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.

District Court
Case No. A785913

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VOLUME 2
PAGES 251–500

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12. Goldstrike does not in any manner waive or intend to waive, but rather intends to preserve and is preserving, (1) all objections as to competency, relevancy, materiality, and admissibility; (2) all objections to the use of any of the responses herein or the submission of any documents produced in response hereto in any proceeding, motion, hearing, or the trial in this or any other action; and (3) all objections to any further discovery or request involving or related to any of the Requests. The supplying of any information in response to the Interrogatories does not constitute an admission by Goldstrike that such information is relevant, admissible or material to any of the issues in this action, and Goldstrike reserves the right to object to any further inquiry with respect to any subject matter at any time.

13. Goldstrike incorporates each of the foregoing general pbjections into each and every answer below as if specifically and fully set forth therein. A republication or restatement, in whole or in part, of any one or more of the foregoing general objections in response to a specific Interrogatory is not intended to waive and does not waive an objection not specifically stated.

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SPECIFIC OBJECTIONS AND ANSWERS

INTERROGATORY NO. 1: Is Barrick the successor in interest to High Desert Mineral Resources of Nevada, Inc. ("High Desert")?

a. Did Barrick, or Barrick's predecessors in interest, in or about 1995 acquire all of the stock in High Desert through purchase, merger or other transaction?

b. Did Barrick, or Barrick's predecessors in interest, in or about 1995 acquire all of the assets and obligations of High Desert?

c. If the answer to either of the above questions is "yes", please describe the nature of the transaction?

ANSWER TO INTERROGATORY NO. 1: Goldstrike expressly incorporates by reference each of the general objections set forth above. Goldstrike specifically objects to Interrogatory No. 1 on the basis that it requires Goldstrike to make legal conclusions rather than state facts. Goldstrike also objects to Interrogatory No. 1 insofar as it seeks information which is already known or available to Bullion through the review of documents which were produced by

Newmont in the related litigation and/or by Barrick Gold of North America Inc. pursuant to the Subpoena. 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 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 in those transactions, and there is no one at Goldstrike that is currently known to have any information about such transactions. Goldstrike will not undertake any affirmative obligation to obtain information about High Desert's or Barrick HD's transactions in the Alleged AOI prior to May 3, 1999.

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.

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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; BGBM008026-36.

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; BAR043822-26.

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 BGBM000785-802 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 by High Desert 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

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Tom Erwin
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. 3 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 the Subpoena, or through Goldstrike's initial disclosures. Goldstrike will not undertake the burden of reviewing the

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previously produced documents in order to provide information in response to Interrogatory No. 3 as Bullion is equally capable of performing that task.

Finally, Goldstrike objects to Interrogatory No. 3 insofar as it is written in such a manner as to suggest that Goldstrike is somehow bound by the May 10, 1979 Agreement ("the 1979 Agreement"), which it is not.

Subject to and without waiving any of the foregoing general or specific objections, Goldstrike answers Interrogatory No. 3 as follows:

Goldstrike asserts that while Barrick HD became the owner of a 38% undivided interest in certain mining claims and/or fee lands as a result of its merger with High Desert on or about November 30, 1995, and while Goldstrike became the owner of those same interests as a result of its merger with Barrick HD on or about May 3, 1999, Goldstrike did not acquire any claims or properties directly from High Desert. The specific mining claims and fee lands which Goldstrike acquired a 38% undivided interest in as a result of Goldstrike's merger with Barrick HD are identified on BGBM006358-541 and BGBM006157-279, which documents have already been produced to Bullion, and to which Bullion is specifically referred pursuant to Rule 33(d) of the Federal Rules of Civil Procedure.

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Goldstrike further asserts that it is not obligated to pay a production royalty to Bullion based on mineral production from any of the unpatented mining claims or fee lands which it acquired through the merger with Barrick HD, or on any of the other mining claims or fee lands identified in response to Interrogatory No. 2, because Goldstrike is not bound by paragraph 11 or any other provision of the 1979 Agreement. Goldstrike specifically asserts that it is not bound by the 1979 Agreement, or any provisions therein, because, among other things:

1. Neither Goldstrike, Barrick HD nor High Desert are parties to the 1979 Agreement, or successors of any party to the 1979 Agreement;

2. Neither Goldstrike, Barrick HD nor High Desert ever assumed the 1979 Agreement or any of the obligations created therein;

3. The royalty obligations purportedly created by paragraph 11 of the 1979 Agreement are personal convents and do not create covenants running with the land, and cannot therefore be enforced against subsequent owners of land;

3. The royalty obligations purportedly created by paragraph 11 of the 1979 Agreement are void because they violate the Rule Against Perpetuities; and

4. The 1979 Agreement constitutes an unreasonable restraint on alienation.

Goldstrike further incorporates by reference its Answer to Bullion's Second Amended Complaint, and each of the affirmative defenses set forth therein.

INTERROGATORY NO. 4: For any interest in unpatented mining claims or fee land acquired by Barrick from Newmont after December 23, 1991, 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.

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ANSWER TO INTERROGATORY NO. 4: Goldstrike incorporates by reference its objections (general and specific) and answers to Interrogatory No. 3, above, as if expressly and fully set forth herein. Additionally, Goldstrike asserts that many of the unpatented mining claims which it acquired from Newmont on or after May 3, 1999 were invalid because they purported to be located entirely on private lands already held by Goldstrike and/or are inferior or invalid because they were located over the top of patented mining claims.

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INTERROGATORY NO. 5: For any interest in unpatented mining claims or fee land however acquired by Barrick after 1995, whether by location, lease, purchase or exchange, if said mining claims or fee land are located within the 1979 AOI, please state each and every reason Barrick does not believe that it is obligated to pay to plaintiff a production royalty for production from said unpatented mining claims or fee land.

ANSWER TO INTERROGATORY NO. 5: Goldstrike incorporates by reference its objections (general and specific) and answers to Interrogatory Nos. 3 and 4, above, as if expressly and fully set forth herein.

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INTERROGATORY NO. 6: Please state the name of the party you believe is responsible to pay the royalty obligation to Plaintiff for production from mineral property described in paragraph 11 of the 1979 Agreement at issue in this matter, including all facts, documents, and witnesses that support your belief.

ANSWER TO INTERROGATORY NO. 6: Goldstrike expressly incorporates by reference each of the general objections set forth above.

Goldstrike specifically objects to Interrogatory No. 6 insofar as it incorrectly assumes that the 1979 Agreement is a viable and enforceable agreement binding upon any party, and that Bullion actually has standing to enforce the agreement against any party. Goldstrike disputes both of these assumptions.

Goldstrike also objects to Interrogatory No. 6 insofar as it requires Goldstrike to provide information that is not relevant and likely to lead to the discovery of admissible evidence in this matter. The only issue in this case is whether Goldstrike is bound by the production royalty obligations allegedly set forth in the 1979 Agreement. Whether other parties may or may not be bound by the 1979 Agreement is irrelevant.

Finally, Goldstrike objects to Interrogatory No. 6 insofar as it requires Goldstrike to provide information which is not in Goldstrike's current custody, possession or control. Goldstrike will not undertake any obligation to obtain information about the 1979 Agreement, or potential parties that may be bound by the 1979 Agreement, or provide information which is not already in Goldstrike's current possession and control.

Subject to and without waiving any of the foregoing general or specific objections, Goldstrike answers Interrogatory No. 6 as follows:

At this time, Goldstrike does not believe that anyone owes Bullion any type of royalty under the 1979 Agreement, or that the 1979 Agreement can be enforced by Bullion against any party. First, Goldstrike asserts that it has seen no evidence to establish that Bullion is an actual successor to any party of the 1979 Agreement, or that Bullion has been properly assigned any rights under the 1979 Agreement. Goldstrike asserts that Bullion therefore lacks standing to

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assert any rights under the agreement against Goldstrike or any other party. Second, Goldstrike asserts that the 1979 Agreement, and paragraph 11 in particular, violates the Rule Against Perpetuities and therefore cannot be legally enforced by any party against any other party. *See also* Goldstrike's answers and objections to Interrogatory No. 3, above, which are expressly incorporated herein by reference. Third, Goldstrike is not currently aware of any particular person or entity that is specifically bound by or obligated under the 1979 Agreement. The last parties with any express obligations under paragraph 11 of the 1979 Agreement were Universal Explorations, Ltd. and/or Universal Gas, Inc. (collectively, "Universal). *See* 1979 Agreement. Goldstrike forms no opinion on whether Universal or any corporate successors have any ongoing obligations, to Bullion or otherwise, under the 1979 Agreement.

INTERROGATORY NO. 7: Please state whether you have sold, assigned, exchanged, or in any way divested yourself of an ownership interest in any mining claims or fee land located within the 1979 AOI which were acquired by you or High Desert after July 10, 1990.

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ANSWER TO INTERROGATORY NO. 7: Goldstrike expressly incorporates by reference each of the general objections set forth above.

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Goldstrike specifically objects to Interrogatory No. 7 insofar as it fails to define the term "mining claims." In particular, Bullion fails to specify whether it seeks information on patented lode mining claims, unpatented lode mining claims, patented mill site claims, or unpatented mill site claims. For purposes of responding to this Interrogatory, Goldstrike will assume that Bullion only seeks information relating to patented and unpatented lode mining claims, as those are the only mining claims with any apparent relevancy to the pending dispute.

Goldstrike specifically objects to Interrogatory No. 7 insofar as it is overbroad and unduly burdensome and requires Goldstrike to provide information that is not relevant and likely to lead to the discovery of admissible evidence in this matter. In particular, Goldstrike objects to Bullion's request for information about mining claims and fee lands which Goldstrike acquired and/or disposed of in the Alleged AOI 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

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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 claims and properties acquired or disposed of by Goldstrike prior to that date. *See also* objections to Interrogatory No. 2, above.

Goldstrike likewise objects to Interrogatory No. 7 insofar as it seeks information about unpatented mining claims and fee lands which Barrick HD may have acquired or disposed of 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 claims and properties acquired or disposed of by Barrick HD prior to that date. *See also id.*

Goldstrike also objects to Interrogatory No. 7 insofar as it requires Goldstrike to provide information about acquisitions or dispositions of mining claims or fee lands made by High Desert after July 7, 1990, and/or by Barrick HD after November 30, 1995. Insofar as any such transactions occurred, Goldstrike was not itself directly involved in those transactions, and there is no one at Goldstrike that is currently known to have any information about such transactions. Goldstrike will not undertake any affirmative obligation to obtain information about High Desert's or Barrick HD's transactions in the Alleged AOI which occurred prior to May 3, 1999. *See also id.*

Goldstrike further objects to Interrogatory No. 7 insofar as it seeks information which is already available to Bullion through documents that were previously produced by Newmont in related litigation, or by Barrick Gold of North America pursuant to the Subpoena. Goldstrike will not undertake the burden of reviewing the previously produced documents in order to provide information in response to Interrogatory No. 7 as Bullion is equally capable of performing that task.

Subject to and without waiving any of the foregoing general or specific objections, Goldstrike answers Interrogatory No. 7 as follows:

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1. On May 3, 1999 at approximately 10:01 a.m., Goldstrike merged with Barrick HD. At that time, and as a result of the merger, Goldstrike acquired Barrick HD's undivided 38% interests in those properties identified in BGBM000785-802 and/or BGBM005936-84. *See supra* Answer to Interrogatory No. 2, which is expressly incorporated herein by reference. Later that same day, Goldstrike transferred all of its interests in those properties to Newmont. *See id.* To the best of Goldstrike's current knowledge and belief, none of the other mining claims or fee simple lands which Goldstrike acquired in the Alleged AOI on or after May 3, 1999 have been transferred to any other owner.

2. On May 3, 1999, Goldstrike transferred certain additional properties to Newmont as part of the asset exchange transaction, at least some of which were located within the Alleged AOI. The specific claims and properties which Goldstrike transferred to 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: BGBM004842-903; BGBM004904-17; BGBM0000785-802. Goldstrike notes, however, that with the exception of those properties which were acquired through the merger with Barrick HD, as described in paragraph 1, above, all of the properties transferred to Newmont as part of the asset exchange were acquired by Goldstrike prior to May 3, 1999.

3. Other than the mining claims and/or properties identified on BGBM0000785-802 and/or BGBM005936-84, Goldstrike does not currently have knowledge of which mining interests or fee simple properties, if any, Barrick HD might have acquired or disposed of in the Alleged AOI between November 30, 1995 and May 3, 1999. Goldstrike asserts that information about Barrick HD's mining claim and/or fee land acquisitions or dispositions in the Alleged AOI between November 30, 1995 and May 3, 1999 may be contained within some of the documents which have been or will be roduced, 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 Goldstrike as it is for Bullion, Goldstrike has no obligation to search for any such information.

4. Other than those properties identified on BGBM000785-802 and BGBM005936-84, Goldstrike does not currently have knowledge of which properties, if any, High Desert might have acquired in the Alleged AOI between July 7, 1990 and November 30, 1995. Goldstrike asserts that an undivided 2% participating interest in some or all of those properties identified on BGBM000785-802 and BGBM005936-84 was transferred from High Desert to SLH Co. on or about November 3, 1995. *See* BGBM002430; BGBM005936-84; BGBM006000-57 (which documents Bullion is referred pursuant to Rule 33(d) of the Federal Rules of Civil Procedure). Goldstrike asserts that information about High Desert's land acquisitions in the Alleged AOI between July 7, 1990 and November 30, 1995 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 Goldstrike as it is for Bullion, Goldstrike has no obligation to search for any such information.

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INTERROGATORY NO. 8: Please list all mines, or the commonly used name for areas of mineral production, owned and/or operated by High Desert or Barrick or by a member of any joint venture in which High Desert or Barrick was a member, within the 1979 AOI since July 10, 1990, on unpatented mining claims or fee land in which High Desert or Barrick acquired an interest on or after July 10, 1990, including for each mine (a) the dates of operation; (b) the gross annual production for gold, silver, and any other metals for each year of production; (c) the gross smelter return received for each year of production; (d) a list of all documents that support your answer; (e) the names of any witnesses who have knowledge about your answer.

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ANSWER TO INTERROGATORY NO. 8: Goldstrike expressly incorporates by reference each of the general objections set forth above.

Goldstrike specifically objects to Interrogatory No. 8 insofar as it is overbroad and unduly burdensome and requires Goldstrike to provide information that is not relevant and likely to lead to the discovery of admissible evidence in this matter. In particular, Goldstrike objects to Bullion's request for information about mining operations, production and gross smelter returns

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on mining claims or fee lands which Goldstrike acquired in the Alleged AOI 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 operations, production and gross smelter returns on mining claims or fee lands acquired by Goldstrike prior to that date. *See also supra* Answer to Interrogatory No. 2.

Goldstrike likewise objects to Interrogatory No. 8 insofar as it seeks information about mining operations, production and/or gross smelter returns, if any, on mining claims or 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 operations, production and/or gross smelter returns, if any, on mining claims or fee lands acquired by Barrick HD prior to that date. *See also id.*

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Goldstrike also objects to Interrogatory No. 8 insofar as it requires Goldstrike to provide information about mining operations, production and/or gross smelter returns, if any, on mining claims or properties acquired by High Desert and/or Barrick HD prior to May 3, 1999. Insofar as any such operations occurred, Goldstrike was not itself directly involved in such operation, and there is no one at Goldstrike that is currently known to have any information about such operations. Goldstrike will not undertake any affirmative obligation to obtain information about High Desert's or Barrick HD's operations in the Alleged AOI prior to May 3, 1999. *See also id.*

Subject to and without waiving any of the foregoing general or specific objections, Goldstrike answers Interrogatory No. 8 as follows:

Part A:

1. Goldstrike operates an open pit mine in the Alleged AOI commonly referred to as the "Betze Post" mine. The Betze Post mine has been in operation since 1987. The majority of the production from the Betze Post mine since May 3, 1999 has come from mining claims or

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properties which Goldstrike acquired or patented prior to May 3, 1999. Such production, and the gross smelter return from such production, is irrelevant to this case. A smaller amount of production from the Betze Post open pit mine has come from some of the properties which Goldstrike acquired from Newmont on May 3, 1999, as part of the asset exchange. The production from these properties is tracked by Goldstrike, and is commonly referred to as the "Barrick Fee" open pit production (indicating that Goldstrike does not believe there to be any royalties owed on such ounces). Since May 3, 1999, Goldstrike has mined 19,324,502 tons from the Barrick Fee open pit area, and has shipped 1,715,698 ounces of gold and 177,083 ounces of silver from that production. Goldstrike does not produce or track any metals other than gold and silver. Goldstrike has not calculated a gross smelter return on the "Barrick Fee" production because no royalty is believed to be owed on those ounces, and thus no such calculation is required. To the best of Goldstrike's current knowledge, belief and understanding, there has been no open pit production on any of the other properties acquired from Newmont in the 1999 asset exchange,[2] from any of the claims or properties acquired from Newmont in July 2004, or from the claims or properties acquired from ELLCO and Newmont in August 2005.

2. Goldstrike also operates an underground mine in the Alleged AOI commonly referred to as the "Miekle" mine. The Miekle mine has been in operation since 1996. The majority of the production from the Miekle mine has come from mining claims or properties which Goldstrike acquired or patented prior to May 3, 1999. A smaller amount of production from the Miekle underground mine has come from some of the mining claims or properties which Goldstrike acquired from Newmont on May 3, 1999, as part of the asset exchange. The production from these properties is tracked by Goldstrike, and is commonly referred to as the "Barrick Fee" underground production (indicating that Goldstrike does not believe there to be any royalties owed on such production). Since May 3, 1999, Goldstrike has mined 2,760,668 tons

[2] A number of the claims which Goldstrike obtained from Newmont as part of the 1999 asset exchange overlapped with Goldstrike's prior owned private land and/or patented claims, and are therefore invalid or inferior claims. Production from the area of these claims is properly deemed to have come from Goldstrike's prior owned private land and/or patented claims, and not from the invalid or inferior claims Goldstrike obtained from Newmont as part of the 1999 asset exchange.

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from the "Barrick Fee" underground mining area, and has shipped 856,589 ounces of gold and 106,253 ounces of silver from such production. Goldstrike does not produce or track any metals other than gold and silver. Goldstrike has not calculated a gross smelter return on the "Barrick Fee" production because no royalty is believed to be owed on those ounces, and thus no such calculation is required. To the best of Goldstrike's current knowledge, belief and understanding, there has been no underground production on any of the other properties acquired from Newmont in the 1999 asset exchange,[3] from any of the claims or properties acquired from Newmont in July 2004, or from the claims or properties acquired from ELLCO and Newmont in August 2005.

Documents containing information about the production and gross smelter royalties from the Betze Post and Miekle mines are still being processed for production. Goldstrike will supplement these responses with a list of the relevant documents, by Bates number, as soon as this process has been completed and Bates numbers have been assigned.

The following individuals likely have information relevant to Part A of Goldstrike's answer to Interrogatory No. 8:

Jim Byers
Barrick Goldstrike Mines Inc.
Elko, Nevada
Mr. Byers should be contacted solely through Goldstrike's counsel

Curtis Caldwell
Barrick Gold of North America
Salt Lake City, Utah
Mr. Caldwell should be contacted solely through Goldstrike's counsel

Russ Hofland
Barrick Goldstrike Mines Inc.
Elko, Nevada
Mr. Hoffland should be contacted solely through Goldstrike's counsel

John Langhans
Barrick Goldstrike Mines Inc.
Elko, Nevada
Mr. Langhans should be contacted solely through Goldstrike's counsel

[3] A number of the claims which Goldstrike obtained from Newmont as part of the 1999 asset exchange overlapped with Goldstrike's prior owned private land and/or patented claims, and are therefore invalid or inferior claims. Production from the area of these claims is properly deemed to have come from Goldstrike's prior owned private land and/or patented claims, and not from the invalid or inferior claims Goldstrike obtained from Newmont as part of the 1999 asset exchange.

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Janna Linebarger
Barrick Goldstrike Mines Inc.
Elko, Nevada
Ms. Linebarger should be contacted solely through Goldstrike's counsel

Sam Marich
Barrick Goldstrike Mines Inc.
Elko, Nevada
Mr. Marich should be contacted solely through Goldstrike's counsel

Tracy Miller
Barrick Goldstrike Mines, Inc.
Elko, Nevada
Ms. Miller should be contacted solely through Goldstrike's counsel

Mark Rantapaa
Barrick Goldstrike Mines, Inc.
Elko, Nevada
Mr. Rantapaa should be contacted solely through Goldstrike's counsel

Paul Tehnet
Barrick Goldstrike Mines Inc.
Elko, Nevada
Mr. Tehnet should be contacted solely through Goldstrike's counsel

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This list may be amended and/or supplemented from time to time as additional people with potentially relevant information are identified by Goldstrike.

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Part B:

Goldstrike asserts that the mining claims and/or fee lands identified in BGBM000785-802 were likely acquired either by High Desert on or after July 7, 1990 and/or by Barrick HD on or after November 30, 1995, and may have been part of a mine in the Alleged AOI commonly known as the Leeville Mine. All of these mining claims and/or fee lands were acquired by Goldstrike at approximately 10:01 a.m. on May 3, 1999, when Barrick HD merged into Goldstrike. Goldstrike transferred these properties to Newmont later that same day (May 3, 1999). Neither Barrick HD nor Goldstrike actually operated the Leeville Mine. Goldstrike asserts on information and belief that there was no production from the Leeville Mine prior to May 3, 1999, and that Goldstrike therefore has no information to provide on the production from the Leeville Mine in response to Interrogatory No. 8. Goldstrike is not currently aware of any other mining claims or fee lands which might have been acquired in the Alleged AOI by High Desert on or after July 7, 1990 and/or by Barrick HD on or after November 30, 1995, or whether

any such properties were part of the Leeville Mine or any other mine. Goldstrike transferred all of its interests in the Leeville Mine to Newmont just hours after those interests were obtained. To the best of Goldstrike's knowledge and belief, no production occurred from those mining claims or fee lands during the brief period of time in which they were held by Goldstrike.

Goldstrike is not currently aware of any specific person who might have information relevant to the operations of or production from the Leeville Mine, but asserts that such information is most likely under the possession and control of Newmont, as the operator of that mine.

INTERROGATORY NO. 9: Please describe in chronological order all transactions/ dealings between you and High Desert and/or the Halavaises (or entities controlled or owned by the Halavaises) related to any mineral interests or other property rights within the 1979 AOI from July 10, 1990, to the current date.

ANSWER TO INTERROGATORY NO. 9: Goldstrike expressly incorporates by reference each of the general objections set forth above.

Goldstrike specifically objects to Interrogatory No. 9 insofar as it is overbroad and unduly burdensome and requires Goldstrike to provide information that is not relevant and likely to lead to the discovery of admissible evidence in this matter.

Goldstrike also objects to Interrogatory No. 9 as vague with respect to the terms "transactions/dealings", the phrase "related to any mineral interests", and the phrase "mineral interests or other property rights within the 1979 AOI."

Subject to and without waiving any of the foregoing general or specific objections, Goldstrike answers Interrogatory No. 9 as follows:

1994-1996: Transactions relating to a project commonly known as the Gold Venture project, the Little High Desert project and/or the Simon Creek project. With respect to the details of those transactions, Goldstrike invokes Rule 33(d) of the Federal Rules of Civil Procedure and refers Bullion to the following documents which are produced concurrently herewith: BAR000339-44; BAR003367-463; BAR003593-98; BAR043764-66; BG016429-31.

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1998-1999: Transactions relating to the termination of the Newmont Gold and High Desert Venture, and the termination of the 2% carried participating interest in that venture held by High Desert Mineral Resources, Inc., a Delaware corporation, formerly known as SLH Co. With respect to the details of those transactions, Goldstrike invokes Rule 33(d) of the Federal Rules of Civil Procedure and refers Bullion to the following documents which have already been produced: BGBM00239-1237; BGBM003345-57; BGBM004382-99; BGBM006767-84; BGBM011499-507; BGBM011717-19; BGBM013673-74.

INTERROGATORY NO. 10: Please describe in chronological order, all transactions/ dealings between you and Newmont related to any mineral interests or other property rights within the 1979 AOI from December 23, 1991, to the current date.

ANSWER TO INTERROGATORY NO. 10: Goldstrike expressly incorporates by reference each of the general objections set forth above.

Goldstrike specifically objects to Interrogatory No. 10 as vague with respect to the terms "transactions/dealings", the phrase "related to any mineral interests", and the phrase "property rights within the 1979 AOI."

