks, Weingand and Pollastro were able to reach the following conclusions:

- The total amount of coal reserves are estimated to be between 16 to 25 million tons of coal based on current data.
- The total value of the in-place coal reserves at Bear Canyon Mine range between \$4 million and \$20 million.
- Estimated coal production costs for the Bear Canyon Mine are between \$30-\$40 per ton, F.O.B. rail.
- The market value of the coal ranges from \$50-\$75 per ton, F.O.B. rail on the spot market and from \$27-\$40 per ton, F.O.B. rail on potential long term contracts.
- The close proximity of the Bear Canyon Mine to coal users and changes in the coal market will invite offers to purchase the mine.
- Cessation of longwall mining for a period of time will not compromise the integrity of the mining equipment.

Pollastro also called into question the competence, safety record, and skill level of the Debtor and those currently operating the Bear Canyon Mine. Among other things, Pollastro questioned the following: the Debtor's decision to change its mining method from continuous mining to longwall mining; the Debtor's questionable safety record; its lack of longwall mining expertise; and its productivity levels. Both Reynolds and Finley disputed some of Pollastro's conclusions. Specifically, Reynolds, who is very familiar with the sandstone channel's in the mine and the access available to mine the Hiawatha Seam, challenged Pollastro's estimates of the cost of accessing all of the Bear Canyon Mine reserve and the potential damages to the longwall equipment if mining is temporarily shut down.

In connection with his investigation, Pollastro contacted potential purchasers to gauge interest. Some of the entities contacted were Arch Coal, CONSOL Energy and various investment groups. In sum, Pollastro concluded that the right to mine the Bear Canyon Mine is a

valuable asset that could be successfully marketed and sold. The Court finds, based upon the credibility of the witnesses, that Pollastro's conclusions are credible.

The Trustee has yet to conclude his investigation into or recovery of the Debtor's assets, and on January 5, 2009 filed the Extension Motion seeking the maximum extension to assume or reject the Agreement and an additional extension to assume or reject the other executory contracts or until June 11, 2009. By an order effective January 12, 2009 and entered February 2, 2009, the Court extended the time for the Trustee to assume or reject the executory contracts or unexpired leases of personal property until March 13, 2009. COP has objected to the Trustee's Extension Motion as it relates to the lease of the Bear Canyon Mine and filed its Assumption Motion seeking immediate assumption or rejection of any unexpired lease between COP and the Debtor.

#### **Current Operation of the Bear Canyon Mine**

Since the entry of the Preservation Order, Hiawatha has been operating the Bear Canyon Mine, but Reynolds testified that he has grave concerns regarding the integrity of the mine and potential damage to the longwall mining equipment if mining stops for even a short period of time. Reynolds also has concerns about the ability of the Bear Canyon Mine to continue operations without additional capital and equipment. Finley testified that despite his efforts to rehabilitate the mine operation, the mine operated at a loss from June 24, 2008 until January or February 2009. At that time, DOGM issued a cessation order instructing Hiawatha to stop all continuous mining (including development of future longwall panels) and requiring all longwall mining to cease after the current panel is completed. The cessation order was issued because the Debtor's DOGM mining permit has not been transferred to Hiawatha yet. According to Finley,

Hiawatha must post a reclamation bond before DOGM will transfer the mining permit.<sup>8</sup> Finley and Reynolds testified that the Debtor currently has a bond with Lyndon Property Insurance Company (Cumberland/Lyndon) (which it is required to maintain as per the Sale Agreement)<sup>9</sup> that is secured by a certificate of deposit or a letter of credit with U.S. Bank. It is Finley's understanding that Cumberland/Lyndon is only waiting for this Court's approval to transfer the bond to Hiawatha and, once that is accomplished, DOGM will lift the cessation order and issue the mining permit to Hiawatha. Reynolds testified that Hiawatha did not have sufficient resources to obtain its own bond at the time of the sale, but if the cessation order were lifted, it may be able to obtain its own bond because after terminating continuous mining operations, the mine has begun to be profitable. But Reynolds also indicated that the operation needs substantial additional capital and equipment to become profitable as a longwall operation.

Since the filing of the Extension Motion, various individuals associated with the Bear Canyon Mine and with interests in the surrounding area and its resources have indicated that they are not interested in working with or entering into contracts with any company other than Hiawatha. For instance, Joe Kingston and Rachel Young, who are brother and sister, both testified that they would be unwilling to allow any other operator to lease their Huntington Cleveland Irrigation Company water shares in order to continue operating the Bear Canyon Mine. Neither individual gave a reason as to why they would not allow another entity to lease these shares. Joe Kingston did admit that other individuals owned shares and that these shares are sold

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<sup>8</sup> Finley also testified that Hiawatha may be appealing DOGM's cessation order through its administrative channels.

<sup>9</sup> Section 1.05 of the Sale Agreement states: "[Debtor] agrees to maintain the reclamation bonds and its workers compensation insurance, in order for [Hiawatha] to complete the assumption or replacement of [Debtor's] bonds and insurance."

on the market from time to time. Hiawatha itself (through Reynolds) maintains that it will not allow any other company to access the Bear Canyon Mine through its portal or access point.

Joe Kingston also testified that he has special trust and confidence in those individuals currently employed by Hiawatha because many of those individuals worked for the Debtor prior to the sale in June 2008, he has observed them over the years and finds them to be trustworthy, responsive, and competent, and has had few if any problems with the Debtor and its former management since 1997. This testimony stands in stark contrast to the numerous letters COP issued during 2007 and early 2008 informing the Debtor of its failure to fulfill its requirements and obligations to COP under the Agreement. Much of Joe Kingston's testimony focused on the trust and confidence he places in the employees and managers who are currently at the Bear Canyon Mine. Joe Kingston testified that his willingness to enter into a new coal mining lease with Hiawatha was based on the fact that it hired many of these men. When pressed for the names of these men in whom he places such trust and confidence, Joe Kingston listed the following individuals: Reynolds (President of the Debtor and now mine manager for Hiawatha), Finley (current President of Hiawatha), Ken Duffet (safety), and Kevin Peterson (mine operations and fabrication).

Joe Kingston maintains that the Agreement was only executed in 1997 because of the special trust and confidence he had in these and other unnamed men, but there was little evidence that Joe Kingston actually relied on the special skill or knowledge of those employed by the Debtor in 1997 when the Agreement was executed, or that the parties contemplated a close association between them in the actual operation of the Bear Canyon Mine. This testimony is also belied by paragraph 10 of the Agreement which states that "[e]ach obligation hereunder shall extend to, and be binding upon, and every benefit hereof shall inure to, the heirs, executors,

administrators, successors, or assigns of the respective parties hereto." In total, the Court founds of the respective pa  
Joe Kingston's testimony on this issue to be self-serving and less than credible.

From the above findings of fact, the Court makes the following conclusions of law.

### III. ASSUMPTION MOTION

In the Assumption Motion, COP asks this Court first to determine whether the Agreement is an unexpired lease that the Trustee can assume or reject under § 365. If the Court finds that the Agreement is an unexpired lease, then COP urges the Court to immediately require the Trustee to assume or reject the Agreement.

Section 365 authorizes the Trustee to assume or reject unexpired leases of the Debtor. An unexpired lease becomes property of the estate under § 541, if it has not terminated prior to a bankruptcy petition being filed.<sup>10</sup> A trustee has this authority even if the debtor has defaulted under the terms of the unexpired lease prior to a bankruptcy petition being filed.<sup>11</sup> If, however, the unexpired lease is terminated prior to filing, then there is nothing for the debtor or the subsequent trustee to assume.<sup>12</sup>

#### A. Statutory Exclusion

COP first asserts that the Agreement is not assumable because it falls within the parameters of § 365(c)(1)(A), constitutes a personal services contract, and is therefore excluded

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<sup>10</sup> *Motorcycle Excellence Group, Inc. v. BMW of N. Am. LLC (In re Motorcycle Excellence Group, Inc.)*, 365 B.R. 370, 377 (Bankr. E.D.N.Y. 2006) (finding that unexpired franchisee lease is property of the estate). Section 541 states:

(a) The commencement of a case ... creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) ... [A]ll legal and equitable interests of the debtor in property as of the commencement of the case.

<sup>11</sup> See § 365(b).

<sup>12</sup> *Moody v. Amoco Oil Co. (In re Moody)*, 734 F.2d 1200, 1212 (7th Cir. 1984).

from the kind of executory contracts that a trustee may assume. A personal services contract is one "which is personal in nature, where the personal needs, characteristics or personality of the obligee are dominant factors in the reason for contracting."<sup>13</sup> Joe Kingston testified that he has particular confidence in Reynolds, Finley and various other individuals who conducted and are now mining coal at the Bear Canyon Mine because they have done a good job, they are willing to work with other surface users, he has known them for years, and he would not have such confidence in any other operators. Joe Kingston stated that the personal characteristics of the workers were dominant factors in COP's reasons for entering into the Agreement. But the balance of the evidence on this point suggests otherwise. First, the Court notes that the Agreement was entered into in 1997 over a decade before the involuntary petition was filed. Ben Stoddard, who was the Debtor's president at the time, is no longer employed by the Debtor or Hiawatha. Joe Kingston was able to name three or four individuals in whom he has specific trust and confidence and who still work at the Bear Canyon Mine. But other than naming these individuals, COP has not demonstrated persons or duties named under the Agreement that are so personal in nature that the characteristics or personality of the coal mine operator could be deemed a dominant factor in the reasons for entering into the Agreement. Second, the Agreement bears no resemblance to a personal services contract and, in fact, contains a provision that allows the rights and obligations of the Agreement to be assigned. Joe Kingston's self-serving and unpersuasive testimony on this issue is unconvincing to this Court.

