Case No. 79652

In the Supreme Court of Nevada

BARRICK GOLDSTRIKE MINES, INC.,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and the Honorable ELIZABETH GOFF GONZALEZ, District Judge,

Respondents,

and

BULLION MONARCH MINING, INC.,

Real Party in Interest.

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

Filed Under Seal

10	Opposition to Renewed Motion to Dismiss, filed in *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, United States District Court Case No. 3:09-cv-00612-MMD-WGC (FILED UNDER SEAL)	05/11/18	6	1017–1034
11	Complaint (FILED UNDER SEAL)	12/12/18	6	1035–1075
12	Opposition to Motion for Summary Judgment on Savings Statute (NRS 11.500) (FILED UNDER SEAL)	07/27/19	6	1076–1106
13	Reply in Support of Goldstrike's Motion for Summary Judgment (FILED UNDER SEAL)	08/14/19	6	1107–1144
14	Second Declaration of Brandon Mark in Support of Motion for Summary Judgment (FILED UNDER SEAL)	08/14/19	6	1145–1186

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

	States District Court Case No. 3:09-cv-00612-MMD-WGC (FILED UNDER SEAL)			
01	Order, filed in *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, United States District Court Case No. 3:09-cv-00612-MMD-WGC	09/30/16	1	1–17
02	Order, filed in *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, United States District Court Case No. 3:09-cv-00612-MMD-WGC	11/01/18	1	18–26
13	Reply in Support of Goldstrike's Motion for Summary Judgment (FILED UNDER SEAL)	08/14/19	6	1107–1144
14	Second Declaration of Brandon Mark in Support of Motion for Summary Judgment (FILED UNDER SEAL)	08/14/19	6	1145–1186

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

BULLION MONARCH MINING, INC.,

Plaintiff,

v.

BARRICK GOLDSTRIKE MINES, INC.,

Defendant.

Case No. 3:09-CV-612-MMD-WGC
(Sub File of 3:08-CV-227-ECR-WGC)

ORDER

****TEMPORARILY SEALED****

(Defendant's Motion for Summary Judgment – ECF Nos. 160 (sealed), 171; Defendant's Renewed Motion for Summary Judgment – ECF No. 161; Plaintiff's Motion for Partial Summary Judgment – ECF Nos. 164 (sealed), 169)

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I. SUMMARY

The parties dispute the contractual obligation to make royalty payments on mining production generated from within an area of interest. Before the Court are the following motions: Defendant Barrick Goldstrike Mines, Inc.'s ("Barrick") Motion for Summary Judgment Based on Preclusion ("Preclusion Motion") (ECF Nos. 160 (sealed), 171) and Renewed Motion for Summary Judgment ("Merits Motion") (ECF No. 161); and Plaintiff Bullion Monarch Mining, Inc.'s ("Bullion") Motion for Partial Summary Judgment ("Bullion's Motion") (ECF Nos. 164 (sealed), 169). [1] The Court has reviewed the parties' respective responses (ECF Nos. 180, 184 (sealed), 185 (sealed), 189) and replies (ECF Nos. 200 (sealed), 203 (sealed), 205). The Court also heard argument on August 30, 2016. (ECF No. 222.) For the reasons discussed below, all three motions are denied.

[1]The parties filed sealed versions of their motions with leave of court. The Court will cite to the sealed version but will reference information in sealed documents in general terms to avoid sealing this Order. The pincite remains the same because the parties redacted text from the unsealed version.

II. BACKGROUND

A. The 1979 Agreement

This dispute arises from an agreement dated May 10, 1979 ("1979 Agreement" or "Agreement") between Bullion's predecessor-in-interest, Bullion Monarch Company, and six other companies including Universal Gas, Inc. and Universal Explorations, Ltd. (collectively, "Universal"). (ECF No. 170-1 at 2.) Bullion alleges that the 1979 Agreement gave Bullion the right to receive a royalty payment on future revenue from mining operations within the "Subject Property" and "Area of Interest" ("AOI") for a period of years. (ECF No. 18 at 2.) The Subject Property is located in Eureka County, Nevada, and has both "unpatented" and "patented" mining claims from particular mines on the property. (ECF No. 170-1 at 22.) The Area of Interest or AOI is identified as "those lands . . . approximately encompassing EIGHT (8) miles in a northerly direction, EIGHT (8) miles in a southerly direction, EIGHT (8) miles in an easterly direction and EIGHT (8) miles in a westerly direction" in a specified area located in Eureka and Elko Counties, Nevada (*id*. at 21) (caps in original). The AOI is the land surrounding the Subject Property.

In the 1979 Agreement, Universal was designated as the Operator of the Subject Property and was solely responsible for control over further development and production from the Subject Property. (ECF No. 170-1 at 6.) Paragraph 4 of the Agreement spelled out the calculation of royalty payments owed by Universal to Bullion on mineral production from the Subject Property. (*Id*. at 6-7.) As a complement to Paragraph 4, Paragraph 6 provided that once Bullion had received a set amount as required under the terms and conditions of Paragraph 4, Bullion was still owed a continuing percentage of royalty from production on the Subject Property. (*Id*. at 8.)

Paragraph 11 of the 1979 Agreement ("Paragraph 11" or the "AOI Provision") gave Universal the exclusive right to acquire additional mineral properties within the AOI. (*Id*. at 11-12.) The Agreement required Universal to offer to include the newly acquired property from the AOI into the Subject Property upon payment by two of the other parties

of a percentage of all acquisition costs. (*Id*. at 11.) If those parties accepted the offer and paid Universal their portion of the acquisition costs, the newly acquired AOI properties would become part of the Subject Property and thereafter be subject to the terms of the Agreement. (*See id*. at 12-13.) Alternatively, Paragraph 11 stated that if the other parties rejected the offer to acquire the property or failed to pay the acquisition costs, then "such properties within the Area of Interest shall not become part of the Subject Property as they apply to POLAR-CAMSELL and will remain the sole property of UNIVERSAL without any obligations to POLAR-CAMSELL, but subject to the royalty interest of Bullion" (*Id*. at 12) (caps in original). Paragraph 18 of the 1979 Agreement states that the terms and conditions of the Agreement are binding upon successors and assignees of the respective parties. (*See id*. at 15.)

B. Ownership History of the Subject Property

The ownership history of the Subject Property spans decades and implicates various joint ventures. As a result, the Court will focus on the relevant transactions as they relate to the current dispute and will base its summary of the chain of title for the Subject Property as it has been agreed upon between the parties. The summary is as follows: [2]

- March 1979: Polar, Camsell, Bullion
- June-September 1979: Universal
- May 1980: Polar (50%), Universal (50%)
- May 1984: NICOR (50%), Universal (50%)
- June 1984: NICOR (100%)
- April 1986: Westmont (NICOR), Petrol (Universal), Camsell, Eltel, Lambert, El Dorado
- Aug. 1990: High Desert

[2]Barrick submitted a binder of exhibits at the August 30, 2016 hearing. Tab 1 of the binder is a chart showing the relevant chain of title. Bullion does not dispute the content of the chart, a copy of which is attached to this Order.

- Dec. 1991: High Desert (40%), Newmont (60%)
- Dec. 1995: Barrick HD (40%), Newmont (60%)
- May 1999: Newmont

C. Procedural History

Bullion initially filed suit against Newmont USA Limited ("Newmont") in April 2008, alleging that Newmont, as the current majority owner and prior joint venture operator of the Subject Property, was liable for royalties from AOI properties that Newmont owned. (*See Bullion Monarch Mining, Inc. v. Newmont USA Limited*, No. 3:08-cv-00227-ECR-VPC ("Newmont Case"), ECF No. 1.) In June 2009, Bullion sought leave to file a First Amended Complaint ("FAC") to add Barrick as a co-defendant and to assert the same five claims against Barrick as it had against Newmont. (Newmont Case, ECF No. 48.) In the FAC, Bullion alleges that Barrick was the corporate successor to High Desert Mineral Resources ("High Desert"), who was the original co-owner of, and joint venture partner with Newmont in, the Subject Property.[3] (*Id.* at 4-5.) Subsequently, the claims against Barrick were severed by consent of all parties. (ECF No. 1.) The Court referred to the suit against Barrick as a "sub-case" of the Newmont Case. (*Id.*) The Court subsequently granted Newmont's motion for summary judgment, finding that Bullion had failed to timely and diligently pursue its claims against Newmont. (Newmont Case, ECF No. 306 (sealed).)[4]

In this case, Barrick initially filed a motion for summary judgment based upon the rule against perpetuities (ECF No. 43) and a motion for summary judgment based upon the merits (ECF No. 50). Bullion filed a cross-motion for summary judgment based upon the merits (ECF No. 53). This Court granted Barrick's motion based upon the rule against perpetuities and denied the other motions as moot. (ECF Nos. 115, 116.) Bullion

[3]For purposes of summary judgment, Barrick does not dispute that it is the successor-in-interest to High Desert. (*See* ECF No. 180 at 20.)

[4]This ruling is final because the Ninth Circuit affirmed the district court's decision and no further appeals were taken. *See Bullion Monarch Mining, Inc. v. Newmont USA Limited*, No. 10-17320 (9th Cir. June 13, 2012).

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then appealed the judgment to the Ninth Circuit Court of Appeals. (ECF No. 118.) The Ninth Circuit certified two questions to the Nevada Supreme Court, including whether the rule against perpetuities applies to an area-of-interest provision in a mining agreement. (ECF No. 132 at 6.) The Nevada Supreme Court decided that the rule does not apply to an area-of-interest provision in a mining agreement. *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines*, Inc. 345 P.3d 1040 (Nev. 2015). As a result of the Nevada Supreme Court's decision, the Ninth Circuit reversed this Court's judgment and remanded the case for further proceedings. (ECF No. 134.) Upon remand, the Court permitted the parties to renew their earlier merits motions and Barrick to file an additional motion for summary judgment based on preclusion. (ECF No. 145.)

III. LEGAL STANDARD

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric*., 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the pleadings, the discovery and disclosure materials on file, and any affidavits "show there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for the nonmoving party and a dispute is "material" if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Where reasonable minds could differ on the material facts at issue, however, summary judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). "The amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (*quoting First Nat'l Bank v. Cities Service Co*., 391 U.S. 253, 288-89 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all inferences in the light most

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favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

The moving party bears the burden of showing that there are no genuine issues of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). "In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56's requirements, the burden shifts to the party resisting the motion to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The nonmoving party "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 252.

Further, "when parties submit cross-motions for summary judgment, '[e]ach motion must be considered on its own merits.'" *Fair Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (quoting William W. Schwarzer, et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 499 (Feb. 1992) (citations omitted). "In fulfilling its duty to review each cross-motion separately, the court must review the evidence submitted in support of each cross-motion." *Id.*

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IV. PRECLUSION MOTION

Barrick argues that Bullion's claims are barred by either claim preclusion or issue preclusion. The Court will address these threshold arguments before turning to the merits motions.

A. Claim Preclusion

1. Legal Standard

A federal court sitting in diversity should follow the forum state's law of claim preclusion when determining the preclusive effect of a prior dismissal upon the merits. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). This principle holds regardless of whether the dismissal was ordered by a state court or by a federal court. *Id*. Thus, Nevada's law on claim preclusion is the appropriate legal standard when determining the claim preclusive effect of this Court's prior judgment in the Newmont Case.

Nevada applies a three-part test when determining the preclusive effect of a former judgment: (1) whether there has been a valid, final judgment in the previous action; (2) whether the claims are identical or the subsequent claims could have been brought in the first action; and (3) whether the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, or the defendant can demonstrate that he should have been included in the earlier suit and the plaintiff fails to provide a reason for not having done so. *Weddell v. Sharp*, 350 P.3d 80, 81 (Nev. 2015).

2. Application

Claim preclusion is inapplicable to bar this action because this case is a sub-case of the originally filed case, not a separate case for preclusion purposes. (Newmont Case, ECF No. 48). Judge Reed severed the original case, brought by Bullion against both Newmont and Barrick, by stipulation of the parties. (ECF No. 1.) At the time of severance, Judge Reed also permitted discovery from the main case to be used in the sub-case although Barrick was allowed to also conduct additional discovery. (*Id*. at 1.) Moreover, the parties advised the Court that "a prompt ruling on dispositive motions filed

in the main case 03:08-cv-227, will assist in narrowing discovery in the sub-case, 03:09-cv-612." (*Id.* at 2.) Thus, the Court and the parties at the time contemplated that this case would be part of the main Newmont Case, not an entirely separate case.

One of the primary purposes underlying the doctrine of claim preclusion is to prevent inconsistent results or repetitious litigation between jurisdictions. *See Taylor v. Sturgell*, 553 U.S. 880, 891 (2008); *see also Montana v. U.S.*, 440 U.S. 147, 154 (1979). Inconsistent results do not occur when defendants are severed in the same case for the purpose of administrative efficiency *and* the same court decides both cases in a consecutive manner. *See, e.g.*, *Digitech Image Technologies, LLC v. Agfaphoto Holding GMBH*, No. 8:12-cv-1153, 2012 WL 4513805, at *4 (C.D. Cal. Oct. 1, 2012) (when defendants are severed from one another in a single patent suit, claim preclusion is inapplicable because, even though all defendants have allegedly infringed the same patent, the factual bases for infringement are not the same across all defendants).

In this case, Bullion amended its complaint when it learned that Barrick may be a responsible party with respect to the royalty under the AOI Provision. (Newmont Case, ECF No. 48; ECF No. 185 at 3.) Bullion proceeded against Barrick on the ground that Barrick was additionally liable for royalty payments and not liable in the alternative. (ECF No. 185 at 2-3.) In its motion to sever, Bullion offered as reasons for severance that claims against defendants may be separately maintained, that Newmont seeks to extend the discovery deadline based on Barrick having been added, and that Bullion "deserves to bring its claims against Newmont to trial as soon as possible." (Newmont Case, ECF No. 89 at 3.) Barrick joined the request (Newmont Case, ECF No. 90) on the basis that it would "best promote the efficient administration of justice" and because severance would enable Barrick to conduct additional discovery (*see* Newmont Case, ECF No. 90 at 2.) Furthermore, Barrick wished to formulate their own discovery plan and defense strategy to eliminate any prejudice that may come from being tried with Newmont. (ECF No. 185 at 3-4.) Thus, the primary reasons for severing the two parties were to prevent delay in

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the trial against Newmont and enable Barrick to conduct any necessary additional discovery.

Despite the clear procedural history that led to the designation of this case as a "sub-case" of the Newmont Case, the parties appear to agree that this is a separate case and that the claim preclusion doctrine may be invoked. They just disagree that the factors for applying the doctrine are satisfied here. The Court disagrees and finds that claim preclusion does not apply because this case is essentially a part of the Newmont Case and was designated as a "sub-case" when Judge Reed granted the stipulation to sever the claims against Barrick.

Even assuming, as the parties insist, that the claim preclusion doctrine may be invoked under the circumstances of this case, the second and third factors required for such application are not satisfied. *See Weddell v. Sharp*, 350 P.3d at 81. The second factor provides that "all claims based on the same facts and alleged wrongful conduct that were or could have been brought in the first proceeding" are subject to claim preclusion. *Alcantara ex rel. Alcantara v. Wal-Mart Stores*, Inc., 321 P.3d 912, 915 (Nev. 2014) (quoting *G.C. Wallace v. Eighth Judicial Dist. Court of State, ex rel. County of Clark*, 262 P.3d 1135, 1139 (Nev. 2011) (quotations omitted)).

Barrick argues that Bullion previously litigated and lost the same claims that it now asserts in this case. (ECF No. 160 at 3.) According to Barrick, the claims are the same because the wording of the complaints in both cases is essentially identical. (*Id*. at 12.) Barrick's argument, while seemingly logical, ignores the pleading standard. To be sure, the Complaint in this case is very similar in content and wording to the Complaint in the Newmont Case. However, such similarity alone does not necessarily support a finding that the claims against both parties are the same. Federal civil pleading *is* notice pleading. *E.g., Starr v. Baca,* 652 F.3d 1202, 1212-16 (9th Cir. 2011). The complaint does not need to include all factual bases for liability; rather, general notice of the basis for liability suffices.

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Here, Bullion is pursuing its claims against Barrick based on additional, distinguishable facts and legal theories, which ultimately makes the claims different for purposes of claim preclusion. Bullion's claims against Barrick are premised on an additional theory of liability: that, in the alternative, if the "royalty interest" as stated in the AOI Provision does not run with the land, it is a personal covenant that Barrick, not Newmont, contractually assumed through the chain of title from Universal and that Barrick still has an obligation to pay. (ECF No. 169 at 1, 17-22.) This is based on an interpretation of the 1990 Option Agreement that High Desert expressly assumed the royalty obligations of the 1979 Agreement. (*See* ECF No. 162-17.) Therefore, Bullion argues that Barrick, as High Desert's successor, contractually assumed an obligation to pay the AOI royalty under the 1979 Agreement. (ECF No. 169 at 21.) Bullion is able to make this argument because of the different facts underlying its relationship with Barrick: Barrick owned a distinct share of the property for a different time period and thus was a party to different agreements. In contrast, Newmont attempted to disclaim an obligation for the AOI royalty in its agreement with High Desert. (*Id*.; *see also* ECF No. 162-27.) Thus, the Court agrees with Bullion that there are enough factual distinctions between the two cases that the requirement of identity of claims is not met.

Additionally, the final factor of claim preclusion is not present because the parties are not identical and Newmont is not Barrick's privy. Both the party asserting claim preclusion and the party against whom claim preclusion is asserted must have been "involved" in the prior case or in privity with a party involved in the prior case. *Five Star Capital Corp. v. Ruby,* 194 P.3d 709, 714 (Nev. 2008). A "privy" or one in "privity" with a party, is "one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." *Paradise Palms Community Ass'n v. Paradise Homes*, 505 P.2d 596, 599 (Nev. 1973). A privy has also been defined under Nevada law as one "who is directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment" in the related proceeding.

Werbicky v. Green Tree Servicing, LLC, No. 2:12-CV-01567-JAD-NJK, 2015 WL 1806857, at *3 (D. Nev. Apr. 21, 2015) (quoting *Paradise Palms*, 505 P.2d at 598). Additionally, the Nevada Supreme Court has recently adopted § 41 of the Restatement (Second) of Judgments to allow non-parties to prior litigation to benefit from a prior judgment when the party in the original action was either vested by the non-party to represent him or was a fiduciary manager of that non-party's interest. *See Alcantara ex rel Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 917 (Nev. 2014). As this Court recently observed, the Supreme Court in interpreting the Restatement (Second) of Judgments held that "[a] party's representation of a nonparty is adequate for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and [its] representative are aligned and (2) either the party understood [itself] to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Werbicky v. Green Tree Servicing, LLC*, No. 2:12-cv-01567-JAD-NJK, 2015 WL 1806857, at *3 (D. Nev. 2015) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 900 (2008)).

Under the first definition of "privity" requiring inheritance, succession, or purchase, the history of the chain of title of the Subject Property demonstrates that Barrick's predecessor High Desert was the sole owner of the Subject Property prior to the joint venture with Newmont (ECF Nos. 165-3 (sealed), 165-7 (sealed)). At the time of the joint venture, High Desert sold an interest in the Subject Property to Newmont (ECF No. 165-10 (sealed)), and Barrick sold the remainder of its interest in the Subject Property to Newmont (*see* ECF No. 162-34). Thus, Barrick did not have a successive interest in the Subject Property; rather, Newmont did.

Under the second definition of privity, it is clear that Barrick could not have controlled the Newmont Case once it was severed or appealed the judgment rendered in favor of Newmont.

Finally, under the third definition of privity, Barrick fails to meet the requirements set out by the Nevada Supreme Court that permit non-parties to take advantage of prior judgments. Barrick argues that Newmont and Barrick are in privity with regard to

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Bullion's claims because they owned the Subject Property as tenants in common and because Newmont, as Operator/Manager of the joint venture, was obligated to represent the joint venture in all matters relating to the 1979 Agreement. (ECF No. 160 at 8.) While as tenants in common Barrick and Newmont had some aligned interests, the records reflect that only Newmont clearly and explicitly attempted to disclaim an obligation to pay the AOI royalty. (*See* ECF No. 162-27.) The joint venture agreement between High Desert and Newmont states that "Newmont shall not . . . assume any obligations to Bullion Monarch Company, other than the obligation, if applicable, to pay to [Bullion] the production royalty described in [Paragraph] 4." (*Id*. at 18-19.) By contrast, Barrick's predecessor, High Desert, expressly assumed the 1979 Agreement by contract. (ECF 162-17 at 2, 30.) Furthermore, although Newmont may have been the manager and contact person during the joint venture with High Desert/Barrick, Newmont never agreed to represent Barrick in legal actions. To the contrary, both parties agreed to indemnify one another for future lawsuits relating to claims made by Bullion for production royalties arising from the 1979 Agreement. (ECF No. 162-34 at 20-21.) Neither party appears to have taken responsibility for defending both parties in any future legal proceedings brought by Bullion.

For the reasons stated above, the Court finds that claim preclusion does not apply.

B. Issue Preclusion

1. Legal Standard

Similarly, a federal district court sitting in diversity should follow the forum state's law regarding issue preclusion. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Under Nevada law, issue preclusion requires that (1) the issue decided in the prior litigation is identical to the issue presented in the current action, (2) the initial ruling must have been on the merits and final, (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation, and (4)

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the issue was actually and necessarily litigated. *Five Star Capital Corp. v. Ruby,* 194 P.3d 709, 713 (Nev. 2008).

2. Application

The Court's finding that this case is a sub-case of the Newmont Case equally applies to prevent consideration of issue preclusion. Assuming again that issue preclusion may be invoked, Barrick cannot establish the first and third factors. The third factor — privity — is the same as the third factor under the claim preclusion doctrine and the Court's finding of a lack of privity equally applies to bar issue preclusion. Moreover, the first factor is also not satisfied.

Barrick contends that the two issues are identical because Bullion's allegations against Barrick are nearly identical to those against Newmont and are based on both Bullion and Newmont obtaining an interest in the Subject Property with knowledge of the 1979 Agreement. (ECF No. 160 at 7, 10.) Further, because Bullion is asserting that Newmont and Barrick are jointly and severally liable under the AOI Provision, Barrick argues that the issue is the same between the two cases. (*Id*.) This argument similarly overlooks the difference between how the two parties came to acquire an interest in the Subject Property.

In the Newmont Case, the Court decided whether Bullion should have raised the issue of Newmont's potential royalty obligations under the AOI Provision before Bullion's filing of the 2007 litigation. That issue was predicated upon Newmont's acquisition of a majority interest in and control of the Subject Property in 1991, which it acquired by entering into a joint venture with High Desert. (*See* ECF No. 162-27.) Barrick, however, has a different position from Newmont in the chain of title. While Barrick admits that it is a successor to High Desert (*see* ECF No. 180 at 20), Barrick merged with High Desert in 1995 in a triangle merger[5] and retained a minority interest in the Subject Property from

[5]Specifically, Barrick Gold Corporation acted as the Parent company, while HD Acquisition Corporation acquired High Desert and merged with it. HD and High Desert then became the surviving corporation, Barrick HD, while Barrick Gold remained the parent company. Barrick Goldstrike Mines then merged with Barrick HD. (ECF Nos. 162-31, 162-33.)

1995 to 1999. (ECF No. 162-31.) Newmont, on the other hand, entered a joint venture with High Desert where it acquired a 60% ownership in the Subject Property. Barrick's relationship with High Desert is different than Newmont's relationship to High Desert. While Bullion may have been on notice of High Desert's ownership and of Barrick Gold Corporation's purchase of the 40% interest in the Subject Property from High Desert (ECF Nos. 201-1, 201-2, 201-3, 201-4), there is no evidence that Bullion was aware that Barrick Gold Corporation may have assumed the AOI Provision before the initiation of the lawsuit against Newmont in 2007 (ECF No. 185 at 3). By contrast, based on the evidence presented in the Newmont Case, Bullion was on notice that Newmont may have assumed the AOI Provision well back into the 1990s and that there was an issue with Newmont paying royalties on properties located within the AOI.

Bullion's potential lack of knowledge of Barrick's potential assumption of the royalty obligations under the AOI Provision is not immaterial to the preclusion analysis. For this reason, Judge Reed's order finding that Bullion had slept on its rights with respect to Newmont is not the same issue. Thus, the first prong of issue preclusion is not met.

In sum, the Court finds that issue preclusion does not apply.

V. MERITS MOTION AND BULLION'S MOTION

In their merits motions, the parties raise the issue of whether the royalty obligation under the AOI Provision "runs with the land" or whether the obligation is personal to Universal and thus requires an express contractual assumption by Universal's successors. (ECF Nos. 161 & 164.) Barrick argues that the AOI Provision is not a covenant that runs with the land and is merely a personal obligation of Universal. (ECF No. 161 at 27.) By contrast, Bullion argues that the AOI Provision is a covenant that runs with the land and that even if it is a personal obligation, Barrick and its predecessors contractually assumed the royalty obligation under the AOI Provision. (ECF No. 164.) The Court does not need to address the issue of whether the AOI Provision runs with the land, as it finds that Paragraph 11 of the 1979 Agreement is ambiguous with respect to

the content of the royalty obligation. Therefore, whether the language of the contract as a whole created a covenant that ran with the land, a personal covenant, or no covenant at all are issues that must be deferred to the trier of fact to resolve.

Construction of a contract and its terms is a question of law. *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (Nev. 2007). A contract is considered to be "ambiguous" when it is subject to more than one reasonable interpretation. *Id*. If a court determines that a contract is ambiguous, then a trial will be required to resolve the ambiguity. *See Galardi v. Naples Polaris, LLC*, 301 P.3d 364, 366 (Nev. 2013).

Paragraph 11 of the Agreement sets out Universal's exclusive right to acquire additional property. If the two specified parties choose not to pay the acquisition costs for the additional property, then Paragraph 11 states that "such [additional] properties [acquired] within the Area of Interest shall not become part of the Subject Property as they apply to POLAR-CAMSELL and will remain the sole property of UNIVERSAL without any obligations to POLAR-CAMSELL, but subject to the royalty interest of BULLION" (ECF No. 170-1 at 12) (caps in original). The phrase, "subject to the royalty interest of Bullion" is ambiguous because the content of the royalty obligation from AOI properties is not defined in Paragraph 11 or anywhere else in the Agreement.

Bullion argues that "royalty interest of Bullion" is defined by the parameters in Paragraph 4 of the Agreement. (*See* ECF No. 164 at 3-4.) More specifically, Bullion believes that Paragraph 4 of the Agreement requires Barrick to pay them a certain percentage of "gross smelter return"[6] royalty from revenue on the relevant properties that Barrick owns in the AOI. (*See* ECF No. 164 at 2, 3-4.) Bullion is correct that Paragraph 4 of the Agreement spells out required royalty payments to Bullion. However, each sub-section of the paragraph applies the royalty obligations to production from the Subject

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[6]The 1979 Agreement defines "gross smelter return" as the "amount of earned revenues, as used in accordance with generally accepted accounting principles, payable to UNIVERSAL by any smelter or other purchaser of metals, ores, minerals or mineral substances, or concentrates produced therefrom for products mined from the Subject Property" (ECF No. 170-1 at 7) (caps in original).

Property.[7] (*See* ECF No. 170-1 at 6-7.) Nowhere in Paragraph 4 is the term "royalty interest of Bullion" used with respect to production from additional properties not included in the Subject Property. (*See id.*) Additionally, Paragraph 11 does not explicitly refer back to Paragraph 4 to apply the payment structure outlined there to royalty payments on additional properties acquired under the framework stated in Paragraph 11. As a result, it is unclear what royalty interest may be owed on production from AOI properties.

Because of this ambiguity, the Court cannot resolve the arguments presented on summary judgment. Specifically, the Court cannot determine whether the AOI Provision runs with the land or whether it is a personal obligation that must be contractually assumed. For this reasons, the Merits Motion and Bullion's Motion are denied.

VI. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the parties' motions.

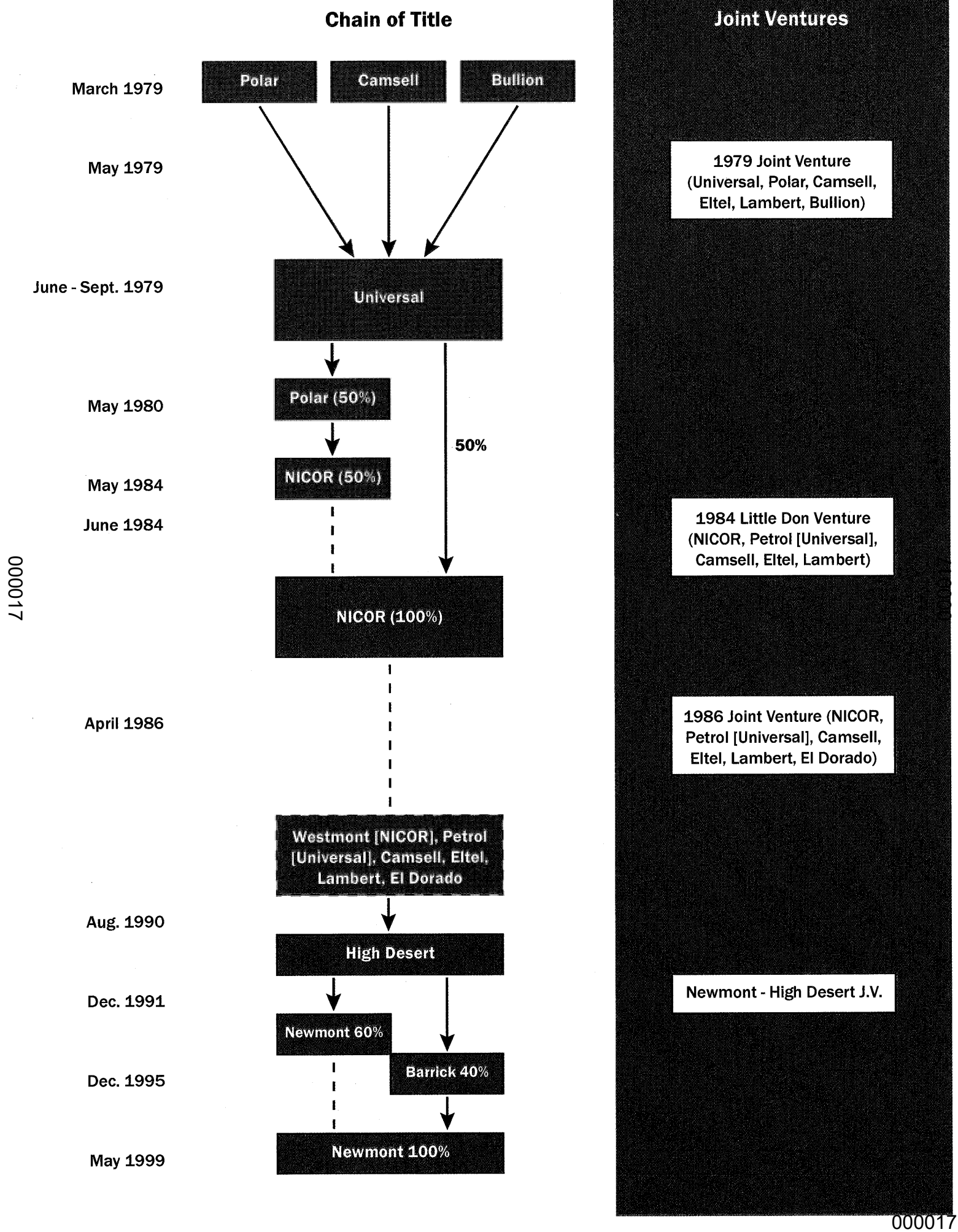
It is therefore ordered that Defendant Barrick's Motion for Summary Judgment Based on Preclusion (ECF Nos. 160 (sealed), 171) and Renewed Motion for Summary Judgment (ECF No. 161) are denied.

It is therefore ordered that Plaintiff Bullion's Motion for Partial Summary Judgment (ECF Nos. 164 (sealed), 169) is denied.

DATED THIS 30th day of September 2016.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

[7]For example, sub-section (A) states that "UNIVERSAL shall pay to BULLION an advance minimum royalty of $2,500.00 each and every month through October of 1979 or until gross production sales *from the Subject Property* have reached the amount of $62,500.00 per month, whichever comes first" (ECF No. 170-1 at 6) (caps in original) (emphasis added).



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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

BULLION MONARCH MINING, INC.,

Plaintiff,

v.

BARRICK GOLDSTRIKE MINES, INC.,

Defendant.

Case No. 3:09-cv-00612-MMD-WGC

ORDER

I. SUMMARY

Plaintiff Bullion Monarch Mining, Inc. sued Defendant Barrick Goldstrike Mines, Inc. in an attempt to recover royalties on the proceeds of a gold mine. (ECF No. 2.) Some eight years later, Defendant has moved to dismiss for lack of subject matter jurisdiction (the "Motion"), specifically arguing the parties were not diverse at the time this case was split from a related case.[1] (ECF No. 281.) Because the Court agrees with Defendant that its nerve center was located in Salt Lake City, Utah, in June 2009, the Court will grant Defendant's Motion. The Court will also grant Plaintiff's related motions to seal.[2] (ECF Nos. 283, 284, 292.)

[1]The Court also reviewed Plaintiff's response (ECF No. 285), and Defendant's reply (ECF No. 297), along with the corresponding appendices and exhibits.

[2]While there is a "strong presumption" in favor of access, and a party seeking to seal judicial materials must identify "compelling reasons" that outweigh the "public interest in understanding the public process," *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178–1180 (9th Cir. 2006), there may be compelling reasons to seal "business information that might harm a litigant's competitive standing." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). Here, compelling reasons exist. Specifically, Plaintiff has moved to selectively seal references to, and exhibits describing, Defendant's confidential business information. (ECF Nos. 283, 284, 292.) This information may harm Defendant's competitive standing if revealed. Thus, Plaintiff's motions are granted. Plaintiff will file redacted versions of the applicable documents within fifteen days.

II. BACKGROUND

The Court refers to its prior order in which it described the facts of this case. (ECF No. 224 at 2-5.) It will not restate those facts here because they are largely irrelevant to Defendant's Motion. As relevant here, Defendant represents that it moved to dismiss for lack of jurisdiction after Defendant became aware of the potential jurisdictional defect in this case, while preparing a proposed joint pretrial order that called for a jurisdictional statement. (ECF No. 281 at 3.) On Plaintiff's motion, Judge Cobb ordered jurisdictional discovery and denied Defendant's motion to dismiss without prejudice. (ECF Nos. 263, 267.) Upon the completion of jurisdictional discovery, and in line with a briefing schedule set by Judge Cobb, Defendant filed its a renewed motion to dismiss for lack of jurisdiction. (ECF No. 281.)

Plaintiff and Defendant agree on many of the threshold questions applicable here. Plaintiff initially filed suit against a third party, and added Defendant as a party to that suit in the spring of 2009. (ECF No. 281 at 4.) Per the parties' agreement, the case between Plaintiff and Defendant was severed from the original case in October 2009, and has been proceeding as a separate case ever since. (*Id.*) Plaintiff alleged, and continues to allege, this Court has diversity jurisdiction over the parties. (*Id.*) The parties agree that the relevant point in time for the jurisdictional inquiry is June 2009, when Plaintiff filed its amended complaint in the original case adding Defendant as a party. (ECF Nos. 281 at 11-12, 285 at 6 n.1.)

The question before the Court is whether Defendant's principal place of business was in Nevada (or Toronto) or Utah in June 2009. The parties agree that Plaintiff is a citizen of Utah, which is both its state of incorporation and the location of its principal place of business. (ECF No. 281 at 4, 5; *see also* ECF No. 2 at 1.) The parties also agree that Defendant is a Colorado corporation. (ECF No. 281 at 4; *see also* ECF No. 2 at 2.) The amount in controversy requirement is satisfied and not in dispute. But the parties disagree as to Defendant's principal place of business in June 2009. If, as Defendant argues, its principal place of business at the time was in Utah, the parties are

not diverse, and this Court has no jurisdiction over this case. (ECF No. 281 at 3-4.) But if, as Plaintiff argues, Defendant's principal place of business in June 2009 was in either Nevada or Toronto, Canada, the parties are diverse, and this Court may continue to exercise diversity jurisdiction over this case. (ECF No. 285 at 1-2.)

III. LEGAL STANDARD

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows defendants to seek dismissal of a claim or action for a lack of subject matter jurisdiction. Although the defendant is the moving party in a motion to dismiss brought under Rule 12(b)(1), the plaintiff is the party invoking the court's jurisdiction. As a result, the plaintiff bears the burden of proving that the case is properly in federal court. *See McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). Plaintiff's burden is subject to a preponderance of the evidence standard. *See Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

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Federal courts are courts of limited jurisdiction. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears. *See Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). "Because subject matter jurisdiction goes to the power of the court to hear a case, it is a threshold issue and may be raised at any time and by any party." *Mallard Auto. Grp., Ltd. v. United States*, 343 F. Supp. 2d 949, 952 (D. Nev. 2004) (citing Fed. R. Civ. P. 12(b)(1)).

Here, Defendant brings a factual attack on the Court's alleged diversity jurisdiction. In a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. *See Safe Air for Everyone v. Myer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Once a moving party has converted a motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction. *See*

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Savage v. Glendale Union High School, 343 F.3d 1036, 1039 n. 2 (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)); *see also Trentacosta v Front. Pac. Aircraft Indus.*, 813 F.2d 1553, 1559 (9th Cir. 1987) (stating that on a factually attacked 12(b)(1) motion to dismiss, the nonmoving party's burden is that of Rule 56(e)).

IV. DISCUSSION

For the reasons explained below, the Court finds that Plaintiff has not met its burden to establish the Court's subject matter jurisdiction over this case. In contrast, the Court is persuaded by Defendant's argument—supported by the evidence before the Court—that its principal place of business was Salt Lake City, Utah in June 2009. Thus, the Court must dismiss Plaintiff's claims against Defendant without prejudice.

The parties and the Court agree that *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), governs the Court's analysis here. In *Hertz*, the Supreme Court clarified that a corporation's principal place of business, for diversity jurisdiction purposes, is its "nerve center." *Id.* at 92-93. A corporation can have only one nerve center—it is a single place within a single state. *Id.* at 93. A corporation's nerve center is "the place where a corporation's officers direct, control, and coordinate the corporation's activities." *Id.* at 92-93. "And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion)." *Id.* at 93. The party asserting federal jurisdiction—here, Plaintiff—must present "competent proof" to substantiate its jurisdictional allegations. *See id.* at 96-97.

Defendant argues that its nerve center was located in Salt Lake City, Utah in June 2009. (ECF No. 281.) Plaintiff counters that Defendant's nerve center was located either in Nevada or Toronto, Canada in June 2009. (ECF No. 285.) As mentioned, the Court agrees with Defendant.

Defendant proffered unrebutted evidence that the majority of its corporate officers and executives lived and worked out of offices leased by Defendant's corporate parent in Salt Lake City in 2009. The Court finds this evidence persuasive in finding that Defendant's nerve center was in Salt Lake City at the time. First, five out of ten of Defendant's officers—including its President and CEO Greg Lang ("Lang"), Vice President Mike Feehan, and CFO Blake Meason—lived and worked out of Salt Lake City at the time. (ECF Nos. 281 at 13, 281-7 at 8-9, 297 at 2.) Second, four out of six of the members of Defendant's board of directors lived and worked in Salt Lake City at the time. (ECF No. 281-7 at 6.) Third, eight out of ten of Lang's direct reports lived and worked in Salt Lake City at the time. (*Id.* at 9-10.) Fourth, all of Defendant's witnesses deposed during jurisdictional discovery—including some of Defendant's corporate officers—offered unrebutted testimony that Defendant's corporate headquarters were in Salt Lake City at the time.[3] (ECF No. 297 at 7.)

Plaintiff responds with the creative but ultimately unpersuasive argument that the Court should ignore the location of Defendant's corporate officers and instead look at the location of Defendant's *de facto* executives. (ECF No. 285 at 5-8.) Defendant's main business is the operation of a gold mine outside of Elko, Nevada. Thus, Plaintiff argues the Court should primarily look at that mine's general manager's location and find that his location—in Nevada—was Defendant's nerve center. (*Id.*) The mine's general manger oversaw nine direct reports who were also based in Nevada, and was ultimately responsible for the 1600 employees and 400-500 independent contractors that worked in and around the mine. (ECF Nos. 285 at 2, 6-7, 281-7 at 10-12, 15.) The mine's general manager also, understandably, ran the mine from Nevada—he made decisions about

[3]Defendant did not properly authenticate the six deposition transcripts it attached as exhibits to its Motion. (ECF Nos. 281-1, 281-2, 281-3, 281-4, 281-5, 281-6.) Nonetheless, the Court will consider them because Plaintiff attached properly authenticated versions of the same transcripts to its response (ECF Nos. 289-7, 286-1, 289-3, 286-8, 286-10, 286-9), both parties cite to them, and neither party contests the authenticity of the transcripts. *See Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 776 (9th Cir. 2002).

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how to operate the mine, issued Requests for Proposals to subcontractors, conducted equipment inventories, held meetings, hired and fired people, and served as a point of contact for state and local officials. (ECF No. 285 at 5-8.)

But the mine's general manager at the time testified at his deposition that he reported to executives in Salt Lake City. (ECF No. 297 at 4-5.) He had to give weekly reports to executives in Salt Lake City on the mine's progress, they had to approve the budgets he presented, and they also had to approve higher-level hires the general manager wanted to make. (*Id.* at 5.) Executives in Salt Lake City also set human resources policies, and mine-related policies such as production targets and life-of-mine plans. (*Id.*) Thus, the mine's general manger is better characterized as part of Defendant's nervous system than as its sole nerve center.[4]

Further, Plaintiff's *de facto* executive argument conflicts with the Court's reading of *Hertz*. The *Hertz* Court provided a hypothetical intended to clarify the application of the nerve center test this Court finds analogous to these facts. "For example, if the bulk of a company's business activities visible to the public take place in New Jersey, while its top officers direct those activities just across the river in New York, the 'principal place of business' is New York." *Hertz*, 559 U.S. at 96. Here, Utah is New York, while Nevada is New Jersey. While it does appear that the bulk of Defendant's business activities were in Nevada, Defendant's top officers were directing those activities just across the state border in Utah. Thus, Defendant's nerve center was in Salt Lake City. *See id.*; *see also Dawson v. Richmond Am. Homes of Nevada, Inc.*, Case No. 2:12-cv-01563-MMD, 2013 WL 1405338, at *2 (D. Nev. Apr. 5, 2013) (finding that nerve center was located where

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[4]Plaintiff also argues that a contracts administrator named Tony Astorga was a *de facto* corporate officer relevant to this analysis, but the Court disagrees. (ECF No. 285 at 6-8.) Instead, the Court agrees with Defendant that Mr. Astorga was part of an administrative supply chain team that reported into executives in Salt Lake City. (ECF No 297 at 5-6.) Indeed, the entire shared services center where Mr. Astorga worked, consisting of various administrative personnel and located in Elko, Nevada, appears to have reported into Salt Lake City. (*Id.*) And while Mr. Astorga negotiated contracts on Defendant's behalf, he used forms provided by Salt Lake City and was confined both in terms of his signing authority and his discretion in negotiating contract terms. (*Id.*).

the majority of Defendant's corporate officers worked and set direction even though Defendant's president managed day-to-day operations from a different state); *Corral v. Homeeq Servicing Corp.*, Case No. 2:10-cv-00465, 2010 WL 3927660, at *3-4 (D. Nev. Oct. 6, 2010) ("Absent such high-level officers directing the corporation from Nevada, Defendant cannot be deemed to have its principal place of business here.").

The Court is also unpersuaded by several of Plaintiff's subsidiary arguments that Defendant's nerve center was located in Nevada in June 2009. Plaintiff argues that Defendant's nerve center could not have been in Utah because it did not register to do business in Utah in 2009, or any other year. (ECF No. 285 at 2, 14-15.) But this lack of registration in Utah is not determinative here. *See Thunder Properties, Inc. v. Wood*, Case No. 3:14-cv-00068-RCJ-WGC, 2017 WL 777183, at *2 (D. Nev. Feb. 28, 2017); *Pound for Pound Promotions, Inc. v. Golden Boy Promotions, Inc.*, Case No. 2:16-cv-01872-GMN-PAL, 2017 WL 1157853, at *2 (D. Nev. Mar. 28, 2017). Plaintiff also argues that Defendant's nerve center was in Nevada because Defendant listed its office and/or mine addresses on various tax documents, filings with Nevada state agencies, and contracts. (ECF No. 285 at 5.) But the stated location of a business on contracts and required filings does not dictate the location of that business' nerve center. *See Hertz*, 559 U.S. at 97.

In addition, Plaintiff argues that the Court should not consider Defendant's corporate officers in Salt Lake City because they were employed by Defendant's corporate parent, and held similar executive roles with a number of other subsidiaries owned by Defendant's ultimate corporate parent. (ECF No. 285.) But corporate officers can hold executive roles at multiple related subsidiaries without changing the result of this jurisdictional inquiry. *See Cent. W. Virginia Energy Co. v. Mountain State Carbon, LLC*, 636 F.3d 101, 106-7 (4th Cir. 2011). And given the evidence presented by Defendant tending to show that its Salt Lake City-based executives oversaw Defendant's operations in Nevada, and the undisputed evidence that the Salt Lake City-based executives were formally listed as Defendant's corporate officers, the Court declines to

exclude consideration of them in this jurisdictional analysis. (ECF Nos. 281 at 14-15, 281-7 at 8-9, 281-8, 297 at 2, 4, 6-7.)

Finally, Plaintiff argues in the alternative that Defendant's nerve center was Toronto, Canada—the headquarters of Defendant's ultimate corporate parent. (ECF No. 285 at 12-14.) However, Defendant's unrebutted evidence tends to show that executives in Salt Lake City—not Toronto—directed and controlled Defendant's activities. (ECF Nos. 281-2 at 10-12, 281-3 at 4-5, 281-6 at 10-11.) Plaintiff also contends that a 2009 shareholder's resolution lists a Canadian address and was signed by a Canadian member of Defendant's board of directors, which show that Defendant was controlled by a nerve center in Toronto. (ECF No. 285 at 9.) However, again, the address written on an official form is not necessarily relevant to this analysis. *See Hertz*, 559 U.S. at 97. Further, while it is true that some members of Defendant's board were located in Toronto, the majority were located in Salt Lake City. (ECF No. 281-7 at 6.) Thus, given the evidence before the Court, Toronto was not Defendant's nerve center in June 2009.

