UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	
	:	Chapter 11
Allied Nevada Gold Corp., *et al.*,	:	Case No. 15-10503 (MFW)
	:	
	:	(Jointly Administered)
	:	
Debtors.	:	
	:	**Objection Due: September 25, 2015 at 4:00 PM extended to October 1, 2015, at 2:00 PM**
	:	**Hearing Date: October 6, 2015 at 10:00 AM**

OBJECTION BY THE UNITED STATES
TO THE DEBTORS' AMENDED JOINT CHAPTER 11
PLAN OF REORGANIZATION

The United States, on behalf of its Internal Revenue Service ("IRS") and the Department of Labor ("DOL"), by and through the undersigned attorneys, in support of its objection to the Debtors' Amended Joint Chapter 11 Plan of Reorganization [Docket No. 932] ("Plan"), avers as follows:

1. On March 10, 2015, the Debtors filed voluntary bankruptcy petitions seeking relief under Chapter 11 of the Bankruptcy Code.

2. IRS is a creditor and party in interest. IRS has asserted an estimated unsecured priority, pre-petition claim against Allied Nevada Gold Corp. in the amount of $144,961.00.

3. DOL is a creditor and party in interest. DOL has asserted an unliquidated claim against Allied Nevada Gold Corp. on behalf of the Allied Nevada Gold Corp. Health and Welfare Plan. DOL has also asserted an unliquidated claim against Allied Nevada Gold Corp. on behalf of the Allied Nevada Gold Corp. 401(K) Plan.

4. IRS records indicate that the 2014 federal income tax return of Allied Nevada Gold Corp. has not yet been accepted for filing. The IRS objects to the confirmation of the Plan unless

and until the 2014 federal income tax return is filed.

5. The United States objects to, and hereby opts out of, the third party non-debtor limitation of liability, injunction and release provisions set forth in Article IX of the Plan. The Plan provides that creditors who vote may opt out of the third party release provisions in the Plan but DOL and IRS do not intend to vote on the Plan. To the extent the third party releases are deemed to apply, the injunction provisions violate the Anti-Injunction Act, I.R.C. Section 7421(a). See American Bicycle Association v. United States, 895 F.2d 1277 (9th Cir. 1990); United States v. Prescription Home Health Care, Inc., 316 F.3d 542 (5th Cir. 2002); In re Plainwell, Inc., 2004-2 USTC Paragraph 50, 393 (D. Del. 2004). The Plan currently defines parties to be released as a "Released Party" which means each of the following solely in their capacity as such: (a) each Holder of Notes Claims who is a Consenting Noteholder; (b) the Indenture Trustee; (c) Scotiabank; (d) Wells Fargo; (e) each Holder of the Secured Swap Claims or Secured ABL Claims; (f) the DIP Agent; (g) the DIP Lenders; (h) the DIP Backstop Lenders; (i) the Exit Facility Lenders and any agent, trustee or similar representative of the Exit Facility Lenders under the Exit Facility; (j) the Creditors Committee and the members of the Creditors Committee; (k) with respect to the foregoing entities in clauses (a) through (j), their respective current or former directors, managers, officers, affiliates, partners, consultants, financial advisors, subsidiaries, principals, members, employees, agents, managed funds, representatives, attorneys and advisors, together with their successors and assigns; (l) the Equity Committee and the Equity Committee's current members, financial advisors, attorneys, consultants and other Professionals, excluding the Prior Equity Committee Advisors, in each case in their capacity as such, and only if serving in such capacity; and (m) the Debtors' officers, managers, directors, employees, financial advisors, attorneys, accountants, consultants, and other Professionals, in

