IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRICK GOLDSTRIKE MINES, INC.,

Petitioner

vs.

EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE,

Respondents,

and

BULLION MONARCH MINING, INC.,

Real Party in Interest.

_____/

Supreme Court Case No.:
District Court Case No. A-18-785913-B

PETITION FOR WRIT OF MANDAMUS

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RESPONDENT'S NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Goldstrike is a Colorado corporation and is a wholly owned subsidiary of Barrick Gold Exploration Inc. Exploration is a wholly owned subsidiary of ABX Financeo Inc., and ABX Financeco Inc. is a wholly owned subsidiary of Barrick Gold Corporation.

The law firm of Parsons Behle & Latimer, attorneys Michael R. Kealy, Esq., Ashley C. Nikkel, Esq., Kristine E. Johnson, Esq., Brandon J. Mark, Esq., and Michael P. Petrogeorge, Esq. (now dissociated due to change in employment), represented Respondent at the district court proceedings.

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These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

DATED: September 19, 2019 PARSONS BEHLE & LATIMER

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ROUTING STATEMENT

According to NRAP 17(a)(1), (a)(13), and (a)(14), this case is presumptively retained by the Supreme Court because it is a proceeding involving the Nevada Supreme Court's original jurisdiction. The issues presented in this writ petition do not fall into the exception outlined in NRAP 17(b)(8) because the issues do not involve challenges to pretrial discovery orders or orders resolving motions in limine.

PETITION FOR WRIT OF MANDAMUS

Petitioner Barrick Goldstrike Mines, Inc. ("Goldstrike") respectfully petitions this Court for a writ of mandamus to vacate the District Court's August 19, 2019 ruling denying Goldstrike's Motion for Summary Judgment, wherein the District Court concluded it was not required to address the applicability of NRS 11.500, based on the Court's failure to apply directly applicable binding authority from this Court regarding the accrual of claims alleging continuing breach of a contract.

ISSUES FOR REVIEW

1. Whether the District Court erred in refusing to apply Nevada's savings statute, particularly subsection NRS 11.500(3), to the uncontested facts as presented because of the District Court's failure to follow this Court's decision in *Schwartz v. Wasserburger*, 117 Nev. 703, 30 P.3d 1114 (2001), addressing the accrual of claims alleging continuing breach of contract.

2. Whether the District Court erred in concluding NRS 11.500(3) and

equitable tolling are not mutually exclusive.

3. Whether the District Court erred in concluding that the Ninth Circuit's decision on Bullion Monarch Mining Inc.'s federal appeal has any bearing upon the Motion for Summary Judgment.

STATEMENT OF RELEVANT FACTS

More than ten years ago, Bullion sued a different party—Newmont USA Limited—for the very same claims it is pursuing in this case. When Bullion was unable to prevail against Newmont USA Limited, it shifted its focus to Goldstrike. This dispute between Bullion and Goldstrike is well into its tenth year, and it continues to tax resources in both the federal and state court systems. It began in 2009 in the United States District Court for the District of Nevada, when Bullion added Goldstrike to the case against Newmont. Petitioner's Appendix ("PA") 0154-61. That matter resulted in a Ninth Circuit appeal that morphed into a certified question to the Nevada Supreme Court and a resulting remand. PA 0131-33. It was then dismissed for lack of subject matter jurisdiction, a ruling which is now on appeal before the Ninth Circuit. PA 0150-52.

Bullion then refiled the complaint in Nevada state court in December 2018, adding some additional parties. PA 0001-41. With discovery currently proceeding in the state court matter, Goldstrike sought summary judgment on all claims as time-barred. PA 0042-51. It is undisputed that the governing four and six-year statutes of

limitation ran long ago. PA 0084, 0091, 1256, 1291. Those untimely claims cannot be salvaged under the clear and unambiguous language of NRS 11.500(3). It provides limited relief in the form of a savings statute for matters that are refiled following dismissal on subject matter jurisdiction grounds, but bars claims refiled more than five years after the filing of the initial action.[1] The District Court, in an oral four-sentence ruling, refused to apply the statute and dismiss the case. PA 1301. The District Court also failed to mention, much less address, binding precedent of this Court—a published decision that Bullion's counsel argued "is wrong" (PA 1298)—in holding that the statutes of limitation on Bullion's claims can renew in perpetuity. PA 1265-66. Goldstrike now seeks extraordinary intervention from this Court to halt this litigation from abusing any more resources due to Bullion's untimeliness.

