

**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. 16-cv-465-WJ/LF (consolidated
with 16-cv-931-WJ-LF)*

No. 18-cv-319-WJ

No. 18-cv-744-WJ

**DEFENDANT SUNNYSIDE GOLD CORPORATION'S MOTION FOR SUMMARY
JUDGMENT ON GROUNDS OF LACK OF PERSONAL JURISDICTION
AND SUPPORTING MEMORANDUM**

I. INTRODUCTION

When this Court last visited the issue of whether personal jurisdiction exists over Sunnyside Gold Corporation (SGC) eighteen months ago, it concluded that Plaintiffs had satisfied their minimal burden at the dismissal stage by alleging facts sufficient to make a *prima facie* showing of personal jurisdiction. *See Mem. Op. and Order*, Doc. Nos. 168, 172. After a year and a half of discovery, however, the Plaintiffs have failed to produce evidence demonstrating that SGC is subject to either general or specific personal jurisdiction in New Mexico or Utah. As such, the Plaintiffs' unsubstantiated jurisdictional allegations will no longer suffice to sustain these lawsuits against SGC, and summary judgment should be granted on grounds of lack of personal jurisdiction. *See ASCO Healthcare, Inc. v. Heart of Tex. Health Care and Rehab., Inc.*, 540 F.Supp.2d 634, 640-41 (D.Md. 2008) ("Because this Court has permitted [plaintiff] to conduct extensive jurisdictional discovery, ... plaintiffs must do more than merely establish personal jurisdiction by the *prima facie* standard. Instead, [plaintiff] must present substantial evidence to show that the defendants had the requisite minimum contacts with

Maryland to justify the Court’s exercise of personal jurisdiction.”) (internal quotations and citation omitted). SGC has conferred with the parties and they oppose this motion.

II. LEGAL STANDARD

Rule 56(a) of the Federal Rules of Civil Procedure provides that the Court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Summary judgment is not a “disfavored procedural shortcut,” but an important procedure “designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

Once the movant has met this initial burden, the burden shifts to the non-moving party to “set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). In applying this standard, the Court views the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A “mere existence of a scintilla of evidence” in support of the non-movant’s position, however, is insufficient; “there must be evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252. Further, “[c]onclusory allegations that are unsubstantiated do not create an issue of fact and are insufficient to oppose summary judgment.” *Elsken v. Network Multi-Family Sec. Corp.*, 49 F.3d 1470, 1476 (10th Cir. 1995).

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. SGC is a Delaware corporation with its principal place of business in Colorado. *Utah Am. Compl.*, ¶ 15; *N.M. Am. Compl.*, ¶ 20, *Allen Am. Compl.*, ¶ 312.

2. SGC does not do business in New Mexico or Utah, is not licensed to do business in New Mexico or Utah, and SGC does not have a registered agent in either state. *K. Roach Decl.*, ¶ 7 [Doc. 42-2].

3. SGC does not own, lease, or maintain any property in New Mexico or Utah, nor does it have any offices or operations in New Mexico or Utah. *Id.*, ¶ 6.

4. SGC does not have any employees located in New Mexico or Utah. *Id.*, ¶ 8.

5. At all relevant times, SGC acted in compliance with a Consent Decree, which was entered and approved by a Colorado state District Court. *Consent Decree* [Doc. 42-1].

6. In the Consent Decree, the Colorado Court acknowledged that SGC owned an inactive mining property in San Juan County, Colorado, commonly referred to as the Sunnyside Mine, and that SGC undertook reclamation and mining operations at the mine from 1985 to 1991. *Id.* at 2.

7. The Colorado Court noted that the Colorado Mined Land Reclamation Board had adopted and approved a reclamation plan that required SGC to design and install several engineered, concrete bulkheads to retain water in the Sunnyside Mine. *Id.* at p. 4.

8. The Consent Decree noted that the Colorado Division of Minerals and Geology had concluded that “hydraulic seals [bulkheads] offer the best alternative for final mine site reclamation” and that “the physical setting of the Sunnyside Mine appeared to be ideal for a hydraulic sealing scheme.” *Id.* at p. 5.