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<sup>13</sup> *Clark v. Shelton*, 584 P.2d 875, 877 (Utah 1978). In determining whether a contract is one for personal services, the Court looks to applicable state law, and in the absence of any ambiguity, the Court looks first within the four corners of the document to determine its meaning. See *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 831 (10th Cir. 2005) (noting that "Utah law is unsettled on the issue whether the court may go beyond the four corners of the contract to determine whether the contract is ambiguous").

In support of its argument, COP refers to the case of *Powerine Co. v. Russel's Inc.*<sup>14</sup> In that case, the court found that a gasoline service station lease was a personal services contract because it was executed on a written form where the provisions regarding the assignment of the lease and subleasing had been stricken out.<sup>15</sup> The court found that this demonstrated the parties' intent to enter into a personal services contract that was not assignable.<sup>16</sup> The facts and circumstances of *Powerine* are distinguishable from this case. Here, the contract clearly provides for the assignment of the rights and obligations under the Agreement. There is simply no indication, but for Joe Kingston's sketchy testimony, that the original parties to the Agreement intended it to be a personal services contract.

COP also asserts that the Agreement cannot be assumed because it falls within §365(c)(2) and is a contract to make a loan, or extend other debt financing or financial accommodations to the Debtor. No evidence has been presented to support COP's claim that the Agreement is a contract to make a loan or extend some other financial accommodation to the Debtor.<sup>17</sup>

The Court concludes that the Agreement is a lease of nonresidential real property. It is not statutorily excluded from assumption by the Trustee as a personal services contract or a contract to make a loan. Therefore, the Agreement falls within the purview of § 365.

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<sup>14</sup> 135 P.2d 906 (Utah 1943).

<sup>15</sup> *Id.* at 913-14.

<sup>16</sup> *Id.* at 914.

<sup>17</sup> Under § 365(c), the Trustee may not assume an unexpired lease "whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if . . . (2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor. . . ."

## B. Prepetition Termination

Under § 541(b)(2) and § 365, the trustee does not have the authority to assume an unexpired nonresidential lease that terminated prior to the filing of the bankruptcy petition, and such a lease does not become property of the estate.<sup>18</sup> “However, the termination must be complete and not subject to reversal, either under the terms of the contract or under state law.”<sup>19</sup> In determining whether an unexpired lease has terminated prepetition, and the extent of a debtor’s interest in property as of the petition date, courts must refer to state law.<sup>20</sup> Consequently, this Court must look to the Agreement and Utah law to make this determination. Under Utah law, the initial review of a contract begins with a court examining the contract itself to ascertain the intent of the parties.<sup>21</sup> COP sent the Default Notice to the Debtor (at the earliest) on November 9, 2007 informing the Debtor that it was in default. The Default Notice provided the Debtor with specific actions that the Debtor needed to take to cure that default. Under paragraph 9 of the Agreement, the Debtor had 60 days after the Default Notice was given to cure the defaults or “this Agreement may be terminated and all of the rights of the [Debtor] shall cease and be wholly determined and

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<sup>18</sup> *In re Memphis-Friday’s Ass’n*, 88 B.R. 830, 840 (Bankr. W.D. Tenn. 1988).

<sup>19</sup> *Moody*, 734 F.2d at 1212 (internal citations omitted).

<sup>20</sup> *Motorcycle Excellence*, 365 B.R. at 378.

<sup>21</sup> *See Gillmor v. Macy*, 121 P.3d 57, 69-70 (Utah App. 2005) (stating that “[o]ur rules of contract interpretation require, [i]f the language within the four corners of the contract is unambiguous, that courts first look to the four corners of the agreement to determine the intentions of the parties ... from the plain meaning of the contractual language. However, Utah law does not strictly require courts to only view the terms of a contract within its *four corners*, according to their *plain meaning*, when making the determination of whether there is an ambiguity in a contract”) (internal citations and quotations omitted) (emphasis in original).

COP *may* at once take possession of any or all of the properties herein described.<sup>22</sup> Sixty days from all of the properties from November 9, 2007 (Friday) was January 8, 2008 (Tuesday). The cure period did not expire until close of business on January 8, 2008. The involuntary petition was filed on January 8, 2008 at 3:36 p.m. prevailing MST. The termination of the Agreement was not complete under its default provision when the involuntary petition was filed. As such, any of the Debtor's legal or equitable interests in the Agreement became property of the estate under § 541(a).

COP attempts to undermine this conclusion by producing various January 2008 letters that purport to cancel and/or renegotiate the terms of the Agreement and provide for its automatic termination effective January 9, 2008. These prepetition actions were, however, prohibited by the December 19, 2007 Supplemental Order. The Supplemental Order prohibited the Debtor from taking any "actions that may result in the termination of its [Agreement] with [COP]. . ." Such activities included the Debtor's attempts to enter into the New Coal Lease Agreement with COP and Reynolds' attempts to terminate the Agreement before the expiration of the 60-day cure period. When asked about the Supplemental Order and its effect, Reynolds stated that although he was aware of the Supplemental Order, he did not consider it or its impact on his negotiations with COP in early January 2008. Reynolds went on to admit that the Supplemental Order did prohibit him from terminating the Agreement.

At the time a bankruptcy petition is filed, the estate includes any rights under a contract that a debtor has — no more, no less.<sup>23</sup> Here, the Debtor still had all of the rights afforded to it under the Agreement when the petition was filed because the Agreement had not automatically

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<sup>22</sup> Emphasis added.

<sup>23</sup> *Moody*, 734 F.2d at 1213.

terminated and any act to prematurely terminate the lease violated the Supplemental Order. As a result, the Agreement and any rights thereunder became property of the estate.

### C. Postpetition Termination

COP maintains that even if the Agreement had not terminated pre-petition, it is not assumable by the Trustee for other reasons. First, COP argues that the automatic stay did not toll the running of the 60-day cure period and, as a result, the Agreement terminated at the end of business on January 8, 2009. But a review of the default provision of the Agreement does not support this argument. The Agreement clearly states that COP *may* terminate the Agreement if the Debtor fails to cure within the 60-day cure period. Although the Agreement does not include what specific action is needed, COP must take some action in order to exercise its discretionary authority at the end of the 60-day period to terminate the Agreement. But by the time the 60-day cure period had run (the end of business on January 8, 2008), the involuntary petition had been filed and the automatic stay prohibited COP (or any other creditor) from seeking termination of the Agreement without first getting relief from the stay.<sup>24</sup>

The case law cited by COP in support of this argument is distinguishable from this case.<sup>25</sup> Admittedly, the automatic stay does not stop the termination of a contract that automatically expires by its own terms.<sup>26</sup> For example, in *Moody* the dealership agreements executed between

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<sup>24</sup> Section 362(a)(3).

<sup>25</sup> In support of its motion, COP has relied or at least cited in support the following cases: *Trigg v. United States of America Dept. Of Interior*, 630 F.2d 1370 (10th Cir. 1980); *Moody*, 735 F.2d 1200; *In re Policy Realty Corp.*, 242 B.R. 121 (S.D.N.Y. 1999); *Memphis-Friday's Ass'n*, 88 B.R. 830; *In re West Pine Construction Co.*, 80 B.R. 315 (Bankr. E.D. Pa. 1987); *In re Compass Development, Inc.*, 55 B.R. 260 (Bankr. D.N.J. 1985). Each of these cases dealt with contracts that were subject to automatic termination, were not curable, or that expired under their stated terms. They did not include leases that were curable at the time the bankruptcy petitions were filed.

<sup>26</sup> *Moody*, 734 F.2d at 1213.

the debtors and the creditor were subject to automatic termination 90 days after notice was provided to the debtors.<sup>27</sup> The 90-day termination notices gave the debtors no right to cure once the notices were issued.<sup>28</sup> The court concluded that the automatic stay did not give the debtors any greater rights than those granted to them in the contract, and at the time the bankruptcy petition was filed, those contract rights were limited to the remaining portion of the 90-day termination period. The court stated that “[t]he automatic stay does not toll the mere running of time under a contract, and thus it does not prevent automatic termination of the contract.”<sup>29</sup> Ultimately, the court held that the debtors had no right to assume or reject the dealership agreements under § 365 because § 362 did not toll the automatic termination of the dealership agreements.<sup>30</sup> Unlike the dealership agreements in *Moody*, termination of the Agreement was not *automatic* at the expiration of the 60-day cure period.<sup>31</sup> COP still had to take steps to terminate the Agreement once the 60-day cure period had expired and it was precluded from doing so by the automatic stay.

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1213.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* The second type of contract in the *Moody* case were jobbership agreements. The jobbership agreements were unlike the dealership agreements because the jobbership termination notices gave the debtors 15 days to cure the articulated default. The debtors in *Moody* filed their bankruptcy petition before the 15-day cure period had expired. In contrast to the dealership agreements, the *Moody* court allowed the debtors to assume or reject various jobbership agreements under § 365 because “[a]t the time debtors filed their petition, the time for cure had not expired. The contract was still executory . . . [and] [u]nder section 365(a), debtors may still elect to assume the contract.” *Id.* at 1215-16.

<sup>31</sup> *In re Wills Motor Inc.*, 133 B.R. 297, 301 (Bankr. S.D.N.Y. 1991) (finding that even though there was no further act needed to terminate the lease, the termination was not complete because there was a state court injunction in place that prevented the termination).