A. Federal litigation

Bullion first filed a complaint alleging claims regarding the royalty payments at issue in the United States District Court for the District of Nevada in 2008, naming only Newmont USA Limited ("Newmont") as a defendant (the "Federal Action").

[1] The statute is clear: "(1) [I]f an action that is commenced within the applicable period of limitations is dismissed because the court lacked jurisdiction over the subject matter of the action, the action may be recommenced in the court having jurisdiction within: (a) [t]he applicable period of limitations; or (b) [n]inety days after the action is dismissed, whichever is later. . . . (3) An action may not be recommenced pursuant to paragraph (b) of subsection 1 more than 5 years after the date on which the original action was commenced." NRS 11.500.

PA 154-161. A year later, on June 22, 2009, Bullion amended its complaint in the federal action to add Goldstrike as a defendant. PA 0056-0065. Bullion alleged Goldstrike and others owed Bullion royalty payments on mining activities in a large area of northern Nevada pursuant to a May 10, 1979 agreement (the "1979 Agreement"), to which Goldstrike was not a party. *Id.* Bullion alleged five causes of action against Goldstrike: (1) declaratory judgment; (2) breach of the 1979 Agreement; (3) breach of the covenant of good faith and fair dealing; (4) unjust enrichment; and (5) accounting of all royalties allegedly owed under the 1979 Agreement. *Id.*

Bullion's claims against Goldstrike were by no means fresh, even when Bullion first brought them in 2009. At that time, the underlying 1979 Agreement was thirty years old and no one involved in its negotiation or drafting was still alive or available. Indeed, the parties to the underlying litigation located no witnesses for any of the allegedly relevant transactions that occurred prior to 1990, and their memories proved spotty at best when they were deposed close to a decade ago. Furthermore, Bullion's claims against Newmont, which was the party holding the actual property allegedly subject to the 1979 Agreement, were dismissed on laches long ago.

Regarding the subject matter jurisdiction issue, when Bullion filed its original claims against Goldstrike in Nevada federal court, the Ninth Circuit Court of

Appeals directed the district courts within the circuit to use the "place of operations" test for determining a corporation's citizenship for diversity purposes. *Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026, 1028 (9th Cir. 2009). However, in early 2010—about nine months after Bullion filed its amended complaint adding Goldstrike as a party based on purported diversity jurisdiction—the United States Supreme Court overruled the Ninth Circuit, holding that a corporation is a citizen of the state where its headquarters are located. *See Hertz Corp. v. Friend*, 559 U.S. 77 (2010). Even though Goldstrike raised concerns about the Court's subject-matter jurisdiction in its answers to Bullion's various complaints and informed Bullion early in the discovery process that its headquarters were located in Utah, Bullion neglected to seek *any* discovery about the issue. PA 0284-97, 0341-56.

In 2017, Goldstrike recognized that the Supreme Court's ruling in *Hertz* altered its prior analysis concerning the federal court's jurisdiction over Bullion's claims. PA 488-504. Goldstrike then squarely alerted the federal court to the probable jurisdictional defect. *Id.* Rather than acknowledging its error, Bullion demanded extensive jurisdictional discovery from Goldstrike. *See* PA 0610-36, 1071. After a year of additional discovery and briefing, the federal court ruled that it never had subject matter jurisdiction over Bullion's claims against Goldstrike and dismissed them. PA 1070-1078. Bullion has appealed that ruling, which remains

pending before the Ninth Circuit Court of Appeals.[2] PA 0131-33. The opening brief in that case is currently due on October 9, 2019. PA 1307.

