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Court File No. **CV-15-10890-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N :

VALERI BELOKON

Applicant

- and-

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC.

Respondents

APPLICATION UNDER Sections 10-11 of the *International Commercial Arbitration Act*, R.S.O. 1990, c. 1.9, Section 5 of the *State Immunity Act,* R.S.C. 1985, c. S-18, Sections 241 and 243 of the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44 and Rule 14.05(3)(h) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194
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Court File No. **CV-15-11142-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

ENTES INDUSTRIAL PLANTS CONSTRUCTION & ERECTION CONTRACTING CO. INC.

Applicant

-and-

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC.

Respondents

APPLICATION UNDER Sections 10-11 of the *International Commercial Arbitration Act,* R.S.O. 1990, c. 1.9, Section 5 of the *State Immunity Act,* R.S.C. 1985, c. S-18 and Rule 14.05(3)(h) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194
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Court File No. **CV-11-9419-00CL**
(CV-10-412059)

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N :

SISTEM MÜHENDISLIK INŞAAT SANAYI VE TICARET ANONIM SIRKETI

Applicant

-and-

THE KYRGYZ REPUBLIC and KYRGYZALTYN JSC

Respondents

APPLICATION UNDER Sections 10-13 of the *International Commercial Arbitration Act,* RSO c.1.9, Section 5 of the *State Immunity Act,* RSC 1985, c S-18, and Rule 14.05(3)(h) of the *Rules of Civil Procedure,* RRO 1990, Reg 194
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Court File No. **CV-14-10731-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N :

STANS ENERGY CORP.

Applicant

-and-

KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC.

Respondents

APPLICATION UNDER rule 14.05(3)(h) of the *Rules of Civil Procedure,* sections 10-13 of the *International Commercial Arbitration Act* and section 5 of the *State Immunity Act*
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AFFIDAVIT OF ROBERT S. SMITH
(Sworn May 10, 2016)

I, ROBERT S. SMITH, residing in New York, New York, affirm and say:

I. Introduction

1. I am a member of the New York bar and a former Associate Judge of the New York Court of Appeals.

2. I have been retained by attorneys acting on behalf of four of the parties to these proceedings: Sistem Mühendislik Inșaat Sanayi Ve Ticaret Anonim Sirketi; Valeri Belokon; Entes Industrial Plants Construction and Erection Contracting Co. Inc.; and Stans Energy Corp. I have been asked to give my opinion on issues of New York law discussed in the Affidavit of Professor Steve Thel, affirmed April 29, 2016 ("Thel Affidavit"), and to say whether I agree or disagree with Professor Thel's opinions.

3. I have worked with two colleagues in the preparation of this opinion: Edward A. Friedman, a partner in the firm of Friedman Kaplan Seiler & Adelman LLP, and Andrew M. Englander, an associate at the same firm. Mr. Englander has done legal research, and both he and Mr. Friedman have reviewed documents, discussed the matter with me, read drafts and offered suggestions. I am the author of this opinion, and the views expressed are my own.

4. A list of the documents that my colleagues and I have reviewed for purposes of this opinion is attached as Exhibit 1.

II. <u>Summary of My Opinion</u>

5. Professor Thel expresses the view that the Agreement on New Terms ("ANT") dated April 24, 2009 among the Government of the Kyrgyz Republic (the "Republic"), Kyrgyzaltyn JSC ("Kyrgyzaltyn"), Centerra Gold Inc. ("Centerra") and several other entities does not "provide any basis under New York law to conclude that the Republic has any equitable or other right, property, interest or equity of redemption in or in respect of Centerra common stock held by [Kyrgyzaltyn]." (Thel Affidavit ¶¶ 8-9.) I disagree. My opinion is that it would be wholly consistent with New York law for a court to conclude, based on the ANT, that Kyrgyzaltyn holds shares in Centerra on behalf of the Republic, as trustee, as nominee or in some similar capacity.

III. My Qualifications

6. I graduated from Stanford University ("with great distinction") in 1965 and from Columbia Law School (*magna cum laude*) in 1968. At law school, I was first in my class academically, was editor-in-chief of the Columbia Law Review and received a number of prizes for academic achievement.

7. Following my graduation from law school, I was for 34 years a litigation lawyer, an associate until 1976 and thereafter a partner, at the firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York. My practice focused primarily on commercial litigation, and included a number of complex cases. In 2003, I left Paul Weiss and worked briefly as an individual practitioner and as Special Counsel to the firm of Kornstein Veisz Wexler & Pollard, LLP before being appointed to the bench.