Second, COP maintains that under § 365(c)(3) the Trustee cannot assume the Agreement under § 365(c)(3) because it “has been terminated under applicable nonbankruptcy law prior to the order for relief.” COP is accurate in pointing out that the order for relief was not entered in this case until September 26, 2008. It is not correct, however, in its assertions that the Debtor voluntarily relinquished the Agreement before that date or that the Agreement expired by its own terms post-petition. As stated before, the later argument fails because the Agreement did not provide for automatic termination at the end of the 60-day cure period. The former argument fails because the Court questions the timing and efficacy of the Debtor’s purported voluntary relinquishment based on the evidence presented at the hearings. If the Debtor voluntarily terminated any coal operating agreement on June 23, 2008, then why weren’t Carl Kingston and Toscano (two of the attorneys involved at the time) notified of that decision before July 8, 2008, and why didn’t Toscano have any recollection of this issue being discussed at the meetings he was purportedly attended? Furthermore, any action by COP to accept the Debtor’s alleged voluntary relinquishment or to exercise dominion or control over the Debtor’s assets (including the Agreement), would be a violation of the automatic stay and, therefore, void and without effect.<sup>32</sup> The evidence presented simply does not support COP’s contention that the Agreement terminated post-petition.

**D. Early Assumption or Rejection**

The Agreement between the Debtor and COP did not terminate prepetition and any legal or equitable rights the Debtor had on the date the involuntary petition was filed became property of the estate. The Agreement did not terminate postpetition due to the restraining effect of the

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<sup>32</sup> *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir.1990).

automatic stay. COP does not assert that the Debtor conveyed its rights under the Agreement to Hiawatha as one of its assets through the sale. Thus, the Agreement was still in effect between the Debtor and COP when the order for relief was entered, the Debtor's rights under the Agreement were not sold postpetition, and under § 365(d)(4), the Trustee has 120 days from the order for relief to assume or reject the Agreement.

COP requests that the Court require the Trustee to immediately assume or reject the Agreement. The bulk of COP's argument focuses on facts allegedly demonstrating that the Trustee does not have the ability or the legal capacity to assume and/or assign the Agreement. Some of these arguments include lack of sufficient water rights to mine, COP's own disinclination to enter into a lease agreement with anyone other than the Debtor or Hiawatha, and the need for more equipment and further capital infusion to make the project viable. The Court does not find these arguments compelling at this point in the case. Any arguments addressing the ability of the Trustee to assume and assign the Agreement can and will be addressed if and when the Trustee decides to assume the Agreement. The Trustee, through the evidence presented and the testimony of Pollastro, has demonstrated that the right to mine the coal in the Bear Canyon Mine is a valuable asset. There are significant amounts of coal reserves and an active market in which to sell those reserves. COP has failed to demonstrate sufficient grounds that would require the Trustee to immediately assume or reject the Agreement. Consequently, COP's Assumption Motion was denied.

#### IV. EXTENSION MOTION

Under § 365(d)(4) a lease of nonresidential real property is deemed rejected if not assumed or rejected by the earlier of 120 after the entry of the order for relief, or the date a confirmation order is entered in the case. Subsection (B) allows a court to grant trustees a 90-day

extension if the request is made prior to expiration of the 120-day period, and if the trustee is able to expiration of the  
to demonstrate cause for such an extension. Cause under § 365(d) is not a defined term. In  
examining cause under § 365(d)(4), courts have looked at the following factors that are applicable  
here: (1) whether the lease is the primary asset; (2) whether amounts due under the lease are being  
paid; (3) whether there will be any potential prejudice to the landlord from noncompensable  
damages; (4) whether the case is unusually large or complex; and (5) any other factor  
demonstrating the lack of a reasonable period of time for the trustee to decide whether to assume  
or reject.<sup>33</sup>

Several of these factors weigh in favor of allowing the Trustee additional time to decide  
whether to assume or reject the Agreement and the other executory contracts and leases. It  
cannot be denied that the right to mine coal in the Bear Canyon Mine and the equipment used to  
mine that coal are the primary assets of the estate. There is no articulated harm COP will suffer if  
the Trustee is given additional time to assume or reject the Agreement. COP will continue in the  
exact same position it is now albeit with a potential ever increasing arrearage under the terms of  
the Agreement. The initial involuntary nature of this case and the litigation surrounding actions  
taken during the gap period have made this case complex. The Trustee has spent much of his  
early months dealing with his disputed election and trying to get up to speed on various motions  
to clarify and reconsider rulings as well as numerous other motions and requests made to this  
Court. This coupled with the Debtor's dilatory acts of not preparing accurate and timely  
Schedules, a Statement of Financial Affairs, and creditor lists as well as the Debtor's failure to

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<sup>33</sup> COLLIER ON BANKRUPTCY, ¶ 365.04[3][f] at 365-38 (15<sup>th</sup> ed. rev. 2007); *see also* *South Street Seaport Ltd. P'ship v. Burger Boys, Inc. (In re Burger Boys, Inc)*, 94 F.3d 755, 761 (2nd Cir. 1996); *In re Beautyco, Inc.*, 307 B.R. 225, 231 (Bankr. N.D. Okla. 2004).

timely and adequately respond to the Trustee's inquiries also weigh in favor of allowing the Trustee's inquiries to the Trustee more time to decide whether to assume or rejection the Agreement. The Trustee has established that cause exists and, therefore, the Court granted the Extension Motion and extended the deadline for the Trustee to assume or reject the Agreement and the other executory contracts included in the Extension Motion to June 11, 2009.

#### V. CONCLUSION

The Agreement between COP and the Debtor and the other executory contracts and leases are important and valuable assets of this estate. All parties have an interest in allowing the Trustee sufficient time to investigate the estate's options and to formulate a course of action in regard to these contracts. COP's reasons for requesting early termination of the Agreement are not sufficiently compelling to require this Court to terminate the Trustee's right before the expiration of the 120-day time period articulated in § 365(d)(4). And the Trustee has presented facts and argument sufficient to establish that there is cause to allow him additional time to determine whether assumption or rejection of the Agreement and the other executory contracts will be beneficial to this estate. Two separate orders have been issued in addition to this Memorandum Decision.

-----END OF DOCUMENT-----

0000000

**SERVICE LIST**

Service of the foregoing **MEMORANDUM DECISION DENYING COP COAL DEVELOPMENT COMPANY'S MOTION TO REQUIRE THE TRUSTEE TO ASSUME OR REJECT LEASE, AND GRANTING TRUSTEE'S MOTION TO EXTEND TIME FOR TRUSTEE TO ASSUME OR REJECT EXECUTORY CONTRACTS OR UNEXPIRED LEASES OF THE DEBTOR** will be effected through the Bankruptcy Noticing Center to each party listed below and to the MATRIX:

C.W. Mining Company  
PO Box 65809  
Salt Lake City, UT 84165  
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Russell S. Walker  
David R. Williams  
Woodbury & Kesler  
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*Debtor's Counsel*

Kenneth A. Rushton, Trustee  
99 West Main Street  
P. O. Box 212  
Lehi, UT 84043  
*Chapter 7 Trustee*

Michael N. Zundel  
Prince Yeates & Geldzahler  
City Centre I, Suite 900  
175 East 400 south  
Salt Lake City, UT 84111  
*Trustee's Counsel*

Keith A. Kelly  
Steven W. Call  
Steve Strong  
Ray Quinney & Nebeker, P.C.  
36 South State St., Suite 1400  
P.O. Box 45385  
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*Counsel for Aquila, Inc.*

Conrad H. Johansen  
Tyler Foutz  
Olsen Skoubye & Nielson  
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*Counsel for Owell Precast, LLC*

John T. Morgan  
US Trustees Office  
Ken Garff Bldg.  
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F. Mark Hansen  
F. Mark Hansen, P.C.  
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*Counsel for Standard Industries, Inc.  
et al.*

Danny C. Kelly  
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*Counsel for Graymont Western US  
Inc.*

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Insurance Company*

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The Law Office of Peter W. Guyon, P.C.  
10 Exchange Place  
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*Counsel for Hiawatha Coal  
Company Inc.*

ORDER SIGNED

CERTIFICATE OF NOTICE

District/off: 1088-2  
Case: 08-20105

User: djf  
Form ID: pdfor1

Page 1 of 1000  
Total Served: 10

Date Rcvd: Mar 18, 2009

The following entities were served by first class mail on Mar 20, 2009.

db +C.W. Mining Company, PO Box 65809, SLC, UT 84165-0809

aty +Conrad H. Johansen, Olsen Skoubye & Nielson, 999 East Murray-Holladay Road, Suite 200, Salt Lake City, UT 84117-5085

aty David E. Leta, Snell & Wilmer, 15 West South Temple, Suite 1200, Beneficial Tower, Salt Lake City, UT 84101-1547

aty +F. Mark Hansen, 431 North 1300 West, Salt Lake City, UT 84116-2630

aty +John T. Morgan tr, US Trustees Office, Ken Garff Bldg., 405 South Main Street, Suite 300, Salt Lake City, UT 84111-3402

aty Keith A. Kelly, 36 South State St., Suite 1400, P.O. Box 45385, Salt Lake City, UT 84145-0385

aty +Michael N. Zundel, Prince Yeates & Geldzahler, City Centre I, Suite 900, 175 East 400 South, Salt Lake City, UT 84111-2314

aty +Russell S. Walker, Woodbury & Kesler, 265 East 100 South, Suite 300, Salt Lake City, UT 84111-1647

tr +Kenneth A. Rushton tr, P.O. Box 212, Lehi, UT 84043-0212

6178153 +A-Fab Engineering, 624 North 300 West, Salt Lake City UT 84103-1308

The following entities were served by electronic transmission.  
NONE.