Goldstrike further objects to Interrogatory No. 10 insofar as it is overbroad and unduly burdensome and requires Goldstrike to provide information that is not relevant and likely to lead to the discovery of admissible evidence in this matter. In particular, Goldstrike objects to Bullion's request for information about dealings between Goldstrike and Newmont prior to May 3, 1999, when Goldstrike actually became the corporate successor of Barrick HD, which was the corporate successor of High Desert. Goldstrike will not provide any information relating to transactions between Newmont and Goldstrike prior to May 3, 1999. *See also supra* Answer to Interrogatory No. 2 which is expressly incorporated herein by reference.

Goldstrike further objects that Interrogatory No. 10 is so broadly worded that it would require Goldstrike to provide information about transactions and dealings with Newmont or its related companies that have nothing to do with the acquisition or disposition of any mining claims or fee lands within the Alleged AOI, or the production of minerals from such claims, and

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therefore have absolutely no bearing on this litigation. Goldstrike has entered into numerous agreements and arrangements with Newmont or its related companies over its years in operation, including but not limited to easement and right of way agreements, joint operating agreements, dewatering agreements, etc. All of these agreements and arrangements might, under the broadest interpretation, be technically "related to . . . mineral interests or other property rights within the 1979 AOI", but the vast majority of them have absolutely no bearing on any of the issues raised in this litigation. Goldstrike will not provide information on agreements and arrangements with Newmont that have no possible bearing on the issues raised in this case.

Subject to and without waiving any of the foregoing general or specific objections, Goldstrike answers Interrogatory No. 10 as follows:

May 3, 1999: Transactions relating to the 1999 asset exchange, the termination of the Newmont Gold and High Desert Venture and the termination of the 2% participating interest in the Newmont Gold and High Desert Venture that was granted to SLH Co. in 1995. With respect to the details of those transactions, Goldstrike invokes Rule 33(d) of the Federal Rules of Civil Procedure and refers Bullion to the following documents which have already been produced: BGBM002118-2209; BGBM000239-756; BGBM004400-16; BGBM004223-83; BGBM001238-565; BGBM006236-313; BGBM001566-95; BGBM004368-81; BGBM004829-41; BGBM004382-99; BGBM002210-85; BGBM006818-35; BGBM006011-43; BGBM001778-851; BGBM004423-39; BGBM006852-81; BGBM004440-47; BGBM003408; BGBM007059-69; BGBM006901-16; BGBM003991-4007; BGBM006044-61; BGBM004306-67; BGBM001852-89; BGBM006767-84; BGBM006981-95; BGBM004284-92; BGBM006882-90; BGBM004457-85; BGBM007752-84; BGBM007070-77; BGBM002107-14; BGBM006917-80; BGBM006220-35; BGBM006996-7058; BGBM006723-57.

2004 and 2005: Transactions relating to Goldstrike's acquisition of certain fee lands and mill sites from Newmont. With respect to the details of those transactions, Goldstrike invokes Rule 33(d) of the Federal Rules of Civil Procedure and refers Bullion to the following documents,

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which are produced concurrently herewith: BAR043773-83; BAR04382-26; BAR043811-15; BAR043816-21; BAR043811-15; BAR043816-21; BAR043801-05; BAR043806-10.

INTERROGATORY NO. 11: For each Barrick mine in production at any time from July 10, 1990, until the present date within the 1979 AOI, please set forth the following:

a. The date the mineral interests being mined were acquired or if by location, the dates of location of unpatented mining claims.

b. For mineral interest acquired after July 10, 1990;

(i) From whom the mineral interests being mined were acquired;

(ii) The annual gross smelter returns for each mineral recovered from each mine from July 10, 1990 through 2009.

c. The monthly gross smelter returns for each mineral recovered from each mine since January 1, 2010.

d. The proven mineral reserves for each mine.

e. The probable mineral reserves for each mine.

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ANSWER TO INTERROGATORY NO. 11: Goldstrike expressly incorporates by reference each of the general objections set forth above.

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Goldstrike specifically objects to Interrogatory No. 11 insofar as it is overbroad and unduly burdensome and requires Goldstrike to provide information that is not relevant and likely to lead to the discovery of admissible evidence in this matter. In particular, Goldstrike objects to Bullion's request for information about mining operations, production, smelter returns and mineral reserves on mining claims or fee lands which Goldstrike acquired in the Alleged AOI prior to May 3, 1999, when it actually became the corporate successor of Barrick HD, which was 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 Goldstrike prior to that date. *See also supra* Answer to Interrogatory No. 2 which is expressly incorporated herein by reference.

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Goldstrike also objects to Interrogatory No. 11 insofar as it requires Goldstrike to provide information about mining operations, production, smelter returns or mineral reserves on mining claims or fee lands which were acquired by Barrick HD prior to November 30, 1995, when Barrick HD 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 claims and properties acquired by Barrick HD prior to that date. *See also id.*

Goldstrike also objects to Interrogatory No. 11 insofar as it requires Goldstrike to provide information about mining operations, production, smelter returns and mineral reserves on mining claims or fee lands properties which were acquired and/or owned by High Desert and/or Barrick HD. Insofar as any such mining operations even occurred, Goldstrike was not itself involved in those operations, and does not have any information about those operations. Goldstrike will not undertake any affirmative obligation to obtain information about High Desert's or Barrick HD's operations in the Alleged AOI prior to May 3, 1999. *See also id.*

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Subject to and without waiving any of the foregoing general or specific objections, Goldstrike answers Interrogatory No. 11 as follows:

Goldstrike operates an open pit mine in the Alleged AOI commonly referred to as the "Betze Post" mine. The Betze Post mine has been in operation since 1987. The majority of the Betze Post mine sits on mining claims or fee lands which Goldstrike acquired or patented prior to May 3, 1999. Information about production, smelter returns and mineral reserves relating to these mining claims and fee lands has no relevance in this case. A smaller amount of production from the Betze Post open pit mine has come from some of the mining claims or fee lands which Goldstrike acquired from Newmont on May 3, 1999, as part of the asset exchange. The production and reserves from these properties are tracked by Goldstrike and is commonly referred to as the "Barrick Fee" open pit production and reserves. As of December 31, 2008, reserves on the "Barrick Fee" open pit mining area were estimated at 1,503,777 ounces.

Goldstrike also operates an underground mine in the Alleged AOI commonly referred to as the "Miekle" mine. The Miekle mine has been in operation since 1996. The majority of the Miekle underground mine sits on mining claims or fee lands which Goldstrike acquired or patented prior to May 3, 1999. Information about production, smelter returns and mineral reserves relating to these mining claims and fee lands has no relevance in this case. A smaller amount of production from the Miekle underground mine has come from some of the mining claims or fee lands which Goldstrike acquired from Newmont on May 3, 1999, as part of the asset exchange. The production and reserves from these properties are tracked by Goldstrike and is commonly referred to as the "Barrick Fee" open pit production and reserves. As of December 31, 2008, reserves on the "Barrick Fee" underground area were estimated at 865,996 ounces.

Goldstrike has not calculated a smelter return on the production from the "Barrick Fee" lands because no royalty is believed to be owed on those ounces, and thus no such calculation is required.

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Documents containing additional information about the production, smelter returns, and mineral reserves on or from the "Barrick Fee" properties (open pit and underground) will be produced in response to these interrogatories and the simultaneously served document requests. Those documents are still being collected from Goldstrike and processed for production. Goldstrike will supplement these responses with a list of the relevant documents, by Bates number, as soon as this process has been completed and Bates numbers have been assigned.

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There are no other mines in the Alleged AOI which have been operated by Goldstrike since May 3, 1999.

INTERROGATORY NO. 12: For each of the proven mineral reserves situated within the 1979 AOI not listed in response to Interrogatory 11, in which Barrick has an interest, please set forth the following:

a. The mining claims or fee land on which the mineral reserve is located.

b. The value of each mineral reserve, specifying the value of each type mineral.

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c. The date the unpatented or patented mining claim or fee land associated with each mineral reserve was acquired.

d. From whom Barrick acquired the unpatented or patented mining claim on fee land on which each mineral reserve is located.

ANSWER TO INTERROGATORY NO. 12: Goldstrike incorporates by reference its objections and answers to Interrogatory No. 11 as if expressly and fully set forth herein.

INTERROGATORY NO. 13: For each of the probable reserves situated within the 1979 AOI not listed in response to Interrogatory 11, please set forth the following:

a. The mining claims or fee land on which the mineral reserve is located.

b. The value of each mineral reserve, specifying the value of each type mineral.

c. The date the unpatented or patented mining claim or fee land associated with each mineral reserve was acquired.

d. From whom Barrick acquired the unpatented or patented mining claim on fee land on which each mineral reserve is located.

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ANSWER TO INTERROGATORY NO. 13: Goldstrike incorporates by reference its objections and answers to Interrogatory No. 11 as if expressly and fully set forth herein.

INTERROGATORY NO. 14: Please state the names of any persons or companies Barrick or High Desert has offered a 50% participation interest as discussed in paragraph 11 of the May 10, 1979 Agreement at issue in this matter. Said provision is specifically discussed in the first full paragraph on page 11 of the 1979 Agreement.

ANSWER TO INTERROGATORY NO. 14: Goldstrike expressly incorporates by reference each of the general objections set forth above.

Goldstrike specifically objects to Interrogatory No. 14 insofar as it is overbroad and unduly burdensome and requires Goldstrike to provide information that is not relevant and likely to lead to the discovery of admissible evidence in this matter. In particular, Goldstrike objects to Bullion's request for information about actions taken by Goldstrike prior to May 3, 1999, when it actually became the corporate successor of Barrick HD, which was the corporate successor of

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High Desert. *See also supra* Answer to Interrogatory No. 2, which is expressly incorporated herein by reference.

Goldstrike also objects to Interrogatory No. 14 insofar as it requires Goldstrike to provide information about actions taken by High Desert or Barrick HD after July 7, 1990, which actions Goldstrike was not itself involved those transactions, and there is no one at Goldstrike that is currently known to have information about such transactions. Goldstrike will not undertake any obligation to obtain information about High Desert's or Barrick HD's actions which is not already in its possession and control. *See also id.*

Finally, Goldstrike objects to Interrogatory No. 14 insofar as it is written in such a manner as to suggest that Goldstrike, Barrick HD or High Desert are somehow bound by the 1979 Agreement, which neither Goldstrike, Barrick HD nor High Desert are. *See also supra* Answer to Interrogatory No. 3 which is expressly incorporated herein by reference.

Subject to and without waiving any of the foregoing general or specific objections, Goldstrike answers Interrogatory No. 14 as follows:

Goldstrike asserts that it has not itself offered a 50% participation interest to any persons or companies as discussed in paragraph 11 of the 1979 Agreement, and asserts that it had no obligation to offer any such participation interest to any person or company because it has never been a party to or otherwise bound by the 1979 Agreement. *See also id.*

Goldstrike asserts that to the best of its current knowledge, information and belief, neither High Desert nor Barrick HD offered a 50% participation interest to any persons or companies as discussed in paragraph 11 of the 1979 Agreement, and asserts that neither High Desert nor Barrick had an obligation to offer any such participation interest to any person or company because neither High Desert nor Barrick HD were ever a party to or otherwise bound by the 1979 Agreement. *See also id.*

INTERROGATORY NO. 15: If Barrick's answer to Interrogatory 14 was that Barrick or High Desert has not offered a 50% participation interest to anyone, please set forth all reasons why Barrick has not done so.

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ANSWER TO INTERROGATORY NO. 15: Goldstrike incorporates by reference its objections and answers to Interrogatory No. 14 as if expressly set forth herein.

Dated: April 5, 2010

PARSONS BEHLE & LATIMER

By: _____
Michael R. Kealy
Francis M. Wikstrom
Michael P. Petrogeorge
Brandon J. Mark
Attorneys for Barrick Goldstrike Mines Inc.

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VERIFICATION

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

I, Richie D. Haddock, Vice President and General Counsel, North America, as designated in-house counsel for Barrick Goldstrike Mines, Inc., have read the foregoing BARRICK GOLDSTRIKE MINES INC.'S ANSWERS AND OBJECTIONS TO PLAINTIFF'S INTERROGATORIES [SET ONE], and am familiar with the objections, answers and responses set forth therein. I am executing this Verification solely in my professional capacity as designated in-house counsel for Barrick Goldstrike Mines Inc., and am duly authorized in that capacity to affirm on behalf of Barrick Goldstrike Mines Inc., under the penalties of perjury, and to the best of my current knowledge, information and belief, that Barrick Goldstrike Mines Inc.'s foregoing answers to plaintiff Bullion Monarch Mining, Inc.'s first set of interrogatories are true and correct.

Dated this 5th day of April, 2010.

Richie D. Haddock
Vice President and General Counsel, North America, as designated in-house legal counsel for Barrick Goldstrike Mines Inc.

SUBSCRIBED and SWORN to before this 5th day of April, 2010.

NOTARY PUBLIC

Notary Public
JILL S. MOFFAT
136 East South Temple, Ste 1800
Salt Lake City, Utah 84111
My Commission Expires
February 7, 2012
State of Utah

PARSONS BEHLE & LATIMER

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of Parsons Behle & Latimer, and that on this 5th day of April, 2010, I caused to be mailed, via U.S. Mail, postage prepaid, a true and correct copy of **BARRICK GOLDSTRIKE MINES INC.'S ANSWERS AND OBJECTIONS TO PLAINTIFF'S INTERROGATORIES [SET ONE]**, to the following:

Clayton P. Brust, Esq.
ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, NV 89503

By: _____

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EXHIBIT 4

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EXHIBIT 4

PARSONS BEHLE & LATIMER

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Francis M. Wikstrom (Utah Bar No. 3462; admitted *pro hac vice*)
Michael P. Petrogeorge (Utah Bar No. 8870; admitted *pro hac vice*)
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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 RENEWED MOTION FOR SUMMARY JUDGMENT BASED ON A LACK OF OBLIGATION UNDER THE 1979 AGREEMENT

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RENEWED MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure and LR 56-1, and the Amended Minutes of Proceedings entered by this Court on June 25, 2015, defendant Barrick Goldstrike Mines Inc. ("Goldstrike") hereby renews its motion for summary judgment dismissing all of Bullion Monarch Mining, Inc.'s ("New Bullion") claims that are based on the May 10, 1979 agreement, including its claims for declaratory relief, breach of contract, breach of implied covenant and good faith and fair dealing and accounting, because the contractual obligations on which these claims are based are not real covenants that run with the land, and the obligations were never assumed by Goldstrike or its corporate predecessors. Goldstrike also moves to dismiss New Bullion's claim for unjust enrichment because New Bullion cannot establish the essential elements of that claim.

This renewed motion is supported by the following memorandum of points and authorities, and by Goldstrike's appendix of exhibits filed concurrently herewith.

Dated: September 22, 2015.

PARSONS BEHLE & LATIMER

By: */s/ Michael P. Petrogeorge*
Michael R. Kealy
Francis M. Wikstrom
Michael P. Petrogeorge
Brandon J. Mark
Attorneys for Defendant Barrick Goldstrike Mines Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In 1979, seven companies (none of which are parties to this litigation) entered into a joint venture to explore and develop mineral interests located in Eureka County, Nevada and referred to in their agreement (the "1979 Agreement") as the "Subject Property." Universal Gas (Montana), Inc. ("Universal") was appointed as operator of the joint venture. Paragraph 4 of the 1979 Agreement required the joint venture to pay a royalty to New Bullion's alleged predecessor, Bullion Monarch Company ("Old Bullion") on minerals produced from the Subject Property.[1]

Paragraph 11 of the 1979 Agreement gave Universal, as operator, the exclusive right to acquire other mining properties in a 255-square-mile "area of interest" (the "AOI") surrounding the Subject Property and, upon payment by the other parties of their proportionate share of the acquisition costs, to add the new property to the Subject Property. But if Universal acquired mining property in the AOI that did not become part of the Subject Property, Paragraph 11 obligated Universal to pay Old Bullion a royalty on minerals Universal produced from such property (the "AOI Royalty Provision"). The AOI Royalty Provision is separate and distinct from the royalty on the Subject Property under paragraph 4. The AOI Royalty Provision applied only to properties in the AOI Universal acquired and retained separately from the Subject Property and outside of the joint venture.

In this case, brought 30 years after the 1979 Agreement, New Bullion (which did not exist until 2004) asserts that the Paragraph 11 obligation of Universal to pay royalties on properties it independently acquired in the AOI is somehow binding on Goldstrike. But Goldstrike was not a party to the 1979 Agreement or a corporate successor to any party to the agreement. Goldstrike

[1] Goldstrike assumes for purposes of this motion ***only*** that New Bullion is Old Bullion's successor in interest with the right to assert Old Bullion's claims under the 1979 Agreement. If this motion is not granted, however, New Bullion should be put to the burden of establishing that Old Bullion's rights under the 1979 Agreement were, in some way, contractually assigned to New Bullion. New Bullion will not be allowed to establish itself as the mere corporate successor of Old Bullion. *See, e.g., Kincade v. Midroc Oil Co.*, 769 So. 2d 813, 817 (La. Ct. App. 2000) (noting that the termination of a business entity ends its function as a business entity except for liquidation purposes).

and its predecessors simply owned an interest in the Subject Property between 1990 and 1999. On May 3, 1999, it transferred its entire interest in the Subject Property to Newmont.[2]

To prevail on its claims, New Bullion must establish one of two propositions: (1) that the AOI Royalty Provision was a real covenant that ran with the Subject Propert; or (2) that Goldstrike or its predecessor, High Desert Mineral Resources of Nevada, Inc. ("High Desert Nevada"), assumed the personal obligation of Universal under the AOI Royalty Provision. New Bullion cannot establish either proposition under the undisputed facts of this case.

As might be expected, the 30-year history of the Subject Property is complicated. The undisputed facts are set forth below and supported by the documents in the lengthy appendix. But they may be distilled into four simple paragraphs.

First, the language of Paragraph 11 made it clear that the obligations of the AOI Royalty Provision were personal to Universal and applied only if it independently obtained lands in the AOI that did not become part of the joint venture's Subject Property. Moreover, the obligation did not meet the technical requirements of a real covenant because it did not "touch and concern" both burdened and benefitted land. Rather, it was a personal obligation of Universal that did not depend on its ownership of the Subject Property. Finally, there was no privity of estate between Universal and Old Bullion with respect to any burdened property.

Second there were many transactions and several joint ventures involving the Subject Property between the date of the 1979 Agreement and August 7, 1990 when Goldstrike's predecessor first obtained an interest in the Subject Property. Although each transaction is explained in detail so the Court has the benefit of the full history, these transactions can be summarized in one sentence: ***There is no evidence that Universal's personal obligations under the Paragraph 11 AOI Royalty Provision were ever assumed by Goldstrike or its corporate predecessors.***

Third, there is no evidence that Goldstrike's corporate predecessors independently acquired any mineral interests in the AOI between 1990 and May 3, 1999, or that Goldstrike obtained any

[2] New Bullion's identical lawsuit against Newmont has been dismissed based on laches.

mineral interests in the AOI during the 8 hours it owned the Subject Property on May 3, 1999. As such, even if the AOI Royalty Provision somehow bound Goldstrike, it would owe no royalty to New Bullion.

Fourth, New Bullion's unjust enrichment claims are premised on Goldstrike's liability under the AOI Royalty Provision. As such, it is duplicative of its contract claims and must be dismissed as a matter of law.

For the foregoing reasons, and those set forth more fully below, this Court should grant Goldstrike's Motion and enter summary judgment in favor of Goldstrike and against New Bullion dismissing all of New Bullion's claims with prejudice.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. THE 1979 AGREEMENT CREATED A ROYALTY OBLIGATION FOR THE OWNER OF THE SUBJECT PROPERTY AND A PERSONAL OBLIGATION ON THE PART OF UNIVERSAL IF IT INDEPENDENTLY ACQUIRED PROPERTIES IN THE AOI THAT DID NOT BECOME PART OF THE SUBJECT PROPERTY.

1. On May 10, 1979, Old Bullion entered into an Agreement (the "1979 Agreement") with Polar Resources Co. ("Polar"), Universal Gas (Montana), Inc. ("Universal"), Universal Explorations, Ltd., Camsell River Investments, Ltd. ("Camsell"), Lambert Management Ltd. ("Lambert"), and Eltel Holdings Ltd. ("Eltel") (collectively the "1979 JV Parties"). (*See* 1979 Agreement, Appendix in Support of Goldstrike's Renewed Motion for Summary Judgment Based on a Lack of Obligation Under the 1979 Agreement ("Goldstrike Appx.") Tab 1.)

2. The 1979 Agreement created a joint venture, with Universal as operator, to recover minerals from certain mining properties (collectively referred to as the "Subject Property").[3] (*See* 1979 Agreement at 1, ¶ 2, ¶ 3.)

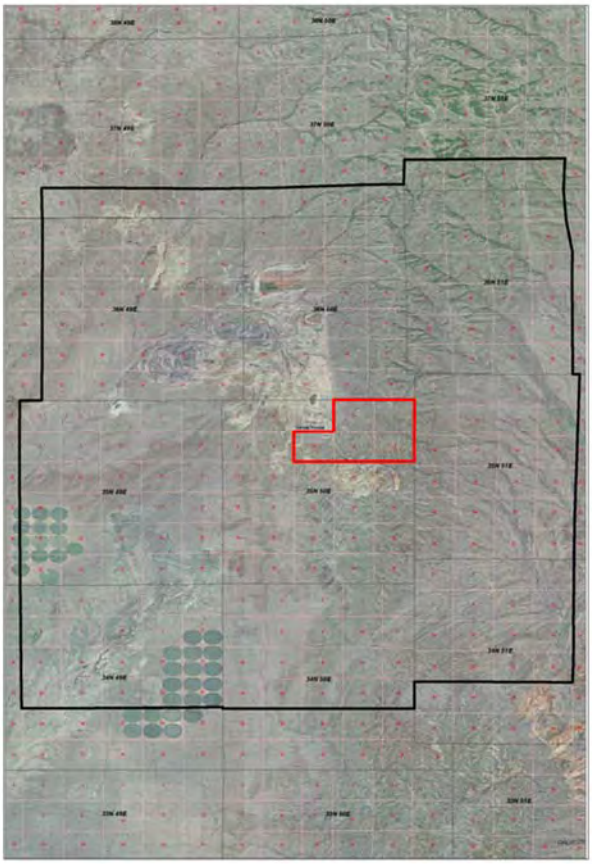
3. The 1979 Agreement created various rights and obligations running to and from the various parties to the agreement. (*See* generally 1979 Agreement)

[3] The specific mining claims and mineral interests constituting the Subject Property are set forth on Exhibit A-1 of the 1979 Agreement, Goldstrike Appx. Tab 1.

4. Paragraph 4 required Universal, as operator of the joint venture, to pay Old Bullion a royalty on mineral production from the Subject Property (the "Subject Property Royalty Provision"). (*Id.* ¶ 4.)

5. Paragraph 6 of the 1979 Agreement provided that once Universal had paid Old Bullion $1 million in royalties, Bullion was deemed to have sold all of its "right, title and interest in the Subject Property" to Universal and Polar, "forever relieving UNIVERSAL and POLAR from any contractual commitment to [OLD] BULLION by virtue of UNIVERSAL's or POLAR's actions or operations on the Subject Property," except for a continuing 1% royalty on production from the Subject Property. (*Id.* ¶ 6.)

6. Paragraph 11 of the 1979 Agreement granted Universal, as operator, the exclusive right to acquire additional mineral properties within the AOI–a large area encompassing 255 square miles—on behalf of the 1979 JV Parties. (*Id.* ¶ 11 and Ex. A-2.) The AOI is the larger area outlined in black on the image below, while the Subject Property is the smaller area outlined in red:



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7. Upon obtaining any mineral properties in the AOI, Universal, as operator, was required to offer to include such properties in the Subject Property upon the payment by Polar, Camsell, Lambert, and Eltel (collectively "Polar-Camsell") of an amount equal to 50% of the acquisition costs. (*See id.* ¶ 11.)

8. Paragraph 11 provided, however, that if Polar-Camsell did not pay their share, Universal could keep the acquisition in the AOI as its sole property subject only to Universal's independent obligation to pay a royalty to OBullion on production from such lands (the "AOI Royalty Provision"). (*Id.*)

II. TRANSACTIONS AFTER THE 1979 AGREEMENT DEMONSTRATE THAT THE AOI ROYALTY PROVISION DID NOT RUN WITH THE LAND AND THE OBLIGATION WAS NOT ASSUMED BY LATER PURCHASERS OF THE SUBJECT PROPERTY.