8. Until I became a judge, I was an active courtroom litigator. By my count, I tried 50 cases in federal and state courts, several of which were lengthy and complex. I also had an active appellate practice. I argued 51 appeals, including two in the United States Supreme Court and six in the New York Court of Appeals.[1] I also argued in all four departments of the New York Appellate Division, in seven federal Courts of Appeals, and in the appellate courts of four states other than New York. Many of the cases I litigated involved contract interpretation issues arising under New York law.

9. In 1980-81, I took a leave from Paul Weiss to serve as a full-time Visiting Professor from Practice at Columbia Law School, where I taught courses in contracts and civil procedure. After returning to Paul Weiss, I continued to teach a procedure course at Columbia on a part-time basis until 1990.

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[1] The New York Court of Appeals is the state's highest appellate court – the counterpart of the court called "Supreme Court" in most other states.

10. I was appointed in November 2003 and confirmed in January 2004 as an Associate Judge of the New York Court of Appeals, where I served until reaching the mandatory retirement age in 2014. While on the Court of Appeals, I was the author of, by my estimate, more than 200 opinions for the Court, as well as numerous dissenting and concurring opinions. Many of my opinions, and many of the cases that I heard and decided as a judge, involved New York contract law.

11. While serving as a judge, I also taught a course in state constitutional law at the Benjamin N. Cardozo School of Law from 2006 to 2009. From 2010 to the present, I have been the coteacher of a course now entitled "Authority and Liberty" at Cardozo Law School.

12. Since January 1, 2015, I have been a partner in the New York City law firm of Friedman Kaplan Seiler & Adelman LLP, where I again have an active litigation (trial and appellate) practice. In addition, since leaving the bench, I have been retained several times to testify as an expert in New York law. I have submitted expert reports on that subject to courts in Australia, England, the Grand Caymans, Hong Kong and the Netherlands, and have testified orally in the Supreme Court of Victoria, Australia.

IV. The Facts

13. I will summarize briefly, and in slightly simplified form, my understanding of the facts relevant to my opinion. I base this summary on the documents I have reviewed and on information provided to me by the attorneys who retained me.

14. Centerra, through its subsidiaries, is engaged in the operation, development and exploration of a gold mining project located in the Republic. Kyrgyzaltyn, an entity wholly owned by the Republic, has for many years been the registered shareholder of a significant number of shares in Centerra.

15. In 2009, Centerra and the Republic settled a pending arbitration between them by entering, along with Krygyzaltyn, an entity known as Cameco (then a major shareholder of Centerra) and related entities, into the ANT. The ANT says that it "shall in all respects be governed by and construed in accordance with, the laws of the State of New York including all matters of construction, interpretation, validity and enforcement, without regard to any conflict of law rules or principles that might lead to the application of the laws of any other jurisdiction." (ANT ¶ 6.6.)

16. One of the terms of the ANT was that Cameco would deposit 25,300,000 common shares of Centerra in escrow, to be subsequently released to Kyrgyzaltyn subject to several contingencies and possible adjustments. (ANT ¶¶ 2.1(a), 2.3.) The ANT also provided for Centerra to issue 18,232,615 common shares to Kyrgyzaltyn. (ANT ¶ 2.1(b).)

17. The second "Whereas" clause in the ANT recites that "Cameco . . . and Kyrgyzaltyn, which holds shares in Centerra on behalf of the Government [defined in Section 6.5 of the ANT, by reference to the Recitals, as 'the Government of the Kyrgyz Republic acting on behalf of the Kyrgyz Republic'] . . . are the largest shareholders in Centerra." Section 6.5 of the ANT defines the term "the Kyrgyz Side," by reference to the same Whereas clause, to mean "Kyrgyzaltyn, together with the Government."

18. The ANT uses the term "Kyrgyz Side" in a number of places. Thus the ANT refers to "Centerra and its shareholders, including the Kyrgyz Side" (ANT, ninth Whereas clause); "Centerra common shares it [the Kyrgyz Side] holds" (ANT ¶ 2.4(c)); "Centerra shares held by the Kyrgyz Side" (ANT ¶ 2.4(d)); "the Kyrgyz Side's ownership in Centerra" (ANT ¶ 3.3(a)); "rights the Kyrgyz Side may have as a shareholder" (*id*); and "shares in Centerra held by the Kyrgyz Side" (ANT ¶ 5.8(c)).

19. The parties that have (through their attorneys) retained me in the present proceedings are creditors of the Republic who seek to seize the Centerra shares held by Kyrgyzaltyn. The parties dispute whether the Republic has an interest in those shares sufficient to justify such a seizure.

