Ostrava Regional Court
Havlíčkovo nábř. 34
728 81 Ostrava 1

June 15, 2016

File No.	**KSOS 25 INS 10525/2016**
Debtor/Petitioner:	OKD, a.s., Business Id. No. 268 63 154, with its registered office at Stonavská 2179, Doly, 735 06 Karviná, registered with the Ostrava Regional Court under File No. B 2900
Represented by:	Petr Kuhn, ČAK License No. 10624, with his registered office at BADOKH – Kuhn Dostál advokátní kancelář s.r.o., 28. října 12, 110 00 Prague 1
Appellant:	NWR Holdings B.V., with its registered office at Herengracht 448, 1017 CA Amsterdam, Kingdom of the Netherlands, Registration No. 61294179

Debtor's Statement on Appeal of NWR Holdings B.V. of June 9, 2016

Attachments: As referred to in the text

I
Summary

1. With reference to the provisions of Section 423 of the Insolvency Act in conjunction with Section 215a *et seq*. of the Instruction of the Ministry of Justice of December 3, 2001, Ref. No. 505/2001-Org, issuing internal and administrative rules to the district, regional and high courts, as amended, **we hereby kindly request that the agreements attached hereto be made anonymous in order to maintain business secrecy**; this concerns the Agreement on the Sale and Purchase of Shares dated January 8, 2010 and the Loan Agreement dated July 12, 2010.

The debtor summarizes its arguments, which are given in greater detail below in Parts II through VII, as follows:

2. The appellant has no standing to appeal the contested resolution, given that the temporary injunction interferes with the legal position of the (body of the) debtor, rather than the legal position of the appellant.

3. The debtor believes it proven beyond doubt that members of the group presenting themselves as the "Ad Hoc Group", whether directly or indirectly (via third parties), in relation to the debtor represent a trinity of (i) persons controlling the debtor, (ii) the major creditor of the debtor, and (iii) a person encumbered with debt towards the debtor. These facts alone establish sufficient grounds for granting the contested temporary injunction.

4. After the temporary injunction was granted, the debtor launched an extensive forensic audit focused on a potential abuse of the position of persons controlling the debtor, and it is in the joint interest of the creditors that the debtor complete this forensic audit. The outcome of the investigation may clash with the interests of its controlling persons, or to be more precise, members of the "Ad Hoc Group", and the creditors should therefore be given the opportunity to independently examine the issues related in particular to the transfer of a large amount of valuable assets to third parties.

II
Appellant's Lack of Standing

5. A decision of the sole shareholder exercising the powers of the general meeting is a decision of a corporate body (just like a decision of the statutory body of a company). This is why procedural law determines that an action claiming the invalidity of a resolution of the general meeting (whether adopted at the general meeting or *per rollam*) is always aimed against the company, rather than its shareholders who adopted it.

6. Therefore, the granted temporary injunction is, by necessity, directed at the debtor, and requires the debtor to tolerate limitations, such as the limitation that decisions of its body may only be adopted with the consent of the interim creditors' committee or, as the case may be, the insolvency court.

7. This being said, the temporary injunction does not limit the appellant's rights; the appellant continues to be the debtor's shareholder and may adopt resolutions while exercising the powers of the general meeting. It appears that the appellant only insufficiently distinguishes between the temporary injunction that was actually granted and a hypothetical temporary injunction whereby it would be ordered to refrain from exercising its voting or other rights. In such case, its post-judgment recourse would be admissible, but it is ruled out in the given case.

8. To the extent that the limitation of the debtor may also affect the appellant, this is only an indirect (invoked) effect on the relationship between the debtor (company) and appellant

(shareholder). This, however, does not give the appellant standing to be a party to the proceedings.

9. A shareholders' decision adopted *per rollam* is still a resolution of the general meeting or a corporate body. If the law describes decisions *per rollam* as decisions 'adopted outside the general meeting', this is understood to mean the adoption of a decision when the said corporate body is not in session. This conclusion is evident from the law, specifically from Section 158 (2) of the Civil Code[1] in conjunction with Section 419 (2) of the Corporations Act,[2] is generally accepted by legal doctrine[3], and has been upheld by the practice of the courts.[4]

10. It is therefore evident that the appellant is not a party to the proceedings on the temporary injunction nor a third party on whom the temporary injunction imposes a duty. This is why the appellant lacks standing to file an appeal.

