

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

IN RE: GOLD KING MINE RELEASE
IN SAN JUAN COUNTY, COLORADO,
ON AUGUST 5, 2015

No. 1:18-md-02824-WJ

This Document Relates to: No. 1:16-cv-00465-WJ-LF
No. 1:16-cv-00931-WJ-LF
No. 1:18-cv-00319-WJ
No. 1:18-cv-00744-WJ-KK

MEMORANDUM OPINION AND ORDER
GRANTING KINROSS GOLD U.S.A. AND KINROSS GOLD CORPORATION'S
MOTION FOR SUMMARY JUDGMENT ON THE CLAIMS OF NEW MEXICO, THE
NAVAJO NATION, UTAH AND THE ALLEN PLAINTIFFS: PERSONAL
JURISDICTION

THIS MATTER comes before the Court on Kinross Gold U.S.A. Inc. ("KGUSA") and Kinross Gold Corporation's ("KGC") (collectively "the Kinross Defendants") Motion for Summary Judgment on the Claims of New Mexico, the Navajo Nation, Utah and the *Allen* Plaintiffs: Personal Jurisdiction, Doc. 866, filed October 13, 2020 ("Motion").

The Kinross Defendants assert that they are not subject to personal jurisdiction in either the State of New Mexico or the State of Utah and move for summary judgment on all claims asserted in this action by New Mexico, the Navajo Nation, Utah, and the *Allen* Plaintiffs. The *Allen* Plaintiffs¹ contend that the Kinross Defendants' contacts with New Mexico, through the actions of the Kinross Defendants' purported agent Sunnyside Gold Corporation ("Sunnyside"), give rise to specific jurisdiction.²

¹ The Kinross Defendants have withdrawn their Motion as to New Mexico, the Navajo Nation and Utah because they have reached an agreement with those Plaintiffs. *See* Doc. 1005, filed January 8, 2021 (withdrawing Motion as to New Mexico and the Navajo Nation); Doc. 1139, filed March 15, 2021 (withdrawing Motion as to Utah).

² The Court has ruled that the *Allen* Plaintiffs' claims against Sunnyside, which are based on Sunnyside's design, planning and construction of the bulkheads, are barred by Colorado's statute of repose. *See* Doc. 1156, filed March 31, 2021. The Court notes that:

Personal Jurisdiction

An out-of-state defendant's contacts with the forum state may give rise to either general jurisdiction or specific jurisdiction:

- (i) "General personal jurisdiction means that a court may exercise jurisdiction over an out-of-state party for all purposes. A court may assert general jurisdiction over foreign ... corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State;" or
- (ii) "Specific jurisdiction means that a court may exercise jurisdiction over an out-of-state party only if the cause of action relates to the party's contacts with the forum state."

Old Republic Insurance Co. v. Continental Motors, Inc., 877 F.3d 895, 903-04 (10th Cir. 2017) (citations and quotation marks omitted). The *Allen* Plaintiffs do not contend that the Kinross Defendants' contacts satisfy the general jurisdiction standard, so only specific jurisdiction is at issue.

Specific Jurisdiction

A principal is entitled to all of the defenses arising out of a transaction between an agent and a third person but not to defenses which are personal to the agent. Circumstances in which it would be improper to permit a third person to proceed solely against a principal based on its vicarious liability for the conduct of an agent include the following: ... (3) when the agent is immune from suit, either by statute or by the common law;

3 Am. Jur. 2d Agency § 315, Actions and Remedies of Third Person, Against principal (2021) (citing *New Jersey Life Ins. Co. v. Getz*, 622 F.2d 198 (6th Cir. 1980)). The Court declines to address at this time whether the *Allen* Plaintiffs' claims against the Kinross Defendants are barred by Colorado's statute of repose because the Parties have not briefed the issue. On April 22, 2021, the Kinross Defendants filed a motion for summary judgment asserting that the *Allen* Plaintiffs' claims against the Kinross Defendants are also barred by Colorado's statute of repose. *See* Doc. 1172. The Court will address the issue after the Kinross Defendants' recent motion is fully briefed.

Specific jurisdiction calls for a two-step inquiry: "(a) whether the plaintiff has shown that the defendant has minimum contacts with the forum state; and, if so, (b) whether the defendant has presented a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Old Republic*, 877 F.3d at 904.

Minimum Contacts

The minimum contacts test for specific jurisdiction has two distinct requirements: "(i) that the defendant must have purposefully directed its activities at residents of the forum state," and (ii) that "the plaintiff's injuries must arise out of [the] defendant's forum-related activities." *Old Republic*, 877 F.3d at 904.