TOTAL: 0

\*\*\*\*\* BYPASSED RECIPIENTS (undeliverable, \* duplicate) \*\*\*\*\*

aty\* +Kenneth A. Rushton tr, P.O. Box 212, Lehi, UT 84043-0212

TOTALS: 0, \* 1

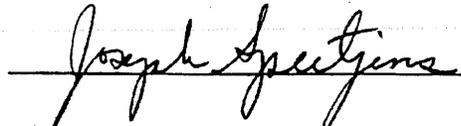
Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP. USPS regulations require that automation-compatible mail display the correct ZIP.

I, Joseph Speetjens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the Certificate of Notice and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Mar 20, 2009

Signature:



The below described is SIGNED.

The below described is SIGNED.

Dated: March 18, 2009



JUDITH A. BOULDEN  
U.S. Bankruptcy Judge



IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

In re:

C.W. MINING COMPANY, a Utah  
corporation,

Debtor.

Case No. 08-20105

Chapter 7

MEMORANDUM DECISION DENYING THE MOTION OF HIAWATHA COAL  
COMPANY, INC. FOR RELIEF FROM THE AUTOMATIC STAY TO COMPLETE  
UTAH DIVISION OF GAS, OIL, AND MINING RECLAMATION PERMIT  
REQUIREMENTS

Before the Court is the Motion of Hiawatha Coal Company, Inc. (Hiawatha) For Relief From the Automatic Stay to Complete Utah Division of Gas, Oil and Mining Reclamation Permit Requirements (Motion for Relief). Standard Industries, Inc. filed a joinder in the Motion for Relief. The chapter 7 trustee (Trustee) and Aquila, Inc. (Aquila), a judgment creditor, oppose the Motion for Relief.

The parties have briefed the legal issues and presented evidence and argument to the Court. Following four days of evidence on this Motion for Relief and two other motions, these

matters were taken under advisement. After considering the evidence, assessing the credibility of the witnesses, considering the arguments of counsel, and conducting an independent review of applicable case law, the Court issued an order denying the Motion for Relief. This Memorandum Decision contains the findings of fact and conclusions of law supporting that order.

## I. JURISDICTION

Jurisdiction is proper under 28 U.S.C. §§ 1334 and 157(a). This is a core matter under 28 U.S.C. § 157(b), and this Court may make a final determination.

## II. FACTS

The facts in this Court's Memorandum Decision Denying C.O.P. Coal Development Company's Motion To Require the Trustee to Assume or Reject Lease, and Granting Trustee's Motion to Extend Time for Trustee to Assume or Reject Executory Contracts or Unexpired Leases of the Debtor issued on March 18, 2009, and the terms uses therein, are incorporated herein by reference.

The Court finds the following additional facts that are related to the Motion for Relief. Finley testified that he and other employees of Hiawatha have had numerous contacts with Cumberland/Lyndon and DOGM since June 24, 2008 regarding the transfer of the reclamation bond and the Debtor's mining permit. On September 4, 2008, DOGM sent a letter to Shawn Baker, identified as the Registered Agent for Co-Op Mining Company,<sup>1</sup> indicating that the application for transfer of the Bear Canyon Mine permit to Hiawatha was incomplete and setting forth various items that needed to be addressed before DOGM could proceed with review of the application. A month later on October 3, 2008, Finley, on behalf of Hiawatha, sent a reply to

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<sup>1</sup> Co-Op Mining Company is the Debtor's d.b.a.

DOGM addressing the deficiencies listed in the September 4, 2008 letter. Finley testified that he had also spoken to DOGM personnel within the last couple of weeks before the evidentiary hearings regarding the transfer of the mining permit.

Since June 24, 2008, Hiawatha has made several improvements to the mining operations at the Bear Canyon Mine, including improvements to the belt lines, in hopes of making the mine more profitable. Finley and Reynolds both testified that if the cessation order is not lifted by the time the longwall is finished with the current panel, the Bear Canyon Mine will be required to cease operations and will be shut down causing substantial economic hardship for Hiawatha and its employees.

### III. HIAWATHA'S MOTION FOR RELIEF FROM STAY

In its Motion for Relief, Hiawatha urges the Court to lift the automatic stay to allow the Debtor to go forward with the transfer of the reclamation bond held by Cumberland/Lyndon, including the underlying security for the bond, and the transfer of the DOGM permit. Hiawatha argues that any right the Debtor had in its DOGM permit was transferred when the Sale Agreement was consummated on or about June 24, 2008 and that the Debtor ceased to have any interest in the DOGM permit after that date that would be subject to the Preservation Order.<sup>2</sup> Hiawatha also argues that this Court does not have the power to enjoin the State's regulatory powers from issuing a new mining permit to Hiawatha. These arguments demonstrate Hiawatha's misunderstanding of the Court's Preservation Order.

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<sup>2</sup> At the outset, the Court notes the odd procedural posture of this Motion for Relief. In its Motion for Relief, Hiawatha asks the Court for relief from the automatic stay to go forward with the DOGM permitting process. It would have been more appropriate for the Debtor to ask for relief from the Preservation Order to complete the June 24, 2008 sale. But in this imperfect world, the Court must resolve the problems that the parties present to it.

After entry of the Preservation Order, the Debtor was required to seek Court approval of any transfer of the Debtor's property not yet consummated. Finley testified that DOGM refused to transfer the mining permit to Hiawatha because Hiawatha had been unable to obtain transfer of the Debtor's reclamation bond to Hiawatha. Hiawatha was unable to get the reclamation bond transferred because of the Preservation Order. He also testified that Lyndon/Cumberland is only waiting for this Court's approval before it transfers the reclamation bond to Hiawatha. The Sale Agreement was executed on June 24, 2008 and the Preservation Order was not issued until August 8, 2008. The Debtor had 45 days from the alleged sale date until the entry of the Preservation Order to effectuate any purported transfer that occurred under the terms of the Sale Agreement. This would have included the transfer of the reclamation bond from the Debtor to Hiawatha as well any interest the Debtor had in the DOGM permit. It cannot be disputed that one of the most valuable assets to a mine operator is its permit to operate the mine. And yet, by August 8, 2008, the Debtor and Hiawatha had failed to transfer the reclamation bond upon which the mining permit was based, and the Preservation Order clearly restrained the Debtor from doing so without further Court approval.

Under the terms of the Preservation Order, the Debtor could have filed a motion, given proper notice to parties, and obtained a hearing at which it could have attempted to meet the appropriate statutory standard to obtain an order to transfer the reclamation bond and seek transfer of the DOGM permit to Hiawatha. The Debtor failed to do so.

Hiawatha maintains that cause exists to lift the stay under § 362(d)(1) because the balance of harm to it outweighs any harm the estate may suffer if the transfer of the reclamation bond and DOGM permit do not go forward. Hiawatha argues that failure to obtain the Debtor's mining

permit will result in closure of the Bear Canyon Mine when the current panel is completed causing potential damage to the longwall equipment or extreme expense in removing it, will result in laying off Hiawatha's workforce, and will result in loss of the improvements Hiawatha has made to the Bear Canyon Mine. On the other hand, if the Motion for Relief is granted, the estate will lose a valuable asset. It is the Trustee's obligation to determine what should happen to the interest the estate retains in the reclamation bond and the DOGM permit and to attempt to maximize the assets of the estate for all creditors, not just those the Debtor elected to favor in its § 303(f) sale. In weighing the balance of harm the Court considered the odd nature of the Sale Agreement, the less-than-arm's length transaction, the attempted transfer of the Debtor's assets for an assumption of only certain debt that has not been paid by Hiawatha and that the ABM, Inc., Security Funding, Inc. and World Enterprises assert is still owed by the Debtor, and the testimony of the Trustee's expert regarding the potential value to the estate of the Debtor's assets and the effects of mining cessation.

The Court is acutely aware of the potential damage to Hiawatha and its workforce of denial of the Motion for Relief. But this is one of those instances where, in the current contested environment between the parties, there is no decision that the Court can make in resolution of this Motion for Relief that will not result in significant hardship to one of the parties. In weighing the balance of harm, it is inescapable that Hiawatha voluntarily placed itself in this position with full knowledge of the Debtor's bankruptcy case and assumed the risk that the transaction would not be concluded as Hiawatha planned. It is indeed unfortunate that Hiawatha's and the Debtor's workforce may bear the brunt of Hiawatha's decision. Certainly it would be in Hiawatha's, the estate's, and Debtor's creditors' best interests for the parties to resolve these issues to achieve the

maximum payment to all of the Debtor's creditors and to continue a viable business. But such a compromise is not the matter before the Court.

#### IV. CONCLUSION

The Trustee and Aquila have carried their burden under § 362(g)(2), and the Court concludes that there are insufficient facts to justifying relief from the automatic stay for cause.

For these reasons, the Court entered the order denying the Motion for Relief.<sup>3</sup>

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<sup>3</sup> In its pleadings, Hiawatha argues that the Debtor has no equity in the DOGM permit and that it is not necessary to an effective reorganization. Hiawatha has the burden of proving the estate has no equity in the bond or permit. This subsection of § 362(d) is difficult to apply to the facts of this chapter 7 case, Hiawatha did not pursue this legal argument in its closing, and there were no facts presented on this point. As a result, the Court will not address that argument here.