9. On June 5, 1979, September 27, 1979, and October 17, 1979, Old Bullion conveyed its right, title, and interest in mining claims within the Subject Property to Universal by means of mineral grant deeds and assignments. The deeds transferred Old Bullion's interests in the mining claims to Universal "free and clear of any liens and encumbrances" and made no reference to the AOI Royalty Provision. The assignments were likewise unrestricted and made no reference to the AOI Royalty Provision. (*See* June 5, 1979 Mineral Grant Deed from Old Bullion (Grantor) to Universal (Grantee), Goldstrike Appx. Tab 2; September 27, 1979 Mineral Grant Deed from Old Bullion (Grantor) to Universal (Grantee), Goldstrike Appx. Tab 3; October 17, 1979 Assignment (Murphy Lease) from Old Bullion (Assignor) to Universal (Assignee), Goldstrike Appx. Tab 4; October 17, 1979 Assignment (RK Lease) from Old Bullion (Assignor) to Universal (Assignee), Goldstrike Appx. Tab 5.)

10. In a series of transactions in 1980, Universal conveyed 50% of its ownership interest in the Subject Property to Polar. Polar became half-owner of the Subject Property but did not assume any of Universal's obligations under the AOI Royalty Provision. (*See* May 26, 1980 Assignments from Universal (Assignor) to Polar (Assignee), Goldstrike Appx. Tab 6; May 26, 1980 Mineral Grant Deed from Universal (Grantor) to Polar (Grantee), Goldstrike Appx. Tab 7;

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June 23, 1980 Quitclaim Deed from Universal (Grantor) to Polar (Grantee), Goldstrike Appx. Tab 8; November 3, 1980 Quitclaim Deed from Universal (Grantor) to Polar (Grantee), Goldstrike Appx. Tab 9.)

11. On May 11, 1984, Polar sold its 50% interest in Subject Property and all of its rights under the 1979 Agreement to NICOR Mineral Ventures, Inc. ("NICOR"). There is no evidence that NICOR assumed any of Polar's obligations under the 1979 Agreement. (*See* Purchase and Sale Agreement ¶¶ 1-2, 12, Goldstrike Appx. Tab 10.)

12. In May 1984, Universal merged with Petrol Oil and Gas Corporation ("Petrol"), with Petrol as the surviving entity. (*See* Plan and Agreement of Merger Between The Petrol Oil and Gas Corporation and Universal Gas (Montana) Inc., Goldstrike Appx. Tab 11.)

A. 1984 – A new joint venture is formed that superseded and replaced the 1979 Joint Venture but the new venture did not assume Universal's obligations under the AOI Royalty Provision.

13. On June 1, 1984, four of the seven parties to the 1979 Agreement and NICOR entered into a new joint venture agreement relating to the Subject Property (and a few additional properties that had been contributed to the new joint venture by the parties). (*See* Venture Agreement among Petrol, Camsell, Lambert, Eltel, and NICOR, Goldstrike Appx. Tab 12 (known as the "Little Don Joint Venture Agreement").)

14. The Little Don Joint Venture Agreement appointed NICOR as the operator and required NICOR to "make or arrange for all payments required by the Existing Agreements," including the 1979 Agreement. But NICOR did not assume any other obligations of any party under the existing agreements. Importantly, NICOR did not assume the obligations of Universal under the AOI Royalty Provision. (*See id.* at 2, 15, §§ 1.8, 8.1, 8.2(e) and Ex. F.)

15. The Little Don Joint Venture Agreement expressly superseded and replaced the existing agreements, including the 1979 Agreement. (*Id.* at § 16.4 and Ex. F.)

16. The Little Don Joint Venture Agreement contained an area-of-interest provision that was quite different from the AOI Royalty Provision in the 1979 Agreement. It allowed any participant to acquire properties in an expanded area of interest, which included more than 400

square miles, but required each participant to offer the other participants the right to purchase their proportionate shares of the new property. If all accepted, it would be included in the joint venture property. If less than all accepted, then a new joint venture would be formed for the new property; but if none accepted, the new property would be owned solely by the acquirer. (*Id*. at Article XIII, Exhibit A-4.)

17. There is no evidence that Universal was ever removed as the operator of the 1979 venture in accordance with the provisions of the 1979 Agreement, or that NICOR (the operator of the 1984 venture) was ever appointed as "successor operator" of the 1979 joint venture in accordance with the 1979 Agreement. (*See* 1979 Agreement, Schedule B at 4 ("Goldstrike Appx.") Tab 1.)

18. Contemporaneously with the formation of the Little Don Joint Venture, Petrol (formerly Universal) conveyed its remaining ownership interest in the Subject Property to NICOR. (*See* Deed, Assignment and Bill of Sale effective June 1, 1984, Goldstrike Appx. Tab 13.)

B. 1986 – A third joint venture is formed that superseded and replaced the earlier joint ventures but did not assume Universal's obligations under the AOI Royalty Provision.

19. On April 15, 1986, the Little Don Joint Venture Parties and an additional party, El Dorado Gold Mines Limited ("El Dorado"), formed yet another joint venture named the "Bullion-Monarch Venture" (this venture had no connection with Old Bullion and so, to avoid confusion, it will be referred to as the "1986 Joint Venture"). (*See* Amended and Restated Venture Agreement among Petrol, Camsell, Lambert, Eltel, NICOR and El Dorado, Goldstrike Appx. Tab 14. (known as the "1986 Joint Venture Agreement")

20. The 1986 Joint Venture Agreement provides that the 1986 Joint Venture was a continuation of the Little Don Joint Venture, but the 1986 Joint Venture Agreement expressly superseded and replaced the Little Don Joint Venture Agreement and the 1979 Agreement. (*Id.* at 34, § 16.1.)

21. The 1986 Joint Venture Agreement had the same area-of-interest provisions as the Little Don Joint Venture Agreement (which, as noted, was different from the AOI Provision set forth in Section 11 of the 1979 Agreement). (*Id*. at Article XIII, Exhibit A-4.)

22. The 1986 Joint Venture Agreement appointed NICOR as its operator and required NICOR to "make or arrange for all payments under the Existing Agreements," including the 1979 Agreement. The 1986 Joint Venture Agreement did not, however, require NICOR to assume or perform any other obligations of any party to the 1979 Agreement, in particular the obligations of Universal under the AOI Royalty Provision. (*Id.* at 2, 19, §§ 1.10, 8.1, 8.2 and Ex. F.)

23. In January 1987, NICOR changed its name to Westmont Mining, Inc. ("Westmont Mining"). (*See* Articles of Amendment, recorded in Eureka County, Nevada (Book 167, Page 565), Goldstrike Appx. Tab 15).

24. On January 4, 1988, Westmont Mining assigned all of its right, title, and interest in the 1986 Joint Venture properties to Westmont Gold, Inc. ("Westmont Gold"). (*See* Westmont Assignment, Goldstrike Appx. Tab 16.)

25. There is no evidence that Westmont Gold ever assumed the obligations of Universal under the AOI Royalty Provision.

C. <u>1990 –High Desert Canada purchased the Subject Property from the 1986 Joint Venture but did not assume Universal's obligations under the AOI Royalty Provision.</u>

26. Effective April 26, 1990, High Desert Mineral Resources, Inc., a Canadian corporation ("High Desert Canada"), entered into an "Option Agreement" with the 1986 Joint Venture to purchase the "Bullion-Monarch Project." (*See* Option Agreement between Bullion-Monarch Venture and High Deseret Mineral Resources, Inc. (the "BMJV-HD Option Agreement"), Goldstrike Appx. Tab 17.)

27. The BMJV-HD Option Agreement provided that "at the Closing, [High Desert Canada] shall assume and become liable for" all obligations ***of the 1986 Joint Venture*** (as an entity rather than the obligations of any individual party thereto) under the 1979 Agreement "which accrue or relate to periods commencing after the Closing." (*Id.* at 7, 14, §§ 3.3(B), 7.3(B)(3)(a)). As noted

above, the 1986 Joint Venture never assumed Universal's obligations under the AOI Royalty Provision so High Desert Canada did not agree to assume those obligations.

28. High Desert Canada exercised the option on July 10, 1990. (*See* Letter from High Desert Canada to Westmont Gold, Inc., Goldstrike Appx. Tab 18.)

29. The transaction between the Bullion-Monarch Venture and High Desert Canada closed on August 7, 1990. (*See* Index, Closing Documents Bullion-Monarch Project from Bullion-Monarch Venture to High Desert Canada, Goldstrike Appx. Tab 19.)

30. At the closing, the 1986 Joint Venture executed a deed transferring all of its right, title, and interest in its properties, which included the Subject Property, to High Desert Canada "subject to" various instruments, including the 1979 Agreement (the "BMJV-HD Deed"). (*See* Deed from 1986 Joint Venture (Grantor) to High Desert Canada (Grantee), Goldstrike Appx. Tab 20.)

31. The BMJV-HD Deed does not contain any language, however, by which High Desert Canada agreed to assume any obligations of any party under the 1979 Agreement. (*See id.*). Specifically, the BMJV-HD Deed does not contain any language by which High Desert Canada assumed Universal's obligations under the AOI Royalty Provision.

32. At the closing, High Desert Canada executed an "Assignment" pursuant to which it expressly assumed all obligations under the RK Lease (one of the mineral leases included as part of the Subject Property in the 1979 Agreement). (*See* Assignment from Bullion-Monarch Venture (Assignor) to High Desert Canada (Grantee), Goldstrike Appx. Tab 21 ("RK Lease Assignment").)

33. The RK Lease Assignment was the only instrument at closing that contained assignment and assumption language. There was no document executed at the closing of the transaction that contained language of assignment or assumption with respect to the 1979 Agreement or its AOI Royalty Provision.

34. At the closing, the 1986 Joint Venture executed a "Quitclaim Deed and Assignment" in favor of High Desert Canada (the "BMJV-HD Quitclaim Deed"). The deed contains no language whereby High Desert Canada assumed any obligations under the 1979 Agreement, in particular

Universal's obligations under the AOI Royalty Provision. (*See* Quitclaim Deed and Assignment from Bullion-Monarch Venture (Grantor) to High Desert Mineral Canada (Grantee), Goldstrike Appx. Tab 22.)

35. The BMJV-HD Quitclaim Deed states that the "representations, warranties and indemnities contained in the Option Agreement, the [BMJV-HD Deed] and the [RK Lease Assignment] shall survive and not be merged into the [BMJV-HD] Quitclaim Deed." Notably, however, it does not include any reference to the assignment and assumption provision in Section 7 of the BMJV-HD Option Agreement as surviving the closing. (*See id.*)

36. There is no evidence, at the time the BMJV-HD Deed and the BMJV-HD Quitclaim Deed were executed and delivered to High Desert Canada that the 1986 Joint Venture as an entity had ever assumed Universal's obligations under the AOI Royalty Provision.

37. The 1986 Joint Venture parties terminated the 1968 Joint Venture on November 30, 1990. (*See* Agreement for Termination of Joint Venture, Goldstrike Appx. Tab 23.)

D. <u>1991 – The High Desert Canada closing documents are "corrected" to transfer the Subject Property to a different corporation—High Desert Nevada—but High Desert Nevada never signed the Option Agreement and never assumed Universal's obligations under the AOI Royalty Provision.</u>

38. In December 1991, Westmont Gold and the other parties to the terminated 1986 Joint Venture executed and recorded a series of "corrective" deeds and assignments (including a corrective assignment for the RK Lease) transferring their interests in the 1986 Joint Venture properties, including the Subject Property, to "High Desert Nevada" instead of High Desert Canada. (*See, e.g.,* Correction Deed from Westmont Gold (Grantor) to High Desert Nevada (Grantee), Goldstrike Appx. Tab 24; Correction Assignment from Westmont Gold (Grantor) to High Desert Nevada (Grantee), Goldstrike Appx. Tab 25; Correction Quitclaim Deed and Assignment from Westmont Gold (Grantor) to High Desert Nevada (Grantee), Goldstrike Appx. Tab 26.[4]).

[4] The corrective deeds and assignments between High Desert Nevada and Westmont Gold are attached hereto as examples. Identical documents were executed by each of the other parties to the terminated 1986 Joint Venture.

39. High Desert Nevada never became a party to the 1990 BMJV-HD Option Agreement and High Desert Nevada never assumed Universal's obligations under the AOI Royalty Provision. (*Id.*)

E. 1991 – Newmont and High Desert Nevada form a joint venture in which Newmont is the majority owner and manager.

40. On December 23, 1991, Newmont and High Desert Nevada entered into the "Newmont Gold and High Desert Venture Agreement" for the purpose of conducting mining operations on properties that included the Subject Property. Newmont acquired 60% of High Desert Nevada's interests and became the manager of the new joint venture. (*See* Newmont Gold and High Desert Venture Agreement, Goldstrike Appx. Tab 27.)

F. 1993 – Quiet title judgment rules that Old Bullion has no rights in the Subject Property other than under the Paragraph 4 Subject Property Royalty Provision.

41. On May 18, 1993, Old Bullion filed a Complaint in the Seventh Judicial District Court in Eureka, Nevada, against High Desert Nevada, Newmont, and others, claiming the defendants breached the 1979 Agreement by failing to pay royalties due on production from the Subject Property under paragraph 4 of the 1979 Agreement, and seeking an order quieting title to the original Subject Property in Old Bullion. (*See* Complaint, Goldstrike Appx. Tab 28.)

42. Newmont and High Desert Nevada filed a counterclaims against Old Bullion, seeking to quiet title to certain "Properties" (including the Subject Property) in High Desert Nevada and Newmont, "free and clear of all claims asserted by [Old Bullion]," and forever barring Old Bullion from "asserting any claim whatever in or to the Properties or in the minerals or mineral interests in the Properties adverse to High Desert [Nevada] or Newmont," except for the production royalty owed on the Subject Property under paragraph 4 of the 1979 Agreement. (*See* Amended Answer and Counterclaims at 2, ¶ 2 & 8-9, ¶ 2-3, Goldstrike Appx. Tab 29.)

43. On September 22, 1993, the Nevada court entered a Judgment by Default against Old Bullion, declaring as follows:

> 1. That [Old Bullion] has no right, title, estate, lien or interest in or to [the Properties, including the Subject Property]; provided,

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> however, that [Old Bullion's] right to a production royalty under the provisions of paragraph 4 [of the 1979 Agreement] shall survive this judgment.
>
> 2. [High Desert Nevada] owns an undivided forty (40%) interest in the Properties, and [Newmont] owns an undivided sixty percent (60%) interest in the Properties [including the Subject Property] free and clear of all claims asserted or which may be asserted by [Old Bullion], except for the said production royalty, and the said production royalty is ***not*** a cloud on the title to the Properties held by [High Desert Nevada] and [Newmont].
>
> 3. [Old Bullion] should be, and hereby is, forever barred and enjoined from asserting any claim whatsoever in or to the Properties or the minerals or mineral interests in the properties adverse to [High Desert Nevada] or [Newmont], but [Old Bullion] shall not be precluded by this order from asserting its right to the said production royalty.

(Judgment by Default at 1-2 (emphasis added), Goldstrike Appx. Tab 30.)

44. There is no evidence that High Desert Nevada independently acquired any property interests in the AOI between August 7, 1990 and November 30, 1995.

G. <u>1995 – Barrick Gold Corporation acquired the shares of High Desert Nevada but acquired no properties in the AOI.</u>

45. On November 30, 1995, High Desert Nevada merged with HD Acquisition Corporation, with High Desert Nevada as the surviving entity. High Desert Nevada then changed its name to Barrick HD Inc. ("Barrick HD"). (*See* Merger Agreement among HD Acquisition Corporation, Barrick Gold Corporation, High Desert Mineral Resources of Nevada, Inc. and Ronald T. Halavais and P. Lee Halavais, Goldstrike Appx. Tab 31; Certificate of Name Change (High Desert Nevada to Barrick HD), Goldstrike Appx. Tab 32.)

46. There is no evidence that Barrick HD independently acquired any property interests in the AOI between November 30, 1995 and May 3, 1999.

H. <u>May 3, 1999 – Goldstrike owns an interest in the Subject Property for 8 hours and then transfers it to Newmont.</u>

47. On May 3, 1999, at 10:01 a.m., Barrick HD merged with and into Goldstrike, with Goldstrike as the surviving entity. (*See* Articles of Merger of Barrick HD Inc. With and Into Barrick Goldstrike Mines Inc., Goldstrike Appx. Tab 33.)

48. Effective May 3, 1999 at 6:00 p.m., Goldstrike and Newmont entered into an Asset Exchange Agreement pursuant to which Goldstrike transferred to Newmont all of its right, title, and interest in the Newmont-High Desert Joint Venture, including all of its interests in the Subject Property. In exchange, Newmont transferred certain other properties, including properties in the AOI, to Goldstrike. (*See* Asset Exchange Agreement between Barrick Goldstrike Mines Inc. and Newmont Gold Company (without exhibits) at 5-7, §§ 2.1, 2.2, Goldstrike Appx. Tab 34.)

49. There is no evidence that Goldstrike acquired any new mining interests in the AOI between 10:01 a.m. on May 3, 1999, when Barrick HD merged with and into Goldstrike, and 6:00 p.m. on May 3, 1999, when Goldstrike transferred to Newmont all of its rights in the Subject Property.

SUMMARY OF THE ARGUMENT

I. THE AOI ROYALTY PROVISION IS A PERSONAL OBLIGATION OF UNIVERSAL AND NOT A COVENANT THAT RUNS WITH THE SUBJECT PROPERTY FOR THREE REASONS: IT DOES NOT "TOUCH AND CONCERN LAND," THERE IS NO PRIVITY OF ESTATE, AND THE PARTIES DID NOT INTEND IT TO RUN.

First, the AOI Royalty Provision does not touch and concern land. A covenant runs with land, binding subsequent purchasers, only if the covenant touches and concerns ***both*** burdened ***and*** benefitted land. In this case, the AOI Royalty Provision benefits no real property interest held by Old Bullion. Old Bullion's right to receive a royalty on mineral production from the Subject Property under paragraph 4 of the 1979 Agreement exists independently of the AOI Royalty Provision set forth in paragraph 11 of the 1979 Agreement. Stated another way, the amount of royalty Bullion receives from the Subject Property under paragraph 4 is solely determined by production from the Subject Property, and this benefit is not increased by the AOI Royalty Provision or decreased by its absence. Likewise, ownership of the Subject Property is not burdened by the AOI Royalty Provision. The AOI Royalty Provision applies to Universal if it independently acquires lands in the AOI that are not made part of the Subject Property. Universal's contractual obligation under the AOI Royalty Provision did not, therefore, render ownership of the Subject Property less valuable or limit the use and enjoyment of that property. Because Universal's obligations under the AOI Royalty Provision could be enforced without reference to its status as

the owner of the Subject Property, the covenant is personal to Universal and does not run with the land.

Second, there was no privity of estate between Old Bullion and Universal. Although they were both parties to the 1979 Agreement and privity of contract existed, it does not establish privity of estate. Privity of estate requires that the covenant be part of a conveyance of real property. That did not occur. Moreover, because neither Old Bullion nor Universal owned lands in the AOI at the time they entered the 1979 Agreement that would be burdened by the AOI Royalty Provision in the future, there is no privity of estate as a matter of law.

Third, New Bullion cannot establish by clear and convincing evidence that the parties to the 1979 Agreement intended the AOI Royalty Provision to run with the land. First and foremost, the agreement itself does not express such an intent. To the contrary, the language of the AOI Royalty Provision indicates that it was intended to be a personal obligation of Universal, applying only to property that Universal acquired in the AOI and held separately and apart from the joint venture established by the 1979 Agreement. Moreover, none of the three common factors for inferring intent are present. First, Old Bullion did not retain any land adjacent to the Subject Property. Second, Old Bullion did not retain an interest in any other land that benefitted from the AOI Royalty Provision. Indeed, it never owned such land at all. Third, while there was a plan for the common exploration and development of mineral interests on the Subject Property, and on possible future acquisitions in the AOI, Old Bullion did not retain title to any of those lands, or to any property that would benefit from the common plan.

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II. EVEN IF THE COVENANT RAN WITH THE LAND, GOLDSTRIKE AND ITS CORPORATE PREDECESSORS DID NOT INDEPENDENTLY ACQUIRE ANY PROPERTIES IN THE AOI FROM WHICH THEY COULD PRODUCE MINERALS AND TO WHICH A ROYALTY OBLIGATION WOULD ATTACH.

There is no evidence that High Desert Nevada, Barrick HD, or Goldstrike acquired any properties in the AOI during the times that each of them owned an interest in the Subject Property. Since they acquired no properties in the AOI, there was no mineral production and there would be no royalty due to New Bullion under any circumstances. Goldstrike transferred its entire interest

in the Subject Property to Newmont on May 3, 1999, and there could be no royalty obligation on properties acquired in the AOI after that date.

III. NEW BULLION CANNOT ESTABLISH THAT GOLDSTRIKE OR ITS CORPORATE PREDECESSORS ASSUMED UNIVERSAL'S PERSONAL OBLIGATIONS UNDER THE AOI ROYALTY PROVISION.

There is no evidence that Goldstrike or its predecessors (or any other party) assumed Universal's obligations under the AOI Royalty Provision. Indeed, a careful examination of the various transactions that occurred in the years following the 1979 Agreement establish such obligations remained with Universal and were never assigned to or assumed by any party.

IV. NEW BULLION CANNOT ESTABLISH THAT A BENEFIT WAS CONFERRED ON GOLDSTRIKE THAT IT APPRECIATED AND RETAINED SUCH THAT IT WAS UNJUSTLY ENRICHED.

There is no evidence that any benefit was conferred on Goldstrike by Old Bullion or that Goldstrike appreciated or retained a benefit. Therefore, New Bullion cannot establish the essential elements of unjust enrichment.

ARGUMENT

I. THE SUMMARY JUDGMENT STANDARD

Summary judgment is a procedural mechanism designed to avoid unnecessary trials where there is no dispute as to the material facts before the Court. *See Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is "not [ ] a disfavored procedural shortcut, but rather [ ] an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotation marks omitted). Summary judgment is particularly useful "to weed out frivolous lawsuits and avoid wasteful trials." *Betz v. Trainer Wortham & Co., Inc.*, 519 F.3d 863, 869 n.5 (9th Cir. 2008) (quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2727 (3d ed. 1998)), *cert. granted and judgment vacated on other grounds by Tainer Wortham & Co., Inc. v. Betz*, 130 S. Ct. 2400 (2010).

Summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 322-23; *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153 (9th Cir. 2009). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. *See* Fed. R. Civ. P. 50(a). In reviewing the facts, the Court should draw all reasonable inferences in favor of the non-moving party (*id*), but factual controversies are to be resolved in favor of the non-movant only where there is an actual controversy over the facts. *See Galen v. County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007) (citing *Celotex*, 477 U.S. at 321-23) (non-moving party "must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial."); *Estate of Tucker ex rel. Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1029-30 (9th Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)) ("A non-moving plaintiff can defeat a motion for summary judgment by producing evidence 'such that a reasonable jury could return a verdict' in his favor.").

Goldstrike, as the moving party, need only identify that evidence "'which it believes demonstrates the absence of a genuine issue of material fact.'" *In re Caneva*, 550 F.3d 755, 761 (9th Cir. 2008) (quoting *Celotex*, 477 U.S. at 323)). Once Goldstrike meets this initial burden, the burden shifts to New Bullion "'to set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial.'" *F.T.C. v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (quoting *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007)); s*ee also Estate of Tucker*, 515 F.3d at 1030 (quoting Fed. R. Civ. P. 56(e)(2)). *See also Oakview Constr., Inc. v. Huffman Builders West, LLC*, 2011 WL 3794258, at 4 (D. Nev. Aug. 25, 2011), copy attached hereto as Exhibit A (recognizing that non-movant had the burden to come forward with evidence to establish the assignment and assumption of the personal covenant at issue to prevail on summary judgment). In meeting this burden, New Bullion "must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of [its] case that [it] must prove at trial." *Gales*, 477 F.3d at 658 (citing *Celotex*, 477 U.S. at 321-23).