III
Inscrutability of the Decision

11. With respect to this particular objection, the debtor notes that, in accordance with the provisions of Section 169 (2), a granted temporary injunction does not *have* to contain a *ratio decidendi*. By granting the temporary injunction, the insolvency court fully accommodated the debtor's petition, and as described above, the said temporary injunction is directed only at the debtor.

12. The appellant claims the insolvency court's decision to be inscrutable because it allegedly lacks substantiation of the conflict of interest and of the need to regulate the debtor's affairs. Both these objections are unfounded if only because of the fact that the appellant itself was clearly able to identify the grounds that led the insolvency court to grant the temporary injunction. Indeed, in the reasons given for the temporary injunction, the insolvency court thoroughly summarizes the basic reasons which led the court to grant the temporary injunction and which are capable of explaining the court's resolution in a comprehensible manner that is open to review.[5]

13. The thrust of the appellant's objections is in fact aimed against the purported non-existence of reasons (rather than the failure of giving such reasons) which served as the basis for the resolution of the insolvency court. This, however, does not make the resolution inscrutable.

IV
Control over the Debtor by AHG Members

14. The legal issue of control or management of the debtor, who is a corporation with its registered office in the Czech Republic, is an issue of Czech law. If issues of control or

[1] The provision refers to decisions of the body adopted "*outside a meeting*".

[2] Pursuant to that provision, even in the case of the sole shareholder, it is still "*a resolution of the general meeting*".

[3] Štenglová, I., Havel, B., Cileček, F., Kuhn, P., Šuk, P.*: Corporations Act. Commentary*. 1st issue, Prague: C.H. Beck, 2013, p. 653, or Švestka, J.; Dvořák, J; Fiala, J. et al. *Civil Code. Commentary. Volume 1*. Prague: Wolters Kluwer, a.s., 2014, p. 527, or Lavický, P. et al.: *Civil Code I. General Part (Sections 1-654). Commentary*. 1st issue, Prague: C.H. Beck 2014, p. 815.

[4] Resolution of the Prague High Court of March 3, 2015, File No. 7 Cmo 455/2014.

[5] Drápal, L., Bureš, j. et al. *Rules of Civil Procedure, I., II., Commentary*. 1st issue, Prague: C.H. Beck, 2009, p. 1138, or Svoboda, K., Smolík, P., Levý, J. Šínová, R. et al. *Rules of Civil Procedure. Commentary*. 1st issue. Prague: C.H. Beck, 2013, p. 590.

management had to submit to a law other than the laws of the controlled or managed person, then the entire regulation of this field in Czech corporate law would become entirely chaotic.

15. NWR Holding B.V. (the appellant), as the sole shareholder of the debtor, is a mere holding company whose sole shareholder is New World Resources N.V., the latter being controlled in turn by New World Resources Plc. (as the sole shareholder). None of this has been contested by the appellant.

16. The person who is ultimately in control of the debtor is the person who controls New World Resources Plc.; pursuant to Section 74 (1) of the Corporations Act, a controlling entity is an entity that is able to directly or indirectly exercise decisive influence over a business corporation. The deeds attached by the debtor to its motion for a temporary injunction show that the persons presenting themselves as the "Ad Hoc Group" ("**AHG**") became shareholders of New World Resources Plc., and their joint share is equal to 61.37%. The appellant confirmed this fact in its appeal, thus acknowledging it as being beyond dispute (Item 38 of the appeal), but the appellant endeavors to diminish its import by claiming that there is no formal or informal agreement on the exercise of voting rights between the said persons, and that each of them only promotes their own interests (Items 38 through 42 of the appeal).

17. Pursuant to Section 75 (3) of the Corporations Act, persons acting in concert who jointly control a share in the voting rights representing at least 40% of all votes in a business corporation shall be deemed to be controlling entities unless another person or persons acting in concert control the same or a higher share. Also, pursuant to Section 78 (2) (i) of the Corporations Act, persons who concluded an agreement on the exercise of voting rights are deemed to be persons acting in concert.