In sum, the Court agrees with Defendant that its principal place of business in June 2009 was Salt Lake City, Utah, which renders it a citizen of Utah for purposes of diversity jurisdiction. Because Plaintiff was also a citizen of Utah at the time, the parties are not diverse.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of Defendant's Motion.

It is therefore ordered that Defendant's motion to dismiss (ECF No. 281) is granted. Plaintiff's claims are dismissed without prejudice.

It is further ordered that Plaintiff's motions to seal (ECF Nos. 283, 284, 292) are granted. Plaintiff will file redacted versions of the applicable documents, as Plaintiff stated in the motions to seal, within fifteen days from the date of the entry of this order.

The Clerk of the Court is directed to enter judgment in accordance with this order and close this case.

DATED THIS 1st day of November 2018.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

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Attorneys for Defendant Barrick Goldstrike Mines, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

BULLION MONARCH MINING, INC., Plaintiff, vs. BARRICK GOLDSTRIKE MINES, INC.; BARRICK GOLD EXPLORATION INC.; ABX FINANCECO INC.; BARRICK GOLD CORPORATION; and DOES 1 through 20, Defendants.	Case No. A-18-785913-B Dept. No. XI Hearing Date: Hearing Time:

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NOTICE OF MOTION AND DEFENDANTS' MOTION TO STAY PROCEEDINGS

Defendant Barrick Goldstrike Mines, Inc. ("Goldstrike"), through counsel of record, Parsons Behle & Latimer, hereby moves the Court for an order staying this action pending the outcome of a parallel federal case *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, Case No. 3:09-CV-612-MMD-WGC (Sub File of 3:08-CV-227-ECR-WGC), United States District Court, District of Nevada (Reno) (the "Federal Case"), which has been pending since 2009. Plaintiff Bullion Monarch Mining, Inc. ("Bullion" or "Plaintiff") has appealed the Federal Case to the Ninth Circuit Court of Appeals, is actively prosecuting that appeal, and the appeal is currently pending.

This Motion is based on the following Memorandum of Points and Authorities with attached exhibits and any oral arguments allowed by this Court at the time of hearing.

NOTICE OF MOTION

TO: ALL PARTIES HEREIN:

PLEASE TAKE NOTICE that the undersigned will bring the above motion for hearing before the Court on 15th day of March, 2019 at In Chambers a.m./p.m. in Department XI, or as soon thereafter as counsel can be heard.

DATED: February 12, 2019.

PARSONS BEHLE & LATIMER

/s/ Michael R. Kealy
Michael R. Kealy, Nevada Bar No. 971
Ashley C. Nikkel, Nevada Bar No. 12838
Attorneys for Defendant
Barrick Goldstrike Mines, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This action arises out of a 1979 agreement related to royalty payment obligations for mining production generated within a specified area of interest. Bullion filed its Complaint in this action on December 12, 2018, alleging claims for (1) declaratory judgment, (2) breach of contract, (3) breach of the covenant of good faith and fair dealing, (4) unjust enrichment, and (5) accounting. Bullion previously asserted these exact same claims based on the exact same purported 1979 agreement in the Federal Case, *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, Case No. 3:09-CV-612-MMD-WGC (Sub File of 3:08-CV-227-ECR-WGC), United States District Court, District of Nevada (Reno). Although that matter was dismissed for lack of subject-matter jurisdiction on November 1, 2018, Bullion continues to litigate that action and those claims, including by prosecuting an appeal of the dismissal to the Ninth Circuit Court of Appeals (the

"Appeal"). Now, with its Appeal still pending, Bullion has brought this action with the same claims alleging the same legal theories based on the same agreement it is currently pursuing in the Federal Case.

This Court has the inherent power to stay proceedings and control its docket—a power it should exercise here. A stay is appropriate because allowing this action to proceed while Bullion's Appeal is pending will result in an inefficient, and potentially wasteful, use of time, effort, and resources of the parties and the Court. In the absence of a stay, if Bullion's Appeal is successful, the parties will likely find themselves back in federal court litigating the very same matters that Bullion is attempting to also litigate here, resulting in duplicative and overlapping efforts, increased costs to the parties, and an avoidable and unnecessary burden on judicial resources. A stay pending the outcome of the Federal Case will also avoid the possibility of piecemeal litigation and conflicting judgments by this Court and the United States District Court. Accordingly, the Court should stay these proceedings pending the outcome of the Appeal.

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II.

FACTUAL BACKGROUND

1. On June 22, 2009, Bullion filed its Amended Complaint in the Federal Case, bringing claims against Goldstrike[1] and other unnamed parties. (*See* Federal Amended Complaint, attached as Ex. 1.)

2. Bullion's Amended Complaint in the Federal Case includes the following claims against all of the defendants: (1) declaratory judgment, (2) breach of contract, (3) breach of the

[1] Bullion also named Barrick Gold Corporation ("BGC") in this prior lawsuit, but stipulated to BGC's dismissal, without prejudice, after BGC filed a motion to dismiss for lack of personal jurisdiction. Bullion also filed a companion suit against Newmont USA Limited, but that suit was dismissed on summary judgment under the doctrine of laches.

covenant of good faith and fair dealing, (4) unjust enrichment, and (5) accounting. (*See* Federal Am. Compl.)

3. On November 1, 2018, the Federal Court dismissed Bullion's claims in the Federal Case for lack of subject-matter jurisdiction. (*See* Federal Case Dkt. 302.)

4. On November 20, 2018, Bullion timely filed its Notice of Appeal in the Federal Case, appealing (1) the federal court's order granting Goldstrike's Motion to Dismiss, (2) the judgment entered in the Federal Case, and (3) "[v]arious interlocutory rulings and orders made appealable by the foregoing." (Notice of Appeal 2, Federal Case Dkt. 305, attached as Ex. 2.)

5. On November 21, 2018, a Time Schedule Order for the Appeal was issued by the Ninth Circuit Court of Appeals. (Time Schedule Order, Federal Case Dkt. No. 307, attached as Ex. 3.) Pursuant to the Time Schedule Order, Bullion's opening brief is due on February 28, 2019, and Goldstrike's answering brief is due on April 1, 2019. (*Id.* at 2, 3.) Bullion may then file a reply brief within 21 days of Goldstrike's brief. (*Id.* at 3.) The court of appeals will likely request oral argument on the Appeal, and the parties can otherwise expect to be involved in work relating to the Appeal for much of this year.

6. Nevertheless, on December 12, 2018, Bullion filed its Complaint in this case, bringing claims against Goldstrike, Barrick Gold Exploration Inc. ("Exploration"), ABX Financeco Inc. ("ABX"), BGC, and other unnamed parties.[2] (*See* Complaint, attached as Ex. 4.)

7. Bullion acknowledges that it originally brought its claims in the Federal Case and only filed "this complaint in an abundance of caution." (Compl. ¶ 34.)

[2] Bullion alleges that BGC is the 100% owner of ABX, that ABX is the "100% owner" of Exploration, and that Exploration is "100% owner" of Goldstrike. (Compl. ¶¶ 3-5.) Bullion also alleges that BGC, ABX and Exploration are liable under the same 1979 agreement that it has alleged Goldstrike is liable under in the Federal Case—for the same basic reasons. (*See* Compl. ¶ 28.)

8. Bullion's Complaint includes causes of action for (1) declaratory judgment, (2) breach of contract, (3) breach of the covenant of good faith and fair dealing, (4) unjust enrichment, and (5) accounting. (*See* Compl.) These are the same claims Bullion alleged in its Amended Complaint in the Federal Case.

9. The allegations in Bullion's Complaint are substantially similar to the allegations in Bullion's Amended Complaint in the Federal Case. (*Compare* Compl. *with* Federal Am. Compl.)

10. For example, both complaints are premised on the exact same purported 1979 agreement. The federal Amended Complaint states:

> On or about May 10, 1979, Bullion's predecessor in interest, Bullion Monarch Company, and Newmont's predecessors in interest, Universal Explorations, Ltd. and Universal Gas, Inc., entered into a royalty agreement ("Agreement") whereby Bullion was to receive a royalty based on production from any mining operations within the Subject Property as described in Exhibit A-1 to the Agreement and the "Area of Interest" described in Exhibit A-2 to the Agreement.

(Federal Am. Compl. ¶ 4.) The Complaint here states:

> On May 10, 1979, Bullion and defendants' predecessors in interest, Universal Explorations, Ltd. and Universal Gas, Inc. ("Universal"), entered into an agreement to give Bullion a royalty based on production from any mining operations within an area described in Exhibit A-l to the Agreement (the original "Subject Property") and from property acquired within an area of interest described in Exhibit A-2 (the "Area of Interest").

(Compl. ¶ 13.)

11. Bullion's claims for relief rest on the exact same theories of liability. For example, with regard to Bullion's claim for declaratory judgment, the Complaint here makes the exact same allegations as the federal Amended Complaint. (*Compare* Compl. ¶¶ 36–39 *with* Federal Am. Compl. ¶¶ 12–15 (both complaints alleging, among other things, that "[a]n actual legal controversy exists between Bullion and defendants as to whether defendants owe Bullion a royalty and/or compensation for production of minerals from property in the Area of Interest").)

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12. Likewise, with respect to Bullion's breach of contract claim, Bullion's Complaint here and its Amended Complaint in the Federal Case make the exact same allegations concerning the liability of Defendants, including, among others, that "Defendants are obligated to pay Bullion royalties on the production from mining activities pursuant to the 1979 Agreement." (*Compare* Compl. ¶¶ 41–44 *with* Federal Am. Compl. ¶¶ 17–20.)

13. Bullion's remaining claims for relief also rest on theories of liability that are substantially similar in both its Complaint and Amended Complaint. (*Compare* Compl. ¶¶ 45–63 *with* Federal Am. Compl. ¶¶ 21–38.)

III.

ARGUMENT

A. LEGAL STANDARDS.

The "'power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Maheu v. Eighth Judicial Dist. Court In & For Clark Cty., Dep't No. 6*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254-255, 57 (1936)). "How this can best be done calls for the exercise of judgment which must weigh competing interests and maintain an even balance." *Id.* (citation omitted). "These competing interests include: (1) possible damage resulting from granting a stay; (2) hardship or inequity to a party if the proceedings go forward; and (3) simplification or complication of issues, proof and questions of law from a stay." *Stephens v. Comenity, LLC*, 287 F. Supp. 3d 1091, 1097 (D. Nev. 2017) (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Here, considerations related to judicial economy, the time and effort of litigants and counsel, and simplification of issues, as

well as the balance of competing interests, support staying this action pending the outcome of the Federal Case.

B. PLAINTIFF'S LAWSUIT SHOULD BE STAYED PENDING THE OUTCOME OF THE FEDERAL CASE.

A. Judicial Economy Supports the Requested Stay.

Staying these proceedings pending the outcome of the Federal Case will avoid potentially unnecessary costs and a "burden to judicial resources" in the Nevada state courts. *See Tonnemacher v. Touche Ross & Co.*, 920 P.2d 5, 10 (Ariz. Ct. App. 1996) (identifying the avoidance of "extra cost and burden to judicial resources" as a factor to consider when deciding "whether to grant a stay"). If the Court opts to proceed with this litigation while the Federal Case is pending, it risks expending judicial resources on litigation that may be rendered duplicative by the Appeal's outcome.

The issues in this case are identical to the issues presented in the Federal Case. In both cases, Bullion has alleged the same five claims based on the same agreement under the same theories of liability. In both cases, Bullion's claims arise from a dispute related to the same contract. Bullion's present Complaint closely tracks the allegations in its Amended Complaint in the Federal Case. (*Compare* Compl. *with* Federal Am. Compl.) For example, the allegations in both Bullion's Complaint and federal Amended Complaint arise from its claim that, based on the same 1979 contract, Bullion is entitled to "a royalty based on production from any mining operations within an area described in Exhibit A-l to the Agreement (the original 'Subject Property') and from property acquired within an area of interest described in Exhibit A-2 (the 'Area of Interest')." (Compl. ¶ 13; *see also* Federal Am. Compl. ¶ 4 (averring that "Bullion was to receive a royalty based on production from any mining operations within the Subject Property as described in Exhibit A-1 to the Agreement and the 'Area of Interest' described in Exhibit A-2 to the Agreement").)

In addition, the allegations Bullion sets forth in the numbered paragraphs supporting each of its claims for relief are also substantially similar in both complaints. (*Comapre* Compl. ¶¶ 35–63 *with* Federal Am. Compl. ¶¶ 11–38.) For example, with regard to its claims for declaratory judgment, its allegations are basically identical in both complaints. (*Compare* Federal Am. Compl. ¶ 12 *with* Compl. ¶ 36.) In other words, Bullion has alleged the same legal controversy in both actions. Because this case involves the same claims and the same contract as the Federal Case, in the absence of a stay, this Court will proceed with litigation that overlaps with and duplicates the Federal Case. This Court will be considering, analyzing, and deciding the same basic legal and factual issues that the Appeal may again place squarely before the federal district court.

Bullion believes there is still jurisdiction in the Federal Case and is currently appealing the Federal Court's decision. Bullion only filed "this complaint in an abundance of caution" (Compl. ¶ 34), a telling concession about the overlapping and identical nature of the two complaints. If Bullion's Appeal is successful, the parties to the Federal Case[3] will find themselves back in Federal Court where the case has already been litigated for more than nine years. Resources expended by this Court to advance the litigation during the Appeal, as well as the time and resources of the parties, will be for naught. This burden on the Court and parties can be avoided through a stay.

There is no reason for this Court to devote its limited resources to this case while the Federal Case, which involves identical issues, has an appeal pending. "[W]hen [an] action is stayed, neither

[3] In this case, Bullion has reasserted the previously dismissed claims against BGC and added additional defendants Exploration and ABX. However, Bullion has merely alleged that these other corporate entities are liable under the same 1979 agreement for the same activity alleged in the Federal Case because these entities are affiliated with the original defendants in the Federal Case. The presence of the additional defendants should not affect the Court's analysis because their inclusion does not change the duplicative and overlapping nature of this matter with the Federal Case. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (explaining that two causes of action do not need the same parties and identical issues in order for one of those proceedings to be stayed).

the parties nor the court need expend substantial resources to process the action." *Tonnemacher*, 920 P.2d at 10. Accordingly, considerations of judicial economy support the entry of a stay.

B. No Damage Will Result from a Stay of the Proceedings.

A stay here will cause no damage because it will last only for so long as it serves the purpose of ensuring judicial economy. Defendant is seeking a stay pending the outcome of the Federal Case. In the Appeal, Bullion's opening brief is currently due on February 28, 2019, and Goldstrike's answering brief is due on April 1. (Time Schedule Order 2–3.) Bullion's reply brief is due 21 days later. (*Id.* at 3.) Considering this briefing schedule and the likelihood of oral argument following that, it is expected that the Appeal will be resolved by later this year or early next. Thus, the duration of the stay is not anticipated to last longer than about a year, which is a reasonable length of time, particularly given that the Federal Case has been pending since 2009.

The requested stay is not prejudicial to Bullion because it will potentially limit unnecessary effort by and expense to Bullion. If the court of appeals rules that the federal courts have jurisdiction, Bullion will be in a better position—having avoided devoting substantial resources to its claims in this Court. On the other hand, if Bullion's Appeal fails, this litigation can proceed after a stay of likely no more than about a year.

Additionally, there is no cost to Bullion from such a modest stay. The Federal Case has been pending since 2009, has already been to the Ninth Circuit Court of Appeals and to the Nevada Supreme Court once before, and all pertinent records and the recollections of all pertinent witnesses have already been preserved in the Federal Case. There is nothing that Bullion must accomplish in this litigation that cannot wait until the Federal Case is finally resolved.

Furthermore, a stay will not force Bullion to litigate in a far-away, inconvenient forum. The fact that the Federal Case is also pending in Nevada is "another critical factor favoring a stay of the state court action in favor of the Federal action." *Caiafa Prof. Law Corp. v. State Farm Fire & Cas.*

Co., 19 Cal. Rptr. 2d 138, 140 (Ct. App. 1993) (citing *Thomson v. Continental Ins. Co.*, 427 P.2d 765 (Cal. 1967)). Here, the Federal Case is pending in the United States District Court for the District of Nevada, which was Bullion's originally preferred forum. This factor also weighs in favor of a stay.

Finally, a stay is not prejudicial to Bullion because when "the state action is merely stayed, it remains available as needed to effect justice." *See Tonnemacher*, 920 P.2d at 10. In short, Bullion will suffer no cognizable damage from a stay pending the outcome of its Federal Case. *See Stephens*, 287 F. Supp. 3d at 1097 (determining a stay was appropriate, in part, because it "would likely be limited in duration").

C. Defendants Will Suffer Hardship if Required to Proceed with this Litigation Due to the Resulting Increased Costs, Time, and Effort.

Defendants have a significant interest in avoiding the increased costs, time, and effort associated with defending this suit, which involves the same legal and factual issues as the Federal Case. Allowing this litigation to proceed while the Appeal is pending will almost certainly require Defendants to cover at least some of the same ground already covered in the Federal Case, thereby working hardship on Defendants by forcing them to expend time and effort on issues already considered by the federal court. Then, if Bullion's Appeal is successful, the litigation of these issues will be back in the hands of the federal court. In the interim, Goldstrike will have been forced to defend two suits brought by the same plaintiff involving the same subject matter in different forums. By granting a stay, the Court will avoid this unfair result.

D. A Stay will Further the Orderly Progression of Justice and Avoid the Unnecessary Complication of Issues.

A stay will further the "orderly course of justice" by preventing the complication of "issues, proof, and questions of law." *See CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (identifying the "the orderly course of justice" as one of the competing interests to be considered when deciding

whether to stay proceedings). Because this case is nearly identical to the Federal Case, which was filed first, the orderly progression of justice weighs heavily in favor of a stay. The Federal Case involves the same claims and issues as this case. It relates to the same facts and involves the same contract. The Federal Case was filed approximately ten years before this case.

While Bullion has added additional defendants to this action, Bullion has merely alleged that these other corporate entities are liable under the same 1979 agreement for the same activity alleged in the Federal Case because these entities are affiliated with the original defendants in the Federal Case. Thus, this case involves exactly the same legal theories and claims. Accordingly, to avoid the complication of issues, it is appropriate for the Court to stay this case pending the Appeal. *See Caiafa Prof. Law Corp.*, 19 Cal. Rptr. 2d at 139 (determining the trial court did not abuse its discretion "in staying a state court action in favor of a Federal court action between substantially identical parties affecting the same subject matter as the state case where the Federal case had been filed nearly nine months before the action in the state court").

In addition, the avoidance of "piecemeal litigation" and "conflicting judgments by state and federal courts" have been identified as factors to be considered when deciding "whether to grant a stay." *Tonnemacher*, 920 P.2d at 10. Here, in the absence of a stay, these are exactly the types of risks the Court and the parties face. While the Appeal is pending, this Court may decide an issue differently than previously decided by the Federal Court. Indeed, this Court will likely be asked to rule on a substantial number of dispositive motions that the Federal Court already decided on an interlocutory basis, and this Court may very well reach different conclusions on those issues. This Court may also decide issues not yet decided in the Federal Case. Then, depending on the outcome of the Appeal, the Federal Case may again proceed. At that point, the Federal Case will be proceeding in the face of any conflicting rulings by this Court and any rulings by this Court on issues the federal court must later decide, which may be different than the federal court's ultimate

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resolution. A stay while the Federal Case is pending will work to prevent these risks by preserving this matter in its current state until after a final decision by the federal courts. Defendant's requested stay is appropriate because, consistent with the orderly progression of justice, it will simplify issues and questions of law by preventing conflicting rulings and piecemeal litigation.

IV.

CONCLUSION

For all the reasons set forth above, the Court should exercise its discretion and enter an order staying the proceedings pending the outcome in the parallel Federal Case.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned hereby affirms that the preceding document does not contain the personal information of any person as defined in NRS 603A.040.

DATED: February 12, 2019.

PARSONS BEHLE & LATIMER

By: /s/ Michael R. Kealy
Michael R. Kealy, Nevada Bar No. 971
Ashley C. Nikkel, Nevada Bar No. 12838

Attorneys for Defendant Barrick Goldstrike Mines, Inc.

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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 on the 12th day of February, 2019, I filed a true and correct copy of the foregoing **NOTICE OF MOTION AND DEFENDANTS' MOTION TO STAY PROCEEDINGS** 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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EXHIBIT 1

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Clayton P. Brust, Esq. (SBN 5234)
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Attorneys for Plaintiff
Bullion Monarch Mining, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BULLION MONARCH MINING, INC., a Utah corporation,

Plaintiff,

vs.

NEWMONT USA LIMITED, a Delaware corporation, d/b/a NEWMONT MINING CORPORATION, BARRICK GOLD CORPORATION, BARRICK GOLDSTRIKE MINES, INC and DOES I-X, inclusive,

Defendant(s).
_____/

CASE NO. **CV-N-08-00227-ECR-VPC**

AMENDED COMPLAINT
[Jury Trial Demanded]

Plaintiff as its complaint alleges:

1. Bullion Monarch Mining ("Bullion"), is a Utah corporation doing business in the State of Nevada at all times relevant hereto.

2. Newmont USA Limited, a Delaware Corporation, dba Newmont Mining Corporation (herein after "Newmont") is a Delaware Corporation doing business in the State of Nevada at all times relevant hereto.

ROBISON, BELAUSTEGUI, SHARP & LOW
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
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2A. Barrick Gold Corporation is a Canadian company and has been doing business in Nevada at all times relevant hereto and Barrick Goldstrike Mines, Inc. (collectively referred to as "Barrick") is a Colorado corporation and has been doing business in Nevada at all times relevant hereto.

3. The true names or capacities, whether individual, corporate, associate, or otherwise, of Defendants designated as DOES I through X are unknown to Plaintiff and therefore Plaintiff sues these Defendants by fictitious names. Plaintiff will amend this Complaint to show the true names and capacities of these Defendants when they have been ascertained.

FACTS

4. On or about May 10, 1979, Bullion's predecessor in interest, Bullion Monarch Company, and Newmont's predecessors in interest, Universal Explorations, Ltd. and Universal Gas, Inc., entered into a royalty agreement ("Agreement") whereby Bullion was to receive a royalty based on production from any mining operations within the Subject Property as described in Exhibit A-1 to the Agreement and the "Area of Interest" described in Exhibit A-2 to the Agreement. A true and correct copy of the Agreement is attached hereto and incorporated herein as Exhibit 1. The term of the Agreement is 99 years.

5. The Area of Interest provision applies to all mining interests acquired by the other parties to the Agreement, or their successors in interest, within the Area of Interest whether by "leasing or purchase of private lands and minerals, or unpatented mining claims." All of such acquired mining interests become subject to the terms and conditions of the Agreement. The Area of Interest is located in

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Eureka and Elko Counties in the State of Nevada.

6. Further, in the event a mining interest from within the Area of Interest was or is used to acquire mining interests outside the Area of Interest, Bullion's royalty interest would also follow to the new property. Upon information and belief, this has occurred.

7. Paragraph 18 of the Agreement provides that the terms of the Agreement are binding upon the successors of the parties to the Agreement.

8. Newmont has recognized that it is obligated to pay royalties pursuant to the Agreement and is currently paying Bullion a royalty on those mining claims designated in Exhibit A-1 to the Agreement. However, when Bullion requested a detailed accounting of the royalties being paid by Newmont in or about August of 2007, Newmont refused to provide detailed accounting for the royalty it is currently paying pursuant to the Agreement, initially claimed it was not governed by the Agreement, and demanded that Bullion employees only contact Newmont through counsel regarding any royalties Newmont may owe. These claims and demands by Newmont violated the Agreement which allows for Bullion to inquire about the royalty owed and requires Newmont to provide detailed accountings of its mining activities so that Bullion may verify the accuracy of the royalty being paid by Newmont.

9. Bullion also inquired about whether Newmont was involved in any mining activities in the Area of Interest in or about August of 2007. Until that time, Newmont had failed to reveal that it was involved in any mining activities in the Area of Interest and had concealed such activities from its "reports" of its

mining activities to Bullion. Again, Newmont refused to provide any accounting for mineral production from within the Area of Interest and claimed it was not subject to the Agreement (despite having paid certain minimal royalties pursuant to the Agreement for years). Several weeks later, in September of 2007, Newmont changed its position, provided an entirely different excuse for refusing to pay a royalty upon its mining activities in the Area of Interest, tacitly admitted that it was subject to the Agreement, but still refused to provide any information regarding its activities in the Area of Interest and refused to pay any royalties based upon Newmont's operations in the Area of Interest. Newmont's failure and refusal to provide accountings of its activities in the Area of Interest has prevented Bullion to from ascertaining its rights and determining the exact timing and amount of royalties Newmont owes Bullion arising from Newmont's activities in the Area of Interest.

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9A. On or about December 23, 1991, High Desert Mineral Resources of Nevada, Inc. entered an agreement with Newmont by which High Desert Mineral Resources of Nevada, Inc. and Newmont agreed to share responsibility for any royalties and obligations due to Bullion pursuant to the Agreement.

9B. Barrick, through a succession of companies, including, but not limited to Barrick HD Inc. and Barrick Goldstrike Mines, Inc. (a Colorado corporation), is the successor in interest to High Desert Mineral Resources of Nevada, Inc. for purposes of the December 23, 1991 agreement between High Desert Mineral Resources of Nevada, Inc. and Newmont. Further, Barrick is the corporate successor to High Desert Mineral Resources of Nevada, Inc. and, upon information

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and belief took over all responsibilities of High Desert Mineral Resources of Nevada, Inc. in approximately 1995, thereby making Barrick responsible for any royalties and obligations due Bullion pursuant to the Agreement that are not owed by Newmont.

10. Bullion, Barrick and Newmont are citizens of different states. The amount in controversy in this matter exceeds $75,000.00. Further, a substantial part, if not all, of the relevant events in this matter occurred in the State of Nevada and all of the property that gives rise to this action is located in the State of Nevada. Accordingly, jurisdiction and venue of this matter are properly in this Court.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

11. Plaintiff incorporates the allegations contained in paragraphs 1-10 as if set forth verbatim.

12. An actual legal controversy exists between Plaintiff and Defendants as to whether Defendants owe Bullion a royalty and/or compensation for mining activities and production of minerals from property in the Area of Interest.

13. Bullion and Defendants have adverse legal positions with respect to their existing legal controversy and Bullion has a legally protectible interest as to whether it is entitled to a royalty and/or compensation for mining activities and production from within the Area of Interest.

14. The existing legal controversy between Plaintiff and Defendants is ripe for judicial determination.

15. As a result of the parties' dispute as to whether Bullion is entitled to royalties, Bullion seeks a declaratory judgment from this Court declaring that Bullion is entitled to the royalties from one or both of the Defendants for production from within the Area of Interest.

SECOND CLAIM FOR RELIEF
(Breach of Contract)

16. Bullion incorporates the allegations contained in paragraphs 1-15 as if set forth verbatim.

17. Defendants are obligated to pay Bullion royalties on mining activities pursuant to the parties' Agreement as described above.

18. Defendants have materially breached the terms of the Agreement.

19. As a direct and proximate result of Defendants' breach, Bullion has suffered general and special damages in excess of $75,000.00.

20. Bullion has also been forced to retain counsel to pursue this action, and has incurred attorney's fees as a result of Defendants' breach.

THIRD CLAIM FOR RELIEF
(Breach of the Covenant of Good Faith and Fair Dealing)

21. Bullion incorporates the allegations contained in paragraphs 1 through 20 as if set forth verbatim.

22. Nevada law implies into each contract or agreement a covenant of good faith and fair dealing.

23. The Agreement includes an implied, if not express, covenant of good faith and fair dealing.

24. The acts and omissions of Defendants, as described above, has

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deprived Bullion of benefits which Bullion had bargained for with Defendants' predecessors in interest.

25. As a sole, direct and proximate result fo the foregoing, Bullion has been damaged in a sum in excess of $75,000.00, to be more precisely proven at trial.

FOURTH CLAIM FOR RELIEF
(Unjust Enrichment)

26. Bullion incorporates the allegations contained in Paragraphs 1 through 25 as if set forth verbatim.

27. Bullion allowed Defendants and Defendants' predecessors in interest to explore and mine in areas where Bullion had established claims and refrained from further exploration and mining activities in the Area of Interest as described above.

28. Defendants and Defendants' predecessors in interest accepted Bullion's property rights and agreement to refrain from further exploration/mining activities and enjoyed their use.

29. In exchange for relinquishment of such property rights and exploration and mining rights pursuant to the Agreement, Bullion expected to be paid and is entitled to be paid its royalty for production from the Area of Interest.

30. Bullion has not been paid for the amount it has enriched Defendants.

31. Defendants have been unjustly enriched by Bullion.

32. Bullion is entitled to compensation for the amount Defendants have been unjustly enriched.

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33. Bullion has also been forced to retain counsel to pursue this action and has incurred attorney fees as a result of Defendants' actions.

FIFTH CLAIM FOR RELIEF
(Accounting)

34. Bullion incorporates the allegations contained in paragraphs 1 through 33 as if set forth verbatim fully herein.

35. Bullion seeks an accounting of all royalties owed to Bullion for mining activities of Defendants in the Area of Interest as described above.

36. Bullion has made a demand upon Newmont, and hereby makes a demand upon Barrick, to provide accounting records for Defendants' mining activities in the Area of Interest and Newmont has refused same.

37. Bullion seeks an order from this Court directing Defendants to provide an accounting of same.

38. Bullion has been required to engage legal counsel to prosecute this action and is entitled to its costs incurred and reasonable attorney's fees.

PRAYER FOR RELIEF

WHEREFORE, Bullion prays for judgment against Defendants, as follows:

1. For declaratory relief declaring Defendants' obligation to pay royalties based upon production from within the Area of Interest as provided by the Agreement;

2. For special and general damages in an amount in excess of seventy-five thousand dollars ($75,000.00) according to proof at trial;

3. For prejudgment interest;

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4. An order directing Defendants to provide an accounting;

5. For reasonable attorney fees and costs of suit incurred herein;

6. A jury trial on all issues so triable; and

7. For such other and further relief as the Court determines to be appropriate under the circumstances.

DATED this 22nd day of June, 2009.

ROBISON, BELAUSTEGUI, SHARP & LOW

By _____
Clayton P. Brust, Esq.

Attorneys for Plaintiff
Bullion Monarch Mining, Inc.

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of ROBISON, BELAUSTEGUI, SHARP & LOW, and that on this date I caused a true copy of **AMENDED COMPLAINT [Jury Trial Demanded]** to be served on all parties to this action by:

_____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada.


_____ personal delivery/hand delivery

_____ facsimile (fax)

_____ Federal Express/UPS or other overnight delivery

_____ Reno Carson Messenger Service

Holland & Hart, LLP
Matthew B. Hippler, Esq.
Shane Biornstad, Esq.
5441 Kietzke Lane, 2nd Flr.
Reno, NV 89511

Dated this 22nd day of June, 2009.

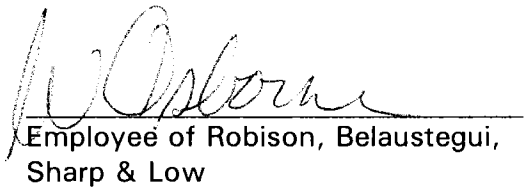
Employee of Robison, Belaustegui, Sharp & Low

EXHIBIT "1"

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EXHIBIT "1"

AGREEMENT

THIS AGREEMENT is made and entered into as of the 10th day of May, 1979 by and between the following parties:

BULLION MONARCH COMPANY, a Utah corporation (BULLION);

POLAR RESOURCES CO., a Nevada corporation (POLAR);

UNIVERSAL GAS (MONTANA), INC., a Montana corporation, and UNIVERSAL EXPLORATIONS, LTD., a Canadian corporation (UNIVERSAL);

CAMSELL RIVER INVESTMENTS, LTD., a Canadian corporation (CAMSELL);

LAMBERT MANAGEMENT LTD., a Canadian corporation (LAMBERT and

ELTEL HOLDINGS LTD., a Canadian corporation (ELTEL);

W I T N E S S E T H:

WHEREAS the parties hereto would all profit from the mining of and production of certain mining properties located in the Lynn Mining District, Eureka County, Nevada, more fully described in Exhibit A-1 attached hereto and incorporated herein by reference, hereinafter collectively referred to as the "Subject Property;" and

WHEREAS the parties have interest in exploring a wider range of mineral properties in which the Subject Property is embedded, hereinafter referred to as the "Area of Interest," more fully described in Exhibit A-2 attached hereto and incorporated herein by reference; and

WHEREAS the parties hereto are desirous of developing the Subject Property's mineral potential by building adequate milling facilities and developing a mine ("the Project"); and

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HOY & MILLER, CHARTERED
ATTORNEYS AT LAW
RENO AND ELKO, NEVADA

BOOK 71 PAGE 9

WHEREAS BULLION purports to own a royalty interest in and to the Subject Property as is more fully set forth in Exhibit A-1; a

WHEREAS POLAR purports to own a 100% interest in and to part of the Subject Property as is more fully set forth in Exhibit A subject to possible outstanding interests and royalties, purports to own a 100% interest in and to other portions of the Subject Property as is more fully set forth in Exhibit A-1, and has under a Lease and Option a 77½% interest to other portions of the Subject Property; and

WHEREAS CAMSELL, LAMBERT and ELTEL are interrelated organizations acting in concert as to the Subject Property, collectively being referred to hereinafter as "CAMSELL" unless specifically referred to otherwise, and have invested monies in the development of the Subject Property to date, their interest and relationship to the Project being governed by that certain Letter Agreement with POLAR dated March 14, 1979, as amended by the letters of March 16, 1979, April 6, 1979 and April 10, 1979, attached thereto, all attached hereto as Exhibit B; and

WHEREAS UNIVERSAL GAS (MONTANA), INC. is presently financing further development of the mining and production potential of the Subject Property, primarily for the production of precious metals basically under the terms of that certain Agreement with POLAR dated March 14, 1979 attached hereto as Exhibit C; and

WHEREAS UNIVERSAL EXPLORATIONS, LTD. is prepared and able to guarantee the financial obligations of UNIVERSAL GAS (MONTA INC. contained herein, both corporations will be collectively referred to as UNIVERSAL herein with the understanding amongst the

BOOK 71 PAGE 10

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parties hereto that UNIVERSAL GAS (MONTANA), INC. will be the active participant referred to as UNIVERSAL while any reference to UNIVERSAL EXPLORATIONS, LTD. under the collective term UNIVERSAL speaks only to its financial backing of the UNIVERSAL obligations recited herein;

NOW THEREFORE, in consideration of the conditions, covenants, promises, obligations, payments and agreements herein contained, the parties agree as follows:

1. SOLE AGREEMENT: That as between the parties hereto this Agreement shall be the sole and only agreement governing the ownership, operations and payment from the Subject Property, cancelling, revoking, rescinding and terminating any and all other deeds, conveyances, contracts or agreements between the parties hereto, or any combination thereof, affecting the Subject Property, except any agreement that may exist between CAMSELL, LAMBERT and ELTEL as to investment in Subject Property development and divisions of proceeds received therefrom, and except any agreement, contract or deed specifically preserved by the terms hereof. Should the terms of any agreement, letter agreement or other document or understanding preserved by specific reference herein be in conflict with this Agreement the terms of this Agreement shall control.

2. OWNERSHIP OF SUBJECT PROPERTY: That as between the parties hereto it is understood and agreed that the ownership of the Subject Property as presently constituted is as set forth in Exhibit A attached hereto, subject only to the terms and conditions of this Agreement specifically referred to herein. In addition, it is understood, agreed and warranted amongst the parties hereto that except

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for agreements, deeds and other documents specifically mentioned herein that none of the parties hereto, individually, in combination or collectively, have conveyed or encumbered the Subject Property.

A. Simultaneously herewith, BULLION shall execute and deliver a Grant Deed to UNIVERSAL conveying all of its right, title and interest in the Subject Property to UNIVERAL. Such interest of BULLION conveyed to UNIVERSAL shall be subject to the payment provisions of Paragraph 4, infra. - Also see paragraph G

B. Simultaneously herewith, POLAR shall execute and deliver a Grant Deed to UNIVERSAL conveying all of its right, title and interest in the Subject Property to UNIVERSAL, subject to the terms and conditions of the March 14, 1979 POLAR - UNIVERSAL Agreement.

C. Simultaneously herewith, CAMSELL shall execute and deliver a Quitclaim Deed to UNIVERSAL conveying and quitclaiming all of its right, title and interest in the Subject Property to UNIVERSAL.

D. At all times pertinent hereto, UNIVERSAL shall have the right to pledge or otherwise hypothecate the titles to any portions, or the whole of, the Subject Property for the purpose of obtaining financing for development of the Subject Property, except that no more than a total of FIFTY PERCENT (50%) of the then current market value of such property shall be so hypothecated or encumbered. At the time, under the March 14, 1979 Agreement, Exhibit C, UNIVERSAL reaches the "earning point", its conveyance to POLAR of 50% interest shall be unencumbered.

3. UNIVERSAL AS OPERATOR: That on March 14, 1979 POLAR and UNIVERSAL entered into an Agreement, a copy of which is attached hereto as Exhibit C and incorporated herein by reference, whereby UNIVERSAL, under the terms and conditions thereof, was to become the sole and only operator of the mineral production from the Subjec Property as of March 1, 1979, and that all of the parties hereto agree to the terms of said Agreement allowing UNIVERSAL the sole and only control over further development and production from the Subjec Property pursuant to the March 14, 1979 Agreement and ratify the sam as if they had been signatory thereto.

4. PAYMENTS TO BULLION:

A. Commencing May 1, 1979, UNIVERSAL shall pay to BULLION an advance minimum royalty of $2,500.00 each and every month through October of 1979 or until gross production sales from the Subject Property have reached the amount of $62,500.00 per month, whichever comes first.

B. Commencing on November 1, 1979, UNIVERSAL shall pay to BULLION an advance minimum royalty of $5,000.00 each and every month until gross production sales from the Subject Property has reached the amount of $125,000.00 per month, or until BULLION has received an aggregate of $250,000.00 under these subparagraphs, A and B.

C. BULLION shall receive a FOUR PERCENT (4%) gross smelter return from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated) until BULLION has received an aggregate of $500,000.00 under these subparagraphs, A, B and C.

D. Thereafter BULLION shall receive a TWO PERCENT (2%) gross smelter return royalty from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated) until BULLION has received an aggregate of $1,000,000.00 under these subparagraphs, A, B, C and D.

E. Thereafter BULLION shall receive a ONE PERCENT (1%) gross smelter return royalty from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated).

"Gross smelter return," as used above, shall mean the amount of earned revenues, as used in accordance with generally accepted accounting principles, payable to UNIVERSAL by any smelter or other purchaser of metals, ores, minerals or mineral substances, or concentrates produced therefrom for products mined from the Subject Property.

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Upon SIXTY (60) days' written notice by BULLION to UNIVERSAL, BULLION may elect to take any monthly production royalty in kind but will be totally responsible for all loading and transportation and the costs thereof. BULLION agrees not to materially interfere with UNIVERSAL's operations should it elect to receive payment in kind, and will hold all the remaining parties hereto harmless from its actions in loading and transporting the in kind payments.

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All advance royalty payments shall be due on the first day of each month and all production royalties shall be due no later than FORTY-FIVE (45) days after the date payment for production sales is received by UNIVERSAL.

5. OBLIGATIONS OF BULLION AND POLAR: BULLION and POLAR shall assume and retain all obligations that they have independently incurred by virtue of their activities on and for the Subject Property prior to the date of this Agreement and, in particular, BULLION shall assume and retain the obligation of that certain Deed of Trust made in favor of Ira J. Jaffee, Trustee, as Beneficiary, recorded in the Official Records of Eureka County, Nevada, Book 41, Page 362. At all times pertinent hereto, UNIVERSAL shall have the unqualified right to direct any and all funds due BULLION or POLAR hereunder to remove any obligations of BULLION or POLAR, respectively, secured by the Subject Property, or any portion thereof, and such will be credited toward the payment schedule due BULLION or POLAR. See Paragraph 4, supra.

6. PURCHASE OF BULLION'S INTEREST: That at the time BULLION has received an aggregate of $1,000,000.00 under the terms and conditions of Paragraph 4, supra, BULLION will have been deemed to have sold and UNIVERSAL and POLAR deemed to have purchased all of BULLION's right, title and interest in the Subject Property (50% each, subject to the terms and conditions of the March 14, 1979 Agreement, Exhibit C) and forever releiving UNIVERSAL and POLAR from any contractual commitment to BULLION by virtue of UNIVERSAL's or POLAR's actions or operations on the Subject Property, save and except for the ONE PERCENT (1%) gross smelter return royalty from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated) set forth in Paragraph 4(E), supra. At that time, UNIVERSAL and POLAR will execute and deliver

to BULLION a Royalty Deed forever evidencing such royalty interest, ONE-HALF PERCENT (1/2%) being chargeable each against UNIVERSAL and POLAR.

7. DEFAULT OF OBLIGATIONS TO BULLION: If, at any time, UNIVERSAL is in default of its payment obligations to BULLION, BULLION, upon FORTY-FIVE (45) days' written notice to all of the parties hereto, may terminate this Agreement and demand that UNIVERSAL execute and deliver to BULLION a Quitclaim Deed of all of its right, title and interest to that portion of the then Subject Property that is specifically listed in Exhibit A-1 attached hereto but not the additional properties added to the Subject Property list subsequent to the date of this Agreement. During the notice period, UNIVERSAL, or any other party hereto not BULLION, or anyone on their behalf, may pay such obligation to BULLION and cure such default.

8. PRODUCTION EXPENSE OVERRUN: Pursuant to the terms of the Letter Agreement between POLAR and CAMSELL dated March 14, 1979, Exhibit B, POLAR and CAMSELL agree to share in cost overruns incurred by UNIVERSAL in bringing the Project into production should UNIVERSAL's initial development costs prior to production exceed ONE MILLION TWO HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS ($1,250,000.00), or should UNIVERSAL's initial development costs and production costs exceed $1,250,000.00 at any time after production commences but production expenses exceed production payments or revenues.

The parties agree to share in cost overruns in excess of $1,250,000.00 commitment of UNIVERSAL in the following percenta

UNIVERSAL	50%
POLAR-CAMSELL	50%

Except as herein outlined, the terms, conditions and penalties for cost overruns and the non-participation in such overruns are governed by Clause 10(D), Schedule B, POLAR - UNIVERSAL Agreement of March 14, 1979.

9. DIVISION OF PROCEEDS: The proceeds of production shal be governed by the terms of this Agreement only (except for the CAMSELL, LAMBERT and ELTEL arrangements). As operator under the March 14, 1979 Agreement (see Paragraph 3, supra), UNIVERSAL shall have the right to pay all normal operating and production expenses, including insurance and taxes (excepting income taxes accruing to the invidivual parties hereto, but specifically including net proce of mine taxes, real and personal property taxes associated with mining and income taxes accruing to the venture), pursuant to normal and usual accounting practices and the terms of the March 14, 1979 Agreement from production payments received. In addition, UNIVERSAL shall be able to treat as production expenses and deduct from production payments received all rentals, advance royalties and production royalties paid to BULLION, the Poulsen Group and any others. The amounts received from products produced from the Subject (production payments) less the production expenses, as defined herein and in the March 14, 1979 Agreement between POLAR and UNIVERSAL, shall be the net production receipts.

As between the parties hereto, the net production receipt shall be divided as follows:

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A. BULLION: none, being only entitled to the payments set forth above in Paragraph 4;

B. UNIVERSAL: FIFTY PERCENT (50%); and

C. POLAR, CAMSELL: FIFTY PERCENT (50%), pursuant to that Letter Agreement between POLAR and CAMSELL dated March 14, 1979, Exhibit B.

Nothing herein shall be construed as prohibiting POLAR-CAMSELL from taking their interest in kind provided that they give UNIVERSAL SIXTY (60) days' written notice of such election. POLAR-CAMSELL will be totally responsible for all loading and transportation and the costs thereof. POLAR-CAMSELL will not materially interfere with UNIVERSAL's operations should it elect to recieve payme in kind and will hold all the remaining parties hereto harmless from its actions in loading and transporting the in kind payments. It is understood and agreed that all such in kind payments are net, after deduction of the proportionate amount of mining and operation costs.

10. TERMINATION BY UNIVERSAL: UNIVERSAL's participation in the Project is governed by the terms and conditions of the POLAR - UNIVERSAL Agreement of March 14, 1979, Exhibit C, except as specifically modified herein. Upon fulfilling its obligations thereunder, UNIVERSAL has the right to terminate its position as Project Operator and to terminate its further participation in Project development and expenses thereof. Such termination is governed by the terms and conditions of the March 14, 1979 UNIVERSAL - POLAR Agreement and, in particular, Schedule B attached thereto.

11. ADDITIONAL PROPERTY ACQUISITIONS: UNIVERSAL, as operator, shall have the exclusive right to acquire additional

mineral properties within the Area of Interest on behalf of the parties hereto, be such acquisition by virtue of the rights and privileges under the 1872 Mining Law, or the leasing or purchase of private lands and minerals, or unpatented mining claims. All parties hereto agree to immediately quitclaim and assign to UNIVERSAL any and all other real property or interest in such that they may have within the Area of Interest, Exhibit A-2, as of the date of this Agreement, subjecting the same to the terms and conditions of this Agreement, excepting any interest of BULLION in and to those porperties presently being worked by Western States Minerals (Pancan

Upon acquiring such properties within the Area of Interest, UNIVERSAL shall offer to include such into the Subject Property upon payment by POLAR-CAMSELL of FIFTY PERCENT (50%) of all acquisition costs incurred in acquiring such properties. Acquisition costs shall include, but are not limited to, purchase price, rental fees, real estate or finder's commissions, legal fees, closing costs, title examinations, appraisal fees and costs incurred by UNIVERSAL in otherwise evaluating the property to be acquired.

