

Regional Court in Ostrava
Havlíčkovo nábř. 34
728 81 Ostrava 1

May 25, 2016

Re File No.:

KSOS 25 INS 10525/2016

Debtor/Applicant:

OKD, a.s., Company No.: 268 63 154
with its registered office at Stonavská 2179, Doly, 735 06,
Karviná
registered with the Regional Court in Ostrava, File No. B

2900

Represented by:

Petr Kuhn, attorney-at-law, License No. 10624,
with his office at BADOKH – Kuhn Dostál advokátní
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110 00 Prague 1, 28. října 12

MOTION

FOR A TEMPORARY INJUNCTION

with a request for deferred publication of the electronic form of the motion pursuant to Section 423 (2)
of the Insolvency Act

In one copy

Schedules: as specified in the List of Schedules.

List of Schedules:

- I. Request to confirm the preparedness to provide operating financing, along with a contact list of entities addressed;
- II. Press Release by NWR Plc. "*Majority Shareholder Exit Completed*" dated March 9, 2016;
- III. Press Release by NWR – List of Shareholders of NWR Plc. dated April 8, 2016;
- IV. Resolution by NWR Plc. to convert notes into shares in the company dated April 8, 2016;
- V. Press releases and news reports containing statements by AHG Group;
- VI. Call by Citibank N.A., London Branch, as the security agent under the € 35,000,000 Super Senior Term Facility Agreement for performance of the debtor in its capacity as guarantor, dated May 11, 2016;
- VII. Call by Citibank N.A., London Branch, as the security agent under the conditions of the € 300,000,000 Senior Secured PIK Toggle Notes due 2020 for performance of the debtor in its capacity as guarantor, dated May 11, 2016.

Summary

1. The debtor asks that the court issue a temporary injunction pursuant to Section 74 et seq. of the Rules of Civil Procedure (the “**Rules of Civil Procedure**”) in conjunction with Section 82 and Section 61 of the Insolvency Act whereby an interim creditors’ committee is to be established.
2. The debtor further asks that the court issue a temporary injunction under Section 74 et seq. of the Rules of Civil Procedure in conjunction with Section 82 of the Insolvency Act, whereby the following is to be established:
 - (a) Operations of the debtor’s business may be halted (and be it partially) or restricted only with the prior consent of the interim creditors’ committee or, until the said interim creditors’ committee has been appointed, with the prior consent of the Insolvency Court; and
 - (b) For a resolution by the General Meeting or a Resolution by the Sole Shareholder exercising the powers of the debtor’s General Meeting to be effective, the consent of the interim creditors’ committee is required or, until the said interim creditors’ committee has been appointed, the consent of the Insolvency Court.

II.

Installation of the Interim Creditors’ Committee

3. Pursuant to Section 61 of the Insolvency Act, the Insolvency Court appoints the interim creditors’ committee promptly upon the debtor’s pertinent motion.
4. The debtor argues that grounds are given for the appointment of an interim creditors’ committee, namely, due to the need of the debtor to negotiate credit financing under Section 41 of the Insolvency Act within the order of the next few weeks. As early as last week the debtor sent out requests to potential parties to confirm their interest in providing operating financing. The debtor has since received responses from several such parties and in the upcoming days the debtor intends to negotiate the options of such credit financing in greater detail.
5. The debtor has also been exploring the possibilities for reestablishing factoring (i.e., financing through short-term loans provided for the supplies of goods and services) in negotiations with banks and trading partners, with whom the debtor cooperated to ensure the payment of liabilities in this way on a long-term basis prior to filing the insolvency petition. A factoring contract is similar to a credit agreement and therefore constitutes credit financing within the meaning of the above-mentioned Section 41 of the Insolvency Act. The debtor has also been negotiating potential standard credit financing.
6. However, pursuant to Section 58 (2) (c) of the Insolvency Act, agreements on credit financing may only be executed with the consent of the creditors’ committee or of the interim creditors’ committee. Due to the urgent need of the debtor to address the issue of operating financing and certain unexpected shortfalls in the debtor’s cash flow (caused by outstanding receivables owed by the debtor’s debtors) it stands to reason to expect that credit financing will have to be urgently approved even before the creditors’ committee has convened.
7. As of May 24, 2016 12:00 noon, a total of 59 creditors of the debtor have registered their claims in the insolvency proceedings. At present, the value of claims registered exceeds CZK 10.3 billion, i.e. the value of claims registered as yet represents approx. 60 % of the value of liabilities recorded by the debtor (see paras. 20 and 21 of the insolvency petition). Therefore, the debtor is of the opinion that the value of claims registered by creditors so far provides grounds for an interim creditors’ committee to be appointed.

Evidence: Request to confirm the preparedness to provide operating financing, along with a contact list of entities addressed;

III.