18. As we demonstrated in the motion for a temporary injunction, AHG members exchanged bonds of New World Resources Plc. for the shares of this company, and further entered into an agreement the purpose of which was the orderly departure of the persons who had previously controlled the debtor (CERCL group and Asental group). One can hardly accept the appellant's version that in so doing, the AHG members proceeded without prior agreement (and that it was pure coincidence that they should pursue the same intent), or that their interests should have started to diverge once they acquired the shares. Sophisticated fiduciaries cannot reasonably be expected to exchange receivables from bonds for a minority share; the transaction only makes sense if the AHG members proceed in a coordinated manner (in concert) and make use of the potential of their joint 60% share, i.e., if they control New World Resources Plc and indirectly also the debtor. This is also confirmed by their publicly known offer to the Czech Republic to sell all shares of the debtor and to write off the receivables from bonds issued by NWR, the repayment of which is guaranteed by the debtor.[6] Such offer may not be made by any person other than the person controlling the current shareholder (i.e. NWR Holding B.V.) and, by necessity, also New World Resources Plc., and at the same time owning the bonds. Seeing as the AHG members jointly offered the share in the debtor, they must have acted based on a prior agreement.

19. After all, this is even confirmed by the very members of the AHG on their website (www.adhocgroup.cz), where they present themselves as investors who "*jointly control the majority of the voting rights in NWR* [Plc.]"[7] The existence of a formal agreement among

[6] On its website, the AHG posted a press release of April 24, 2016: "*Investors* (i.e. AHG members) *offered to the government to sell OKD free and clear of debts towards bondholders*."

[7] The AHG website also contains the following press releases: "*The members of Ad Hoc Group, **who jointly control the majority of the voting rights in NWR** ("investors"), are seriously concerned that the Czech government continues to devote insufficient effort to the negotiations over the future of OKD.*" (emphasis added). "*The members of AHG (investors), **who control the majority of the voting rights in NWR**, confirm that the Tuesday meeting with ministers meant a significant step forward*." (emphasis added)

AHG members is further supported by the annual report of NWR Plc. (p. 65), to which the debtor referred as early as in its motion for a temporary injunction. As AHG members concluded an agreement the purpose of which was the orderly departure of the persons who previously controlled the debtor (CERCL group and Asental group), it is self-evident that the aim of this agreement was for AHG to gain control over the debtor.

20. The appellant denies that AHG members acted in concert and that they indirectly control the debtor, but it would then fall upon the appellant to substantiate these allegations (and refute the default assumptions of the law). The appeal, however, does not contain anything that would show that the appellant has satisfied this requirement.

21. The fact that the AHG is a group of persons rather than a single "entity" (which the appellant feels the urge to explain in its appeal) is irrelevant when examining the matter. What is, however, of decisive significance is the fact that the AHG (as an association of persons) controls the majority of the voting rights in New World Resources Plc. and acts in concert with the joint aim of securing maximum gains from the restructuring (!) of the debtor (while this is a perfectly legitimate goal, it still confirms the fact that they control the debtor).

Evidence:
- Printout from www.adhocgroup.cz
- Annual Report of NWR Plc, pages 12 and 65, mentioning a transfer agreement (attached to the insolvency petition as Schedule 17)
- Press releases (attached to the motion for a temporary injunction as Schedules 2, 3 and 5)

V
AHG Members as Creditors

22. The deeds attached by the debtor to its motion for a temporary injunction show that it is the very members of the AHG who are the main creditors under a receivable registered by Citibank N.A. by means of application No. 100, i.e., the receivables from SSCF.[8] It is AHG who gives instructions to Citibank N.A. as to the enforcement of receivables registered in the insolvency proceedings.

Evidence:
- Request of May 11, 2016 from Citibank N.A., London Branch, as Security Agent under the €35,000,000, Super Senior Term Facility Agreement to meet a guarantee obligation of the debtor, p. 11 (Schedule No. 6 to the motion for a temporary injunction).