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**SERVICE LIST**

Service of the foregoing **MEMORANDUM DECISION DENYING THE MOTION OF HIAWATHA COAL COMPANY, INC. FOR RELIEF FROM THE AUTOMATIC STAY TO COMPLETE UTAH DIVISION OF GAS, OIL, AND MINING RECLAMATION PERMIT REQUIREMENTS** will be effected through the Bankruptcy Noticing Center to each party listed below and to the MATRIX:

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*Debtor's Counsel*

Kenneth A. Rushton, Trustee  
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*Chapter 7 Trustee*

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*Counsel for Owell Precast, LLC*

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MCDONOUGH, PC  
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*Counsel for Lyndon Property  
Insurance Company*

ORDER SIGNED

Certificate of Service Page 9 of 9  
**CERTIFICATE OF NOTICE**

District/off: 1088-2  
Case: 08-20105

User: gci  
Form ID: pdforl

Page 1 of 1  
Total Served: 12

Date Rcvd: Mar 18, 2009

The following entities were served by first class mail on Mar 20, 2009.

db +C.W. Mining Company, PO Box 65809, SLC, UT 84165-0809

aty +Conrad H. Johansen, Olsen Skoubye & Nielson, 999 East Murray-Holladay Road, Suite 200, Salt Lake City, UT 84117-5085

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tr +Kenneth A. Rushton tr, P.O. Box 212, Lehi, UT 84043-0212

The following entities were served by electronic transmission.  
NONE.

TOTAL: 0

\*\*\*\* BYPASSED RECIPIENTS (undeliverable, \* duplicate) \*\*\*\*  
aty\* +Kenneth A. Rushton tr, P.O. Box 212, Lehi, UT 84043-0212

TOTALS: 0, \* 1

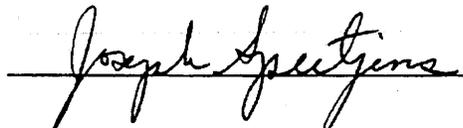
Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP. USPS regulations require that automation-compatible mail display the correct ZIP.

I, Joseph Speetjens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the Certificate of Notice and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

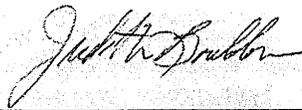
Date: Mar 20, 2009

Signature:



The below described is SIGNED.

Dated: August 07, 2008



JUDITH A. BOULDEN  
U.S. Bankruptcy Judge



IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

In re:

C.W. MINING COMPANY, a Utah  
corporation,

Putative Debtor.

Case No. 08-20105

Chapter 11

MEMORANDUM DECISION DENYING IN PART AND GRANTING IN PART  
MOTION OF AQUILA, INC. FOR ORDER PRESERVING AND PROTECTING  
ASSETS OF BANKRUPTCY ESTATE AND REQUESTING NOTICE AND HEARING  
IN CONNECTION WITH DEBTOR'S PURPORTED SALE OF SUBSTANTIALLY ALL  
OPERATING ASSETS TO A RELATED ENTITY

Before the Court is the Motion of Aquila, Inc. (Aquila) for Order Preserving and Protecting Assets of Bankruptcy Estate and Requesting Notice and Hearing in Connection With Debtor's Purported Sale of Substantially All Operating Assets to a Related Entity (Motion). In the Motion, Aquila, a prepetition judgment creditor of the putative Debtor, C.W. Mining Company (Debtor), seeks an order: (1) prohibiting the Debtor from using, transferring, encumbering, or disposing of any of its assets outside the ordinary course of business without first obtaining this Court's approval; (2) requiring the Debtor to give notice to all parties in interest of

its efforts to sell and transfer all of its assets to a related entity; (3) prohibiting the Debtor from taking any action to transfer, terminate, assign, impair, or encumber the Debtor's long-term right to mine coal under an operating agreement (Coal Operating Agreement) between the Debtor and COP Coal Development Company (COP Coal); and (4) providing that if the Court approves a sale that the buyer Hiawatha Coal Company, Inc. (Hiawatha) pay into the Court's registry or an escrow account all consideration paid for the purchase of the Debtor's assets until further order of the Court. The Debtor and Standard Industries, Inc. (Standard Industries) oppose the Motion. An evidentiary hearing was held on August 1, 2008. At the hearing, Steve Strong and Keith Kelly appeared on behalf of Aquila, one of the petitioning creditors. Paul Toscano and Russell Walker appeared on behalf of the Debtor. Mark Hansen appeared on behalf of creditor Standard Industries, and Tyler Foutz appeared on behalf of petitioning creditor ~~Owell Precast, LLC.~~

The parties have briefed the legal issues and presented evidence and argument to the Court. Following the evidentiary hearing, the matter was taken under advisement.<sup>1</sup> After considering the evidence, assessing the credibility of the witness, considering the arguments of counsel, and conducting an independent review of applicable case law, the Court makes the following ruling.

#### I. FACTS

This involuntary chapter 11 case was filed on January 8, 2008 by three petitioning creditors: Aquila, House of Pumps, Inc., and Owell Precast, LLC. An order for relief has not been entered, and the involuntary petition is scheduled for trial in October 2008.

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<sup>1</sup> After the Court took the Motion under advisement, Aquila filed a supplement to the motion. The Court has taken into consideration the facts and arguments presented in the supplemental pleading.

On October 30, 2007, before the involuntary case was commenced, Aquila obtained a money judgment against the Debtor in the United States District Court for the District of Utah (District Court). On December 19, 2007, the District Court entered a Supplemental Order in Aid of Enforcement of Judgment (Supplemental Order). The Supplemental Order states: "Given the size of the judgment and given the transfer of interest by CWM noted in the deposition of CWM's president Charles Reynolds, there is significant risk that CWM will attempt to transfer its assets to prevent Aquila from executing and recovering its damages." The District Court went on to order that "CWM shall preserve its assets and not transfer or dispose of its assets other than in the ordinary course of business; provided, however, CWM may sell assets for the purpose of making its payroll after giving one week's advance notice to Aquila before such sale occurs." The Supplemental Order also precludes CWM from taking "any action that may result in the termination of its Coal Operating Agreement ("Lease") with COP Coal Development Co ("COP"), dated March, 1997. . . ." The involuntary petition was filed shortly after the Supplemental Order was entered.

The testimony of Mr. Charles Reynolds (Reynolds), the president of the Debtor, established that the Debtor entered into a Purchase and Sale Agreement (Sale Agreement) with Hiawatha sometime in June 2008. Under the terms of this Sale Agreement, the Debtor sold or is in the process of selling substantially all of its operating assets to Hiawatha. Section 3 of the Sale Agreement provides: "The full purchase price, except for the amount due in accordance with § 1.02 above, shall be payable at closing, in cash or by the assumption of indebtedness to secured creditors, as determined in accordance with §§ 1.01, 1.04, 1.05, and 1.06 above." It appears that Hiawatha has purchased the assets of the Debtor through an assumption of liabilities only. There

is no evidence that Hiawatha has paid the Debtor any cash in conjunction with the sale. Aquila's judgment debt is not one of the debts assumed by Hiawatha. Reynolds is now employed by Hiawatha, and most of the miners once employed by the Debtor are now employed by Hiawatha.

## II. JURISDICTION

The Debtor has argued that this Court lacks both subject matter and personal jurisdiction over the Debtor and its assets. The Court disagrees with this conclusion. Pursuant to the Bankruptcy Code, the Court obtained jurisdiction over the Debtor and its 11 U.S.C. § 541 property<sup>2</sup> at the time the involuntary petition was filed with the Court. The fact that the Debtor is contesting the involuntary filing does not divest the Court of its subject matter jurisdiction. This Court has stated: "The filing of a petition sufficient on its face clearly gives the bankruptcy court jurisdiction over an involuntary case."<sup>3</sup> Therefore, the Court finds that its jurisdiction is proper under 28 U.S.C. §§ 1334 and 157(a). This Court also has personal jurisdiction over the Debtor based on proper service of the involuntary petition pursuant to Rule 1010 of the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules). Further, the Court finds that this is a core matter under 28 U.S.C. § 157(b), and this Court may make a final determination.

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<sup>2</sup> See 11 U.S.C. § 541(a) which provides: "The commencement of a case under section 301, 302, or 303 of this title creates an estate." All future statutory references are to title 11 of the United States Code unless otherwise indicated.

<sup>3</sup> *In re Alta Title Co.*, 55 B.R. 133, 137 (Bankr. D. Utah 1985) (Clark, J.) (stating that "[w]hile some courts have labeled the three petitioning creditor requirement 'jurisdictional,' this requirement is not jurisdictional in the sense of subject matter jurisdiction, but is a substantive matter which must be proved or waived if put in issue").

### III. SECTIONS 362(a)(2) AND 303(f)

Aquila argues, among other things, that the Debtor has violated the Supplemental Order by transferring its assets to Hiawatha and that this Court should grant the relief sought in its Motion and also declare the sale reflected in the Sale Agreement void. In response, the Debtor contends that it entered into the Sale Agreement merely to preserve the Debtor's assets in an attempt to comply with the Supplemental Order<sup>4</sup> and that § 303(f) gives it the ability to sell its assets without notice to parties in interest and without Court approval until an order for relief is entered. The parties agree that § 303 governs this issue. Subsection (f) of § 303 provides: "Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced." Therefore, during this "gap" period, the Debtor has the ability to continue to use, acquire, or dispose of property inside or outside the ordinary course of business without notice to parties in interest or Court approval unless the Court orders otherwise. Aquila argues, however, that § 303(f) excuses an involuntary debtor's compliance with § 363(b) during the gap period only to the extent the debtor would be authorized outside of bankruptcy to make such transfers. Aquila maintains that this Debtor was not authorized to enter into the Sale Agreement without complying with § 363 because doing so was a violation of the Supplemental Order. In response, the Debtor argues that Aquila fails to take into account other applicable provisions of the Bankruptcy Code that impact this involuntary

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<sup>4</sup> Because resolution of the Motion turns on an interpretation of the Bankruptcy Code, it is unnecessary for the Court to resolve various disputed issues of fact. But the Court notes in passing the incongruity of arguing that transferring assets of a company preserves those assets for the company.

filing, namely the automatic stay provisions of § 362.