B. State litigation

In December 2018, Bullion attempted to refile claims against Goldstrike in the Eighth Judicial District Court in the State of Nevada—the exact same five claims that it first asserted more than ten years ago in federal court, based on the same factual allegations. PA 0001-41. Bullion also named three additional entities—ABX Financeco Inc. ("ABX"), a Delaware holding company, Barrick Gold Exploration, Inc. ("Exploration"), and Barrick Gold Corporation (which was recently served but has not yet appeared). *Id.* ABX has sought dismissal on personal jurisdiction grounds, and discovery into personal jurisdiction as to that entity is ongoing. The parties are otherwise engaging in discovery on Bullion's claims against Goldstrike and Exploration.

C. Briefing on Motion for Summary Judgment and Argument

On July 16, 2019, Goldstrike filed a Motion for Summary Judgment, moving the District Court for an order dismissing all claims against Goldstrike because they were time-barred by the applicable statutes of limitation, and precluded by NRS

[2] The federal District Court previously dismissed Bullion's claims against Goldstrike for violation of the Rule Against Perpetuities. Bullion appealed that decision, and the Ninth Circuit certified the question of law to the Nevada Supreme Court, which was addressed in *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, 131 Nev. 99, 345 P.3d 1040 (2015), and ultimately resulted in a remand back to the federal District Court.

11.500(3) since Bullion attempted to recommence the claims "more than 5 years after" the original action was commenced. PA 0042-51.

In the extensive briefing, Goldstrike explained that Bullion commenced its original federal action against Goldstrike in 2009, and that its claims accrued in 2009 at the latest. PA 0042-51, 1234-74. Bullion could have filed a parallel action in state court at any time to avoid its state claims being time-barred if the federal court dismissed for lack of subject-matter jurisdiction at any point after that. PA 1261. Instead, Bullion waited until December 2018 to file in state court, well after the underlying statutes expired and past the time period clearly delineated by NRS 11.500(3). PA 1259-62.

In opposition to Barrick's motion, Bullion argued that equitable tolling applied and made a multitude of constitutional challenges to NRS 11.500(3).[3] PA 0082-112. It also argued briefly at the end of its opposition that its claims are not time-barred because Barrick engaged in "continuing breaches." PA 0110-11. On reply, Goldstrike presented a detailed discussion of the important legislative rationale behind the statute and its clear applicability to the instant circumstances. PA 1234-74. Goldstrike also cited directly applicable precedent from this Court regarding the accrual of claims of continuing breach. *See Schwartz v. Wasserburger*,

[3] However, Bullion failed to notify the Attorney General's Office that a constitutional challenge was being made, as required by NRS 30.130.

117 Nev. 703, 30 P.3d 1114 (2001). PA 1265-66.

The Court heard oral argument on the Motion on August 19, 2019. PA 1288-1302. After a brief argument from both sides, the Court ruled:

> Equitable tolling and NRS 11.500 are not mutually exclusive. If you want to address the facial constitutionality of portions of 11.500, you must give notice to the Attorney General's Office so that that can be fully addressed.
>
> Given the allegation of continuing breaches, the motion is denied. After the Ninth Circuit rules there may be certain other factual issues related to earlier breaches that you want to raise by motion for summary judgment, but on the way the motion has been presented it's denied.

PA 1301. This oral ruling is the entirety of the Court's order on the motion. Goldstrike now seeks a writ of mandamus to compel the District Court to apply the clear language of NRS 11.500(3) and grant summary judgment in favor of Goldstrike.