V. Analysis

1. The ANT is Only Evidence in These Proceedings, Not a Basis For Any Claim

20. In considering the question addressed by Professor Thel – whether the ANT provides a basis for concluding that the Republic has an interest in Centerra stock – I think it important to put the question in context. These proceedings are not suits for breach of the ANT; none of the parties is asserting claims that arise under the ANT. The ANT is of interest in this case only as a piece of evidence that may be relevant to the question of whether the Republic has an interest in the Centerra shares registered in the name of Kyrgyzaltyn. If that question is considered under New York law, I believe that the language in the ANT that I quote in paragraphs 17-18 above – particularly the recital that Kyrgyzaltyn "holds shares in Centerra on behalf of the Government" – would be relevant and would support the inference that the Republic has a beneficial interest in this property.

21. Professor Thel's opinion seems to be saying that the legal principles he mentions – New York's "strong 'four-corners' rule" and "robust parol evidence rule" (Thel Affidavit ¶ 11), and the principle that language in a recital will not be construed to vary the terms of an otherwise unambiguous agreement (Thel Affidavit ¶ 20) – prohibit reliance on some of the language in the ANT even as evidence of the facts that the language states or implies. In other words, Professor Thel seems to be saying that, when these passages of the ANT are proffered as evidence, New York contract principles require a court to treat them as non-existent. If that is Professor Thel's view, I do not agree with him.

22. I am aware of no principle of New York law that forbids reliance on contract language as evidence of the facts that the language states or implies. It is commonplace, in suits involving business transactions, for contracts to be considered as evidence even if the suit does not involve a claim under that contract. *See, e.g.*, *ABKCO Indust., Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 674-75 (1976) (in enforcement proceeding, considering contract as evidence of the nature of one party's interest in that contract); *In re Application of Charney*, 233 A.D.2d 147, 147 (1st Dep't 1996) (same). I am aware of no case in which principles of contract law have been held to render the contract's language, including language in a "Whereas" clause or recital, inadmissible to prove facts stated or implied in that language.

2. Even If the ANT is Considered as a Source of Rights and Duties, a Court Could Conclude That the Republic Has an Interest in the Centerra Stock

23. In this section of my analysis, I will put aside, for purposes of discussion, the point made in the previous section, and will assume that the ANT should be treated in these proceedings not just as evidence, but as a source of relevant contractual rights and obligations. Even on that assumption, it is my opinion, contrary to Professor Thel's, that a Court could read the ANT as supporting a conclusion that the Republic has an interest in the Centerra shares held by Kyrgyzaltyn.

24. The premise of Professor Thel's opinion appears to be that the substantive provisions of the ANT (ignoring the recitals in the Whereas clauses) unambiguously treat Kyrgyzaltyn not just as a Centerra shareholder, but as the sole beneficial owner of the shares held in its name. There is no language in the ANT that, in my view, supports this premise.

25. Professor Thel is of course correct in saying that the ANT provides for the transfer of Centerra shares to Kyrgyzaltyn. (Thel Affidavit ¶ 17.) But his conclusion that "[i]t is absolutely clear that under New York law the ANT did not give the Republic any equitable or

other right, property, interest or equity of redemption in or in respect of the Centerra common stock transferred by or pursuant to the ANT" (*id.*) is, in my opinion, incorrect, indeed a non sequitur. If Kyrgyzaltyn took the shares as the Republic's nominee or trustee, then the ANT does give the Republic an interest in the stock. And the ANT does not say (except in a Whereas clause) whether Kyrgyzaltyn is to receive the shares for its own benefit or on behalf of the Republic. I see nothing in the substantive provisions of the ANT inconsistent with the idea that Kyrgyzaltyn received the shares as a trustee for, or as nominee of, the Republic.

26. The ANT does say, in providing for the transfer of Centerra shares into escrow, that the shares shall be transferred to a "Custodian . . . to be held for the benefit of and on behalf of Kyrgyzaltyn and/or Cameco, as the case may be." (ANT ¶ 2.1(a).) I believe, however, that this could reasonably be read as only explaining the capacity in which the Custodian holds the shares, not as excluding the possibility that Cameco or Kyrgyzaltyn might in turn hold the shares on behalf of some other entity. Similarly, language saying that shares should be issued by Centerra to Kyrgyzaltyn "so that Kyrgyzaltyn will beneficially own and be entitled to all the benefits arising from (including the exercise of all rights attaching to) such shares" (ANT ¶ 2.2(a)) appears to prescribe only the way in which the shares should be issued by Centerra, not to exclude the Republic from having any rights in the shares. There are other substantive provisions in the agreement protecting the rights of Kyrgyzaltyn to the shares (*e.g.*, ANT ¶ 2.2(d) ("Kyrgyzaltyn shall be entitled to all dividends and other distributions . . . .")), but none of these speak expressly, or seem to me to speak by implication, to the rights and obligations running between the Republic and Kyrgyzaltyn.