New Bullion can meet its burden only by coming forward with affirmative evidence. *Id*. at 658 (citing *Anderson*, 477 U.S. at 257). "Bald assertions that genuine issues of material fact exist are insufficient." *Id*. (citing *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993)). New Bullion cannot "'rest upon the mere allegations or denials'" of its pleadings but must produce evidence that "'set[s] forth specific facts showing that there is a genuine issue for trial." *Estate of Tucker*, 515 F.3d at 1030 (quoting *Anderson*, 477 U.S. at 248); *See also Celotex*, 477 U.S. at 324 (In "cases where the non-moving party will bear the burden of proof at trial . . . Rule 56(e) required the non-moving party to go beyond the pleading and . . . [to] designate specific facts showing that there is a genuine issue for trial." (internal quotation omitted)). A "'mere scintilla of evidence' is not enough. *Galen*, 477 F.3d at 658 (quoting *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005)).

II. THE AOI ROYALTY PROVISION IS NOT A COVENANT THAT RUNS WITH THE LAND; IT IS MERELY A PERSONAL OBLIGATION OF UNIVERSAL.

Only real covenants that run with the land can bind successive owners of property absent a knowing, voluntary assumption of the covenant. *Vulcan Materials Co. v. Miller,* 691 So. 2d 908, 914 (Miss. 1997). Whether a covenant runs with the land is a question of law for the Court. *See, e.g.*, *Haygood v. Duncan*, 55 S.E. 2d 220, 221 (Ga. 1949); *Barry v. The Chicago, Indianpolis & St. Louis Short Line Railway Co.*, 156 III. App. 9, 1910 WL 2055, at *4 (Ill. Ct. App. May 1910), copy attached hereto as Exhibit B.

For a covenant to run with the land, three elements must be satisfied. First, the covenant must touch and concern land. *See Wheeler v. Schad*, 7 Nev. 204, 208-09, 1871 WL 3397 (1871), copy attached hereto as Exhibit C; *ECM, Inc. v. Placer Dome U.S. Inc.*, No. 03-15896, 147 Fed. Appx. 668, 669, 2005 WL 2142268, at * 1 (9th Cir. Sept. 7, 2005) (hereinafter, "*ECM App. III*"), a copy of which is attached hereto as Exhibit F. Second, there must be horizontal and vertical privity. *See Wheeler*, 7 Nev. at 208-09; *ECM App. III,* 2005 WL 2142268 at * 1. Third, the original parties must have intended for the covenant to run with the land and to bind subsequent purchasers of the property. *See Wheeler*, 7 Nev. at 208-09; *ECM App. III*, 2005 WL 2142268 at * 1. New

Bullion must establish any factual issues related to these three elements by clear and convincing evidence. *See, e.g.*, *Clarke v. Caldwell*, 521 N.Y.S. 2d 851, 853-54 (N.Y. App. Div. 1987).

The Court must analyze whether the AOI Royalty Provision, standing alone, satisfies all three requirements. Whether other covenants contained in the 1979 Agreement may run with the land is immaterial to the determination of whether the AOI Royalty Provision runs. *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 333 N.Y.S.2d 472, 477 (N.Y. App. Div. 1972), *aff'd as modified* 344 N.Y.S. 2d 30 (N.Y. App. Div. 1973) ("The effect and substance of each covenant must be examined to determine the presence or absence of the necessary factors.").

As discussed below, New Bullion lacks evidence, much less clear and convincing evidence, to establish any of the three required elements with respect to the AOI Royalty Provision. As a result, this Court should rule as a matter of law that the AOI Royalty Provision is not a real covenant binding upon Goldstrike.

A. <u>The AOI Royalty Provision does not "touch and concern" any land.</u>

1. A real covenant must burden one property and benefit another.

A covenant does not run with land unless it "touches and concerns" land. In the *ECM vs. Placer Dome* litigation,[5] this Court outlined the tests that various courts have applied in determining whether a covenant touches and concerns land. In two opinions, this Court observed that:

- The touch and concern requirement "dictates that the burdens and benefits created by the covenant relate to land and its ownership." July 12, 2000 Order, *ECM, Inc. v. Placer Dome U.S. Inc., et al.*, at 6. CV-N-92-499-ECR (PHA) (hereinafter, "*ECM Order I*"), a copy of which is attached hereto as Exhibit G.
- "[To] touch and concern the land, a covenant must bear upon the use and enjoyment of the land and be of the kind that the owner of an estate or interest in land may make because of his ownership right . . . ." *Id. (*quoting *Flying Diamond Oil Corp. v. Newton Sheep Co.,* 776 P.2d 618, 623-24 (Utah 1989)).

[5] The decisions in *ECM v. Placer Dome*, both from this Court and the Ninth Circuit, are unpublished, and thus copies of the relevant orders and opinions are attached hereto as Exhibits D-H. Goldstrike recognizes that unpublished Ninth Circuit decisions issued prior to 2007 are not precedent and may not be cited as such to courts in the Ninth Circuit (9th Cir. R. 36-3(b)). At the very least, however, the *ECM* decisions are relevant, albeit nonbinding, authority. *See U.S. v. Soto-Castelo*, 621 F. Supp. 2d 1062, 1069 (D. Nev. 2008) (recognizing that unpublished decisions are not binding precedent, but may be relevant authority).

- "If the performance of a covenant can be enforced regardless of one's status as owner of an interest in the land, the covenant is personal and . . . assignable." *Id. (*quoting *Flying Diamond*, 776 P.2d at 624).
- "A real covenant bestows a benefit or imposes a burden only on the rights of a landholder, as a landholder." *Id.* (quoting *Flying Diamond*, 776 P.2d at 624).
- "Where the burdens and benefits created by the covenant are of such a nature that they may exist independently from the parties' ownership interests in land, the covenant does not touch and concern the land." *Id.* at 6 (quoting *Runyon v. Paley*, 416 S.E. 2d 177, 183 (N.C. 1992)).
- Although the touch and concern requirement does not require that the covenant physically affect land, "the meaning of touch and concern becomes 'less clear as physical contact becomes less direct'." *ECM App. III,* at 6, 2005 WL 2142268 at * 1, (quoting Roger A. Cunningham, et al., *The Law of Property §* 8.15 at 471-72 (2d ed. 1993)).

A covenant runs with the land and binds a later purchaser of that land only if it touches and concerns ***both*** burdened ***and*** benefitted land. *See* Restatement (First) of Property § 537 & cmt. c (1944) (for covenant to run with the land there must be benefitted land); *ECM, Inc. v. Placer Dome U.S., Inc.,* 24 Fed. Appx. 821, 2001 WL 1664032, at * 1 (9th Cir. Dec. 26, 2001) (hereinafter "*ECM App. II"*), a copy of which is attached hereto as Exhibit D (covenant of good faith and fair dealing did not touch and concern land "because the benefits and burdens created by the covenant . . . stand independent of the party's ownership interest in the land"). A classic example of a covenant that runs with the land is an easement that burdens the property it crosses and benefits an adjacent property.

The covenant at issue in this case is similar to those at issue in the *ECM v. Placer Dome* litigation and *Vulcan Materials Co. v. Miller*. The courts in these cases concluded that covenants made with respect to lands not owned by the parties at the time the covenants were made were personal obligations that did not run with the land.

In *ECM,* the Ninth Circuit Court affirmed this Court, holding that the implied covenant of good faith and fair dealing at issue in that case did not touch and concern land "because the benefits and burdens created by the covenant . . . stand independent of the party's ownership interest in the land." *ECM App. II*, 2001 WL 1664032, at *1. The Ninth Circuit also rejected ECM's argument that an area-of-influence covenant ran with the land, holding that the covenant "did not affect [the

plaintiff's] legal relationship with its land" and "did not involve land owned by either party." *Id. at* *2.[6] As in *ECM,* the benefits and burdens of the AOI Royalty Provision stand entirely independent of, and do not touch and concern, the ownership of the Subject Property.

In *Vulcan Materials v. Miller*, Miller reserved a royalty interest in certain limestone properties when it transferred options on those properties to Vulcan's predecessor. 691 So. 2d at 609-10. The agreement provided that if Vulcan's predecessor "should open any other business related to this industry," it would also pay a royalty on minerals produced from this source. *Id.* Vulcan succeeded to the interest in the option property and acquired additional property that Miller contended was subject to the royalty agreement, arguing that the agreement was a covenant that ran with the land. *Id.* at 910-11. The appellate court rejected Miller's assertion, ruling that the agreement to pay royalties on other properties did not run with the option property:

> [T]he burden that would be placed on the [after-acquired property] by the royalty agreement would not enhance its value or render the property more beneficial or convenient to its owner . . . and instead merely imposes a benefit for Miller personally . . . .

691 So.2d at 914. As in *Vulcan Minerals*, the burden placed on properties acquired in the AOI did not enhance the value of the Subject Property or render it more beneficial or convenient to its owner, and the AOI Royalty Provision therefore imposes a benefit for Old Bullion, and aburden on Universal, personally.

2. The AOI Royalty Provision does not burden or benefit any property.

New Bullion cannot establish that the benefits and burdens of the AOI Royalty Provision touch and concern land because it cannot identify a real property interest that is benefited by the AOI Royalty Provision, as well as a real property interest that is burdened by the that provision. First, the AOI Royalty Provision benefits no real property interest held by Old Bullion. Old Bullion's right to receive a royalty on mineral production from the Subject Property exists

[6] This Court also held that an agreement to share information derived from exploration conducted on other lands did not touch and concern the leased lands because it was not "incident to [the Lessee's] status as a holder of an interest in [the leased] land," did not "diminish the Lessee's legal relations in respect to the land," and "imposed a personal burden independent of any ownership interest." *Id.* at 10. Again, the Ninth Circuit affirmed. *ECM App. III*, 2005 WL 2142268, at *1.

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independently, under paragraph 4. It derives no benefit from, and its value is not enhanced by, the AOI Royalty Provision. The amount of royalty Bullion receives from the Subject Property is solely determined by production from that property and this benefit is not increased by the AOI Royalty Provision or decreased by its absence. The benefit of the AOI Royalty Provision (i.e., the right to receive future royalties on after-acquired land) was personal to Old Bullion and not dependent on its status as a landowner. Absent a showing that the AOI Royalty Provision enhanced the value of some property interest owned by Old Bullion, the AOI Royalty Provision fails the real covenant test.

Pursuant to Paragraph 4 of the 1979 Agreement, Old Bullion obtained a royalty interest in the Subject Property. It also obtained a contractual right under Paragraph 11 to receive a separate royalty from other lands that Universal might acquire within the AOI at a later time. These two rights existed independently of each other. Old Bullion did not need to own the royalty interest under Paragraph 4 in order to enjoy the benefit of the AOI Royalty Provision under Paragraph 11. It could, for example, have sold its Paragraph 4 right to receive royalty payments on production from the Subject Property to a third party and still retained its contractual right to receive royalty payments from Universal under Paragraph 11. In other words, Old Bullion did not need to own a royalty interest in the Subject Property under Paragraph 4 in order to enjoy the benefit of the AOI Royalty Provision under Paragraph 11 (and visa versa). Because the AOI Royalty Provision existed independently of Old Bullion's royalty interest in the Subject Property, the AOI Royalty Provision does not touch and concern that (or any other) land. *ECM Order I,* at 6 (quoting *Runyon v. Paley*, 416 S.E. 2d 177, 183 (N.C. 1992)) ("Where the burdens and benefits created by the covenant are of such a nature that they may exist independently from the parties' ownership interest in land, the covenant does not touch and concern the land and will not run with the land.").

On the other hand, ownership of the Subject Property was not burdened by the AOI Royalty Provision. The AOI Royalty Provision expressly applies to Universal as the independent owner of lands that it might acquire in the AOI and not make part of the Subject Property. The AOI Provision does not apply to Universal as owner of the Subject Property. Universal's contractual obligation

under the AOI Royalty Provision did not render ownership of the Subject Property less valuable nor did it limit the use and enjoyment of that property. The existence of the AOI Royalty Provision did not alter the economics of exploring, developing, or mining the Subject Property, nor did it prevent the 1979 JV Parties from fully using and exploiting that property. The burden to pay Old Bullion a royalty on future acquisitions in the AOI fell entirely on Universal, irrespective of its status as an owner of the Subject Property. Because Universal's obligations under the AOI Royalty Provision could be enforced without reference to its status as the owner of the Subject Property, the covenant is personal to Universal and does not run with the land. *See ECM Order I* at 6.

An often-cited test for determining when the burden of a covenant touches and concerns land provides that "if the covenantor's ***legal relations in respect to the land*** are lessened – his ***legal interest as owner*** rendered less valuable" by the covenant's performance, then the burden of the covenant satisfies the touch and concern requirement. *See* Russell R. Reno, *The Enforcement of Equitable Servitudes on Land*, 28 Va. L. Rev. 951, 962 (1942) (emphasis added) (citing Harry A. Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639 (1914); *see also City of Reno v. Matley*, 378 P.2d at 260 (discussing the test in describing when the benefit of a covenant touches and concerns land). Universal's promise to pay royalties on lands it might later acquire in the AOI did not lessen Universal's "legal relations" to the Subject Property, or render its legal interest "as owner" of the Subject Property less valuable. Under the controlling law, it is not enough that Universal was burdened by the AOI Royalty Provision. In order to run with the land, a covenant must also affect "the legal rights which otherwise would flow from ownership of land and which are connected with the land" and "be of the kind that the owner of [land] may make because of his ownership right." *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618, 623-24 (Utah 1989) (quoting *Neponsit Property Owners' Assoc. v. Emigrant Industrial Savings Bank*, 15 N.E. 2d 793, 796 (N.Y. Ct. App. 1938)). *See also Wuellner Oil & Gas, Inc. v. EnCana Oil & Gas (USA), Inc.*, 861 F. Supp. 2d 775, 780 (W.D. La. 2012) ("Personal obligations that relate to a real right . . . do not run with that real right."). If a covenant can be enforced regardless of one's status as an

owner of the affected land the covenant is personal and does not run with the land. *Flying Diamond Oil Corp.*, 776 P.2d at 624.

In sum, the AOI Royalty Provision is merely a promise to pay money and is wholly unrelated to the Subject Property. The promise to pay royalties on other land acquired within the AOI could have been made and performed by any party, regardless of whether it owned the Subject Property, or any property at all. Such promises are not related to the landowner's ownership, use, and enjoyment of the Subject Property and do not run with the land. *See, e.g, Beeter v. Sawyer Disposal LLC,* 771 N.W.2d 282, 185-86 (N.D. 2009) (covenant to pay royalty associated with waste disposal business does not touch and concern land); *Longley-Jones Associates, Inc. v. Ircon Realty Co.,* 493 N.E.2d 930 (N.Y. 1986) (covenant to pay a broker's commission does not run with the land*); Silver v. Abbot Realty Inc.,* 249 So.2d 38, 38 (Fla. Dist. Ct. App. 1971) (promise to pay brokerage fee was not a covenant running with land*); Pelser v. Gingold,* 8 N.W.2d 36, 39-40 (Minn. 1943) (promise to pay a loan and promise to pay for home improvements do not touch and concern land*); Schram v. Coyne,* 127 F.2d 205, 209 (6th Cir. 1942) (agreement to assume and pay mortgage does not touch and concern land). Thus, the promises of the AOI Provision did not affect Universal's relationship to the Subject Property and do not touch and concern the land.

B. No privity of estate exists for the AOI Royalty Provision.

There are two elements to the privity requirement: horizontal privity and vertical privity. Horizontal privity exists "when the original covenanting parties make their covenant in connection with the conveyance of an estate in fee from one of the parties to the other." 9 *Powell on Real Estate* § 60.04[3][c][iii] at 60-60.1. For horizontal privity to exist, "[t]he covenant and the conveyance must be made at the same time." *Id.* The burdened land must also have been owned by the covenantor or the covenantee at the time the covenant was made. *See Wheeler v. Schad*, 7 Nev. 204, 867-69, 1871 WL 3397, at *3-4 (1871).[7]

[7] Vertical privity "arises when the person presently claiming the benefit, or being subjected to the burden, is a successor to the estate of the original person so benefited or burdened." 9 *Powell on Real Estate* § 60.04[3][c] at 60-62. Goldstrike concedes for purposes of this motion ***only*** that New Bullion is the successor to Old Bullion's claimed royalty interest.

As discussed above, some courts have concluded that covenants made with respect to land not owned by the parties do not run with the land because they not touch and concern the parties' land. So, for example, because the AOI Royalty Provision neither benefits nor burdens the parties' interest in the Subject Property, the covenant cannot run with the land. Other courts have taken a different approach to the question. When considering whether a covenant made regarding land not owned by the parties can run with the land, these courts analyze the question under privity concepts and focus on the lands actually burdened by the promise—here future properties to be acquired in the AOI. These courts conclude that because the parties owned no interest in the property burdened by the provision, there is no privity of estate with respect to that land and, accordingly, the covenant cannot run with the land. *See, e.g., Mountain West Mines, Inc. v. Cleveland-Cliffs Iron Co.*, 376 F. Supp. 2d 1298, 1300-01 (D. Wyo. 2005), *aff'd in part and rev'd in part on other grounds*, 470 F.3d 947 (10th Cir. 2006).

Wheeler v. Schad is instructive. That case involved the conveyance of a portion of the grantors' mill-site and water rights on a particular parcel of land. 7 Nev. At 868-89; 1871 WL 3397, at *2. A few days later, the same parties entered into a separate agreement pursuant to which they agreed to share in the costs of constructing and maintaining a dam and a flume. *Id.* At the time of the conveyance of the mill-site and water rights, neither the grantors nor the grantees held any interest in the land that would be the subject of the construction-and-maintenance agreement. 7 Nev. at 868-69; 1871 WL 3397, at *4. The grantors' successor nonetheless sued to enforce the covenant against the grantees' successor. 7 Nev. at 864-66; 1871 WL 3397, at *2.

The Nevada Supreme Court rejected the claim, ruling that because the agreement to share in the costs of constructing and maintaining a dam was not made at the time of the conveyance of the mill-site and water rights, there was no privity of estate. The court emphasized that the covenant was to construct a dam and flume to be located on land that was not then-owned by either the covenantor or the covenantee. The court likened that kind of agreement to an agreement by a landowner to build a dam for the benefit of another landowner for a fee. The court concluded that in both scenarios the covenant was made with respect to land that was "distinct" from the

covenanting parties' land and, accordingly, could not be made to run with land. *Id.* at *4. In sum, the *Wheeler* court ruled that a party seeking to enforce a covenant "must have an interest in the land charged with it" and this interest must exist at the time the covenant was made. *Id.* at *3.

As in *Wheeler*, the AOI Royalty Provision created an obligation with respect to lands that were not then-owned by Universal or Old Bullion. Furthermore, the creation of the AOI Royalty Provision and the conveyance of the Subject Property occurred at different times.[8] Thus, just as there was no privity of estate in *Wheeler*, there was no privity of estate with respect to the AOI Royalty Provision.

The rationale of *Wheeler* was applied more recently in *Mountain West.* Mountain West Mines, Inc. ("Mountain West") gave Cleveland-Cliffs ("Cliffs") an option to acquire a number of properties located in Wyoming. The option agreement provided Mountain West a royalty on the option properties and contained a separate area-of-mutual-interest clause pursuant to which Cliffs agreed to pay a royalty on other lands that it might acquire in a large area known as the Powder River Basin. *Id.* Cliffs thereafter sold the option properties to various third parties, who then sold them to Power Resources, Inc. and Pathfinder Mines Corp. (collectively, "Power and Pathfinder"). *Id.* Twenty years after Mountain West entered the option agreement with Cliffs, and after Power and Pathfinder had acquired the option properties, Mountain West sued, asserting, among other things, that Power and Pathfinder became bound by the area-of-mutual-interest clause as a result of their acquisition of the option properties. Mountain West claimed that Power and Pathfinder owed royalties on other properties Power and Pathfinder had acquired in the Powder River Basin because the area-of-mutual-interest clause ran with the land. *Id.*

[8] It is undisputed that the 1979 JV Parties executed the 1979 Agreement independent of, and separate from, any transfer of land between the parties. Indeed, Old Bullion did not begin to transfer any property interests to Universal until a month after the 1979 Agreement had been fully executed. (*Compare* 1979 Agreement, Goldstrike Appx. Tab 1, *with* June 27, 1979 Mineral Grant Deed, Goldstrike Appx. Tab 2.) Old Bullion did not complete its transfer of property to Universal for more than three more months. (*See* September 27, 1979 Mineral Grant Deed from Old Bullion (Grantor) to Universal (Grantee), Goldstrike Appx. Tab 3; October 17, 1979 Assignment (Murphy Lease) from Old Bullion (Assignor) to Universal (Assignee), Goldstrike Appx. Tab 4; October 17, 1979 Assignment (RK Lease) from Old Bullion (Assignor) to Universal (Assignee), Goldstrike Appx. Tab 5.) None of the conveyances contained the AOI Royalty Provision.

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The court rejected Mountain West's claims, finding that the covenant did not run with the option properties because neither Mountain West nor Cliffs owned an interest in the properties subject to the covenant at the time the option was entered:

> In order for the covenant to run with the land there must be privity of estate between the parties to the agreement. This means there must be a mutual or successive relationship to the same rights of property. . . .
>
> In the present case, however, neither Mountain West nor Cliffs ever had an interest in the Highland properties [acquired in the area of mutual interest].

Id. at 1307 (internal citations omitted) (quoting *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W. 2d 903, 910-11 (Tex. 1982)). The court was "astound[ed]" that Mountain West would seek "royalty payments on land which it has never owned by companies with which it has never entered into a contract or agreement." *Id.* at 1303. *See Grimes v. Walsh & Watts, Inc.*, 649 S.W. 2d 724 (Tex. Ct. App. 1983) (Area-of-mutual-interest clause in agreement did not run with the land because the plaintiff had no interest in the later-obtained lease property at the time of the agreement.)

Here, Bullion's only argument to establish horizontal privity of estate between Bullion and Universal is that Old Bullion and Universal were original parties to the 1979 Agreement. While being parties to an agreement establishes privity of contract, it does not establish privity of estate. This Court should therefore be similarly "astounded" and conclude that there is no privity of estate, and that the AOI Royalty Provision does not run with the land.

C. There is no evidence that the parties to the 1979 Agreement intended the AOI Royalty Provision to run with the land.

The interpretation of a covenant is a question of law for the court. *Bauman v. Turpen*, 160 P.3d 1050, 1054-55 (Wash. Ct. App. 2007). "To determine whether or not a covenant runs with the land, one must ascertain the mutual intent of the parties as expressed by the covenant's plain language." *Hemsath v. City of O'Fallon*, 261 S.W.3d 1, 4 (Mo. Ct. App. 2008). In determining intent, courts give the language in the covenant its ordinary and common meaning (*Krein v. Smith*,

807 P.2d 906, 907 (Wash. Ct. App. 1991)), in light of the circumstances of the original transaction. *See Hollis v. Garwall, Inc.*, 974 P.2d 836, 843 (Wash. 1999). *See also* 9 *Powell on Real Estate* § 60.04[3][b] at 60-51 ("The intention of the covenanting parties as to the running of the covenant must be sought in the language of their transaction, read in light of the circumstances of its formulation.").

The intent for a covenant to run with the land must be expressly stated or inferred from the circumstances in which the words were used. *See* Restatement (First) of Property § 544 cmt. c. Factors to be considered to support an inference include, "(1) the retention of adjacent land by a grantor-covenantee; (2) the benefitting of retained land as a result of the agreement, and (3) the establishment of a common plan of development which includes land retained by the grantor." 9 *Powell on Real Estate* § 60.04[3][b] at 60-54 & -55. S*ee also* Restatement (First) of Property § 544 cmt. c. A majority of courts recognize that "there is no presumption in favor of the running of the benefit" and that "the burden of proof is upon the plaintiff, in every case, to show that the benefit was intended to run with the land." 9 *Powell on Real Estate* § 60.04[3][b] at 60-57. "Substantial doubt or ambiguity is resolved against the person seeking" enforcement of the covenant. *Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd. P'ship*, 862 P.2d 1048, 1058 (Haw. 1993).

New Bullion has no evidence, let alone the required clear and convincing evidence, that the 1979 JV Parties intended the AOI Royalty Provision to run with the land. The most salient evidence that the 1979 JV Parties did ***not*** intend the AOI Royalty Provision to run with the land is the fact that the 1979 Agreement does not say so. Neither the AOI Royalty Provision itself nor any other language in the 1979 Agreement states that the AOI Royalty Provision runs with the land. *See Mountain West*, 376 F. Supp. 2d 1298 at 1308 ("[T]he Option and Agreement . . . demonstrate that it was not the parties' intention that the AMI clause run with the land" because, among things, "[t]he Option and Agreement does not state that the AMI clause runs with the land.").

