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of Creditor, the Estate of Walter Wigger

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ALASKA

IN RE Northwest Gold, LLC, Debtor(s).

Case No. 17-00100

OBJECTION TO DEBTOR'S PLAN AND DISCLOSURE STATEMENT

The Estate of Wigger, by and through its attorneys, CSG, Inc., objects to the confirmation of the Plan and Disclosure Statement proposed by the Debtor,[1] Northwest Gold, LLC ("NWG"). NWG's plan is contrary to Bankruptcy Code and a recent U.S. Supreme Court decision.[2] The terms of NWG's plan show bad faith.[3] NWG's plan is not in the best interest of the creditors, but only in the best interest of one creditor,[4] and it is not feasible.[5] NWG's disclosure statement does not provide adequate information for a hypothetical reasonable investor or the relevant class to make an informed decision about its proposed plan.[6] It would be an error for this court to confirm NWG's proposed plan.

[1] ECF No. 124.
[2] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012).
[3] 11 U.S.C. §1129(a)(3).
[4] 11 U.S.C.§1129(a)(7).
[5] 11 U.S.C. §1129(a)(11).
[6] 11 U.S.C. §1125.

I. Applicable Law

The Bankruptcy Court has a duty to ensure that the confirmed plan satisfies requirements pursuant to 11 U.S.C. §1129.[7] NWG must prove by the preponderance of the evidence that either:

(1) The plan satisfies 11 U.S.C. §1129(a) requirements,

or

(2) If the only requirement not satisfied by the plan is 11 U.S.C. §1129(a)(8), then the plan must satisfy the requirements for a "cramdown" plan pursuant to 11 U.S.C. §1129(b).[8]

Additionally, NWG has the burden to prove that its disclosure statement has "adequate information," which "means information of a kind, and in sufficient detail … that would enable a hypothetical reasonable investor typical of holders of claims or interest of the relevant class to make an informed judgment about the plan…"[9]

II. NWG's plan does not comply with §1129(b)(2)(A) requirements for a "cramdown."

The central lynchpin of NWG's plan is the §1129(b) "cramdown" in an effort to force Wigger to sell its undisputed real property interest to AER at a bargain basement price.[10] It would be clear error, according to the 2012 decision by the U.S. Supreme Court, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, to confirm NWG's plan, which expects to sell Wigger's collateral at a substantially reduced price.[11]

Wigger objects to NWG's plan, therefore, it cannot be confirmed under 11 U.S.C. §1129(a)(8). Section 1129(b) permits confirmation under nonconsensual circumstances if

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[7] *Liberty Nat'l Enter. V. Ambanc La Mesa Ltd. P'ship (In re Ambranc La Mesa Letd. P'ship)*, 115 F.3d 650, 653 (9th Cir. 1997); *In re Bellows*, 554 B.R. 219, 227 (Bkrtcy.D.Alaska 2016).
[8] *Id*.
[9] 11 U.S.C. §1125.
[10] ECF No. 124, page 2.
[11] 566 U.S. 639, 641 (2012).

NWG's plan satisfies the requirements for a "cramdown." That is "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interest that is impaired under, and has not accepted, the plan." The plan is fair and equitable if one of three elements is satisfied:

> **(i)** the secured creditor retains its lien on the property and receives deferred cash payments; **(ii)** the property is sold free and clear of the lien, 'subject to section 363(k),' and the creditor receives a lien on the proceeds of the sale. Section 363(k), in turn, provides that 'unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property' -- *i.e.,* the creditor may credit-bid at the sale, up to the amount of its claim. Finally, under clause **(iii)**, the plan provides the secured creditor with the "indubitable equivalent" of its claim.[12]

NWG's plan is similar to the debtor's plan in the 2012 U.S. Supreme Court case, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*. NWG is proposing a liquidating chapter 11, and the RadLAX debtors proposed to dissolve and liquidate its assets.[13] RadLAX intended to sell its assets to a "stalking horse" with an advanced bid like NWG intends to sell the real property to AER for $1,000,000.[14] Under RadLAX and NWG's plan, the secured creditor "would not be permitted to bid for the property using the debt it is owed to offset the purchase price, a practice known as 'credit-bidding'".[15] The U.S. Supreme Court found it "contrary to common sense" to confirm a plan that does not allow the secured creditor to credit-bid at the sale of its secured collateral.[16] The U.S. Supreme Court decided that "[a]s a matter of law, no bid procedures like the ones proposed here *could* satisfy the requirements of §1129(b)(2)(A)."[17]

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[12] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).
[13] *Id*. at 641.
[14] *Id*. RadLAX at least planned to sell in an open auction unlike NWG. NWG proposes to sell only to AER.
[15] *Id*. at 643.
[16] *Id.* at 646.
[17] *Id*. at 650.