SUMMARY OF THE ARGUMENT

It is undisputed that Bullion's claims against Goldstrike accrued by at least 2009, if not before, and that Bullion did not file this lawsuit until December 2018. Each of those claims, whether governed by a four or six-year statute of limitations, is barred. Nevada law, as embodied in NRS 11.500(3), is clear and unambiguous: time-barred claims may be raised in the correct court after dismissal for lack of subject-matter jurisdiction, ***but not if it has been more than five years*** since the original filing. That is precisely the situation at hand. The Court declined to apply the express provisions of the statute, which were specifically intended to apply to

exactly this situation. The Court's only clear reason for doing so—the existence of an allegation by Bullion of "continuing breaches," is based upon a legally flawed premise that cannot be supported and ignores this Court's clear, on-point precedent.

Issuance of a writ of mandamus vacating the Court's Order and requiring it to apply NRS 11.500(3) is necessary because, as it currently stands, the Court has declined to recognize a directly applicable legislative enactment that terminates the claims against Goldstrike. This provision is case dispositive. Goldstrike should not be compelled to litigate this case to conclusion, engaging significant monetary and personnel resources, as well as those of the Court, when the Nevada Legislature has expressed an unambiguous intent that such claims be dismissed.[4]

ARGUMENT

A. Writ relief is an appropriate and necessary remedy in this case.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also Lewis v. Smart*, 96 Nev. 846, 849, 619 P.2d 1212, 1214 (1980) (mandamus available when respondent has mandatory duty to perform specific act). It is appropriate for

[4] This case is currently in the early stages of discovery. Trial is set for September 2020. PA 1308-12.

this Court in the exercise of its discretion to entertain a petition for extraordinary writ relief in certain instances. Specifically, a writ is appropriate where the petition raises important legal issues that are likely to be the subject of litigation within the Nevada district court system, or where such issues require clarification to promote judicial economy and administration. *See State v. Eighth Judicial Dist. Court*, 129 Nev. 492, 497, 306 P.3d 369, 373 (2013); *Bradford v. Eighth Judicial Dist. Court*, 129 Nev. 584,586, 308 P.3d 122, 123 (2013); *Borger v. District Court*, 120 Nev. 1021, 1025-26, 102 P.3d 600, 603 (2004); *see also Thomas v. Eighth Judicial Dist. Court*, 133 Nev. 468, 470-71, 402 P.3d 619, 423-24 (2017) (exercising discretion to review writ challenge to denial of motion to dismiss based on double jeopardy grounds, where denial would result in second trial proceeding).

For example, the Court may consider a district court's refusal to apply a statute or interpretation thereof via a writ petition, even where an adequate legal remedy exists. *See, e.g.*, *State Office of Attorney General v. Justice Court*, 133 Nev. 78, 80, 392 P.3d 170, 172 (2017) (exercising discretion to consider a writ petition concerning the district court's refusal to apply NRS 30.130 to a criminal proceeding); *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 363, 325 P.3d 1267, 1278-79 (2014) (exercising discretion to consider a writ petition concerning the district court's refusal to dismiss a case under medical malpractice statute of limitations period).

This is so even on denial of a motion for summary judgment. Indeed, although the Court will not generally "exercise its discretion to consider petitions for extraordinary writ relief that challenge district court orders denying summary judgment," "an exception applies when no disputed factual issues exist and, ***pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action***." *Libby*, 130 Nev. at 363, 325 P.3d at 1278 (internal quotations and citation omitted) (emphasis added); *see also MountainView Hospital v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184-85, 273 P.3d 861. 864-65 (2012) (considering district court's denial of motion to dismiss under medical malpractice affidavit requirement by extraordinary writ where issue was not fact-bound and involved an unsettled and potentially significant, recurring question of law); *ANSE, Inc. v. Eighth Judicial Dist. Court*, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008) (the Court may address writ petitions when "summary judgment is clearly required by a statute or rule."); *see also Boesiger v. Desert Appraisals*, LLC, 135 Nev. ___, ___, 444 P.3d 436, 438-39 (2019) ("Summary judgment is an important procedural tool by which factually insufficient claims or defenses [may] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." (internal quotations and citations omitted)).

