

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO**  
Bankruptcy Judge Joseph G. Rosania, Jr.

In re:

Westmountain Gold, Inc.,  
EIN: 26-1315498

Debtor.

Case No. 17-11527-JGR  
Chapter 11

In re:

Terra Gold Corporation,  
EIN: 45-5500508

Debtor.

Case No. 17-11528-JGR  
Chapter 11

**Jointly Administered Under  
Case No. 17-11527-JGR**

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**ORDER**

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This matter comes before the Court on Terra Gold Corporation's Chapter 11 Final Report and Application for Final Decree filed in Case No. 17-11528-JGR (Doc. 61), WestMountain Gold, Inc.'s Chapter 11 Final Report and Application for Final Decree filed in Case No. 17-11527-JGR (Doc. 426) (collectively, the "Applications"), and Snowmass Mining, Co., LLC's Objection thereto (Doc. 434; the "Objection").

**BACKGROUND**

The Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on March 1, 2017. On the same date, the Court entered an order for joint administration of the cases. On December 20, 2017, the Debtors filed their First Amended and Restated Joint Plan of Reorganization (Doc. 325; the "Plan"). Section 9.12 of the Plan provides that "[t]he Debtors will request entry of a final decree closing the case on or before the later of the date all Claim objections and any pending litigation is concluded or 180 days after the Effective Date of the Plan." Section 11.2 of the Plan sets forth the post-confirmation purposes for which the Court will retain jurisdiction. The Court notes that the only enumerated post-confirmation purpose that is implicated in the instant proceeding is entry of a final decree; the remaining purposes have either been satisfied or are not applicable.

Section 7.1 of the Plan, in relevant part, outlines the treatment of Classes 3 and C, under the Plan and provides that “[e]ach creditor holding an Allowed Claim in Classes 3 and C shall receive a pro-rata share of the Class 3 and C Participation Interest.” This section further provides that “[t]he Class 3 and C Participation Interest shall be in the form of Exhibit C attached to this Plan.” The Participation Assignment attached as Exhibit C to the Plan provides for the appointment of a Claims Agent and describes in greater detail how distributions will flow through the Claims Agent to Classes 3 and C. Exhibit C further provides: “This participation interest provided to the Class 3 and Class C claimants shall be in accordance with a Participation Agreement in the form to be filed prior to the Confirmation Date.” A review of the docket reflects that a blank form of the Participation Agreement was filed on January 18, 2018, by counsel for the Unsecured Creditors’ Committee (Doc. 344), but a fully executed copy thereof has not been filed to date.

By virtue of the January 17, 2018 Stipulated Order resolving its motion to allow claim (Doc. 341), Snowmass is the largest Class 3 creditor, holding an allowed unsecured claim totaling \$430,000. Snowmass is a party to the Participation Agreement and, under the Plan, is to receive \$.12 per dollar of its claim, paid within five years.

The Court held an evidentiary hearing on confirmation of the Plan on January 18, 2018. At the hearing, in relevant part, the Court confirmed the Plan, and counsel for Snowmass represented on the record that the parties stipulated to the Court’s retention of jurisdiction over the “execution and delivery of the Participation Agreement.” A Minute Order to that effect entered on the same date (Doc. 343), and a separate Order Confirming the Plan entered on January 19, 2018 (Doc. 347). Thereafter, on January 23, 2018, the Debtors filed a Notice of Effective Date of the Plan (Doc. 355).

On January 8, 2020, the Debtors filed their Chapter 11 Final Reports and Applications for Final Decree. Schedule C to the Applications reflects that payments completed under the Plan were as follows: Total administrative payments/fees and taxes - \$222,436.11; and Total priority payments - \$210,000.

Snowmass filed its Objection to the Applications on February 7, 2020. Snowmass’s objections were threefold: (i) the cases have not been fully administered or substantially consummated because no payments have been made to secured or unsecured creditors; (ii) the Debtors have neither filed the fully executed Participation Agreement with the Court, nor provided a complete copy of the same to Snowmass or the Claims Agent; and (iii) closure of the cases is not appropriate because the Claims Agent understood that the Court would not close the cases and would retain jurisdiction over the administration of the Participation Agreement through the final payment.

The Court held a preliminary hearing on the Applications and the Objection on April 1, 2020, and heard argument of the parties. Snowmass represented that, between the date of filing the Objection and the date of the hearing, it had received a fully executed copy of the Participation Agreement from the Debtors. Snowmass also represented that Exhibit A to the Participation Agreement contained an error regarding the amount of its claim, which the Debtor conceded. Snowmass maintained that the cases have not been

fully administered or substantially consummated and argued that they should not be closed until the final payment is made under the Participation Agreement. The Debtors argued that the cases should be closed for three reasons: (i) the Plan provides for it; (ii) to minimize payment of United States Trustee fees; and (iii) to escape the stigma of bankruptcy. The Court took the matter under advisement, and is now prepared to rule.

## ANALYSIS

11 U.S.C. § 350(a) of the Bankruptcy Code provides that, “[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case.” Bankruptcy Rule 3022 similarly provides that, “[a]fter an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case.” The Bankruptcy Code and Bankruptcy Rules do not define the term “fully administered.” However, the Advisory Committee Note to Rule 3022 sets forth a non-exclusive list of factors to be considered in determining whether a case has been fully administered. These factors include, in relevant part, whether payments under the plan have commenced.