23. AHG is also the owner of the receivables registered by Citibank N.A. by application No. 33 (receivables from Senior Secured Notes). This fact is supported by the annual report of NWR Plc., which says that the creditors under SSCF (application No. 100) are at the same time shareholders of NWR Plc. and owners of the Senior Secured Notes registered by Citibank N.A. by application No. 33.

Evidence:
- Annual Report of NWR Plc., p. 60 (attached to the insolvency petition as Schedule No. 17);

24. The appellant claims that none of the AHG members registered any receivable in the insolvency proceedings, but this is because AHG enforces its receivables via Citibank N.A., which is the Security Agent of the bondholders. As the bondholders' agent, Citibank N.A. registered receivables totaling CZK 10,485,984,781.32.

[8] Super Senior Term Facility Agreement for €35,000,000 dated September 9, 2014 (attached to the insolvency petition as Schedule No. 8).

25. AHG members are not registered creditors, but this does not mean that they have no direct legal interest in seeing the registered joint creditor, Citibank N.A., succeed with its claim and recover the greatest possible portion of the registered receivable.

Evidence:
- Application No. P33 – Receivable of Citibank N.A. (on record as part of the insolvency case file);
- Application No. P100 – Receivable of Citibank N.A. (on record as part of the insolvency case file).

26. The debtor reiterates in this regard that, as part of the negotiations between the AHG and the Czech Government, the AHG offered to sell the debtor "free and clear" of any debts towards the bondholders. "Cleaning" the debtor from such receivables may logically only be done by the creditor of such receivables, i.e., the holder of bonds and related receivables registered by application No. 33.

VI
Conflict of Interest between Debtor and Persons Controlling the Debtor

27. The debtor itself admits that the granted temporary injunction may be justifiable as long as the specific circumstances of the particular relationship between a shareholder and a company (see Item 46 of the appeal) give grounds for it. In this sense, there is no dispute between the debtor and the appellant.

28. The debtor has sufficiently demonstrated that the position of the appellant towards the debtor is very specific, thus giving grounds for a temporary injunction. We summarize that:

(a) in the insolvency proceedings, AHG members act, firstly, on the side of the debtor's shareholders (via persons from the NWR group); but also

(b) on the side of the debtor's creditors (via Citibank N.A.), seeking the satisfaction of receivables inter alia from bonds issued by NWR, the repayment of which is guaranteed by the debtor; and at the same time

(c) on the side of those (within NWR group) who have debts towards the debtor as a result of the subrogation claim of the debtor and potential other receivables of the debtor.

29. The NWR group forced the debtor to assume a guarantee obligation in the amount of CZK 10.5 billion, and then did nothing to prevent the debtor from ending up in a situation in which its debts exceeded its assets by more than two times. When the debtor got into trouble, the NWR group carried out transactions to strip itself of its influence over the debtor and left the debtor to its creditors. AHG members, investment fund managers, are driven by an enormous desire to minimize losses, and they threaten that share transfers will continue; at the same time, it is likely that these transactions will be carried out abroad (as was previously the case), which considerably increases the uncertainty of not only the debtor but also of the remaining participants to the proceedings.

30. For the sake of clarity, the debtor below provides a detailed description of the facts demonstrating the specific position and interests of the appellant, or to be more precise, its controlling persons.

Forensic Audit

31. Following issuance of the temporary injunction, a forensic audit of the debtor was launched in order to examine the previous actions of its controlling persons that could have been

detrimental to the debtor. The outcome of this audit may serve as basis in the future for seeking compensation for loss from the appellant and other persons related to the appellant. It is in the joint interest of the debtor's creditors for the thorough investigation to be completed.