The U.S. Supreme Court found that a creditor has the right to credit-bid at the sale, up to the amount of its claim.[18] The Court explains that this right,

> protects a creditor against the risk that its collateral will be sold at a depressed price. It enables **the creditor to purchase the collateral for what it considers the fair market price** (up to the amount of its security interest) without committing additional cash to protect the loan.[19] [Emphasis added]

This section means the secured creditor, like Wigger, get to determine its bid up to the amount of its security. It gets to decide the amount - not the debtor in possession, here NWG, not the U.S. Trustee, and not AER.

To prohibit Wigger from credit-bidding and force it to sell its interest at the depressed price of $1,000,000, is contrary to common-sense, the law, and violates Wigger's right to credit-bid.

III. NWG filed its plan in bad faith under 11 U.S.C. §1129(a)(3).

Under 11 U.S.C. §1129(a)(3), NWG has the affirmative duty to prove that it is proposing its plan in good faith. First, NWG filing its plan and disclosure statement as a "small business" is evidence that its plan is not confirmable. NWG is not a small business as defined under §101 (51D)(A) of the bankruptcy code, which defines such a debtor as having secured and unsecured debts of less than $2 million.[20] NWG's petition is *prima facie* evidence that it cannot file a chapter 11 plan as a small business debtor.[21] The US Trustee

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[18] *Id.* at 645.
[19] *Id*. at n.2, ("That right is particularly important for the Federal Government, which is frequently a secured creditor in bankruptcy and which often lacks appropriations authority to throw good money after bad in a cash-only bankruptcy auction.")
[20] (51D) The term "small business debtor"— (A) subject to subparagraph (B), means a person engaged in commercial or business activities . . . that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $2,000,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor;
[21] ECF No. 124 (alteration in original).

has not appointed a creditors committee. NWG is not entitled to small business debtor relief and the fact that it filed a plan that blatantly violates the definition shows bad faith.

Second, NWG lists the value of the real property at $1,000,000 without one bit of evidence supporting that value. There are at least four undisputed or unchallenged statements of value of the real property all of which place the property at a substantially higher value:

1) NWG's own petition;[22]
2) NWG's own financial statement filings;[23]
3) Chris Guinn's appraisals of 2015[24] and 2017[25] setting the property value at $4,085,000 without tailings and $5,000,000 with tailings; and

NWG's March petition listed the value of the real property at $2 million, with mineral interests it valued the property at $11 million.[26] Without any evidence of how the value has changed – except perhaps at the behest of AER – NWG low balls the value the property.

Just days before filing its plan, NWG filed its July financial report showing the value of the real property as $2.5 million, which is the same amount shown in its petition.[27] Even at the evidentiary hearing, NWG and AER presented zero evidence of value having no one – not even its representatives – state a value. This is fatal to their assessment of a plan value at $1 million.

Wigger alone has presented evidence of the property value through MAI Appraiser Chris Guinn's undisputed and unrebutted appraisals.[28] NWG and AER had the opportunity

[22] NWG's Petition for Bankruptcy, ECF No. 1.
[23] NWG's Monthly Reports all state the "Land" value as $2.5 million, ECF No. 15, 42, 82, 101, 122, and 146.
[24] Chris Guinn's Appraisal (4/19/17), Trail Exhibit 49.
[25] Chris Guinn's Appraisal (3/21/15), Trial Exhibit 48.
[26] ECF No. 1.
[27] Every financial statement NWG filed as stated the same value, ECF No. 15, 42, 82, 101, 122, and 146.
[28] Trial Exhibit 48; Trial Exhibit 49.

to present evidence of value at the July 5 and 6 omnibus hearing. They failed to do so, and the Court closed the evidence. Guinn's appraisals stand as the sole basis to value the real property since there is no other basis to do so and currently there is no other appraisal before the court.

NWG's plan itself is evidence enough to show NWG's plan was proposed in bad faith; therefore it does not meet the §1129(a)(3) requirement.

IV. NWG's plan is not in the best interest of the creditors.

If the plan is confirmed and executed, Wigger will receive less than the amount it would receive if NWG liquidated under chapter 7.[29] The liquidating chapter 7 would at least have a neutral trustee administering the liquidation. NWG is so indebted to AER that NWG cannot be counted on to conduct a fair liquidation plan. NWG's plan is only in the best interest of one creditor, AER.