each case in their capacity as such, and only if serving in such capacity. as the Administrative Agent, the Prepetition Lenders and their respective Related Persons (comprising twenty-four enumerated groups of parties, including "current and former directors and officers). Correspondingly, the release and injunction provisions of the Plan extend its protections to the Released Party. While the Third Circuit stopped short of adopting a *per se* rule that a non-debtor release in a reorganization plan is not permissible (as other circuits have done), it held that, at most, such a provision could only be valid in "extraordinary" cases. Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 212 (3d Cir. 2000). At minimum, Continental held that such a nonconsensual release of non-debtor entities must contain all of the following "hallmarks": "fairness, necessity to the reorganization, and specific factual findings to support these conclusions." Id. at 214; see also In re: Wash. Mut., Inc., 442 B.R. 314, 351-52 (Bankr. D. Del. 2011) (collecting cases). This Court has interpreted Continental's holding on non-debtor releases to mean that "limiting the liability of non-debtor parties is a *rare thing that should not be considered absent a showing of exceptional circumstances* in which several key factors are present." In re Genesis Health Ventures, Inc., 266 B.R. 591, 608 (Bankr. D. Del. 2001) (emphasis added). This Court has previously held that a non-Debtor release over a creditor's objection "would not pass muster." Wash. Mut., 442 B.R. at 352 ("This Court has previously held that it does not have the power to grant a third party release of a non-debtor."). Where this Court has even contemplated approval of a non-consensual release, it has required the following factors be present to justify the "rare" release: "(1) the non-consensual release was necessary to the success of the reorganization, (2) the releasees have provided a critical financial contribution to the debtor's plan, (3) the releases' financial contribution is necessary to make the plan feasible, and (4) the release is fair to the non-consenting creditors, i.e., whether the non-

consenting creditors received reasonable compensation in exchange for the releases." In re Tribune Co., 464 B.R. 126, 177-78 (Bankr. D. Del. 2011); see also Genesis Health Ventures, 266 B.R. at 607-09. 52. Here, setting aside the question of whether the Debtors have made such a showing against all creditors generally (and they have not), the Debtors make no adequate showing of a single factor, let alone all of the Tribune / Genesis factors, that justifies the extraordinary release of non-Debtors with respect to their potential liability to the United States.

6. The United States objects to the Plan to the extent it fails to preserve the setoff and recoupment rights of the United States. Confirmation of a plan does not extinguish setoff claims when they are timely asserted. United States v. Continental Airlines (In re Continental Airlines), 134 F.3d 536, 542 (3d Cir. 1998), cert. denied, 525 U.S. 929 (1998). Like other creditors, the United States has the common law right to setoff mutual debts. "The government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." United States v. Munsey Trust Co. of Washington, D.C., 332 U.S. 234 (1947) (citing Gratiot v. United States, 40 U.S. (15 Pet) 336, 370, 10 L.Ed. 759 (1841)); see also Amoco Prod. Co. v. Fry, 118 F.3d 812, 817 (D.C. Cir. 1997). This right – "which is inherent in the federal government – is broad and 'exists independent of any statutory grant of authority to the executive branch.'" Marre v. United States, 117 F.3d 297, 302 (5th Cir. 1997) (quoting United States v. Tafoya, 803 F.2d 140 (5th Cir. 1986)). Hence, the United States can setoff mutual prepetition debts and claims as well as post-petition debts and claims. Zions First Nat'l Bank, N.A. v. Christiansen Bros. (In re Davidson Lumber Sales, Inc.), 66 F.3d 1560, 1569 (10th Cir. 1995); Palm Beach County Bd. Of Pub. Instruction (In re Alfar Dairy, Inc.), 458 F.2d 1258, 1262 (5th Cir.), cert. denied, 409 U.S. 1048 (1972); Mohawk Indus., Inc. v. United States (In re Mohawk Indus., Inc.), 82 B.R. 174, 178-79 (Bankr. D. Mass. 1987).