When an involuntary petition is filed under § 303 of the Bankruptcy Code, the automatic stay goes into effect precluding parties from taking various actions against a debtor or property of the estate. Specifically, § 362(a)(2) stays “the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title.”<sup>5</sup> It is undisputed that Aquila obtained its judgment against the Debtor before the involuntary petition was filed. The Court also concludes that the Supplemental Order was issued to aid Aquila in its attempt to collect on its judgment pursuant to Fed. R. Civ. P. 69, DUCivR 69-1, and Utah R. Civ. P. 64. The question that remains then is this: what is the effect of the automatic stay on this Supplemental Order?

When a petition for bankruptcy relief is filed the stay makes a prepetition judgment unenforceable without further order of the court.<sup>6</sup> This is the case even when a supplemental order issued in an attempt to enforce the judgment contains restrictive or injunctive-like language. DUCivR 69-1(a), under which the Supplemental Order was issued, specifically provides that “[t]he moving party, on proper affidavit, may request that the debtor or other person be ordered to refrain from alienation or disposition of the property or assets in any way detrimental to the moving party's interest.” This is exactly what the Supplemental Order did. It restrained the

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<sup>5</sup> See *In re Weitzman*, 381 B.R. 874, 882 (Bankr. N.D. Ill. 2008) (denying creditor's request to sue chapter 13 trustee in non-bankruptcy forum and stating that creditor's attempt to collect prepetition judgment against chapter 13 trustee and estate property held by that trustee was not permitted by the automatic stay). The bankruptcy court in *Weitzman* wrote: “The stay prevents, among other actions, the enforcement of a prepetition judgment against the debtor or property of the estate. 11 U.S.C. § 362(a)(2). In other words, when the automatic stay is in effect, prepetition judgments are incapable of enforcement.” *Id.*

<sup>6</sup> See §362(a)(2).

Debtor, prepetition, from using or disposing of its assets outside the ordinary course of business disposing of its assets and from taking any actions that may result in the termination of its Coal Operating Agreement and from taking any actions that may result in the termination of its Coal Operating Agreement with COP Coal. When the automatic stay went into effect, the October 2007 judgment and any orders supplemental thereto became unenforceable without first seeking relief from the provisions unenforceable without of the automatic stay. In voluntary cases, other provisions of the Code such as § 363 would replace the injunctive provisions of the Supplemental Order and give statutory structure to transactions involving § 541 property. But to enforce the Supplemental Order post-petition in this unadjudicated involuntary case, Aquila was required to move to either lift the § 362 stay to continue to enforce the Supplemental Order, or to immediately file its § 303(f) motion for the Court to “order otherwise” and restrict the Debtor’s unfettered use of its assets.<sup>7</sup>

The Court recognizes that ruling that the automatic stay prevents enforcement of a prepetition injunctive or restraining-type order could result in “a parade of horrors,” but the Bankruptcy Code provides exceptions to the application of the automatic stay that deal with this potential parade. Section 362(b) provides for at least twenty-eight scenarios where the stay does not go into effect. The Supplemental Order does not fit into any one of the twenty-eight exceptions. As a result, the Supplemental Order is subject to the automatic stay, and this Court cannot enforce it to prevent the transfer that has already occurred.

Although there is very little case law directly on point, the bankruptcy court in *In re Weitzman* was presented with the following scenario. During the pendency of a debtor’s chapter

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<sup>7</sup> The legislative history of § 303(f) indicates that imposition of restrictions on a putative debtor may be appropriate when the debtor intends to conceal, dispose, or abscond with estate assets in a manner that would be detrimental to the debtor’s creditors. See S. Rep. No. 989, 95th Cong., 2d Sess. 33, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5819.

13 case, a prejudgment creditor issued a third-party citation to the chapter 13 trustee ordering the trustee to appear before the state court to answer questions regarding any assets of the debtor in the trustee's control, and the citation prohibited the trustee from transferring any portion of the debtor's non-exempt assets. The court found that the prepetition judgment could not validly support the commencement of a supplemental proceeding because § 362(a)(2) prohibited such actions.<sup>8</sup> As articulated in *Weitzman*, the automatic stay prohibits any attempt to use a supplemental proceeding or a supplemental order to enforce a prepetition judgment.<sup>9</sup> As a result, the automatic stay prohibited the enforcement of the Supplemental Order at the time the Sale Agreement was executed.

This analysis may frustrate Aquila's attempted collection of its prepetition judgment. Under § 303, Aquila could have come before this Court and asked it to require the Debtor to comply with § 363 and other provisions of the Code before the adjudication of the involuntary or to appoint an interim trustee but it failed to do so.<sup>10</sup> Aquila's delay in bringing the Motion allowed the filing of the involuntary petition to shield the Debtor from the consequences of the Supplemental Order with no commensurate obligations on the Debtor's part to protect and

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<sup>8</sup> *Weitzman*, 381 B.R. at 882. Under Illinois law, a judgment creditor can initiate supplemental proceedings to discover the assets of a judgment debtor. Both the judgment debtor and any third party that might hold the debtor's assets are subject to this citation. The citation may include "restraining provisions" which keep the judgment debtor or a third party from disposing of the assets. DUCiv. R 69-1(a) has a similar provision which allows the District Court to issue an order requiring the debtor to refrain from alienating or disposing of the property or assets in any way detrimental to the creditor who is attempting to collect its judgment.

<sup>9</sup> See also *Galmore v. Dykstra (In re Galmore)*, no. 07-2205 JPK, 2008 WL 2879680 at \*8, \_\_\_ B.R. \_\_\_, (Bankr. N.D. Ind. July 25, 2008) (holding that a bench warrant, used postpetition by a creditor to have the debtor arrested, was civil in nature and subject to § 362(a)(2)).

<sup>10</sup> See *In re Professional Accountant Referral Services, Inc.*, 142 B.R. 424 (Bankr. D. Colo. 1992) (holding that an interim trustee can be appointed during the gap period).

preserve assets of the estate. This may not be what Aquila and the other petitioning creditors intended when they filed the involuntary petition, but it is the result nonetheless. The Bankruptcy Code simply says what it says, and this Court cannot change that fact.

The Court will, however, pursuant to § 303(f), order that from this point forward any use, transfer, or disposition of any of the Debtor's assets outside the ordinary course of the Debtor's business is subject to the provisions of § 363 of the Bankruptcy Code. If the Debtor wants to transfer, sell, or seek approval of the transfer or sale of its assets to Hiawatha or any other party outside the ordinary course of the Debtor's business, a motion must be filed, set for hearing, and properly noticed out to all parties pursuant to the Bankruptcy Code and Bankruptcy Rules. This order applies to any portion of the Sale Agreement or any other post-petition transfer that has not yet been consummated including the approval of the sale by various governmental agencies and regulatory agencies or commissions.

Standard Industries argued that any order of this Court that restricts or restrains the Debtor from operating or transferring its assets should be obtained through an adversary proceeding pursuant to Rule 7001. Under Rule 7001, an attempt to obtain an injunction or other equitable relief requires the commencement of an adversary proceeding.<sup>11</sup> The relief granted in this order, however, is not an injunction or other equitable relief as contemplated by Rule 7001. In "ordering otherwise," the restrictions this Court is imposing on the Debtor's future transfer, use, or disposition of assets outside the ordinary course of business, or its attempts to take any action in furtherance of the consummation of the Sale Agreement, are authorized by § 303(f)

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<sup>11</sup> See FED. R. BANKR. P. 7001 which provides: "An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings: . . . (7) a proceeding to obtain an injunction or other equitable relief . . ."

which allows this Court to “prevent a debtor from controlling an asset [or assets] during the ‘gap period’ between the filing of the involuntary petition and the entry of an order for relief.”<sup>12</sup>

Requiring the Debtor to comply with the provisions of § 363, Rule 6004, and Rule 2002 when taking steps to act outside the ordinary course of business is not akin to an injunction and does not require the commencement of an adversary proceeding.

**IV. CONCLUSION**

Before the involuntary bankruptcy petition was filed, the relationship between the Debtor and its creditor Aquila was governed by the District Court, the October 2007 judgment, and the Supplemental Order. But when the petitioning creditors filed the involuntary bankruptcy petition, the parties’ relationship and their abilities to act became subject to the provisions of the Bankruptcy Code. It is within the framework of the Bankruptcy Code that these parties must now operate. Section 362(a)(2) is clear. Aquila is prohibited from enforcing a prepetition judgment against the Debtor or property of the estate after the automatic stay goes into effect unless the stay is lifted. Based on the foregoing, Aquila’s Motion is DENIED in part and GRANTED in part. A separate order will be issued in conjunction with this Memorandum Decision.

-----END OF DOCUMENT-----

<sup>12</sup> *Jenkins v. Hodes (In re Hodes)*, 402 F.3d 1005, 1009 (10th Cir. 2005) (petitioning creditors filed a motion, not an adversary proceeding, to stop the construction of a home and to restrict the putative debtors’ use of deposit funds). Similarly in this case, Aquila filed a motion rather than an adversary proceeding to attempt to stop the Debtor’s transfer of its assets and to restrict further transfers of its assets without court order after notice and a hearing.