27. In my opinion, a New York court reading the substantive provisions of the ANT in isolation from the Whereas clauses might well find no clear answer to the question of

whether Kyrgyzaltyn acquired the shares for its own or the Republic's benefit. Where the substantive provisions of an agreement are inconclusive, a court may, as one of the authorities quoted by Professor Thel acknowledges, look to the recitals in the Whereas clauses as well as the substantive provisions to decide the contract's meaning. (*See* Thel Affidavit ¶ 20 n.11 (citing *Musman v. Modern Deb, Inc.*, 56 A.D.2d 752, 753 (1st Dep't 1977) ("Where a recital clause and an operative clause are inconsistent and the recital clause is clear but the operative clause is ambiguous, the recital clause should prevail.").) *See also Hackenheimer v. Kurtzmann*, 235 N.Y. 57, 65-66 (1923) ("Taking the contract as a whole, including its recitals, it is clear that what was in the minds of the parties was the protection of valuable good will inherent in the name Kurtzmann."); *Frenchman & Sweet v. Philco Discount Corp.*, 21 A.D.2d 180, 182 (4th Dep't 1964) (noting that "recitals assist in determining the proper construction of a contract" and affirming trial court's review of "the entire agreement, including the whereas clause" in construing the contract at issue); *Olin Corp. v. Ins. Co. of N. Am.*, 2016 WL 1048057, at *4-5 (S.D.N.Y. Mar. 11, 2016) (relying on preamble in finding contract unambiguous); *In re FKF 3, LLC*, 501 B.R. 491, 506 (S.D.N.Y. 2013) ("[A]lthough recitals in a contract cannot grant rights extending beyond those particularly described in the agreement, they may be useful in construing the rights and obligations created by the agreement."); 4 Robert L. Haig, *New York Practice Series – Commercial Litigation in New York State Courts* § 36:29 (4th ed. 2015) ("Whereas" clauses are "the best avenue for clearly setting forth the factual circumstances giving rise to" a particular contract, its "procedural history . . . , and ultimately the intent of the parties. If the intent of the agreement is ever disputed, the 'Whereas' or 'Recital' clause could prove invaluable."). Thus a New York court addressing this question could consider whether the

recital in the ANT's second Whereas clause that Kyrgyzaltyn holds its shares "on behalf of the Government" answers the question that the substantive terms leave unanswered.

28. In interpreting an agreement and considering whether it is ambiguous, New York courts examine the agreement as a whole, not particular sections in isolation. *See, e.g.*, *William C. Atwater & Co. v. Panama R.R. Co.*, 246 N.Y. 519, 524 (1927) ("Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby."); *Olin Corp.*, 2016 WL 1048057, at *3 ("Courts do not consider contract terms or clauses in isolation; rather, each part of the contract should be considered 'in light of the obligation as a whole.'"). I have observed a distinct tendency in the New York courts to find agreements to be unambiguous, even if that conclusion is not self-evident. *See, e.g.*, *South Rd. Assoc. v. Int'l Business Machines Corp.*, 4 N.Y.3d 273, 277-78 (2005) ("premises" held, in context, unambiguously to refer only to interior of building, not land); *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475-76 (2004) (contract held unambiguous although an intermediate appellate court had divided 3-2 over its meaning). Taking this into account, a New York court, considering the whole ANT, including its preamble and the several references in its substantive provisions to shares held by "the Kyrgyz Side" (defined to include both the Republic and Kyrgyzaltyn), might hold that the ANT is unambiguous in establishing that the Republic does have an interest in the shares.

29. On the other hand, if a New York court held the ANT as a whole to be ambiguous on this issue, it could look to evidence extrinsic to the ANT to determine its meaning, including the subsequent conduct of the parties. *See Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) ("Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous . . . ."); *U.S. Fidelity and Guaranty Co. v. Delmar Dev. Partners, LLC*,

14 A.D.3d 836, 838 (3d Dep't 2005) (recognizing that, when looking to extrinsic evidence, "the subsequent conduct of the parties [may] be used to indicate their intent") (citation omitted).

30. Thus, if the ANT was held to be ambiguous, a New York court might examine certain of the documents identified in Exhibit 1 to resolve the ambiguity. In particular, a court could consider item 5 in Exhibit 1, a Resolution adopted by the Republic on the date of the ANT, in which the Republic resolves "to authorize the open joint stock company 'Kyrgyzaltyn', on behalf of the Government of the Kyrgyz Republic, to receive and hold shares in the company 'Centerra Gold Inc.' . . . ." A court could also consider item 6 in Exhibit 1, a decree of the Republic dated six days after the ANT, which refers to "shares received . . . to the benefit of the Kyrgyz Republic from the company 'Cameco Corporation' . . . ."