Indeed, when there are only legal issues presented that are dispositive of the suit, and not questions of fact, a writ petition is appropriate. This Court previously

held that when a case involves an important matter of first impression, such as the application of a statute of limitations in a novel situation, it is appropriate to exercise discretion to consider the petition. *Desert Fireplaces Plus, Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 632, 636, 97 P.3d 607, 609 (2004); *see also Soro v. Eighth Judicial*, 133 Nev. 882, 411 P.3d 358 (2017) (petition for writ of mandamus or prohibition was proper vehicle for borrowers to challenge trial court's denial of their motion to dismiss under anti-deficiency statute); *Badger v. Eighth Judicial Dist. Court*, 132 Nev. 396, 401, 373 P.3d 89, 93 (2016) (exercising discretion to consider writ petition where district court failed to grant summary judgment where Nevada statute required it).

This case meets all the requirements for writ relief. No disputed factual issues exist concerning Bullion's failure to file this case within five years of 2009 (its original filing against Goldstrike) or NRS 11.500(3)'s applicability. Pursuant to the statute's clear mandate, the District Court was required to dismiss Bullion's action because it was commenced more than five years after Bullion's initial suit in federal court. The District Court failed to apply that mandate, which warrants writ relief from this Court. To require Goldstrike to move forward with the underlying litigation including discovery, motion practice, and possibly trial, when the action is plainly barred under NRS 11.500(3), is an inadequate remedy. The District Court's decision is properly challenged through this extraordinary vehicle.

Additionally, this case involves an important matter of first impression. The petition implicates important questions regarding the balance of a plaintiff's fair opportunity to present its claims and a defendant's need for finality in the face of prolonged litigation. It presents the Court with its first opportunity to address the application of NRS 11.500(3) in the very context the statute was designed to address.

Furthermore, the issues in this petition are purely questions of law—whether NRS 11.500(3) applies and whether the District Court erred in concluding it does not by ignoring this Court's binding precedent in *Schwartz*. Neither of these questions requires the Court to resolve factual or evidentiary issues. Instead, both issues turn on the application of legal principles—one in a statute and one in this Court's precedent.

Accordingly, Goldstrike respectfully requests the Court exercise its discretion to consider this critical question.

B. The Court should compel the District Court to enter summary judgment in favor of Goldstrike under NRS 11.500(3).

The District Court's reasons for refusing to apply NRS 11.500(3) constitute legal error for three reasons. First, the District Court acted arbitrarily and capriciously by summarily refusing to apply NRS 11.500(3) because of Bullion's "allegation of continuing breaches." In reaching this conclusion, the District Court refused to apply an unambiguous statute and controlling authority that renders moot the allegations of continuing breaches. Second, the District Court plainly erred in

concluding "[e]quitable tolling and NRS 11.500 are not mutually exclusive." Third, the District Court's rationale that "after the Ninth Circuit rules there may be certain other factual issues related to earlier breaches that you want to raise by motion for summary judgment" is similarly arbitrary and capricious because no basis exists to wait for the federal appellate court to rule on the validity of Bullion's appeal from the dismissal of the federal action for lack of subject matter jurisdiction.

1. NRS 11.500(3) requires the dismissal of Bullion's claims, and the "continuing breach" theory is inapplicable and has no relevance to the application of the statute.

As set forth above, Bullion's claims against Goldstrike in this case are time-barred. They accrued in 2009 at the latest, but Bullion did not file this lawsuit until 2018. They cannot be salvaged under the plain language of the savings statute, NRS 11.500(3). Unfortunately for Bullion, it is undisputed that it has been well over five years since the claims were initially filed in federal court, and subsection (3) expressly precludes those claims as a matter of law.