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**SERVICE LIST**

Service of the foregoing **MEMORANDUM DECISION DENYING IN PART AND GRANTING IN PART MOTION OF AQUILA, INC. FOR ORDER PRESERVING AND PROTECTING ASSETS OF BANKRUPTCY ESTATE AND REQUESTING NOTICE AND HEARING IN CONNECTION WITH DEBTOR'S PURPORTED SALE OF SUBSTANTIALLY ALL OPERATING ASSETS TO A RELATED ENTITY** will be

effected through the Bankruptcy Noticing Center to each party listed below and to the MATRIX:

Paul James Toscano  
10 Exchange Place  
Suite 614  
Salt Lake City, UT 84111  
*Debtor's Counsel*

Russell S. Walker  
Woodbury & Kesler  
265 East 100 South  
Suite 300  
Salt Lake City, UT 84111  
*Debtor's Counsel*

Keith A. Kelly  
Steven W. Call  
Steve Strong  
Ray Quinney & Nebeker, P.C.  
36 South State St., Suite 1400  
P.O. Box 45385  
Salt Lake City, UT 84145-0385  
*Counsel for Aquila, Inc.*

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Tyler Foutz  
Olsen Skoubye & Nielson  
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David E. Leta  
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Suite 1200  
Beneficial Tower  
Salt Lake City, UT 84101-1547

F. Mark Hansen  
F. Mark Hansen, P.C.  
431 North 1300 West  
Salt Lake City, UT 84116  
*Counsel for Standard Industries, Inc.*

COAL OPERATING AGREEMENT

THIS AGREEMENT made and entered into this 23rd day of June, 2008 by and between C.O.P. Coal Development Company, a Utah corporation, hereinafter referred to as "Owner", and Hiawatha Coal Company, Inc., a Utah corporation, hereinafter referred to as "Operator";

WITNESSETH, that:

In consideration of the covenants and agreements hereinafter contained, the parties hereto mutually and severally agree as follows:

Owner, in consideration of the royalties to be paid and conditions to be observed as hereinafter set forth, does hereby grant unto Operator the exclusive authority to operate and control the following described tracts of land, situated in the state of Utah, for the term of 3 years, beginning June 23, 2008, and extending to June 22, 2011 with an option to renew for 5 years, subject to terms agreeable to the parties:

See Exhibit "A" attached hereto and made a part hereof

1. USE OF PROPERTY

Operator shall have the exclusive right to, and use of the described property for purposes reasonably incident to the mining and removal of coal, including any existing underground workings or facilities heretofore placed in or upon the leased area. Operator shall also have unrestricted use of all access roads leading to and from the described property. Owner shall retain all other rights to the use of the property including, but not limited to, hunting, grazing, recreational, timber, oil and gas and other minerals and water rights.

2. SIGNING BONUS

Operator shall pay Owner a signing bonus of three million dollars (3,000,000), payable in ten equal installments of \$300,000, and an eleventh payment for the remaining balance owed for accrued interest and principle, each due on the 15<sup>th</sup> day of each month beginning on October 15, 2008. All payments will be applied first to interest then principle. The signing bonus shall not be construed as a royalty payment for any purpose.

3. ROYALTIES

Operator shall pay a royalty equal to the lesser of 8% or the maximum royalty

**EXHIBIT "E"**

Δπ EXHIBIT 184  
C.O.P. Coal  
Department  
Date P-408 Rptr. AL

allowed by law of the average gross realization on every ton (2,000 lbs.) of coal mined and removed from the described premises. Said royalty is payable in addition to the royalty amounts payable on the federal and state leases. In computing the average gross realization, severance and or sales taxes shall not be considered as part of the sale price. The royalty on coal stockpiled shall not become due or payable until actual shipment of the stockpiled coal from the premises.

Operator shall, on or before the twentieth day of each month during the term hereof, pay to Owner all sums due to Owner hereunder for the preceding calendar month as shown by the statement to be furnished as hereinafter provided.

For any advance royalties paid by Owner on the Federal Coal Leases, Operator shall reimburse Owner for those advance royalties, in the amounts and at such times as they would become due in the course of mining the coal, had Owner not paid the advance royalties.

#### 4. INTEREST

Operator shall pay to Owner interest at the rate of 15% per annum, compounded annually, on all amounts due to Owner under this or any other agreement between Operator and Owner including, but not limited to, the unpaid signing bonus due under this agreement. All payments will be applied first to interest, then to principle.

#### 5. SECURITY INTEREST GRANTED

Operator grants Owner a security interest in all of Operator's assets, income, cash, cash equivalents, and other proceeds obtained in full or part from Operator's use or possession of the premises. Owner may record a UCC-1 financing statement to perfect and give notice of its security interest.

#### 6. STATEMENTS AND MINE MAPS

Operator shall make and furnish to Owner on or before the twentieth day of each month during the term of this Agreement, a statement of the amount of coal removed from said coal lands, such statement to be made under the hand and certificate of Operator. Operator shall also make and furnish Owner, at least once each year, an up-to-date mine map of workings on the premises. Operator agrees to keep a true, correct and accurate account of coal removed from the premises, and a true and accurate map of all mines or workings now or hereafter opened or used on the premises. The properly authorized representatives of Owner shall have free and full access to the accounts, books, and records of Operator relating to tonnages of coal removed.

Operator shall furnish Owner with copies of all mining plans within a reasonable time of when said plans are approved by the Utah Division of Oil, Gas and Mining.

7. CONDITION OF PROPERTY

It is expressly understood that the property herein referred to is delivered to Operator in its present as is, where is condition and that Operator is familiar with said property and accepts the same in its present condition and assumes full responsibility for all known or unknown defects.

8. OPERATION OF MINE

Operator shall diligently and continuously operate the subject property for the term hereof unless the operation thereof is prevented by strike, car shortages, government regulation, any act of God, or similar cause beyond the control of Operator, or unless all of the merchantable coal in said premises is sooner extracted, mined and removed. Operator shall conduct all operations hereunder in a good and miner like manner and in a manner which will result in the ultimate maximum economic recovery of coal from the property. Operator shall comply with all governmental, statutory and regulatory requirements applicable to Operator. Any material failure to do so shall be a material breach of this agreement for which Owner may terminate this agreement.

Operator agrees to indemnify and hold Owner harmless from and against any and all damages, claims, costs and expenses arising out of or related in any way to Operator's use or occupation of the property, including but not limited to any caving or subsidence of the surface. Operator agrees to maintain insurance coverage against all such damages, claims and costs, with companies acceptable to Owner, in an amount not less than \$1,000,000, listing Owner as an additional insured.

Operator shall pay all operating expenses for Operator's mining operation, including mining machinery, lumber, timber, permits etc.

Operator shall, in the operation and development of the premises, comply with all applicable Federal, State, and local laws that apply to Operator's mining operation and shall conduct its mining operations and take all actions and perform all duties required to maintain the Federal and State mining permits and approvals relating to the Premises.

Operator shall hold Owner harmless from and against any and all damages, claims, costs, and expenses arising from or growing out of any injuries to, or death of, the employees of

Operator or any other person whomsoever, where such injury, death or damage occurs of or in connections with the possession, use or operation in any manner of the property.

#### 9. SURVEYS AND INSPECTIONS

Owner or its agents may and shall at all reasonable times have free access to said premises and the mine, or mines open thereon, or which may hereafter be opened thereon, and to all workings, thereon for the purpose of determining whether the said property is being maintained, protected, and used in accordance with the terms of this agreement; and for the purpose of checking the tonnage of coal which may be mined and extracted by Operator.

From time to time, Owner may cause a survey of the mine or mines of Operator to be made by some competent engineer selected by Owner for the purpose of checking the statements made by Operator of the coal removed from the premises, and of the amounts paid as royalties by reason thereof and for the purpose of determining the manner in which the mining upon the premises has been or is being performed. Operator may be present, or his duly appointed representative, at the making of any such survey and shall furnish necessary men free of expense to Owner to assist Owner's said engineer in making such a survey.

#### 10. TAXES

Operator shall pay all taxes with respect to Operator's mining operation, equipment, and other property used by Operator.

#### 11. TERMINATION OF AGREEMENT

Upon the termination of this Agreement by expiration, surrender, forfeiture, or any other cause, except by default, Operator shall have the privilege at any time within a period of 6 months thereafter of removing from the premises all machinery, equipment, tools, materials, etc. placed by Operator in or on the premises. If reasonably required, Operator may have an additional period of not more than 6 months within which to remove stockpiled coal and coal dust, subject of course, to the payment of the royalties on any such coal or coal dust so removed.

At Owner's option, any property or improvements remaining on the premises more than six months after termination of this Agreement, shall revert to and become the sole and absolute property of the Owner. However, should Owner elect not to become the owner of any such property or improvement, Owner shall so notify Operator in writing, demanding that Operator remove such items and if not so removed within ten days after notification, Owner may remove or dispose of such property at Operator's expense.

## 12. BANKRUPTCY

For purposes of bankruptcy law, Operator's right to enter upon and occupy Owner's real property is a lease of nonresidential real property. If

- (i) A voluntary or involuntary petition for bankruptcy is filed naming Operator as a bankruptcy debtor, or naming a third party as a bankruptcy debtor on a debt for which Operator is or may be a co debtor, AND
- (ii) Operator's ability to perform any part of this Agreement is adversely effected by
  - (ii)(A) events, acts or omissions however caused, which are related to the reasons for which the bankruptcy petition is filed, OR
  - (ii)(B) the bankruptcy filing itself,

then Owner shall have these rights, each of which is cumulative and independent of the others:

- (a) Owner may treat the bankruptcy filing as an event of default and/or a material breach.
- (b) Owner may give Operator written notice setting thirty days from the notice as the stated term of the lease. At the end of the thirty day period, this Agreement shall expire by the stated term of the lease.
- (c) Upon request by Owner however given, Operator will stipulate to any motion by Owner for relief from the automatic stay.
- (d) Upon request by Owner however given, Operator will reject this Agreement.
- (e) Upon written request by Owner, Operator will stop severing coal from the real property, and/or processing coal on the real property, and/or transporting coal from the real property, and/or engaging in other specified activities on the real property.
- (f) Upon written request by Owner, Operator will surrender the real property to Owner.
- (g) Owner may, upon giving Operator thirty days written notice, revoke Operator's right to enter all or specified parts of Owner's real property, and may block roads, paths, doors, entries and other access to the real property, and use any other lawful means to prevent Operator from entering all or specified parts of the real property,

and may remove any or all of Operator's personal property from Owner's real property.