The forensic audit covers particularly the following areas:

32. In 2006, the original OKD, a.s. (Business Id. No. 000 02 593) was dissolved and divided into the following successor companies, inter alia:

(a) the debtor, to whom mostly coal mining assets passed;
(b) RPG Byty, s.r.o. (formerly RPG RE Residential, s.r.o.), Business Id. No. 277 69 127, to whom passed mostly apartments and other property leased mainly to debtor's employees;
(c) RPG Gas, s.r.o., Business Id. No. 277 69 119, to whom passed the facilities and infrastructure serving the ventilation of the debtor's mines and the supply with certain raw materials (gases) which are indispensable for the safe operation of the debtor's enterprise;
(d) RPG Transport, s.r.o., Business Id. No. 277 69 101, to whom passed mostly rail sidings and related facilities used for coal and other material transport on the debtor's operating sites;
(e) Asental Business, s.r.o. (formerly RPG RE Commercial, s.r.o.), Business Id. No. 277 69 135, to whom mostly real estate used for business passed;
(f) Asental Land, s.r.o. (formerly RPG RE Land, s.r.o.), Business Id. No. 277 69 143, to whom mostly extensive land plots passed

33. In 2008, the debtor divided further by way of spin-off; mostly power engineering management assets (including internal distribution electrical facilities and heat and pressurized air generation facilities) passed to the successor company, NWR Energy, a.s., Business Id. No. 278 26 554.

Evidence: - Unabridged extract from the Commercial Register related to the debtor.

34. The situation described above would not itself have to be detrimental to the debtor, as the said successor companies were initially part of the debtor's group. However, a string of subsequent transactions was performed through which these companies and their assets were sold or otherwise siphoned off from the debtor's group. As a result:

(a) Apartments and other property leased to the debtor's employees are owned by RPG Byty, s.r.o., Business Id. No. 277 69 127, controlled by a Luxembourg company with an unknown ownership structure;

(b) Ventilation facilities in the debtor's mines and infrastructure for supplying certain raw materials necessary for the safe operation of the debtor's enterprise (for instance nitrogen) are owned by Green Gas DPB, a.s., Business Id. No. 004 94 356, controlled by the Dutch company Green Gas International B.V.;

(c) The energy management of the debtor (including internal distribution networks and other essential facilities), without which the operation of the debtor's establishment is unimaginable, is owned by Veolia Průmyslové služby ČR, a.s., Business Id. No. 278 26 554, controlled by the French Veolia group; and

(d) Certain land plots on which the debtor's mining activities are carried out are owned by Asental Land, s.r.o., Business Id. No. 277 69 143, controlled by the Dutch company Asental Property B.V.

35. Due to the above-mentioned actions of the persons controlling the debtor, the fundamental functions of the debtor's enterprise (e.g. ventilation, power engineering, transport of material within the site), as well as other facilities essential for the operation of the debtor's establishment (e.g. rail sidings, distribution of energies and air), are dependent on supplies from third parties.

36. Some of these transfers are directly linked to the agreements on supplies to the debtor. Therefore, in the event of the failure to meet any of the debtor's obligations, the persons controlling the debtor run the risk of suffering great loss. This is why the persons controlling the debtor wish the debtor to continue to honor the contractual relationships with these companies, whereas this may, to a major extent, clash with the debtor's interests in the insolvency proceedings and may bring about preferential treatment for certain creditors of the debtor.

37. By way of example, the debtor wishes to mention the agreement on the sale of shares in NWR Energy, a.s. (today Veolia Průmyslové služby ČR, a.s.) made on 8 January 2010 by and between New World Resources N.V. ("**NWR N.V.**") as the seller and Veolia Energie ČR, a.s. (formerly Dalkia Česká Republika a.s.) as the buyer. Pursuant to Article 15 of said agreement, NWR N.V. must see to it that the debtor will observe the obligations under the Framework Agreement[9] made between the debtor and Veolia Průmyslové služby ČR, a.s., and that the debtor will in no way call into question the obligations under said agreement. If the debtor were to contest any of its obligations vis-a-vis Veolia Průmyslové služby ČR, a.s., NWR N.V. would be obliged to pay Veolia Energie ČR, a.s. a contractual penalty in the amount of EUR 10,000,000 (i.e., approx. CZK 270,000,000).

Evidence: - Agreement on the Sale and Purchase of Shares of 8 January 2010, made between New World Resources N.V. and Veolia Energie ČR, a.s. (formerly Dalkia Česká Republika a.s.).

