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 All Cases

ORDER DENYING DEFENDANT SUNNYSIDE GOLD CORPORATION'S REQUEST TO CLAWBACK AN INADVERTENTLY PRODUCED DOCUMENT AND SEQUESTER DEPOSITION TESTIMONY OF RULE 30(b)(6) WITNESS HAYDUK

This matter comes before the Special Master on the request by Sunnyside Gold Corporation to clawback an inadvertently produced document that was used at the deposition of a Rule 30(b)(6) Kinross Gold and Kinross Gold USA witness. The clawback request is being pursued by Sunnyside Gold because it is Sunnyside Gold's document and it is Sunnyside Gold's privilege that is being asserted. Sunnyside Gold Corporation states that the document should have been marked as protected by the attorney-client privilege and should not have been produced in discovery. Sunnyside Gold argues that the document should be returned to it pursuant to Federal Rule of Evidence 502(b) as an inadvertent disclosure.[1] The Sovereign Plaintiffs, the Navajo Nation and

[1] The Stipulated Protective Order Pursuant to Rule 502(d) of the Federal Rules of Evidence, filed in this case as Doc. 148, states in Paragraph 4 that in the case of an inadvertently produced document upon notification by the party claiming the privilege, "the receiving party must promptly return, sequester, or destroy the specific information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the receiving party disclosed it before being notified. *See* Fed. R. Civ. P. 26(b)(5)(B). If the receiving party does not agree with the privilege claim, the parties must meet and confer in an attempt to resolve the claim within 14 days of the notification of the privilege claim by the producing party. If meeting and conferring regarding the privilege claims does not resolve the claim, either party may promptly present the information to the Court or Special Master, as appropriate, *in camera*, for a determination of the claim and any party in possession of the

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the State of New Mexico, argue that Sunnyside Gold waived any claim of privilege because it failed to properly and timely object to the document as privileged during the deposition.

The Special Master finds that that the document was inadvertently produced. However, the Special Master finds that Sunnyside Gold waived the attorney-client privilege during the deposition because it unduly delayed its objection to the document and allowed the deponent to continue to be questioned about the document for a substantial amount of time. Having waived the assertion of the attorney-client privilege, Sunnyside Gold is not entitled to the return of the document. The document may be used in this litigation as though it had been voluntarily produced in discovery. Similarly, the portion of the deposition of Nicholas Hayduk during which the document was introduced as Exhibit 213, and during which the witness was being examined about the exhibit, will not be stricken. The transcript of the deposition will be released without redactions.

The document, SGCDOC458672-SGCDOC458678, is a string of emails beginning on July 7, 2015 and ending on August 3, 2015. The emails are printed from the latest date to the earliest date. The four emails dated August 3, July 31, July 29, and July 28 at 1:09 PM are between attorneys, Martin Litt and Nathan Longenecker, general counsel at that time for Sunnyside Gold Corporation and Kinross Gold USA, and their clients, Lauren Roberts and Pat Maley, who were officers and directors of Sunnyside Gold and Kinross Gold USA at that time. Those four emails appear on their face to be protected by the attorney-client privilege because they are communications between attorneys and clients purportedly for the purpose of giving or seeking

information must preserve the information until the claim is resolved. *See* Fed. R. Civ. P. 26(b)(5)(B). The burden of proving the privilege claimed remains with the producing party."

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legal advice. The last nine emails in the string are dated July 28 at 1:02, July 28 at 12:46, July 21 at 8:11, July 21 at 9:01, July 10 at 8:28, July 10 at 8:51, July 10 at 7:43, July 9, and July 7, and are generated by or sent to an independent consultant named Stephen Phillips as well as some of the previously named people. Those last nine emails would not be protected under the attorney-client privilege whether or not they had been inadvertently produced because of the inclusion of the independent consultant Phillips.

The Special Master accepts Sunnyside Gold's assertion that the document SGCDOC458672-SGCDOC458678 was inadvertently produced. The sheer volume of the production of documents by Sunnyside Gold in this case (estimated to be 400,000) makes an inadvertent production understandable. In litigation involving this magnitude of documents, mistakes are sometimes made, and documents are sometimes overlooked or misclassified. Sunnyside Gold stated that there are at least ten other versions of this email string, which were marked as privileged, included in a privilege log, and withheld from production pursuant to the attorney-client privilege. This particular version of the email string was apparently simply missed during its review for attorney-client privilege. It was not until the document was being used during the deposition of Nicholas Hayduk that Sunnyside Gold realized that a potentially privileged document was being used as an exhibit and that it had apparently been inadvertently produced.

During the deposition, the Navajo Nation directed the videographer to put the document on a screen, identified it as Exhibit 213, and began questioning the Rule 30(b)(6) witness about the document. After few minutes of questioning, the witness noted that one of the emails was to two lawyers and was "presumably seeking their legal advice because that's the only capacities they hold at the KGUSA level." *Tr. p. 194, lines 1-3.* Several minutes later counsel for Sunnyside

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