Purposeful Direction

"The purposeful direction requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, ... or of the unilateral activity of another party or a third person. Mere foreseeability of causing injury in another state is insufficient to establish purposeful direction." *Old Republic*, 877 F.3d at 904-05 (citation omitted). Purposeful direction may be established where there is: "(a) an intentional action ... , that was (b) expressly aimed at the forum state ..., with (c) knowledge that the brunt of the injury would be felt in the forum state." *Old Republic*, 877 F.3d at 907.

"Arising out of" Requirement

Step two of the minimum contacts test requires the Court to determine whether the plaintiff's injuries "arise out of" the defendant's forum-related activities.

The import of the 'arising out of' analysis is whether the plaintiff can establish that the claimed injury resulted from the defendant's forum-related activities. This requirement has been subject to different interpretations. Some courts have interpreted the phrase 'arise out of' as endorsing a theory of 'but-for' causation, while other courts have required proximate cause to support the exercise of personal jurisdiction. But-for causation means any event in the causal chain leading to the

plaintiff's injury is sufficiently related to the claim to support the exercise of specific jurisdiction. Considerably more restrictive is proximate causation, which turns on whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim. This court on several occasions has declined to choose between but-for and proximate causation, finding that neither test was outcome determinative given the facts at hand.

Compañía de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V., 970 F.3d 1268, 1284-85 (10th Cir. 2020) (citations and quotation marks omitted).

Fair play and substantial justice (reasonableness)

The second part of the specific jurisdiction inquiry asks "whether the defendant has presented a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Old Republic*, 877 F.3d at 904.

Even when a defendant has purposefully established minimum contacts with a forum state, minimum requirements inherent in the concept of fair play and substantial justice may defeat the reasonableness of jurisdiction. We consider (1) the burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. A defendant must present a compelling case that factors like these render jurisdiction unreasonable. The reasonableness inquiry evokes a sliding scale: the weaker the plaintiff's showing on minimum contacts, the less a defendant need show in terms of unreasonableness to defeat jurisdiction. Still, instances where the exercise of personal jurisdiction offends fair play and substantial justice are rare.

Compañía de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V., 970 F.3d 1268, 1289 (10th Cir. 2020) (citations and quotation marks omitted).

Discussion

The Kinross Defendants base their Motion on the following facts which are not disputed by the Allen Plaintiffs:³

³ The *Allen* Plaintiffs have not properly disputed any of the facts asserted by the Kinross Defendants. A response to a motion for summary judgment:

- (i) "KGUSA is a wholly owned subsidiary of Bema Gold (U.S.) Inc, a Nevada Corporation, which in turn is a wholly owned subsidiary of KGC." Motion at 4, ¶ 8.
- (ii) "All of [Sunnyside's] shares are owned by Echo Bay, Inc., which ... is a wholly owned subsidiary of KGUSA." Motion at 4, ¶ 7.
- (iii) "KGUSA did not own any direct or indirect interest in Echo Bay, Inc. or [Sunnyside], before [January 31, 2003]." Motion at 4, ¶ 9.
- (iv) "[Sunnyside] closed the Sunnyside Mine on August 1, 1991 ... [and installed the third bulkhead⁴] in the American Tunnel in December of 2002." Motion at 5, ¶ 14.
- (v) "On January 14, 2003, the State of Colorado issued notice that Permit No. CO-0027529, which permitted water discharged from the American Tunnel, had been transferred from [Sunnyside] to Gold King Mines Corporation." Motion at 5, ¶ 15.
- (vi) "On February 26, 2003, Colorado's Department of Public Health and Environment determined that [Sunnyside] had fulfilled and met its obligations under the Colorado state court's Consent Decree. On July 3, 2002, the Consent Decree was terminated." Motion at 5, ¶ 16.⁵

must contain a concise statement of the material facts cited by the movant as to which the non-movant contends a genuine issue does exist. Each fact in dispute must be numbered, **must refer with particularity to those portions of the record upon which the non-movant relies**, and must state the number of the movant's fact that is disputed. All material facts set forth in the Memorandum [in support of the motion for summary judgment] will be deemed undisputed unless specifically controverted.

D.N.M.LR-Civ. 56.1(b) (emphasis added). The *Allen* Plaintiffs do not refer with particularity to portions of the record for any of the facts they dispute.

⁴ A "bulkhead" is a hydraulic seal designed to block the discharge of water through a mine tunnel. See Response at 7, ¶ 2.

⁵ The *Allen* Plaintiffs dispute this fact stating:

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