Should POLAR-CAMSELL reject such offer or fail to pay or reach agreement for paying such acquisition costs within FORTY-FIVE (45) days of such offer by UNIVERSAL, then such properties within the Area of Interest shall not become part of the Subject Property as they apply to POLAR-CAMSELL and will remain the sole property of UNIVERSAL without any obligations to POLAR-CAMSELL, but subject to the royalty interest of BULLION.

However, should POLAR accept such offer and pay or reach an agreement with UNIVERSAL for paying such acquisitions costs, the newly acquired properties shall become part of the Subject Property and will be treated thereafter under the terms of this Agreement pertaining to the Subject Property.

12. POULSEN LEASE AND OPTION: The parties hereto recognize the Lease and Option of POLAR with the Poulsens, a copy of which is attached hereto as Exhibit D. UNIVERSAL shall make all payments due thereunder and shall credit such as a development or production expense.

What are the Poulsen Properties.

While under Lease, the Poulsen properties shall be, and are, part of the Subject Property, however, at any time, UNIVERSAL may elect to exercise the purchase option. Upon doing so, UNIVERSAL shall offer such to POLAR-CAMSELL under the terms of Paragraph 12, supra. Failure of POLAR-CAMSELL to participate in the acquisition (purchase) costs shall remove such properties from Subject Property status as the same applies to POLAR-CAMSELL.

13. TERM: The term of this Agreement, as it affects the continuing contractual relationships between the parties hereto, is for a period of NINETY-NINE (99) years commencing on the date hereof, unless sooner terminated, surrendered or forfeited.

14. TITLE PERFECTION: The parties hereto recognize that title to the Subject Property, or portions thereof, may contain certain imperfections, clouds thereon or outstanding interests that may require acquisition, clearing or otherwise perfecting. UNIVERSAL shall, in its discretion, seek out such imperfections and cure the same. All expenses incurred by UNIVERSAL in investi-

gating title to the Subject Property from March 1, 1979, and curing imperfections or acquiring outstanding interests in the same shall be treated as a development or production expense by UNIVERSAL pursuant to the March 14, 1979 POLAR - UNIVERSAL Agreement.

15. INSPECTION, RECORDS: At all times pertinent hereto, the non-operating parties shall have the right to reasonable inspection of the Subject Property and all geological and production records upon giving FIVE (5) days' written notice to UNIVERSAL. Such inspection shall be at the Subject Property or at any offices of UNIVERSAL in the Elko-Carlin, Nevada area. Personal inquiry by the parties hereto directly to UNIVERSAL shall be made only to the following UNIVERSAL officers and employees, and no others:

Joseph A. Mercier
Dan Mercier
Don Hargrove

or their nominees.

Monthly, on the monthly anniversary of this Agreement, UNIVERSAL shall prepare and deliver to the parties hereto a summary report of development on the Subject Property, including building construction, geological finds, etc., and setting forth production and development expenditures.

16. NOTICES: All notices required herein shall be in writing by certified or registered mail, (United States or Canada, as the case may be), return receipt requested (or the Canadian equivalent of such service), to the addresses listed below. Service of such notice is to be deemed accomplished as of the date of mailing:

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BULLION MONARCH COMPANY
Attention: R. D. Morris
Henderson Bank Building
Elko, NV 89801

UNIVERSAL GAS (MONTANA), INC.
Attention: Joe Mercier, President
640 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 1G7

With a copy to: UNIVERSAL GAS (MONTANA), INC.
Attention: John C. Miller, Esq.
Blohm Building, Suite 201
Elko, NV 89801

POLAR RESOURCES CO.
Attention: C. Warren Hunt
1119 Sydenham Road, S. W.
Calgary, Alberta
CANADA T2T 0T5

Sent copied to all certified return receipt

CAMSELL RIVER INVESTMENTS
Attention: K. H. Lambert
808 Home Oil Tower
324 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 2Z2

LAMBERT MANAGEMENT LTD.
Attention: K. H. Lambert
808 Home Oil Tower
324 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 2Z2

ELTEL HOLDINGS LTD.
Attention: K. H. Lambert
808 Home Oil Tower
324 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 2Z2

17. RECORDATION: This Agreement may be recorded into the Official Records of either Eureka County of Elko County, Nevad or both, by any one of the parties hereto.

18. BINDING EFFECT: The terms and conditions of this Agreement shall inure to the benefit of, and be binding upon, the successors and assigns of the parties hereto.

19. ASSIGNABILITY: The respective positions and interests of the parties hereto shall be freely assignable except that such assignment shall not be binding on or affect the remaining parties hereto in any manner, unless and until such assignment is noted in writing to UNIVERSAL, or any successor Operator.

IN WITNESS WHEREOF, the parties hereto set their hands as of the day and year first above written.

BULLION MONARCH COMPANY, a Utah corporation

BY: R. D. Morris

TITLE: President

POLAR RESOURCES CO., a Nevada corporation

BY:

TITLE: President

UNIVERSAL GAS (MONTANA), INC., a Montana corporation

SEAL Affixed

BY:

TITLE:

CAMSELL RIVER INVESTMENTS Ltd. a Canadian corporation

BY: K H Lambert

TITLE: President

LAMBERT MANAGEMENT LTD., a Canadi corporation

BY: K H Lambert

TITLE: President

ELTEL HOLDINGS LTD., a Canadian corporation

BY: K H Lambert

TITLE: Director + Secretary

UNIVERSAL EXPLORATIONS, LTD. a Canadian corporation

BY:

TITLE:

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STATE OF Nevada)
) SS.
COUNTY OF Elko)

On May 11, 1979, personally appeared before me, a Notary Public, R.O. Morris, a duly qualified and acting officer of BULLION MONARCH COMPANY, who acknowledged to me that he executed the above instrument in that capacity.

J. C. Miller
NOTARY PUBLIC

JOHN C. MILLER
Notary Public - State of Nevada
Elko County, Nevada
My Commission Expires August 28, 1981

PROVINCE ~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On _____, 1979, personally appeared before me, a Notary Public, C. WARREN HUNT, a duly qualified and acting officer of POLAR RESOURCES CO., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

PROVINCE ~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 28, 1979, personally appeared before me, a Notary Public, Joseph A. Mercier, a duly qualified and acting officer of UNIVERSAL GAS (MONTANA), INC., who acknowledged to me that he executed the above instrument in that capacity.

SEAL Affixed

NOTARY PUBLIC

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PROVINCE ~~STATE~~ OF ALBERTA)
) ss.
COUNTY OF _____)

On MAY 17, 1979, personally appeared before me, a Notary Public, KENNETH H. LAMBERT, a duly qualified and acting officer of CAMSELL RIVER INVESTMENTS, LTD., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

SEAL Affixed

HOY & MILLER, CHARTERED
ATTORNEYS AT LAW
RENO AND ELKO, NEVADA

05/11/79

AFFIDAVIT OF EXECUTION

I Susan Lee Nicholl of the City of Calgary, in the Province of Alberta, make oath and say that:

1. I was personally present and did see Mr. C. Warren Hunt named in the within or in annexed instrument who is personally known to me to be the person named therein, duly signed and executed the same for the purposes named therein.

2. That the same was executed at the City of Calgary, in the Province of Alberta and that I am the subscribing witness thereto.

3. That I know the said Mr. C. Warrent Hunt and he is, in my belief, of the full age of twenty-one years.

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SUSAN LEE NICHOLL

SWORN BEFORE ME AT THE CITY OF CALGARY, IN THE PROVINCE OF ALBERTA, THIS 7th DAY OF JUNE, 1979

A Notary Public in and for the Province of Alberta

SEAL Affixed

BOOK 71 PAGE 26

PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 17, 1979, personally appeared before me, a Notary Public, KENNETH H. LAMBERT, a duly qualified and acting officer of LAMBERT MANAGEMENT LTD., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

SEAL Affixed

PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 17, 1979, personally appeared before me, a Notary Public, KENNETH H. LAMBERT, a duly qualified and acting officer of ELTEL HOLDINGS LTD., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

SEAL Affixed

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PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On _____, 1979, personally appeared before me, a Notary Public, Joseph A. Mercier, a duly qualified and acting officer of UNIVERSAL EXPLORATIONS, LTD., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

SEAL Affixed

HOY & MILLER, CHARTERED
ATTORNEYS AT LAW
RENO AND ELKO, NEVADA

05/11/79

EXHIBIT A-1

SUBJECT PROPERTY

The following described unpatented and patented mining claims generally located in Sections 1, 2, 10, 11 and 12 of Township 35 North, Range 50 East, M.D.B.&M., Lynn Mining District, Eureka County, Nevada:

Unpatented Claims	Polar	Bullion
	100%	Royalty
Big Jim	"	"
Big Jim 1 to 31, inclusive	"	"
Cracker Jack	"	"
Cracker Jack 1 to 5, inclusive	"	"
Yellow Rose 6 to 21, inclusive	"	"
Polar 1 to 20, inclusive	"	"
Hill Top	"	"
Hill Top 1 to 2, inclusive	"	"
Hill Top Fractional	"	"
Hill Top 1 to 4 Fractional	"	"
RJV	"	"
Unity 1	"	"
Unity 2	"	"
Badger	"	"
Badger 1	"	"
Compromise 4 to 7, inclusive	"	"
Lamira	"	"
Junction	"	"
Paragon	"	"
Paragon 2	"	"
Paragon 4	"	"
Paragon Fractional	"	"

Patented Claims (Poulsen Lease and Option)

	U.S. Patent No.	U.S. Survey No.	Polar	Bullion
			77½%	Royalty
Big Six No. 3	783757	4332	"	"
Holt	881735	4422	"	"
July	935874	4528	"	"
Great Divide	945439	4393	"	"
Bald Eagle	046758	4527		

EXHIBIT A-2

AREA OF INTEREST

All those lands contained in the Sections and Townships listed below approximately encompassing the area EIGHT (8) miles in a northerly direction, EIGHT (8) miles in a southerly direction, EIGHT (8) miles in an easterly direction and EIGHT (8) miles in a westerly direction from Section 10, Township 35 North, Range 50 East, M.D.B.&M., Eureka County, Nevada.

Township 34 North, Range 49 East
Sections: 1-5, 8-17 and 20-24

Township 35 North, Range 49 East
Sections: 1-5, 8-17, 20-29 and 32-36

Township 36 North, Range 49 East
Sections: 1-5, 8-17, 20-29 and 32-36

Township 37 North, Range 49 East
Sections: 32-36

Township 34 North, Range 50 East
Sections: 1-24

Township 35 North, Range 50 East
Sections: All

Township 36 North, Range 50 East
Sections: All

Township 37 North, Range 50 East
Sections: 31-36

Township 34 North, Range 51 East
Sections: 3-10 and 15-22

Township 35 North, Range 51 East
Sections: 3-10, 15-22 and 27-34

Township 36 North, Range 51 East
Sections: 3-10, 15-22 and 27-34

Township 37 North, Range 51 East
Sections: 31-34

LAMBERT MANAGEMENT LTD.

Telephone: (403) 233-0047
, HOME OIL TOWER
324 - 8 AVENUE S.W.
CALGARY, ALBERTA
CANADA T2P 2Z2

Telephone: (403) 454-26
13716 - 101 AVENUE,
EDMONTON, ALBERTA
CANADA T5N 0J7

March 14, 1979

Polar Resources Co.
1119 Sydenham Road, S. W.
Calgary, Alberta
T2T 0T5

Attention: Mr. Warren Hunt

Dear Sirs:

RE: Gold Claims Lynn Mining District
Eureka County, Nevada

As you are aware, since early 1976 Camsell River Investments Ltd. has entered into several agreements with you relating to the Bullion Monarch Company gold claims in Nevada and has also entered into agreements relating to the same properties with Bullion Monarch Company. As a result of these agreements, Camsell and its silent coventurers, Lambert Management Ltd. and Eltel Holdings Ltd. have advanced about $505,000. U.S. to you and $300,000. U.S. to Bullion Monarch Company and have expended a further $10,000. U.S. or so on drilling invoices and other expenses relating to the properties.

Our mutual files on this matter are extensive and the legal determination of the various agreements would undoubtedly take more time and effort to resolve than is prudent under the circumstances. We have always maintained that we do not wish to hamper your efforts to put the properties into production so long as an equitable arrangement can be reached between us. Based on the proposed agreement you have negotiated with Universal Gas (Montana) Inc. (hereinafter called the "Mill Agreement") and our meetings and telephone conversations of March 10, 11, 12 and 13, we believe we have reached an agreement acceptable to you and the parties we represent. This agreement between you and the "Camsell Group" would enable Universal to obtain the interest it has bargained for in the Mill Agreement and would resolve our diverse interests in an amiable fashion.

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BOOK 71 PAGE 30

EXHIBIT F

The Agreement is as follows:

1) All of the interests of any nature whatsoever of Polar Resources Co. and those of other parties represented by Polar Resources Co. (hereinafter called the "Polar Group") and all of the interests of any nature whatsoever of Camsell River Investments Ltd. and those of the parties represented by Camsell River Investments Ltd. (hereinafter called the "Camsell Group") in "The Mining Properties" as defined in the Mill Agreement shall be pooled and then reallocated 50% to Universal Gas (Montana) Inc. pursuant to the Mill Agreement and 50% collectively to the Polar Group and the Camsell Group (hereinafter called the "Polar-Camsell Group").

2) The Camsell Group will receive 100% of the cash flow from the Polar-Camsell Group's 50% interest in the Mining Properties until the Camsell Group has received an amount equivalent to its expenditures relating to the Mining Properties before interest as established by independent audit. This amount is about $815,000 U.S.

3) After the Camsell Group has received the amount indicated in paragraph 2 above, the Polar Group will receive 100% of the cash flow from the Polar-Camsell Group's 50% interest in the Mining Properties until the Polar Group has received an amount equivalent to its expenditures relating to the Mining Properties before interest as established by independent audit. This amount is about $450,000. U.S.

4) After the Polar Group has received the amount indicated in paragraph 3 above, the Polar Group and the Camsell Group will split the cash flow from the Polar-Camsell Group's 50% interest in the Mining Properties on a 50-50 basis until the Camsell Group has received an amount equivalent to the amount of interest the Camsell Group would have paid to its banker calculated on all Camsell Group advances to Polar Resources Co. and Bullion Monarch Company from the dates of advance at the Canadian Imperial Bank of Commerce prime rate from time to time plus 2% per annum, compounded semi annually. Any cash received by the Camsell Group pursuant to this agreement would be credited to the "phantom bank account" on the date of receipt in order to determine the amount to be ultimately received by the Camsell Group pursuant to this paragraph 4.

5) After the Camsell Group has received the amount calculated pursuant to paragraph 4 above, the Polar-Camsell Group's interests shall be divided and an undivided 30% of the interest shall be transferred to the Camsell Group and an undivided 70% shall be transferred to the Polar Group.

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BOOK 71 PAGE 31

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6) Title to the Polar-Camsell Group's interest in the Mining Properties shall be held in trust by Polar Resources Co. pursuant to the terms of this Agreement and this Agreement or its successor shall be filed against the title to the Mining Properties in the appropriate offices in the state of Nevada. Polar shall deliver to the Camsell Group a legal opinion from a Nevada attorney stating that the terms and conditions of this Agreement are enforceable by the Camsell Group as against Polar Resources Co. and that the Camsell Group's interests have been adequately registered to protect its interests as against third parties.

7) The proceeds Polar Resources Co. receives from Universal Gas (Montana) Inc. on the sale of the assets listed in the Mill Agreement shall be distributed as follows:

a) The Polar Group shall receive 100% of the proceeds from the sale of assets acquired after December 31, 1976.

b) The Camsell Group shall receive 80.4% of the proceeds from the sale of assets acquired prior to January 1, 1977 and the Polar Group shall receive the balance.

c) Polar Resources Co. shall account to the Camsell Group for any assets held on December 31, 1976 which have been disposed of by Polar Resources Co. subsequent to December 1, 1976 but prior to the execution of the Mill Agreement. The Camsell Group shall receive an amount equal to 80.4% of such disposition proceeds from Polar Resources Co. and the source of funds for such payment shall be the Polar Group's share of the proceeds of the sale of assets pursuant to the Mill Agreement.

8) The Polar-Camsell Group recognizes a fee of $1,500. per month payable to Polar Resources Co. from the cash flow generated by the mill for the services of Warren Hunt from the date of commencement of milling operations and also recognizes the need to employ a full time representative at the mine as soon as gold production commences in meaningful amounts.

9) In the event of cost overruns beyond the $1,250,000. U.S. stated in the Mill Agreement, the Polar-Camsell Group acknowledges that it will be responsible for 50% of such overruns. These overruns shall be allocated as between the Polar Group and the Camsell Group as follows:

a) For exploration, mine development, and mine operation expenses on the Big Jim claims 24 and 25 and for mill development expenses related to that mine, 50% shall be paid by the Polar Group and 50% shall be paid by the Camsell Group.

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BOOK 71 PAGE 32

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b) For all other expenses 70% shall be paid by the Polar Group and 30% shall be paid by the Camsell Group.

10) This Agreement is subject to the execution of the Mill Agreement and is subject to revision of the method contemplated in paragraph 1 to arrive at the interests outlined in paragraphs 2, 3, 4 and 5 if subsequent investigation reveals that the tax consequences of such method are adverse. The intent is that the Agreement will be structured so as to minimize adverse tax implications in Canada and the United States for all parties concerned while at the same time arriving at the same distribution of cash flow from the Mining Properties.

11) This Agreement shall be interpreted in accordance with the laws of the Province of Alberta.

12) Each of the parties shall execute any further agreements required by legal counsel for any party to implement the terms or intent of this Agreement.

If you agree with the above terms and conditions please indicate your acceptance on the copy of this letter enclosed.

Yours very truly,

Lambert Management Ltd.

K H Lambert

K. H. Lambert
President

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/mjm
encl:

Accepted this 14th day of March, 1979

Polar Resources Ltd.

C. Warren Hunt
President

Accepted this 14th day of March, 1979

Eltel Holdings Ltd.

K H Lambert

K. H. Lambert
Secretary

Accepted this 14th day of March, 1979

Camsel River Investments

K H Lambert

K. H. Lambert
President

BOOK 71 PAGE 33

LAMBERT ...

Telephone: (403) 233-0047
808 HOME OIL TOWER
324 - 8 AVENUE S.W.
CALGARY, ALBERTA
CANADA T2P 2Z2

Telephone: (403)
13716 - 101 AVE
EDMONTON, AL
CANADA T5N

March 16, 1979

Polar Resources Co.
1119 Sydenham Road, S. W.
Calgary, Alberta
T2T 0T5

Attention: Mr. Warren Hunt

Dear Sirs:

RE: Gold Claims - Lynn Mining District
Eureka County, Nevada

Further to our letter of March 14, 1979 and the writer's meeting with your Messrs. Hunt and Ross Hamilton on March 14, 1979, we wish to confirm that the agreement contained in the said letter is amended by adding the following:

9.1(a) Any funds advanced pursuant to sub paragraph 9(a) shall be repaid pro rata from the Polar-Camsell Group's first cash flow from the mill prior to the commencement of payments to the Camsell Group pursuant to paragraph 2.

9.1(b) Any funds advanced pursuant to sub paragraph 9(b) shall be repaid pro rata from the Polar-Camsell Group's cash flow from the mill after the obligations to the Camsell Group outlined in paragraph 1 have been satisfied.

9.2 The penalty provisions in the Mill Agreement shall apply mutatis mutandis to the Polar Group and the Camsell Group in the event of a default by either Group on an obligation to advance further funds pursuant to paragraph 9.

If you agree with the above additional terms and conditions please indicate your acceptance on the copy of this letter enclosed.

Yours very truly,

Lambert Management Ltd.

K. H. Lambert

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BOOK 71 ... 34

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Attachment to: Polar Resources Co.
March 16, 1979

Accepted this day of March, 1979

Polar Resources Co.

C. Warren Hunt
President

Accepted this 16th day of March, 1979

Eltel Holdings Ltd.

K. H. Lambert
Secretary

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Accepted this 16th day of March, 1979

Camsel River Investments Ltd.

K. H. Lambert
President

BOOK 71 PAGE 35

POLAR RESOURCES CO.
1070 SILVER STREET
ELKO, NEVADA 89801
(702) 738-8712

April 6, 1979

Mr. K. H. Lambert
Lambert Management Ltd.
S808, 324 8th Ave. S.W.
Calgary T2P 222

Dear Sir:

Your letter of March 16 1979 is acknowledged and a copy returned herewith signed as requested.

In accordance with our telephone conversation this morning, in which the writer pointed out that clauses 7b and 7c of the letter agreement of March 14, 1979 were unduly broad in that they might be construed to include Polar's assets which had not been acquired by the joint venture nor in the period of the joint venture, April 1 - Nov. 30, 1976, the following is proposed:

Clause 7 subclause b is amended so that the words " prior to Jan. 1, 1977" are replaced by "between April 1, 1976 and November 30, 1976".

Clause 7 subclause c. The meaning of the word "assets" as used in this subclause is understood to mean properties and equipment acquired by the joint venture or charged by Polar to the joint venture so as to establish equity of contributions of the members of the joint venture, that is to say, Polar Resources Co. and Camsel River Investments Ltd.

If the foregoing meet with your approval, kindly sign a copy hereof and return for our files.

Yours truly,
Polar Resources Co.

C. Warren Hunt, Pres.

See qualifications in letter of April 10/79
Lambert Management
per K H Lambert

BOOK 71 PAGE 36

LAMBERT MANAGEMENT LTD.

Telephone: (403) 233-0047
808 HOME OIL TOWER
8 AVENUE S.W.
CALGARY, ALBERTA
CANADA T2P 2Z2

Telephone: (403) 454-26[illegible]
13716 - 101 AVENUE,
EDMONTON, ALBERTA
CANADA T5N 0J7

April 10, 1979

Polar Resources Co.
1119 Sydenham Road S.W.
Calgary, Alberta
T2T 0T5

ATTENTION: Mr. Warren C. Hunt

Dear Sirs:

RE: Gold Claims Lynn Mining District
Eureka County, Nevada

Further to your letter of April 6, 1979, we wish to confirm our agreement that clauses 7b and 7c of our letter agreement of March 14, 1979 have not been drafted to contemplate assets to be sold under the Mill Agreement. We agree that the language should be changed.

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We are prepared to accept your suggested change for sub clause 7b provided that the 80.4% figure is changed to reflect the actual percentage of the total funds used by Polar between April 1 and November 30, 1976 which was injected by the Camsell Group. Your auditor could provide us with that percentage.

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We accept your clarification of the word "assets" in sub clause 7c and would also suggest that the 80.4% figure used in sub clause 7c should be changed to the same percentage as will be used in subclause 7b.

If the foregoing meets with your approval, kindly sign the enclosed copy of this letter and return it for our files.

Yours very truly,

LAMBERT MANAGEMENT LTD.

K.H. Lambert

K.H. Lambert
President

KHL/rs

Enc.

Accepted this 17th day of April, 1979

POLAR RESOURCES LTD.

PER: _____

BOOK 71 PAGE 37

EXHIBIT 2

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DANIEL F. POLSENBERG
Nevada Bar No. 2376
JOEL D. HENRIOD
Nevada Bar No. 8492
ABRAHAM G. SMITH
Nevada Bar No. 13,250
LEWIS ROCA ROTHGERBER CHRISTIE LLP
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CBrust@RSSBLaw.com

Attorneys for Plaintiff
Bullion Monarch Mining, Inc.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BULLION MONARCH MINING, INC., Plaintiff, *vs.* BARRICK GOLDSTRIKE MINES, INC., Defendant.	Case No. 03:09-CV-612-MMD-WGC **NOTICE OF APPEAL**

Notice is hereby given that plaintiff BULLION MONARCH MINING, INC. hereby appeals to the United States Court of Appeals for the Ninth Circuit from:

1. The "Order" granting defendant's motion to dismiss and dismissing plaintiff's claims, entered on November 1, 2018 (ECF No. 302);

2. The "Judgment in a Civil Case," entered on November 1, 2018 (ECF No. 303); and

3. Various interlocutory rulings and orders made appealable by the foregoing.

Dated this 20th day of November, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*

DANIEL F. POLSENBERG
Nevada Bar No. 2376
JOEL D. HENRIOD
Nevada Bar No. 8492
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Nevada Bar No. 1167
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71 Washington Street
Reno, Nevada 89503

Attorneys for Plaintiff

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REPRESENTATION STATEMENT

Pursuant to Federal Rule of Appellate Procedure 12(b) and Circuit Rules 3-2(b) and 12-2, the following is a list of all parties and their respective counsel:

PARTY	COUNSEL REPRESENTING PARTY
BULLION MONARCH MINING	DANIEL F. POLSENBERG DPolsenberg@LRRC.com JOEL D. HENRIOD JHenriod@LRRC.com ABRAHAM G. SMITH ASmith@LRRC.com LEWIS ROCA ROTHGERBER CHRISTIE LLP 3993 Howard Hughes Parkway, Suite 600 Las Vegas, Nevada 89169 Telephone: (702) 949-8200 Facsimile: (702) 949-8398 CLAYTON P. BRUST CBrust@RSSBLaw.com KENT R. ROBISON KRobison@RSSBLaw.com ROBISON, SHARP, SULLIVAN & BRUST, P.C. 71 Washington Street Reno, Nevada 89503 Telephone: (775) 329-3151 Facsimile: (775) 329-7941
BARRICK GOLDSTRIKE MINES, INC.	MICHAEL R. KEALY MKealy@ParsonsBehle.com PARSONS BEHLE & LATIMER 50 West Liberty Street, Suite 750 Reno, Nevada 89501 Telephone: (775) 323-1601 Facsimile: (775) 348-7250 FRANCIS W. WIKSTROM FWikstrom@ParsonsBehle.com MICHAEL P. PETROGEORGE ECF@ParsonsBehle.com BRANDON J. MARK BMark@ParsonsBehle.com PARSONS BEHLE & LATIMER One Utah Center 201 South Main Street, Suite 1800 Salt Lake City, Utah 84111 Telephone: (801) 536-6700 Facsimile: (801) 536-6111

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5 and Local Rule 5-4, I certify that I electronically transmitted the foregoing "Notice of Appeal" for service through the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Michael R. Kealy
50 West Liberty Street, Suite 750
Reno, Nevada 89501
mkealy@parsonsbehle.com

Francis M. Wikstrom
Michael P. Petrogeorge
Brandon J. Mark
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
ecf@parsonsbehle.com

Dated this 20th day of November, 2018.

/s/ Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

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EXHIBIT 3

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Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

Molly C. Dwyer
Clerk of Court

November 21, 2018

No.:	18-17246
D.C. No.:	3:09-cv-00612-MMD-WGC
Short Title:	Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.

Dear Appellant/Counsel

A copy of your notice of appeal/petition has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

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Please furnish this docket number immediately to the court reporter if you place an order, or have placed an order, for portions of the trial transcripts. The court reporter will need this docket number when communicating with this court.

The due dates for filing the parties' briefs and otherwise perfecting the appeal have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the appellant to comply with the time schedule order will result in automatic dismissal of the appeal. 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 21 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BULLION MONARCH MINING, INC.,

Plaintiff - Appellant,

v.

BARRICK GOLDSTRIKE MINES, INC.,

Defendant - Appellee.

No. 18-17246

D.C. No. 3:09-cv-00612-MMD-WGC
U.S. District Court for Nevada, Reno

TIME SCHEDULE ORDER

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The parties shall meet the following time schedule.

If there were reported hearings, the parties shall designate and, if necessary, cross-designate the transcripts pursuant to 9th Cir. R. 10-3.1. If there were no reported hearings, the transcript deadlines do not apply.

Wed., November 28, 2018	Mediation Questionnaire due. If your registration for Appellate ECF is confirmed after this date, the Mediation Questionnaire is due within one day of receiving the email from PACER confirming your registration.
Thu., December 20, 2018	Transcript shall be ordered.
Tue., January 22, 2019	Transcript shall be filed by court reporter.
Thu., February 28, 2019	Appellant's opening brief and excerpts of record shall be served and filed pursuant to FRAP 31 and 9th Cir. R. 31-2.1.

Mon., April 1, 2019	Appellee's answering brief and excerpts of record shall be served and filed pursuant to FRAP 31 and 9th Cir. R. 31-2.1.

The optional appellant's reply brief shall be filed and served within 21 days of service of the appellee's brief, pursuant to FRAP 31 and 9th Cir. R. 31-2.1.

Failure of the appellant to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: John Brendan Sigel
Deputy Clerk
Ninth Circuit Rule 27-7

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EXHIBIT 4

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JHenriod@LRRC.com
ASmith@LRRC.com

Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

BULLION MONARCH MINING, INC., Plaintiff, *vs.* BARRICK GOLDSTRIKE MINES, INC.; BARRICK GOLD EXPLORATION INC.; ABX FINANCECO INC.; BARRICK GOLD CORPORATION; and DOES 1 through 20, Defendants.	Case No.: Dep't No.: **COMPLAINT** ***(Jury Trial Demanded)*** Business court requested (EDCR 1.61(a)(2)(ii), (iii)) Exempt from arbitration (NAR 3(A)): Probable award in excess of $50,000, declaratory relief, and equitable relief

Bullion Monarch Mining, Inc. ("Bullion") alleges as its complaint:

PARTIES AND JURISDICTION

1. Bullion is a Utah corporation doing business in Nevada at all times relevant hereto.

2. Barrick Goldstrike Mines, Inc. ("Goldstrike") is a Colorado corporation doing business in Nevada at all times relevant hereto.

3. Barrick Gold Exploration Inc. ("Exploration") is a Delaware corporation doing business in Nevada at all times relevant hereto. Exploration is—and at all relevant times was—the 100% owner of Goldstrike.

4. ABX Financeco Inc. ("ABX") is a Delaware corporation doing business in Nevada at all times relevant hereto. ABX is—and at all relevant times was—the 100% owner of Exploration.

5. Barrick Gold Corporation ("Barrick Gold") is an Ontario corporation doing business in Nevada at all times relevant hereto. Barrick Gold is—and at all relevant times was—the 100% owner of ABX.

6. Bullion does not know the true names or capacities of some defendants and therefore sues them by fictitious "Doe" designations. Bullion will amend the complaint once it ascertains the Doe defendants' true names and capacities.

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7. Upon information and belief, one or more defendants maintain offices in Henderson, Nevada.

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8. This Court has jurisdiction over defendants under NRS 14.065(1) and the United States Constitution because defendants have sufficient minimum contacts directed toward Nevada, and this suit arises out of those Nevada contacts.

9. This Court has subject-matter jurisdiction under Article 6, section 6(1) of the Nevada Constitution and NRS 4.370(1)(a) because Bullion seeks damages in excess of $15,000.

10. It is also appropriate to commence the action in this Court pursuant to NRS 13.010 and 13.040.

FACTS

11. Through the 1970s, Bullion's predecessor in interest, Bullion Monarch Company (also "Bullion"), had prospected extensively in Nevada's Carlin Trend, acquiring valuable mining claims throughout the area.

12. In 1979, four prospective members of a joint venture negotiated with Bullion to give up both its mining claims in a particularly profitable area and also to refrain from competing for any other property in the surrounding area.

13. On May 10, 1979, Bullion and defendants' predecessors in interest, Universal Explorations, Ltd. and Universal Gas, Inc. ("Universal"), entered into an agreement to give Bullion a royalty based on production from any mining operations within an area described in Exhibit A-1 to the Agreement (the original "Subject Property") and from property acquired within an area of interest described in Exhibit A-2 (the "Area of Interest"). A copy of the 1979 Agreement is attached as Exhibit 1.

14. The term of the 1979 Agreement is 99 years, through 2078.

15. Under paragraph 11 of the 1979 Agreement, the Area of Interest provision applies to all mining interests acquired by the other parties to the 1979 Agreement, or by their successors in interest, within the Area of Interest, whether by "leasing or purchase of private lands and minerals, or unpatented mining claims." All of such acquired mining interests become subject to the terms and conditions of the 1979 Agreement, including the royalty on Subject Property. The Area of Interest is located in Eureka and Elko Counties in the State of Nevada.

16. In exchange for this royalty, Bullion was functionally excluded from prospecting in or acquiring any other interest in the Area of Interest through 2078 and from sharing directly in the proceeds of the joint venture.

17. Further, in the event a mining interest from within the Area of Interest was or is used to acquire mining interests outside the Area of Interest, Bullion's royalty interest would also follow to the new property. Upon information and belief, this has occurred.

18. Bullion's royalty under this 1979 Agreement was threefold. First, it

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applied to production from the original claims Bullion transferred to the venture, claims that formed the core of the venture's original "Subject Property." Second, as Universal (or its successors) acquired additional property in the area surrounding Bullion's claims—the "area of interest" in which Bullion was prohibited from competing—the "Subject Property" as between Universal and Bullion would expand to subject those claims to the same royalty. If the co-venturers exercised their right to share in the acquisition costs of any area-of-interest property, that property would become "Subject Property" of the venture for all purposes. But even if the co-venturers declined, Bullion was still entitled to its royalty as that property would have become "Subject Property" as between Universal and Bullion. Third, paragraph 18 of the 1979 Agreement provides that the rights and obligations of the parties, including the obligation to pay Bullion's royalty and Bullion's obligation not to compete, "inure to the benefit of and [are] binding upon the successors and assigns of the parties hereto."

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19. In all cases, the royalty began with a series of fixed payments up to $1 million, and was thereafter limited to a 1% gross smelter return (GSR) royalty based upon mineral production. Bullion may elect to take any monthly production royalty in kind but is responsible for loading and transportation.

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20. In 1984 and 1986, two joint venture agreements shifted the operation from Universal to Nicor Mineral Ventures, Inc., although Universal's successor, Petrol Oil & Gas Co., continued to be a member of those ventures. Nicor agreed to "make or arrange for *all payments* required by the Existing Agreements," which includes the 1979 Agreement. (1984 Venture Agreement § 8.2(e); 1986 Venture Agreement § 8.2(e) (emphasis added).)

21. On April 26, 1990, High Desert Mineral Resources of Nevada, Inc. ("High Desert") entered into an option agreement with the 1986 joint venture (known as the "Bullion-Monarch Joint Venture" but unrelated to Bullion), which granted to High Desert the option to acquire all of the Subject Property

under the 1979 Agreement. Further, pursuant to the terms of the Option Agreement, if High Desert exercised the option, High Desert agreed to assume and become liable for all of the obligations, rentals, royalties, and other payments due, or to become due, under the 1979 Agreement.

22. On July 10, 1990, High Desert exercised the option and became subject to all of the terms, obligations, and conditions of the 1979 Agreement, including the Area of Interest provision, and became obligated to pay all of the obligations, rentals, royalties, and other payments due, or to become due, under the 1979 Agreement.

23. On December 23, 1991, High Desert entered into an agreement with Newmont Gold Company ("Newmont") by which High Desert and Newmont agreed to share responsibility for any royalties and obligations due to Bullion pursuant to the 1979 Agreement.

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24. Between July 10, 1990 and today, upon information and belief, defendants have entered into various agreements with High Desert, the principals in High Desert, and/or entities directly owned by or related to High Desert or its principals. As a result of these agreements, defendants and/or mineral properties in which defendants had an interest, or acquired an interest, became subject to the terms, obligations, and conditions of the 1979 Agreement, including the obligation for payment of a royalty to plaintiff based upon production from said mineral properties since these properties are located within the Area of Interest.

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25. Between December 23, 1991 and today, upon information and belief, defendants have entered into entered into various agreements with Newmont. As a result of these agreements, defendants and/or mineral properties in which defendants had an interest, or acquired an interest, became subject to the terms, obligations and conditions of the 1979 Agreement, including the obligation for payment of a royalty to Bullion based upon production from said prop-

erties since these properties are located within the Area of Interest.

26. Defendants, through a succession of companies, including, but not limited to Barrick HD Inc., are successors in interest to High Desert Mineral Resources of Nevada, Inc. In 1995, Goldstrike acquired and/or merged with High Desert Mineral Resources of Nevada, Inc., with Goldstrike being the surviving company. As a result of the merger, Goldstrike is obligated to perform all of High Desert's obligations which resulted from High Desert's exercise of the 1990 Option Agreement and all of High Desert's obligations which resulted from High Desert entering into a joint venture with Newmont on December 23, 1991.

27. [redacted]

28. [redacted]

a. [redacted]

b. [redacted]

c. [redacted]

[redacted]

29. Further, since defendants are the corporate successors to High Desert Mineral Resources of Nevada, Inc., defendants are responsible for all royalties and obligations due to Bullion pursuant to the May 10, 1979 Agreement.

30. Bullion originally filed these claims against Goldstrike on June 22, 2009 in the U.S. District Court for the District of Nevada. For more than eight years, the claims went forward based on Goldstrike's representation that it was not contesting the federal court's diversity jurisdiction. On September 8, 2017, however, Goldstrike for the first time filed a motion to dismiss contesting jurisdiction. (Case No. 3:09-cv-00612-MMD-WGC, ECF 260.)

31. That motion was initially denied without prejudice to allow for jurisdictional discovery. (ECF 268.)

32. After discovery, Barrick refiled its motion (ECF 281), which the district court granted on November 1, 2018. (ECF 302.)

33. Bullion believes there is still federal jurisdiction and is appealing the district court's order. (ECF 306.)

34. Nonetheless, Bullion is filing this complaint in an abundance of caution.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

35. Bullion incorporates the foregoing allegations in this claim.

36. An actual legal controversy exists between Bullion and defendants as to whether defendants owe Bullion a royalty and/or compensation for production of minerals from property in the Area of Interest.

37. Bullion and defendants have adverse legal positions with respect to their existing legal controversy, and Bullion has a legally protectable interest as to whether it is entitled to a royalty and/or compensation for mining activities and production from within the Area of Interest.

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38. The existing legal controversy between Bullion and defendants is ripe for judicial determination.

39. As a result of the parties' dispute as to whether Bullion is entitled to royalties, Bullion seeks a declaratory judgment from this Court declaring that Bullion is entitled to the royalties from one or both of the defendants for production from within the Area of Interest.

SECOND CLAIM FOR RELIEF
(Breach of Contract)

40. Bullion incorporates the foregoing allegations in this claim.

41. Defendants are obligated to pay Bullion royalties on the production from mining activities pursuant to the 1979 Agreement as described above.

42. Defendants have materially breached the terms of the 1979 Agreement.

43. As a direct and proximate result of defendants' breach, Bullion has suffered general and special damages in excess of $15,000.

44. Bullion has also been forced to retain counsel to pursue this action and has incurred attorney's fees as a result of defendants' breach.

THIRD CLAIM FOR RELIEF
(Breach of the Covenant of Good Faith and Fair Dealing)

45. Bullion incorporates the foregoing allegations in this claim.

46. Nevada law implies into each contract or agreement a covenant of good faith and fair dealing.

47. The 1979 Agreement and other agreements in this matter include an implied, if not express, covenant of good faith and fair dealing.

48. The acts and omissions of defendants, as described above, have deprived Bullion both of benefits that Bullion had bargained for directly with defendants' predecessors in interest, and of rights which Bullion enjoyed as a third-party beneficiary.

49. As a sole, direct and proximate result of the foregoing, Bullion has been damaged in a sum in excess of $15,000.00, to be more precisely proven at trial.

50. Bullion has also been forced to retain counsel to pursue this action and has incurred attorney's fees as a result of defendants' breach.

FOURTH CLAIM FOR RELIEF
(Unjust Enrichment)

51. Bullion incorporates the foregoing allegations in this claim.

52. Bullion allowed defendants and defendants' predecessors in interest to explore and mine in areas where Bullion had established claims and refrained from further exploration and mining activities in the Area of Interest as described above.

53. Defendants and defendants' predecessors in interest accepted Bullion's property rights and agreement to refrain from further exploration/mining activities and enjoyed their use.

54. In exchange for relinquishment of such property rights and exploration and mining rights pursuant to the Agreement, Bullion expected to be paid and is entitled to be paid its royalty for production from the Area of Interest.

55. Bullion has not been paid for the amount it has enriched defendants.

56. Defendants have been unjustly enriched by Bullion.

57. Bullion is entitled to compensation for the amount defendants have been unjustly enriched.

58. Bullion has also been forced to retain counsel to pursue this action and has incurred attorney's fees as a result of defendants' actions.

FIFTH CLAIM FOR RELIEF
(Accounting)

59. Bullion incorporates the foregoing allegations in this claim.

60. Bullion seeks an accounting of all royalties owed to Bullion for mining activities of defendants in the Area of Interest.

61. Bullion has made a demand upon Goldstrike, and hereby makes a demand upon Exploration, EBX, and Barrick Gold, to provide accounting records for defendants' mining activities in the Area of Interest.

62. Bullion seeks an order from this Court directing defendants to provide an accounting of their mining activities in the Area of Interest.

63. Bullion has also been forced to retain counsel to pursue this action and has incurred attorney's fees as a result of defendants' actions.

PRAYER FOR RELIEF

Wherefore, Bullion prays for judgment and an accounting against defendants, as follows:

1. A judgment declaring defendants' obligation to pay royalties based upon production from the Area of Interest as provided by the 1979 Agreement;

2. A judgment of special and general damages in an amount in excess of $15,000;

3. An order awarding prejudgment interest;

4. An accounting of all royalties owed to Bullion for mining activities of defendants in the Area of Interest;

5. An order awarding reasonable attorney's fees and costs of suit incurred herein;

6. A jury trial on all issues so triable; and

7. Such other and further relief as the Court determines to be appropriate under the circumstances.

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6. A jury trial on all issues so triable; and

7. Such other and further relief as the Court determines to be appropriate under the circumstances.

Dated this 6th day of December, 2018.

ROBISON, SHARP, SULLIVAN & BRUST, P.C.

By: _____

CLAYTON P. BRUST (SBN 5234)
KENT ROBISON (SBN 1167)
71 Washington Street
Reno, Nevada 89503

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: _____

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169

Attorneys for Plaintiff

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EXHIBIT 1

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EXHIBIT 1

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AGREEMENT

THIS AGREEMENT is made and entered into as of the 10th day of May, 1979 by and between the following parties:

BULLION MONARCH COMPANY, a Utah corporation (BULLION);

POLAR RESOURCES CO., a Nevada corporation (POLAR);

UNIVERSAL GAS (MONTANA), INC., a Montana corporation, and UNIVERSAL EXPLORATIONS, LTD., a Canadian corporation (UNIVERSAL);

CAMSELL RIVER INVESTMENTS, LTD., a Canadian corporation (CAMSELL);

LAMBERT MANAGEMENT LTD., a Canadian corporation (LAMBERT); and

ELTEL HOLDINGS LTD., a Canadian corporation (ELTEL);

W I T N E S S E T H:

WHEREAS the parties hereto would all profit from the mining of and production of certain mining properties located in the Lynn Mining District, Eureka County, Nevada, more fully described in Exhibit A-1 attached hereto and incorporated herein by reference, hereinafter collectively referred to as the "Subject Property;" and

WHEREAS the parties have interest in exploring a wider range of mineral properties in which the Subject Property is embedded, hereinafter referred to as the "Area of Interest," more fully described in Exhibit A-2 attached hereto and incorporated herein by reference; and

WHEREAS the parties hereto are desirous of developing the Subject Property's mineral potential by building adequate milling facilities and developing a mine ("the Project"); and

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WHEREAS BULLION purports to own a royalty interest in and to the Subject Property as is more fully set forth in Exhibit A-1; and

WHEREAS POLAR purports to own a 100% interest in and to part of the Subject Property as is more fully set forth in Exhibit A-1, subject to possible outstanding interests and royalties, purports to own a 100% interest in and to other portions of the Subject Property as is more fully set forth in Exhibit A-1, and has under a Lease and Option a 77½% interest to other portions of the Subject Property; and

WHEREAS CAMSELL, LAMBERT and ELTEL are interrelated organizations acting in concert as to the Subject Property, collectively being referred to hereinafter as "CAMSELL" unless specifically referred to otherwise, and have invested monies in the development of the Subject Property to date, their interest and relationship to the Project being governed by that certain Letter Agreement with POLAR dated March 14, 1979, as amended by the letters of March 16, 1979, April 6, 1979 and April 10, 1979, attached thereto, all attached hereto as Exhibit B; and

WHEREAS UNIVERSAL GAS (MONTANA), INC. is presently financing further development of the mining and production potential of the Subject Property, primarily for the production of precious metals basically under the terms of that certain Agreement with POLAR dated March 14, 1979 attached hereto as Exhibit C; and

WHEREAS UNIVERSAL EXPLORATIONS, LTD. is prepared and able to guarantee the financial obligations of UNIVERSAL GAS (MONTANA) INC. contained herein, both corporations will be collectively referred to as UNIVERSAL herein with the understanding amongst the

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parties hereto that UNIVERSAL GAS (MONTANA), INC. will be the active participant referred to as UNIVERSAL while any reference to UNIVERSAL EXPLORATIONS, LTD. under the collective term UNIVERSAL speaks only to its financial backing of the UNIVERSAL obligations recited herein;

NOW THEREFORE, in consideration of the conditions, covenants, promises, obligations, payments and agreements herein contained, the parties agree as follows:

1. SOLE AGREEMENT: That as between the parties hereto this Agreement shall be the sole and only agreement governing the ownership, operations and payment from the Subject Property, cancelling, revoking, rescinding and terminating any and all other deeds, conveyances, contracts or agreements between the parties hereto, or any combination thereof, affecting the Subject Property, except any agreement that may exist between CAMSELL, LAMBERT and ELTEL as to investment in Subject Property development and divisions of proceeds received therefrom, and except any agreement, contract or deed specifically preserved by the terms hereof. Should the terms of any agreement, letter agreement or other document or understanding preserved by specific reference herein be in conflict with this Agreement the terms of this Agreement shall control.

2. OWNERSHIP OF SUBJECT PROPERTY: That as between the parties hereto it is understood and agreed that the ownership of the Subject Property as presently constituted is as set forth in Exhibit A attached hereto, subject only to the terms and conditions of this Agreement specifically referred to herein. In addition, it is understood, agreed and warranted amongst the parties hereto that except

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for agreements, deeds and other documents specifically mentioned herein that none of the parties hereto, individually, in combination or collectively, have conveyed or encumbered the Subject Property.

A. Simultaneously herewith, BULLION shall execute and deliver a Grant Deed to UNIVERSAL conveying all of its right, title and interest in the Subject Property to UNIVERAL. Such interest of BULLION conveyed to UNIVERSAL shall be subject to the payment provisions of Paragraph 4, infra.