The Plan makes no provision for these rights. Such treatment is impermissible, because Section 553 of the Bankruptcy Code preserves the right of setoff in bankruptcy as it exists outside bankruptcy, Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 18 (1995), neither expanding nor constricting it, United States v. Maxwell, 157 F.3d 1099, 1102 (7th Cir. 1998). "[T]he government of the United States suffers no special handicap under § 553 of the Bankruptcy Code," id. at 1103, that alters this principle. Moreover, because "[s]etoff occupie[s] a favored position in our history of jurisprudence," Bohack Corp. v. Borden, Inc., 599 F.2d 1160, 1164 (2d Cir. 1979), courts do not interfere with its exercise absent "the most compelling circumstances." Niagara Mohawk Power Corp. v. Utica Floor Maintenance, Inc. (In re Utica Floor Maintenance, Inc.), 41 B.R. 941, 944 (N.D.N.Y. 1984); see also New Jersey Nat'l Bank v. Gutterman (In re Applied Logic Corp.), 576 F.2d 952 (2d Cir. 1978) ("The rule allowing setoff ... is not one that courts are free to ignore when they think application would be unjust."). Compelling circumstances generally entail criminal conduct or fraud by the creditor. In re Whimsy, Inc., 221 B.R. 69 (S.D.N.Y. 1998). No such compelling circumstances are present here, and accordingly, the Plan must provide for and preserve the government's setoff rights. Failure to do so violates section 1129(a)(1). ("The court shall confirm a plan only if ... the plan complies with the applicable provisions of this title".)

7. The United States objects to Articles II, paragraph 2.1 and VII, paragraph 7.2 of the Plan to the extent the Plan fails to provide for the payment of interest on United States administrative expense claims. See 11 U.S.C. Section 503(b)(1)(C) and Section 511; United States v. Friendship College, Inc., 737 F.2d 430 (4th Cir. 1984); In re Mark Anthony Construction, Inc., 886 F.2d 1101 (9th Cir. 1989).

8. If the IRS priority tax claims are not paid in full in cash on the Effective Date, the IRS

objects to Article II, section 2.3 and VII, paragraph 7.2 of the Plan to the extent these provisions fail to comport with 11 U.S.C. Section 1129(a)(9)(C) and Section 511 by not providing for the payment of an adequate rate of interest from the Effective Date on such claims.

9. The IRS objects to Article VII, section 7.2 Of the Plan to the extent that penalties are automatically disallowed.

10. The IRS objects to the Plan to the extent the Plan purports to set an administrative claims bar date for taxes described in 11 U.S.C. Section 503(b)(1)(B) and (C) in violation of Section 503(b)(1)(D) of the Bankruptcy Code and 3002-1(a) of the Delaware Local Bankruptcy Rules.

11. The IRS objects to the discharge provisions in the Plan to the extent it discharges debts described in 11 U.S.C. Section 1141(d)(6).

12. The United States objects to Article VI, section 6.2 of the Plan to the extent that this provision bars creditors from amending timely filed proofs of claim for any reason in accordance with applicable bankruptcy law. Amendments to proofs of claim should be within the discretion of the Bankruptcy Court and should be freely allowed where the purpose is to do such things as cure defects and describe a claim with greater particularity. In re Ben Franklin Hotel Assoc., 186 F3d, 301, 301 (3d Cir. 1999). This is especially true where, as here, IRS records reflect that the Debtors' 2014 federal corporate income tax return has either not been filed or has been filed so recently it has not been logged into the appropriate IRS data base. The Plan provides that any amendment to increase or to assert additional claims in a timely filed claim after the Effective Date will be automatically expunged and disallowed in its entirety unless the claimant has obtained prior approval to file the amended claim. The IRS pre-petition claim includes an estimated claim for the Debtors' 2014 corporate income tax return. The Debtors sought and

received an extension from the IRS to file the 2014 return. Accordingly, it is unfairly burdensome for the IRS to have to first seek Bankruptcy Court approval to amend the claim it was forced to estimate as a direct result of the actions of the Debtors.

WHEREFORE, the United States respectfully requests that the Court deny confirmation of the Plan and grant such other and further relief as the Court deems necessary and just.