In denying the motion, the District Court did not consider the foregoing, nor did it address the unambiguous language of subsection (3). Instead, it relied solely upon Bullion's incorrect assertion that even if the statute of limitations applies to its claims, and even if no tolling is permitted, it should be permitted to recover for future royalties under a "continuing breach" theory. PA 0110. Bullion's argument, and the

District Court's reliance upon it, is flawed.[5] Indeed, it directly contradicts this Court's decision in *Schwartz v. Wasserburger*, 117 Nev. 703, 30 P.3d 1114 (2001). In *Schwartz*, the Court held that "[i]n the event a plaintiff elects to sue upon the anticipatory breach [of a contract] and not the promisor's actual nonperformance, the accrual date of the cause of action is accelerated from time of performance to the date of such election." 117 Nev. at 702, 30 P.3d at 1116. This is a bright-line rule: once a party sues for breach of contract, all claims for future payments under that contract accelerate and accrue at the time of suit.

Here, Bullion elected to sue Goldstrike after Goldstrike told Bullion that it was "clear that Newmont assumed any and all liability for any royalty obligations that may be owed to Bullion Monarch … and that Barrick is not therefore a proper party in the pending lawsuit." PA 1285. This "is a classic example of an anticipatory breach." *Finnell v. Bromberg*, 79 Nev. 211, 225, 381 P.2d 221, 228 (1963). Three days later, Bullion elected to sue Goldstrike for breach of contract, seeking prospective declaratory relief[6] to resolve the "parties' dispute as to whether Bullion

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[5] Notably, the District Court stated only that "[g]iven the allegation of continuing breaches, the motion is denied." PA 1301. Presumably, the "allegation" it referred to was Bullion's argument, but it engaged in no analysis or discussion regarding that argument or its application here.

[6] "There are two types of relief: retrospective relief, such as money damages, and prospective relief, such as injunctive or declaratory relief." *City of Fernley v. State, Dep't of Tax*, 132 Nev. 32, 42, 366 P.3d 699, 706 (2016).

is entitled to royalties" under the 1979 Agreement. PA 0056-65. All of Bullion's claims against Goldstrike, including for purported future breaches of the 1979 Agreement, accelerated and accrued at that time. 54 C.J.S. *Limitations of Actions* § 190 ("A cause of action in contract cases … accrues either on the date that performance under the contract is due or, if the plaintiff so elects, on the date that the plaintiff sues upon the anticipatory breach." (citing *Schwartz*, 117 Nev. at 707, 30 P.3d at 1116)).

Bullion relied primarily upon the case of *Clayton v. Gardner*, 107 Nev. 468, 813 P.2d 997 (1991). PA 0110. However, that case merely holds that when a party breaches an installment contract requiring regular payments of a specific amount, the non-breaching party may either elect to accelerate the future obligations of the contract by "fil[ing] suit immediately" or "allow borrowers a chance to cure" by waiting to file suit. 107 Nev. 468, 471 n.3, 813 P.2d 997, 999 n.3 (1991). If the non-breaching party elects to wait, then the statute of limitations only runs as to each installment payment when due—the reward for not filing suit.

Clayton is inapplicable here for at least two reasons. First, as Bullion itself argued before the District Court, the 1979 Agreement does not provide for "set installment payments," with an established amount due on a regular and recurring basis. PA 1298. Instead, the royalty payments it provides for are not "installments" on an amount certain. While the percentage is set, the amount due and payable each

period (if any) varies greatly depending upon activities and production. And if there is no production, no payments are due. This is not an "installment contract."

Second, Bullion elected to sue anticipatorily—*i.e.*, before all payments had accrued—which accelerated all of its claims under *Schwartz*. The underlying principle espoused by *Schwartz* and its applicability to the facts at hand has not only been recognized by the Nevada Supreme Court, it has also been validated by the United States Supreme Court. In *Franconia Assocs. v. United States*, 536 U.S. 129, 144 (2002), the Court addressed the timeliness of claims filed against the United States under the Tucker Act. The government had argued that a congressional enactment had breached the parties' agreement, causing the plaintiffs' claims to accrue at the time of its passage. The Supreme Court held, however, that since the enactment was only a statement of future intent to repudiate "the parties' bargain, not a present breach of the loan agreements," the plaintiffs had the option of waiting to sue until the government actually dishonored its commitments. *Id.* at 133.