B. Simultaneously herewith, POLAR shall execute and deliver a Grant Deed to UNIVERSAL conveying all of its right, title and interest in the Subject Property to UNIVERSAL, subject to the terms and conditions of the March 14, 1979 POLAR - UNIVERSAL Agreement.

C. Simultaneously herewith, CAMSELL shall execute and deliver a Quitclaim Deed to UNIVERSAL conveying and quitclaiming all of its right, title and interest in the Subject Property to UNIVERSAL.

D. At all times pertinent hereto, UNIVERSAL shall have the right to pledge or otherwise hypothecate the titles to any portions, or the whole of, the Subject Property for the purpose of obtaining financing for development of the Subject Property, except that no more than a total of FIFTY PERCENT (50%) of the then current market value of such property shall be so hypothecated or encumbered. At the time, under the March 14, 1979 Agreement, Exhibit C, UNIVERSAL reaches the "earning point", its conveyance to POLAR of 50% interest shall be unencumbered.

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3. UNIVERSAL AS OPERATOR: That on March 14, 1979 POLAR and UNIVERSAL entered into an Agreement, a copy of which is attached hereto as Exhibit C and incorporated herein by reference, whereby UNIVERSAL, under the terms and conditions thereof, was to become the sole and only operator of the mineral production from the Subject Property as of March 1, 1979, and that all of the parties hereto agree to the terms of said Agreement allowing UNIVERSAL the sole and only control over further development and production from the Subject Property pursuant to the March 14, 1979 Agreement and ratify the same as if they had been signatory thereto.

4. PAYMENTS TO BULLION:

A. Commencing May 1, 1979, UNIVERSAL shall pay to BULLION an advance minimum royalty of $2,500.00 each and every month through October of 1979 or until gross production sales from the Subject Property have reached the amount of $62,500.00 per month, whichever comes first.

B. Commencing on November 1, 1979, UNIVERSAL shall pay to BULLION an advance minimum royalty of $5,000.00 each and every month until gross production sales from the Subject Property has reached the amount of $125,000.00 per month, or until BULLION has received an aggregate of $250,000.00 under these subparagraphs, A and B.

C. BULLION shall receive a FOUR PERCENT (4%) gross smelter return from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated) until BULLION has received an aggregate of $500,000.00 under these subparagraphs, A, B and C.

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D. Thereafter BULLION shall receive a TWO PERCENT (2%) gross smelter return royalty from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated) until BULLION has received an aggregate of $1,000,000.00 under these subparagraphs, A, B, C and D.

E. Thereafter BULLION shall receive a ONE PERCENT (1%) gross smelter return royalty from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated).

"Gross smelter return," as used above, shall mean the amount of earned revenues, as used in accordance with generally accepted accounting principles, payable to UNIVERSAL by any smelter or other purchaser of metals, ores, minerals or mineral substances, or concentrates produced therefrom for products mined from the Subject Property.

Upon SIXTY (60) days' written notice by BULLION to UNIVERSAL, BULLION may elect to take any monthly production royalty in kind but will be totally responsible for all loading and transportation and the costs thereof. BULLION agrees not to materially interfere with UNIVERSAL's operations should it elect to receive payment in kind, and will hold all the remaining parties hereto harmless from its actions in loading and transporting the in kind payments.

All advance royalty payments shall be due on the first day of each month and all production royalties shall be due no later than FORTY-FIVE (45) days after the date payment for production sales is received by UNIVERSAL.

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5. OBLIGATIONS OF BULLION AND POLAR: BULLION and POLAR shall assume and retain all obligations that they have independently incurred by virtue of their activities on and for the Subject Property prior to the date of this Agreement and, in particular, BULLION shall assume and retain the obligation of that certain Deed of Trust made in favor of Ira J. Jaffee, Trustee, as Beneficiary, recorded in the Official Records of Eureka County, Nevada, Book 41, Page 362. At all times pertinent hereto, UNIVERSAL shall have the unqualified right to direct any and all funds due BULLION or POLAR hereunder to remove any obligations of BULLION or POLAR, respectively, secured by the Subject Property, or any portion thereof, and such will be credited toward the payment schedule due BULLION or POLAR. See Paragraph 4, supra.

6. PURCHASE OF BULLION'S INTEREST: That at the time BULLION has received an aggregate of $1,000,000.00 under the terms and conditions of Paragraph 4, supra, BULLION will have been deemed to have sold and UNIVERSAL and POLAR deemed to have purchased all of BULLION's right, title and interest in the Subject Property (50% each, subject to the terms and conditions of the March 14, 1979 Agreement, Exhibit C) and forever releiving UNIVERSAL and POLAR from any contractual commitment to BULLION by virtue of UNIVERSAL's or POLAR's actions or operations on the Subject Property, save and except for the ONE PERCENT (1%) gross smelter return royalty from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated) set forth in Paragraph 4(E), supra. At that time, UNIVERSAL and POLAR will execute and deliver

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to BULLION a Royalty Deed forever evidencing such royalty interest, ONE-HALF PERCENT (1/2%) being chargeable each against UNIVERSAL and POLAR.

7. DEFAULT OF OBLIGATIONS TO BULLION: If, at any time, UNIVERSAL is in default of its payment obligations to BULLION, BULLION, upon FORTY-FIVE (45) days' written notice to all of the parties hereto, may terminate this Agreement and demand that UNIVERSAL execute and deliver to BULLION a Quitclaim Deed of all of its right, title and interest to that portion of the then Subject Property that is specifically listed in Exhibit A-1 attached hereto, but not the additional properties added to the Subject Property list subsequent to the date of this Agreement. During the notice period, UNIVERSAL, or any other party hereto not BULLION, or anyone on their behalf, may pay such obligation to BULLION and cure such default.

8. PRODUCTION EXPENSE OVERRUN: Pursuant to the terms of the Letter Agreement between POLAR and CAMSELL dated March 14, 1979, Exhibit B, POLAR and CAMSELL agree to share in cost overruns incurred by UNIVERSAL in bringing the Project into production should UNIVERSAL's initial development costs prior to production exceed ONE MILLION TWO HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS ($1,250,000.00), or should UNIVERSAL's initial development costs and production costs exceed $1,250,000.00 at any time after production commences but production expenses exceed production payments or revenues.

The parties agree to share in cost overruns in excess of $1,250,000.00 commitment of UNIVERSAL in the following percentages:

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UNIVERSAL	50%
POLAR-CAMSELL	50%

Except as herein outlined, the terms, conditions and penalties for cost overruns and the non-participation in such overruns are governed by Clause 10(D), Schedule B, POLAR - UNIVERSAL Agreement of March 14, 1979.

9. DIVISION OF PROCEEDS: The proceeds of production shall be governed by the terms of this Agreement only (except for the CAMSELL, LAMBERT and ELTEL arrangements). As operator under the March 14, 1979 Agreement (see Paragraph 3, supra), UNIVERSAL shall have the right to pay all normal operating and production expenses, including insurance and taxes (excepting income taxes accruing to the invidivual parties hereto, but specifically including net proceeds of mine taxes, real and personal property taxes associated with mining and income taxes accruing to the venture), pursuant to normal and usual accounting practices and the terms of the March 14, 1979 Agreement from production payments received. In addition, UNIVERSAL shall be able to treat as production expenses and deduct from production payments received all rentals, advance royalties and production royalties paid to BULLION, the Poulsen Group and any others. The amounts received from products produced from the Subject (production payments) less the production expenses, as defined herein and in the March 14, 1979 Agreement between POLAR and UNIVERSAL, shall be the net production receipts.

As between the parties hereto, the net production receipts shall be divided as follows:

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A. BULLION: none, being only entitled to the payments set forth above in Paragraph 4;

B. UNIVERSAL: FIFTY PERCENT (50%); and

C. POLAR, CAMSELL: FIFTY PERCENT (50%), pursuant to that Letter Agreement between POLAR and CAMSELL dated March 14, 1979, Exhibit B.

Nothing herein shall be construed as prohibiting POLAR-CAMSELL from taking their interest in kind provided that they give UNIVERSAL SIXTY (60) days' written notice of such election. POLAR-CAMSELL will be totally responsible for all loading and transportation and the costs thereof. POLAR-CAMSELL will not materially interfere with UNIVERSAL's operations should it elect to recieve payment in kind and will hold all the remaining parties hereto harmless from its actions in loading and transporting the in kind payments. It is understood and agreed that all such in kind payments are net, after deduction of the proportionate amount of mining and operation costs.

10. TERMINATION BY UNIVERSAL: UNIVERSAL's participation in the Project is governed by the terms and conditions of the POLAR - UNIVERSAL Agreement of March 14, 1979, Exhibit C, except as specifically modified herein. Upon fulfilling its obligations thereunder, UNIVERSAL has the right to terminate its position as Project Operator and to terminate its further participation in Project development and expenses thereof. Such termination is governed by the terms and conditions of the March 14, 1979 UNIVERSAL - POLAR Agreement and, in particular, Schedule B attached thereto.

11. ADDITIONAL PROPERTY ACQUISITIONS: UNIVERSAL, as operator, shall have the exclusive right to acquire additional

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mineral properties within the Area of Interest on behalf of the parties hereto, be such acquisition by virtue of the rights and privileges under the 1872 Mining Law, or the leasing or purchase of private lands and minerals, or unpatented mining claims. All parties hereto agree to immediately quitclaim and assign to UNIVERSAL any and all other real property or interest in such that they may have within the Area of Interest, Exhibit A-2, as of the date of this Agreement, subjecting the same to the terms and conditions of this Agreement, excepting any interest of BULLION in and to those porperties presently being worked by Western States Minerals (Pancana).

Upon acquiring such properties within the Area of Interest, UNIVERSAL shall offer to include such into the Subject Property upon payment by POLAR-CAMSELL of FIFTY PERCENT (50%) of all acquisition costs incurred in acquiring such properties. Acquisition costs shall include, but are not limited to, purchase price, rental fees, real estate or finder's commissions, legal fees, closing costs, title examinations, appraisal fees and costs incurred by UNIVERSAL in otherwise evaluating the property to be acquired.

Should POLAR-CAMSELL reject such offer or fail to pay or reach agreement for paying such acquisition costs within FORTY-FIVE (45) days of such offer by UNIVERSAL, then such properties within the Area of Interest shall not become part of the Subject Property as they apply to POLAR-CAMSELL and will remain the sole property of UNIVERSAL without any obligations to POLAR-CAMSELL, but subject to the royalty interest of BULLION.

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However, should POLAR accept such offer and pay or reach an agreement with UNIVERSAL for paying such acquisitions costs, the newly acquired properties shall become part of the Subject Property and will be treated thereafter under the terms of this Agreement pertaining to the Subject Property.

12. POULSEN LEASE AND OPTION: The parties hereto recognize the Lease and Option of POLAR with the Poulsens, a copy of which is attached hereto as Exhibit D. UNIVERSAL shall make all payments due thereunder and shall credit such as a development or production expense.

While under Lease, the Poulsen properties shall be, and are, part of the Subject Property, however, at any time, UNIVERSAL may elect to exercise the purchase option. Upon doing so, UNIVERSAL shall offer such to POLAR-CAMSELL under the terms of Paragraph 12, supra. Failure of POLAR-CAMSELL to participate in the acquisition (purchse) costs shall remove such properties from Subject Property status as the same applies to POLAR-CAMSELL.

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13. TERM: The term of this Agreement, as it affects the continuing contractual relationships between the parties hereto, is for a period of NINETY-NINE (99) years commencing on the date hereof, unless sooner terminated, surrendered or forfeited.

14. TITLE PERFECTION: The parties hereto recognize that title to the Subject Property, or portions thereof, may contain certain imperfections, clouds thereon or outstanding interests that may require acquisition, clearing or otherwise perfecting. UNIVERSAL shall, in its discretion, seek out such imperfections and cure the same. All expenses incurred by UNIVERSAL in investi-

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gating title to the Subject Property from March 1, 1979, and curing imperfections or acquiring outstanding interests in the same shall be treated as a development or production expense by UNIVERSAL pursuant to the March 14, 1979 POLAR - UNIVERSAL Agreement.

15. INSPECTION, RECORDS: At all times pertinent hereto, the non-operating parties shall have the right to reasonable inspection of the Subject Property and all geological and production records upon giving FIVE (5) days' written notice to UNIVERSAL. Such inspection shall be at the Subject Property or at any offices of UNIVERSAL in the Elko-Carlin, Nevada area. Personal inquiry by the parties hereto directly to UNIVERSAL shall be made only to the following UNIVERSAL officers and employees, and no others:

Joseph A. Mercier
Dan Mercier
Don Hargrove

or their nominees.

Monthly, on the monthly anniversary of this Agreement, UNIVERSAL shall prepare and deliver to the parties hereto a summary report of development on the Subject Property, including building construction, geological finds, etc., and setting forth production and development expenditures.

16. NOTICES: All notices required herein shall be in writing by certified or registered mail, (United States or Canada, as the case may be), return receipt requested (or the Canadian equivalent of such service), to the addresses listed below. Service of such notice is to be deemed accomplished as of the date of mailing:

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BULLION MONARCH COMPANY
Attention: R. D. Morris
Henderson Bank Building
Elko, NV 89801

UNIVERSAL GAS (MONTANA), INC.
Attention: Joe Mercier, President
640 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 1G7

With a copy to: UNIVERSAL GAS (MONTANA), INC.
Attention: John C. Miller, Esq.
Blohm Building, Suite 201
Elko, NV 89801

POLAR RESOURCES CO.
Attention: C. Warren Hunt
1119 Sydenham Road, S. W.
Calgary, Alberta
CANADA T2T 0T5

CAMSELL RIVER INVESTMENTS
Attention: K. H. Lambert
808 Home Oil Tower
324 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 2Z2

LAMBERT MANAGEMENT LTD.
Attention: K. H. Lambert
808 Home Oil Tower
324 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 2Z2

ELTEL HOLDINGS LTD.
Attention: K. H. Lambert
808 Home Oil Tower
324 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 2Z2

17. RECORDATION: This Agreement may be recorded into the Official Records of either Eureka County of Elko County, Nevada, or both, by any one of the parties hereto.

18. BINDING EFFECT: The terms and conditions of this Agreement shall inure to the benefit of, and be binding upon, the successors and assigns of the parties hereto.

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19. ASSIGNABILITY: The respective positions and interests of the parties hereto shall be freely assignable except that such assignment shall not be binding on or affect the remaining parties hereto in any manner, unless and until such assignment is noted in writing to UNIVERSAL, or any successor Operator.

IN WITNESS WHEREOF, the parties hereto set their hands as of the day and year first above written.

BULLION MONARCH COMPANY, a Utah corporation

BY: R. D. Morris

TITLE: President

POLAR RESOURCES CO., a Nevada corporation

SEAL Affixed

BY:

TITLE: President

UNIVERSAL GAS (MONTANA), INC., a Montana corporation

SEAL Affixed

BY:

TITLE: PRESIDENT

SECRETARY

CAMSELL RIVER INVESTMENTS ~~INC.~~ Ltd., a Canadian corporation

BY: K H Lambert

TITLE: President

SEAL Affixed

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LAMBERT MANAGEMENT LTD., a Canadian corporation

BY: K H Lambert

TITLE: President

SEAL Affixed

ELTEL HOLDINGS LTD., a Canadian corporation

BY: K H Lambert

TITLE: Director + Secretary

SEAL Affixed

UNIVERSAL EXPLORATIONS, LTD. a Canadian corporation

BY:

TITLE: [illegible] TREASURER

SEAL Affixed

STATE OF Nevada)
) SS.
COUNTY OF Elko)

On May 11, 1979, personally appeared before me, a Notary Public, R.O. Morris, a duly qualified and acting officer of BULLION MONARCH COMPANY, who acknowledged to me that he executed the above instrument in that capacity.

J. C. Miller
NOTARY PUBLIC

JOHN C. MILLER
Notary Public - State of Nevada
Elko County, Nevada
My Commission Expires August 28, 1981

BOOK 71 PAGE 24

HOY & MILLER, CHARTERED
ATTORNEYS AT LAW
RENO AND ELKO, NEVADA

05/11/79

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PROVINCE ~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On _____, 1979, personally appeared before me, a Notary Public, C. WARREN HUNT, a duly qualified and acting officer of POLAR RESOURCES CO., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

PROVINCE ~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 28, 1979, personally appeared before me, a Notary Public, Joseph A. Mercier, a duly qualified and acting officer of UNIVERSAL GAS (MONTANA), INC., who acknowledged to me that he executed the above instrument in that capacity.

SEAL Affixed

NOTARY PUBLIC

PROVINCE ~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 17, 1979, personally appeared before me, a Notary Public, KENNETH H. LAMBERT, a duly qualified and acting officer of CAMSELL RIVER INVESTMENTS, INC., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

SEAL Affixed

05/11/79

HOY & MILLER, CHARTERED
ATTORNEYS AT LAW
RENO AND ELKO, NEVADA

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AFFIDAVIT OF EXECUTION

I Susan Lee Nicholl of the City of Calgary, in the Province of Alberta, make oath and say that:

1. I was personally present and did see Mr. C. Warren Hunt named in the within or in annexed instrument who is personally known to me to be the person named therein, duly signed and executed the same for the purposes named therein.

2. That the same was executed at the City of Calgary, in the Province of Alberta and that I am the subscribing witness thereto.

3. That I know the said Mr. C. Warrent Hunt and he is, in my belief, of the full age of twenty-one years.

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S. Nicholl
SUSAN LEE NICHOLL

SWORN BEFORE ME AT THE CITY OF CALGARY,
IN THE PROVINCE OF ALBERTA, THIS 7th
DAY OF JUNE, 1979

A Notary Public in and for the Province of Alberta

SEAL Affixed

BOOK 71 PAGE 26

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PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 17, 1979, personally appeared before me, a Notary Public, KENNETH H. LAMBERT, a duly qualified and acting officer of LAMBERT MANAGEMENT LTD., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

SEAL Affixed

PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 17, 1979, personally appeared before me, a Notary Public, KENNETH H. LAMBERT, a duly qualified and acting officer of ELTEL HOLDINGS LTD., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

SEAL Affixed

PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 28, 1979, personally appeared before me, a Notary Public, Joseph A. Mercier, a duly qualified and acting officer of UNIVERSAL EXPLORATIONS, LTD., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

SEAL Affixed

05/11/79

HOY & MILLER, CHARTERED
ATTORNEYS AT LAW
RENO AND ELKO, NEVADA

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EXHIBIT A-2

AREA OF INTEREST

All those lands contained in the Sections and Townships listed below approximately encompassing the area EIGHT (8) miles in a northerly direction, EIGHT (8) miles in a southerly direction, EIGHT (8) miles in an easterly direction and EIGHT (8) miles in a westerly direction from Section 10, Township 35 North, Range 50 East, M.D.B.&M., Eureka County, Nevada.

Township 34 North, Range 49 East
Sections: 1-5, 8-17 and 20-24

Township 35 North, Range 49 East
Sections: 1-5, 8-17, 20-29 and 32-36

Township 36 North, Range 49 East
Sections: 1-5, 8-17, 20-29 and 32-36

Township 37 North, Range 49 East
Sections: 32-36

Township 34 North, Range 50 East
Sections: 1-24

Township 35 North, Range 50 East
Sections: All

Township 36 North, Range 50 East
Sections: All

Township 37 North, Range 50 East
Sections: 31-36

Township 34 North, Range 51 East
Sections: 3-10 and 15-22

Township 35 North, Range 51 East
Sections: 3-10, 15-22 and 27-34

Township 36 North, Range 51 East
Sections: 3-10, 15-22 and 27-34

Township 37 North, Range 51 East
Sections: 31-34

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EXHIBIT A-1

SUBJECT PROPERTY

The following described unpatented and patented mining claims generally located in Sections 1, 2, 10, 11 and 12 of Township 35 North, Range 50 East, M.D.B.&M., Lynn Mining District, Eureka County, Nevada:

Unpatented Claims	Polar	Bullion
Big Jim	100%	Royalty
Big Jim 1 to 31, inclusive	"	"
Cracker Jack	"	"
Cracker Jack 1 to 5, inclusive	"	"
Yellow Rose 6 to 21, inclusive	"	"
Polar 1 to 20, inclusive	"	"
Hill Top	"	"
Hill Top 1 to 2, inclusive	"	"
Hill Top Fractional	"	"
Hill Top 1 to 4 Fractional	"	"
RJV	"	"
Unity 1	"	"
Unity 2	"	"
Badger	"	"
Badger 1	"	"
Compromise 4 to 7, inclusive	"	"
Lamira	"	"
Junction	"	"
Paragon	"	"
Paragon 2	"	"
Paragon 4	"	"
Paragon Fractional	"	"

Patented Claims (Poulsen Lease and Option)

	U.S. Patent No.	U.S. Survey No.	Polar	Bullion
Big Six No. 3	783757	4332	77½%	Royalty
Holt	881735	4422	"	"
July	935874	4528	"	"
Great Divide	945439	4393	"	"
Bald Eagle	046758	4527	"	"

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LAMBERT MANAGEMENT LTD.

Telephone: (403) 233-0047
808 HOME OIL TOWER
324 - 8 AVENUE S.W.
CALGARY, ALBERTA
CANADA T2P 2Z2

Telephone: (403) 454-2671
13716 - 101 AVENUE,
EDMONTON, ALBERTA
CANADA T5N 0J7

March 14, 1979

Polar Resources Co.
1119 Sydenham Road, S. W.
Calgary, Alberta
T2T 0T5

Attention: Mr. Warren Hunt

Dear Sirs:

RE: Gold Claims Lynn Mining District
Eureka County, Nevada

As you are aware, since early 1976 Camsell River Investments Ltd. has entered into several agreements with you relating to the Bullion Monarch Company gold claims in Nevada and has also entered into agreements relating to the same properties with Bullion Monarch Company. As a result of these agreements, Camsell and its silent coventurers, Lambert Management Ltd. and Eltel Holdings Ltd. have advanced about $505,000. U.S. to you and $300,000. U.S. to Bullion Monarch Company and have expended a further $10,000. U.S. or so on drilling invoices and other expenses relating to the properties.

Our mutual files on this matter are extensive and the legal determination of the various agreements would undoubtedly take more time and effort to resolve than is prudent under the circumstances. We have always maintained that we do not wish to hamper your efforts to put the properties into production so long as an equitable arrangement can be reached between us. Based on the proposed agreement you have negotiated with Universal Gas (Montana) Inc. (hereinafter called the "Mill Agreement") and our meetings and telephone conversations of March 10, 11, 12 and 13, we believe we have reached an agreement acceptable to you and the parties we represent. This agreement between you and the "Camsell Group" would enable Universal to obtain the interest it has bargained for in the Mill Agreement and would resolve our diverse interests in an amiable fashion.

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BOOK 71 PAGE 30
EXHIBIT B

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The Agreement is as follows:

1) All of the interests of any nature whatsoever of Polar Resources Co. and those of other parties represented by Polar Resources Co. (hereinafter called the "Polar Group") and all of the interests of any nature whatsoever of Camsell River Investments Ltd. and those of the parties represented by Camsell River Investments Ltd. (hereinafter called the "Camsell Group") in "The Mining Properties" as defined in the Mill Agreement shall be pooled and then reallocated 50% to Universal Gas (Montana) Inc. pursuant to the Mill Agreement and 50% collectively to the Polar Group and the Camsell Group (hereinafter called the "Polar-Camsell Group").

2) The Camsell Group will receive 100% of the cash flow from the Polar-Camsell Group's 50% interest in the Mining Properties until the Camsell Group has received an amount equivalent to its expenditures relating to the Mining Properties before interest as established by independent audit. This amount is about $815,000 U.S.

3) After the Camsell Group has received the amount indicated in paragraph 2 above, the Polar Group will receive 100% of the cash flow from the Polar-Camsell Group's 50% interest in the Mining Properties until the Polar Group has received an amount equivalent to its expenditures relating to the Mining Properties before interest as established by independent audit. This amount is about $450,000. U.S.

4) After the Polar Group has received the amount indicated in paragraph 3 above, the Polar Group and the Camsell Group will split the cash flow from the Polar-Camsell Group's 50% interest in the Mining Properties on a 50-50 basis until the Camsell Group has received an amount equivalent to the amount of interest the Camsell Group would have paid to its banker calculated on all Camsell Group advances to Polar Resources Co. and Bullion Monarch Company from the dates of advance at the Canadian Imperial Bank of Commerce prime rate from time to time plus 2% per annum, compounded semi annually. Any cash received by the Camsell Group pursuant to this agreement would be credited to the "phantom bank account" on the date of receipt in order to determine the amount to be ultimately received by the Camsell Group pursuant to this paragraph 4.

5) After the Camsell Group has received the amount calculated pursuant to paragraph 4 above, the Polar-Camsell Group's interests shall be divided and an undivided 30% of the interest shall be transferred to the Camsell Group and an undivided 70% shall be transferred to the Polar Group.

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BOOK 71 PAGE 31

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6) Title to the Polar-Camsell Group's interest in the Mining Properties shall be held in trust by Polar Resources Co. pursuant to the terms of this Agreement and this Agreement or its successor shall be filed against the title to the Mining Properties in the appropriate offices in the state of Nevada. Polar shall deliver to the Camsell Group a legal opinion from a Nevada attorney stating that the terms and conditions of this Agreement are enforceable by the Camsell Group as against Polar Resources Co. and that the Camsell Group's interests have been adequately registered to protect its interests as against third parties.

7) The proceeds Polar Resources Co. receives from Universal Gas (Montana) Inc. on the sale of the assets listed in the Mill Agreement shall be distributed as follows:

a) The Polar Group shall receive 100% of the proceeds from the sale of assets acquired after December 31, 1976.

b) The Camsell Group shall receive 80.4% of the proceeds from the sale of assets acquired prior to January 1, 1977 and the Polar Group shall receive the balance.

c) Polar Resources Co. shall account to the Camsell Group for any assets held on December 31, 1976 which have been disposed of by Polar Resources Co. subsequent to December 1, 1976 but prior to the execution of the Mill Agreement. The Camsell Group shall receive an amount equal to 80.4% of such disposition proceeds from Polar Resources Co. and the source of funds for such payment shall be the Polar Group's share of the proceeds of the sale of assets pursuant to the Mill Agreement.

8) The Polar-Camsell Group recognizes a fee of $1,500. per month payable to Polar Resources Co. from the cash flow generated by the mill for the services of Warren Hunt from the date of commencement of milling operations and also recognizes the need to employ a full time representative at the mine as soon as gold production commences in meaningful amounts.

9) In the event of cost overruns beyond the $1,250,000. U.S. stated in the Mill Agreement, the Polar-Camsell Group acknowledges that it will be responsible for 50% of such overruns. These overruns shall be allocated as between the Polar Group and the Camsell Group as follows:

a) For exploration, mine development, and mine operation expenses on the Big Jim claims 24 and 25 and for mill development expenses related to that mine, 50% shall be paid by the Polar Group and 50% shall be paid by the Camsell Group.

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BOOK 71 PAGE 32

b) For all other expenses 70% shall be paid by the Polar Group and 30% shall be paid by the Camsell Group.

10) This Agreement is subject to the execution of the Mill Agreement and is subject to revision of the method contemplated in paragraph 1 to arrive at the interests outlined in paragraphs 2, 3, 4 and 5 if subsequent investigation reveals that the tax consequences of such method are adverse. The intent is that the Agreement will be structured so as to minimize adverse tax implications in Canada and the United States for all parties concerned while at the same time arriving at the same distribution of cash flow from the Mining Properties.

11) This Agreement shall be interpreted in accordance with the laws of the Province of Alberta.

12) Each of the parties shall execute any further agreements required by legal counsel for any party to implement the terms or intent of this Agreement.

If you agree with the above terms and conditions please indicate your acceptance on the copy of this letter enclosed.

Yours very truly,

Lambert Management Ltd.

K H Lambert

K. H. Lambert
President

/mjm
encl:

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Accepted this 14th day of March, 1979

Polar Resources Ltd.

C. Warren Hunt
President

Accepted this 14th day of March, 1979

Eltel Holdings Ltd.

K H Lambert

K. H. Lambert
Secretary

Accepted this 14th day of March, 1979

Camsel River Investments Ltd.

K H Lambert

K. H. Lambert
President

BOOK 71 PAGE 33

LAMBERT MANAGEMENT LTD.

Telephone (403) 233-0047
808 HOME OIL TOWER
324 - 8 AVENUE S.W.
CALGARY, ALBERTA
CANADA T2P 2Z2

Telephone (403) 454-2671
13716 - 101 AVENUE,
EDMONTON, ALBERTA
CANADA T5N 0J7

March 16, 1979

Polar Resources Co.
1119 Sydenham Road, S. W.
Calgary, Alberta
T2T 0T5

Attention: Mr. Warren Hunt

Dear Sirs:

RE: Gold Claims - Lynn Mining District
Eureka County, Nevada

Further to our letter of March 14, 1979 and the writer's meeting with your Messrs. Hunt and Ross Hamilton on March 14, 1979, we wish to confirm that the agreement contained in the said letter is amended by adding the following:

9.1(a) Any funds advanced pursuant to sub paragraph 9(a) shall be repaid pro rata from the Polar-Camsell Group's first cash flow from the mill prior to the commencement of payments to the Camsell Group pursuant to paragraph 2.

9.1(b) Any funds advanced pursuant to sub paragraph 9(b) shall be repaid pro rata from the Polar-Camsell Group's cash flow from the mill after the obligations to the Camsell Group outlined in paragraph 4 have been satisfied.

9.2 The penalty provisions in the Mill Agreement shall apply mutatis mutandis to the Polar Group and the Camsell Group in the event of a default by either Group on an obligation to advance further funds pursuant to paragraph 9.

If you agree with the above additional terms and conditions please indicate your acceptance on the copy of this letter enclosed.

Yours very truly,

Lambert Management Ltd.

K H Lambert

W. H. Lambert

/mjm
encl:

BOOK 71 PAGE 34

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Attachment to: Polar Resources Co.
March 16, 1979

Accepted this day of March, 1979

Polar Resources Co.

C. Warren Hunt
President

Accepted this 16th day of March, 1979

Eltel Holdings Ltd.

K. H. Lambert
Secretary

Accepted this 16th day of March, 1979

Camsel River Investments Ltd.

K. H. Lambert
President

BOOK 71 PAGE 35

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POLAR RESOURCES CO.

1070 SILVER STREET
ELKO, NEVADA 89801
(702) 738-8712

April 6, 1979

Mr. K. H. Lambert
Lambert Management Ltd.
#808, 324 8th Ave. S.W.
Calgary T2P 2Z2

Dear Sir:

Your letter of March 16 1979 is acknowledged and a copy returned herewith signed as requested.

In accordance with our telephone conversation this morning, in which the writer pointed out that clauses 7b and 7c of the letter agreement of March 14, 1979 were unduly broad in that they might be construed to include Polar's assets which had not been acquired by the joint venture nor in the period of the joint venture, April 1 - Nov. 30, 1976, the following is proposed:

Clause 7 subclause b is amended so that the words " prior to Jan. 1, 1977" are replaced by "between April 1, 1976 and November 30, 1976".

Clause 7 subclause c. The meaning of the word "assets" as used in this subclause is understood to mean properties and equipment acquired by the joint venture or charged by Polar to the joint venture so as to establish equity of contributions of the members of the joint venture, that is to say, Polar Resources Co. and Camsel River Investments Ltd.

If the foregoing meet with your approval, kindly sign a copy hereof and return for our files.

Yours truly,
Polar Resources Co.

C. Warren Hunt, Pres.

See qualifications in letter of April 10/79
Lambert Management Ltd
per K H Lambert

BOOK 71 PAGE 36

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LAMBERT MANAGEMENT LTD.

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CANADA T5N 0J7

April 10, 1979

Polar Resources Co.
1119 Sydenham Road S.W.
Calgary, Alberta
T2T 0T5

ATTENTION: Mr. Warren C. Hunt

Dear Sirs:

RE: Gold Claims Lynn Mining District
Eureka County, Nevada

Further to your letter of April 6, 1979, we wish to confirm our agreement that clauses 7b and 7c of our letter agreement of March 14, 1979 have not been drafted to contemplate assets to be sold under the Mill Agreement. We agree that the language should be changed.

We are prepared to accept your suggested change for sub clause 7b provided that the 80.4% figure is changed to reflect the actual percentage of the total funds used by Polar between April 1 and November 30, 1976 which was injected by the Camsell Group. Your auditor could provide us with that percentage.

We accept your clarification of the word "assets" in sub clause 7c and would also suggest that the 80.4% figure used in sub clause 7c should be changed to the same percentage as will be used in subclause 7b.

If the foregoing meets with your approval, kindly sign the enclosed copy of this letter and return it for our files.

Yours very truly,
LAMBERT MANAGEMENT LTD.
K.H. Lambert
K.H. Lambert
President

KHL/rs
Enc.

Accepted this 17th day of April, 1979

POLAR RESOURCES LTD.

PER: _____ BOOK 71 PAGE 37

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Steven D. Grierson
CLERK OF THE COURT

OPPS

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Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

BULLION MONARCH MINING, INC., Plaintiff, *vs.* BARRICK GOLDSTRIKE MINES, INC.; BARRICK GOLD EXPLORATION INC.; ABX FINANCECO INC.; BARRICK GOLD CORPORATION; and DOES 1 through 20, Defendants.	Case No. A785913 Dep't No. 11 **OPPOSITION TO MOTION FOR STAY** ***(Oral Argument Requested)***[1] Hearing Date: March 15, 2019 (In Chambers)

Defendant Barrick Goldstrike wants to delay the adjudication of Bullion's rights for the duration of Bullion's Ninth Circuit appeal—"about a year," Goldstrike anticipates—but quite possibly longer. Goldstrike does not think that is very much time, "particularly given that the Federal Case has been

[1] Bullion asks that this Court hear oral argument on this motion after hearings on the other defendants' motions to dismiss.

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Case Number: A-18-785913-B

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pending since 2009." (Mot. 9:10–12.) For plaintiff Bullion, though, who has been waiting for a trial of its claims since 2009, the proposed delay is significant indeed. As the object of Bullion's Ninth Circuit appeal will not be defeated if the stay is denied, and neither Goldstrike nor any other defendant will suffer harm if the suit proceeds, this Court should deny the request for a stay. *See* NRAP 8(c).

BACKGROUND

A. Factual Background

1979 Agreement

In 1979, Bullion gave several valuable mineral rights to a venture operated by Universal Gas (Montana), Inc., so that the venture could mine that property (the "subject property") and the area surrounding it. To ensure the venture's profitability, Bullion agreed not to prospect in that surrounding area of interest for 99 years. (Ex. 1, 1979 Agreement para. 11.) In exchange, Bullion was to receive a 1% royalty from production both on claims within the original subject property and in the area of interest. (Ex. 1, 1979 Agreement para. 4, 11.)[2]

[2] The area-of-interest provision provides in relevant part:

> UNIVERSAL, as operator, shall have the exclusive right to acquire additional mineral properties within the Area of Interest **on behalf of the parties hereto** . . . . All parties hereto agree to immediately quitclaim and assign to UNIVERSAL any and all other real property or interest in such that they may have within the Area of Interest, Exhibit A-2, as of the date of this Agreement, subjecting the same to the terms and conditions of this Agreement . . . .
>
> Upon acquiring such properties within the Area of Interest, UNIVERSAL shall offer to include such into the Subject Property upon payment by POLAR-CAMSELL of FIFTY PERCENT (50%) of all acquisition costs incurred in acquiring such properties. . . .
>
> Should POLAR-CAMSELL reject such offer . . . then such properties within the Area of Interest shall not become part of the Subject Property **as they apply to POLAR-CAMSELL**

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The payment obligations that originally applied to Universal expressly passed to Universal's successors:

> The terms and conditions of this Agreement shall inure to the benefit of, and be binding upon, the successors and assigns of the parties hereto.

(*Id.* para. 18.)

Transfer to Goldstrike

Over the next two decades, various entities and ventures purchased the original subject property subject to Bullion's royalty interest. Goldstrike's immediate predecessor, High Desert Mineral Resources of Nevada, Inc., warranted that it would

> assume and become liable for . . . *all obligations* of [the venture] under the Underlying Agreements (including the obligations to pay rentals, *royalties* or other payments) which accrue or relate to periods commencing after the Closing . . . .

(1990 Option Agreement § 7.3(B)(3)(a) (emphasis added), *quoted in* Ex. 2, ECF 202-2.) And the existing obligations expressly include "the royalty and other obligations provided for in the May 10, 1979 Agreement." (1990 Option Agreement § 3.3(A)(6)(d) & Ex. F, *quoted in* Ex. 2, ECF 202-2.) Barrick assumed all of High Desert's obligations. (Answer to Interrogs. 1, *quoted in* Ex. 2, ECF 202-8, at 2.)

Goldstrike confirmed that it or its predecessors had acquired properties in the area of interest and that this land was productive. (*See* Ex. 3, Answers to Interrogatories No. 2, 7-13.) Goldstrike eventually parlayed its interest in all of the original subject property for additional area-of-interest properties, divesting from the original subject property. (Ex. 4, ECF 161, at 13–14, ¶¶ 47–49.) But it

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> and will remain the sole property of UNIVERSAL without any obligations to POLAR-CAMSELL, **but subject to the royalty interest of BULLION**.

(Emphasis added.)

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has never paid royalties from production in the area of interest.

B. Procedural Background

Bullion Sued in Federal Court in 2009

Bullion sued Goldstrike in the U.S. District Court for Nevada in 2009, alleging a breach of the 1979 agreement and claims for unjust enrichment and an accounting. (D. Nev., No. 3:09-cv-00612-ECR-VPC.)[3] Goldstrike affirmed Bullion's understanding that Goldstrike, a Colorado corporation, was diverse from Bullion, a Utah corporation: Goldstrike admitted in its answer that it was incorporated in Colorado and did business in Nevada. (227 ECF No. 69, ¶2A; ECF No. 18, ¶2A; ECF No. 20, ¶2A.) When the district court asked about jurisdiction, Goldstrike again stated that it was incorporated in Colorado, did business in Nevada, and that it was not contesting jurisdiction. (ECF No. 7.)

The Case Has Been in the Nevada Supreme Court Before

When Goldstrike procured summary judgment on Nevada's rule against perpetuities, the Ninth Circuit certified the question to the Nevada Supreme Court. *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.* (*Bullion I*), 686 F.3d 1041 (9th Cir. 2012). The Supreme Court held that the rule against perpetuities did not apply to the parties' area-of-interest provision in their commercial mining agreement, and the Ninth Circuit accordingly reversed. *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.* (*Bullion II*), 131 Nev., Adv. Op. 13, 345 P.3d 1040 (2015); *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.* (*Bullion III*), 600 Fed. Appx. 559, 560 (9th Cir. 2015).

The Federal District Court Dismissed for Lack of Subject-Matter Jurisdiction

Bullion is back in state court after Goldstrike raised for the first time in 2017 the possibility that its nerve center in 2009 was in Utah, destroying diver-

[3] All references to "ECF" are to filings in this federal case.

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sity. (ECF No. 260.) After jurisdictional discovery, the federal district court agreed and dismissed Bullion's complaint without prejudice for lack of subject-matter jurisdiction. (ECF No. 302.) Pending Bullion's appeal to the Ninth Circuit, Bullion filed this action, adding other Barrick entities believed to have property within Bullion's area of interest.

ARGUMENT

I.

THE STANDARD FOR GRANTING A STAY PENDING A FEDERAL APPEAL

A. The Party Seeking a Stay Must Have Compelling Reasons for the Delay

In Nevada, a stay should usually be denied except for compelling reasons: if it is "necessary to prevent irreparable injury or a miscarriage of justice." *Kress v. Corey*, 65 Nev. 1, 17, 189 P.2d 352, 360 (1948) (ellipses omitted) (quoting 3 C.J. *Appeal and Error* § 1411). That is echoed in several of the factors governing stays pending appeal, including (1) whether the object of the appeal will be defeated if the stay is denied; (2) whether the party seeking a stay will suffer irreparable or serious injury if the stay is denied; (3) whether the other party will suffer irreparable or serious injury if the stay is granted. *See* NRAP 8(c).

B. Parallel Proceedings Are the Norm

An ongoing proceeding in federal court is not, in itself, a reason for a Nevada court to stay litigation. Federal and state courts have long recognized that, in most circumstances, two actions on the same subject matter may proceed in parallel state and federal proceedings. *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922). "In general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs*, 129 Nev. 682, 687, 310 P.3d 583, 587 (2013) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012). "With whatev-

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er doubts, with whatever difficulties, a case may be attended, we must decide it, if it is brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.), *cited with approval in N. Lake Tahoe Fire*, 129 Nev. at 687, 310 P.3d at 587.

That the parallel litigation may result in some duplication is not reason enough for a court "to bow out of a case over which it has jurisdiction." *Burns v. Watler*, 931 F.2d 140, 146 (1st Cir. 1991) (quoting *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 12 (1st Cir. 1990)). Indeed, when both a federal and state court have jurisdiction, they in some cases "*must*[] proceed with the respective litigations simultaneously." *Id.*at 145. In *Burns v. Watler*, for example, the First Circuit reversed the federal district court's decision to stay a personal-injury diversity action pending resolution of parallel state-court claims—even though both actions had been filed around the same time and the litigation was not very far along. *Id.* at 145-46 (noting the inapplicability of abstention doctrines).

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C. A Stay is Especially Inappropriate When There Are No Ongoing Federal District-Court Proceedings

Sometimes the concurrence of federal and state trials on state-law claims creates discretion for one or the other forum to abstain while the other proceeds. (In that circumstance, though, it is customarily the *federal* court that abstains, not the state court.) And the proper exercise of discretion can be difficult.

When there are no ongoing proceedings in federal district court, though, that dilemma vanishes. A judgment that there is no federal jurisdiction is, until reversed by an appellate court, a judgment that there is no jurisdiction: While the judgment stands, the state court is the only forum with jurisdiction to hear the case and the only forum actively proceeding to a trial of the claims. There is no call for a stay of the federal litigation.

II.

THESE PROCEEDINGS SHOULD NOT BE INDEFINITELY DELAYED

Goldstrike has not met its burden to show compelling circumstances to justify a stay, and this Court should not grant one.

A. Goldstrike Has No Right to Seek a Stay

1. Goldstrike Is Judicially Estopped from Denying Plaintiff a Forum in State Court

Goldstrike is not in a position to prohibit Bullion from proceeding in state court. Goldstrike successfully convinced a federal district court to dismiss Bullion's complaint for lack of diversity jurisdiction—essentially saying that the action should have been brought in state court. Now Goldstrike is arguing just the opposite: that Bullion cannot proceed in the state court to which Goldstrike forced it because there may still be jurisdiction in federal court, after all. *See New Hampshire v. Maine*, 532 US 742, 749 (2001).

2. Goldstrike Cannot Exploit the Likelihood of Reversal

The likelihood that Goldstrike may have led the federal district court into reversible error does not give Goldstrike the right to exploit that possibility of reversal to further delay justice for Bullion. Although *Bullion* could have argued that a likely reversal from the Ninth Circuit warrants a stay pending appeal, that argument is not available to the party who has successfully pressed the position that federal courts do not have jurisdiction.[4]

B. Denying Goldstrike's Request for a Stay Will Not Defeat the Object of Bullion's Appeal—or Goldstrike's Judgment

Primary among the factors governing stays in Nevada is whether the object of the appeal will be defeated by denying a stay. Just as the presence of

[4] This ties into the fourth factor under NRAP 8(c): the likelihood of success on appeal. That factor would favor a stay if Bullion were seeking one, but is not a basis for Goldstrike to obtain a stay over Bullion's objection.

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this factor has "added significance and generally warrants a stay," *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 250, 89 P.3d 36, 37–38 (2004), the absence of this factor counsels against granting a stay.

Here, Goldstrike would not have had standing to seek a stay under Rule 8(c)(1)—based on jeopardy to the object of a pending appeal. In any case, a stay is not necessary to protect the object of that appeal.

1. Goldstrike Lacks Standing

Ordinarily, it is the losing party who seeks a stay pending appeal, but here Goldstrike, who prevailed in having Bullion's complaint dismissed, is the one asking for a stay pending Bullion's appeal. As Goldstrike is not aggrieved by the judgment in its favor, it does not have standing to pursue a stay on the basis that the object of Bullion's appeal might be defeated.

2. Litigating the Merits Here Does Not Interfere with the Question of Federal Subject-Matter Jurisdiction

In any case, proceeding in this court will not defeat the object either of Bullion's appeal or of Goldstrike's judgment in federal court. The fact of ongoing proceedings in state court does not weigh in the Ninth Circuit's determination of whether Bullion is diverse from Goldstrike. And while Bullion sued in federal court on the shared understanding with Goldstrike that Bullion was entitled to adjudicate its claims in a federal forum, the object of Bullion's appeal is not impaired by pressing forward in state court pending the outcome of the appeal. At the same time, proceeding in this Court *respects*—not defeats—the judgment that Goldstrike obtained by taking the federal district court at its word that the action should proceed only in state court.

This case is unlike those cited by Goldstrike where some proceeding in another court will clarify an issue for the litigation that is stayed. In *Stephens v. Comenity, LLC*, for example, the court exercised its discretion to stay a class action under the Telephone Consumer Protection Act pending a decision from

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the D.C. Circuit that would be dispositive on an issue of law—the definition of "automated telephone dialing system"—that the court would face once the stay was lifted. 287 F. Supp. 3d 1091, 1097 (D. Nev. 2017). In *Caiafa Professional Law Corp. v. State Farm Fire & Casualty*, the state court stayed a petition for fees pending a federal suit that would decide a dispositive issue for the state litigation: whether claimed fees arose from a racketeering scheme. 19 Cal. Rptr. 138 (Ct. App. 1993) ("reemphasizing" that "a stay was a discretionary decision for the California trial courts[,] not a right held by litigants who preferred the federal forum").[5] *Cf. also Tonnemacher v. Touche Ross & Co.*, 920 P. 2d 5 (Ariz. Ct. App. 1996) (discussing the possibility of a stay in dicta where action was still pending in federal *trial* court). And in *CMAX, Inc. v. Hall*, the stay of trial pending an enforcement proceeding before the Civil Aeronautics Board "provide[d] a means of developing comprehensive evidence bearing upon the highly technical tariff questions which are likely to arise in the district court case." 300 F.2d 265, 269 (9th Cir. 1962). It was, in other words, essential guidance for the questions facing the court issuing the stay.