38. The debtor is indeed currently contesting certain of its obligations arising for it from the Framework Agreement. The Framework Agreement moreover appears to be the subject matter of proceedings before the Czech Anti-Trust Office over the potential abuse of a dominant market position by Veolia Průmyslové služby ČR, a.s.

Evidence: - Request for information and material from the Office for the Protection of Competition ref. No. ÚOHS-P1214/2015/DP-39412/2015/820/TPi of 23 November 2015.

39. In 2010, the debtor's syndicated loan was refinanced with the use of an intra-group loan. One of the reasons for repaying the syndicated loan was the imminent risk that debt equity ratio, priority leverage ratio, and interest coverage ratio could have attained values which would have constituted a violation of the covenants in the loan agreement. The total line of credit under the intra-group loan was CZK 11,760,490,000.

40. It follows from the loan agreement that the reason for drawing the intra-group loan in 2010 was the payout of dividends or, as it were, the payment of other liabilities vis-a-vis the debtor's shareholders. In the ultimate consequence, refinancing the syndicated loan because of increasing leverage thus led to an even higher accumulation of debt, seeing as a part of the means made available to the debtor under the intra-group loan was subsequently used to pay out dividends and other liabilities towards the debtor's shareholders.

Evidence: - Loan Agreement of 12 July 2010 (Article 2.2).

[9] The Framework Agreement originally made on 27 November 2008 (in the current wording and/or as amended by later modifications) by and among OKD, a.s., Veolia Průmyslové služby ČR, a.s. (formerly NWR Energy, a.s.), and Veolia Komodity ČR, s.r.o. (formerly CZECH-KARBON s.r.o.).

41. The information available to the debtor appears to suggest that the entities who control the debtor have been exploiting their position vis-a-vis the debtor so as to gain an advantage at the expense of the debtor. A forensic audit ought to dispel or confirm these concerns.

VII
Other Legal Issues

42. From the explanatory memorandum regarding Sec. 333 of the Insolvency Act, the debtor, contra the appellant, takes away as the main message that the lawmaker's intention is to give the creditors' committee control over the composition of the debtor's statutory body: "*The creditors' committee may also prevent the appointment of any new statutory body of the debtor by withholding its approval at the general meeting.*" It is self-evident that this limitation serves the purpose of curbing the influence of the debtor's shareholders and the conflict of their interests with those of the debtor's creditors.

43. If the appellant's musings had merit, according to which the composition of the debtor's board and its members' motivations hardly matter because "such new Board of Directors would still have to comply with obligations imposed thereon by both the Corporations Act and the Insolvency Act" (cf. item 57 - 59 of the Appeal), then the limitation drawn by Sec. 333 (2) of the Insolvency Act would be utterly superfluous. In actual fact, however, the composition of the debtor's statutory body (and the actions and motivations of its members) are of key relevance for the course of the insolvency procedure, and particularly so if the debtor's insolvency were to be resolved such that the debtor is rescued through reorganization, for in this case the statutory body essentially retains its powers of disposal over the estate. This fact is also reflected in the cited provision of Sec. 333 (2) of the Insolvency Act.

44. At the same time, the appellant has failed to mention what decisions falling within the scope of competencies of the general meeting might currently be of interest to the appellant, and what potential decisions which it might want to pass in its capacity as the single shareholder of the debtor could be affected by the temporary injunction. The only interference with the appellant's shareholder's rights of which the Appeal speaks is a restriction of the "immediate exercise of shareholder's rights" (cf. item 13 of the Appeal).

45. The appellant purportedly holds the view that its hypothetical decisions would not be able to prevent or circumvent the effects of mandatory rules of statutory law (cf. item 59 of the Appeal). For this reason, it remains unclear what kind of specific interference with the appellant's shareholder's rights could possibly be triggered by the issued temporary injunction, when the appellant itself believes that its decisions exercising the competencies of the general meeting cannot have influence on the course of the insolvency procedure.

VIII
Relief Sought

46. For this reason, the debtor asks that the appellate court reject the appeal of NWR Holdings B.V. for lack of standing of the appellant. For the event that the appellate court should not endorse the objection brought in Article II of this Statement, we ask that the appellate court dismiss the appeal of NWR Holdings B.V. and uphold the contested resolution.