As the Court explained, the "[f]ailure by the promisor to perform at the time indicated for performance in the contract establishes an immediate breach." *See* Restatement (Second) of Contracts §235(2) (1979) (hereinafter "Restatement") ("When performance of a duty under a contract is due[,] any non-performance is a breach.")." Conversely, "the promisor's renunciation of a "contractual duty *before* the time fixed in the contract for . . . performance" is a repudiation. (citing 4 A.

Corbin, Contracts §959, p. 855 (1951) (emphasis added)).” 536 U.S. at 142-43. The Court explained,

> “[t]he time of accrual ... depends on whether the injured party chooses to treat the ... repudiation as a present breach.” 1 C. Corman, Limitation of Actions § 7.2.1, p. 488 (1991). **If that party “[e]lects to place the repudiator in breach before the performance date, the accrual date of the cause of action is accelerated from [the] time of performance to the date of such election.”** *Id.,* at 488–489. But if the injured party instead opts to await performance, “the cause of action accrues, and the statute of limitations commences to run, from the time fixed for performance rather than from the earlier date of repudiation.” *Id.,* at 488.

Id. at 144. Pursuant to both the Nevada Supreme Court’s decision in *Schwartz* and the United States Supreme Court’s decision in *Franconia*, the District Court’s one-sentence ruling that “continuing breaches” exist here and preclude summary judgment is legally incorrect. This error must be corrected immediately because the District Court refused to apply the directly applicable terms of NRS 11.500(3) based upon its ruling that “continuing breach theory” applied.

2. **NRS 11.500(3) and equitable tolling are mutually exclusive**.

While the District Court’s oral ruling refers only to the “allegation of continuing breaches” in denying the motion, it also stated that “[e]quitable tolling and NRS 11.500(3) are not mutually exclusive.” PA 1301. It is unclear what role, if any, this statement played in the Court’s consideration of the motion. However, any reliance upon this assertion would be misplaced. As Goldstrike explained in its briefing, NRS 11.500(3) provides relief from the applicable statute(s) of limitation

in a certain specifically defined situation—when a timely filed suit is dismissed for lack of subject-matter jurisdiction and re-filed after the statute has run. Application of equitable tolling in this circumstance would be directly contrary to the statute, and therefore the statute and that equitable doctrine are mutually exclusive.

In granting expanded relief to plaintiffs NRS 11.500(3), however, the Nevada Legislature determined that such relief would not be open-ended. Instead, such lawsuits could be refiled only if less than five years had passed since the original filing. NRS 11.500(3) thus represents a carefully crafted balance between the competing objectives of permitting plaintiffs full access to the courts, while recognizing the important considerations of finality and repose underlying all statutes of limitation. *See* PA 1249.

In providing relief from dismissal on limitations grounds, NRS 11.500(3) essentially operates as a tolling statute. As such, it was incorrect for the District Court to state that 11.500(3) and equitable tolling may exist simultaneously. "Savings statutes are 'codified equivalents of the equitable tolling doctrine.'" *Burr v. Trinity Med. Ctr.*, 492 N.W.2d 904, 907 (N.D. 1992). It would be improper to apply equitable tolling in addition to the statute; essentially, "tolling on top of tolling." Indeed, "[i]f a common rule can be distilled from [caselaw from across the country], it is this: when a state enacts a savings statute in order to provide relief from a statute of limitations bar, courts are reluctant to deviate from the specific

statutory requirements to craft alternative or additional mechanisms for relief." *Laugelle v. Bell Helicopter Textron, Inc.*, No. CV 10C-12-054 PRW, 2014 WL 2699880, at *6 (Del. Super. Ct. June 11, 2014). This Court has adhered to this principle. *See Wheble v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 128 Nev. 119, 121–23, 272 P.3d 134, 135-47 (2012) (where plaintiffs timely filed the original complaint and corrected the procedural defect in the complaint five days later, litigated the case for years before dismissal, and quickly refiled their claims within 90 days, the savings statute did not salvage its claims); *see also Berkson v. LePome*, 126 Nev. 492, 503, 245 P.3d 560, 568 (2010) (courts "should not supply judicial meaning to a statute that is plain and unambiguous" and should instead "leave th[e] decision to the Legislature if it wants to extend statute-of-limitations periods [for claims that fail] for 'technical' reasons."). "Unless there are specific constitutional limitations to the contrary, statutes are to be construed in favor of the legislative power." *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967).