Here, by contrast, the Ninth Circuit's decision will not provide any guidance to this Court: either the court will affirm, leaving the case here unaffected (except for the passage of time without progress toward a trial); or the court will reverse, which will allow the resumption of claims in federal court.[6] The passive hope that another proceeding will make this one unnecessary in retrospect does not justify a stay.

[5] *Caiafa* illustrates the point that the party requesting a stay in state court is ordinarily the party that selected the federal forum, not the party who—because of a dismissal or remand—has pushed its opponent into state court.

[6] Restoration of jurisdiction in federal court would not automatically strip this Court of jurisdiction, but any question of abstention is premature.

3. A Stay Would Not Resolve the Litigation More Quickly

There is no question that Goldstrike's actions in forcing this state-court action will cause duplication, whether or not the Ninth Circuit reverses. But consider what is going to be duplicated in contrast to what Goldstrike is requesting. Goldstrike appears to argue that a stay would be efficient, but there is no scenario in which such a stay would lead to a quicker resolution of Bullion's claims. If, as Goldstrike speculates, the Ninth Circuit will issue a decision within the next year or so, there is little chance that this state-court litigation will have progressed beyond the point that the federal-court litigation did—the joint pretrial memorandum and final pretrial conference. So if the Ninth Circuit reverses, returning to federal court will not put the parties further from trial than they had come in state court. In fact, as discussed immediately below, proceeding in Nevada's state courts could in the meantime narrow some of the issues for the federal litigation. And if the Ninth Circuit affirms, the stay will have been a waste of time, as the parties could have used the time on appeal to bring this case closer to trial.

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4. Resolution of State-Law Claims in State Court Could Expedite the Issues in Federal Court

The parties will no doubt bring some of their same arguments to this Court as were brought to the federal district court, including their respective requests for summary judgment on the application of the area-of-interest royalty provision. The federal district court denied both parties' motions, but if this Court were to grant one of those motions, the Nevada Supreme Court could issue a definitive decision on the controlling rule of Nevada law, which would apply to any federal-court litigation if the Ninth Circuit reverses on subject-matter jurisdiction.[7]

[7] Even if this Court again denies the motions for summary judgment, the Nevada Supreme Court could resolve the questions in a writ petition.

Indeed, after the Nevada Supreme Court ruled in Bullion's favor on the rule-against-perpetuities certified question, Bullion suggested to the federal court that certain other aspects of the case present important and novel questions of state law suitable for certification. (*See* Ex. 5, ECF 186, at 31–32.) A resolution of these questions of Nevada law in Nevada's state courts could narrow the issues in the federal litigation if the Ninth Circuit reverses.

C. A Stay Will Prejudice Bullion

Further support for denying the stay is the prejudicial delay that Bullion would face in being denied *any forum* in which to litigate its decade-old case. *See* NRAP 8(c)(3).

1. Additional Delay, after a Decade of Waiting, Is Prejudice

Bullion has been waiting a decade for justice. Although a delay does not always constitute serious harm, this Court should be cognizant when "the underlying proceedings could be unnecessarily delayed by a stay." *Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 987 (2000). In other words, while the cost of litigation that may ultimately prove unnecessary does not generally factor into a stay, unnecessary delay counsels against a stay.

Goldstrike's motion is a transparent effort to create additional delay. Before the dismissal for lack of subject-matter jurisdiction, the federal district court had determined that Bullion's claims had merit enough to go to trial. Additional delay because of Goldstrike's procedural maneuvers would just take this adjudication farther from Bullion's grasp.

2. This Action Is the Only One Naming Other Barrick Entities

This complaint is, moreover, not the same as the one in federal court. As Goldstrike acknowledges in a footnote, this case is the only one naming as defendants Goldstrike's parent corporations, Barrick Gold Exploration Inc., ABX

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Financeco Inc., and Barrick Gold Corporation. This is critical because since the 2009 filing of Bullion's federal-court complaint, Bullion has learned that properties in an area where Bullion has royalty interests have been sold or transferred to these other entities,[8] apparently in an attempt to evade the royalty obligation that would otherwise fall to Goldstrike.

D. Denying the Stay Will Not Harm Goldstrike

In contrast, Goldstrike faces no serious harm in litigating in the forum to which it has steered this case. *See* NRAP 8(c)(2). While this factor is not always necessary in deciding to deny a stay, the absence of harm from denying a stay supports that result. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 250, 89 P.3d 36, 37–38 (2004).

Here, Goldstrike faces ordinary litigation expenses: discovery, trial preparation, and—if this case proceeds markedly faster than the federal appeal—trial. "Such litigation expenses, while potentially substantial, are neither irreparable nor serious." *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 987 (2000). Indeed, as discussed, the possibility that this case may cover some of the same ground that the federal case did is par for the course in parallel federal-state proceedings. *See Burns v. Watler*, 931 F.2d 140, 146 (1st Cir. 1991); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922). Nothing about this Court's duty to exercise jurisdiction is unusual so as to warrant a stay. Indeed, the only unusual aspect of this case is Goldstrike's persistence in halting these proceedings, where there unquestionably *is* subject-matter jurisdiction, in favor of federal appellate proceedings, where Goldstrike says there is *not*.

[8] Because these transactions have been shrouded in secrecy, Bullion needs discovery to determine the true owners of this area-of-interest land and may result in the naming of additional defendants now listed under fictitious Doe designations.

CONCLUSION

"Justice delayed is justice denied"[9] is a truism, but it must not become an empty platitude. After stripping Bullion of a federal forum and forcing Bullion to file its claims in state court, Goldstrike cannot block those very claims from advancing toward trial. Goldstrike's efforts to delay justice through a stay should be rejected.

Dated this 4th day of March, 2019.

ROBISON, SIMONS, SHARP & BRUST, P.C.

By: */s/Abraham G. Smith*

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Attorneys for Plaintiff

[9] JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 472 (Justin Kaplan, gen. ed., 17th ed., Little, Brown & Co. 2002) (quoting William E. Gladstone), *quoted in Weddell v. Stewart*, 127 Nev. 645, 650, 261 P.3d 1080, 1084 (2011).

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CERTIFICATE OF SERVICE

Pursuant to Rule 5(b), I hereby certify that on this date, I electronically served the foregoing document entitled "Opposition to Motion for Stay" *via* the Court's E-Filing System, upon the following counsel of record. The date and time of the electronic service is in place of the date and place of deposit in the mail.

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Attorneys for Defendant Barrick Goldstrike Mines, Inc. and ABX Financeco Inc.

Dated this 4th day of March, 2019

/s/ Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

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EXHIBIT 1

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EXHIBIT 1

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AGREEMENT

THIS AGREEMENT is made and entered into as of the 10th day of May, 1979 by and between the following parties:

BULLION MONARCH COMPANY, a Utah corporation (BULLION);

POLAR RESOURCES CO., a Nevada corporation (POLAR);

UNIVERSAL GAS (MONTANA), INC., a Montana corporation, and UNIVERSAL EXPLORATIONS, LTD., a Canadian corporation (UNIVERSAL);

CAMSELL RIVER INVESTMENTS, LTD., a Canadian corporation (CAMSELL);

LAMBERT MANAGEMENT LTD., a Canadian corporation (LAMBERT); and

ELTEL HOLDINGS LTD., a Canadian corporation (ELTEL);

W I T N E S S E T H:

WHEREAS the parties hereto would all profit from the mining of and production of certain mining properties located in the Lynn Mining District, Eureka County, Nevada, more fully described in Exhibit A-1 attached hereto and incorporated herein by reference, hereinafter collectively referred to as the "Subject Property;" and

WHEREAS the parties have interest in exploring a wider range of mineral properties in which the Subject Property is embedded, hereinafter referred to as the "Area of Interest," more fully described in Exhibit A-2 attached hereto and incorporated herein by reference; and

WHEREAS the parties hereto are desirous of developing the Subject Property's mineral potential by building adequate milling facilities and developing a mine ("the Project"); and

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WHEREAS BULLION purports to own a royalty interest in and to the Subject Property as is more fully set forth in Exhibit A-1; and

WHEREAS POLAR purports to own a 100% interest in and to part of the Subject Property as is more fully set forth in Exhibit A-1, subject to possible outstanding interests and royalties, purports to own a 100% interest in and to other portions of the Subject Property as is more fully set forth in Exhibit A-1, and has under a Lease and Option a 77½% interest to other portions of the Subject Property; and

WHEREAS CAMSELL, LAMBERT and ELTEL are interrelated organizations acting in concert as to the Subject Property, collectively being referred to hereinafter as "CAMSELL" unless specifically referred to otherwise, and have invested monies in the development of the Subject Property to date, their interest and relationship to the Project being governed by that certain Letter Agreement with POLAR dated March 14, 1979, as amended by the letters of March 16, 1979, April 6, 1979 and April 10, 1979, attached thereto, all attached hereto as Exhibit B; and

WHEREAS UNIVERSAL GAS (MONTANA), INC. is presently financing further development of the mining and production potential of the Subject Property, primarily for the production of precious metals basically under the terms of that certain Agreement with POLAR dated March 14, 1979 attached hereto as Exhibit C; and

WHEREAS UNIVERSAL EXPLORATIONS, LTD. is prepared and able to guarantee the financial obligations of UNIVERSAL GAS (MONTANA) INC. contained herein, both corporations will be collectively referred to as UNIVERSAL herein with the understanding amongst the

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parties hereto that UNIVERSAL GAS (MONTANA), INC. will be the active participant referred to as UNIVERSAL while any reference to UNIVERSAL EXPLORATIONS, LTD. under the collective term UNIVERSAL speaks only to its financial backing of the UNIVERSAL obligations recited herein;

NOW THEREFORE, in consideration of the conditions, covenants, promises, obligations, payments and agreements herein contained, the parties agree as follows:

1. SOLE AGREEMENT: That as between the parties hereto this Agreement shall be the sole and only agreement governing the ownership, operations and payment from the Subject Property, cancelling, revoking, rescinding and terminating any and all other deeds, conveyances, contracts or agreements between the parties hereto, or any combination thereof, affecting the Subject Property, except any agreement that may exist between CAMSELL, LAMBERT and ELTEL as to investment in Subject Property development and divisions of proceeds received therefrom, and except any agreement, contract or deed specifically preserved by the terms hereof. Should the terms of any agreement, letter agreement or other document or understanding preserved by specific reference herein be in conflict with this Agreement the terms of this Agreement shall control.

2. OWNERSHIP OF SUBJECT PROPERTY: That as between the parties hereto it is understood and agreed that the ownership of the Subject Property as presently constituted is as set forth in Exhibit A attached hereto, subject only to the terms and conditions of this Agreement specifically referred to herein. In addition, it is understood, agreed and warranted amongst the parties hereto that except

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for agreements, deeds and other documents specifically mentioned herein that none of the parties hereto, individually, in combination or collectively, have conveyed or encumbered the Subject Property.

A. Simultaneously herewith, BULLION shall execute and deliver a Grant Deed to UNIVERSAL conveying all of its right, title and interest in the Subject Property to UNIVERAL. Such interest of BULLION conveyed to UNIVERSAL shall be subject to the payment provisions of Paragraph 4, infra.

B. Simultaneously herewith, POLAR shall execute and deliver a Grant Deed to UNIVERSAL conveying all of its right, title and interest in the Subject Property to UNIVERSAL, subject to the terms and conditions of the March 14, 1979 POLAR - UNIVERSAL Agreement.

C. Simultaneously herewith, CAMSELL shall execute and deliver a Quitclaim Deed to UNIVERSAL conveying and quitclaiming all of its right, title and interest in the Subject Property to UNIVERSAL.

D. At all times pertinent hereto, UNIVERSAL shall have the right to pledge or otherwise hypothecate the titles to any portions, or the whole of, the Subject Property for the purpose of obtaining financing for development of the Subject Property, except that no more than a total of FIFTY PERCENT (50%) of the then current market value of such property shall be so hypothecated or encumbered. At the time, under the March 14, 1979 Agreement, Exhibit C, UNIVERSAL reaches the "earning point", its conveyance to POLAR of 50% interest shall be unencumbered.

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3. UNIVERSAL AS OPERATOR: That on March 14, 1979 POLAR and UNIVERSAL entered into an Agreement, a copy of which is attached hereto as Exhibit C and incorporated herein by reference, whereby UNIVERSAL, under the terms and conditions thereof, was to become the sole and only operator of the mineral production from the Subject Property as of March 1, 1979, and that all of the parties hereto agree to the terms of said Agreement allowing UNIVERSAL the sole and only control over further development and production from the Subject Property pursuant to the March 14, 1979 Agreement and ratify the same as if they had been signatory thereto.

4. PAYMENTS TO BULLION:

A. Commencing May 1, 1979, UNIVERSAL shall pay to BULLION an advance minimum royalty of $2,500.00 each and every month through October of 1979 or until gross production sales from the Subject Property have reached the amount of $62,500.00 per month, whichever comes first.

B. Commencing on November 1, 1979, UNIVERSAL shall pay to BULLION an advance minimum royalty of $5,000.00 each and every month until gross production sales from the Subject Property has reached the amount of $125,000.00 per month, or until BULLION has received an aggregate of $250,000.00 under these subparagraphs, A and B.

C. BULLION shall receive a FOUR PERCENT (4%) gross smelter return from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated) until BULLION has received an aggregate of $500,000.00 under these subparagraphs, A, B and C.

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D. Thereafter BULLION shall receive a TWO PERCENT (2%) gross smelter return royalty from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated) until BULLION has received an aggregate of $1,000,000.00 under these subparagraphs, A, B, C and D.

E. Thereafter BULLION shall receive a ONE PERCENT (1%) gross smelter return royalty from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated).

"Gross smelter return," as used above, shall mean the amount of earned revenues, as used in accordance with generally accepted accounting principles, payable to UNIVERSAL by any smelter or other purchaser of metals, ores, minerals or mineral substances, or concentrates produced therefrom for products mined from the Subject Property.

Upon SIXTY (60) days' written notice by BULLION to UNIVERSAL, BULLION may elect to take any monthly production royalty in kind but will be totally responsible for all loading and transportation and the costs thereof. BULLION agrees not to materially interfere with UNIVERSAL's operations should it elect to receive payment in kind, and will hold all the remaining parties hereto harmless from its actions in loading and transporting the in kind payments.

All advance royalty payments shall be due on the first day of each month and all production royalties shall be due no later than FORTY-FIVE (45) days after the date payment for production sales is received by UNIVERSAL.

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5. OBLIGATIONS OF BULLION AND POLAR: BULLION and POLAR shall assume and retain all obligations that they have independently incurred by virtue of their activities on and for the Subject Property prior to the date of this Agreement and, in particular, BULLION shall assume and retain the obligation of that certain Deed of Trust made in favor of Ira J. Jaffee, Trustee, as Beneficiary, recorded in the Official Records of Eureka County, Nevada, Book 41, Page 362. At all times pertinent hereto, UNIVERSAL shall have the unqualified right to direct any and all funds due BULLION or POLAR hereunder to remove any obligations of BULLION or POLAR, respectively, secured by the Subject Property, or any portion thereof, and such will be credited toward the payment schedule due BULLION or POLAR. See Paragraph 4, supra.

6. PURCHASE OF BULLION'S INTEREST: That at the time BULLION has received an aggregate of $1,000,000.00 under the terms and conditions of Paragraph 4, supra, BULLION will have been deemed to have sold and UNIVERSAL and POLAR deemed to have purchased all of BULLION's right, title and interest in the Subject Property (50% each, subject to the terms and conditions of the March 14, 1979 Agreement, Exhibit C) and forever releiving UNIVERSAL and POLAR from any contractual commitment to BULLION by virtue of UNIVERSAL's or POLAR's actions or operations on the Subject Property, save and except for the ONE PERCENT (1%) gross smelter return royalty from production from the Subject Property (based on 100% operating interest in UNIVERSAL, otherwise prorated) set forth in Paragraph 4(E), supra. At that time, UNIVERSAL and POLAR will execute and deliver

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to BULLION a Royalty Deed forever evidencing such royalty interest, ONE-HALF PERCENT (1/2%) being chargeable each against UNIVERSAL and POLAR.

7. DEFAULT OF OBLIGATIONS TO BULLION: If, at any time, UNIVERSAL is in default of its payment obligations to BULLION, BULLION, upon FORTY-FIVE (45) days' written notice to all of the parties hereto, may terminate this Agreement and demand that UNIVERSAL execute and deliver to BULLION a Quitclaim Deed of all of its right, title and interest to that portion of the then Subject Property that is specifically listed in Exhibit A-1 attached hereto, but not the additional properties added to the Subject Property list subsequent to the date of this Agreement. During the notice period, UNIVERSAL, or any other party hereto not BULLION, or anyone on their behalf, may pay such obligation to BULLION and cure such default.

8. PRODUCTION EXPENSE OVERRUN: Pursuant to the terms of the Letter Agreement between POLAR and CAMSELL dated March 14, 1979, Exhibit B, POLAR and CAMSELL agree to share in cost overruns incurred by UNIVERSAL in bringing the Project into production should UNIVERSAL's initial development costs prior to production exceed ONE MILLION TWO HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS ($1,250,000.00), or should UNIVERSAL's initial development costs and production costs exceed $1,250,000.00 at any time after production commences but production expenses exceed production payments or revenues.

The parties agree to share in cost overruns in excess of $1,250,000.00 commitment of UNIVERSAL in the following percentages:

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UNIVERSAL	50%
POLAR-CAMSELL	50%

Except as herein outlined, the terms, conditions and penalties for cost overruns and the non-participation in such overruns are governed by Clause 10(D), Schedule B, POLAR - UNIVERSAL Agreement of March 14, 1979.

9. DIVISION OF PROCEEDS: The proceeds of production shall be governed by the terms of this Agreement only (except for the CAMSELL, LAMBERT and ELTEL arrangements). As operator under the March 14, 1979 Agreement (see Paragraph 3, supra), UNIVERSAL shall have the right to pay all normal operating and production expenses, including insurance and taxes (excepting income taxes accruing to the invidivual parties hereto, but specifically including net proceeds of mine taxes, real and personal property taxes associated with mining and income taxes accruing to the venture), pursuant to normal and usual accounting practices and the terms of the March 14, 1979 Agreement from production payments received. In addition, UNIVERSAL shall be able to treat as production expenses and deduct from production payments received all rentals, advance royalties and production royalties paid to BULLION, the Poulsen Group and any others. The amounts received from products produced from the Subject (production payments) less the production expenses, as defined herein and in the March 14, 1979 Agreement between POLAR and UNIVERSAL, shall be the net production receipts.

As between the parties hereto, the net production receipts shall be divided as follows:

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A. BULLION: none, being only entitled to the payments set forth above in Paragraph 4;

B. UNIVERSAL: FIFTY PERCENT (50%); and

C. POLAR, CAMSELL: FIFTY PERCENT (50%), pursuant to that Letter Agreement between POLAR and CAMSELL dated March 14, 1979, Exhibit B.

Nothing herein shall be construed as prohibiting POLAR-CAMSELL from taking their interest in kind provided that they give UNIVERSAL SIXTY (60) days' written notice of such election. POLAR-CAMSELL will be totally responsible for all loading and transportation and the costs thereof. POLAR-CAMSELL will not materially interfere with UNIVERSAL's operations should it elect to recieve payment in kind and will hold all the remaining parties hereto harmless from its actions in loading and transporting the in kind payments. It is understood and agreed that all such in kind payments are net, after deduction of the proportionate amount of mining and operation costs.

10. TERMINATION BY UNIVERSAL: UNIVERSAL's participation in the Project is governed by the terms and conditions of the POLAR - UNIVERSAL Agreement of March 14, 1979, Exhibit C, except as specifically modified herein. Upon fulfilling its obligations thereunder, UNIVERSAL has the right to terminate its position as Project Operator and to terminate its further participation in Project development and expenses thereof. Such termination is governed by the terms and conditions of the March 14, 1979 UNIVERSAL - POLAR Agreement and, in particular, Schedule B attached thereto.

11. ADDITIONAL PROPERTY ACQUISITIONS: UNIVERSAL, as operator, shall have the exclusive right to acquire additional

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mineral properties within the Area of Interest on behalf of the parties hereto, be such acquisition by virtue of the rights and privileges under the 1872 Mining Law, or the leasing or purchase of private lands and minerals, or unpatented mining claims. All parties hereto agree to immediately quitclaim and assign to UNIVERSAL any and all other real property or interest in such that they may have within the Area of Interest, Exhibit A-2, as of the date of this Agreement, subjecting the same to the terms and conditions of this Agreement, excepting any interest of BULLION in and to those porperties presently being worked by Western States Minerals (Pancana).

Upon acquiring such properties within the Area of Interest, UNIVERSAL shall offer to include such into the Subject Property upon payment by POLAR-CAMSELL of FIFTY PERCENT (50%) of all acquisition costs incurred in acquiring such properties. Acquisition costs shall include, but are not limited to, purchase price, rental fees, real estate or finder's commissions, legal fees, closing costs, title examinations, appraisal fees and costs incurred by UNIVERSAL in otherwise evaluating the property to be acquired.

Should POLAR-CAMSELL reject such offer or fail to pay or reach agreement for paying such acquisition costs within FORTY-FIVE (45) days of such offer by UNIVERSAL, then such properties within the Area of Interest shall not become part of the Subject Property as they apply to POLAR-CAMSELL and will remain the sole property of UNIVERSAL without any obligations to POLAR-CAMSELL, but subject to the royalty interest of BULLION.

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However, should POLAR accept such offer and pay or reach an agreement with UNIVERSAL for paying such acquisitions costs, the newly acquired properties shall become part of the Subject Property and will be treated thereafter under the terms of this Agreement pertaining to the Subject Property.

12. POULSEN LEASE AND OPTION: The parties hereto recognize the Lease and Option of POLAR with the Poulsens, a copy of which is attached hereto as Exhibit D. UNIVERSAL shall make all payments due thereunder and shall credit such as a development or production expense.

While under Lease, the Poulsen properties shall be, and are, part of the Subject Property, however, at any time, UNIVERSAL may elect to exercise the purchase option. Upon doing so, UNIVERSAL shall offer such to POLAR-CAMSELL under the terms of Paragraph 12, supra. Failure of POLAR-CAMSELL to participate in the acquisition (purchse) costs shall remove such properties from Subject Property status as the same applies to POLAR-CAMSELL.

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13. TERM: The term of this Agreement, as it affects the continuing contractual relationships between the parties hereto, is for a period of NINETY-NINE (99) years commencing on the date hereof, unless sooner terminated, surrendered or forfeited.

14. TITLE PERFECTION: The parties hereto recognize that title to the Subject Property, or portions thereof, may contain certain imperfections, clouds thereon or outstanding interests that may require acquisition, clearing or otherwise perfecting. UNIVERSAL shall, in its discretion, seek out such imperfections and cure the same. All expenses incurred by UNIVERSAL in investi-

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gating title to the Subject Property from March 1, 1979, and curing imperfections or acquiring outstanding interests in the same shall be treated as a development or production expense by UNIVERSAL pursuant to the March 14, 1979 POLAR - UNIVERSAL Agreement.

15. INSPECTION, RECORDS: At all times pertinent hereto, the non-operating parties shall have the right to reasonable inspection of the Subject Property and all geological and production records upon giving FIVE (5) days' written notice to UNIVERSAL. Such inspection shall be at the Subject Property or at any offices of UNIVERSAL in the Elko-Carlin, Nevada area. Personal inquiry by the parties hereto directly to UNIVERSAL shall be made only to the following UNIVERSAL officers and employees, and no others:

Joseph A. Mercier
Dan Mercier
Don Hargrove

or their nominees.

Monthly, on the monthly anniversary of this Agreement, UNIVERSAL shall prepare and deliver to the parties hereto a summary report of development on the Subject Property, including building construction, geological finds, etc., and setting forth production and development expenditures.

16. NOTICES: All notices required herein shall be in writing by certified or registered mail, (United States or Canada, as the case may be), return receipt requested (or the Canadian equivalent of such service), to the addresses listed below. Service of such notice is to be deemed accomplished as of the date of mailing:

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BULLION MONARCH COMPANY
Attention: R. D. Morris
Henderson Bank Building
Elko, NV 89801

UNIVERSAL GAS (MONTANA), INC.
Attention: Joe Mercier, President
640 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 1G7

With a copy to: UNIVERSAL GAS (MONTANA), INC.
Attention: John C. Miller, Esq.
Blohm Building, Suite 201
Elko, NV 89801

POLAR RESOURCES CO.
Attention: C. Warren Hunt
1119 Sydenham Road, S. W.
Calgary, Alberta
CANADA T2T 0T5

CAMSELL RIVER INVESTMENTS
Attention: K. H. Lambert
808 Home Oil Tower
324 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 2Z2

LAMBERT MANAGEMENT LTD.
Attention: K. H. Lambert
808 Home Oil Tower
324 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 2Z2

ELTEL HOLDINGS LTD.
Attention: K. H. Lambert
808 Home Oil Tower
324 8th Avenue, S. W.
Calgary, Alberta
CANADA T2P 2Z2

17. RECORDATION: This Agreement may be recorded into the Official Records of either Eureka County of Elko County, Nevada, or both, by any one of the parties hereto.

18. BINDING EFFECT: The terms and conditions of this Agreement shall inure to the benefit of, and be binding upon, the successors and assigns of the parties hereto.

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19. ASSIGNABILITY: The respective positions and interests of the parties hereto shall be freely assignable except that such assignment shall not be binding on or affect the remaining parties hereto in any manner, unless and until such assignment is noted in writing to UNIVERSAL, or any successor Operator.

IN WITNESS WHEREOF, the parties hereto set their hands as of the day and year first above written.

BULLION MONARCH COMPANY, a Utah corporation

BY: R. D. Monie

TITLE: President

POLAR RESOURCES CO., a Nevada corporation

SEAL Affixed

BY:

TITLE: President

UNIVERSAL GAS (MONTANA), INC., a Montana corporation

SEAL Affixed

BY:

TITLE: PRESIDENT

SECRETARY

CAMSELL RIVER INVESTMENTS Ltd. ~~Inc.~~, a Canadian corporation

BY: K H Lambert

TITLE: President

SEAL Affixed

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LAMBERT MANAGEMENT LTD., a Canadian corporation

BY: K H Lambert SEAL Affixed

TITLE: President

ELTEL HOLDINGS LTD., a Canadian corporation

BY: K H Lambert SEAL Affixed

TITLE: Director & Secretary

UNIVERSAL EXPLORATIONS, LTD. a Canadian corporation

BY:

TITLE: SEAL Affixed

STATE OF Nevada)
) SS.
COUNTY OF Elko)

On May 11, 1979, personally appeared before me, a Notary Public, R.O. Morris, a duly qualified and acting officer of BULLION MONARCH COMPANY, who acknowledged to me that he executed the above instrument in that capacity.

J. C. Miller
NOTARY PUBLIC

JOHN C. MILLER
Notary Public - State of Nevada
Elko County, Nevada
My Commission Expires August 22, 1981

BOOK 71 PAGE 24

HOY & MILLER, CHARTERED
ATTORNEYS AT LAW
RENO AND ELKO, NEVADA

05/11/79

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PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On _____, 1979, personally appeared before me, a Notary Public, C. WARREN HUNT, a duly qualified and acting officer of POLAR RESOURCES CO., who acknowledged to me that he executed the above instrument in that capacity.

_____
NOTARY PUBLIC

PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 28, 1979, personally appeared before me, a Notary Public, JOSEPH A. MERCIER, a duly qualified and acting officer of UNIVERSAL GAS (MONTANA), INC., who acknowledged to me that he executed the above instrument in that capacity.

SEAL Affixed

_____
NOTARY PUBLIC

PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 17, 1979, personally appeared before me, a Notary Public, KENNETH H. LAMBERT, a duly qualified and acting officer of CAMSELL RIVER INVESTMENTS, INC., who acknowledged to me that he executed the above instrument in that capacity.

_____
NOTARY PUBLIC

SEAL Affixed

05/11/79

HOY & MILLER, CHARTERED
ATTORNEYS AT LAW
RENO AND ELKO, NEVADA

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AFFIDAVIT OF EXECUTION

I Susan Lee Nicholl of the City of Calgary, in the Province of Alberta, make oath and say that:

1. I was personally present and did see Mr. C. Warren Hunt named in the within or in annexed instrument who is personally known to me to be the person named therein, duly signed and executed the same for the purposes named therein.

2. That the same was executed at the City of Calgary, in the Province of Alberta and that I am the subscribing witness thereto.

3. That I know the said Mr. C. Warrent Hunt and he is, in my belief, of the full age of twenty-one years.

S. Nicholl
SUSAN LEE NICHOLL

SWORN BEFORE ME AT THE CITY OF CALGARY,
IN THE PROVINCE OF ALBERTA, THIS 7th
DAY OF JUNE, 1979

A Notary Public in and for the Province of Alberta

SEAL Affixed

BOOK 71 PAGE 26

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PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 17, 1979, personally appeared before me, a Notary Public, KENNETH H. LAMBERT, a duly qualified and acting officer of LAMBERT MANAGEMENT LTD., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

SEAL Affixed

PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 17, 1979, personally appeared before me, a Notary Public, KENNETH H. LAMBERT, a duly qualified and acting officer of ELTEL HOLDINGS LTD., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

SEAL Affixed

PROVINCE
~~STATE~~ OF ALBERTA)
) SS.
COUNTY OF _____)

On MAY 28, 1979, personally appeared before me, a Notary Public, Joseph A. Mercier, a duly qualified and acting officer of UNIVERSAL EXPLORATIONS, LTD., who acknowledged to me that he executed the above instrument in that capacity.

NOTARY PUBLIC

SEAL Affixed

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EXHIBIT A-2

AREA OF INTEREST

All those lands contained in the Sections and Townships listed below approximately encompassing the area EIGHT (8) miles in a northerly direction, EIGHT (8) miles in a southerly direction, EIGHT (8) miles in an easterly direction and EIGHT (8) miles in a westerly direction from Section 10, Township 35 North, Range 50 East, M.D.B.&M., Eureka County, Nevada.

Township 34 North, Range 49 East
Sections: 1-5, 8-17 and 20-24

Township 35 North, Range 49 East
Sections: 1-5, 8-17, 20-29 and 32-36

Township 36 North, Range 49 East
Sections: 1-5, 8-17, 20-29 and 32-36

Township 37 North, Range 49 East
Sections: 32-36

Township 34 North, Range 50 East
Sections: 1-24

Township 35 North, Range 50 East
Sections: All

Township 36 North, Range 50 East
Sections: All

Township 37 North, Range 50 East
Sections: 31-36

Township 34 North, Range 51 East
Sections: 3-10 and 15-22

Township 35 North, Range 51 East
Sections: 3-10, 15-22 and 27-34

Township 36 North, Range 51 East
Sections: 3-10, 15-22 and 27-34

Township 37 North, Range 51 East
Sections: 31-34

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EXHIBIT A-1

SUBJECT PROPERTY

The following described unpatented and patented mining claims generally located in Sections 1, 2, 10, 11 and 12 of Township 35 North, Range 50 East, M.D.B.&M., Lynn Mining District, Eureka County, Nevada:

Unpatented Claims	Polar	Bullion
Big Jim	100%	Royalty
Big Jim 1 to 31, inclusive	"	"
Cracker Jack	"	"
Cracker Jack 1 to 5, inclusive	"	"
Yellow Rose 6 to 21, inclusive	"	"
Polar 1 to 20, inclusive	"	"
Hill Top	"	"
Hill Top 1 to 2, inclusive	"	"
Hill Top Fractional	"	"
Hill Top 1 to 4 Fractional	"	"
RJV	"	"
Unity 1	"	"
Unity 2	"	"
Badger	"	"
Badger 1	"	"
Compromise 4 to 7, inclusive	"	"
Lamira	"	"
Junction	"	"
Paragon	"	"
Paragon 2	"	"
Paragon 4	"	"
Paragon Fractional	"	"

Patented Claims (Poulsen Lease and Option)

	U.S. Patent No.	U.S. Survey No.	Polar	Bullion
Big Six No. 3	783757	4332	77½%	Royalty
Holt	881735	4422	"	"
July	935874	4528	"	"
Great Divide	945439	4393	"	"
Bald Eagle	046758	4527	"	"

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LAMBERT MANAGEMENT LTD.

Telephone: (403) 233-0047
808 HOME OIL TOWER
324 - 8 AVENUE S.W.
CALGARY, ALBERTA
CANADA T2P 2Z2

Telephone: (403) 454-2671
13715 - 101 AVENUE,
EDMONTON, ALBERTA
CANADA T5N 0J7

March 14, 1979

Polar Resources Co.
1119 Sydenham Road, S. W.
Calgary, Alberta
T2T 0T5

Attention: Mr. Warren Hunt

Dear Sirs:

RE: Gold Claims Lynn Mining District
Eureka County, Nevada

As you are aware, since early 1976 Camsell River Investments Ltd. has entered into several agreements with you relating to the Bullion Monarch Company gold claims in Nevada and has also entered into agreements relating to the same properties with Bullion Monarch Company. As a result of these agreements, Camsell and its silent coventurers, Lambert Management Ltd. and Eltel Holdings Ltd. have advanced about $505,000. U.S. to you and $300,000. U.S. to Bullion Monarch Company and have expended a further $10,000. U.S. or so on drilling invoices and other expenses relating to the properties.

Our mutual files on this matter are extensive and the legal determination of the various agreements would undoubtedly take more time and effort to resolve than is prudent under the circumstances. We have always maintained that we do not wish to hamper your efforts to put the properties into production so long as an equitable arrangement can be reached between us. Based on the proposed agreement you have negotiated with Universal Gas (Montana) Inc. (hereinafter called the "Mill Agreement") and our meetings and telephone conversations of March 10, 11, 12 and 13, we believe we have reached an agreement acceptable to you and the parties we represent. This agreement between you and the "Camsell Group" would enable Universal to obtain the interest it has bargained for in the Mill Agreement and would resolve our diverse interests in an amiable fashion.

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BOOK 71 PAGE 30
EXHIBIT B

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The Agreement is as follows:

1) All of the interests of any nature whatsoever of Polar Resources Co. and those of other parties represented by Polar Resources Co. (hereinafter called the "Polar Group") and all of the interests of any nature whatsoever of Camsell River Investments Ltd. and those of the parties represented by Camsell River Investments Ltd. (hereinafter called the "Camsell Group") in "The Mining Properties" as defined in the Mill Agreement shall be pooled and then reallocated 50% to Universal Gas (Montana) Inc. pursuant to the Mill Agreement and 50% collectively to the Polar Group and the Camsell Group (hereinafter called the "Polar-Camsell Group").

2) The Camsell Group will receive 100% of the cash flow from the Polar-Camsell Group's 50% interest in the Mining Properties until the Camsell Group has received an amount equivalent to its expenditures relating to the Mining Properties before interest as established by independent audit. This amount is about $815,000 U.S.

3) After the Camsell Group has received the amount indicated in paragraph 2 above, the Polar Group will receive 100% of the cash flow from the Polar-Camsell Group's 50% interest in the Mining Properties until the Polar Group has received an amount equivalent to its expenditures relating to the Mining Properties before interest as established by independent audit. This amount is about $450,000. U.S.

4) After the Polar Group has received the amount indicated in paragraph 3 above, the Polar Group and the Camsell Group will split the cash flow from the Polar-Camsell Group's 50% interest in the Mining Properties on a 50-50 basis until the Camsell Group has received an amount equivalent to the amount of interest the Camsell Group would have paid to its banker calculated on all Camsell Group advances to Polar Resources Co. and Bullion Monarch Company from the dates of advance at the Canadian Imperial Bank of Commerce prime rate from time to time plus 2% per annum, compounded semi annually. Any cash received by the Camsell Group pursuant to this agreement would be credited to the "phantom bank account" on the date of receipt in order to determine the amount to be ultimately received by the Camsell Group pursuant to this paragraph 4.

5) After the Camsell Group has received the amount calculated pursuant to paragraph 4 above, the Polar-Camsell Group's interests shall be divided and an undivided 30% of the interest shall be transferred to the Camsell Group and an undivided 70% shall be transferred to the Polar Group.

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BOOK 71 PAGE 31

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6) Title to the Polar-Camsell Group's interest in the Mining Properties shall be held in trust by Polar Resources Co. pursuant to the terms of this Agreement and this Agreement or its successor shall be filed against the title to the Mining Properties in the appropriate offices in the state of Nevada. Polar shall deliver to the Camsell Group a legal opinion from a Nevada attorney stating that the terms and conditions of this Agreement are enforceable by the Camsell Group as against Polar Resources Co. and that the Camsell Group's interests have been adequately registered to protect its interests as against third parties.

7) The proceeds Polar Resources Co. receives from Universal Gas (Montana) Inc. on the sale of the assets listed in the Mill Agreement shall be distributed as follows:

a) The Polar Group shall receive 100% of the proceeds from the sale of assets acquired after December 31, 1976.

b) The Camsell Group shall receive 80.4% of the proceeds from the sale of assets acquired prior to January 1, 1977 and the Polar Group shall receive the balance.

c) Polar Resources Co. shall account to the Camsell Group for any assets held on December 31, 1976 which have been disposed of by Polar Resources Co. subsequent to December 1, 1976 but prior to the execution of the Mill Agreement. The Camsell Group shall receive an amount equal to 80.4% of such disposition proceeds from Polar Resources Co. and the source of funds for such payment shall be the Polar Group's share of the proceeds of the sale of assets pursuant to the Mill Agreement.

8) The Polar-Camsell Group recognizes a fee of $1,500. per month payable to Polar Resources Co. from the cash flow generated by the mill for the services of Warren Hunt from the date of commencement of milling operations and also recognizes the need to employ a full time representative at the mine as soon as gold production commences in meaningful amounts.

9) In the event of cost overruns beyond the $1,250,000. U.S. stated in the Mill Agreement, the Polar-Camsell Group acknowledges that it will be responsible for 50% of such overruns. These overruns shall be allocated as between the Polar Group and the Camsell Group as follows:

a) For exploration, mine development, and mine operation expenses on the Big Jim claims 24 and 25 and for mill development expenses related to that mine, 50% shall be paid by the Polar Group and 50% shall be paid by the Camsell Group.

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b) For all other expenses 70% shall be paid by the Polar Group and 30% shall be paid by the Camsell Group.

10) This Agreement is subject to the execution of the Mill Agreement and is subject to revision of the method contemplated in paragraph 1 to arrive at the interests outlined in paragraphs 2, 3, 4 and 5 if subsequent investigation reveals that the tax consequences of such method are adverse. The intent is that the Agreement will be structured so as to minimize adverse tax implications in Canada and the United States for all parties concerned while at the same time arriving at the same distribution of cash flow from the Mining Properties.

11) This Agreement shall be interpreted in accordance with the laws of the Province of Alberta.

12) Each of the parties shall execute any further agreements required by legal counsel for any party to implement the terms or intent of this Agreement.

If you agree with the above terms and conditions please indicate your acceptance on the copy of this letter enclosed.

Yours very truly,

Lambert Management Ltd.

K H Lambert

K. H. Lambert
President

/mjm
encl:

Accepted this 14th day of March, 1979

Polar Resources Ltd.

C. Warren Hunt
President

Accepted this 14th day of March, 1979

Eltel Holdings Ltd.

K H Lambert

K. H. Lambert
Secretary

Accepted this 14th day of March, 1979

Camsel River Investments Ltd.

K H Lambert

K. H. Lambert
President

BOOK 71 PAGE 33

LAMBERT MANAGEMENT LTD.

Telephone (403) 233-0047
808 HOME OIL TOWER
324 - 8 AVENUE S.W.
CALGARY, ALBERTA
CANADA T2P 2Z2

Telephone (403) 454-2671
13716 - 101 AVENUE,
EDMONTON, ALBERTA
CANADA T5N 0J7

March 16, 1979

Polar Resources Co.
1119 Sydenham Road, S. W.
Calgary, Alberta
T2T 0T5

Attention: Mr. Warren Hunt

Dear Sirs:

RE: Gold Claims - Lynn Mining District
Eureka County, Nevada

Further to our letter of March 14, 1979 and the writer's meeting with your Messrs. Hunt and Ross Hamilton on March 14, 1979, we wish to confirm that the agreement contained in the said letter is amended by adding the following:

9.1(a) Any funds advanced pursuant to sub paragraph 9(a) shall be repaid pro rata from the Polar-Camsell Group's first cash flow from the mill prior to the commencement of payments to the Camsell Group pursuant to paragraph 2.

9.1(b) Any funds advanced pursuant to sub paragraph 9(b) shall be repaid pro rata from the Polar-Camsell Group's cash flow from the mill after the obligations to the Camsell Group outlined in paragraph 4 have been satisfied.

9.2 The penalty provisions in the Mill Agreement shall apply mutatis mutandis to the Polar Group and the Camsell Group in the event of a default by either Group on an obligation to advance further funds pursuant to paragraph 9.

If you agree with the above additional terms and conditions please indicate your acceptance on the copy of this letter enclosed.

Yours very truly,

Lambert Management Ltd.

K. H. Lambert
K. H. Lambert

/mjm
encl:

BOOK 71 PAGE 34

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Attachment to: Polar Resources Co.
March 16, 1979

Accepted this day of March, 1979

Polar Resources Co.

C. Warren Hunt
President

Accepted this 16th day of March, 1979

Eltel Holdings Ltd.

K. H. Lambert
Secretary

Accepted this 16th day of March, 1979

Camsel River Investments Ltd.

K. H. Lambert
President

BOOK 71 PAGE 35

000173

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POLAR RESOURCES CO.

1070 SILVER STREET
ELKO, NEVADA 89801
(702) 738-8712

April 6, 1979

Mr. K. H. Lambert
Lambert Management Ltd.
SP08, 324 8th Ave. S.W.
Calgary T2P 2Z2

Dear Sir:

Your letter of March 16 1979 is acknowledged and a copy returned herewith signed as requested.

In accordance with our telephone conversation this morning, in which the writer pointed out that clauses 7b and 7c of the letter agreement of March 14, 1979 were unduly broad in that they might be construed to include Polar's assets which had not been acquired by the joint venture nor in the period of the joint venture, April 1 - Nov. 30, 1976, the following is proposed:

Clause 7 subclause b is amended so that the words " prior to Jan. 1, 1977" are replaced by "between April 1, 1976 and November 30, 1976".

Clause 7 subclause c. The meaning of the word "assets" as used in this subclause is understood to mean properties and equipment acquired by the joint venture or charged by Polar to the joint venture so as to establish equity of contributions of the members of the joint venture, that is to say, Polar Resources Co. and Camsel River Investments Ltd.

If the foregoing meet with your approval, kindly sign a copy hereof and return for our files.

Yours truly,
Polar Resources Co.

C. Warren Hunt, Pres.

See qualifications in letter of April 10/79
Lambert Management Ltd.
per K.H. Lambert

BOOK 71 PAGE 36

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LAMBERT MANAGEMENT LTD.

Telephone: (403) 233-0047
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CANADA T2P 2Z2

Telephone: (403) 454-2671
13716 - 101 AVENUE,
EDMONTON, ALBERTA
CANADA T5N 0J7

April 10, 1979

Polar Resources Co.
1119 Sydenham Road S.W.
Calgary, Alberta
T2T 0T5

ATTENTION: Mr. Warren C. Hunt

Dear Sirs:

RE: Gold Claims Lynn Mining District
Eureka County, Nevada

Further to your letter of April 6, 1979, we wish to confirm our agreement that clauses 7b and 7c of our letter agreement of March 14, 1979 have not been drafted to contemplate assets to be sold under the Mill Agreement. We agree that the language should be changed.

We are prepared to accept your suggested change for sub clause 7b provided that the 80.4% figure is changed to reflect the actual percentage of the total funds used by Polar between April 1 and November 30, 1976 which was injected by the Camsell Group. Your auditor could provide us with that percentage.

We accept your clarification of the word "assets" in sub clause 7c and would also suggest that the 80.4% figure used in sub clause 7c should be changed to the same percentage as will be used in subclause 7b.

If the foregoing meets with your approval, kindly sign the enclosed copy of this letter and return it for our files.

Yours very truly,
LAMBERT MANAGEMENT LTD.
K H Lambert
K.H. Lambert
President

KHL/rs
Enc.

Accepted this 17th day of April, 1979

POLAR RESOURCES LTD.

PER: _____

BOOK 71 PAGE 37

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EXHIBIT 2

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EXHIBIT 2

PARSONS BEHLE & LATIMER

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Email: ecf@parsonsbehle.com

Attorneys for Barrick Goldstrike Mines Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

BULLION MONARCH MINING INC.,

Plaintiff,

vs.

BARRICK GOLDSTRIKE MINES INC.,

Defendant.

Case No. 03:09-cv-612-MMD-WGC
(Sub File of 3:08-cv-227-MMD-WGC)

BARRICK GOLDSTRIKE MINES INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF OBLIGATION UNDER THE 1979 AGREEMENT

Defendant Barrick Goldstrike Mines Inc. ("Goldstrike") submits this Reply Memorandum in support of its Motion for Summary Judgment Based on Lack of Obligation Under the 1979 Agreement filed on September 22, 2015 [Dkts. 161, 162] ("Goldstrike MSJ").[1]

[1] On September 22, 2015, plaintiff Bullion Monarch Mining, Inc. ("New Bullion") filed its own Motion for Partial Summary Judgment [Dkts. 166 (filed under seal), 169, 170] ("Bullion PMSJ"). If the Goldstrike MSJ is granted, the Bullion PMSJ must necessarily be denied.