Moreover, none of the three factors for inferring intent is present in this case. First, Old Bullion did not retain any land adjacent to the Subject Property. Second, it did not retain an interest in any other land that benefitted from the AOI Royalty Provision. Indeed, it never owned such

land. And third, while there was a plan for the common exploration and development of mineral interests on the Subject Property, and on possible future acquisitions in the AOI that became part of the Subject Property, Old Bullion did not itself retain title to any of those lands, or to any property that would benefit from the common plan. Thus, the AOI Royalty Provision fails each of the three factors suggesting intent for the covenant to run with the land.

To the contrary, the AOI Royalty Provision imposes a royalty payment obligation on a specifically named entity, Universal, based on its right to acquire and retain additional properties in the AOI for its own account. The provision appears on its face to be designed to prevent Universal from taking advantage of its exclusive right to acquire properties in the AOI and thereby usurp potential business opportunities that should belong to the joint venture. Accordingly, Paragraph 11 of the 1979 Agreement required that Universal offer the other participants the option to contribute their share of the purchase price and thus add the new property to the Subject Property subject to the Subject Property Royalty Provision of paragraph 4. But if the other parties did not elect to contribute, the AOI Royalty Provision states that the property would remain the sole property of Universal, and Universal would be solely responsible for paying a royalty to Bullion on production from that land under the AOI Royalty Provision of paragraph 11. The royalty obligation arises because Universal is the sole and exclusive owner of the newly acquired property, not because Universal is the operator of the joint venture or the owner of the Subject Property. This evinces an intent to create a personal obligation in Universal rather than a covenant running with the Subject Property.

Paragraph 2(A) of the 1979 Agreement further establishes that the parties did not intend the AOI Royalty Provision to run with the land. The paragraph specifies that Old Bullion would execute a deed transferring all of its interest in the Subject Property to Universal "subject to the payment provisions of Paragraph 4" of the agreement. Paragraph 2(A) does not mention Paragraph 11, and thus reflects the parties' different intent as between the Subject Property Royalty Provision (Paragraph 4) and the AOI Royalty Provision (Paragraph 11). While the Subject Property Royalty Provision was intended to bind later purchasers of the land, the parties saw no need to make Old

Bullion's deed subject to the Paragraph 11 AOI Royalty Provision. This is further evidence that the AOI Royalty Provision was intended only as a contractual agreement—binding on Universal, but not otherwise. Stated another way, if the parties had intended the AOI Royalty Provision to run with the land, they would have required that Old Bullion's deeds be made subject to both Paragraph 4 and Paragraph 11.

III. EVEN ASSUMING *ARGUENDO* THAT THE AOI ROYALTY PROVISION RUNS WITH THE LAND, GOLDSTRIKE AND ITS CORPORATE PREDECESSORS DID NOT INDEPENDENTLY ACQUIRE ANY LANDS IN THE AOI WHILE THEY OWNED AN INTEREST IN THE SUBJECT PROPERTY AND THUS DID NOT PRODUCE ANY MINERALS THAT WOULD BE SUBJECT TO A ROYALTY.

Even if the AOI Royalty Provision ran with the land (which it does not), New Bullion's claims would still fail as a matter of law because New Bullion cannot establish that any properties were acquired in the AOI between August 7, 1990 and May 3, 1999 (the time when Goldstrike or its predecessors held an interest in the Subject Property). The AOI Royalty Provision required Universal to pay Old Bullion a royalty on any mineral production from other properties Universal might acquire within the AOI. If the AOI Royalty Provision is binding on Goldstrike as a subsequent owner of the Subject Property, the most that it could possibly require is for Goldstrike to pay a royalty on production from properties that it or its predecessors independently acquired in the AOI during the time they owned the Subject Property.

New Bullion has no evidence that High Desert, Barrick HD or Goldstrike acquired any properties in the AOI when they respectively owned the Subject Property because it did not happen. Since they did not acquire any properties, it necessarily follows that they did not produce any minerals from such properties. Because no properties were acquired and no minerals were produced, neither Goldstrike nor its corporate predecessors could owe any royalties to New Bullion on account of any covenant that ran with the Subject Property. Thus, even if the AOI Royalty Provision were binding on Goldstrike (or its corporate predecessors) as a covenant that ran with the land (which it is not), the preconditions for the payment of a royalty never materialized. As such, New Bullion cannot not establish any facts from which it can recover damages against Goldstrike, and its claims against Goldstrike fail as a matter of law.

IV. NEW BULLION CANNOT ESTABLISH THAT GOLDSTRIKE OR ITS CORPORATE PREDECESSORS ASSUMED UNIVERSAL'S PERSONAL COVENANT UNDER THE AOI ROYALTY PROVISION.

Under long-standing Nevada law, personal covenants are binding only on those successors who assume and agree to be bound by them. *See Southern Pac. Co. v. Butterfield*, 154 P. 932, 933 (Nev. 1916) (notwithstanding language in a real estate purchase contract that the agreement binds the successors, heirs and assigns, the assignee is not bound because he did not agree to assume the obligation); *see also* Restatement (Second) of Contracts § 327 ("A manifestation of assent by an assignee to the assignment is essential to make it effective . . . ."). *Cf. also Meritage Homes of Nevada, Inc. v. FNBN-Rescon I, LLC*, --- F.Supp. 3d ---, 2015 WL 476149, *8 (D. Nev. Feb. 4, 2015) (applying Nevada law) ("For an entity to be bound by the terms of a contract, that entity must have agreed, i.e. there must have been a 'meeting of the minds,' regarding such terms."). Contract law governs assignments of personal covenants, which are only effective upon the assent of the assignee. *See, e.g.*, *Unterberger v. Red Bull North America, Inc.,* 162 Cal. App. 4th 414, 421 (Cal. Ct. App. 2008) ("An assignment of rights under an executory contract does not impose upon the assignee the obligations of the assignor under the contract unless the assignee assumes these obligations." (internal quotation marks and citations omitted)).

It is axiomatic that a party cannot assume "all of the obligations under a contract." By definition, a contract requires two or more parties with obligations running to and from each of them. If a party were to assume "all of the obligations," the contract would become a nullity because the obligations would merge. A party cannot contract with himself. In order to prevail, New Bullion must prove that Goldstrike or its predecessors affirmatively assumed the specific obligation of Universal under the AOI Royalty Provision.

It is undisputed, however, that no instrument exists by which Goldstrike or its corporate predecessors assumed Universal's obligations under the AOI Royalty Provision. Moreover, since none of the parties who owned the Subject Property before them had assumed Universal's obligations under the AOI Royalty Provision, they could not have assigned those obligations to High Desert Nevada.

A. None of the parties that acquired the Subject Property before High Desert Nevada had assumed the obligations of Universal under the AOI Royalty Provision and, therefore, could not assign those obligations.

Although the history of the Subject Property after the execution of the 1979 Agreement is long and complicated, the pertinent transactions in determining whether an assumption occurred are succinctly summarized as follows:

- In a series of transactions in 1980, Universal conveyed 50% of its ownership interest in the Subject Property to Polar. (SOF ¶ 10) None of these transactions contained an assumption of Universal's obligations under AOI Royalty Provision. (*See id.*)
- On May 11, 1984, Polar sold its 50% interest in the Subject Property to NICOR Mineral Ventures, Inc. ("NICOR"). (SOF ¶ 11) NICOR did not assume Universal's obligations under the AOI Royalty Provision. (*See id.*)
- On June 1, 1984, four of the seven parties to the 1979 Agreement and NICOR entered into a new joint venture agreement" called the "Little Don Joint Venture." (SOF ¶ 13). NICOR became the owner of the Subject Property and the operator of the new joint venture. (SOF ¶ 14) NICOR did not assume the obligations of Universal (then known as Petrol) under the AOI Royalty Provision. (*See id.*)
- On April 15, 1986, the parties to the Little Don Joint Venture and El Dorado Gold Mines Limited ("El Dorado") entered into yet another joint venture (the "1986 Joint Venture Agreement"). (SOF ¶ 19). NICOR was again appointed as operator. (SOF ¶ 22). NICOR did not assume Universal's AOI obligations under the 1979 Agreement. (*See id.*) Nor did the 1986 Joint Venture itself assume Universal's obligations under the AOI Royalty Provision.
- NICOR changed its name to Westmont Mining Inc. and later conveyed all of its interest in the Subject Property to Westmont Gold, Inc. ("Westmont Gold"). (SOF ¶ 23). Westmont Gold became the operator of the 1986 Joint Venture but did not assume Universal's obligations under the AOI Royalty Provision. (SOF ¶¶ 24-25).

In sum, none of the parties to whom the Subject Property passed, or who became operators of later joint ventures, assumed Universal's obligations under the AOI Royalty Provision. Although several of those parties acknowledged an obligation to pay a royalty on production from the Subject Property pursuant to Paragraph 4 of the 1979 Agreement (the Subject Property Royalty Provision), none agreed to assume Universal's obligations under the Paragraph 11 AOI Royalty Provision in the event it independently acquired properties in the AOI. As a result, the obligations of the AOI Royalty Provision remained with Universal and never became an obligation of any party that later acquired the Subject Property.

B. High Desert Nevada did not assume Universal's AOI Royalty Provision Obligation.

Relying on the April 26, 1990 Option Agreement between the 1986 Joint Venture and High Desert Canada, New Bullion has maintained that High Desert Nevada assumed Universal's AOI Royalty Provision obligation when it purchased the Subject Property. For any of four reasons, Goldstrike is entitled to summary judgment that Goldstrike and its predecessors did not assume Universal's obligation. First, the 1986 Joint Venture as an entity never assumed Universal's AOI Royalty Provision obligation and could not have assigned it to High Desert Canada. Second, even under the terms of the Option Agreement, High Desert Canada (which is not a predecessor of Goldstrike) did not assume Universal's AOI Royalty Provision obligation. Third, assuming *arguendo* that High Desert Canada had agreed to assume Universal's AOI Royalty Provision obligations at closing, that obligation merged into the deed and expired because the parties to that transaction did not execute an assignment and assumption as part of the closing. And fourth, High Desert Nevada, Goldstrike's predecessor, never was a party to the Option Agreement and never independently assumed Universal's AOI obligation.

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1. The 1986 Joint Venture itself never assumed Universal's AOI Royalty Provision obligation and could not have assigned it to High Desert Canada.

The Option Agreement dated April 26, 1990 was between the 1986 Joint Venture and High Desert Canada. Section 7.3(B) of the Agreement provided:

> ***At the closing***, [High Desert Canada] ***shall . . . assume*** and become liable for the following obligations and liabilities of [the 1986 Joint Venture] to the extent that the same were not required to be paid or performed by [the 1986 Joint Venture] prior to the Closing: . . . . ***To the extent disclosed*** to [High Desert Canada], ***all obligations of [the 1986 Joint 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.

(Option Agreement 7.3(B)(3)(a), Goldstrike Appx. Tab 17) (emphasis added).

The Option Agreement is clear that the only obligations that High Desert Canada would be required to assume at closing were the obligations that the 1986 Joint Venture (as an entity) had under the 1979 Agreement. As demonstrated above in Section IV.A, the 1986 Joint Venture itself

never assumed Universal's AOI Royalty Provision obligation. Therefore, High Desert Canada was not obligated to assume that particular obligation because the 1986 Joint Venture itself was not obligated. *See Escrow Found. Bldg. Corp. v. Henderson*, 26 F. Supp. 865 (D. Nev. 1939) (assignee cannot assume obligations assignor never had).

2. If the 1986 Joint Venture had been responsible for Universal's AOI Obligation, the obligation was not assumed by High Desert Canada.

a. The 1986 Joint Venture did not disclose the AOI Obligation as one to be assumed.

The Option Agreement states that High Desert Canada is required to assume only those obligations that the 1986 Joint Venture had under the 1979 Agreement that were disclosed to High Desert Canada. (*See* Option Agreement at § 7.3(B).) This duty of disclosure was a condition precedent to High Desert Canada's assumption obligations. *See NGA #2 Ltd. Liability Co. v. Rains*, 946 P.2d 163, 168 (Nev. 1997) ("A condition precedent to an obligation to perform calls for the performance of some act after a contract is entered into, upon which the corresponding obligation to perform is immediately made to depend.").

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The mere identification of the 1979 Agreement in the Option Agreement did not constitute a disclosure by the 1986 Joint Venture that it was responsible for any specific obligation of any particular party to that agreement. *See Grimes v. Walsh & Watts, Inc.*, 649 S.W. 2d at 727 (Rejecting claim that an assignment occurred merely because agreement was attached to and incorporated by reference: "While the later agreement referred to the first agreement, the Defendants did not take on the obligations of their own grantor.") The 1979 Agreement, with all of its exhibits, is over 90 pages long. It includes numerous obligations running among the seven parties. If the 1986 Joint Venture had assumed any of these obligations, its duty of disclosure required it to identify the specific obligations that High Desert Canada was then required to assume. There is no evidence that the 1986 Joint Venture disclosed that it was obligated to perform any obligation under the 1979 Agreement, let alone the obligation of Universal under the AOI Royalty Provision.

The 1986 Joint Venture knew how to make the required disclosures of obligations it wanted High Desert Canada to assume. This is evidenced by its handling of the RK Lease. The 1986 Joint Venture specifically disclosed the RK Lease as an obligation to be assumed by preparing and requiring High Desert Canada to execute an assumption agreement at closing. (*See* SOF ¶ 32). No such disclosure and assumption occurred with respect to any specific obligation under the 1979 Agreement, and specifically the AOI Royalty Obligation.

b. Section 7.3.B(3) of the Option Agreement did not constitute an assumption by High Desert Canada

Section 7.3.B(3) of the Option Agreement, standing alone, does not constitute an assumption of any obligation under the 1979 Agreement. That provision requires an assumption instrument to be executed at closing, based on the particular obligations disclosed to High Desert Canada during the diligence process. The Option Agreement expressly states that the assumption of certain obligations is something High Desert Canada "shall" do "at the Closing."[9] Because no instrument evidencing an assumption was executed at closing, no assumption occurred.

3. The Option Agreement merged into the deeds at closing and any duty of High Desert Canada to assume any obligations of the 1986 Joint Venture terminated as a matter of law.

Even if High Desert Canada could have assumed the AOI Royalty Obligation that the 1986 Joint Venture never had and never disclosed, any such obligation in the Option Agreement terminated under the merger doctrine when the transaction closed.

> The general rule concerning a contract made to convey the property is that once a deed has been executed and delivered, the contract becomes merged into the deed, because it has accomplished the purpose for which it was created. The terms in the deed which follows the contract of sale become the ***sole*** memorial of the agreement which was once contained in the contract of sale. . . .

Hanneman v. Downer, 871 P.2d 279, 285 (Nev. 1994) (quoting *Clark v. Cypress Shores Develop. Co.,* 516 So. 2d 622, 626 (Ala.1987) (emphasis added).) *See also* 14 *Powell on Property,* § 81A.07[1][d] ("[U]pon the execution, delivery and acceptance of an unambiguous deed all prior

[9] If Bullion's interpretation of Section 7.3(B) were correct, it would have been unnecessary for the parties to execute an assignment and assumption of the RK Lease at closing.

negotiations and agreements are deemed merged into the deed. The deed is considered to express the true and final intention of the parties."); 26A C.J.S. Deeds 195 (updated 2010) (Even if the terms of the "preliminary agreements may vary from those contained in the deed, the deed alone must be looked to for determination of the rights of the parties"); *Deed as Superseding or Merging Provisions of Antecedent Contract Imposing Obligations Upon the Vendor*, 38 A.L.R.2d 1310 (updated 2010) ("[T]he delivery and acceptance of an executed deed is considered, prima facie, to merge or supersede the provisions of an antecedent contract which imposes obligations upon the vendor. This rule appears to have an almost universal acceptance."); *Cf. also Czarobski v. Lata*, 882 N.E.2d 536, 540 (Ill. 2008) ("the merger doctrine evolved to protect the security of land titles . . . and brings finality to real estate contracts.").

None of the deeds transferring the property from the 1986 Joint Venture to High Desert Canada, or any other closing documents, contained language by which High Desert Canada assumed the obligations under the AOI Royalty Provision. The quitclaim deed expressly provides that certain representations, warranties, and indemnities in the Option Agreement survive the closing but makes no mention of the assumption obligation. (SOF ¶ 32) By implication, the assumption provision does not survive under the merger doctrine.

4. High Desert Nevada is a different corporation than High Desert Canada and High Desert Nevada never assumed the AOI Royalty Obligation.

a. High Desert Nevada was never a party to the Option Agreement and never assumed the AOI Royalty Obligation.

In December 1991, corrective deeds and other instruments were executed to transfer the Subject Property to High Desert Nevada, a different corporation than High Desert Canada. The 1986 Joint Venture had dissolved at that time so corrective documents were executed by each individual member of the former joint venture. Two undisputed facts surrounding these corrective deeds are critical.

First, a "corrective" Option Agreement was never executed by the parties. Thus, High Desert Nevada never became a party to the Option Agreement and never became obligated to

assume any obligations disclosed by the 1986 Joint Venture. High Desert Nevada had no obligations whatsoever under the Option Agreement because it never signed it.

Second, High Desert Nevada signed a "corrective" assumption agreement relating to the RK Lease. No such document was prepared or signed relating to ***any*** obligation arising under the 1979 Agreement. Accordingly, High Desert Nevada never assumed the AOI Royalty Provision.

b. High Desert Nevada, as grantee of deeds transferring the Subject Property "subject to" the 1979 Agreement, did not assume the AOI Royalty Obligation.

The corrective deeds by which the Subject Property was transferred to High Desert Nevada state that the transfer is "subject to" the 1979 Agreement. High Desert Nevada did not, however, sign the deeds.

The phrase "subject to" in a deed executed by only one party to a transaction is not an assignment or assumption of contractual rights, and the mere acceptance of a deed made "subject to" personal covenants is not sufficient to show the grantee's assumption of those covenants. The phrase "subject to" is construed as meaning "subordinate to," "subservient to," "limited by," or as a grantor's attempt to put the grantee on notice of potential defects in title. *See, e.g, Beattie v. State ex rel. Grand River Dam Auth.*, 41 P.3d 377, 383 (Okla. 2002); *Wild River Adventurers, Inc. v. Bd. of Trustees of Sch. Dist. No. 8*, 812 P.2d 344, 346-47 (Mont. 1991); *Hendrickson v. Freericks*, 620 P.2d 205, 209 (Alaska 1980); *Ault v. Holden*, 44 P.3d 781, 792 (Utah 2002). The words "subject to" are intended to protect the grantor against certain covenants of warranty, or to give notice of, and exempt, potential title defects. *See, e.g, Hedin v. Roberts*, 559 P.2d 1001, 1002 (Wash. 1997); *Hancock v. Planned Dev. Corp.*, 791 P.2d 183, 186 (Utah 1990). The import of such language is to put the grantee on notice of potential encumbrances and inform the grantee that the transfer is made "subject to" any covenants that might run with the land.

The words "subject to" do not constitute language of assignment and assumption of any personal covenants. *See Escrow Foundation Building Corp. v. Henderson*, 26 F. Supp. 865, 866 (D. Nev. 1939) (deed transferring property "subject to" mortgage, but without any language of assignment or assumption, did not transfer obligations of mortgage to assignee); *see also Buchman*

v. BASF Corp., 107 Fed. Appx. 378 (5th Cir. 2004) (taking deed subject to a royalty agreement is not an assumption of the agreement); *Lone Star Gas Co. v. Mexia Oil & Gas, Inc.,* 833 S.W. 2d 199 (Tex. Ct. App. 1992) (taking assignment of a lease subject to an agreement requiring payment of severance taxes is not an assumption of that obligation); *Longley-Jones Associates, Inc. v. Ircon Realty Co.*, 493 N.E.2d 930 (N.Y. 1986) (taking deed subject to lease is not an assumption of the obligation in the lease to pay a broker's commission); *Kelly v. Tri-Cities Broadcasting, Inc.*, 147 Cal. App. 3d 666 (Cal. Ct. App. 1983) (taking assignment of a lease subject to the terms of the lease is not an assumption of post-occupancy rental obligation of lease); *Snidow v. Hill*, 197 P.2d 801 (Cal. Ct. App. 1948) (taking deed subject to a mortgage is not an assumption of mortgagor's obligations). High Desert Nevada's acceptance of corrective deeds that were "subject to" the 1979 Agreement does not, therefore, establish that High Desert Nevada assumed any personal covenants contained within that agreement.

Escrow Foundation is instructive. There, a mortgage and deed of trust were executed by Nevada State Life Insurance Company in favor of Reno National Bank. *See* 26 F. Supp. at 865. The insurance company transferred the property to E.C. and Florence Lyons pursuant to a deed that was "'[s]ubject to an encumbrance of $85,000.00 and interest at the rate of eight per cent per annum.'" *Id.* at 865-66. The Lyons later transferred the property to Escrow pursuant to a deed stating that Escrow "assumes and agrees to pay" the mortgage. *Id.* at 866. Following a default, the property was sold at foreclosure and the receiver for Reno National Bank sued Escrow seeking a deficiency judgment. The court held that the Lyons had not assumed the mortgage in the first place because "[a] deed of a mortgagor containing merely a provision that the land conveyed is subject to [e]ncumbrance thereon does not constitute an agreement upon the part of the grantee to assume and pay the debt." *Id.* at 866 (citing *Shepherd v. May*, 115 U.S. 505 (1885); *Union Mut. Life Ins. Co. v. Hanford*, 143 U.S. 187 (1892)). Because the Lyons had not assumed the mortgage when it obtained the land, there were no obligations that could be assigned to or assumed by Escrow pursuant to the later deed, and the court dismissed the receiver's claims. *See id.* at 866-67.

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Like the deed in *Escrow Foundation*, the corrective deeds transferring the Subject Property to High Desert Nevada did not contain any language indicating an express agreement by High Desert Nevada to assume the obligations of Universal under the AOI Royalty Provision.[10] *See also Wueller Oil & Gas, Inc. v. EnCana Oil & Gas,* 861 F. Supp. 2d 775, (W.D. La. 2012) (phrase "subject to . . . other contracts" in lease assignment related to other agreements encumbering the property being leased and did not extend to agreements impacting other interests in the area); *Golden v. SM Energy Co.*, 826 N.W. 2d 610, 617 (S. N.D. 2013) (conclusion that a party accepts an area of mutual interest provision merely by accepting the assignment of an oil and gas lease "subject to" related agreements "turns the law of assignments on its head," "turns the "AMI clause, as well as any other personal covenant, into a covenant that runs with the land and obliterates the requirement than assignee consent to be responsible for the obligations of assignor").

In sum, High Desert Nevada's mere notice of the 1979 Agreement, and its mere acceptance of deeds to the property "subject to" that agreement, are insufficient, as a matter of law, to establish that it assumed the obligations of the AOI Royalty Provision. *Id*.

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V. NEW BULLION CANNOT PROVE THE ESSENTIAL ELEMENTS OF ITS CLAIMS FOR UNJUST ENRICHMENT BECAUSE NO BENEFIT WAS CONFERRED ON OR UNJUSTLY RETAINED BY GOLDSTRIKE.

Bullion's unjust enrichment claim is premised on the assertion that Goldstrike received a benefit as a successor party to the 1979 Agreement (the exclusive right to obtain properties in the AOI). Since the cause of action relies on the assertion of a contractual right and reciprocal obligation, it fails because an unjust enrichment claim does not lie where there is an express contract governing the rights of the parties by and to whom the benefits were conferred. *See Meritage Homes*, --- F. Supp. 3d ---, 2015 WL 476149, at *14, copy attached hereto as Exhibit I.

The doctrine of unjust enrichment applies to situations where there is no legal contract and the person sought to be charged is in possession of money or property that in good conscience and justice he should not retain. *See Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12,*

[10] Moreover, *Escrow Foundation* makes it clear that neither High Desert Nevada nor High Desert Canada could have assumed obligations that the 1986 Joint Venture itself never had in the first place.

1975, 942 P.2d 182, 187 (Nev. 1997) (citing 66 Am. Jur. 2d *Restitution* § 11 (1973)). An action based on a theory of unjust enrichment is not available when there is an express, written contract, governing the relationship of the parties because no agreement can be implied when there is an express agreement. *See Id.* at 187 (citing 66 Am. Jur. 2d *Restitution* § 6 (1973)); *see also Lipshie v. Tracy Investment Co.*, 566 P.2d 819, 824 (Nev. 1977) ("To permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles.").