Effectiveness of Resolutions of Debtor's General Meeting

Conflict of Debtor's Interests with Interests of Entities Controlling the Debtor

8. Entities controlling the debtor are as follows: NWR Holdings B.V., organized and existing under the laws of the Netherlands, with its registered office at Herengracht 448, 1017 CA Amsterdam, Netherlands, Reg. No. 61294179 (“**NWR Holdings BV**”) and New World Resources Plc., established and registered in England and Wales, with its registered office at c/o Hackwood Secretaries Limited, One Silk Street, London EC2Y 8HQ, Great Britain, Reg. No. 7584218 (“**NWR Plc.**”) (for a detailed description of the capital structure and assets of entities which control the debtor or which form a group with the debtor, see paras. 49 through 53 of the insolvency petition).
9. Further, NWR Plc. is controlled by Ashmore Investment Management Limited, with its registered office at 61 Aldwych, London, WC2B 4AE, Great Britain, Reg. No. 03344281; M&G Investment Management Limited, with its registered office at Laurence Pountney Hill, London EC4R OHH, Great Britain, Reg. No. 00936683; and Gramercy Funds Management LLC, with its registered office at 20 Dayton Avenue, Greenwich, CT 06830, the United States of America, associated and jointly acting as Ad Hoc Group (jointly “**AHG Group**”). AHG Group is the entity ultimately controlling NWR Plc. and thus indirectly controlling also the debtor.

Evidence:

- Press Release by NWR Plc. “*Majority Shareholder Exit Completed*” dated March 9, 2016;
- Press Release by NWR – List of Shareholders of NWR Plc., dated April 8, 2016;
- Annual Report of NWR Plc., pp. 12 and 65 (attached to the insolvency petition as Schedule 17);
- Resolution by NWR Plc. to convert notes into shares in the company dated April 8, 2016.

10. Members of AHG Group are also the debtor's creditors under the €300,000,000 Senior Secured PIK Toggle Notes due 2020, issued by New World Resources N.V., dated October 7, 2014 (the “**Bonds Issue**”), or under the obligation of the debtor as a guarantor for repayment of the Bonds Issue, as described in greater detail in para. 15 of the insolvency petition and in the registration of the receivable kept in the insolvency file under No. P33.
11. The receivable from the Bonds Issue was registered in the insolvency proceeding by Citibank N.A., London Branch, Reg. No. BR001018, with its registered office at Citigroup Centre, Canada Square 25, London E14 5LB, Great Britain (“**Citibank**”). Citibank moreover acts as the Security Agent for bondholders and as the joint and several creditor of all bondholders (see Article XIII., Section 13.06 of the Bonds Issue) who is authorized to enforce receivables corresponding to secured debts from the debtor.

Evidence:

- Registration of a receivable of Citibank N.A., London Branch (part of the insolvency file as No. P33);

- Terms and conditions of the € 300,000,000 Senior Secured PIK Toggle Notes due 2020 issued by New World Resources N.V., dated October 7, 2014 (attached to the insolvency petition as Schedule 6);
- Call by Citibank N.A., London Branch, as the Security Agent under the Terms and Conditions, for performance of the debtor in its capacity as guarantor, dated May 11, 2016.

12. The majority of the bonds under the Bonds Issue is also owned by members of AHG Group, who are thus also the principal creditors of the debtor on account of the debtor's guarantee for debts under the Bonds Issue. Members of AHG Group are also creditors of the debtor under the €35,000,000 Super Senior Term Facility Agreement, concluded on September 9, 2014, or under the debtor's guarantee for repayment of the obligations under the said agreement, as described in greater detail in para. 17 of the insolvency petition. **This means that AHG Group is on the one hand an association controlling the debtor, and on the other hand the biggest creditor of the debtor.** The interests of the persons controlling the debtor and those of the debtor may therefore be in conflict.

- Evidence:
- Press releases and news reports containing statements by AHG Group
 - Schedule 1 to the €35,000,000 Super Senior Term Facility Agreement, dated September 9, 2014 (attached as Schedule 8 to the insolvency petition);
 - Call by Citibank N.A., London Branch, as the Security Agent under the € 35,000,000 Super Senior Term Facility Agreement, for performance of the debtor in its capacity as guarantor, dated May 11, 2016.

13. The debtor is a guarantor for major obligations of NWR Holdings BV and those of the persons controlling NWR Holdings BV, arising from the Bonds Issue. As a consequence of being called upon to perform under the guarantee, the debtor may, by taking recourse as a guarantor, become a major creditor of NWR Holdings BV and of the persons controlling NWR Holdings BV. The debtor and its shareholders thus become each other's creditor and debtor. By their very nature, such relations are always conflicting, and the need to resolve them in a transparent manner is made even more urgent by the debtor's insolvency.

- Evidence:
- registration of a receivable of Citibank N.A., London Branch (placed in insolvency file under No. P33);
 - Terms and conditions of the € 300,000,000 Senior Secured PIK Toggle Notes due 2020 issued by New World Resources N.V., dated October 7, 2014 (attached to the insolvency petition as Schedule 6);
 - €35,000,000 Super Senior Term Facility Agreement, concluded on September 9, 2014 (attached to the insolvency petition as Schedule 8);
 - Call by Citibank N.A., London Branch, as the Security Agent for performance of the debtor in its capacity as guarantor, dated May 11, 2016.