CHARLES M. OBERLY, III
United States Attorney

By: *<u>/s/ Ellen W. Slights</u>*
Ellen W. Slights
Assistant United States Attorney
Delaware State Bar No. 2782
1007 Orange Street, Suite 700
P.O. Box 2046
Wilmington, DE 19899-2046

Dated: October 1, 2015

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	
	:	Chapter 11
Allied Nevada Gold Corp., *et al.*,	:	Case No. 15-10503 (MFW)
	:	
	:	(Jointly Administered)
	:	
Debtors.	:	
	:	**Objection Due: September 25, 2015 at 4:00 PM**
	:	**extended to October 1, 2015**
	:	**Hearing Date: October 6, 2015 at 10:00 AM**

AFFIDAVIT OF SERVICE

I, Marissa Ballasy, an employee in the Office of the United States Attorney for the District of Delaware, hereby attest under penalty of perjury that on October 1, 2015 a copy of the OBJECTION BY THE UNITED STATES TO THE DEBTORS' AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION was served as indicated below, upon:

Allied Nevada Gold Corp.
9790 Gateway Drive, Suite 200
Reno, NV 89521
Attn: Stephen M. Jones
Via Fax: 775-358-4458

Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036-6745
Attn: Philip C. Dublin, Alexis Freeman and Matthew C. Fagen
Via Email: pdublin@akingump.com, afreeman@akingump.com, mfagen@akingump.com

Blank Rome LLP
1201 Market St., Suite 800
Wilmington, DE 19899
Attn: Michael D. Debaecke and Stanley B. Tarr
Via Email: debaecke@blankrome.com, tarr@blankrome.com

Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King St., Suite 2207, Lockbox # 35
Wilmington, DE 19801
Attn: Tiiara N. A. Patton
Via Email: tiiara.patton@usdoj.gov

Arent Fox LLP
1675 Broadway, New York
New York, NY 10019
Attn: Robert M Hirsh and Jeffrey N Rothleder
Via Email: hirsh.robert@arentfox.com, jeffrey.rothleder@arentfox.com

Polsinelli PC
222 Delaware Avenue, Suite 1101
Wilmington, DE 19801
Attn: Christopher A. Ward
Via Email: cward@polsinelli.com

Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038
Attn: Brett Lawrence, Kristopher Hansen and
Jayme Goldstein
Via Fax: 212-806-6006

Young, Conaway, Stargatt & Taylor LLP
1000 North King Street
Wilmington, DE 19801
Attn: Matthew B. Lunn and Robert F. Poppiti, Jr.
Via Email: bankfilings@ycst.com

Perkins Coie LLP
30 Rockefeller Plaza, 22nd Floor
New York, NY 10112
Attn: Tina N. Moss
Via Email: tmoss@perkinscoie.com

Womble Carlyle Sandridge & Rice
222 Delaware Avenue, Suite 1501
Wilmington, DE 19801
Attn: Francis A. Monaco, Jr.
Via Email: fmonaco@wcsr.com

Wachtell Lipton Rosen & Katz
51 West 52nd Street
New York, NY 10019-6119
Attn: Richard G. Mason and John R. Sobolewski
Via Email: rgmason@wlrk.com,
jrsobolewski@wlrk.com

Morris Nichols Arsht & Tunnell
1201 N. Market Street
Wilmington, DE 19899
Attn: Derek C. Abbott
Via Email: dabbott@mnat.com

LeClairRyan, A Professional Corporation
70 Linden Oakes, Suite 210
Rochester, NY 14625
Attn: Gregory J. Mascitti and Janice B. Grubin
Via Email: gregory.mascitti@leclairryan.com,
janice.grubin@leclairryan.com

Cole Schotz P.C.
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
Attn: Patrick J. Reilley
Via Email: preilley@coleschotz.com

/s/ Marissa Ballasy
Marissa Ballasy