TABLE OF CONTENTS

000179

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

OTHER AUTHORITIES

INTRODUCTION[2]

The outcome of the competing motions for summary judgment turns on paragraph 11 of the 1979 Agreement (the "AOI Provision"). Under this provision, Universal, as the operator of the venture created by the 1979 Agreement (the "1979 JV"), was given the exclusive right to acquire properties within a 255-square-mile area of interest (the "AOI"). If Universal acquired new mining properties within the AOI, it was obligated to offer all the other active members of the 1979 JV (defined as "POLAR-CAMSELL"[3]) the opportunity to pay their proportionate share of the acquisition price. If POLAR-CAMSELL agreed to pay their proportionate share, the newly acquired properties would become part of the "Subject Property" to be owned and operated on behalf of the 1979 JV, and Old Bullion would be entitled to a royalty on production from those properties under paragraph 4 of the 1979 Agreement (the "Subject Property Royalty Provision"). If POLAR-CAMSELL declined to pay their proportionate share of the acquisition costs, however, Universal would keep the acquired property as its "sole" property, but was required to pay Old Bullion a royalty under paragraph 11. POLAR-CAMSELL, and the 1979 JV, had no obligation to pay any royalties on the lands that Universal acquired in the AOI and kept for itself.

The first question before the Court is whether Universal's exclusive right to acquire AOI property and its attendant obligation to pay a royalty on production from properties it acquired and kept as its "sole" property were assigned to and assumed by Goldstrike's predecessor, High Desert.[4] If the answer to this first question is no, the second question is whether the AOI Provision constitutes a real covenant that runs with the Subject Property, binding subsequent owners of that

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[2] Unless otherwise specified herein, capitalized terms have the meaning assigned to them in the Goldstrike MSJ.

[3] "POLAR" is defined to mean Polar Resources Co., a Nevada Corporation, and CAMSELL is defined to mean, collectively, Camsell River Investments, Ltd., a Canadian corporation, Lambert Management Ltd., a Canadian corporation, and Eltel Holdings Ltd., a Canadian corporation. *See* 1979 Agreement at 1-2, Goldstrike Appx. Tab 1.

[4] Goldstrike acknowledges that New Bullion has raised a material issue of fact whether the High Desert corporate entity that signed the 1990 Option Agreement was the corporate predecessor of Goldstrike. For purposes of summary judgment only, Goldstrike will assume that New Bullion's position is correct, will refer to the entity that signed the 1990 Option Agreement simply as "High Desert," and will assume that the entity that signed the 1990 Option Agreement is the same entity that is the corporate predecessor of Goldstrike.

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land. If the answer to the second question is also no, then the third and final question is whether Goldstrike is obligated to pay New Bullion royalties under the theory of unjust enrichment. As demonstrated below, the answer to all of these questions is no.

There was no assignment or assumption of Universal's rights and obligations under the AOI Provision.

Although the 35-year history following the execution of the 1979 Agreement involves numerous parties and agreements, the significant fact for the motion at hand is what is missing from that history. Nowhere in any of the documents is there an assignment and assumption of Universal's exclusive right and royalty obligation under the AOI Provision.

The 1979 Agreement contained specific provisions governing how Universal might resign or be replaced as the "operator" of the 1979 JV, and there is no evidence that anyone ever became a successor operator under the 1979 Agreement. Rather, in 1984, and again in 1986, entirely new joint ventures were formed. These later ventures were governed by their own agreements which expressly "superseded" the 1979 Agreement, appointed their own operator (Nicor/Westmont), added new parties, and did not include Old Bullion.

The 1984 and 1986 joint venture agreements each contain their own area-of-interest provisions that are distinctly different from, and entirely inconsistent with, the AOI Provision in the 1979 Agreement. Specifically, they (1) apply to a larger, 400-square-mile area of interest, (2) allow any of the participants in the new ventures to acquire lands in the area of interest rather than giving any one of the parties (which included Universal (then known as Petrol)) the exclusive right of acquisition, and (3) they allow acquired properties that are not accepted by the venture to remain the sole property of the acquiring party with ***no*** royalty obligation to anyone. Thus, while it can be argued that, as between Old Bullion (New Bullion) and Universal (Petrol), the latter still had the exclusive right to acquire and keep properties in the original 255-square mile AOI with a corresponding obligation to pay a royalty to Old Bullion (New Bullion) on such lands, the rights and obligations of Universal under the AOI Provision were never assigned to or assumed by the 1984 or 1986 joint ventures (or any party thereto).

Through the 1990 Option Agreement, High Desert agreed that it would assume "at closing" any obligations that the 1986 Joint Venture (an entity distinct from any of its participants) held under the 1979 Agreement, but only if such obligations were expressly disclosed to High Desert. Because Universal's rights and obligations under the AOI Provision were never assigned to or assumed by the 1986 Joint Venture, there was nothing that could be assigned to and assumed by High Desert under the 1990 Option Agreement.[5] Accordingly, no obligations relating to the AOI Provision were disclosed to High Desert by the 1986 Joint Venture, and High Desert was not asked to execute an assignment and assumption agreement relative to the AOI Provision at closing. Importantly, Universal (Petrol), a party to the 1986 Joint Venture, never took any action to assign its exclusive rights under the AOI Provision to High Desert, and High Desert did nothing to assume Universal's corresponding obligations thereunder.

New Bullion's assignment/assumption theory rests on the flawed supposition that something must have happened to Universal's rights and obligations under the AOI Provision when all of the parties to the 1979 Agreement (other than Old Bullion) decided to form the 1984 and later the 1986 Joint Ventures, along with additional parties. New Bullion postulates that Universal's rights and obligations must have been transferred to someone, somewhere along the way. The evidence simply does not bear this out. The undisputed fact is that the rights and obligations under the AOI Provision remained with Universal and were never assigned to or assumed by anyone. To the extent New Bullion, as the presumed successor of Old Bullion, has a claim, its remedy is against Universal, and perhaps the other parties to the 1979 Agreement. It has no rights or remedies against High Desert/Goldstrike.

The AOI Provision did not run with the Subject Property.

The plain language of the AOI Provision in the context of the entire 1979 Agreement demonstrates that Universal's rights and obligations thereunder did not run with the Subject Property and do not bind subsequent owners of that land. Aside from the fact that there was no

[5] If New Bullion's interpretation were correct, the 1986 Joint Venture would have been responsible for paying Bullion a royalty on properties that Universal (Petrol) acquired and kept for itself, i.e., properties that were of no benefit whatsoever to the 1986 Joint Venture.

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privity of estate between Universal and Old Bullion, and the fact that the covenant did not "touch and concern" any land, the language of the 1979 Agreement makes it clear that the parties did not intend the obligation to run.

High Desert/Goldstrike never received the exclusive right so there is no unjust enrichment.

Finally, there is no evidence that High Desert/Goldstrike has been unjustly enriched because it never received, appreciated, or accepted an exclusive right to acquire properties in the AOI. Thus, equity does not require it to pay any royalties under the AOI Provision.

NEW BULLION RELIES ON EVIDENCE THAT THIS COURT HAS ALREADY EXCLUDED AS INADMISSIBLE

Only admissible evidence may be considered in ruling on a motion for summary judgment. *Beyene v. Coleman Sec. Svcs. Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988) (citing Fed. R. Civ. P 56(e)); *see also* LR 56-1. On January 25, 2011, this Court granted Goldstrike's Motion to Strike certain evidence because it was irrelevant, constituted inadmissible parol evidence, was inadmissible hearsay, or set forth improper legal conclusions. *See* January 25, 2011, Minutes of Court [Dkt. #114]; *see also* Goldstrike's Mot. to Strike Inadmissible Evid. Proffered in Supp. of New Bullion's Mot. for Partial Summ J. [Dkt. #64 (filed under seal)]. New Bullion ignores the Court's prior order and attempts to proffer the same inadmissible evidence in opposition to the Goldstrike MSJ.[6] Specifically, New Bullion proffers the following previously excluded documents: (1) July 3, 1990, Letter from Thomas Erwin to Randy Parcel, Ex. 2 to Appx. in Supp. of Bullion Monarch's Opp. to Summ. J. on Lack of Obligation ("Bullion Opp. Appx."); (2) July 10, 1990, Letter from Randy Parcel to Paul Schlauch (Bullion Opp. Appx. Ex. 3); (3) April 28, 1999, notes of Frank Erisman (Bullion Opp. Appx. Ex. 10); (4) July 2, 2009, Expert Report of Richard W. Harris (Bullion Opp. Appx. Ex. 14); and (5) the indemnification provisions from the 1999 Asset Exchange Agreement between Newmont and Goldstrike. This inadmissible evidence, and all alleged factual statements based thereon, should be stricken from Bullion Monarch's Opposition to Summary Judgment on

[6] New Bullion also cited the same inadmissible evidence in support of the Bullion PMSJ.

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Lack of Obligation Under the 1979 Agreement ("Bullion Opp.") [Dkt. 186 (original filed under seal)].

ADDITIONAL EVIDENCE THAT SHOULD BE EXCLUDED AS INADMISSIBLE

The letter from Old Bullion's legal counsel, Garry McAllister, attached to the Bullion Opp. Appx. as Ex. 12 is inadmissible for three independent reasons. First, the self-serving statements of Old Bullion's counsel are not binding upon Goldstrike. *See* Fed. R. Civ. P. 32(a)(3). Second, the letter constitutes inadmissible hearsay for which no exception applies. *See* Fed. R. Evid. 801(c), 802 & 803. Third, the letter sets forth an improper and inadmissible legal conclusion. *Cf. Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1065 n. 10 (9th Cir. 2002); *McHugh v. United Serv. Auto. Ass'n*, 164 F.3d 451, 454 (9th Cir. 1999); *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994). The letter, and all factual statements based thereon, should therefore be stricken from the Bullion Opp.

RESPONSE TO NEW BULLION'S COUNTER STATEMENT OF FACTS[7]

The Goldstrike MSJ set forth 49 statements of undisputed facts supporting summary judgment. New Bullion did not specifically respond to any of them. Nor did it come forward with admissible evidence to establish a genuine issue relating thereto. Thus, each of Goldstrike's factual statements should be considered undisputed. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (a factual dispute is genuine only when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party, who "must do more than simply show that there is some metaphysical doubt as to the material facts"); *Ahmed v. Deutsche Bank, N.A.*, No. 2:09-cv-02234-GMN-LRL, 2011 WL 3425460, at *6 (D. Nev. Aug. 4, 2011) (summary judgment proper where plaintiff provides little more than "gossamer threads of whimsy speculation and conjecture" to support its claim).[8]

[7] New Bullion incorporates by reference into the Bullion Opp. the statement of undisputed facts set forth in the Bullion PMSJ. *See* Bullion Opp. at 1, n. 1. Goldstrike therefore incorporates by reference herein its objections and response to each of those factual statements, as set forth at pages 2-14 of its Mem. in Opp. to Bullion Monarch's Mot. for Partial Sum. J. [Dkt. 180] ("Goldstrike Opp. to Bullion PMSJ").

[8] A copy of this decision is attached hereto as Ex. A.

The majority of New Bullion's "Counterstatement of Facts" can be ignored because they merely quote or summarize undisputed terms in the controlling documents,[9] attempt to improperly characterize documents that should be construed by the Court based on their plain language,[10] rely on previously excluded evidence,[11] or are undisputed but immaterial.[12] Only a few of New Bullion's "Counterstatements of Fact" require a response.

> *New Bullion Counter Fact: Area of interest acquisitions, too, are subject to the 1% royalty. If Polar does not pay for its half, however, those properties "shall not become part of the Subject Property as they apply to Polar-Camsell," but they remain "subject to the royalty interest."*

New Bullion mischaracterizes the 1979 Agreement. One of two things would happen if Universal acquired properties in the AOI. If POLAR-CAMSELL (a defined term that included all of the other parties to the joint venture except Old Bullion) pays one-half of the acquisition costs, the property becomes part of the Subject Property to be operated for and on behalf of the 1979 JV, and subject to the Subject Property Royalty Provision in paragraph 4. *See* 1979 Agreement at ¶¶ 4, 11. If POLAR-CAMSELL does not contribute to the acquisition costs, the property "remains the sole property of UNIVERSAL." *See id.* at ¶ 11. Although Universal's solely owned property would be "subject to" a royalty in favor of Old Bullion, that royalty from Universal is separate and distinct from any royalty due from the 1979 JV on the Subject Property under paragraph 4. Indeed, any royalties paid to Bullion on Universal's "sole" property under paragraph 11's AOI Provision would be paid by Universal, in its personal capacity, rather than as operator of the joint venture. *See id.*

> *New Bullion Counter Fact: In 1984 and 1986, two joint venture agreements shifted the operation from Universal to Nicor Mineral Ventures, Inc., although Universal's successor, Petrol Oil & Gas Co., continued to be a member of those ventures.*

New Bullion cites no evidence in support its claim that the 1984 and 1986 joint venture

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[9] *See* Ex. B hereto.

[10] *See* Ex. C hereto.

[11] *See* Ex. D hereto.

[12] *See* Ex. E hereto.

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agreements "shifted the operation."[13] To the contrary, the evidence establishes the existence of three separate and distinct joint ventures, one established in 1979, a second established in 1984 and a third established in 1986. Each of these ventures were governed by their own agreements which involved slightly different parties, appointed different operators, and contained their own area of interest provisions.[14] Bullion cites no evidence that the 1984 and 1986 joint ventures were continuations of the 1979 JV, or that Nicor (the operator of the latter two ventures) was ever appointed as Universal's successor operator under the 1979 Agreement. Indeed, the 1984 and 1986 joint venture agreements provide that they "supersede" earlier agreements, including the 1979 Agreement. *See* 1984 Joint Venture Agreement at §§ 16.4 & 16.1, Goldstrike Appx. Tab 12; 1986 Joint Venture Agreement at §§ 16.5 & 16.14, Goldstrike Appx. Tab 14.

> *New Bullion Counter Fact: After the closing, High Desert acquired additional properties beyond the original mining claim . . . , properties that Bullion believes are in the area of interest. In discovery, Barrick confirmed that it or its predecessors had done so.*

New Bullion cites no evidence to support this statement. Exhibit 5.1(k) to the 1995 Merger Agreement identifies properties held by the High Desert/Newmont venture as of that date. Although the exhibit includes properties in addition to the Subject Property as originally defined in the 1979 Agreement, it does indicate when these additional properties were acquired (or by whom). More importantly, it does not establish that such properties were acquired by High Desert after it acquired the Subject Property in 1990 (rather than by the 1979, 1984 or 1986 joint ventures). There is likewise nothing in the cited excerpts of Goldstrike's interrogatory response evidencing acquisitions in the AOI by High Desert after it acquired the Subject Property in August 1990.

> *New Bullion Counter Fact: In negotiations, High Desert represented that the area-of-interest royalty encumbered the property.*

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[13] The 1986 Joint Venture Agreement specifically states that the 1986 Joint Venture "shall be deemed a continuation of the 1984 Venture." 1986 Joint Venture Agreement at § 16.1. There is no such language in the 1984 or 1986 Joint Venture Agreements indicating that either of these ventures were intended to be a continuation of the 1979 JV.

[14] *Compare* 1979 Agreement (Goldstrike Appx. Tab 1) at 10-12, ¶ 11, *with* 1984 Joint Venture Agreement (Goldstrike Appx. Tab 12) at p. 1, p. 15, § 8.1 & pp. 24-25, Art. XIII, *with* 1986 Joint Venture Agreement (Goldstrike Appx. Tab 14) at p.1, p.19, § 8.1 & pp. 30-31, Art. XIII.

The cited abstract, which High Desert provided to Newmont in 1991, does not support this statement. The abstract merely identifies and describes the various documents recorded against the Subject Property, including the 1979 Agreement. The abstract contains no conclusions regarding High Desert's liability under any of the identified instruments or their particular covenants, and contains no admission that High Desert was ever assigned or assumed the rights and obligations of Universal under the AOI Provision.

> *New Bullion Counter Fact: Newmont is paying royalties on production from Bullion's original mining claims, but Barrick has never paid royalties from production in the area of interest.*

It is undisputed, but immaterial, that Newmont has been paying Bullion royalties on production ***from the Subject Property*** under paragraph 4. It is also undisputed that Goldstrike has paid no royalties to Bullion from its production from properties it owns in the AOI (because it owes no royalties).

ARGUMENT

New Bullion attempts to shift its burden of proof to Goldstrike, claiming that Goldstrike must disprove Bullion's claims. *See* Bullion Opp. at 6. All Goldstrike is required to show to obtain summary judgment, however, is that New Bullion failed to present admissible evidence supporting an essential element of its claims. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999) (quoting *Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)*). ("Summary judgment for a defendant is appropriate when the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial.'"). Goldstrike made its required showing because there is no evidence by which New Bullion can prove that (1) High Desert/Goldstrike assumed Universal's royalty obligations to Old Bullion under the AOI Provision, (2) the AOI Provision ran with the Subject Property, or (3) High Desert/Goldstrike has been unjustly enriched. Goldstrike is therefore entitled to judgment on New Bullion's claims as a matter of law, and the Goldstrike MSJ should be granted.

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I. NEW BULLION PRESENTS NO EVIDENCE THAT HIGH DESERT ASSUMED UNIVERSAL'S OBLIGATIONS UNDER THE AOI ROYALTY PROVISION.

New Bullion suggests that summary judgment is inappropriate because assumption requires a finding of intent, which is ordinarily a question of fact. *See* Bullion Opp. at 6.[15] But "when a contract is clear, unambiguous, and complete, its terms must be given their plain meaning and the contract must be enforced as written; the court may not admit any other evidence of the parties' intent because the contract expresses their intent." *Ringle v. Bruton*, 86 P.3d 1032, 1039, 120 Nev. 82, 93 (Nev. 2004). Summary judgment is appropriate where a plaintiff fails to come forward with evidence to establish a genuine issue on the question of intent. *See, e.g., JV Properties, LLC v. SMR7, LLC*, No. 62035, 2014 WL 7277393, at *2 (Nev. 2014).[16]

New Bullion's argument for assumption rests entirely on the 1990 Option Agreement. Specifically, New Bullion argues that Goldstrike's corporate predecessor, High Desert, agreed to assume and become liable for Universal's royalty obligations under the 1979 Agreement. As discussed below, this argument is flawed for three independent reasons. First, the 1990 Option Agreement was not an agreement between High Desert and Universal. It was an agreement between High Desert and the 1986 Joint Venture. There is no evidence that the 1986 Joint Venture was ever assigned or assumed Universal's rights and obligations under the AOI Provision. Therefore, the 1986 Joint Venture had no rights and obligations that could be assigned to and assumed by High Desert under the 1990 Option Agreement. Second, the 1990 Option Agreement conditioned High Desert's assumption obligation on prior disclosure by the 1986 Joint Venture. Even assuming *arguendo* that Universal's rights and obligations under the AOI Provision had been

[15] The cases cited by New Bullion are inapposite. *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1138-39 (9th Cir. 2011), applies California law holding that the interpretation of a contract is a question of fact. This case is controlled by Nevada law, which has long recognized that the interpretation of an unambiguous contract is a question of law. *See Federal Ins. Co. v. Coast Converters, Inc.*, 339 P.3d 1281, 1284 (Nev. 2014); *Grand Hotel Gift Shop v. Granite State Ins. Co.*, 839 P.2d 599, 602 (Nev. 1992). *Easton Bus. Opp., Inc. v. Town Exec. Suites-Eastern Marketplace, LLC*, 230 P.3d 827, 832 (Nev. 2010) merely confirms that there must be intent to make an assignment or assumption. It says nothing about whether intent (or lack thereof) may be determined on summary judgment. *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067-68 (9th Cir. 1998) does not hold that every agreement assigning "all" the terms of a contract is unambiguous and can be interpreted as a matter of law. It merely held that the contract at issue in that case was unambiguous.

[16] A copy of this case is attached hereto as Ex. F.

000191

000191

somehow assigned to and assumed by the 1986 Joint Venture, there is no evidence that the 1986 Joint Venture ever disclosed the existence of such obligations to High Desert. Thus, High Desert was not obligated to assume those obligations from the 1986 Joint Venture under the 1990 Option Agreement. Third, High Desert's assumption obligation was an executory promise, to be performed by High Desert at closing, after the 1990 Option Agreement had already been signed. Because this executory obligation was not fulfilled when the transaction closed in August 1990, it merged into the deed. Thus, even assuming *arguendo* that the rights and obligations of Universal under the AOI Provision had been somehow assigned to and assumed by the 1986 Joint Venture, and further assuming *arguendo* that such obligations were disclosed to High Desert, the 1986 Joint Venture did not require performance of the obligation at the time of closing and the obligation thereafter ceased to exist.

In an effort to avoid the fundamental defects in their claim, New Bullion suggests that since Universal and all of the other parties to the 1979 Agreement besides Old Bullion were parties to the 1986 Joint Venture, they must have intended the rights and obligations of Universal under the AOI Provision to transfer to and bind the 1986 Joint Venture. This argument makes two flawed assumptions. First, it assumes that Nicor, the operator of the 1986 Joint Venture, succeeded to Universal's role as operator under the 1979 Agreement. But the 1979 Agreement is clear as to how Universal could resign and how a successor operator could be appointed, and there is no evidence that these requirements were ever met. Second, it assumes that Nicor, as operator of the 1986 Joint Venture, was assigned Universal's exclusive right to acquire properties in the AOI on behalf of the other parties to the 1979 Agreement, and assumed the corresponding royalty obligation. Again, there is no evidence of this occurring. Indeed, the 1986 Joint Venture Agreement contained its own unique area of interest provision. Under that provision, any party to the 1986 Joint Venture could acquire lands in an expanded area of interest, and if the 1986 Joint Venture did not accept the newly acquired lands, the acquiring party would retain those lands without paying any royalties to anyone.

It simply makes no sense that Nicor, or any other party, would assume Universal's obligations under the AOI Provision without acquiring Universal's corresponding right of exclusive

acquisition. *Cf.* Williston on Contracts 4th § 74:35 ("If the party clearly delegates the duties as well as makes an absolute and complete assignment of rights, it seems a reasonable interpretation of the bargain that, absent circumstances showing a contrary intention, the assignee impliedly undertakes the performance of the duties."). This is a fatal flaw in New Bullion's theory that cannot be ignored. Simply put, the rights and obligations under the AOI Provision remained with Universal and were never assigned to or assumed by any other party, and most critically, not by the 1986 Joint Venture. If New Bullion, as the alleged successor of Old Bullion, has a claim, its claim is against Universal and perhaps the other parties to the 1979 Agreement. New Bullion cannot remedy its perceived problem by foisting obligations on High Desert/Goldstrike that these parties never assumed.

A. Universal's rights and obligations under the AOI Provision were never assigned to nor assumed by the 1986 Joint Venture.

New Bullion asserts: "The text of the 1990 option agreement shows that High Desert expressly assumed all of ***Universal's obligations*** under the 1979 Agreement." Bullion Opp. at 13 (emphasis added). While this statement would have to be true for New Bullion to prevail, that is not what the 1990 Option Agreement says. It is undisputed that the 1990 Option Agreement required High Desert to assume at closing only those obligations that the ***1986 Joint Venture*** had under the 1979 Agreement. There is nothing requiring it to assume the obligations of ***Universal***. Universal's rights and obligations under the AOI Provision were never assigned to or assumed by the 1986 Joint Venture (or any other party), and thus there was nothing for High Desert to assume under the 1990 Option Agreement. *See* Goldstrike MSJ at 33-34.

New Bullion tries to argue that the 1986 Joint Venture assumed Universal's obligations under the 1979 Agreement because its operator (Nicor) purchased its interests in the Subject Property from Polar, which purchased half of Universal's interest in the original Subject Property and was responsible to pay half the royalty on the Subject Property. This argument is flawed at every stage—most critically because Polar never assumed an obligation to pay Old Bullion half the royalty on properties that Universal might acquire in the AOI and keep for itself (rather than share with POLAR-CAMSELL as part of the Subject Property). Indeed, paragraph 11 expressly provides

otherwise. *See* 1979 Agreement at 11 (if POLAR-CAMSELL do not contribute to Universal's cost of acquiring lands in the AOI, those lands "shall not become part of the Subject Property as they apply to POLAR-CAMSELL"). Simply put, neither Polar nor Nicor ever held the exclusive right to acquire lands in the AOI under the AOI Provision, and they never assumed the corresponding obligation to pay any royalties on properties that Universal acquired and kept as its "sole property."

New Bullion argues that the 1986 Joint Venture must have assumed Universal's obligations under the AOI Provision because its operator (Nicor) was required to "make or arrange for *all payments* required by the Existing Agreements," including the 1979 Agreement.[17] *See* Bullion Opp. at 6-7. This argument is premised on the mistaken assumption that the 1986 Joint Venture assumed Universal's royalty obligations under the AOI Provision. Because it did not, there were no such payments for Nicor to be responsible for.

Finally, New Bullion suggests that Universal's obligations under the AOI Provision (and all other obligations contained within the 1979 Agreement) passed to the 1986 Joint Venture because those obligations were not expressly disclaimed. This argument turns the law of assumption on its head. An assumption requires the agreement of the party to be bound. *See Southern Pac. Co. v. Butterfield*, 154 P. 932, 933 (Nev. 1916); Restatement (Second) of Contracts § 327. An assumption does not occur simply because a party is aware of the existence of an obligation by another party and fails to disclaim it. As set forth above and in the Goldstrike MSJ, there is no evidence of any agreement by the 1986 Joint Venture to assume Universal's obligations under the AOI Provision.[18]

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[17] The cited language merely allocates responsibility for any payments that may be required to Nicor, as operator of the 1986 Joint Venture. It does not constitute an assumption of any specific obligation, let alone Universal's royalty obligation under the AOI Provision.

[18] New Bullion claims that the 1986 Joint Venture's assignment of Universal's obligations under the AOI Provision is evidenced by the letters exchanged between the parties' counsel leading up to the execution of the 1990 Option Agreement. This argument fails because the cited letters have already been stricken as inadmissible parol evidence. *See supra* at 4-5. Even if these letters were admissible, they do not establish that the 1986 Joint Venture assumed ***Universal's obligations*** under the AOI Provision. Both of the letters relate to Section 3.3 of the 1990 Option Agreement and its corresponding exhibits, which deal with warranties of title, not the assumption of personal obligations. By declining the requested changes to Section 3.3 and Exhibit A, the 1986 Joint Venture was not, as New Bullion asserts, making any representation that it had assumed Universal's obligations under the AOI Provision. It merely confirms that there might be real covenants in the

B. The 1986 Joint Venture never disclosed Universal's royalty obligation under the AOI Provision as an obligation of the 1986 Joint Venture that High Desert was required to assume.

Since the 1986 Joint Venture was never assigned and did not assume Universal's rights and obligations under the AOI Provision, it is not surprising that it did not make any disclosure to High Desert relating thereto. New Bullion tries to argue that the required disclosure occurred through Section 3.3(A)(6)(d) of the 1990 Option Agreement. But that provision merely states that title to the Subject Property is "subject to" the "royalty and other obligations provided for in the May 10, 1979 Agreement." The phrase "subject to" is construed to mean "subordinate to," "subservient to," "limited by," or a grantor's attempt to put the grantee on notice of potential defects in title. *See* Goldstrike MSJ at 37-39, and cases cited therein. This language does not constitute a disclosure by the 1986 Joint Venture that it actually held Universal's rights and obligations under the AOI Provision. *See Grimes v. Walsh & Watts, Inc.*, 694 S.W. 2d 724 (Tex. Ct. App. 1983).[19]

New Bullion contends that the disclosure obligation was satisfied through the 1990 Option Agreement's reference to the "royalty and other obligations provided for in the May 10, 1979 Agreement." This argument fails for three independent reasons. First, as noted in the preceding paragraph, this language is contained within Section 3.3, which merely identifies potential encumbrances on the 1986 Joint Venture's title to the Subject Property, without identifying any specific obligations of the 1986 Joint Venture to be assumed by High Desert. Second, there were at least two different royalty obligations contained within the 1979 Agreement—the Subject Property Royalty Provision of paragraph 4 and Universal's obligation to pay Old Bullion a royalty on property it acquired in the AOI and kept for itself under the AOI Provision of paragraph 11. The 1986 Joint Venture never had the latter obligation, and it thus never disclosed it to High Desert. Third, New Bullion's interpretation of Section 3.3 would render the first clause of Section 7.3(B)(3)(a) a nullity. If the parties to the 1990 Option Agreement believed that the obligations of

1979 Agreement, relating to royalties or otherwise, that run with the land and must therefore be excluded from the 1986 Joint Venture's warranties of title.

[19] New Bullion asserts that *Grimes* is not a case about "insufficient disclosure," but a case about whether an assumption occurred. Bullion Opp. at 16-17. This is a distinction without a difference. *Grimes* makes clear that mere knowledge of an agreement is not enough to effectuate an assumption of any specific obligation contained therein. There must be disclosure of the specific obligation to be assumed.

the 1986 Joint Venture were disclosed through Section 3.3, there would be no reason to include the precondition of disclosure in Section 7.3(B)(3)(a).

Finally, New Bullion suggests that specific disclosure was unnecessary because High Desert assumed "all obligations" of the 1986 Joint Venture under the 1979 Agreement. *See* Bullion Opp. at 16-17. This argument has two fatal flaws. First, it ignores the fact that the 1979 Agreement had numerous obligations running to and from its various parties and then presumes that the 1986 Joint Venture assumed just Universal's under the 1979 Agreement, including Universal's royalty obligation under the AOI Provision. There is no evidence to support that claim. Second, it ignores the express language of Section 7.3(B)(3)(a), which imposed upon the 1986 Joint Venture the affirmative obligation to identify any specific obligations which the 1986 Joint Venture was obligated to perform, and High Desert was thus obligated to assume. Unless and until such disclosure occurred, High Desert was not required to assume anything.

C. High Desert's assumption obligations merged into the deeds at closing.

Any assumptions under Section 7.3(B)(3)(a) of the 1990 Option Agreement (under the heading "Closing Obligations") were to occur, if at all, "[a]t the Closing." *See* 1990 Option Agreement at § 7.3(B)(3)(a), Goldstrike Appx. at Tab 17. There is no evidence that High Desert was assigned or assumed Universal's rights and obligations under the AOI Provision at the closing. Thus, any obligation High Desert may have had to assume Universal's royalty obligation under the AOI Provision ceased to exist, and merged into the executed deeds.[20]

New Bullion contends that a deed supersedes a contractual obligation only if the parties intended it to do so. The required intent exists in this case.[21] The corrective deeds specifically

[20] Goldstrike never argued that ***Universal's*** royalty obligation under the AOI Provision were "extinguished" under the merger doctrine. *See* Bullion Opp. at 10. That obligation continues to exist between Universal (Petrol) and Old Bullion (New Bullion). What merged into the deeds was High Desert's executory obligation to assume any obligations that the 1986 Joint Venture had and disclosed to High Desert under Section 7.3(B)(3)(a).

[21] Goldstrike cited various authorities in support of its contention that the 1990 Option Agreement merged into the deed as a matter of law. Goldstrike MSJ. at 35-36. While New Bullion contends that one of these authorities, *Hanneman v. Downer*, 871 P.2d 279 (Nev. 1994), supports its case, it does not even discuss the others. *Hanneman* itself merely notes that "[w]hether merger is applicable 'depends upon the intention of the parties, and intention in such cases is a question of fact. . . ." *Id.* at 285. As noted above, the question of intent is properly resolved on summary

provide that the "representations, warranties, and indemnities" set forth in the 1990 Option Agreement survive the closing.[22] If the parties wanted other provisions of the 1990 Option Agreement to likewise survive they could and would have said so. New Bullion cites no evidence, in the 1990 Option Agreement or the deeds themselves, establishing that the parties did not intend the obligation to merge.

JV Properties, LLC v. SMR7, LLC, No. 62035, 2014 WL 7277393 (Nev. Dec. 19, 2014) is instructive. JV Properties entered into an "offer and acceptance agreement" for the sale of a parcel of real estate in Clark County to SMR7. *Id.* at *1. JV Properties transferred the property to SMR7 pursuant to a deed. *Id.* Thereafter, JV Properties defaulted on a promissory note that encumbered the property, and SMR7 sued JV Properties for damages incurred to save the property from foreclosure. *Id.* JV Properties opposed SMR7's motion for summary judgment, claiming that the obligations of the offer and acceptance agreement survived the deed. *Id.* Like New Bullion, JV Properties argued that the "detailed terms and provisions within its offer and acceptance agreement" evidenced the parties' intent for that agreement, rather than the deed, to memorialize their deal, or at least established a question of fact on the issue of intent. *Id.* at *2. The court disagreed, granting summary judgment in favor of SMR7 and finding "no evidence the parties intended for the offer and acceptance agreement to control over the deed." *Id.* Critical was the fact that the deed, like the corrective deeds here, included "some but not all of the provisions contained in the offer and acceptance of agreement," indicating that "the parties elected to choose which contractual provisions would be included within the deed and which would not." *Id.*

000197

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judgment where the agreements are unambiguous, and the facts are not reasonably in dispute. *See JV Properties, LLC, supra* at 9.

[22] New Bullion claims that since the "representations, warranties and indemnities" of a seller always merge into a deed, the parties must have intended the assumption obligations of the buyer, High Desert, along with any other unperformed obligations of the parties, to continue past closing. *See* Bullion Opp. at 12. This argument is flawed because the deed's language is not limited to ***the seller's*** representations, warranties and indemnities, but includes the buyer's representations, warranties and indemnities as well. There would be no reason to carve out these specific obligations for survival if the parties intended all of the obligations to survive. Indeed, the only reasonable inference is that the parties were selective in the obligations that would survive, and intended all other obligations, including High Desert's obligation to assume the disclosed obligations of the 1986 Joint Venture, to merge.

New Bullion suggests that the parties intended the obligations to survive because the obligation to pay royalties was ongoing and could not be fully performed at the time of closing. New Bullion focuses on the wrong obligation. The obligation at issue is High Desert's obligation to assume the 1986 Joint Venture's disclosed obligations, if any, under the AOI Provision pursuant to Section 7.3(B)(3)(a) of the 1990 Option Agreement. Any such assumption was to be made, if at all, "at the Closing" and would be fully performed the moment that an assignment and agreement was signed. Thus, there was nothing that prevented the assumption from being fully performed at the time of closing, and there is nothing in the 1990 Option Agreement (or elsewhere in the record) suggesting that the obligation of assumption was intended by the parties to continue past the closing.

Finally, New Bullion makes the tortured argument that High Desert's assumption obligations were incorporated in, and did not merge into the deeds, because the deeds were made "subject to" the 1979 Agreement. In support, New Bullion cites to *Lowden Inv. Co. v. General Elec. Credit Co.*, 741 P.2d 806 (Nev. 1987), claiming that it requires the court to construe the phrase "subject to" with reference to the underlying purchase agreement, and that since the 1990 Option Agreement required the assumption of obligations under the 1979 Agreement, so too does the deed. But *Lowden* does not apply. The question in *Lowden* was whether a buyer assumed the obligations under an existing loan when it acquired a jet. *Id.* at 808. The court found an assumption because the purchase agreement provided for two forms of payment—a cash payment and satisfaction of the existing loan. *Id.* at 809. The assumption was not conditioned upon the occurrence of any future event, but occurred simultaneously with the acceptance of the jet and was not an executory obligation that needed to survive. Here, by contrast, High Desert's assumption obligations were conditioned on events that failed to occur prior to closing, and any promise of assumption remained an executory obligation that merged into the deed at closing.[23]

[23] *Lowden* cites to *Escrow Found. Bldg. Corp. v. Henderson*, 26 F. Supp. 865 (D. Nev. 1939) for the proposition that "generally the words 'subject to' connote an absence of personal liability." 741 P.2d 806, 809. What *Escrow Foundation* actually holds, and what Goldstrike argues in this case, is that a party taking property "subject to" an agreement is not agreeing to assume the personal covenants contained within that agreement. 26 F. Supp. at 866. Rather, there must be independent evidence of assumption. *Id.* *Lowden* is therefore consistent with, not contrary to *Escrow*

D. Post-closing evidence does not establish the required assumption.

New Bullion cites to a variety of post-closing documents to suggest an admission by High Desert that it assumed Universal's royalty obligations under the AOI Provision. But the cited evidence establishes no such thing.

"Solicitation of Participation": All this document says is that High Desert's title is "subject to" the 1979 Agreement. As such, it merely disclaims warranties of title relating to any real covenants that may run with the land. *See supra* at 13. It does not admit a prior assumption of any personal covenants, such as Universal's royalty obligations under the AOI Provision.

Abstract of Title: The abstract of title that High Desert provided to Newmont in conjunction with the 1991 joint venture negotiations merely summarizes the instruments that have been recorded against the Subject Property and may encumber title. *See supra* at 13. Nowhere does the abstract suggest that High Desert assumed any of the personal covenants contained within the 1979 Agreement, such as Universal's royalty obligations under the AOI Provision.

Section 2.1(f)(i) of the Newmont Agreements: Through Section 2.1(f)(i) of the 1991 Option Agreement and Section 2.1(f)(i) of the 1991 Joint Venture Agreement with Newmont, High Desert merely represents that title to the Subject Property is "subject to" the 1979 Agreement. *See supra* at 13. Again, this amounts to a disclaimer of any warranty of title, and not an admission by High Desert that it assumed the personal obligations of Universal under the 1979 Agreement.[24]

Edward N. Jackson Affidavit: The affidavit is a mere abstract of title identifying the 1979 Agreement as an instrument recorded against the Subject Property. Mr. Jackson expressed no opinion as to which of the covenants contained within that agreement are personal versus real covenants, and never suggested that High Desert assumed Universal's personal obligations under the AOI Provision.

1995 Merger Agreement: The cited portion of the 1995 Merger Agreement states that the

Foundation.

[24] New Bullion notes that Newmont affirmatively disclaimed any liability under the AOI Provision, suggesting that the lack of such disclaimer by High Desert evidences an assumption. Newmont's overly cautious behavior does not set the legal standard. As noted above, an assumption requires the affirmative agreement of the party to be bound. *See supra* at 12. There is no evidence of such agreement by High Desert with respect to Universal's royalty obligations under the AOI Provision.

"[o]bligations described in paragraph 4" (the Subject Property Royalty Provision) constitute an encumbrance on the Subject Property. *See* 1995 Merger Agreement (Goldstrike Appx. Tab 31) at 32-33 & Ex. 5.1(k). Again, this amounts to a mere disclaimer of warranties of title with respect the Subject Property Royalty Provision. *See supra* at 13. Nowhere does High Desert suggest that it assumed the personal royalty obligation of Universal under the AOI Provision.[25]

Newmont's Payment of Royalties: The fact that Newmont has paid royalties on the Subject Property pursuant to the Subject Property Royalty Provision of paragraph 4 is irrelevant and immaterial because (1) the actions of Newmont do not bind Goldstrike, and (2) the Subject Property Royalty Provision is a distinct obligation and, unlike the AOI Provision, may well run with the land.[26]

E. New Bullion cannot rely on equity to enforce the 1990 Option Agreement against High Desert (and thus Goldstrike).

New Bullion claims that it would be "inequitable" to allow High Desert (and thus Goldstrike) to avoid its assumption obligations under Section 7.3(B)(3)(a) of the 1990 Option Agreement. This argument fails for two reasons. First, the prerequisites for assumption never occurred (*see supra* at 11-14), and thus there was nothing that High Desert was obligated to assume. Second, New Bullion was neither a party nor third party beneficiary of the 1990 Option Agreement, and has no standing to equitably enforce its terms.[27] *See, e.g.*, *Canfora v. Coast Hotels & Casinos, Inc.*, 121 P.3d 599, 605 (Nev. 2005); *Lipshie v. Tracy Inv. Co.*, 566 P.2d 819, 824-25 (Nev. 1977); *Olsen v. Iacometti*, 533 P.2d 1360, 1364 (Nev. 1975).[28]

[25] The fact that High Desert referenced paragraph 4, without referencing paragraph 11, evidences High Desert's belief that the AOI Provision was not an encumbrance on the Subject Property.

[26] It is not necessary for this Court to determine whether the Subject Property Royalty Provision is a covenant running with the land.

[27] The parties to the 1986 Joint Ventures would be the only parties with standing to enforce the alleged assumption obligation against High Desert.

[28] New Bullion cannot claim third-party beneficiary status merely because Old Bullion was a party to the agreement allegedly assumed by High Desert. *Cf. Olsen*, 533 P.2d at 1362-63 (mortgagee could not claim third-party beneficiary status under an agreement assigning mortgage in absence of evidence that assignment was intended to directly benefit mortgagee).

II. THE AOI ROYALTY PROVISION DOES NOT RUN WITH THE LAND.

The Nevada courts have long recognized a three part test in determining whether a covenant runs with the land: (1) the original parties intended the covenant to run: (2) horizontal and vertical privity of estate; and (3) the covenant "touches and concerns" land. *See* Goldstrike MSJ at 18-19 (citing *Wheeler v. Schad*, 7 Nev. 204, 208-09, 1871 WL 3397 (1871); *ECM, Inc. v. Placer Dome U.S. Inc.*,[29] No. 03-15896, 147 Fed. Appx. 668, 669, 2005 WL 2142268, at * 1 (9th Cir. Sept. 7, 2005).[30] New Bullion cannot prove any of these required elements, and its claims must therefore be dismissed as a matter of law[31]

A. The 1979 Agreement demonstrates that the parties to did not intend the AOI Provision to run with the Subject Property.

New Bullion argues that the intent of the AOI Provision to run with the Subject Property is evidenced by (1) paragraph 11 of the 1979 Agreement, (2) paragraph 18 of the 1979 Agreement, (3) subsequent transfers of the Subject Property, (4) Old Bullion's own self-serving statements in conjunction with the 1993 quiet title action.[32] Each of these argument fails as a matter of law.

1. Paragraph 11 of the 1979 Agreement does not evidence the parties' intent for the AOI Provision to run with the Subject Property.

The language of paragraph 11 undermines, rather than supports, New Bullion's claims. First, paragraph 11 contains no language indicating that the rights and obligations of the AOI

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[29] A copy of this decision is attached hereto as Ex. G.

[30] There is no reason to believe that the Nevada Supreme Court would abandon this long-recognized test in favor of the approach recommended in the Restatement (Third) of Property. Even if it were inclined to adopt the Restatement (Third), that approach requires a showing of intent that New Bullion cannot make. This Court should therefore decline New Bullion's invitation to certify the real covenant question to the Nevada Supreme Court, and further delay this litigation.

[31] Goldstrike cited persuasive authority establishing that any factual matters relating to these three elements must be established by clear and convincing evidence. *See* Goldstrike MSJ at 19. This heightened standard applies based on the policy favoring the free and unobstructed use of realty. *See Huggins v. Castle Estates, Inc.*, 36 N.Y. 2d 427 (1975). Although New Bullion cites authority from other jurisdictions requiring a mere preponderance of the evidence (*see* Bullion Opp. at 21-23), it provides no explanation as to why Nevada would apply the lesser burden of proof. This Court need not decide the issue, however, as New Bullion cannot establish the required elements under either standard.

[32] The Goldstrike MSJ discusses the factors courts use to determine whether there may be an inference that the parties intended a covenant to run with the land when they did not expressly say so in the contract. *See* Goldstrike MSJ at 27-30. New Bullion does not address any of those factors in its opposition (or in the Bullion PMSJ).

Provision run with the Subject Property. Rather, that language makes clear that with respect to properties that Universal acquired in the AOI and holds as its "sole" property, the AOI Provision binds Universal, in its personal capacity, and not as the owner of the Subject Property. *See* Goldstrike Opp. to Bullion PMSJ at 21-24, and cases cited therein; *see also* Goldstrike MSJ at 27-30.

New Bullion suggests that there is only one royalty established by the 1979 Agreement—the Subject Property Royalty Provision, and that paragraph 11 is a mere extension of that one royalty. In support, Bullion quotes selectively from paragraph 11 to suggest that while the AOI lands do not become part of the Subject Property for some purposes, they become part of the Subject Property for purposes of the royalty owed under paragraph 4. This argument makes no sense. Either the property becomes part of the Subject Property upon which the 1979 JV pays royalties under paragraph 4, or it remains Universal's "sole" property upon which Universal, in its personal capacity, pays royalties under paragraph 11.

New Bullion relies on language in paragraph 11 stating that lands acquired by Universal in the AOI "shall not become part of the Subject Property ***as they apply to POLAR-CAMSELL***." (Emphasis added). This language simply makes clear that POLAR-CAMSELL, a term defined to mean all of the other active members of the 1979 Joint Venture, will not have to perform any obligations or pay any royalties with respect to Universal's solely owned property. This language does not evidence an intent to make Universal's solely owned property in the AOI part of the Subject Property.

Finally, New Bullion notes that Universal's solely owned property in the AOI is "subject to the royalty interest of Bullion," implying that this language refers back to paragraph 4's Subject Property Royalty Provision. But even if the royalty established through paragraph 11's AOI Provision is defined by paragraph 4 for ***calculation purposes***, the royalty to be paid by Universal, in its personal capacity, on its solely owned properties in the AOI under paragraph 11 remains a

distinct legal obligation that exists separate and apart from any royalty to be paid by Universal, in its capacity as operator and on behalf of the 1979 JV, on the Subject Property under paragraph 4.[33]

2. Paragraph 18 of 1979 Agreement does not evidence the parties' intent for the AOI Provision to run with the Subject Property.

The generic "successors and assigns" language set forth in paragraph 18 of the 1979 Agreement is legally insufficient to satisfy the intent requirement because each covenant in the agreement must satisfy the real covenant elements on its own merits. *See* Goldstrike Opp. to Bullion's PMSJ at 22-24, and cases cited therein. All this language establishes is that the contract is binding on the successors and assigns of the parties to the 1979 Agreement, and High Desert/Goldstrike is not a successor to any party to the 1979 Agreement. Paragraph 18 does not evidence an intent for any covenant, let alone the AOI Provision, to bind successor owners of the Subject Property.[34]

New Bullion's interpretation of paragraph 18 is belied by Paragraph 19 of the 1979 Agreement, precluding assignment ***unless and until*** proper notice is provided to Universal, as operator of the 1979 JV. *See* 1979 Agreement ¶ 19. Paragraphs 18 and 19 must be read together,[35] and paragraph 19's requirement that notice be given before an assignment occurs is compelling evidence that the parties were not expressing an intent for the provisions of the 1979 Agreement, and specifically the AOI Provision, to run with the Subject Property. *See* Goldstrike Opp. to Bullion PMSJ at 23-24, and cases cited therein.

[33] The parties clearly knew how to refer back to paragraph 4 when they intended to do so. *See* 1979 Agreement at ¶¶ 2(A), 5 & 9(A). The fact that paragraph 11 makes no reference to paragraph 4 is compelling evidence that the parties intended Universal's royalty obligation under the AOI Provision to be separate and distinct from the royalty obligations due on the Subject Property under paragraph 4.