But Goldstrike and its corporate predecessors were never parties to the 1979 Agreement and were never "operators" under that agreement. Thus, they never received an exclusive right to acquire properties in the AOI. New Bullion cannot rely on the agreement for the existence of the benefit and then claim unjust enrichment on the theory that the agreement did not exist. Because New Bullion's unjust enrichment claim is merely duplicative of its contract claims, it fails as a matter of law. *See, e.g., Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 197 (Nev. 1997) ("An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied where there is an express agreement.").

Even if Bullion could overcome this problem, to prevail on its claim for unjust enrichment, New Bullion would have to 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). There is no evidence that New Bullion or Old Bullion conferred upon Goldstrike, or that Goldstrike appreciated, accepted, and unjustly retained such a benefit. Because New Bullion cannot establish the essential elements of its unjust enrichment claims against Goldstrike, they should be dismissed as a matter of law.

CONCLUSION

For the reasons set forth above, this Court should grant Goldstrike's renewed motion, and enter judgment in favor of Goldstrike, and against New Bullion, dismissing all of New Bullion's claims against Goldstrike with prejudice.

Dated: September 22, 2015

PARSONS BEHLE & LATIMER

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2015, a true and correct copy of the foregoing **BARRICK GOLDSTRIKE MINES INC.'S MOTION FOR SUMMARY JUDGMENT BASED ON A LACK OF OBLIGATION UNDER THE 1979 AGREEMENT** was served on the following electronically via the ECF system:

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EXHIBIT 5

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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

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BULLION MONARCH'S OPPOSITION TO SUMMARY JUDGMENT ON LACK OF OBLIGATION UNDER THE 1979 AGREEMENT

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BULLION MONARCH'S OPPOSITION TO SUMMARY JUDGMENT ON LACK OF OBLIGATION UNDER THE 1979 AGREEMENT

As plaintiff Bullion Monarch Mining, Inc. demonstrated in its motion for summary judgment, defendant Barrick Goldstrike Mines, Inc. has a duty as a matter of law to pay production royalties in an area of interested defined by the 1979 agreement.

Even if this Court disagrees that Bullion is correct as a matter of law, however, that does not exculpate *Barrick* as a matter of law. In its bid for summary judgment, Barrick at most shows that the relevant agreements are ambiguous. A reasonable jury could believe Bullion's evidence that supports the existence of Barrick's obligation.

Barrick's renewed motion for summary judgment also adds, improperly, several new arguments, but they do not help. They only show that Barrick has gone to extraordinary lengths to try to extinguish Bullion's bargained-for right to royalties.

COUNTERSTATEMENT OF FACTS[1]

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. Instead, Universal "as operator" has "the exclusive right to acquire additional mineral properties *on behalf of the parties hereto*." (*Id.* para. 11.)

[1] Bullion incorporates by reference the statement of undisputed facts in its motion for summary judgment.

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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 (based on 100% operating interest in UNIVERSAL, otherwise prorated).

(Barrick 1: 1979 Agreement para. 4.)[2] The agreement contemplates that co-venturer Polar Resources Co. might buy half of Universal's interest and would thus pay half the royalty. (*Id.* para. 6.) Area-of-interest acquisitions, too, are subject to the 1% royalty. (*Id.* para. 11.) 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." (*Id.* (emphasis added).)[3]

The agreement's obligations pass to successors:

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[2] ""Barrick #:" refers to tab numbers in Barrick's appendix (Doc. 162).

[3] 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** 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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> 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.)

Subsequent Ventures

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. (Barrick 12: 1984 Venture Agreement § 8.2(e) (as noted in Barrick's statement of facts ¶ 14); Barrick 14: 1986 Venture Agreement § 8.2(e) (as noted in Barrick's statement of facts ¶ 22) (emphasis added).)

High Desert's Option

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. [redacted] the name on High Desert's letterhead (App. 3: July 10, 1990 letter.)[4] The parties later acknowledged that that was "a name under which High Desert Mineral Resources *of Nevada*, Inc. was doing business." (*See, e.g.*, App. 6: 1991 Correction Deed (emphasis added).) To dispel any confusion, a correction 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*." (App. 6: Correction Deed 3 (emphasis added).)

[4] "App." refers to Bullion's appendix to this opposition.

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[redacted] High Desert had resisted such a provision, but relented when Westmont insisted that High Desert assume the 1979 agreement. (App. 2 (request from High Desert's counsel); App. 3 (response from Westmont's counsel).) The venture deeded the properties to High Desert "pursuant to" the option agreement. (Barrick 20: 1990 Deed; App. 6: 1991 Correction Deed.)

High Desert Acquired Area-of-Interest Properties

[redacted] In discovery, Barrick confirmed that it or its predecessors had done so. (App. 4; *see* Answers to Interrogatories No. 2, 7-13.)

Barrick Assumed High Desert's Obligations

[redacted]

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High Desert and Barrick were Left with the Area-of-Interest Royalty

[redacted] In later discussions with Newmont, Bullion confirmed that area-of-interest property would be "deemed 'Subject Property' as covered by and referred to in Paragraph 4." (App. 12: Aug. 21, 1997 McAllister Letter.)

[redacted] Newmont is paying royalties on production from Bullion's original mining claims (App. 13: 227 Doc. 45, at 9), but Barrick has never paid royalties from production in the area of interest.

Quiet-Title Action

In 1993, Bullion filed a quiet-title action as to the subject property. This Court dismissed that action, but it expressly left intact Bullion's royalty under the 1979 agreement. (Barrick 30: 1993 Judgment ¶ 1.) [redacted]

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POINTS AND AUTHORITIES

To prevail on summary judgment, Barrick must prove that (I) as a matter of law, Barrick did not assume by contract the obligation to pay an area-of-interest royalty, (II) as a matter of law, the obligation is a purely "personal" covenant of Universal, *and* (III) no evidence supports a finding of unjust enrichment. Because Barrick fails each of these tasks, this Court should deny summary judgment.

I.

BARRICK DID NOT, AS A MATTER OF LAW, CONTRACTUALLY DISCLAIM THE AREA-OF-INTEREST ROYALTY OBLIGATION

Where the issue is not the *meaning* of a contractual provision, but whether the defendant has *assumed* the contract, summary judgment is usually inappropriate. *See Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1138–39 (9th Cir. 2001). This is because assumption is a question of intent. *Id.*; *see also Easton Bus. Opportunities, Inc. v. Town Exec. Suites–E. Marketplace, LLC*, 230 P.3d 827, 832 (Nev. 2010). While an agreement that assigns all the terms of a prior contract is unambiguous, *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067–68 (9th Cir. 1998), a party claiming less than a total assignment cannot generally do so as a matter of law, *see Orion*, 268 F.3d at 1138–39.

Barrick at most raises a factual question regarding the scope of Barrick's assumption and the amount of damages. Barrick is not entitled to summary judgment.

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A. Corporate Reorganizations and Mergers Do Not Extinguish an Area-of-Interest Royalty

1. Barrick's Predecessor Did Not Escape Responsibility by Misstating its Name

Among Barrick's new arguments is the contention that, because its corporate predecessor misstated its doing-business name, the underlying contractual obligations disappeared to Canada. That's just silly.

The parties later acknowledged that that was "a name under which High Desert Mineral Resources *of Nevada*, Inc. was doing business." (*See, e.g.*, App. 6: 1991 Correction Deed (emphasis added).)

And while Barrick crows that the parties never executed "a 'corrective' Option Agreement" (Doc. 161, at 36), that is not quite true. A correction 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*." (App. 6: Correction Deed 3 (emphasis added).) This unequivocally makes High Desert Mineral Resources of Nevada, Inc. the optionee in that agreement.

By contrast, "High Desert Canada" was never actually—nor intended to be—the optionee or grantee. One attorney, Paul J. Schlauch, represented both "High Desert Mineral Resources, Inc., a Nevada corporation," and "High Desert Mineral Resources of Nevada, Inc." (*See* App. 6: Correction Deed; Ex. 3.) And

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the same corporate officers, R. Sean Halavais and P. Lee Halavais, signed the original option agreement and the letter exercising the option[5]—both for "High Desert Mineral Resources, Inc., a Nevada corporation"—and the later joint venture agreement for "High Desert Mineral Resources of Nevada, Inc."

Finally, equity cannot sustain Barrick's argument for an evaporating duty. High Desert's acquisition was a crucial transaction, which is why Barrick now wants to escape it. [redacted]

2. Barrick Concedes All other Corporate Successors, Including Barrick, Assumed their Predecessors' Liability

When two corporations merge, the surviving corporation is liable for the debts and obligations of the merged corporation. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 n.3 (1964); *Lamb v. Leroy Corp.*, 454 P.2d 24, 26–27 (Nev. 1969).

Except for the bizarre "High Desert Canada" argument, Barrick concedes this. For example, Petrol Oil & Gas Corp. succeeded to the obligations of its predecessor, Universal. (*See* Doc. 161, at 7.) Likewise, Westmont Gold, Inc. succeeded to the obligations of its predecessor, Nicor Mineral Ventures, Inc. (*See* Doc. 161, at 9.)

Barrick even admits that it assumed all of High Desert's obligations.

[5] The letterhead says: "Gold / High Desert Mineral Resources, Inc. / A Nevada Corporation." (App. 3: July 10, 1990 Letter.)

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(App. 4: Answer to Interrogs. 1; Doc. 271-3, at 4:9-10; 9:24-26.) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. Substantial Evidence Supports a Jury Finding that the Obligation to Pay Bullion's Area-of-Interest Royalty Passed to Barrick under Contract

1. Barrick Concedes that Universal Agreed to Pay Area-of-Interest Royalties to Bullion

Barrick admits that, under the original 1979 agreement, Universal agreed to pay a 1% production royalty on properties acquired in the area of interest. (Doc. 161, at 2, 6, 30.)

2. Polar Agreed to Share Universal's Obligation

Polar agreed to share half of Universal's royalty obligations. (Barrick 1: 1979 Agree-ment § 6.) Barrick says that this did not include the area-of-interest royalty. (*See* Doc. 161, at 6–7.) While Bullion believes that Barrick's position is wrong as a matter of law, it does not matter because Polar and Universal ultimately conveyed their interests at the same time. Whether the assignment of the area-of-interest provision came from Universal and Polar or from Universal alone is immaterial.

3. The Bullion-Monarch Venture Assumed the Obligation

The 1984 and 1986 joint-venture agreements confirm that Universal (and Polar) passed the area-of-interest royalty obligation to Nicor. Nicor agreed to "make or arrange for *all payments* required by the Existing Agreements," which includes the 1979 agreement. (Barrick 12: 1984 Venture Agreement § 8.2(e) (as

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noted in Barrick's statement of facts ¶ 14); Barrick 14: 1986 Venture Agreement § 8.2(e) (as noted in Barrick's statement of facts ¶ 22) (emphasis added).) Because Universal's successor, Petrol, was a party to those agreements and a member of the venture, the other parties should have clarified that the area-of-interest royalty stayed with Petrol if they so intended. Because they made no exception, a jury could reasonably find that the parties intended Nicor to assume that obligation on behalf of the venture.[6]

4. The Deed to High Desert did Not Preclude an Assumption as a Matter of Law

a. THE MERGER-BY-DEED DOCTRINE IS INAPPLICABLE

Barrick argues that, because a sales contract merges into the deed, a deed that fails to explicitly mention the area-of-interest provision somehow extinguishes that obligation. (Doc. 161, at 35–36.) That's not true. Barrick relies on *Hanneman v. Downer*, but that case specifically warns against the "overly simplistic" view of the merger doctrine that Barrick advances. 871 P.2d 279, 285 (Nev. 1994) (rejecting the argument that a deed extinguishes contractual liability). A deed supersedes a contractual obligation only if the parties *intend* it to, which is a question of fact, not one for summary judgment. *Id.* (quoting *Webb v.*

[6] Even if the venture's assumption were ineffective, however, that would not invalidate High Desert's later assumption. (*Contra* Doc. 161, at 33–34.) In negotiating the sale of the property to High Desert, the venture believed itself bound by the 1979 agreement's obligations and insisted that High Desert assume them. (App. 2 (request from High Desert's counsel); App. 3 (response from Westmont's counsel).) The venture's bona fide belief is enough to make High Desert's express assumption enforceable. *See* 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37:48 (4th ed. updated 2015); *see also Clark Cnty. v. Bonanza No. 1*, 615 P.2d 939, 944 (Nev. 1980) (citing 1 WILLISTON ON CONTRACTS § 119, at 489 (3d. ed.)) (a promisor's reasonable but erroneous belief that it had promised a detriment is valuable consideration). While Barrick cites a case that takes a contrary position, the Nevada Supreme Court has never endorsed it. (Doc. 161, at 34 (citing *Escrow Found. Bldg. Corp. v. Henderson*, 26 F. Supp. 865 (D. Nev. 1939)).)

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Graham, 510 P.2d 1195, 1197 (Kan. 1973)). And contractual obligations continue in force where they are to be performed after the conveyance (*see id.*):

> [A]ny provision of the contract required by its nature and effect to be observed or performed after the closing should remain binding after the closing until satisfied.

Town of Nags Head v. Tillett, 336 S.E.2d 394, 398 (N.C. 1985). This is so because the deed does not contradict the contract as to continuing obligations. *See Hanneman*, 871 P.2d at 285 (Nev. 1994); *accord Kuniansky v. D.H. Overmyer Warehouse Co.*, 406 F.2d 818, 820 (5th Cir. 1968) ("furnishing the deed was simply one of several obligations . . . and was not inconsistent with the contract").

Not surprisingly, in most cases the deed is a one-way document that satisfies only the *seller's* obligation to convey; the buyer's obligations almost never merge because they likely continue to the seller (e.g., installment payments) or third parties (e.g., a mortgage or royalty) after the closing. *See, e.g.*, *Kuzemchak v. Pitchford*, 431 P.2d 756, 758 (N.M. 1967) (buyer's assumption of mortgage debt survives delivery of the deed). The deed thus does not extinguish a continuing royalty obligation ancillary to the sale itself. *Chainey v. Shostrom*, 6 P.2d 353, 354–55 (Cal. Ct. App. 1931).

Here, a reasonable jury could find that the parties to the 1990 option agreement intended High Desert's royalty-payment obligations to survive the closing. First, the option agreement repeatedly suggests that they do. [redacted]

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Second, the deed itself states that even the obligations of the seller—whose contractual obligations normally *would* merge with the deed—expressly survive. (App. 6: 1991 Deed 2–3.) That is all the more reason to think the parties intended the royalty-payment obligation of High Desert to survive.

b. THE DEED AND THE OPTION AGREEMENT TOGETHER SUPPORT A FINDING THAT HIGH DESERT ASSUMED THE OBLIGATIONS OF THE 1979 AGREEMENT

Barrick's misunderstanding of the merger doctrine leads Barrick into crooked paths. Barrick fixates on the fact that Westmont's deed to High Desert says that High Desert takes the property "subject to" the 1979 agreement. (Doc. 161, at 37–39.) Barrick apparently believes that those words preclude a contractual assumption.

The Nevada Supreme Court has rejected Barrick's talismanic reading. A deed must be read in conjunction with the purchase agreement. *Lowden Inv. Co. v. Gen. Elec. Credit Co.*, 741 P.2d 806, 809 (Nev. 1987). If the purchase agreement suggests the purchaser is accepting responsibility for payment, use of the words "subject to" does not disclaim that responsibility. *Id.* (distinguishing *Escrow Found. Bldg. Corp.*, 26 F. Supp. 865, on which Barrick principally relies).

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5. *A Jury Could Find that Barrick's Predecessor Assumed the Royalty Obligation*

[redacted] Even if that assumption is ambiguous, extrinsic evidence supports a jury finding that High Desert intended to. The negotiating history, the terms of the relevant agreements, and the parties' subsequent practice all support such a finding.

Despite High Desert's promise to assume the obligations of the 1979 agreement, Barrick now argues that High Desert had to execute a separate "assumption agreement" to make that promise effective. It is telling, however, that no such requirement is anywhere suggested in the many thousands of pages produced in discovery. (*See* Brust Opp. Aff. ¶ 15.) Indeed, all parties consistently acted as though High Desert did assume Universal's obligations under that agreement. Those obligations were a specific issue in High Desert's negotiations with Westmont. After acquiring the properties, High Desert repeatedly represented that they were subject to the 1979 agreement. Newmont, to whom Barrick ultimately transferred the subject property, continues to pay Bullion royalties on its original mining claims pursuant Universal's initial obligations.

a. NEGOTIATIONS

Westmont's Communications with High Desert

High Desert initially tried to negotiate out of assuming some of Universal's obligations under the 1979 Agreement. Westmont, however, insisted that High Desert assume all of the agreement's obligations, and High Desert accepted those terms. (App. 2 (request from High Desert's counsel); App. 3 (response from Westmont's counsel).)

Notes from Barrick's and Newmont's Attorney

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Abstract from High Desert to Newmont

The abstract that High Desert gave Newmont in the course of negotiating a joint venture with Newmont mentions both the area of interest and the royalty obligation. A reasonable jury could find that this reflects High Desert's understanding that it had assumed the obligation to pay area-of-interest royalties.

[redacted]

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b. THE TEXT OF THE AGREEMENTS

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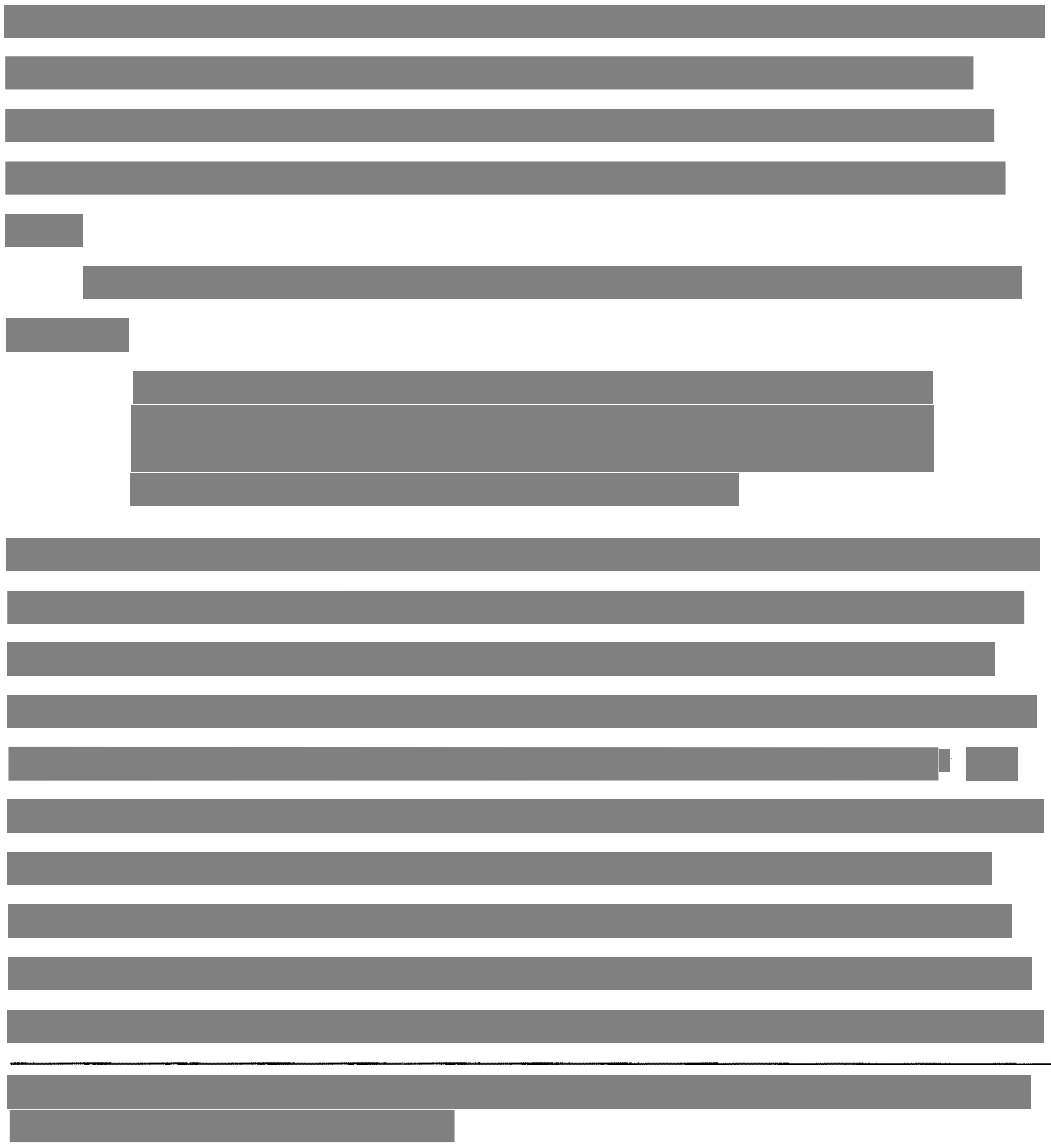

[9] The court distinguished that precedent only because the estate to which the area-of-interest should have attached was a lease that had *expired*, so there was no privity of estate. 694 S.W.2d 724, 728 (Tex. App. 1983). There is no such issue here because the analogous estate, Bullion's original mining claims conveyed in the 1979 agreement, passed intact to High Desert. The court of appeals continues to recognize that, where an area-of-interest provision attaches to an *un*expired interest, the area-of-interest provision runs with the land. *E.g.*, *Anderson Energy Corp. v. Dominion Okla. Tex. Expl. & Prod., Inc.*, ___ S.W.3d ___, No. 04-14-00170-CV, 2015 WL 3956212 (Tex. App. June 30, 2015).

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1991 Newmont–High Desert Joint Venture

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[10] Barrick also points to a separate lease, the "RK Lease," as evidence that the venture needed to expressly disclose the area-of-interest royalty obligation as one High Desert would assume. (Doc. 161, at 34.) The parties did execute a separate assignment and quitclaim deed with respect to that lease, probably because a lease, different from a contract, is a property right that must be conveyed by deed. *See* NRS 111.105. At most, the treatment of the RK Lease raises a *factual issue* regarding the intent of the parties to assign the obligations of the 1979 agreement. That issue cannot be resolved on summary judgment.

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1995 Barrick Merger Agreement

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c. THE PARTIES' CONDUCT

In addition to the repeated incorporation of the 1979 agreement with each transfer of the mineral rights, Universal's successors have consistently acted as though they assumed the area-of-interest royalty provision.

Requests for Bullion's records

In the 1993 litigation with Bullion, High Desert's counsel listed the 1979 agreement as part of High Desert's chain of title. (App. 1: Jackson Aff. ¶¶ 9, 10.1.) High Desert did not contend that Universal's obligations under that agreement did not bind High Desert. A jury could find that its failure to assert that position in the prior litigation undermines Barrick's current characterization of the parties' intent.

Payment of Some Royalties

Barrick suggests that Universal's obligations in the 1979 agreement were "personal" and thus did not bind successors to that agreement. (*E.g.*, Doc. 161,

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at 34.) Newmont's continued payment of royalties on the original mining claims (App. 13: 227 Doc. 45, at 9), however, belies this position. If, as Newmont's actions suggest, subsequent agreements effectively conveyed Universal's obligation to pay royalties on the subject property, a jury could find they were effective to convey the area-of-interest royalty obligation, too.

Representations to Third Parties

[redacted]

C. The *Extent* of Barrick's Liability is Not at Issue

Barrick also raises a new argument that the area-of-interest royalty cannot apply because it did not acquire property in the area of interest while it held the original mining claims. (Doc. 161, at 30.) Barrick is wrong for three reasons.

First, this is really an argument that, even if Barrick assumed the obligation, Bullion has no damages. That issue, however, is not before the Court. Bullion does not have a complete list of the area-of-interest properties only because parties have postponed discovery on this issue. Bullion earlier requested a description of the properties Barrick obtained from Newmont, but Barrick has not yet responded.

Second, the existing evidence shows that Barrick and its predecessors *did* acquire area-of-interest property. [redacted]

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[redacted] In discovery, Barrick confirmed that it or its predecessors had done so. (App. 4; *see* Answers to Interrogatories No. 2, 7–13.)

