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* *No. 16-cv-931-WJ/LF* *No. 18-cv-319-WJ*	

UNITED STATES OF AMERICA'S OPPOSITION TO KINROSS GOLD CORPORATION'S MOTION FOR SUMMARY JUDGMENT ON THE UNITED STATES' CROSSCLAIMS: PERSONAL JURISDICTION

Pursuant to Federal Rule of Civil Procedure 4(k)(2), this Court has personal jurisdiction over Kinross Gold Corporation (KGC), the Canadian successor-by-amalgamation (merger) to Echo Bay Mines Ltd. Rule 4(k)(2) authorizes a court to exercise personal jurisdiction over a defendant if (1) the claim arises under federal law, (2) the defendant is not subject to jurisdiction in any individual state's courts of general jurisdiction, and (3) the exercise of jurisdiction comports with due process. *See Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico*, 563 F.3d 1285, 1293-94 (Fed. Cir. 2009). These three elements are satisfied here.

The United States' crossclaims "arise under federal law," specifically Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Sections 107 and 113, 42 U.S.C. §§ 9607 and 9613. In response to interrogatories propounded by the United States, KGC admits that it is not currently subject to jurisdiction in any state. Finally, this Court's exercise of jurisdiction over KGC is consistent with the Constitution. Echo Bay Mines' nationwide contacts during the pertinent time-period are attributable to KGC and support assertions of both general

jurisdiction and specific jurisdiction. Additionally, KGC's current, extensive, commercial contacts within the United States belie any complaint that litigating in this forum is unconstitutionally unfair and unreasonable. Defendant KGC's motion should be denied.

ARGUMENT

A. Federal Rule of Civil Procedure 4(k)(2) Provides a Basis for Establishing Personal Jurisdiction over Foreign Defendants

The text of Federal Rule of Civil Procedure 4(k)(2) states as follows:

> Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Fed. R. Civ. P. 4(k)(2). The 10th Circuit has held that "Rule 4(k)(2) . . . provides for federal long-arm jurisdiction if the plaintiff can show that the exercise of jurisdiction comports with due process." *GCIU-Employer Ret. Fund v. Coleridge Fine Arts*, 700 F. App'x 865, 867-68 (10th Cir. 2017).

1. The United States' Crossclaims Arise under Federal Law (CERCLA)

On July 1, 2019, the United States filed crossclaims against Defendants KGC and Sunnyside Gold Corporation (SGC), seeking recovery of response costs incurred by the United States in connection with decades of releases of hazardous substances at the Bonita Peak Mining District National Priorities List Site (the "Site"), pursuant to CERCLA Section 107(a), 42 U.S.C. § 9607(a). Dkt. 195 at 46. Under CERCLA Sections 113(g)(2) and 113(f)(1), the United States further seeks (i) a declaration that KGC and SGC are jointly and severally liable for all future response costs to be incurred by the United States in connection with the Site and (ii) equitable

apportionment or allocation among itself, KGC, and SGC of any award granted against the United States from claims asserted by other parties. *Id.*

The United States' crossclaims contain fulsome allegations supporting its claim that KGC, as successor by amalgamation (merger) to Echo Bay Mines, is liable under CERCLA Section 107(a)(2) as an "operator" at the Site at the time of disposal of hazardous substances there.[1] *See United States v. Bestfoods*, 524 U.S. 51, 66-67, 118 S. Ct. 1876 (1998) ("[O]perator must manage, direct, or conduct operations . . . having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."). The United States alleges that Echo Bay Mines took numerous actions relating to the generation, management, and release of hazardous substances, specifically acid mine drainage, at the Site between 1985 and 2003. *See United States v. United Nuclear Corp.*, 814 F. Supp. 1552, 1558 (D.N.M. 1992) (CERCLA liability for seepage of liquid from mine tailings pond).

Specifically, the United States' crossclaims allege that Echo Bay Mines negotiated the 1985 acquisition of the Sunnyside Mine from Standard Metals (Dkt. 195 at 55-56 (¶ 49)) and then directed and financed the rehabilitation of the mine (*id.* at 56 (¶ 54)). The United States also alleges that Echo Bay Mines, along with SGC, later decided to close the Sunnyside Mine (*id*. at 58 (¶ 60)) and as part of mine closure, conducted studies and drafted memoranda identifying environmental issues, and subsequently funded and implemented actions to address contamination at operations at the Lake Emma basin, the Mayflower Mill tailings impoundments, the Terry Tunnel, and the American Tunnel (*id*. at 58-59 (¶¶ 60-62)).