[34] Nevada law has long recognized that such language is also insufficient to impose liability on a contractual assignee who has not expressly assumed the personal obligations of an assignor. *See Southern Pac. Co. v. Butterfield*, 154 P. 932, 932 (Nev. 1916).

[35] *See Canfora v. Coast Hotels & Casinos, Inc.*, 121 P.3d 599, 605 (Nev. 2005) (internal quotations omitted) (contractual intent is "gleaned from reading the contract as a whole").

3. Facts surrounding subsequent transfers of the Subject Property do not evidence the intent of the parties for the AOI Provision to run with the Subject Property.

New Bullion claims that since most of the parties to the 1979 Agreement were parties to the 1984 and 1986 Joint Venture Agreements, and since these parties failed to specifically discuss and disclaim the AOI Provision in association with these later transactions, they must have intended the AOI Provision to run with the land. As discussed above, however, the intent of the parties to the 1979 Agreement should be determined from the clear and unambiguous language of the agreement itself. *See Ringle, supra* at 9. Even if the later conduct of the parties were properly considered, however, New Bullion points to nothing in the 1984 and 1986 Joint Venture Agreements that evidences an intent for the 1979 AOI Provision to run. All that New Bullion cites is general language whereby the parties acknowledge the existence of the 1979 Agreement and allocate responsibility for any real covenants contained therein. Nowhere in these later agreements is there any suggestion that any particular provision, such as the AOI Provision, was intended to run with the land.[36] Indeed, the best evidence of the parties' contrary intent is the fact that they included in these later contracts entirely new and different area of interest provisions. If the parties to the 1979 Agreement intended for the AOI Provision to run with the Subject Property, they would have had no need to draft such critically different provisions. They would have merely noted that the AOI Provision continued to bind the parties and moved on.[37]

4. Old Bullion's self-serving statements in 1993 are inadmissible and do not evidence the intent of the 1979 JV Parties.

As noted above, the self-serving letter of Old Bullion's own legal counsel, written in 1993, some fourteen years after the 1979 Agreement was signed, constitutes inadmissible hearsay not

[36] One of the provisions cited by New Bullion is Section 7.3(B)(3)(a) of the 1990 Option Agreement. Since this provision deals with the assumption of personal covenants (subject to expressly stated conditions precedent), it cannot possibly evidence the parties intent and belief that the AOI Provision (or any other provision) runs with the Subject Property.

[37] New Bullion claims that "[a] reasonable jury could view Newmont's later, frantic attempt to escape the area-of-interest royalty as a too-late recognition that the royalty passes automatically." Bullion Opp. at 26. This argument is flawed. To begin, Newmont was not a party to the 1979 Agreement, and its actions cannot evidence the intent of the parties to that agreement. Moreover, Newmont's acts evidence a contrary understanding. If the AOI Provision ran with the land, the only way for Newmont to "escape" the provision would have been to decline to buy the land.

subject to any exception and must be stricken from the record. *See supra* at 5. Regardless, the letter evidences nothing but Old Bullion's after-the-fact view of the AOI Provision. It does not evidence the intent of the other parties to the 1979 Agreement.

B. No privity of estate exists for the AOI Provision.

New Bullion contends that horizontal privity exists because Old Bullion deeded its "original mining claims" to Universal. Bullion Opp. at 27. But Universal did not own the Subject Property at the time the 1979 Agreement was made and Old Bullion held only a "purported royalty interest" therein. *See* 1979 Agreement at 2; Goldstrike Opp. to Bullion PMSJ at 3, 26. Thus, while Old Bullion and Universal were in privity of contract, they were not in privity of estate with respect to the Subject Property. And they most certainly were not in privity of estate with respect to other lands in the AOI that had yet to be acquired by either party. *See* Goldstrike MSJ at 24-27; Goldstrike Opp. to Bullion's PMSJ at 25-26.

New Bullion suggests that the privity analysis should be governed by *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903 (Tex. 1982), rather than *Mountain West Mines, Inc. v. Cleveland-Cliffs Iron Co.*, 376 F. Supp. 2d 1298 (D. Wyo. 2005), *aff'd in part and rev'd in part on other grounds*, 470 F.3d 947 (10th Cir. 2006).[38] As discussed more fully in Goldstrike's Opp. to Bullion's PMSJ, *Westland* is nonbinding and unpersuasive because the opinion does not even analyze the privity issue. *See* Goldstrike Opp. to Bullion PMSJ at 21 & n. 11. It merely recites several general propositions and concludes, without explanation, that privity exists.

id. *Westland Oil* is also distinguishable on its facts insofar as it applied to future obligations springing from oil and gas leases in which the parties already held an interest, as opposed to entirely different properties to be acquired at some unspecified time in the future. *See id.* The privity question at issue in this case was squarely addressed in *Mountain West* (*see* Goldstrike MSJ at 25-26; Goldstrike Opp. to Bullion PMSJ at 22-24, 26), and this Court should follow the well-reasoned opinion of that court in concluding that the AOI Provision does not run with the Subject Property.

[38] New Bullion suggests that the *Mountain West* case has been reversed in its entirety, when it has not. *See* Bullion Opp. at 27-28.

C. The AOI Provision does not "touch and concern" land.[39]

New Bullion claims that AOI Provision benefits the Subject Property because it "'facilitate[s] a leasehold or mineral estate's development by reducing development risk and cost, spreading risk, organizing investments, and guaranteeing the participation of sufficiently capitalized parties.'" *See* Bullion Opp. at 29 (quoting Andrew Scott Graham, *Real or Personal?: The Area of Mutual Interest Covenant in the Williston Basin after* Golden v. SM Energy Company, 89 N.D. L. Rev. 241, 263 (2013)).[40] According to New Bullion, "mineral properties are less valuable when a prospector owns them but is unable to develop them than when the prospector gives them to a joint venture with wherewithal in exchange for an area-of-interest royalty," and that an area-of-interest provision "makes the venture more likely to come into existence and for a mine on those properties to succeed because the mine can include adjacent and nearby mineral properties." *Id.* Bullion's argument actually demonstrates that the AOI Provision benefits the business venture and its parties, rather than the land itself. *See* Goldstrike Opp. to Bullion PMSJ at 27. Simply put, the AOI Provision is a mere promise by one party, Universal, to pay money to another party, Old Bullion, on lands Universal acquires in the AOI and keeps as its own, wholly unrelated to Universal's ownership of the Subject Property on behalf of the 1979 JV. *See id.* The promises of the AOI Provision did not affect Universal's relationship to the Subject Property and do not touch and concern that land.

New Bullion attempts to distinguish the *ECM Placer Dome* decisions on the basis that they dealt with the covenant of good faith and fair dealing and an obligation to disclose mineralization data, rather than the payment of production royalties. *See* Bullion Opp. at 29-30. Such distinctions

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[39] The law and undisputed facts relating to the "touch and concern" requirement, and the reasons that New Bullion cannot satisfy those requirements, are discussed at length in the Goldstrike MSJ and that discussion will not be repeated here. *See* Goldstrike MSJ at 20-24.

[40] Mr. Graham's article is an advocacy piece setting forth the author's personal view of what he believes the law should be. It does not reflect the state of the law in Nevada (or North Dakota). He is critical of the parties' stipulation in *Golden v. SM Energy Co.*, 826 N.W.2d 610 (N.D. 2013), that the area-of-mutual-interest clause was a personal rather than a real covenant. And he is critical of the North Dakota Supreme Court's holding in *Beeter v. Sawyer Disposal LLC*, 771 N.W.2d 282 (N.D. 2009), that a covenant in a deed requiring payment of six percent of gross revenues from a waste disposal operation on the property is a personal covenant and does not run with the land. But his criticisms do not change the law.

are immaterial. The AOI Provision did not create an immediate royalty interest in favor of Old Bullion.[41] Rather, it required Universal to pay royalties to Old Bullion if and when it acquired properties in the AOI and produced minerals therefrom. Thus, the AOI Provision constitutes a personal contractual promise, not a grant of any real property interest, the same as the covenant of good faith and fair dealing and data disclosure obligations at issue in *ECM Placer Dome*.[42]

New Bullion's efforts to avoid *Vulcan Materials Co. v. Miller*, 691 So. 2d 908 (Miss. 1997), are also misplaced. New Bullion claims that the holding in *Vulcan Materials* conflicts with the Mississippi Supreme Court's prior holding in *Miller v. Mississippi Stone Co., Inc.*, 379 So. 2d 919 (Miss. 1980). The *Vulcan Materials* Court already rejected this claim, noting that the *Miller* decision failed to articulate the basis for its holding, and clarifying that the *Miller* holding was not premised on a covenant running with the land, but on the assumption of a personal covenant. *See Vulcan Materials*, 691 So. 2d at 913 (*Miller* "'does no more than hold that the first assignee from Lambert, who affirmatively assumed the obligations Lambert had, was bound by the terms.'").

New Bullion next argues that *Vulcan Materials* was wrongly decided because it focused on benefits to the after-acquired land, rather than benefits to the originally held estate. *See* Bullion Opp. at 30. While the Mississippi Court may have been unartful in stating its holding, the ruling was nonetheless correct. The burden that the royalty in *Vulcan Materials* placed on the newly acquired lands did not enhance the value of the grantor's originally held estate, or render those originally held properties more beneficial or convenient to the owner/occupant, but merely created a personal benefit to the holder of the royalty. 691 So. 2d at 914. Likewise, the burden that the AOI Provision places on Universal's later acquired lands in the AOI does not enhance the value of

[41] New Bullion states that mineral royalties are property interests that run with the land. Bullion Opp. at 30, n. 22. This may be true when a royalty is granted in land that is already owned by the grantee. But where the contracting party merely agrees to pay a royalty on land to be acquired in the future, it is only a contractual promise to pay money. *Cf.* 5 Kuntz, *Oil and Gas*, §63.5 (1991) ("[A] net profits interest may or may not be an interest in land and the nature of the interest and the rights of its owner must be determined form the provisions of the instrument which created it.").

[42] The disclosure obligation at issue in the *ECM Placer Dome* litigation applied to properties that were actually leased by the contracting parties at the time the contract was signed. 147 Fed. Appx. 668, 669, 2005 WL 2142268 at *1, attached hereto as Ex. G. The AOI Provision, by contrast, relates to properties to be acquired by Universal in the future. This factual distinction alone renders Judge Bea's dissent inapplicable to the current case.

the Subject Property (or Old Bullion's royalty thereon), or render the Subject Property (or Old Bullion's royalty thereon) more beneficial or convenient to the owner of the Subject Property. *See* Goldstrike MSJ at 21-24; Goldstrike Opp. to Bullion PMSJ at 26-27. The AOI Provision merely creates a personal burden on Universal with a corresponding personal benefit to Old Bullion.

New Bullion also asserts that *Vulcan Materials* is distinguishable because it addressed a royalty that applied not to separate property within an area of interest, but to "any other business related to" the same industry. This distinction is immaterial. *Vulcan Materials* declined to enforce the covenant as one running with the land not because it related to a business, but because it did not enhance the value of any land or render the property more beneficial or convenient to its owner/occupant. 691 So. 2d at 914. The royalty in *Vulcan Minerals*, like the AOI Provision here, merely extended a personal benefit to the party to whom the royalty would be paid. *Id.*

New Bullion states: "Once someone who owns the subject property acquires property in the area of interest, the obligation to pay royalties runs not just with the subject property, but also with the newly-acquired land in the area of interest." Bullion Opp. at 31. This argument fails because (1) it presumes that the AOI Provision runs with the Subject Property when it does not (*see supra* 19-26), and (2) there is nothing in the AOI Provision that supports New Bullion's contention. *See* Goldstrike Opp. to Bullion PMSJ at 24-25. Indeed, the fact that Universal may be required to create real property interests in unspecified lands that it may own in the AOI at some point in the future undermines the claim that the obligation runs with the Subject Property. Regardless, the issue before this court is not whether any royalty established on the after acquired properties in the AOI will run with *those* lands, but whether the obligation to establish such royalties in the first instance runs with the Subject Property.[43] Clearly, it does not.

[43] New Bullion cites to the expert testimony of Harris to establish that it is "industry practice" for area-of-interest provisions to be deemed covenants running with the land. *See* Bullion Opp. at 31. New Bullion contends that "Barrick has not moved to exclude" this "unrefuted" testimony (*id.*), when, in fact, the Harris report was stricken on January 25, 2011. *See supra* 4-5.

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III. GOLDSTRIKE HOLDS NO LANDS TO WHICH THE AOI PROVISION WOULD ACTUALLY ATTACH.

Even assuming *arguendo* that the AOI Provision somehow runs with the Subject Property, it applies only to properties that High Desert/Goldstrike acquired in the AOI during the times that they owned the Subject Property. Because Goldstrike retains no such lands, there is nothing for it to pay royalties on.[44] *See* Goldstrike MSJ at 30.

New Bullion claims that this argument relates to damages, and that discovery on the issue has not yet been completed. New Bullion is wrong. Fact discovery closed on June 30, 2010. *See* May 27, 2010, Minutes of Proceeding [Dkt. 32]. During that discovery, New Bullion asked for and received a listing of all properties held in the AOI. *See* Goldstrike's Answers and Objections to Plaintiff's Interrogatories [Set One] (Interrogatory No. 2), excerpt attached hereto as Ex. H. New Bullion also asked for and received information regarding Goldstrike's production from the identified properties. *See* Goldstrike's First Supplemental Responses to Plaintiff's Request for Production of Documents [Set One] (Request for Production No. 15), excerpt attached hereto as Ex. I. Although New Bullion's obligation to supplement its expert reports on the calculation of its damages was postponed pending a determination of liability (*see* May 27, 2010 Minutes of Proceeding [Dkt. 32]), such supplementation is unnecessary in determining whether the royalty attaches to the identified properties in the first instance. Regardless of whether High Desert acquired lands in the AOI during the time it held the Subject Property, there is no evidence to establish any production from those properties while they were owned by High Desert/Goldstrike,[45] and thus there is nothing for Goldstrike to pay royalties on.

New Bullion claims that Goldstrike cannot "thwart" the AOI Provision through its 1999 Asset Exchange Agreement with Newmont. Under that transaction, Goldstrike transferred its interests in the Subject Property, along with other interests, to Newmont. Once that transfer occurred, any royalty obligations that ran with the Subject Property ceased to bind Goldstrike, and

[44] Contrary to New Bullion's claims, this argument was raised in the Goldstrike's original motion for summary judgment back in Argument, Section II. [Dkt. 48 (filed under seal)].

[45] New Bullion's reliance on the indemnification provisions of the Asset Exchange Agreement is misplaced insofar as this Court already ruled such provisions inadmissible. *See supra* at 4-5.

bound only Newmont. The lands Newmont transferred to Goldstrike in the AOI were not subject to the AOI Provision because Goldstrike no longer owned the Subject Property when it obtained title to those lands.

IV. NEW BULLION CANNOT PROVE UNJUST ENRICHMENT.

To prevail on its claim for unjust enrichment, New Bullion must establish that (1) it conferred a benefit on Goldstrike, (2) Goldstrike appreciated the benefit conferred, and (3) Goldstrike accepted and retained the benefit conferred. *See Unionamerica Mtg. v. McDonald*, 626 P.2d 1272, 1273 (Nev. 1981). New Bullion claims that it meets these elements because it conferred a benefit on Goldstrike by not prospecting in the AOI. This argument cannot stand for three reasons. First, the alleged benefits were conferred on Universal, not Goldstrike, and Goldstrike has no equitable responsibility therefore. *See* Goldstrike Opp. to Bullion PMSJ at 28-29. Second, it was Old Bullion, not New Bullion that would have conferred the alleged benefits if they were indeed conferred. While New Bullion may be the holder of Old Bullion's rights under the 1979 Agreement, it is not Old Bullion's corporate successor and does not stand in its shoes with respect to equitable claims. *See id.* Third, New Bullion offers no evidence to establish that Goldstrike received and appreciated the benefits allegedly conferred. *See id.* at 29.

New Bullion makes the broad assertion, without any evidentiary support, that Goldstrike was able to "expand the mine into a valuable venture" as a result of Old "Bullion's exclusion from the area of interest." Bullion Opp. at 35. It is unclear, however, what mine New Bullion refers to. To the extent it refers to mines operated on the Subject Property, the Bullion entities have been well compensated for their contributions through increased royalties on production from the Subject Property under the Subject Property Royalty Provision in paragraph 4. *See id.* at 29-30 & n. 19. To the extent it refers to Goldstrike's separate mining operations, there is no evidence to support the claim. Goldstrike has been an active player in the Carlin Trend for over 30 years, and has built and developed its own, independent mining operations through the outlay of its own resources. There is no evidence that any of Goldstrike's holdings in the area would have gone to Old Bullion, rather than Goldstrike, or that Goldstrike benefitted from Old Bullion's alleged forbearance under

the 1979 Agreement. Simply put, New Bullion is attempting to extract equitable compensation for its contributions to the 1979 JV from a party that was never involved in that venture, based on production from properties wholly unrelated to the Subject Property and the 1979 JV. This is something it simply cannot do.

CONCLUSION

For the reasons set forth above, and in the Goldstrike MSJ, this Court should grant Goldstrike MSJ (and deny Bullion's PMSJ).

Dated: December 7, 2015

PARSONS BEHLE & LATIMER

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ERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2015, a true and correct copy of the foregoing **BARRICK GOLDSTRIKE MINES INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF OBLIGATION UNDER THE 1979 AGREEMENT,** was served on the following electronically via the ECF system:

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United States District Court,
D. Nevada.

Syed AHMED, Plaintiff,
v.
DEUTSCHE BANK, N.A., Defendant.

No. 2:09–cv–02234–GMN–LRL. | Aug. 4, 2011.

Attorneys and Law Firms

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Victoria Hightower, Stanley E. Wade, Jr., The Cooper Castle Law Firm, LLP, Las Vegas, NV, for Defendant.

ORDER

GLORIA M. NAVARRO, District Judge.

***1** Pending before the Court is Defendant's Motion for Summary Judgment (ECF No. 13); Plaintiffs Response (ECF No. 14); and Defendant's Reply (ECF No. 22). In light of these filings and the hearing held on July 28, 2011, Defendant's Motion will be GRANTED in part and DENIED in part. The Motion will be DENIED without prejudice as to Plaintiffs breach of contract, RESPA, and FDCPA claims. The Motion will be GRANTED as to all of the other causes of action.

I. BACKGROUND

This is a foreclosure case in which Plaintiff Syed Ahmed, who is represented by an attorney, sued Defendant Deutsche Bank, N.A. on fourteen causes of action: (1) Defendant failed to abide by the HUD requirements; (2) Defendant failed to provide a face-to-face meeting under the federal regulations; (3) Defendant failed to adapt collection and servicing policies according to Plaintiffs individual circumstances; (4) Defendant failed to offer mandatory loss mitigation under federal law; (5) TILA violations; (6) Breach of Contract; (7) RESPA violations; (8) violations of the Fair Debt Collections Practices Act ("FDCPA"); (9) Restitution for money had and received; (10) predecessor-in-interest deceptively concealed that Defendant acquired the mortgages; (11) violations of mandatory notice provisions under Nevada laws; (12) HOEPA violations; (13) Unconscionability; and (14) Negligence.

In 2004, Plaintiff and Washington Mutual Bank entered into a promissory note and deed of trust secured by Plaintiff's residence. (*See* Ex. B, Mot. for Summ. J., ECF No. 13.) [1] Washington Mutual's beneficial interest in these instruments was later transferred to J.P. Morgan Chase. J.P. Morgan Chase, in turn, transferred its interest to Defendant in January of 2009. (*See* Ex. C, Mot. for Summ. J., ECF No. 13.) Defendant subsequently conducted a Trustee's Sale with regard to Plaintiff's property on May 21, 2009 (*see* Ex. F, Mot. for Summ. J., ECF No. 13), after recording a Notice of Default and Election to Sell on January 30, 2009, (*see* Ex. D, Mot. for Summ. J., ECF No. 13). Plaintiff now seeks damages and to have the Trustee's Sale overturned.

II. SUMMARY JUDGMENT STANDARD

The Federal Rules of Civil Procedure provide for summary adjudication if "the movant shows there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc., 477* U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.*"Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor."*Diaz v. Eagle Produce Ltd. P'ship,* 521 F.3d 1201, 1207 (9th Cir.2008) (citing *United States v. Shumway,* 199 F.3d 1093, 1103–04 (9th Cir.1999)). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims."*Celotex Corp. v. Catrett,* 477 U.S. 317, 323–24 (1986).

***2** In determining whether summary judgment is appropriate, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case."*C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.,* 213 F.3d 474, 480 (9th Cir.2000) (citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways:

(1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."*T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir.1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor."*Id.* at 255.But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

III. DISCUSSION

A. Causes of Action One through Four

In Counts One through Four, Plaintiff asserts various claims under the National Housing Act and the regulations promulgated under that Act. Plaintiff alleges that his mortgage loan is an "FHA-insured loan" and that Defendant must therefore abide by the regulations contained in 24 C.F.R. §§ 203.600–203.606, upon which he bases these four causes of action. (*See* Compl. ¶ 12.)

***3** Certain requirements must be met in order for a mortgage to be eligible for insurance by the Federal Housing Administration ("FHA"). Relevant here, the loan must not exceed the maximum mortgage amount set forth under 24 C.F.R. § 203.18. *See Prince v. U.S. Bancorp.*, No. 2:09–cv–0195–KJD–PAL, 2010 WL 3385396, at *3 (D .Nev. Aug. 25, 2010). In 2004, that amount was $175,085.00 for a single-family home in Clark County. *See Single Family Loan Production—Increase in FHA Maximum Mortgage* limits, *available at* http://portal.hud.gov/h udportal/HUD?src=/program_offices/administration/ hudclips/letters/mortgagee/2003ml.

The loan relevant to this case was executed on October 29, 2004 and was for $1,470,000. (*See* Ex. B, Mot. for Summ J., ECF No. 13 .) This is nearly ten times the limit for it to be FHA insured. Therefore, Plaintiff's loan could not have been FHA insured and his claims fail.

Further, there is no private cause of action under the regulations that Plaintiff cites. As the court in *Baker v. Northland Mortgage* Company, 344 F.Supp. 1385 (N.D.Ill.1972) explained with regard to the same regulatory scheme, "[t]he statute and regulations relied upon deal only with relations between the mortgagee and the government, and give mortgagors no claim to a duty owed nor a remedy."Summary judgment will be granted as to these claims.

B. Cause of Action Five: TILA Violation

Plaintiff claims that Defendant breached TILA "by failing to disclose its intertwined relationship to Plaintiff."(Compl.¶ 27.) However, because Plaintiff concedes that Defendant was not the originator of the loan, (*see* Resp. 2:12, ECF No. 14), this claim must fail.

For "closed-end" credit transactions, such as residential mortgage transactions, TILA requires the lender to disclose the creditor's identity, the amount financed, applicable finance charges, annual percentage rates, the total sale price, and other essential information. *See*12 C.F.R. § 226.18. All of these disclosures must be made "before consummation of the transaction." 12 C.F.R. § 226.17(b). However, as another Court in this District has noted, "[n]owhere in TILA does it prohibit subsequent purchasers of a loan from failing to disclose an 'intertwined relationship' with a borrower."*Prince*, 2010 WL 3385396, at *4. Here, Defendant —by Plaintiffs own admission—was not the initial lender with which Defendant entered into the deed of trust or

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promissory note, but, rather, was a subsequent purchaser of the loan. As such, Defendant had no duty under TILA to disclose its "intertwined relationship"; therefore, Plaintiff's TILA claim fails.

Furthermore, Plaintiff's TILA claim is barred by the statute of limitations. TILA imposes a one-year statute of limitations within which a claim for damages "may be brought." 15 U.S.C. § 1640(e)."[A]s a general rule the limitations period starts at the consummation of the transaction."*King v. California*, 784 F.2d 910, 915 (9th Cir.1986).

***4** Equitable tolling may nonetheless apply in certain circumstances and can operate to suspend the limitations period until the borrower discovers or has reasonable opportunity to discover the fraud or non-disclosure that form the basis of the TILA action. *See King*, 784 F.2d at 914–15. However, such equitable tolling is only appropriate when "despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim."*Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir.2000). Equitable tolling does not apply when the plaintiff fails to allege facts demonstrating that he could not have discovered the alleged violations by exercising reasonable diligence. *Copeland v. Lehman Bros. Bank*, No. 09cv1774–WQH–RBB, 2011 WL 9503, *6 (S.D. Cal. Jan 3, 2011). Additionally, where the basis of equitable tolling is fraudulent concealment, it must be pled with particularity under Rule 9(b) of the Federal Rules of Civil Procedure. *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 662 (9th Cir.1999).

Here, it is undisputed that Plaintiff's mortgage was executed in 2004; therefore, he had until 2005 to bring a TILA damages claim, absent the application of equitable tolling. Although Plaintiff does contend in his Response that equitable tolling applies to his TILA claim (Resp. 13:18–14:10, ECF No. 14), he provides no evidence in support of this contention. Thus, summary judgment must be granted as to his TILA damages claim.

To the extent that Plaintiff is bringing a TILA rescission claim, summary judgment must also be entered. The TILA rescission remedy is only available for three years, and the statute of limitations period also begins at the "consummation of the transaction or upon the sale of the property, whichever occurs first."15 U.S.C. § 1635(f); *King v. State of California*, 784 F.2d 910, 914 (9th Cir .1986). This statute of limitations period, unlike the statute of limitations applicable to a TILA damages claim, is an absolute limitation not subject to equitable tolling. *Birk v. Gateway Funding Corp.*, No. CIV S–10–1039–MCE–CMK, 2011 WL 590865, at * 5 (E.D.Cal. Feb. 10, 2011); *see Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir.2002). Therefore, Plaintiff's rescission claim is also time barred. The TILA rescission claim should have been brought by 2007, not in 2009.

C. Causes of Action Six, Seven and Eight

Plaintiffs Complaint does not allege any facts with regard to Defendant in its causes of action for breach of contract; violations of RESPA; or violations of the FDCPA. Instead, all three of those causes of action allege wrongdoing on the part of "predecessor-in-interest WAMU." Defendant therefore seeks summary judgment as to these counts because "there are no facts alleged against Defendant to support these claims for relief."(Mot. for Summ. J. 10:14–15, ECF No. 13.) In its Response, however, Plaintiff points out that Defendant admitted in its Answer that Defendant is Washington Mutual's "successor in interest" and clarifies that those causes of action are meant to apply to Defendant as the successor in interest to Washington Mutual. (*See* Resp. 14:13–16, ECF No. 14.) In its Reply, Defendant does not argue that, as a matter of law, breach of contract, RESPA, or FDCPA claims generally cannot be brought against a loan originator's successor in interest. Instead, Defendant only argues that, in this particular case, "any liabilities as it [sic] relates to the origination of WAMU loans remains with the FDIC."(Reply 7:2–3, ECF No. 22.)

***5** If Washington Mutual was still the owner of Plaintiff's loan when the FDIC was appointed Receiver for Washington Mutual on September 25, 2008, then Defendant is correct that Defendant could not be held liable for any wrongdoing associated with the origination of the loan. *See Gusenkov v. Washington Mut. Bank, FA*, No. C. 09–04747 SI, 2010 WL 2612349, at *2 (N.D. Cal. June 24, 2010); *see also Benito v. Indymac Mortgage Services*, No. 2:09–cv–01218–PMP–PAL, 2010 WL 2130648, at *4 (D.Nev. May 21, 2010). However, Defendant has failed to provide any evidence that Washington Mutual still owned the loan at the time the FDIC was appointed Receiver. Defendant even admitted to this failure at the July 28, 2011 hearing, but urged the Court to nonetheless grant summary judgment with regard to these claims. The Court cannot do so, however, as a question of material fact still remains as to whether Washington Mutual owned the note at the time the FDIC was appointed Receiver for the bank.

The Motion for Summary Judgment will therefore be denied without prejudice as to Plaintiffs breach of contract, RESPA, and FDCPA claims. Defendant's only argument in favor of summary judgment as to these claims is premised on the notion that the FDIC was appointed Receiver for Washington Mutual when Washington Mutual still owned Plaintiffs loan, but, yet, Defendant has failed to provide any evidence showing that that was actually the case.

D. Cause of Action Nine: Restitution for Money Had and Received

Plaintiff alleges that "Possessor-in-interest WAMU has been unjustly enriched and cannot in good conscience keep that portion of the monthly payments it collects from Plaintiff which is attributable to the artificial, inflated component of Plaintiff's loan contract," (Compl.¶ 46), and that "Successor-in-interest [Defendant] should return this money to Plaintiff."(Compl.¶ 47.) However, a claim for unjust enrichment cannot stand when, as here, there are express, written contracts—such as the deed of trust and promissory note—that govern the relationships between the parties. *See Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev.1997). Plaintiff entered into an express contract with Washington Mutual to pay certain amounts of money per month. It cannot now try to recoup the money it paid to Washington Mutual pursuant to the contract via an unjust enrichment cause of action. Therefore, this claim fails.

E. Cause of Action Ten: Deceptive Concealment

As a Court in this District has already explained, no cause of action exists for deceptive concealment under Nevada or Federal law, *see Prince*, 2010 WL 3385396, at *7; therefore, Plaintiff cannot prevail on this claim.

To the extent that Plaintiff may be attempting to plead a claim for fraudulent concealment, the claim still fails, as he has failed to plead with particularity or produce evidence to show that:

> (1) [T]he defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages.

***6** *Hall v. MortgageIt, Inc.*, 2:09–cv–02233–JCM–GWF, 2011 WL 2651870, at * 2 (D.Nev. July 06, 2011). Notably, Plaintiff failed to plead or produce evidence that Washington Mutual—the entity relevant to this cause of action—engaged in the alleged concealment with the intent to defraud Plaintiff or that Plaintiff would have acted differently if he had known of the allegedly concealed facts.

F. Cause of Action Eleven: Notice Provisions under Nevada Law

Plaintiff claims that the foreclosure sale should be set aside because Defendant did not provide him with proper notice of the Trustee's Sale pursuant to Nev.Rev.Stat. § 107.080, *et seq.* Although Plaintiff does not plead exactly which forms of notice were improper or omitted, he quotes several statutes in full in his Response to the Motion for Summary Judgment and concludes "*No such requirements were met by Defendant in their notice of sale.*" (Resp. 11:1, ECF No. 14.) However, Plaintiff's own claim fails because he did not abide by Nev.Rev.Stat. § 107.080.

As Defendant explains in its Motion for Summary Judgment and Plaintiff fails to rebut, Nev.Rev.Stat. § 107.080(5) provides that a Trustee's Sale may be declared void by a court only if: (1) the trustee or other entity does not substantially comply with the provisions of that section or any applicable provision of Nev.Rev.Stat. §§ 107.086 or 107.087; (2) a lawsuit is commenced by the affected party within 90 days of the date of the sale; *and* (3) "[a] notice of lis pendens providing notice of the pendency of the action is recorded in the office of the county recorder of the county where the sale took place within 30 days after commencement of the action."Defendant explains in its Motion that Plaintiff has entirely failed to record a notice of lis pendens with regard to this lawsuit, let alone file it within thirty days of August 13, 2009, the date on which this lawsuit was commenced.

Plaintiff does not address this point anywhere in his Response, nor does he produce evidence raising a question of

material fact as to whether he actually filed such a notice of lis pendens. Because a Trustee's Sale may not be declared void under Nev.Rev.Stat. § 107.080 unless a notice of lis pendens is recorded and because Plaintiff has not demonstrated that there is a question of material fact as to whether it recorded a lis pendens, summary judgment will be granted as to this claim. Furthermore, as Defendant accurately points out in its Motion for Summary Judgment, Plaintiff has provided little more than "gossamer threads of whimsy speculation and conjecture" to support this claim. (*See* Mot. for Summ. J. 7:17–22, ECF No. 13.) Nowhere does Plaintiff provide any evidence that the notice was actually deficient, nor does he plead facts or supply evidence to support his allegation that Nev.Rev.Stat. § 107 .085—which applies only to trust agreements subject to section 152 of HOEPA—is applicable in this case.

G. Cause of Action Twelve: HOEPA Violations

***7** It is not clear what cause of action this section of Plaintiff's Complaint is alleging. In one paragraph, Plaintiff seems to be alleging a violation of Nev.Rev.Stat. § 107.085's 60–day notice requirement. (*See* Compl. ¶ 58.) In the other, Plaintiff seems to be alleging a violation of Nevada's Unfair Lending Practices statute. (*See* Compl. ¶ 58.) However, in Plaintiff's Response to the Motion for Summary Judgment, he indicates that he is pursuing neither of those tacks. Rather, according to Plaintiff, this cause of action is alleging violations of HOEPA's disclosure requirements. (*See* Resp. 20:25–22:18, ECF No. 14.) However, this HOEPA claim is barred by the statute of limitations.

HOEPA is an amendment to TILA and is therefore governed by the same statute of limitations. *Von Brincken v. Mortgageclose.com, Inc.*, 2011 WL 2621010, at *2 (E.D. Cal. June 30, 2011). For the reasons that Plaintiff's TILA claims are time barred, so too are his HOEPA claims.

H. Cause of Action Thirteen: Unconscionability

In Nevada, unconscionability is not a cause of action, but a defense to a breach of contract claim. *Villa v. First Guaranty Financial Corp.*, No. 2:09–cv–02161–GMN–RJJ, 2010 WL 2953954, at *5 (D.Nev. July 23, 2010). As such, it fails.

Furthermore, even if the Court were to liberally construe this cause of action as a request for declaratory judgment that the promissory note is unconscionable, Plaintiff has pleaded absolutely no facts nor provided any evidence indicating that the note was procedurally and substantively unconscionable —both of which generally need to be present for a contract to be unenforceable under Nevada law, *see Guerra v. Hertz Corp.*, 504 F.Supp.2d 1014, 1021 (D.Nev.2007). Instead, Plaintiff simply pleads that "NRS 104.2302 requires the court to analyze the circumstances under which the contract was made. If the court finds that the clause or contract was unconscionable at the time it was made, the court may refuse to enforce the clause or contract."(Compl.¶ 62.) However, Plaintiff fails to provide evidence of any of these circumstances. Because Plaintiff has failed to plead facts or produce evidence in support of this claim, summary judgment will be granted.

I. Cause of Action Fourteen: Negligence

In support of this cause of action, Plaintiff simply pleads "Plaintiff owed a duty of care to Defendant"; "Defendant breached that duty"; and "Plaintiff suffered damages." (Compl.¶¶ 64–66 .) Not only do these allegations fail to set forth sufficient facts to state a valid claim, this cause of action fails because lenders do not normally owe a fiduciary duty to borrowers, *see Reyna v. Wells Fargo Bank*, No. 2:10–cv–01730–KJD–RJJ, 2011 WL 2690087, at *6 (D.Nev. July 11, 2011). A lender owes a borrower a fiduciary duty only in "exceptional circumstances" where there is a special relationship between the lender and the borrower. *Id.* However, Plaintiff has pleaded no such exceptional circumstances, nor has he provided any evidence supporting a fiduciary or any other duty between Defendant and Plaintiff. Thus, this claim also fails.

CONCLUSION

***8 IT IS HEREBY ORDERED** that Defendant's Motion for Summary Judgment (ECF No. 13) is **GRANTED in part** and **DENIED in part.**The Motion is **DENIED without prejudice as to Plaintiffs breach of contract, RESPA, and FDCPA claims.**The Motion is **GRANTED as to all of the other claims.**

All Citations

Not Reported in F.Supp.2d, 2011 WL 3425460

Footnotes

1 Plaintiff initially objected to all of the exhibits attached to Defendant's Motion for Summary Judgment, arguing that all of the exhibits are "materially disputed as these exhibits are not authenticated and there is no authentication by any custodian of record. Also, Defendant has not requested any judicial notice for these exhibits."(Resp. 2:9–10, ECF No. 14.) Although it was not required to explicitly request judicial notice, *see*Fed.R.Evid. 201(c), Defendant subsequently requested judicial notice in its Reply and noted that its exhibits should be considered at this stage because they are public records and are central to the allegations of the Complaint. (Reply 3:6–8, ECF No. 22.) At the July 28, 2011 hearing, the Court asked Plaintiff whether, in light of Defendant's Reply, he still had any objections to the exhibits and what his basis for those objections was. Plaintiff did not articulate any objection, nor did he provide any basis for challenging the authenticity of the documents. The Court will therefore consider Exhibits B, C, D, E, and F, all of which are public documents recorded in the Clark County Recorder's office that are capable of authentication via Fed.R.Evid. 901(b)(3) due to their appearance and contents when viewed in conjunction with the circumstances that underlie this case. Furthermore, they are judicially noticeable under Fed.R.Evid. 201 insofar as they are public documents containing facts not subject to reasonable dispute, nor actually disputed by Plaintiff.

End of Document

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STATEMENTS OF "FACT" THAT MERELY QUOTE/SUMMARIZE UNDISPUTED TERMS WITHIN THE CONTROLLING DOCUMENTS

1. "The agreement's obligations pass to successors: 'The terms and conditions of this Agreement shall inure to the benefit of, and be binding upon, the successors and assigns of the parties hereto.'" Bullion Opp. at 2-3.

2. "Nicor agreed to 'make or arrange for all payments required by the Existing Agreements,' which includes the 1979 Agreement." *Id.* at 3.

3. "The parties later acknowledged that [High Desert Mineral Resources, Inc., a Nevada corporation] was 'a name under which High Desert Mineral Resources of Nevada, Inc. was doing business.'" *Id*.

4. "The option, which High Desert exercised . . . required High Desert to 'Assume and become liable for . . . all obligations of [the venture] under the Underlying Agreements (including the obligations to pay rentals, royalties and other payments) which accrue or relate to periods commencing after the Closing.'" *Id.* at 4.

5. "[T]he existing obligations expressly include 'the royalty and other obligations provided for in the May 10, 1979 Agreement." *Id*.

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STATEMENTS OF "FACT" THAT ATTEMPT TO CHARACTERIZE CONTROLLING DOCUMENTS FOR THE COURT

1. "In 1979, Bullion gave several valuable mineral rights to a venture operated by Universal Gas (Montana), Inc., so that the venture could mine that property (the "subject property") and the area surrounding it." Bullion Opp. at 1.

Old Bullion contributed a "purported" royalty interest in the Subject Property to the 1979 JV. *See* 1979 Agreement at 2, Goldstrike Appx. Tab 1. There is no evidence that Old Bullion held any "valuable mineral interests" anywhere in the AOI. Goldstrike Opp. to New Bullion MPSJ at 3.

2. "To ensure the venture's profitability, Bullion agreed not to prospect in that surrounding area of interest for 99 years. Instead, Universal 'as operator' has the exclusive right to acquire additional mineral properties *on behalf of the parties thereto*." Bullion Opp. at 1.

Although Old Bullion agreed in paragraph 11 that Universal, as operator of the 1979 JV, had the exclusive right to acquire additional mineral properties in the AOI "on behalf of the other parties thereto," paragraph 11 allowed Universal to retain the acquired property for itself if POLAR-CAMSELL, the other active members of the 1979 JV, failed to share in the costs of acquisition. *See* 1979 Agreement at 11. New Bullion cites no evidence to support its characterization of the motivation "[to] ensure the venture's profitability."

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3. "In exchange, Bullion was to receive a 1% production royalty: '. . . Bullion shall receive a ONE PERCENT (1%) gross smelter return royalty from production from the Subject Properties [sic[1]] (based on 100% operating interest in UNIVERSAL, otherwise prorated).'" Bullion Opp. at 1.

New Bullion cites no evidence to support its conclusion that the Subject Property Royalty Provision in paragraph 4 was given to Old Bullion in exchange for Universal, as operator of the 1979 JV, having the exclusive right to acquire additional mineral properties in the AOI.

4. "The agreement contemplates that co-venturer Polar Resources Co. might buy half of Universal's interest and would thus pay half the royalty." *Id.*

[1] New Bullion misquotes paragraph 4 to read "Subject Properties" when it actually reads "Subject Property."

Paragraph 6 of the 1979 Agreement contemplates that Polar will buy half of Universal's interest in the ***Subject Property*** and will be responsible for half the royalty on the ***Subject Property*** under the Subject Property Royalty Provision in paragraph 4. *See* 1979 Agreement at 7-8. New Bullion cites no evidence to support the implication that Polar is required to participate in one-half of the acquisition costs for properties that Universal acquires in the AOI but keeps as its "sole" property, or to pay one half of any royalties Universal might owe on such property under the AOI Provision of paragraph 11. Indeed, Paragraph 11 of the 1979 Agreement expressly states the opposite. *See id.* at 10-11.

5. "In 1990, Nicor's successor, Westmont Mining Inc. (then operator of the venture), offered High Desert Mineral Resources of Nevada, Inc. an option to purchase the subject property from the venture." Bullion Opp. at 3.

The 1990 Option Agreement names "High Desert Mineral Resources, Inc., a Nevada corporation" as the Optionee. *See* 1990 Option Agreement at 1, Goldstrike Appx. Tab. 17.

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6. "The option agreement originally called High Desert 'High Desert Mineral Resources, Inc. ("Optionee"), a Nevada corporation.'" Bullion Opp. at 3.

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Undisputed that the 1990 Option Agreement refers to an entity known as "High Desert Mineral Resources, Inc., a Nevada corporation." The use of the term "originally" is misleading, however, as there is no evidence that the 1990 Option Agreement was ever amended.

7. "[High Desert Mineral Resources, Inc., a Nevada corporation], was the name on High Desert's letterhead." *Id.*

The July 10, 1990 option exercise letter was written on letterhead from "High Desert Mineral Resources, Inc. a Nevada corporation" with no indication as to whether it is coming from High Desert Mineral Resources, Inc., a company headquartered in Canada, or High Desert Mineral Resources of Nevada, Inc., a company headquartered in Elko, Nevada. Regardless, the identity of the "Optionee" under the 1990 Option Agreement is immaterial.

8. "To dispel any confusion, a corrective deed names High Desert Mineral Resources of Nevada, Inc. as the 'Grantee,' then states that it 'is made pursuant to an Option Agreement . . . between Bullion- Monarch Venture and Grantee.'" *Id.*

New Bullion accurately quotes the corrective deeds, but the interpretation of that language is a matter for this Court. New Bullion cites no evidence to support its claim that the language was intended "[t]o dispel any confusion."

9. "By contract, however, Newmont refused to assume the area-of-interest royalty." *Id.* at 5.

New Bullion's characterization of Newmont's disclaimer is misleading because there is no evidence that High Desert had any obligations under the AOI Provision for Newmont to assume.

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STATEMENTS OF FACT THAT ARE UNDISPUTED, BUT IMMATERIAL

1. "The [1986] venture included Universal's direct corporate successor, Petrol Oil & Gas Co." Bullion Opp. at 4.

2. "The venture deeded the properties to High Desert "pursuant to" the option agreement." *Id*.

3. "Through a stock acquisition and later merger . . . , Barrick assumed all of High Desert's obligations." *Id.*

4. "In 1991, High Desert gave Newmont Gold Co. a 60% interest in its properties, acknowledging 'the royalty and other obligations and burdens created by the [1979] Agreement.'" *Id.* at 5.

5. "Barrick eventually swapped all of the original 'subject property' for additional area-of-interest properties from Newmont." *Id*.[2]

6. "In 1993, Bullion filed a quiet-title action as to the subject property. This Court dismissed the action, but it expressly left intact Bullion's royalty under the 1979 Agreement." *Id*.

7. "When Bullion later sued Newmont for area-of-interest royalties, this Court rejected Newmont's argument that the 1993 judgment precluded Bullion's claim." *Id*.

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[2] Goldstrike held a mere 40% interest in the Subject Property, and it was this 40% interest that was "swapped" with Newmont.

STATEMENTS OF "FACT" SUPPORTED SOLELY BY INADMISSIBLE EVIDENCE

1. "High Desert resisted such a provision, but relented when Westmont insisted that High Desert assume the 1979 Agreement." *Id.* at 4.

2. "Notes from Newmont's attorney reflect concern about High Desert's 'oblig. To pay royalty on any int. w/in 8 miles' . . . and 'how [to] calc. amount of royalty' to Bullion." *Id.* at 5.

3. "In later discussions with Newmont, Bullion confirmed the area-of-interest provision would be "deemed 'Subject Property' as covered by and referred to in Paragraph 4." *Id.*

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2014 WL 7277393
Unpublished Disposition
Only the Westlaw citation is currently available.
An unpublished order shall not be
regarded as precedent and shall not
be cited as legal authority. SCR 123.
Supreme Court of Nevada.

JV PROPERTIES, LLC, a Nevada
Limited Liability Company, Appellant,
v.
SMR7, LLC, a Nevada Limited
Liability Company, Respondent.

No. 62035. | Dec. 19, 2014.

Synopsis

Background: Purchaser of real property brought action against vendor after conveying property subject to deed of trust securing loan from third party. The District court, Clark County, Joanna Kishner, J., 2012 WL 756980, granted summary judgment to purchaser on issue of liability, and later granted summary judgment on issue of damages, 2012 WL 6057446. Vendor appealed.

Holdings: The Supreme Court held that:

[1] agreement between vendor and purchaser merged into sale deed;

[2] sale deed did not restrain statutory covenant against encumbrances; and

[3] vendor, rather than title insurer, was liable for damages award.

Affirmed.

West Headnotes (3)

[1] Deeds
Merger of Previous Agreements

Offer and acceptance agreement between purchaser and vendor of real property merged into the sale deed of property subject to deed of trust securing loan to vendor from third party, despite contention that existence of detailed terms and provisions in agreement evidenced an intent to have agreement and not deed memorialize deal; deed included some but not all of the provisions contained in agreement, indicating that parties elected to choose which contractual provisions would be included within deed.

Cases that cite this headnote

[2] Covenants
Covenant Against Incumbrances

Sale deed that stated conveyance was subject to reservations, restrictions, conditions, rights, rights of way and easements, if any of record, did not restrain the covenant against encumbrances, which was statutorily included in every sale deed unless restrained by express terms contained in deed; restraining covenant "by express terms" required language used in deed to comport with statute, inclusion of the term "rights" within deed only restrained covenant against prior conveyances, and deed's clause did not use the word "encumbrance." West's NRSA 111.170(1)(a, b).