Third, Barrick cannot escape responsibility as a matter of law through a strategic do-si-do with Newmont. Both Barrick and Newmont were aware of the area-of-interest royalty and so attempted an "exchange" to separate the original claims (which Barrick owned) from additional area-of-interest properties that Barrick wanted, thwarting the purpose of the area-of-interest provision. [redacted] Barrick obfuscates by saying that it only owned the subject property for eight hours after its merger with "Barrick HD," but that it irrelevant because Barrick succeeds to any liability of its predecessors, including Barrick HD and High Desert.

D. Evidence Supports a Finding that Barrick is Estopped from Disclaiming the Royalty Obligation

Barrick is estopped from invoking its own breach to escape liability. The 1979 agreement says that it binds successors. (Barrick 1: 1979 Agreement § 18.)[12] [redacted]

[12] The agreement also incorporates another agreement, between Universal and Polar, that requires a similar assignment:

> All assignments of mineral claims or any interests therein shall be made subject to this agreement and *shall require the transferee to assume all of the obligations of this Agreement . . . .*

(Barrick 1: 1979 Agreement, Ex. C. § 24(b) (emphasis added).)

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Bullion, as the third-party beneficiary of that agreement, is entitled to enforce that covenant against Barrick as High Desert's successor. *See Canfora v. Coast Hotels and Casinos, Inc.*, 121 P.3d 599, 605 (Nev. 2005) (intended third party beneficiary bound by obligations and benefits of agreement).

II.

THE OBLIGATION TO PAY AREA-OF-INTEREST ROYALTIES IS NOT, AS A MATTER OF LAW, A "PERSONAL COVENANT"

Barrick's obligation to pay area-of-interest royalties runs with the land as a matter of law. *See Westland Oil*, 637 S.W.2d at 911. Because that covenant attached to Barrick when it acquired the subject property, whether Barrick also assumed it by contract is irrelevant. *See Snashall v. Jewell*, 363 P.2d 566, 570 (Or. 1961); RESTATEMENT (FIRST) OF PROPERTY ch. 45 intro. Note (1944). If there is any ambiguity, however, on summary judgment the ambiguity must be resolved in Bullion's favor. *See Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981).

A. Barrick Applies the Wrong Standard

Barrick frames its entire legal argument with two assertions: (1) a plaintiff must prove the existence of a covenant running with the land by "clear and convincing evidence"; and (2) the evidence must satisfy a strict, three-part test. Both assertions are wrong.

1. Bullion's Burden at Trial is Only to Prove a Real Covenant by a Preponderance

Nevada ordinarily requires a civil plaintiff to prove its case by no more than a preponderance of the evidence. *Holliday v. McMullen*, 756 P.2d 1179,

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1180 (Nev. 1988). As a rule, a heightened standard applies only to prove moral wrongdoing, such as criminal conduct (*see id.* (proof of murder for disinheritance)), fraud (*Bulbman, Inc. v. Nev. Bell*, 825 P.2d 588, 592 (Nev. 1992); NRS 42.005(1)), or oppression (NRS 42.005(1)). Even so, a plaintiff can prove some "bad acts," such as undue influence (*In re Estate of Bethurem*, 313 P.3d 237, 242 (Nev. 2013)) or abuse of the corporate form (*Paul Steelman, Ltd. v. Omni Realty Partners*, 885 P.2d 549, 550 (Nev. 1994)), by a mere preponderance.

To prove that a covenant runs with the land, Bullion need only provide evidence that a factfinder could find preponderates. Barrick, citing exclusively to New York law, asserts that the burden is much higher: "clear and convincing evidence." (Doc. 161, at 18 (citing *Clarke v. Caldwell*, 521 N.Y.S.2d 851, 853–54 (App. Div. 1987)).) New York's standard is inapposite, however, because other jurisdictions and leading treatises have rejected this heightened burden. *See, e.g.*, *Stern v. Metro. Water Dist.*, 274 P.3d 935, 946–47 (Utah 2012), *cited in* 21 C.J.S. *Covenants* § 78 (updated 2015); 20 AM. JUR. 2D *Covenants* § 47 (updated 2015). In fact, Barrick elsewhere relies heavily on the very case that establishes the preponderance standard for proving a real covenant. (Doc. 161, at 19–20, 23–24 (citing *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618 (Utah 1989), which is construed as so holding in *Stern*, 274 P.3d at 946).)[13] The Restatement (Third), too, implicitly requires only a bare preponderance, since a real covenant can be implied just from the nature of the agreement. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.2 (2000) (so construed in *Stern*, 274 P.3d at 946–47 & n.18). Because the question is merely one of rights created by agreement, not Barrick's blameworthiness, it makes sense to require

[13] Barrick also relies on two district-court orders in *ECM v. Placer Dome U.S., Inc.*, No. CV-N-92-0499-ECR, both of which cite extensively to *Flying Diamond*. (*See* Doc. 161-7, at 6; Doc. 161-8, at 5, 6, 10.)

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proof by only a preponderance.[14]

2. Nevada would Likely Adopt the Flexible Standard of the Third Restatement

Barrick's proposed test for real covenants—"touch and concern," privity, and intent—sounds like a relic of the 19th century because it is. (Doc. 161, at 18–19, 27 (citing *Wheeler v. Schad*, 7 Nev. 204 (1871)).) In the 144 years since *Wheeler*, Nevada has moved toward the flexible approach of the Third Restatement. Nevada will likely do so in the area of real covenants, too.

A dearth of recent, controlling Nevada authority does not mean Nevada clings to the 19th century, especially in the face of a persuasive, modern Restatement rule. For example, this Court recently applied the modern Restatement approach to a choice-of-law question. *Izquierdo v. Easy Loans Corp.*, No. 2:13-CV-1032-MMD-VCF, 2014 WL 2803285 (D. Nev. June 19, 2014) (Du, D.J.). Even though, in 1869, Nevada followed the ancient rule that the forum's statute of limitations applies in contract cases,[15] this Court correctly recognized that Nevada has since adopted many provisions of the Restatement (Second) of Conflict of Laws, and it predicted—accurately[16]—that a contractual selection of another state's laws includes that state's statute of limitations. *Izquierdo*, 2014 WL 2803285, at *3–4 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)); *accord Zurich Am. Ins. Co. v. Intermodal Maint. Servs., Inc.*, No. 3:13-CV-00512-HDM, 2015 WL 1280748, at *6 (D. Nev. Mar. 20, 2015) (McKib-

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[14] The only time a "clear and convincing" standard applies in the context of real covenants is when someone like Barrick tries to *set aside* such a covenant. In that case, clear and convincing evidence is required to *disprove* the covenant's application. *See Leaver v. Grose*, 563 P.2d 773, 775 (Utah 1977).

[15] *Wilcox v. Williams*, 5 Nev. 206 (1869).

[16] *See Mardian v. Michael & Wendy Greenberg Family Trust*, 131 Nev. Adv. Op. 72, at 5, ___ P.3d ___, ___ (Sept. 24, 2015) (*en banc*) (holding that a general choice-of-law provision includes the chosen state's statute of limitations).

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ben, D.J.) (same); *DeLeon v. CIT Small Bus. Lending Corp.*, No. 2:11-CV-01028-PMP-NJK, 2013 WL 1907786, at *6–7 (D. Nev. May 7, 2013) (Pro, D.J.) (same); *Shinn v. Baxa Corp.*, No. 2:07-CV-1648 JCM (PAL), 2011 WL 3419239, at *1 (D. Nev. Aug. 2, 2011) (Mahan, D.J.) (same).

Here, similarly, Nevada would likely follow the Third Restatement in deciding whether a covenant runs with the land. The Restatement rejects the antiquated "touch and concern" doctrine in favor of looking at what the parties actually intended. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.2 & reporter's note (2000). Nevada has not even mentioned the "touch and concern" doctrine since 1963. *See City of Reno v. Matley*, 378 P.2d 256, 260 (Nev. 1963). Even in that case, however, the Court slid easily past that requirement to focus on the "intention of the parties," noting extensive criticism of the strict, traditional approach. *Id.* at 260–61. And since then, Nevada has expressly adopted the "flexible approach" of Third Restatement over the "rigid traditional rule" in other areas,[17] including the certified question in *this case*, *see Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, 345 P.3d 1040, 1043, 1044 (Nev. 2015) (approving § 3.3 cmt. b, which takes a pragmatic view of the rule against perpetuities). Given Nevada's evolution, there is no reason to resurrect the 19th-century test.

B. Substantial Evidence Supports Bullion's Position that an Area-of-Interest Provision Runs with the Land

Bullion's motion demonstrates (at pages 22–28) that an area-of-interest

[17] *St. James Vill., Inc. v. Cunningham*, 210 P.3d 190, 195 (2009) (adopting § 4.8 because of the reasonable balance the modern rule achieves); *see also, e.g.*, *Double Diamond Ranch Master Ass'n v. Second Judicial Dist. Court*, 354 P.3d 641, 645 & n.4 (Nev. 2015) (approving § 6.19); *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 215 P.3d 449, 457–58 (Nev. 2009) (adopting § 6.11); *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court*, 291 P.3d 128, 134–35 (Nev. 2012) (same).

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provision runs with the land under both the traditional and modern approaches.[18] Because of that, such a provision "will apply as long as a party to the agreement, or a successor to its interest, continues to own the burdened interest." William B. Burford, *Operating Agreements, Farmouts, Term Assignments, AMIs, Reassignment Obligations, and Rights of First Refusal*, *in* ROCKY MTN. MIN. L. INST., ADVANCED MINERAL TITLE EXAMINATION: OIL, GAS, AND MINING, Paper 6, at 6-16 (2014).

Barrick's contrary arguments fail as a matter of law. Even if Barrick's reading were colorable, however—that the parties did *not* intend the area-of-interest royalty to run with the land—Bullion has extrinsic evidence that shows the opposite, and a reasonable jury could believe it.

1. A Jury Could Find that the Parties Intended the Covenant to Run with the Land

Under the modern rule, the parties' intent is enough to show that the area-of-interest provision runs with the land. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.2 & reporter's note (2000).

Here, the 1979 agreement shows that the parties treated Bullion's area-of-interest royalty as one of the bundle of rights that would bind anyone who purchased the mineral rights in the subject property. The parties made it easy for Universal to transfer its interest to another (*see* Barrick 1: 1979 Agreement para. 19), but expressly bound that successor to the terms of the agreement, including the area-of-interest provision:

> 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.) That kind of language is presumed to create a covenant running with the land. *See* 21 C.J.S. *Covenants* § 33 (updated 2015). Barrick tries to

[18] Bullion incorporates the arguments in its motion by reference.

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limit this provision to the payment of royalties on the original mining claims in paragraph 4 (Doc. 161, at 29–30), but by the provision's express language it applies to *all* "[t]he terms and conditions of this Agreement."[19]

If that provision is unclear, then whether the parties thought the "terms and conditions" included the payment of area-of-interest royalties is a jury question. The absence of any specific discussion of that provision in subsequent transfers strongly suggests that it was just part of the property package. (*See, e.g.*, Barrick 12: 1984 Little Don Venture §§ 5.1(a)(i)) 6.1–6.2, 8.2(e) & Ex. F (Nicor's agreement to "make or arrange for *all payments* required by the Existing Agreements" (emphasis added), including the 1979 Agreement; Barrick 14: 1986 Amended Little Don (Bullion-Monarch) Venture §§ 5.1(c)(i), § 6.1, 8.2(e), art. 13, Ex. F, Ex. G; Barrick 17: [redacted]

The paragraph 4 royalty, in any case, includes royalties from the area of interest. While Barrick assumes that purchases in the area of interest do not join the "subject property" for purposes of Bullion's royalty (Doc. 161, at 29), the contract says otherwise. If Polar does not pay half of Universal's acquisition costs, those properties "shall not become part of the Subject Property *as they*

[19] Barrick makes the strawman argument that "a party cannot assume 'all of the obligations under a contract'"—i.e., the reciprocal promises made by both sides—because that would make the contract a "nullity." (Doc. 161, at 31.) True enough, but a successor can certainly assume *all* of her predecessor's obligations, which is exactly what paragraph 18 says. As Universal's successor, Barrick is bound to all the "terms and conditions" that originally bound Universal.

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apply to POLAR-CAMSELL," but they remain "subject to *the* royalty interest." (Barrick 1: 1979 Agreement para. 11 (emphasis added).) In other words, Polar is excused from paying "*the* royalty"—referring to the royalty created in paragraph 4—that it would normally share with Universal. Paragraph 11, however, does not *create* a separate royalty or even state its percentage, but rather confirms that the paragraph 4 royalty applies to area-of-interest properties.

In addition, Bullion confirmed that area-of-interest property would be "deemed 'Subject Property' as covered by and referred to in Paragraph 4." (App 12: Aug. 21, 1997 McAllister Letter.) So even under Barrick's reading that only the obligations of paragraph 4 run with the land, a jury could find that paragraph 4 encompasses the area-of-interest royalty.

2. The Parties are in Privity

If the privity requirement remains in force, Bullion has satisfied it. The relevant property in which the parties share an interest is Bullion's original mining claims. Bullion was in privity with Universal, to whom Bullion deeded its property in exchange for the area-of-interest royalty. (Barrick 1: 1979 Agreement paras. 7, 11.) And through Nicor and Polar, Universal is in vertical privity with Barrick, who at one point purchased all of the original claims, then acquired mineral properties within the area of interest.

Barrick says there is no privity, but it is looking at the wrong property. Barrick ignores the landmark case on this question, *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, which found privity by looking to the interests given in *exchange* for the area-of-interest royalty, not at the area of interest itself. 637 S.W.2d at 905. Instead, Barrick relies heavily on one trial court's discussion of privity to suggest that Bullion needed to *own* area-of-interest properties before obtaining a royalty. (Doc. No. 161, at 25 (citing *Mountain W. Mines, Inc. v. Cleveland-Cliffs Iron Co.*, 376 F. Supp. 2d 1298, 1307 (D. Wyo. 2005), *rev'd*, 470 F.3d 947

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(10th Cir. 2006)).) That decision tried to apply *Westland Oil* but instead misinterpreted it. The trial court said "[Westland] had an interest in the [area-of-interest] land when the covenant was made" (*id.*), but that's not true. Westland did not yet have an interest in the area-of-interest leases; it had only a contractual promise that *after* it performed (by drilling a well), it could earn a half-interest in the lease. *Westland Oil*, 637 S.W.2d at 905. Westland assigned what it had to a third party, whose successor ultimately obtained the interest in the lease. Westland prevailed against the successor only because the area-of-interest provision entitled Westland to rights in the "acqui[sition of] any *additional* leasehold interests"—implying that the interest it sought was different from the one it initially assigned. *Id.* (emphasis added).

Regardless, Barrick's case is of dubious precedential value. Had the trial court correctly interpreted the privity requirement, it would have been easy to affirm on those grounds. *Cf. Grimes v. Walsh & Watts, Inc.*, 649 S.W.2d 724, 728 (Tex. Ct. App. 1983) (addressing privity rather than intent). Instead, the court of appeals undertook the more complicated "intent" analysis without addressing privity. *Mountain W. Mines, Inc. v. Cleveland-Cliffs Iron Co.*, 470 F.3d 947, 953 n.1 (10th Cir. 2006).[20]

3. The Area-of-Interest Provision Touches and Concerns Land

An area-of-interest provision touches and concerns land because it "clearly affect[s] the nature and value of the estate." *Westland Oil*, 637 S.W.2d at 911. Barrick argues otherwise, alleging that the area-of-interest provision does not increase Bullion's royalty on production from the "subject property." (Doc.

[20] The Tenth Circuit, unlike the trial court, was not "astound[ed]" by the plaintiff's argument, and reversed and remanded the sanctions order. *Id.* at 954. This Court should disregard Barrick's invitation (at page 27) to adopt this reversed point.

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161, at 21–22.) This view is myopic. It ignores that the area-of-interest provision made the joint venture possible in the first place, which is what makes Bullion's royalty interest valuable:

> The [area-of-interest provision] operates directly to facilitate 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.

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).[21] In other words, 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 financial wherewithal in exchange for an area-of-interest royalty. And the prospector's promise not to compete in the area surrounding the original properties 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. It thus "provides a necessary advantage to realizing the profit from the estate." *Id.* at 264. Were it not for the area-of-interest provision, Bullion's royalty interest in the subject property would be significantly less valuable. It is this benefit to the land itself that makes an area-of-interest provision, like other noncompete agreements, run with the land. *Id.* at 253, 264 (citing *N. Pac. Ry. Co. v. McClure*, 81 N.W. 52, 55 (N.D. 1899)).

Barrick is misled by cases that do not involve the kind of limited area-of-interest provision or the public policy of encouraging production.

The unpublished *ECM v. Placer Dome* decisions discuss the *contract* doc-

[21] *Id.* at 260 ("[The area-of-interest provision] promised an increased return of initial investment and greatly increased the likelihood that developers would undertake the risk of developing the [property].")

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trine of good faith and fair dealing (24 F. App'x 821, 822 (9th Cir. 2001)) and an obligation to disclose mineral discoveries (147 F. App'x 668, 669 (9th Cir. 2005)). Neither topic is analogous to the *property* right of a mineral royalty,[22] and neither decision analyzes the touch-and-concern test in any detail. A dissent from the second decision, however, powerfully argues that the obligation to disclose mineral discoveries does run with the land because disclosure erases the "informational advantage," which in turn diminishes the land's value. 147 F. App'x at 670 (Bea, J., dissenting).

Vulcan Materials is likewise inapplicable. The court had already enforced a covenant that, like this one, required royalty payments from identified properties that the grantor had not yet acquired. *Miller v. Miss. Stone Co.*, 379 So. 2d 919 (Miss. 1980). The court's later opinion addressed a separate royalty, not within a specified area of interest, but on "any other business related to this industry." *Vulcan Materials Co. v. Miller*, 691 So. 2d 908, 910 (Miss. 1997). The grantor tried to enforce that royalty against a successor who acquired property that had never been described. And the court did enforce the royalty, but as a personal rather than a real covenant. *Id.* at 915. In any case, the *Vulcan Materials* decision is poorly reasoned: The traditional approach requires a benefit to the grantor's original interest (the "dominant estate"), not the grantee's after-acquired interest (the "servient estate"). *Id.* at 913–14 (citing 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 12 (1995)). Yet in applying the test, the court erroneously looked for a benefit to the after-acquired property. *Id.* at 914.

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[22] Mineral royalties are property interests that run with the land. *E.g.*, *Lyle v. Jane Guinn Revocable Trust*, 365 S.W.3d 341, 353 (Tex. App. 2010); *cf. GeoStar Corp. v. Parkway Petroleum, Inc.*, 495 N.W.2d 61, 67 (N.D. 1993) ("a royalty interest is real property"); *see generally* WEST'S ALR DIGEST MINES AND MINERALS k70(1).

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4. The Royalty Obligation also Runs with the Land in the Area of Interest

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. That party cannot escape the royalty obligation by simply getting rid of the subject property. The reason is that the acquisition is made possible by the area-of-interest provision's assurance of noncompetition. *See generally* Graham, *supra*, at 263–64. The benefits of that acquisition do not disappear when the party sells off the subject property, so neither should the royalty obligation.

5. Industry Practice is that the Area-of-Interest Royalty Runs with the Land

This Court can also look to the existence of a trade usage, whether or not the contract is ambiguous. *Galardi v. Naples Polaris, LLC*, 301 P.3d 364, 367–68 (Nev. 2013). Such evidence can defeat summary judgment. *Id.* (citing *Den Norske Bank AS v. First Nat'l Bank of Boston*, 75 F.3d 49, 58–59 (1st Cir. 1996)).

[redacted] the expert testified that an area-of-interest provision "runs with the underlying mining claims or fee land" (App. 14). That unrebutted testimony at least creates a jury question precluding summary judgment for Barrick.

C. There is a Certifiable Question whether Nevada Treats an Area-of-Interest Royalty as Anything other than a Real Covenant

If there is any question that Nevada would treat Bullion's area-of-interest royalty as a covenant running with the land, it should be certified to the Neva-

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da Supreme Court. NEV. R. APP. P 5. Because so little authority supports Barrick's view, and public policy opposes it, this Court should not presume that Nevada would adopt that position.

1. This is a Question of First Impression

Important and novel questions of state law are suitable for certification. *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003) (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 294 F.3d 1085, 1086 (9th Cir. 2002)). Here, Nevada has not addressed whether area-of-interest provisions are covenants running with the land. Nor has it addressed Barrick's theory that Bullion would have to present clear and convincing evidence.

2. This Court should Not Presume that Royalties Tied to Area-of-Interest Production are Purely Personal Obligations

In requesting summary judgment on the proposition that area-of-interest royalties are purely personal obligations, Barrick is asking this Court to rely mainly on one district-court decision. (Doc. No. 161, at 25 (citing *Mountain W. Mines, Inc.*, 376 F. Supp. 2d at 1307, *rev'd*, 470 F.3d 947).) That court's analysis was not adopted by the court of appeals, and the case has been cited just once, in a case where the parties stipulated that their area-of-interest provision did not run with the land. *See Golden v. SM Energy Co.*, 826 N.W.2d 610 (N.D. 2013) (citing *Mountain West* in passing).

Rather than follow that case, this Court should rely on *Westland Oil*, which has been cited hundreds of times and whose rationale has been tested over decades. In any case, this Court should not *presume* that Nevada would reject *Westland Oil* without allowing the Nevada Supreme Court to answer that question itself.

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III.

SUBSTANTIAL EVIDENCE SUPPORTS A FINDING OF UNJUST ENRICHMENT

A. Barrick's Argument against Unjust Enrichment Undermines its Argument against Contractual Liability

The only reason to reach Bullion's unjust-enrichment claim is a finding that Barrick has no contractual obligation. Yet to defeat unjust enrichment, Barrick now seems to argue that there *is* such an obligation, contradicting the rest of its motion. As the cases Barrick relies on demonstrate, Barrick is arguing in circles.

Barrick cites *Meritgage Homes of Nevada, Inc. v. FNBN-Rescon I, LLC*, for the proposition that Bullion's breach-of-contract claim defeats a claim for unjust enrichment. (Doc. 161, at 39 (citing 86 F. Supp. 3d 1130, 1146 (D. Nev. 2015)).) The court in *Meritage*, however, rejected a similar argument because it "overlooks the possibility that [a party] may plead unjust enrichment in the alternative by assuming the absence of a contract." *Id.* at 1146. That is what Bullion has done here: if the Court finds that there is no contractual relationship between Barrick and Bullion, then Bullion is entitled to recover the benefit Barrick has retained on a theory of unjust enrichment.

Barrick's reliance on *Leasepartners Corp. v. Robert L. Brooks Trust* for a similar proposition is equally misguided. There, the court *reversed* summary judgment on the grounds Barrick advocates. 942 P.2d 182, 187 (Nev. 1997). The existence of one contract between the defendant and a third party and another between the plaintiff and the third party did not preclude the plaintiff's unjust-enrichment claim against the defendant. *Id.* at 187 (citing *Lipshie v. Tracy Inv. Co.*, 566 P.2d 819 (Nev. 1977); 66 AM. JUR. 2D *Restitution* § 11 (1973)). Here, if Barrick is correct that (1) Bullion contracted with Universal,

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and (2) Universal's successor contracted with Barrick's predecessor, but (3) Barrick never assumed Universal's contractual obligations to Bullion, then Bullion's unjust-enrichment claim is proper.

B. There is Substantial Evidence that Barrick Unjustly Retained Benefits—the Revenue from Production that Bullion Facilitated and Royalties that Barrick has Not Paid

Barrick's argument against unjust enrichment on the merits is just one conclusory sentence:

> There is no evidence that New Bullion or Old Bullion conferred upon [Barrick], or that [Barrick] appreciated, accepted, and unjustly retained such a benefit.

(Doc. 161, at 40.) Even if that were a sufficient argument, substantial evidence contradicts it.

Facilitating a business transaction is a sufficient benefit to support an unjust enrichment claim. In *Custom Teleconnect, Inc. v. International Tele-Services, Inc.*, for example, this Court denied summary judgment on the plaintiff's claim that it had delivered a customer to the defendant. 254 F. Supp. 2d 1173, 1181 (D. Nev. 2003). Even though the plaintiff *also* argued that the defendant's work with the customer breached a nondisclosure agreement, the business opportunity was an independent benefit for unjust enrichment. *Id.*

Here, Bullion conferred a significant business advantage on Barrick, which Barrick has accepted and enjoyed without compensating Bullion. Bullion relinquished its valuable mining claims and promised to refrain from prospecting in the area of interest through 2078. Robert D. Morris was one of the earliest prospectors in the Carlin Trend, which includes the area of interest. [redacted] Barrick thus obtained a benefit not just in Bullion's original mineral properties, but also in the ability—

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facilitated by Bullion's exclusion from the area of interest—to expand the mine into a valuable venture. *See* Graham, *supra*, at 263–64. [redacted] The result of Bullion's forbearance is production in the area of interest, from which Barrick has earned revenue but has paid no royalties. Barrick has thus accepted all of the benefits of the area-of-interest scheme enacted in the 1979 agreement but has incurred none of its costs. The 1% royalty rightfully belongs to Bullion. A reasonable jury could find that Barrick unjustly retained the benefit of the additional revenue.