9. The Consent Decree, entered into by the State of Colorado and approved by a Colorado Court, specifically contemplated that “installation of these bulkhead seals will impound water behind the bulkheads, eventually flooding the Mine, and at some time subsequent to initial Mine flooding, water, which is now discharged through the American Tunnel and Terry Tunnel

portals pursuant to the CDPS Permits, may flow through underground fractures and fault systems which may form seeps and springs which discharge into surface waters.” *Id.* at p. 6.

10. While Colorado and SGC initially disagreed as to how any restored flows would be handled, the Consent Decree reflected an agreement designed to improve water quality. The Consent Decree states:

[T]o resolve this dispute, to allow SGC to proceed with final reclamation of the Sunnyside Mine, to provide for closure of the American and Terry Tunnels by hydraulic seals, to provide for mitigation of certain other historic mining conditions, to protect the waters of the State of Colorado, and to provide for final termination of CDPA Permits No. CO-00272529 and CO-0036056, the parties agree to the terms and conditions of this Consent Decree.

Id. at p. 6-7.

11. Finally, in the Consent Decree, the Colorado Court “ordered, adjudged and decreed ... that the settlement embodied in this Consent Decree is lawful under the [Colorado Water Quality Control] Act, is consistent with the purposes of the Act, and *is intended to protect the waters of the State of Colorado.*” *Id.* at p. 8 (emphasis added).

12. EPA reviewed and commented on the Consent Decree and, on April 5, 1996, EPA congratulated both SGC and the State on the Consent Decree and its stated purpose of improving water quality in the Animas River.

The Environmental Protection Agency (EPA) commends both the State of Colorado and Sunnyside Gold Corporation (SGC) on your innovative approach to problems encountered in final closure of the Sunnyside Gold Mine. Further, the EPA is pleased that Colorado has chosen to use a watershed/trading approach as one step toward achieving the goals of improving water quality in the Animas River. As active members of the Animas River Stakeholders Group, EPA understands and supports the concepts of community based environmental protection.

Exhibit 1, USA_000025388.

13. The purpose of bulkheads is to improve water quality by submerging exposed metals in water, depriving them of oxygen, and thereby decreasing acid rock drainage. EPA and the State of Colorado consultants Deere & Ault, in commenting on bulkheads in the Bonita Peak Mining District, have plainly stated as much.

Water impounding concrete bulkheads installed at strategic locations in draining and discharging underground mine workings have the potential to flood the workings and create a mine pool that will eventually establish a ground water system with water table and flow paths similar to the pre-mining system. Saturation of sulfide minerals in the flooded workings and country rock will create relatively anoxic conditions and limit the generation of ARD [acid rock drainage]. Bulkhead installation eliminates rapid and continuous collection and discharge of ground water through open mine workings and minimizes direct discharge of ARD from mine portals....Bulkhead installation in mines that are determined to be good candidates has the potential to significantly reduce metal loading to receiving streams.

Exhibit 2, ER_DRMS00003923.

14. The bulkheads SGC installed reduced discharge from the American Tunnel from approximately 1600 gallons per minute to less than 100 gallons per minute. As the State of Colorado commented, “Installing a bulkhead at Sunnyside significantly improved the drainage.”

Exhibit 3, ER_DRMS00001949.

15. The instant lawsuits arise out of the August 5, 2015 Gold King Blowout.

According to the State of Utah:

On the morning of August 5, 2015, the U.S. Environmental Protection Agency (“EPA”) and its contractors triggered an uncontrolled blowout at the Gold King Mine located about five miles north of Silverton, Colorado (the “Blowout”). The disaster dumped over three million gallons of acid wastes and toxic metals into Cement Creek and the Animas River, turning the river into a vivid orange brown color. As the flow continued downstream, those hazardous wastes were deposited along the Animas and San Juan Rivers, until the plume reached Lake Powell in Utah on August 14, 2015.

Utah Am. Compl., ¶ 1. As Utah notes: “EPA conceded it is responsible for the Blowout and its impacts, stating: ‘EPA takes responsibility for the Gold King Mine release and is

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