14. Under such circumstances, it is imperative **to preempt any doubts as to the bias of the debtor's management to the maximum possible extent, and to ensure that the debtor treats all its creditors equally and that the debtor's assets are managed in a transparent manner.** In the same vein, one must ensure that the debtor is protected against unfounded speculations concerning any potential transactions concerning the debtor's assets.

Conditional Effectiveness of Resolution of the General Meeting

15. The course of action of the debtor's Board of Directors may be changed, for instance, by a decision on the level of the debtor's General Meeting or other corporate decisions of the debtor's shareholder and its controlling persons (e.g. through a recall of the current members of the debtor's Board of Directors and the appointment of persons who will proceed in compliance with the instructions of the controlling person, and through adoption of a decision on the winding-up of the debtor followed by liquidation).
16. With a view to the collision of interests between shareholders and creditors, Section 333 of the Insolvency Act suspends the performance of the debtor's corporate bodies. The provisions of Section 333(2) of the Insolvency Act make the effectiveness of decisions by the General Meeting or Supervisory Board conditional upon the consent of the creditors' committee. However, this suspension of the performance of corporate bodies or, as it were, postponement of the effectiveness of their decisions does not occur until the restructuring is approved.
17. Considering the gravity of the conflict of interest, the gravity of the insolvency situation of the debtor, and the need to implement an expeditious solution, the debtor seeks a temporary injunction with effects similar to the above-cited Section 333 of the Insolvency Act in order to bring order into the legal relations of the debtor even before the restructuring is approved. **The debtor therefore asks that decisions of the debtor's General Meeting be subjected to the requirement of the common interest of creditors, and that the effectiveness of such decision be tied to an assenting decision by the interim creditors' committee.**
18. Considering the potential far-reaching implications of the conflict of interest, it is necessary to immediately bring order into the legal relations between the debtor and its controlling persons. The appointment of the interim creditors' committee may require a certain amount of time, in the order of several days. For this reason, the debtor proposes that – until the interim creditors' committee has been installed –the effectiveness of decisions of the debtor's General Meeting be made conditional upon the consent of the Insolvency Court. In certain situations, the Insolvency Act expressly anticipates that the duties of the creditors' committee will be performed by the insolvency court (for instance, Section 61(2) and Section 66 of the Insolvency Act).
19. The General Meeting is a body of the debtor within the meaning of Section 151 *et seq.* of the Civil Code (building upon Section 398 *et seq.* of the Corporations Act). This means that a temporary injunction is aimed at the debtor alone. This applies similarly in the case of a sole shareholder who exercises the powers of the supreme body pursuant to Section 12 of the Corporations Act. An application for a temporary injunction also concerns *per rollam* decisions, i.e., decisions of debtor's shareholders *outside* the General Meeting pursuant to Section 418 of the Corporations Act.
20. Pursuant to Section 76(1)(e) of the Rules of Civil Procedure, a temporary injunction may be used to order a party that it tolerate something. Pursuant to Section 82(1) and Section 113(1) of the Insolvency Act, the insolvency court may order a temporary injunction even without a petition. In other words, the debtor proposes that it be ordered to tolerate the suspensive effects of a decision of its General Meeting (or similar decision) until the interim creditors' committee gives its consent (to such decision).
21. The debtor is aware that the proposed temporary injunction is not expressly regulated by law. That being said, the insolvency court is not strictly bound by a "catalogue" of types of

temporary injunctions under the Rules of Civil Procedure or the Insolvency Act, as can be seen from the fact that the lawmaker has allowed the insolvency court to order temporary injunctions even without a petition, and has provided only a non-exhaustive list of such injunctions. The Rules of Civil Procedures apply only to the extent that they do not go against the principles of insolvency proceedings, and the temporary injunction seeks to fulfill these very principles as expressed in Section 5(a), (b) and (d) of the Insolvency Act. In the past, insolvency courts have proceeded in a similar way (among others also the above-referenced Court, for instance in KSOS 13 INS 59/2011 – A7) when deciding on the elimination of effects of a pending insolvency procedure, i.e., by granting an temporary injunction outside the statutory catalogue.

IV.

Relief Sought

- 22.** In light of the foregoing, the debtor asks that the Insolvency Court order a temporary injunction whereby:
- (a) in ruling I, it appoints an interim creditors' committee;
 - (b) in ruling II, it resolves that the operations of the debtor's enterprise may only be halted (and be it partly) or restricted with the prior consent of the interim creditors' committee or, until the interim creditors' committee has been appointed, with the prior consent of the Insolvency Court;
 - (c) in ruling III, it resolves that (i) decisions of the sole shareholder exercising the powers of the debtor's General Meeting, (ii) decisions of the debtor's General Meeting, and (iii) per rollam decisions of shareholders require the consent of the interim creditors' committee (or, until the interim creditors' committee has been appointed, the consent of the Insolvency Court) to be effective.
- 23.** With a view to the contents of this motion, the debtor asks that the Insolvency Court only publish the electronic form of this motion in the insolvency register along with the court order of the temporary injunction.

OKD, a.s.