The District Court's suggestion that tolling could be applied to situations governed by NRS 11.500(3) is contrary to the foregoing authority and would impermissibly contravene the express will of the Legislature. The District Court should be instructed to apply NRS 11.500(3) and enter an order of summary judgment in favor of Goldstrike, absent consideration of any tolling factors.

3. The federal appellate court's evaluation of Bullion's appeal is irrelevant.

Finally, the District Court's statement that "after the Ninth Circuit rules there may be certain other factual issues related to earlier breaches that you want to raise by motion for summary judgment," does not salvage the ruling, and only serves to demonstrate that the District Court misperceived the issues before it. The Ninth Circuit Court of Appeal's ruling on Bullion's appeal of the Federal Court's dismissal for lack of subject-matter jurisdiction will do nothing to change the contours of Goldstrike's summary judgment motion here. If the Ninth Circuit affirms the Federal Court, then subject-matter jurisdiction was lacking. This will mean that NRS 11.500(3) applies, and Bullion's state claims are time-barred.

In the unlikely event that the Ninth Circuit reverses the Federal Court's jurisdictional ruling, then Bullion's claims will not have been "dismissed because the court lacked jurisdiction over the subject matter of the action." NRS 11.500. Therefore, Nevada's savings statute would not apply *at all* to save Bullion's claims, and the statutes of limitations that began running on Bullion's claims when they first accrued would now bar those claims. *See Schwartz*, 117 Nev. at 707, 30 P.3d at 1116. While Bullion would be permitted to continue pursuing its claims in Federal Court in those circumstances, its claims in this Court would again be time-barred. Thus, Bullion's claims in this lawsuit are untimely regardless of the outcome in Federal Court.

CONCLUSION

As outlined in this Petition, the District Court acted arbitrarily and capriciously by denying Goldstrike's Motion for Summary Judgment and refusing to apply NRS 11.500(3). Extraordinary relief is necessary to remedy its decision. Accordingly, Goldstrike respectfully requests the Court issue a writ of mandamus compelling the District Court to vacate its order and apply NRS 11.500(3), thereby granting summary judgment in favor of Goldstrike.

DATED: September 19, 2019

PARSONS BEHLE & LATIMER

By: /s/ Michael R. Kealy
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VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF WASHOE)

Michael R. Kealy, Esq., hereby declares under the penalties of perjury of the laws of the state of Nevada that the following assertions are true:

1. I am an attorney with the law firm of Parsons Behle & Latimer, counsel of record for Petitioner Barrick Goldstrike Mines, Inc. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and as to those facts, I believe them to be true.

2. I certify and affirm that 28214005this Petition for Writ of Mandamus is made in good faith and not for the purpose of delay.

DATED this 19th day of September, 2019.

Michael R. Kealy

SUBSCRIBED and SWORN to before
me this 19th day of September, 2019

NOTARY PUBLIC in and for said
County and State

TRACY L. BROWN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 02-77984-2 - Expires June 3, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), is proportionally-spaced, has a compliant typeface of 14 points, and contains 5,326 words and 22 pages.

Finally, I hereby certify that I have read this Answering Brief, and to the best of my knowledge, informat]ion and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief does not conform with the Nevada Rules of Appellate Procedure.

DATED: September 19, 2019 PARSONS BEHLE & LATIMER

By: /s/ Michael R. Kealy
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Parsons Behle & Latimer and that the 19th day of September, 2019, I filed a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS** with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification to all registered users as follows:

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