In the context of Chapter 11 reorganizations, courts have determined that a case has been “fully administered” when it has been “substantially consummated” under 11 U.S.C. § 1101(2). See *Matter of Wade*, 991 F.2d 402, 407 n.2 (7th Cir. 1993) (citation omitted); see also *In re Gates Cmty. Chapel of Rochester, Inc.*, 212 B.R. 220, 224 (Bankr. W.D.N.Y. 1997) (collecting cases). 11 U.S.C. § 1101(2) states that:

“substantial consummation” means--

- (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
- (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
- (C) commencement of distribution under the plan.

It is undisputed that under the facts of the cases presently before the Court, the first two elements of “substantial consummation” under 11 U.S.C. § 1101(2) have been satisfied. What remains at issue is whether distributions have “commenced” under the Plan pursuant to 11 U.S.C. § 1101(2)(C).

There is a split of authority regarding the “commencement of distributions” element of the substantial consummation analysis. In the case of *In re Centrix Fin., LLC*, 394 F. App’x 485 (10th Cir. 2010), which both the Debtors and Snowmass failed to cite, the Tenth Circuit adopted the majority view. The Tenth Circuit stated as follows:

Appellants’ construction of § 1101(2)(A) as requiring completion of substantially all payments to creditors would render meaningless § 1101(2)(C), **which requires only that distributions under the plan be commenced.** Appellants’

construction has been rejected by a majority of courts to consider the issue, beginning with *In re Hayball Trucking, Inc.* .... *Hayball Trucking* reasoned that, in order to give effect to subsection (C), “distributions to creditors over a period of time are not the types of transfers of property ... contemplated in subsection (A).” Instead, the court concluded: [S]ubsections (A) and (C) appear to distinguish between transfers of property to or from the debtor at or near the time the plan is confirmed [,] undertaken to shape the new financial structure of the debtor[,], and distributions of dividends to creditors made over a period of time from operating revenues. **“Substantial consummation” requires completion or near completion of the former, but only commencement of the latter.** ... We agree with the well-reasoned majority rationale  
....

*Id.* at 489 (emphasis added) (citation omitted).

Judge Romero examined *Centrix Fin.* in the case of *In re W. Capital Partners LLC*, No. 13-15760 MER, 2015 WL 400536 (Bankr. D. Colo. Jan. 28, 2015), wherein the debtor moved to modify its confirmed plan and substantial consummation was at issue. Judge Romero summarized the Tenth Circuit’s position on “commencement of distribution” as follows:

[I]n the Tenth Circuit, “commencement of distribution” for the purposes of § 1101(2)(C) is satisfied when the reorganized debtor begins distributions under the confirmed plan. The Tenth Circuit’s position also disposes of [movant’s] contention [that] this Court should follow the minority position explained in *In re Dean Hardwoods, Inc* that “commencement should mean not just the beginning of payments to a single creditor, but the commencement of distribution to all or substantially all creditors.”

*Id.* at \*8 (footnotes omitted).

In the present case, Snowmass effectively argues the minority view of “commencement of distribution.” Specifically, Snowmass argues that the Plan has not been substantially consummated because no payments have been made to secured or unsecured creditors. However, it is undisputed that distributions have been made to both administrative and priority claimants under the Plan. Thus, under the Tenth Circuit’s definition of “commencement of distribution,” 11 U.S.C. § 1101(2)(C) has been satisfied. Because the parties agree that the remaining elements of the substantial consummation analysis under 11 U.S.C. § 1101(2) have been satisfied, the Court finds that the Plan has been substantially consummated.

With respect to the Participation Agreement, the Court has retained jurisdiction over the execution and delivery of such agreement, thereby satisfying the terms of the January 18, 2018 Minute Order. It is undisputed that the Participation Agreement has been executed. Snowmass also represented at the April 1, 2020 hearing that the Debtors had recently delivered a fully executed copy of the Participation Agreement to Snowmass. However, Snowmass represented that the amount of its claim was incorrect on Exhibit A to the Participation Agreement. Additionally, it appears that the Debtors have not delivered a complete copy of the Participation Agreement to the Claims Agent. Therefore, the Court finds that the Debtors must correct Exhibit A to the Participation Agreement, file a finalized, fully executed copy of the corrected Participation Agreement—complete with all exhibits—with the Court, and serve a finalized, fully executed, and complete copy of the corrected Participation Agreement on all parties in interest, including the Claims Agent.

Upon delivery of the corrected Participation Agreement as set forth herein, the cases having been substantially consummated, the Court finds that the cases will be fully administered. As such, it will be appropriate for final decrees to enter and the cases to close. The Court does not believe that these cases should remain open in this forum for five years for the Court to supervise completion of payments under the Plan. Indeed, both the confirmed Plan and the executed Participation Agreement are contracts by and between the parties thereto, and the remedies for any future breach thereof lie in state court. Accordingly,

IT IS ORDERED that the Objection (Doc. 434) is sustained in part and overruled in part. The Debtors shall correct, file, and serve a finalized, fully executed, and complete copy of the Participation Agreement as set forth herein on or before **April 30, 2020**, and file a certificate of service evidencing the same, after which, final decrees will separately issue in Case Nos. 17-11527-JGR and 17-11528.

Dated this 7th day of April, 2020.

BY THE COURT:



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Joseph G. Rosania, Jr.  
United States Bankruptcy Judge