- (h) Owner may demand payment of all unpaid royalties whether or not presently due, and any other amounts owed by Operator, within thirty days from the demand. If Operator fails to pay as demanded, Owner may terminate this Agreement for nonpayment.
- (i) Owner may reject and refuse to accept or consent to, and may treat as void and as of no force and effect, any voluntary or involuntary assignment or delegation to, and/or any voluntary or involuntary assumption or performance by, any third party of any rights or duties of Operator under this Agreement.
- (j) Operator shall pay, indemnify, defend, and hold Owner harmless from any costs, losses, injuries, expenses, consequential and incidental damages, and third party claims, whether or not foreseeable, arising out of Owner's exercise of any rights under this section 12 of the Agreement.

### 13. DEFAULT

If Operator does not comply with any of the provisions, obligations, covenants, or agreements herein written and contained or with any other agreement between Operator and Owner, and such default shall continue for a period of 30 days after service of written notice, including by e-mail, by Owner identifying the default and specifying with reasonable particularity the nature and extent thereof, then and in such event this Agreement may be terminated and all of the rights of Operator shall cease and be wholly determined and Owner may at once take possession of any or all of the properties herein described.

In the event of such default, Owner shall have the right, but not the obligation to operate the underground coal mining business of Operator. If Owner elects to operate the coal mine business and notifies Operator of its election in writing, Operator agrees that all of Operator's permits, bonds, licenses and approvals shall immediately revert to and become the property of the Owner.

### 14. HEIRS AND SUCCESSORS

Each obligation hereunder shall extend to, and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

15. ASSIGNMENT

Operator's rights hereunder may not be assigned, transferred or conveyed, whether voluntary or involuntary, without Owner's advance written consent, through execution or other judicial process. Any attempted assignment, transfer, or conveyance, whether voluntary or involuntary, to a third party is an event of default and a material breach and shall give Owner the right to cancel this agreement. If Operator is subject to the execution of its assets, this shall be an event of default and a material breach and shall give Owner the right to cancel this agreement.

16. SEVERABILITY

If any part of this agreement is invalid or unenforceable, all remaining parts of the agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed as of the day and year first above written.

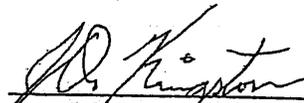
**OWNER**

C.O.P. Coal Development Company  
53 West Angelo Ave  
Salt Lake City, UT 84115

**OPERATOR**

Hiawatha Coal Company  
P O Box 1202  
Huntington, UT 84528

By:

  
\_\_\_\_\_  
J.O. Kingston

By:

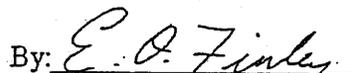
  
\_\_\_\_\_  
E. O. Finley

EXHIBIT A

Page 1 of 3

BEAR CANYON

U-024316            Issued            8-1-80

T.16 S., SLM, Utah

Sec 13: W2W2

Sec. 14: NE, E2NW

Containing 400 acres, more or less.

U-024318            Issued            8-1-80

T.16 S., R.7.E, SLM, Utah

Sec 26: E2NW

Containing 80 acres, more or less.

MORHLAND

U-61048            Revised            10-29-92

T 16 S., R. 7 E., SLM, Utah

Sec 1: Lot 1, SENE, E2SE

Sec. 12: E2NE

T 16 S., R. 8E., SLM, Utah

Sec. 6; Lots; Lots 11-14, E2SW, W2SE, SESE

Sec. 7; Lots; 1,2, E2NW, W2NE, SENE, SE

Sec. 8; SWSW

Containing 1,108.27 acres, more or less.

EXHIBIT A  
Page 2 of 3

U-61049                      Revised:              6-19-2002

Track 1:

T. 16 S., R. 7 E., SLM, Utah  
Sec 1; Lot 2, SWNE, W2SE  
Sec 12; W2NE, E2W2, SE  
Sec 13; E2, E2W2

T. 16 S., R. 8 E., SLM, Utah  
Sec 7; Lots 3,4, E2SW  
Sec 18; Lots 1-4, E2, E2W2  
Sec. 19; SWNE, NWSE  
Sec. 20; SENW, NESW

Track 2:

T 16S, R. 8E., SLM, Utah  
Sec 19: SENE, NESE  
Sec 20: SWNW, NWSW

Containing 2,196.09 more or less

McCADDEN HOLLOW

U-46484                      Readjusted:              5-1-88

T. 16 S., R7 E. SLM, Utah  
Sec. 10; N2, N2S2, SESW, S2SE  
Sec. 11; ALL  
Sec. 12; W2W2

Containing 1,400 acres, more or less.

WILD HORSE RIDGE

U-020668                      Readjusted              5-1-88

T. 16 S., R. 7 E, SLM, Utah  
Sec. 25: SENE, NESE

T. 16 S., R. 8 E., SLM, Utah  
Sec. 30; Lots 1-4, W2NE, E2W2, NWSE

Sec. 31; NENW, NWNE

Containing 626.32 acres, more or less

EXHIBIT A

Page 3 of 3

U-038727    Readjusted    5-1-88

T. 16 S., R. 7 E., SLM, Utah  
  Sec 24; SENE, E2SE  
  Sec 25; N2NE, SWNE, SWNW, NWSW, W2SE, SESE

T. 16 S., R 8 E., SLM, Utah  
  Sec. 19; Lots 2-4, SENW, E2SW, SWSE

Containing 740.39 acres, more or less.

FEE GROUND

T. 16S, R. 7E, SLB&M

  Section 14: S1/2, W1/2NW1/4

  Section 23: ALL

  Section 24: W1/2, W1/2, E1/2

  Section 25: NW1/4NW1/4, E1/2NW1/4, NE1/4, SW1/4

  Section 26: NE1/4

T. 16S, R 8E, SLB&M

  Section 7: E1/2NE1/4

  Section 8: N1/2SW1/4, SE1/4, SW1/4, W1/2SE1/4

  Section 16: W1/2W1/2

  Section 17: ALL

  Section 19: Lot 1, NE1/4NW1/4, N1/2NE1/4

  Section 20: N1/2NW1/4, NE1/4, NE1/4SE1/4

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed, first-class postage prepaid, or emailed as indicated below, a true and correct copy of the foregoing HIAWATHA COAL COMPANY INC.'S REQUEST FOR REVIEW OF DIVISION ACTION to the following on this 4th day of May, 2009:

Hiawatha Coal Company, Inc.  
ATTN: Elliot Finley, Pres.  
Post Office Box 1240  
Huntington, UT 84528  
via email

Utah Division of Oil, Gas & Mining  
1594 West North Temple, Suite 1210  
P.O. Box 145801  
Salt Lake City, Utah 84114-5801

Secretary  
Board of Oil, Gas and Mining  
Utah Division of Oil, Gas & Mining  
1594 West North Temple, Suite 1210  
P.O. Box 145801  
Salt Lake City, Utah 84114-5801

Steven F. Alder, Esq.  
Kevin Bolander, Esq.  
Assistant Utah Attorneys General  
Utah Division of Oil, Gas & Mining  
1594 West North Temple, Suite 300  
Salt Lake City, Utah 84114

Michael S. Johnson, Esq.  
Stephen Schwendiman, Esq.  
Assistan Attorneys General  
Utah Board of Oil, Gas & Mining  
1594 West North Temple, Suite 300  
Salt Lake City, UT 84116

F. Mark Hansen  
Attorney for Joseph Kingston and  
Rachel Young  
431 North 1300 West  
Salt Lake City, UT 84116  
via email

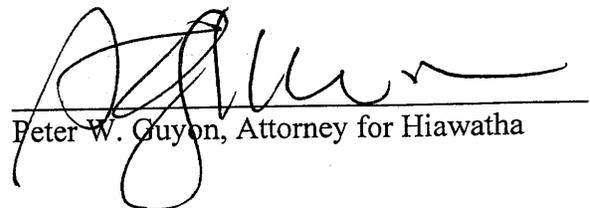
Hiawatha Coal Company, Inc.  
Lon Jenkins, Esq.  
Attorney for Lyndon Insurance  
Jones Waldo Holbrook and McDonough  
1170 South Main Street #1500  
Salt Lake City, UT 84101  
Via email

Michael N. Zundel, et al.  
Prince Yeates & Geldzahler  
Attorney for Chapter 7 Trustee  
Kenneth A. Rushton  
175 East 400 South  
Salt Lake City, UT 84111

Pamela Brown, Forest Supervisor  
Forest Service  
Manti-La Sal National Forest  
599 West Price River Road  
Price, UT 84501

Kent Hoffman, Deputy State Director  
Bureau of Land Management  
State Office  
440 West 200 South, Suite 500  
Salt Lake City, UT 84101

DATED this 4th day of May, 2009

  
Peter W. Guyon, Attorney for Hiawatha