V. NWG's plan is not feasible.

NWG's plan proposes to sell mine tailings and distribute the proceeds pro rata to the unsecured creditors. NWG has insufficient revenue to continue gravel sales operations. NWG's plan to sell gravel does not sustain the operation itself, NWG's business, or adequate protection for Wigger's collateral. NWG's gravel sales simply do not provide sustainable cash flow. Historically, NWG's gravel sales have barely covered the property taxes, insurance, and operating expenses, let alone pay the unsecured creditors.

VI. NWG's disclosure statement does not provide adequate information.[30]

NWG's disclosure statement is inadequate for several reasons. First, NWG did not provide any discussion of the value of the real property. NWG simply asserted that it will "sell the Real Property [interest] free and clear of all liens or claims under 11 U.S.C. §363 to

[29] 11 U.S.C. §1129(a)(7).
[30] 11 U.S.C. §1125.

Airport Equipment Rental[sic] (AER) for $1,000,000."[31] Nowhere in NWG's disclosure statement or plan did NWG attempt to justify this low value given to the real property.

Second, NWG did not provide any discussion of the equipment rental agreement(s) with AER, which compounded and augmented its debt to AER from $2.1 million to over $6 million. NWG did not provide any discussion of the litigation with AER prior to bankruptcy. This litigation was resolved by an exchange of NWG's Confession of Judgment[32] and AER's Agreement not to Execute[33] the judgment entered into and personally guaranteed by NWG's principal members, J. Scott. Ducharme and Robert T. Knappe, Jr. for over $6.2 million. The Agreement was dependent on NWG having "until March 1, 2017 within which to either pay the full balance of the indebtedness as owed to [AER] or to reach some other payment resolution acceptable to [AER]."[34] NWG was not capable of paying the full balance on March 1, 2017, and has not disclosed the "other payment resolution acceptable to"[35] AER. An informed decision by investors and creditors cannot be made without understanding the AER-NWG resolution.

Third, NWG does not give an analysis of what creditors would receive if a chapter 7 liquidation were executed. NWG simply states that "the unsecured creditors would receive no distribution" because a chapter 7 trustee will not have the time to sell the real property or mine tailings.[36] NWG does not discuss what secured creditors would receive in a chapter 7 liquidation. Without explanation, NWG concludes the trustee would have no time to liquidate.

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[31] ECF No. 124, page 2 (altered).
[32] ECF No. 29-2, Exhibit A.
[33] *Id*.
[34] *Id*. (altered).
[35] *Id*.
[36] ECF No. 124, page 9.

Fourth, NWG does not address the other assets it has to sell such as its green house inventory, Plant A, Plant B, Dredge #10 (including the Bucyrus-Erie Monighan and Belt Feeder), buildings, furniture, office equipment, furnace for the shop, additional equipment,[37] and miscellaneous parts, tools, and pipe.

Lastly, NWG states that it will "file [sic] adversary action to avoid AER[sic] 2016 security interest in mine tailings" and then NWG proposes "to sell the mine tailings located at Wash Plant A and B for $1,000,000." NWG gives no information about (a) who will purchase the tailings; (b) justification for the $1,000,000 value; (c) when the sale will occur; or (d) how tailings will be removed from the property and how the property will be adequately protected.

NWG's disclosure statement is devoid of adequate information regarding NWG's assets, liabilities, and the feasibility of its proposed plan. Therefore, NWG's plan should not be confirmed.

VII. Conclusion

Since the beginning of this bankruptcy, Wigger has properly asserted and maintained that it is the undisputed first priority lienholder of the real property. It has diligently and dutifully engaged this Court and the parties in an attempt to craft practical and equitable solutions. NWG's proposed "plan" makes clear to Wigger and this Court the true intent of NWG's bankruptcy filing and litigation: to sell to AER Wigger's undisputed senior interest at the lowest price possible. Without merit, NWG wants to force Wigger to give-up its interest for $1,000,000. NWG's plan shirks the terms of the original agreement between Walt Wigger and NWG. NWG's plan shirks Walt Wigger of his ability to support his family and the charities he admired after his death. NWG's plan shirks Fairbanks and the mining

[37] ECF No. 99, Exhibit A.

community of the opportunity, to bid on a property ideal for a variety prospective developments and rich in Fairbanks history.

The U.S. Supreme Court definitively determined that the plan proposed by NWG is "contrary to common sense," violates the law and, as a matter of law NWG's proposed sale cannot be confirmed.[38]

DATED this 13th day of November 2017.

/s/ Jo A. Kuchle

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CERTIFICATE OF SERVICE
This is to certify that on this 13th day of November 2017, a true and correct copy of the foregoing was served electronically on:

Erik LeRoy
David Bundy
Gail M. Ballou
US Trustee
Cabot Christianson

/s/ Jo A. Kuchle
CSG, Inc.

[38] *Id* at 646-649.