Cases that cite this headnote

[3] Deeds
Merger of Previous Agreements

Insurance
Contracts and Other Instruments

Vendor and Purchaser
Damages

Vendor of real property, rather than title insurer, was liable for damages award to purchaser resulting from vendor's breach of sale deed by conveying property subject to deed of trust securing loan from third party, despite contention that obligation of purchaser to obtain title insurance contained in offer and acceptance agreement indicated title insurer would be liable for any alleged loss; agreement's terms did not control because agreement merged with sale deed, and, even if agreement did control,

agreement did not prevent purchaser from recovering damages for the breach of the deed.

Cases that cite this headnote

Attorneys and Law Firms

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ORDER OF AFFIRMANCE

***1** This is an appeal from two district court orders granting partial summary judgment in a real property action. [1] Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

JV Properties, LLC (JV) owned a parcel of unimproved real property located in Clark County, Nevada. On May 10, 2006, a third party loaned the sum of $10,891,000 to JV (the May 10, 2006, promissory note), secured by a deed of trust against thirty separate parcels, including the subject property (the May 10, 2006, deed of trust). Shortly thereafter, JV negotiated with SMR7, LLC, (SMR7) for the conveyance of the subject property to SMR7, along with two other parcels. JV and SMR7 entered into three separate offer and acceptance agreements. JV ultimately conveyed the subject property and the other two parcels to SMR7 via grant, bargain, and sale deed. The grant, bargain, and sale deed stated that the conveyance was subject to (1) "[t]axes for fiscal year 2006/07"; and (2) "[r]eservations, restrictions, conditions, rights, rights of way and easements, if any of record on said premises."JV has since defaulted on the May 10, 2006, promissory note.

SMR7 filed a complaint in district court, and later filed a motion for partial summary judgment against JV on the issue of JVs liability. The district court granted partial summary judgment, finding (1) the offer and acceptance agreement merged with the grant, bargain, and sale deed, and the deed became the sole memorial of the agreement, and (2) the grant, bargain, and sale deed, while reserving "rights," did not expressly restrain the covenant against encumbrances under NRS 111.170(1)(b). The district court later issued a second order granting summary judgment on the issue of damages based on a formal payoff demand from the beneficiary of the May 10, 2006, deed of trust. JV now appeals from both district court orders.

Standard of review

"This court reviews a district court's grant of summary judgment de novo...."*Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when, after viewing the evidence and any reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

This appeal also requires this court to interpret NRS 111.170 as well as the contractual provisions. "Issues involving statutory and contractual interpretation are legal issues subject to ... de novo review."*Weddell v. H2O, Inc.*, 128 Nev. ——, ——, 271 P.3d 743, 748 (2012)."When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory."*S. Nev. Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal quotations omitted).

The district court correctly found that the offer and acceptance agreement merged into the deed.

***2** Traditionally, a contract of sale will merge into the deed once the deed is executed and delivered. *Hanneman v. Downer*, 110 Nev. 167, 177, 871 P.2d 279, 285 (1994) (determining that " '[t]he terms in the deed which follows the contract of sale become the sole memorial of the agreement' ") (citations omitted). However, the doctrine of merger may not apply if the parties did not intend for the contract of sale to merge into the deed. *Hanneman*, 110 Nev. at 177, 871 P.2d at 285 (concluding that intention is a " 'question of fact to be determined by an examination of the instruments and from the facts and circumstances surrounding their execution' ") (citations omitted). The issue here is whether the parties intended for the offer and acceptance agreement to merge with the deed.

[1] JV argues that the existence of detailed terms and provisions within its offer and acceptance agreement are evidence that the parties intended the offer and acceptance agreement to memorialize their deal and not the deed. Alternatively, JV contends that at a minimum, the district court granted summary judgment prematurely because intent

is a question of fact. In contrast, SMR7 argues that JV failed to produce sufficient evidence to warrant application of an exception to the doctrine of merger or to survive summary judgment.

We agree with SMR7 that after examining the instruments and surrounding facts, there is no evidence the parties intended for the offer and acceptance agreement to control over the deed. For instance, the deed included some but not all of the provisions contained in the offer and acceptance agreement. This indicates that the parties elected to choose which contractual provisions would be included within the deed and which would not. Further, after reviewing the other evidence presented by JV, we agree with the district court that no genuine issues of material fact regarding the doctrine of merger exist.

Therefore, the traditional rule applies, and we affirm the finding of the district court that the offer and acceptance agreement merged into the deed upon its execution and delivery.

The district court correctly found that the deed failed to expressly restrain the covenant against encumbrances.

Unless restrained by the express terms contained in the deed, all real property conveyed by way of a grant, bargain, and sale deed includes two statutory covenants: the covenant against prior conveyances, and the covenant against encumbrances. NRS 111.170(1)(a)-(b). The issue here is whether the deed's language stating that the conveyance was subject to "[r]eservations, restrictions, conditions, rights, rights of way and easements, if any of record" restrained the covenant against encumbrances.

[2] JV argues that the district court erred when it found that the concepts of reservations, restrictions, or rights are not interchangeable with the concept of encumbrances. SMR7 argues that JVs interpretation confuses the statutory language used in NRS 111.170(1)(a)-the covenant against prior conveyances-with the statutory language used in NRS 111.170(1)(b)-the covenant against encumbrances. SMR7 notes that NRS 111.170(1)(a)[2] uses the term "right" in describing the covenant against prior conveyances, while NRS 111.170(l)(b)[3] makes no mention of "right" in describing the covenant against encumbrances. NRS 111.170(1)(a)-(b). SMR7 contends that the two terms are not interchangeable, as evidenced by the Legislature's use of different words in the two subsections of NRS 111.170(1), and that JV's proposed interpretation would render NRS 111.170(1)(b) superfluous.

***3** We agree with SMR7 that the language in the deed fails to expressly restrain the covenant against encumbrances. NRS 111.170(1) allows for the covenant against prior conveyances and the covenant against encumbrances to be restrained "by express terms." NRS 111.170(1). To restrain either of these covenants, the language used in the deed must comport with NRS 111.170. Under a plain language reading, the inclusion of the word "rights" within a grant, bargain, and sale deed disclaimer only restrains the covenant against prior conveyances. Restraining the covenant against encumbrances requires use of the word "encumbrance." For instance, if the deed in this case included encumbrances within its list of items the conveyance was subject to, then NRS 111.170(1) would have been properly complied with. However, this is not the case. Thus, we agree with the district court's finding that the deed did not restrain the covenant against encumbrances.

Therefore, we affirm the district court's order of partial summary judgment as to JV's liability.

The district court correctly calculated and awarded damages.

JV does not challenge the accuracy of the amount of the damages award of $699,815.00.

[3] Rather, JV argues that the damages award itself was erroneous because the parties expressly agreed pursuant to the offer and acceptance agreement that SMR7 would obtain title insurance and that the title company would be liable for any alleged loss associated with the transaction in question. JV contends that to allow SMR7 to recover from JV is tantamount to re-writing the parties' agreement, which is not permitted. SMR7 argues that JVs reliance on the terms of the offer and acceptance agreement is irrelevant because it merged with the deed. Alternatively, SMR7 asserts that even if this court looks to the language of the agreement, there is no language that limits damages against JV. Further, SMR7 contends that the mere fact that title insurance was obtained has no effect on whether JV is liable for damages.

We agree with SMR7 that JV's argument lacks merit because, as discussed above, the offer and acceptance agreement merged with the deed, and thus its terms do not control. However, even if the terms of the agreement are considered, the damages award against JV is still proper. The fact that

the parties agreement provided for title insurance does not prevent SMR7 from recovering damages for the breach of the deed. *See Lagrange Const., Inc. v. Kent Corp.*, 88 Nev. 271, 275, 496 P.2d 766, 768 (1972) (stating that damages must place the non-breaching party in as good a position as it would have been had there been no breach). Therefore, we affirm the summary judgment order of the district court as to damages. Accordingly we [4]

ORDER the judgment of the district court AFFIRMED.

All Citations

Slip Copy, 2014 WL 7277393 (Table)

Footnotes

1 The orders have been properly certified as final pursuant to NRCP 54(b).

2 NRS 111.170(1)(a) reads "[t]hat previous to the time of the execution of the conveyance the grantor has not conveyed the same real property, or any *right,* title, or interest therein, to any person other than the grantee."(emphasis added).

3 NRS 111.170(b) reads "[t]hat the real property is, at the time of the execution of the conveyance, free from encumbrances, done, made or suffered by the grantor, or any person claiming under the grantor."

4 We have considered the parties' remaining arguments and conclude that they are without merit.

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147 Fed.Appx. 668
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Ninth
Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

ECM, INC., Plaintiff-Appellant,
v.
PLACER DOME U.S., INC.; Cortez
Gold Mines, Defendants-Appellees.

No. 03-15896. | Argued and Submitted
June 13, 2005. | Decided Sept. 7, 2005.

Attorneys and Law Firms

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C. David Russell, Esq., Guild, Russell, Gallagher & Fuller, Ltd., Reno, NV, Rodney Patula, Graham & James, Ryan J. Meckfessel, Esq., Squire Sanders & Dempsey, LLP, San Francisco, CA, for Defendants-Appellees.

Appeal from the United States District Court for the District of Nevada, Edward C. Reed, District Judge, Presiding. D.C. No. CV-92-00499-ECR.

Before: TALLMAN, BYBEE, and BEA, Circuit Judges.

***669 MEMORANDUM** [*]

****1** Appellant ECM, Inc. ("ECM") appeals the entry of summary judgment in favor of Appellee Placer Dome U.S. ("PDUS"). The district court ruled that the disclosure provision of the lease agreement between ECM and PDUS's predecessor-in-interest did not run with the land and therefore did not bind PDUS.

We review a district court's grant of summary judgment *de novo*. *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir.2004). Three elements define a covenant that runs with the land: 1) the original parties to the covenant must intend for the covenant to run; 2) the covenant must touch and concern the land; and 3) there must be privity of estate. *Wheeler v. Schad*, 7 Nev. 204, 208-09 (1871).

For reasons explained by the district court, we conclude that the disclosure provision did not touch and concern the land. The covenant therefore does not run with the land, and PDUS is not bound by it.

AFFIRMED.

BEA, Circuit Judge, dissenting.
****1** I respectfully dissent.

The facts of this case are relatively straightforward. ECM, Inc. ("ECM") staked the Gold Acres South ("GAS") claim in Nevada. Placer Dome U.S. Inc. ("PDUS") staked claims to the northwest of the GAS claim. ECM leased the GAS claim to Royal Gold, Inc. ("Royal Gold") pursuant to the ECM Lease. Section 19(b) of the ECM Lease stated:

> Lessee [Royal Gold] shall furnish lessor [ECM], upon request by Lessor and at termination of this Lease, any reports and data regarding the leased Property gathered or prepared by Lessee or its agents including, but not limited to, reports and data concerning mineral occurrence and economics of mine development or operations.

Royal Gold later entered into a joint venture with PDUS to explore the GAS claim, and PDUS assumed primary responsibility for exploring the GAS claim. PDUS acquired soil samples from the GAS claim; ECM was also given those soil samples. PDUS analyzed the samples, which suggested a gold discovery on the GAS claim. PDUS also acquired data from a drill hole on its own claim which suggested a gold discovery running below ground from PDUS's claim into the GAS claim. PDUS prepared reports regarding the gold discovery on the GAS claim, but did not provide any of those reports to ECM. PDUS then sought to restructure the lease of the GAS claim. ECM, not knowing of the gold discovery, agreed to a new lease which diluted its interest in the GAS claim. PDUS later struck gold on the GAS claim, and ECM cried foul.

The issue, then, is whether section 19(b) of the ECM Lease required PDUS to disclose to ECM the reports and data regarding the gold find on the GAS claim. Because PDUS is a successor-in-interest to the original covenantor of the ECM Lease (*i.e.*, Royal Gold), PDUS is bound to any covenants in the ECM Lease only if the covenant ran with the leasehold. *See Wheeler v. Schad*, 7 Nev. 204, 208-09 (1871). The district court assumed that (1) the original parties intended the covenant to run; and (2) that there was privity of estate. The district court found the final element was lacking, *i.e.*, that section 19(b) did not "touch and concern" the land.

**2 I agree with the district court that because the covenantee (ECM) is suing the *670 covenantor's assignee (the covenantor was Royal Gold, and its assignee is PDUS), the proper consideration here is whether the "burden" of section 19(b) touches and concerns the leasehold. *See* 1 Herbert T. Tiffany & Basil Jones, *Tiffany Real Property* § 126 (2004) ("While the textwriters differ, reason and authority, as presented in Professor Clark's discussion of the question, tend strongly to support his conclusion that benefit and burden are capable of running separately, and therefore the covenantee's assignee may sue the covenantor when the benefit runs, *and the covenantee may sue the covenantor's assignee when the burden runs*, but the covenantee's assignee may sue the covenantor's assignee only when benefit and burden both run."(emphasis added)). I also agree with the district court that, in determining whether section 19(b) touched and concerned the leasehold, Nevada courts would likely use Professor Charles E. Clark's rule: the "burden" of a covenant "touches and concerns" the leasehold "[i]f the promisor's legal relations in respect to the land in question are lessened"; that is, if "his legal interest as owner [is] rendered less valuable by the promise." William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 8.15, at 479 (3d ed.2000) (quoting Charles E. Clark, *Real Covenants and Other Interests which "Run with Land"* 97 (2d ed.1947)); *see Reno v. Matley*, 79 Nev. 49, 378 P.2d 256, 260 (1963) (discussing with approval the Clark "touch and concern" rule).

It is here where I part company from the district court and the majority. Section 19(b) stated in part: "Lessee shall furnish lessor, upon request by Lessor and at termination of this Lease, any reports and data regarding the leased Property gathered or prepared by Lessee or its agents...." Such reports and data included, but were not limited to, "reports and data concerning mineral occurrence and economics of mine development or operations."

ECM either requested the reports and data at issue from PDUS, or the ECM Lease terminated without PDUS providing any of the reports and data. Further, the terms of section 19(b) would encompass reports of a gold discovery upon the GAS claim. The broad term "regarding" would include reports and data "with respect to," "concerning," "relating to," or "about" the GAS claim. *See* Webster's Third New Int'l Dictionary 470, 1911 (1965). Surely, that would include reports and data of a gold discovery upon the GAS claim; data of a gold discovery on the GAS claim would be "about" the GAS claim.

The question, then, "is whether section 19(b) touches and concerns the land, *i.e.*, whether the promisor's legal relations in respect to the land in question are lessened"; that is, if "his legal interest as owner [is] rendered less valuable by the promise." Stoebuck, *supra*, § 8.15, at 479. PDUS had a legal interest in the GAS claim through the lease; ECM also had a legal interest in the GAS claim as owner. When PDUS acquired information of a gold discovery on the GAS claim, unbeknownst to ECM, the value of PDUS's legal interest in the GAS claim increased; it then possessed a valuable informational advantage over ECM. If PDUS had divulged information of that gold discovery to ECM, PDUS's informational advantage would have dissipated, and with it, PDUS's legal interest in the GAS claim would have been rendered less valuable by adhering to the promise in section 19(b). Because disclosure of the reports and data regarding the gold discovery on the GAS claim would have lessened PDUS's legal interest in the GAS claim, the disclosure provision "touched and concerned" the land.

*671 **3 Information has value; indeed, in business, information *is* gold.[1] After PDUS discovered gold on the GAS claim unbeknownst to ECM, PDUS negotiated a restructuring of the lease of the GAS claim. ECM agreed to a new lease and a dilution of its interest in the mining output from the GAS claim. Surely, ECM would not have so agreed had they known of the gold discovery on the GAS claim.

PDUS claimed during oral argument, however, that section 19(b) only encompasses reports and data derived exclusively from sources on the GAS claim, rather than sources off of the GAS claim (such as PDUS's drill holes on its own neighboring claim). Section 19(b) makes no such distinction. It is inclusive of any reports and data, as long as those reports and data are

"regarding" the GAS claim. Data which corroborates, ratifies, or concerns the presence of minerals on the GAS claim is data "regarding" the GAS claim. As noted above, disclosure of such data would have lessened the value of PDUS's legal interest in the GAS claim, and thus the disclosure covenant in section 19(b) "touched and concerned" the land.

In my view, the district court erred in finding section 19(b) did not touch and concern the GAS claim. I would thus remand to the district court for it to consider whether the other two elements it assumed-*i.e.*, whether the original parties intended for the covenant to run, and whether there was privity of estate-are met here. Because the majority's opinion differs, I respectfully dissent.

All Citations

147 Fed.Appx. 668, 2005 WL 2142268

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

1 No one can forget that Rothschild agents used semaphores and lamps to signal the result of Waterloo across the English Channel in time for Rothschild to buy heavily British public debt ("gilts"), the value of which rose dramatically when the market belatedly got the news of the British victory.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

000232

BULLION MONARCH MINING, INC.,

Plaintiff,

v.

BARRICK GOLDSTRIKE MINES INC., *et al.*,

Defendants.

Case No. CV-N-08-00227-ECR-VPC

BARRICK GOLDSTRIKE MINES INC.'S FIRST SUPPLEMENTAL ANSWERS AND OBJECTIONS TO PLAINTIFF'S INTERROGATORIES [SET ONE]

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Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure ("FRCP"), defendant Barrick Goldstrike Mines Inc. ("Goldstrike") hereby objects to and answers plaintiff Bullion Monarch Mining, Inc.'s ("Bullion") first set of interrogatories served on Goldstrike via mail on or about February 24, 2010 (hereinafter, the "Interrogatories").

GENERAL OBJECTIONS

1. Goldstrike objects to the Interrogatories to the extent that they contain more than the number of written interrogatory requests allowed pursuant to FRCP 33. In particular, FRCP

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Newmont in the related litigation and/or by Barrick Gold of North America Inc. pursuant to a subpoena issued in 2009. Subject to and without waiving any of the foregoing general or specific objections, Goldstrike answers Interrogatory No. 1 as follows:

On November 30, 1995, Barrick HD, Inc. ("Barrick HD") became the corporate successor of High Desert Mineral Recourses of Nevada, Inc. ("High Desert") as the result of a merger transaction. On May 3, 1999, Goldstrike became the corporate successor of Barrick HD Inc. ("Barrick HD") as the result of a different merger transaction. As to the remainder of Interrogatory No. 1, Goldstrike invokes Rule 33(d) of the Federal Rules of Civil Procedure and refers Bullion to the following documents, which have been or will be produced to Bullion, and which relate to and provide the relevant details of the above identified merger transactions: BGBM001538-67; BGBM004953-58; BGBM005920-24; BGBM006157-279; BGBM006553-58; BGBM008078-215; BAR001977-80.

INTERROGATORY NO. 2: Please list all interests in unpatented mining claims and fee land located or otherwise acquired by High Desert or Barrick since July 10, 1990, within the Area of Interest described in Ex. A-2 to the May 10, 1979 Agreement ("the 1979 AOI"), including (a) a description of the mining claims or fee land, together with legal description of the ¼ section where they are situated, (b) the nature of the interest acquired, (c) the dates of location or acquisition; (d) a list of all documents that evidences the location or acquisition; and, (d) the names of any witnesses who have knowledge about your answer. (The 1979 Agreement has been produced in this litigation as documents numbered "Newmont000165-271").

ANSWER TO INTERROGATORY NO. 2: Goldstrike expressly incorporates by reference each of the general objections set forth above.

Goldstrike specifically objects to Interrogatory No. 2 insofar as it fails to define the term "unpatented mining claim." In particular, Bullion fails to specify whether it seeks information on unpatented lode mining claims, unpatented mill site claims, or both. For purposes of responding to this Interrogatory, Goldstrike will assume that Bullion only seeks information relating to

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unpatented lode mining claims, as those are the only mining claims with any apparent relevancy to the pending dispute.

Goldstrike also objects to Interrogatory No. 2 insofar as it is overbroad and unduly burdensome and requires Goldstrike to provide information that is not relevant or likely to lead to the discovery of admissible evidence in this matter. In particular, Goldstrike objects to Bullion's request for information about unpatented mining claims and fee lands which Goldstrike acquired prior to May 3, 1999, when it became the corporate successor of Barrick HD, which was the corporate successor of High Desert. This is the earliest possible date on which Goldstrike could have potentially become bound to the provisions of the 1979 Agreement, and Bullion has no basis for obtaining any information about mining claims or fee lands acquired by Goldstrike prior to that date.

Goldstrike likewise objects to Bullion's request insofar as it seeks information about unpatented mining claims and fee lands which Barrick HD may have acquired prior to November 30, 1995, when it became the corporate successor of High Desert. This is the earliest possible date on which Barrick HD could have potentially become bound to the provisions of the 1979 Agreement, and Bullion has no basis for obtaining any information about mining claims or fee lands acquired by Barrick HD prior to that date.

Goldstrike also objects to Interrogatory No. 2 insofar as it requires Goldstrike to provide information about acquisitions made by High Desert and/or by Barrick HD. Insofar as any such transactions occurred, Goldstrike was not itself involved, and does not have any information about those transactions in its current possession, custody or control. Goldstrike will not undertake any affirmative obligation to obtain information about High Desert's or Barrick HD's transactions in the Alleged AOI.

Finally, Goldstrike objects to Interrogatory No. 2 insofar as it seeks information that is available to Bullion in the public domain, and is therefore equally available to both Bullion and Goldstrike.

Subject to and without waiving any of the foregoing general or specific objections, Goldstrike answers Interrogatory No. 2 as follows:

1. Goldstrike participated in an asset exchange transaction with Newmont which closed on May 3, 1999. As a result of that exchange, Goldstrike acquired certain unpatented lode mining claims and fee lands from Newmont, most of which are located within the Area of Interest purportedly created by the May 10, 1979 Agreement (the "Alleged AOI"). The specific mining claims and fee lands which Goldstrike acquired from Newmont as part of the asset exchange transaction are identified in the following documents, which have already been produced to Bullion, and to which Bullion is referred pursuant to Rule 33(d) of the Federal Rules of Civil Procedure: BGBM004829-41; BGBM007963-8025; BGBM8026-36.

2. On or about July 14, 2004, Goldstrike acquired certain additional unpatented lode mining claims and fee lands from Newmont, most of which are located within the Alleged AOI. The specific mining claims and fee lands which Goldstrike acquired from Newmont on or about July 14, 2004 are identified in the following documents, which are being produced to Bullion simultaneously herewith, and to which Bullion is referred pursuant to Rule 33(d) of the Federal Rules of Civil Procedure: BAR043773-83; BAR04382-26.

3. On or about August 15, 2005, Goldstrike acquired certain properties from Elko Land and Livestock Company ("ELLCO") most of which are located within the Alleged AOI. The specific properties which Goldstrike acquired from ELLCO on or about August 15, 2005 are identified in the following documents which are being produced to Bullion simultaneously herewith, and to which Bullion is referred pursuant to Rule 33(d) of the Federal Rules of Civil Procedure: BAR043811-15; BAR043816-21.

4. On or about August 15, 2005, Goldstrike acquired certain additional properties from Newmont, most of which are located in the Alleged AOI. The specific properties which Goldstrike acquired from Newmont on or about August 15, 2005 are identified in the following documents which are being produced to Bullion simultaneously herewith, and to which Bullion is

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referred pursuant to Rule 33(d) of the Federal Rules of Civil Procedure: BAR043801-05; BAR043806-10.

5. As noted above, Barrick HD merged with High Desert on or about November 30, 1995. *See* BGBM006358-541; BGBM006157-279. At that time, and as a result of the merger, Goldstrike is informed and believes that Barrick HD acquired an undivided 38% interest in the mining claims and/or fee lands which were then owned by High Desert, and which are identified on BGBM005936-84 (which documents Bullion is referred pursuant to Rule 33(d) of the Federal Rules of Civil Procedure).[1] On May 3, 1999, and as a result of the merger with Barrick HD, Goldstrike became the ***temporary*** owner of Barrick HD's 38% undivided interest in these mining claims and/or properties. *See infra* Answer to Interrogatory No. 7, which is expressly incorporated herein by reference.

Other than the mining claims and/or properties identified on BGBM005936-84, Goldstrike does not currently have specific knowledge of any other mining interests or fee simple properties which Barrick HD acquired in the Alleged AOI on or after November 30, 1995. Goldstrike asserts that other information about Barrick HD's mining claim and/or land acquisitions in the Alleged AOI on or after November 30, 1995 may be contained within some of the other documents which have been or will be produced, either by Barrick Gold of North America in response to the Subpoena, as a supplement to Goldstrike's initial disclosures, or in response to Bullion's latest discovery requests. Because the burden of reviewing such documentation and locating any such information is the same for Bullion as it is for Goldstrike, Goldstrike has no obligation to search for any such information.

6. Other than those properties identified on BGBM00785-802 and BGBM005936-84 (which documents Bullion is specifically referred to pursuant to Rule 33(d) of the Federal Rules of Civil Procedure), Goldstrike does not currently have specific knowledge of those mining interests or fee simple properties, if any, which High Desert might have acquired in the Alleged AOI on or after July 7, 1990. Goldstrike asserts that other information about High Desert's land

[1] High Desert's remaining 2% undivided interest was transferred to SLH Co. prior to the merger.

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acquisitions in the Alleged AOI on or after July 7, 1990 may be contained within some of the documents which have been or will be produced, either by Barrick Gold of North America in response to the Subpoena, as a supplement to Goldstrike's initial disclosures, or in response to Bullion's latest discovery requests. Because the burden of locating any such information is the same for Bullion as it is for Goldstrike, Goldstrike has no obligation to search for any such information.

The following individuals may have information relating to Goldstrike's acquisitions in the Alleged AOI on or after May 3, 1999:

Steve Hull
Parsons Behle & Latimer
201 S. Main Street, Suite 1800
Salt Lake City, UT 84111

Mr. Hull should be contacted solely through counsel for Goldstrike

Rich Haddock
Barrick Gold of North America
136 East South Temple, Suite 1800
Salt Lake City, UT 84111

Mr. Haddock should be contacted solely through counsel for Goldstrike

Cy Wilsey
Barrick Gold of North America
136 East South Temple, Suite 1800
Salt Lake City, UT 84111

Mr. Wilsey should be contacted solely through counsel for Goldstrike

Orson Tingey
Barrick Goldstrike Mines, Inc.
P.O. Box 29
Elko, NV 89803

Mr. Tingey should be contacted solely through counsel for Goldstrike

The following individual may have information relating to High Desert's acquisitions in the Alleged AOI after July 7, 1990:

Lee Halavais
4790 Caughlin Pkwy #242
Reno, NV 89519
775-721-5796 or 775-753-7619

Tom Erwin

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Erwin & Thompson LLP
One East Liberty Street, Suite 424
P.O. Box 40817
Reno, NV 89501-2123
775-786-9494

Mr. Erwin should be contacted solely through counsel for Goldstrike

INTERROGATORY NO. 3: For any interest in unpatented mining claims or fee land acquired by Barrick from High Desert after July 10, 1990, if said unpatented mining claims or fee land are located within the 1979 AOI, please state each and every reason why Barrick does not believe that it is obligated to pay a production royalty to Plaintiff for production from said unpatented mining claims or fee land.

ANSWER TO INTERROGATORY NO. 3: Goldstrike expressly incorporates by reference each of the general objections set forth above.

Goldstrike specifically objects to Interrogatory No. 2 insofar as it fails to define the term "unpatented mining claim." In particular, Bullion fails to specify whether it seeks information on unpatented lode mining claims, unpatented mill site claims, or both. For purposes of responding to this Interrogatory, Goldstrike will assume that Bullion only seeks information relating to unpatented lode mining claims, as those are the only mining claims with any apparent relevancy to the pending dispute.

Goldstrike also objects to Interrogatory No. 3 insofar as it is overbroad and unduly burdensome and requires Goldstrike to provide information that is not relevant or likely to lead to the discovery of admissible evidence in this matter. In particular, Goldstrike objects to Bullion's request for information about unpatented mining claims and fee lands which Goldstrike acquired prior to May 3, 1999, when it became the corporate successor of Barrick HD, which was the corporate successor of High Desert. *See also supra* Answer to Interrogatory No. 2, which is expressly incorporated herein by reference.

Goldstrike further objects to Interrogatory No. 3 insofar as it seeks information which is already available to Bullion through documents that were previously produced by Newmont in related litigation, by Barrick Gold of North America pursuant to a subpoena issued by Bullion in 2009, or through Goldstrike's initial disclosures. Goldstrike will not undertake the burden of

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

000239

BULLION MONARCH MINING, INC.,

Plaintiff,

v.

BARRICK GOLDSTRIKE MINES INC., *et al.*,

Defendants.

Case No. CV-N-09-00612-ECR-VPC

BARRICK GOLDSTRIKE MINES INC.'S FIRST SUPPLEMENTAL RESPONSES TO PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS [SET ONE]

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Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure ("FRCP"), defendant Barrick Goldstrike Mines Inc. ("Goldstrike") hereby objects and responds to plaintiff Bullion Monarch Mining, Inc.'s ("Bullion") first set of requests for production of documents served on Goldstrike on or about February 24, 2010 (hereinafter, the "Requests").

GENERAL OBJECTIONS

1. Goldstrike objects to the Requests to the extent that the documents sought have been previously produced or provided to Bullion or its counsel by Newmont in related litigation,

ANSWER TO REQUEST NO. 14: Goldstrike expressly incorporates by reference each of the general objections set forth above.

Goldstrike objects that the request is vague, ambiguous, and unintelligible. Specifically, the request seeks documents relating to a royalty described in the 1979 Agreement that is "payable or paid ***to***" Goldstrike. To the extent the request attributes a position to Goldstrike that it has never taken, Goldstrike objects.

Goldstrike also objects that any such royalty exists whatsoever. The 1979 Agreement is neither valid nor binding on any party, Goldstrike has never assumed an obligation to pay any royalties under the 1979 Agreement, and Goldstrike has never claimed any entitlement to be paid any royalties under the 1979 Agreement. *See* Goldstrike's Answers to Interrogatories Nos. 3, 4, 14 and 15, which are expressly incorporated by reference as if set forth herein.

Goldstrike objects that the term "reflect" is vague, ambiguous, and otherwise undefined. Goldstrike interprets the term "reflect" to mean "expressly reference."

In accordance with these clarifications, and subject to the general objections set forth above and the specific objections set forth herein, Goldstrike responds that it is not now and has never been liable to pay to any party, nor is it entitled to receive from any party, any royalty under the 1979 Agreement. Thus, Goldstrike is not aware of any documents in its possession, custody, or control that expressly reference the "'Gross smelter return' as described in paragraph 4.E. of the 1979 Agreement" that is (or was) "payable or paid to" Goldstrike.

REQUEST FOR PRODUCTION NO. 15: For each mine within the Area of Interest acquired by High Desert or Barrick after July 10, 1990, which has been under production at anytime between January, 1992, and the current date, please provide the following:

(a) Daily production records, including the location of the production, the tonnage of ore produced from each location and the grade of ore produced from each location.

(b) Resource models, if any, which include grade, blocks, and resource category, whether that category be "proven", "probable", "inferred" or "mineralized material".

(c) Reserve models.

(d) Metallurgical test work, both original before mining and any done during production.

(e) All documents showing projected and actual gold recoveries for each block of ore.

(f) All documents showing or describing the mining segregation methods used for material mined, including how ore is defined and mined, what is done with material that is mineralized but low grade (sub-ore) but above waste cut-offs, and waste.

ANSWER TO REQUEST NO. 15: Goldstrike expressly incorporates by reference each of the general objections set forth above. Goldstrike also objects to the extent the request seeks documents that are publicly available and therefore equally accessible to all parties.

Goldstrike specifically objects that the request as a whole is overbroad and unduly burdensome insofar as it requests documents that are neither relevant nor likely to lead to the discovery of relevant evidence in this matter. As explained further in Goldstrike's Answer to Interrogatory No. 2, which is expressly incorporated by reference herein, Goldstrike did not become the corporate successor to Barrick HD formerly known as High Desert until May 3, 1999. Therefore, any documents prior to that date are irrelevant and will not be produced.

Goldstrike also objects that this request as a whole is overbroad, unduly burdensome, and oppressive because it seeks "All" documents within certain enumerated categories. The categories identified in this request are extraordinarily broad, and Goldstrike often maintains information possibly falling within these categories in numerous forms and in numerous places. It would be unreasonably onerous and burdensome for Goldstrike to identify, gather, and produce all forms of such information from all sources when one form would suffice for Bullion's purposes in this lawsuit. Goldstrike has endeavored in good faith to obtain and produce documents containing the information that Bullion appears to seek through the various categories of requested documents but will not undertake the obligation to produce every single document in Goldstrike's possession that might contain such information in some alternative form.

Goldstrike also objects that the phrase "each mine within the Area of Interest" is vague, ambiguous, and otherwise undefined. Goldstrike does not necessarily maintain its documents and records by "mine," as the term appears to be used by Bullion's request. Specifically, many of

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Goldstrike's records are divided between different areas of mining activity, at varying levels of specificity. In this regard, Goldstrike hereby incorporates by reference its Answer to Interrogatory No. 11, which is incorporated herein by reference as if set forth herein.

Additionally, Goldstrike objects to the extent Bullion requests documents that are only maintained in electronic form and which are not reasonably accessible because of undue burden or expense. Goldstrike has undertaken a good-faith effort to obtain information from numerous electronically stored sources, including sources that are no longer in "active" use. However, some electronically stored information is no longer reasonably accessible without undue burden or cost, and will not be produced.

Subject to and without waiving the general objections set forth above and the specific objections set forth herein, Goldstrike responds and objects to each discrete subpart of Request No. 15 as follows:

(a) Goldstrike objects to the terms "Daily production records," "tonnage of ore," and "grade of ore" as used in Request No. 15(a) because they are vague, ambiguous, and otherwise undefined. Goldstrike does not maintain "daily production records" as Bullion appears to use that term. Goldstrike will not attempt to speculate about the meaning that Bullion intended for these terms.

In accordance with these clarifications, and subject to and without waiving the general objections set forth above and the specific objections set forth herein, Goldstrike responds that it will produce concurrently herewith several different forms of production records from various areas of Goldstrike's mining activity. These documents, as well as others responsive to these Requests and to Bullion's Interrogatories, are control labeled with the prefix "BAR."

Goldstrike specifically notes that such records, which are produced as they are maintained in the ordinary course of business, include production information from areas acquired both before and after July 10, 1990, as well as areas acquired both before and after May 3, 1999. Some production records that Goldstrike will produce differentiate production from various areas of mining activity based on certain designated characteristics. By providing production records from areas of mining activity acquired before May 3, 1999, Goldstrike does not intend to imply

that they are relevant to this dispute or that such areas of mining activity are in anyway subject to Bullion's claims in this litigation. Production from areas acquired prior to May 3, 1999 has no relevance to this lawsuit, and Goldstrike reserves the right to object to the admissibility of such information at any trial or other proceeding, and reserves the right to oppose any further request for information relating to such prior production. *See* Goldstrike's Answer to Interrogatory No. 11, which is incorporated herein by reference as if set forth herein.

(b) and (c) Goldstrike objects to the terms "Resource models," "grade," "blocks," "resource category," "proven," "probable," "inferred," "mineralized material," and "Reserve models" as used in Request Nos. 15(b) and 15(c) because they are vague, ambiguous, and otherwise undefined. Goldstrike will not attempt to speculate about the meaning that Bullion intended for these terms.

In accordance with these clarifications, and subject to and without waiving the general objections set forth above and the specific objections set forth herein, Goldstrike responds that it will produce documents containing several different forms of reserve and resource information. These documents, as well as others responsive to these Requests and to Bullion's Interrogatories, are control labeled with the prefix "BAR." Goldstrike notes that reserve and resource information is also available from various publicly available sources, including publicly available portions of Barrick Gold Corporation's website, as well as from publicly available databases maintained by U.S. (EDGAR) and Canadian (SEDAR) regulatory authorities.

As before, Goldstrike notes that the documents produced in response to Request Nos. 15(b) and/or 15(c) are produced as they are maintained in the ordinary course of business and may include resource and reserve information from areas acquired both before and after July 10, 1990, as well as areas acquired both before and after May 3, 1999. By providing resource and reserve information from areas of mining activity acquired before May 3, 1999, Goldstrike does not intend to imply that they are relevant to this dispute or that such areas of mining activity are in anyway subject to Bullion's claims in this litigation. Resource and reserve information from areas acquired prior to May 3, 1999 has no relevance to this lawsuit, and Goldstrike reserves the right to object to the admissibility of such information at any trial or other proceeding, and

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reserves the right to oppose any further request for information relating to such resources and reserves. *See* Goldstrike's Answer to Interrogatory No. 11, which is incorporated herein by reference as if set forth herein.

(d) Goldstrike objects to the term "Metallurgical test work" as used in Request No. 15(d) because it is vague, ambiguous, and otherwise undefined. Goldstrike will not attempt to speculate about the meaning that Bullion intended for this term.

Goldstrike also objects to the request insofar as it purports to require Goldstrike to produce responsive information in multiple forms from multiple sources. A complete and exhaustive production of all metallurgical test data would be prohibitively voluminous because it can only be produced in a form in which the vast majority of the information and data provided would not be relevant to Bullion's claims. In particular, one database contains the results of metallurgical testing on materials from mines around the world that are owned by other Barrick Gold Corporation subsidiaries. It would be unduly burdensome and tremendously expensive for Goldstrike to search, identify, and retrieve from this database only the test results relating to mining claims acquired by Goldstrike on or after May 3, 1999, or even just the test results relating to Goldstrike after May 3, 1999.

In accordance with these clarifications, and subject to and without waiving the general objections set forth above and the specific objections set forth herein, Goldstrike responds that it will produce several forms of metallurgical test information. These documents, as well as others responsive to these Requests and to Bullion's Interrogatories, are control labeled with the prefix "BAR."

As before, Goldstrike specifically notes that the documents produced in response to Request No. 15(d) will be produced as they are maintained in the ordinary course of business and may include metallurgical test information from areas acquired both before and after July 10, 1990, as well as areas acquired both before and after May 3, 1999. By providing metallurgical test information from areas of mining activity acquired before May 3, 1999, Goldstrike does not intend to imply that they are relevant to this dispute or that such areas of mining activity are in anyway subject to Bullion's claims in this litigation. Metallurgical test information from areas

acquired prior to May 3, 1999 has no relevance to this lawsuit, and Goldstrike reserves the right to object to the admissibility of such information at any trial or other proceeding, and reserves the right to oppose any further request for information relating to such metallurgical test work. *See* Goldstrike's Answer to Interrogatory No. 11, which is incorporated herein by reference as if set forth herein.

(e) Goldstrike objects to the terms "projected gold recoveries," "actual gold recoveries," and "block of ore" as they are used in Request No. 15(e) because they are vague, ambiguous, and otherwise undefined. Goldstrike will not attempt to speculate about the meaning that Bullion intended for these terms.

In accordance with these clarifications, and subject to and without waiving the general objections set forth above and the specific objections set forth herein, Goldstrike responds that it will produce information related to recovery rates and predicted recovery curves, among other information that may be responsive to this request. These documents, as well as others responsive to these Requests and to Bullion's Interrogatories, are control labeled with the prefix "BAR."

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As before, Goldstrike specifically notes that the documents produced in response to Request No. 15(e) will be produced as they are maintained in the ordinary course of business and may include information related to recovery rates and predicted recovery curves from areas acquired both before and after July 10, 1990, as well as areas acquired both before and after May 3, 1999. By providing information related to recovery rates and predicted recovery curves from areas of mining activity acquired before May 3, 1999, Goldstrike does not intend to imply that they are relevant to this dispute or that such areas of mining activity are in anyway subject to Bullion's claims in this litigation. Documents and information about recovery rates and predicted recovery curves from areas acquired prior to May 3, 1999, have no relevance to this lawsuit, and Goldstrike reserves the right to object to the admissibility of such information at any trial or other proceeding, and reserves the right to oppose any further request for information relating to such recovery rates and predicted recovery curves. *See* Goldstrike's Answer to Interrogatory No. 11, which is incorporated herein by reference as if set forth herein.

(f) Goldstrike objects to the terms "mining segregation methods," "mineralized," "waste cut-offs," and to the phrases "how ore is defined and mined" and "what is done with material that is mineralized but low grade," as used in Request No. 15(f) because they are vague, ambiguous, and otherwise undefined. Goldstrike will not attempt to speculate about the meaning that Bullion intended for these terms and phrases.

In accordance with these clarifications, and subject to and without waiving the general objections set forth above and the specific objections set forth herein, Goldstrike responds that it will produce documents relating to, among other things, ore tracking and cut-off grades. These documents, as well as others responsive to these Requests and to Bullion's Interrogatories, are control labeled with the prefix "BAR."

As before, Goldstrike specifically notes that the documents produced in response to Request No. 15(f) will be produced as they are maintained in the ordinary course of business and may include information relating to ore tracking and cut-off grades from areas acquired by Goldstrike well before May 3, 1999, including areas Goldstrike acquired prior to July 10, 1990. By providing documents relating to ore tracking and cut-off grades from areas of mining activity acquired before May 3, 1999, Goldstrike does not intend to imply that they are relevant to this dispute or that such areas of mining activity are in anyway subject to Bullion's claims in this litigation. Documents and information about ore tracking and cut-off grades relating to areas acquired prior to May 3, 1999, have no relevance to this lawsuit, and Goldstrike reserves the right to object to the admissibility of such information at any trial or other proceeding, and reserves the right to oppose any further request for information relating to such ore tracking and cut-off grades. *See* Goldstrike's Answer to Interrogatory No. 11, which is incorporated herein by reference as if set forth herein.

REQUEST FOR PRODUCTION NO. 16: Please produce all documents listed in Exhibit H at Bates numbers Newmont 5124-5132.

ANSWER TO REQUEST NO. 16: Goldstrike expressly incorporates by reference each of the general objections set forth above. Goldstrike further objects to the extent that Bullion requests documents that have already been produced, either by Newmont in the related litigation

EXHIBIT 3

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

BULLION MONARCH MINING, INC.,

Plaintiff,

v.

BARRICK GOLDSTRIKE MINES INC., *et al.*,

Defendants.

Case No. CV-N-08-00227-ECR-VPC

BARRICK GOLDSTRIKE MINES INC.'S ANSWERS AND OBJECTIONS TO PLAINTIFF'S INTERROGATORIES [SET ONE]

000248

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure ("FRCP"), defendant Barrick Goldstrike Mines Inc. ("Goldstrike") hereby objects to and answers plaintiff Bullion Monarch Mining, Inc.'s ("Bullion") first set of interrogatories served on Goldstrike via mail on or about February 24, 2010 (hereinafter, the "Interrogatories").

GENERAL OBJECTIONS

1. Goldstrike objects to the Interrogatories to the extent that they contain more than the number of written interrogatory requests allowed pursuant to FRCP 33. In particular, FRCP

000248

33 states: "Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including discrete subparts." Fed. R. Civ. P. 33(a). When discrete subparts are taken into account, the Interrogatories contain at least 34 different written interrogatory requests. Goldstrike has elected to respond to each of the Interrogatories, including each discrete subpart, despite this technical violation. But Goldstrike reserves the right to refuse to answer any future interrogatory requests or provide additional information in response to any current interrogatory request or discrete subpart therein on the basis that Bullion has exceeded the number of written interrogatory requests allowed under Rule 33.

2. Goldstrike objects to the Interrogatories to the extent that the information sought therein has been previously produced or provided to Bullion or its counsel through documents produced by Newmont in related litigation, in response to a subpoena *duces tecum* which Bullion issued to Barrick Gold of North America in 2009 (the "Subpoena") and/or as part of Goldstrike's own initial disclosures or any supplements thereto.

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3. Goldstrike objects to the Interrogatories to the extent that the information sought therein is contained in publicly available records which are equally available to both Goldstrike and Bullion.

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4. Goldstrike objects to the Interrogatories insofar as they seek information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence in this matter.

5. Goldstrike objects to the Interrogatories to the extent they are overbroad, vague, ambiguous, compound, complex, unduly burdensome, or oppressive in the amount, scope, or type of information requested.

6. Goldstrike objects to the Interrogatories insofar as they seek to impose burdens on Goldstrike that are inconsistent with or in addition to its discovery obligations as set forth in Rules 26 and/or 33 of the Federal Rules of Civil Procedure.

7. Goldstrike objects to the Interrogatories as overbroad, unduly burdensome and oppressive insofar as they seek to impose upon Goldstrike the obligation to identify information that is not currently known or available to Goldstrike. Goldstrike will not undertake any

000249

obligation to identify or disclose information that is not reasonably and readily within its current knowledge, custody, possession or control.

8. Goldstrike objects to each Interrogatory to the extent that it seeks disclosure of information that would violate rights of privacy, or other statutorily or judicially recognized protections and privileges, confidentiality agreements, or court orders restricting dissemination of information, or result in disclosure of materials or information prepared in anticipation of litigation or of confidential settlement discussions.

9. Goldstrike objects to the Interrogatories to the extent that they seek information and documents protected from discovery by the attorney client privilege, the work product doctrine, the common interest privilege, the joint defense privilege or other applicable privileges or protections. Goldstrike does not waive but rather intends to preserve and is preserving the attorney client privilege, the work product protection, the common interest privilege, the joint defense privilege and every other privilege or protection with respect to all information and each and every document protected by any of such privileges or protections. Goldstrike will not knowingly identify information which is subject to any applicable privileges or protections. If any privileged or protected information is inadvertently disclosed by Goldstrike at anytime, Goldstrike requests that defendants immediately return to Goldstrike's counsel all documents, copies and other media which refer to or reflect in any way such inadvertently disclosed information.

10. Goldstrike objects to the "Preliminary Definitions and Instructions" set forth on pages 2-6 of the Interrogatories insofar as they seek to impose burdens on Goldstrike that are inconsistent with, or in addition to, Goldstrike's obligations as set forth in Rules 26 and/or 33 of the Federal Rules of Civil Procedure.

11. Goldstrike objects to the Interrogatories insofar as they fail to adequately define the terms "Barrick" and "you." For purposes of responding to the Interrogatories, Goldstrike interprets the terms "Barrick" and "you" to refer only to defendant, Barrick Goldstrike Mines Inc., and not to any defendant, or to any other related or affiliated entity.

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