[1] The United States also alleges that, under theories of alter ego and veil piercing, KGC is responsible for SGC's liability as an owner and operator of the Site. Because the United States' "direct operator" claim against Echo Bay Mines (now amalgamated into KGC) is sufficient to support personal jurisdiction, we do not address the SGC-related theories herein.

The crossclaims likewise assert that Echo Bay Mines interacted with environmental regulators to address releases and potential releases of hazardous substances at the Site, *e.g.* Echo Bay Mines, along with SGC, submitted a plan to the Colorado Division of Minerals and Geology to create the Sunnyside Mine Pool (*id*. at 59 (¶ 63)) and was aware in 1999 that the Sunnyside Mine Pool was not stable and was accelerating the formation of acid mine drainage (*id*. at 60 (¶ 67)). Finally, in addition to the specific actions identified above, the United States generally asserted that Echo Bay Mines managed and directed SGC's operations at the Site, including operations involving the treatment and disposal of hazardous substances at the Sunnyside Mine, American Tunnel, Terry Tunnel, and Mayflower Mill and tailings impoundments from 1985 to 2003 (*id*. at 68 (¶ 109)).

The United States, of course, is not required to prove liability at the jurisdictional stage. It needs simply to allege sufficient facts to state a claim and, as discussed below, show that some of those facts illustrate Echo Bay Mines' contacts with the subject forum – the United States for purposes of Rule 4(k)(2). Discovery to date, however, has provided substantial evidentiary support for the United States' assertion of CERCLA operator liability against KGC, including evidence of Echo Bay Mines' involvement in environmental matters at the Site (i) while mining and milling was ongoing, (ii) as part of the decision to halt active mining there, and (iii) in closing the mine and addressing environmental concerns.

Echo Bay Mines was directly involved in environmental decision-making impacting the Site while ore was being extracted from the Sunnyside Mine and processed at the Mayflower Mill. It managed and directed operations at the Site on its own or in partnership with various joint ventures.[2] For example, a series of memoranda from 1989 through 1992 detail the

[2] These joint ventures included the Sunnyside-Gerber Venture, the Alta Bay Venture, and the San Juan County Mining Venture. *See* Declaration of Jessica Warren, Exs. 1-3 (Attach. A hereto).

participation of Echo Bay Mines personnel in roughly quarterly "operations reviews" of the San Juan County Mining Venture, and addressed environmental and budgeting issues relating to operation of the Sunnyside Mine. *See* Warren Decl., Exs. 4-16. Echo Bay Mines officers and employees attended and participated in these meetings and discussed issues including construction and maintenance of tailings ponds, mine waste control and cleanup activities ("reclamation"), environmental permitting, chemical cleanup, and U.S. EPA's investigation of potential contamination of the Animas River drainage.

Throughout 1990 and 1991, Echo Bay Mines investigated and assessed environmental issues at the Sunnyside Mine in conjunction with the company's decision to halt active mining there. Personnel visited Sunnyside Mine in May, October, and November 1990 to assess environmental issues and potential reclamation costs. *See* Warren Decl, Exs. 17-19. Then, from January 10-12, 1991, a contingent from Echo Bay Mines' Canadian operations, led by Lupin mine geologist H.R. Bullis, visited the Sunnyside Mine to evaluate issues relating to closure and reclamation. This inspection resulted in a series of memoranda among Echo Bay Mines personnel in the United States and Canada assessing issues relating to potential mine closure. *See* Warren Decl., Exs. 20-24.

Finally, Echo Bay Mines continued to be directly involved in various environmental issues at the Site following its decision to close the Sunnyside Mine. For example, on October 1, 1993, the Colorado Department of Public Heath (CDPH) sent a letter to Echo Bay Mines and SGC regarding the plugging of the American Tunnel. *See* Warren Decl., Ex. 25. Echo Bay Mines undertook this project and, as it neared completion, on July 23, 1996, Echo Bay Mines' President and CEO, Richard Kraus, sent an invitation to the Director of CDPH to come celebrate the

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