31. I have reviewed the opinion of Justice Thorburn in one of these proceedings dated April 15, 2014. I believe that the Court's analysis of the ANT as it bears on the issue of the Republic's interest in shares held by Kyrgyzaltyn is consistent with the way a New York court applying New York law would approach the same question. Specifically, the holding in the case cited in paragraph 56 of Justice Thorburn's opinion, *Disera v. Liberty Development Corp.*, [2008] 63 R.P.R. (4th) 197 (O.C.A.), in which the Court relied on a recital clause to interpret a contract, is consistent with the New York authorities I cite in paragraph 27 above.

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32. For the reasons given above, I respectfully disagree with Professor Thel's opinion that the ANT provides no basis for a conclusion that the Republic has an interest in the Centerra stock held by Kyrgyzaltyn.

VI. Compliance with Duties of Expert Witness

33. I confirm that I understand that my primary duty as an expert witness is as set out in Rule 4.1.01 of the Ontario *Rules of Civil Procedures*, and more particularly as follows:

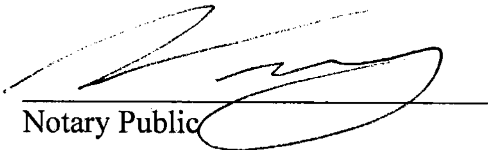
a. to provide opinion evidence that is fair, objective and nonpartisan;

b. to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

c. to provide such additional assistance as the court may reasonably require to determine a matter in issue.

34. I affirm this affidavit in relation to motions and/or applications before this Court regarding the shares of Centerra and for no other or improper purpose.

AFFIRMED BEFORE ME at the)
New York, New York in the)
United States of America,)
this 10 day of May, 2016.)



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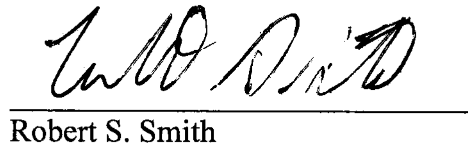

Robert S. Smith

VERONICA M. GARVEY
Notary Public, State of New York
No. 01GA4929722
Qualified in Kings County
Commission Expires May 2, 20 18

EXHIBIT 1

Documents Reviewed

1. Agreement On New Terms for the Kumtor Project among the Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic, Kyrgyzatlyn JSC, Centerra Gold Inc., Kumtor Gold Company CJSC, Kumtor Operating Company CJSC, and Cameco Corporation, dated April 24, 2009

2. Affidavit of Steve Thel, affirmed April 29, 2016, in *Sistem Mühendislik Inşaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrygz Republic and Kyrgyzatlyn JSC*, No. CV-11-9419-00CL (ONSC)

3. *Sistem Mühendislik Inşaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrygz Republic and Kyrgyzatlyn JSC*, 2014 CanLII 2407 (ONSC)

4. Law No. 142 of the Kyrgyz Republic "On ratification of the Agreement on new terms for the project," dated April 30, 2009

5. Resolution of the Government of the Kyrgyz Republic No. 254, dated April 24, 2009

6. Decree No. 1141-IV of the Jogorku Kenesh of the Kyrgyz Republic, dated April 30, 2009

7. Resolution No. 1139-IV of the Jogorku Kenesh of the Kyrgyz Republic, dated April 30, 2009

8. Restated Concession Agreement among the Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic and Kumtor Gold Company CJSC, dated as of June 6, 2009

9. Restated Gold and Silver Sale Agreement among Kumtor Operating Company on behalf of Kumtor Gold Company, Kyrgyzaltyn JSC, and the Government of the Kyrgyz Republic on behalf of the Kyrgyz Republic, dated June 6, 2009

10. Restated Centerra Shareholders Agreement among Kyrgyzaltyn JSC, Cameco Corporation, and Centerra Gold Inc., dated as of June 6, 2009

11. Settlement Agreement between Centerra Gold Inc., Kumtor Gold Company CJSC, a closed stock company organized under the laws of the Kyrgyz Republic, and the Kyrgyz Republic acting through its government, dated June 6, 2009

12. Kumtor Restructuring Agreement among Kyrgyzaltyn JSC, Cameco Corporation, Cameco Gold Inc., and Centerra Gold Inc., dated as of December 31, 2003

13. Second Amended and Restated Agreement between Kyrgyzaltyn JSC and Kumtor Operating Company, dated June 6, 2009