IV.

THE 1993 LITIGATION DID NOT EXTINGUISH BULLION'S AREA-OF-INTEREST ROYALTY

Barrick asserts what appears to be an argument for claim preclusion based on a default judgment from 1993. (Doc. 161, at 12–13.) [redacted] Court ruled that the 1993 judgment did not preclude a later action seeking area-of-interest royalties. (*Id.* at 13–15.)

Even if there were a question about the scope of that judgment, Bullion confirmed in 1997 that it could continue to assert an area-of-interest royalty. Area-of-interest property would be "deemed 'Subject Property' as covered by and referred to in Paragraph 4" (App. 12: Aug. 21, 1997 McAllister Letter), which is the paragraph that expressly survived the 1993 judgment (Barrick 30: Judgment ¶ 1).

CONCLUSION

Barrick is trying to deprive Bullion of its bargained-for royalty based on a

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strained reading of the law and facts. Substantial evidence supports Bullion's position that Barrick's predecessors intended to, and did, assume the royalty to Bullion. Barrick's motion for summary judgment should be denied.

Dated this 2nd day of November, 2015.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5 and Local Rule 5-4, I certify that I served the foregoing BULLION MONARCH'S OPPOSITION TO SUMMARY JUDGMENT ON LACK OF OBLIGATION UNDER THE 1979 AGREEMENT through the United States District Court's CM/ECF system electronic mail.

Dated this 2nd day of November, 2015.

s/ Richard P. McCann
An Employee of Lewis Roca Rothgerber LLP

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

000379

BULLION MONARCH MINING, INC., Plaintiff, v. NEWMONT USA LTD., *et al.*, Defendants.	Case No. CV-N-08-00227-ECR-VPC **ANSWER OF BARRICK GOLDSTRIKE MINES INC. TO AMENDED COMPLAINT**

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Defendant Barrick Goldstrike Mines Inc. ("Goldstrike"), by and through undersigned counsel, answers and responds to Plaintiff Bullion Monarch Mining, Inc.'s ("Bullion") Amended Complaint [Jury Trial Demanded] ("Amended Complaint") as follows:

ANSWER

Goldstrike admits, denies, or otherwise responds to the numbered allegations of the Bullion's Amended Complaint as follows:

1. Admit.

2. Admit.

2A. Goldstrike admits that Barrick Gold Corporation ("BGC") is a Canadian company but denies that BGC has done any business in Nevada at any time relevant to this lawsuit. Goldstrike admits that it is a Colorado corporation and that it has been doing business in Nevada at all times relevant hereto.

3. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 3 of the Amended Complaint and therefore denies the same.

4. Goldstrike admits that various parties entered into a document entitled "Agreement" on or about May 10, 1979 (the "1979 Agreement"), and admits that a copy of that agreement is attached to the Amended Complaint as Exhibit 1. Goldstrike asserts that the 1979 Agreement speaks for itself and denies the allegations and characterizations set forth in paragraph 4 of the Amended Complaint. Goldstrike specifically denies that Bullion is a lawful successor in interest to the Bullion Monarch Company named as a party in the 1979 Agreement and asserts, on information and belief, that Bullion is a new company without standing to enforce the terms of the 1979 Agreement. Goldstrike lacks knowledge or information sufficient to form a belief as to the allegation that Newmont USA Limited dba Newmont Mining Corporation ("Newmont") is a successor in interest to Universal Explorations, Ltd., and Universal Gas, Inc., and therefore denies those allegations. Goldstrike denies each and every allegation contained in paragraph 4 of the Amended Complaint that is not specifically admitted herein.

5. Goldstrike asserts that the 1979 Agreement speaks for itself and denies the allegations and characterizations set forth in paragraph 5 of the Amended Complaint. Goldstrike admits that the "Area of Interest" set forth in the 1979 Agreement is located in Eureka and Elko Counties in the State of Nevada (hereinafter, the "Area of Interest"). Goldstrike denies each and every allegation contained in paragraph 5 of the Amended Complaint that is not specifically admitted herein.

6. Goldstrike asserts that the 1979 Agreement speaks for itself and denies the allegations and characterizations set forth in paragraph 6 of the Amended Complaint. Goldstrike denies each and every allegation contained in paragraph 6 of the Amended Complaint that is not

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specifically admitted herein.

7. Goldstrike asserts that the 1979 Agreement speaks for itself and denies the allegations and characterizations set forth in paragraph 7 of the Amended Complaint. Goldstrike denies each and every allegation contained in paragraph 7 of the Amended Complaint that is not specifically admitted herein.

8. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 8 of the Amended Complaint and therefore denies the same.

9. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 9 of the Amended Complaint and therefore denies the same.

9A. Goldstrike admits that High Desert Mineral Resources of Nevada, Inc. ("High Desert"), entered into a joint venture agreement with Newmont on or about December 13, 1991 (the "Newmont HD Joint Venture"), asserts that that agreements governing the Newmont HD Joint Venture speak for themselves, and denies the allegations and characterizations of such agreements set forth in paragraph 9A of the Amended Complaint. Goldstrike denies each and every allegation contained in paragraph 9A of the Amended Complaint that is not specifically admitted herein.

9B. Goldstrike admits that a transaction occurred in 1995 pursuant to which High Desert merged with another Barrick entity, that the surviving corporation became Barrick HD, Inc. ("Barrick HD"), and that at the conclusion of the merger, Barrick HD held a 38% interest in the Newmont HD Joint Venture. Goldstrike asserts that the agreements governing the merger speak for themselves and denies the allegations and characterizations of the merger set forth in paragraph 9B of the Amended Complaint. Goldstrike further admits that Barrick HD merged into Goldstrike in 1999. Goldstrike asserts that the documents effectuating Barrick HD's merger into Goldstrike speak for themselves and denies the allegations and characterizations of the merger set forth in paragraph 9B of the Amended Complaint. Goldstrike admits that it is the corporate successor to High Desert but asserts that in 1999, the Newmont HD Joint Venture was terminated

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and it conveyed away all mining claims and property rights acquired in the High Desert merger. Goldstrike denies that BGC is in any way the successor in interest to High Desert and denies that BGC is a proper party to this litigation.

Goldstrike denies that it (Goldstrike) is responsible for any royalties or obligations due Bullion pursuant to the 1979 Agreement and denies that it is a proper party to this litigation. Goldstrike specifically asserts (i) that its alleged liability under the 1979 Agreement is premised entirely on the liability of High Desert, (ii) that, on information and belief, High Desert acquired the mining claims and other property rights that were the subject of the Newmont HD Joint Venture through quit claim or other deeds, and (iii) that there are no facts alleged in the Complaint that are sufficient to establish High Desert (and thus Goldstrike) is successor to any of the parties in the 1979 Agreement. Goldstrike also asserts that all mining claims and property rights

Goldstrike denies each and every allegation contained in paragraph 9B of the Amended Complaint that is not specifically admitted herein.

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10. Denied with respect to Goldstrike and BGC. Goldstrike specifically asserts that Bullion and Goldstrike are both citizens of the same state and that this Court therefore lacks subject matter jurisdiction over this dispute. Goldstrike further asserts that BGC is a Canadian corporation with its principal place of business in Toronto, Canada, and that BGC is not a citizen of any state. Goldstrike is without knowledge or information sufficient to form a belief as to whether the amount in controversy exceeds $75,000 and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 10 of the Amended Complaint that is not specifically admitted herein.

11. Goldstrike realleges and incorporates herein by reference its answers and responses to paragraphs 1 through 10 of the Amended Complaint as set forth above.

12. Admit. Goldstrike specifically asserts, however, that neither BGC nor Goldstrike owe any royalty obligations to Bullion, under the 1979 Agreement or otherwise.

13. Goldstrike admits that Bullion and Defendants have adverse legal positions with respect to this lawsuit. Goldstrike denies that Bullion has any legally protectible interest as to

whether it is entitled to a royalty and/or other compensation for mining activities and production from within the Area of Interest. Goldstrike specifically asserts, on information and belief, that Bullion is an entirely new and separate legal entity from the entity that was a party to the 1979 Agreement and denies that Bullion has any legal rights under the 1979 Agreement. Goldstrike further asserts that neither BGC nor Goldstrike owe any royalty obligations to Bullion, under the 1979 Agreement or otherwise. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 13 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 13 of the Amended Complaint that is not specifically admitted herein.

14. Admit.

15. Goldstrike admits that Bullion seeks a declaratory judgment but denies that Bullion is entitled to any such judgment against Goldstrike or BGC. Goldstrike specifically denies that Bullion is entitled to any royalties from Goldstrike or BGC relating to production from within the Area of Interest, pursuant to the 1979 Agreement or otherwise. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 15 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 15 of the Amended Complaint that is not specifically admitted herein.

16. Goldstrike realleges and incorporates herein by reference its answers and responses to paragraphs 1 through 15 of the Amended Complaint as set forth above.

17. Denied with respect to Goldstrike and BGC. Goldstrike specifically denies the suggestion that Bullion is a "party" to the 1979 Agreement. Goldstrike further denies any suggestion that Goldstrike or BGC are "parties" to the 1979 Agreement and denies that Goldstrike or BGC are obligated to pay Bullion any royalties on mining activities, pursuant to the 1979 Agreement or otherwise. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 17 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 17 of the Amended Complaint that is not specifically admitted herein.

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18. Denied with respect to Goldstrike and BGC. Goldstrike denies the suggestion that Bullion is a "party" to the 1979 Agreement. Goldstrike further denies any suggestion that Goldstrike or BGC are "parties" to the 1979 Agreement, and denies that Goldstrike or BGC have any obligations under the 1979 Agreement which could be breached. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 18 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 18 of the Amended Complaint that is not specifically admitted herein.

19. Denied with respect to Goldstrike and BGC. Goldstrike specifically denies the suggestion that Bullion is a "party" to the 1979 Agreement. Goldstrike further denies any suggestion that Goldstrike or BGC are "parties" to the 1979 Agreement, denies that Goldstrike or BGC have any obligations under the 1979 Agreement that could be breached, and denies that Goldstrike or BGC are liable to Bullion for any damages. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 19 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 19 of the Amended Complaint that is not specifically admitted herein.

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20. Denied with respect to Goldstrike and BGC. Goldstrike specifically denies the suggestion that Goldstrike or BGC are "parties" to the 1979 Agreement and denies that Goldstrike or BGC had any obligations under the 1979 Agreement which could be breached. Goldstrike further denies that Bullion is a "party" to the 1979 Agreement, denies that Bullion had any legitimate basis to assert claims against Goldstrike or BGC under the 1979 Agreement, and denies that Bullion has any right to recover its attorneys' fees against Goldstrike or BGC, under the 1979 Agreement or otherwise. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 20 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 20 of the Amended Complaint that is not specifically admitted herein.

21. Goldstrike realleges and incorporates herein by reference its answers and

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responses to paragraphs 1 through 20 of the Amended Complaint as set forth above.

22. Admit.

23. Admit.

24. Denied with respect to Goldstrike and BGC. Goldstrike specifically denies the suggestion that Bullion is a "party" to the 1979 Agreement. Goldstrike further denies any suggestion that Goldstrike or BGC are "parties" to the 1979 Agreement and denies that Goldstrike or BGC have any obligations under the 1979 Agreement, implied or otherwise, that could be breached. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 24 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 24 of the Amended Complaint that is not specifically admitted herein.

25. Denied with respect to Goldstrike and BGC. Goldstrike denies the suggestion that Bullion is a "party" to the 1979 Agreement. Goldstrike further denies any suggestion that Goldstrike or BGC are "parties" to the 1979 Agreement, denies that Goldstrike or BGC have any obligations under the 1979 Agreement, implied or otherwise, that could be breached, and denies that Goldstrike or BGC are liable to Bullion for any damages. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 25 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 25 of the Amended Complaint that is not specifically admitted herein.

26. Goldstrike realleges and incorporates herein by reference its answers and responses to paragraphs 1 through 25 of the Amended Complaint as set forth above.

27. Denied with respect to Goldstrike and BGC. Goldstrike specifically denies that Bullion, which is, upon information and belief, a newly formed and wholly separate entity from the Bullion Monarch Company identified as a party to the 1979 Agreement, has any established claims in the Area of Interest or refrained from conducting any mining or exploration activities in the Area of Interest. Goldstrike further denies any suggestion that Goldstrike or BGC are "parties" to the 1979 Agreement and denies that Goldstrike or BGC have any obligations under

the 1979 Agreement, implied or otherwise. Goldstrike further denies that Bullion "allowed" Goldstrike or any of its predecessors in interest to explore and mine in the Area of Interest and specifically asserts that Bullion had no right, under the 1979 Agreement or otherwise, to prevent such exploration and mining. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 27 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 27 of the Amended Complaint that is not specifically admitted herein.

28. Denied with respect to Goldstrike and BGC. Goldstrike specifically denies that Bullion, which is, upon information and belief, a newly formed and wholly separate entity from the Bullion Monarch Company identified as a party to the 1979 Agreement, had any property rights in the Area of Interest or refrained from conducting exploration/mining activities in the Area of Interest. Goldstrike further denies any suggestion that Goldstrike or BGC are "parties" to the 1979 Agreement or otherwise accepted or obtained anything of value from Bullion. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 28 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 28 of the Amended Complaint that is not specifically admitted herein.

29. Denied with respect to Goldstrike and BGC. Goldstrike specifically denies that Bullion, which is, on information and belief, a newly formed and wholly separate entity from the Bullion Monarch Company identified as a party to the 1979 Agreement, relinquished any property rights and exploration and mining rights in the Area of Interest, pursuant to the 1979 Agreement or otherwise, or has any reasonable expectation to be paid any royalty for production from the Area of Interest.

30. Denied with respect to Goldstrike and BGC. Goldstrike specifically denies that Goldstrike or BGC have been enriched, in any way, by Bullion or that Bullion is entitled to be paid anything by Goldstrike or BGC. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 30 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation

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contained in paragraph 30 of the Amended Complaint that is not specifically admitted herein.

31. Denied with respect to Goldstrike and BGC. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 31 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 31 of the Amended Complaint that is not specifically admitted herein.

32. Denied with respect to Goldstrike and BGC. Goldstrike specifically denies that Goldstrike or BGC have been unjustly enriched, in any way, and further denies that Goldstrike or BGC owe Bullion any compensation. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 32 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 32 of the Amended Complaint that is not specifically admitted herein.

33. Denied with respect to Goldstrike and BGC. Goldstrike specifically denies that Bullion had any legitimate basis to assert claims against Goldstrike or BGC in this lawsuit and denies that Bullion has any right to recover its attorneys' fees in this case. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 33 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 33 of the Amended Complaint that is not specifically admitted herein.

34. Goldstrike realleges and incorporates herein by reference its answers and responses to paragraphs 1 through 33 of the Amended Complaint as set forth above.

35. Goldstrike admits that Bullion seeks an accounting but denies that Goldstrike owes Bullion any royalties for Goldstrike's mining activities in the Area of Interest. Goldstrike further denies that BGC conducts any mining activities in the Area of Interest or otherwise owes any royalties to Bullion. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 35 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 35 of the Amended Complaint that is not specifically admitted herein.

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36. Goldstrike admits that Bullion's Amended Complaint makes a demand upon Goldstrike to provide accounting records for its mining activities in the Area of Interest, and that Goldstrike refuses to provide the same, but denies that Bullion is entitled to any such accounting records. Goldstrike further admits that Bullion's Amended Complaint makes a demand upon BGC to provide accounting records for its mining activities in the Area of Interest, but denies that BGC conducts any mining activities in the Area of Interest, and further denies that BGC owes Bullion any royalties. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 36 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 36 of the Amended Complaint that is not specifically admitted herein.

37. Goldstrike admits that Bullion seeks an order from this Court directing Defendants to provide an accounting of their mining activities in the Area of Interest but denies that Bullion is entitled to any such accounting vis-à-vis Goldstrike or BGC. Goldstrike specifically denies the assertion that BGC had conducted any mining activities in the Area of Interest. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 37 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 37 of the Amended Complaint that is not specifically admitted herein.

38. Denied with respect to Goldstrike and BGC. Goldstrike specifically denies that Bullion had any legitimate basis to assert claims against Goldstrike or BGC in this lawsuit and denies that Bullion has any right to recover its attorneys' fees in this case. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 38 insofar as they are pled against Newmont and therefore denies the same. Goldstrike denies each and every allegation contained in paragraph 38 of the Amended Complaint that is not specifically admitted herein.

39. Goldstrike denies that Bullion is entitled to any of the relief requested against Goldstrike or BGC in the Amended Complaint, or any other relief, of any kind or nature whatsoever.

40. Goldstrike generally denies each and every allegation contained within the Amended Complaint that is asserted against Goldstrike or BGC but is not expressly admitted herein.

FIRST AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over this matter because Bullion and Goldstrike are, upon information and belief, both citizens of the same state.

SECOND AFFIRMATIVE DEFENSE

Bullion's Amended Complaint fails to state claims against Goldstrike upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

Bullion lacks standing to assert any claims arising out of or relating to the 1979 Agreement because Bullion is not, upon information and belief, a party to the 1979 Agreement or a lawful successor in interest to or assignee of any party to the 1979 Agreement.

FOURTH AFFIRMATIVE DEFENSE

The 1979 Agreement cannot be enforced by Bullion because Bullion is not, upon information and belief, a party to the 1979 Agreement and has not, upon information and belief, provided any consideration thereunder.

FIFTH AFFIRMATIVE DEFENSE

Bullion's claims under the 1979 Agreement are, upon information and belief, barred and precluded due to the lack of mutuality of obligation.

SIXTH AFFIRMATIVE DEFENSE

Bullion's claims under the 1979 Agreement are, upon information and belief, barred and precluded due to a total or partial failure of consideration.

SEVENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded because Goldstrike is not a party to the 1979 Agreement or a lawful successor in interest to or assignee of any party to the 1979 Agreement.

EIGHTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are barred and precluded insofar as the covenants in the 1979 Agreement do not run with the land.

NINTH AFFIRMATIVE DEFENSE

The 1979 Agreement is void, and cannot be enforced by Bullion, insofar as the 1979 Agreement violates the rule against perpetuities.

TENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded by the doctrine of adverse possession.

ELEVENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded because the 1979 Agreement constitutes an unreasonable restraint on alienation.

TWELFTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded by the applicable statutes of limitation.

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THIRTEENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are barred and precluded insofar as Bullion Monarch failed to mitigate its damages.

FOURTEENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded by the doctrines of laches, waiver, estoppel, and/or unclean hands.

FIFTEENTH AFFIRMATIVE DEFENSE

Goldstrike is not liable under any alleged contract between Bullion and Universal Explorations, Ltd., and Universal Gas, Inc., because Goldstrike has not voluntarily assumed that alleged contract or any of its alleged provisions, terms, conditions, promises, or covenants.

SIXTEENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded by the doctrines of *res judicata*, collateral estoppel, issue preclusion, or claim preclusion.

SEVENTEENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded because of the failure of privity of contract.

EIGHTEENTH AFFIRMATIVE DEFENSE

Goldstrike reserves the right to modify its defenses or set forth additional affirmative defenses as they become known to Goldstrike during the course of these proceedings.

WHEREFORE, Goldstrike prays that all of Bullion's claims against Goldstrike be dismissed, with prejudice.

Dated: July 16, 2009

PARSONS BEHLE & LATIMER

By: _____
Michael R. Kealy
Francis M. Wikstrom
Michael P. Petrogeorge
Brandon J. Mark
Attorneys for Defendants Barrick Gold Corporation and Barrick Goldstrike Mines Inc.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Parsons Behle & Latimer, and that on the 16th day of July, 2009, a true and correct copy of the foregoing ANSWER OF BARRICK GOLDSTRIKE MINES, INC. TO AMENDED COMPLAINT was served via the Court's CM/ECF system, as follows:

Clayton P. Brust, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

Matthew B. Hippler, Esq.
Shane M. Biornstad, Esq.
Holland & Hart, LLP
5441 Kietzke Lane, Suite 200
Reno, Nevada 89511

Tracy Brown
Employee of Parsons Behle & Latimer

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EXHIBIT 7

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EXHIBIT 7

Clayton P. Brust, Esq. (SBN 5234)
ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, Nevada 89503
Tele: 775.329.3151
Facsimile: 775.329.7941
Attorneys for Plaintiff
Bullion Monarch Mining, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BULLION MONARCH MINING, INC., a Utah corporation,

Plaintiff,

vs.

BARRICK GOLDSTRIKE MINES, INC. and DOES I-X, inclusive,

Defendant(s).
_____/

CASE NO. **CV-N-09-00612-ECR-VPC**

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SECOND 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.

2A. Barrick Goldstrike Mines, Inc. ("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" or the "1979 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 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

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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.

9A. (i) On or about April 26, 1990, High Desert Mineral Resources of Nevada, Inc., ("High Desert") entered into an Option Agreement with Bullion-Monarch Joint Venture, which granted to High Desert the option to acquire all of the Exhibit A-1 Subject Properties under the May 10, 1979, Agreement; further, pursuant to the terms of said Option Agreement, in the event 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 terms of the May 10, 1979 Agreement.

(ii) On or about July 10, 1990, High Desert did exercise the Option as provided for by said Option Agreement, and became subject to all of the terms, obligations, and conditions of the May 10, 1979 Agreement, including paragraph 11, 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

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terms of the May 10, 1979 Agreement.

9B. 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.

9C. Between July 10, 1990, and the current date, upon information and belief, Barrick has 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, Barrick and/or mineral properties in which Barrick 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 described in Exhibit A-2 to the 1979 Agreement.

9D. Between December 23, 1991, and the current date, upon information and belief, Barrick has entered into various agreements with Newmont; as a result of these agreements, Barrick and/or mineral properties in which Barrick 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 properties since these properties are located within the Area of Interest described in Exhibit A-2 to the 1979 Agreement.

9E. Barrick, through a succession of companies, including, but not limited to Barrick HD Inc., is the successor in interest to High Desert Mineral Resources of

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Nevada, Inc. because in or about 1995, Barrick acquired and/or merged with High Desert Mineral Resources of Nevada, Inc. (The "Merger") with Barrick being the surviving company. As a result of the Merger, Barrick 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. Further, since Barrick is the corporate successor to High Desert Mineral Resources of Nevada, Inc., Barrick is responsible for all royalties and obligations due Bullion pursuant to the May 10, 1979 Agreement.

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

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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 1979 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 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.

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

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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;

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 19th day of February, 2010.

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 **SECOND AMENDED COMPLAINT [Jury Trial Demanded]** to be served on all parties to this action by:

X 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

Parsons Behle & Latimer
Michael P. Petrogeorge, Esq.
Brandon J. Mark, Esq.
Francis Wikstrom, Esq.
201 South Main Street, Ste. 1800
Salt Lake City, UT 84111

Parsons Behle & Latimer
Michael Kealy, Esq.
50 West Liberty St., Ste. 750
Reno, NV 89501

Attorneys for Defendant Barrick Goldstrike Mines, Inc.

Dated this 19th day of February, 2010.

Employee of Robison, Belaustegui, Sharp & Low

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

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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:

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.

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

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

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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: PRESIDENT

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

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

000422

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

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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 executedthe 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. L. 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

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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

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

EXHIBIT A-2
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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	"	"

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

EXHIBIT A-1
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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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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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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

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[redacted]

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:

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[redacted]

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

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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.
SPOB, 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

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LAMBERT MANAGEMENT LTD.

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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
President

KHL/rs
Enc.

Accepted this 17th day of April, 1979

POLAR RESOURCES LTD.

PER: _____ BOOK 71 PAGE 37

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EXHIBIT 8

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EXHIBIT 8

PARSONS BEHLE & LATIMER

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Telephone: (775) 323-1601
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Francis M. Wikstrom (Utah Bar No. 3462; admitted *pro hac vice*)
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Facsimile: (801) 536-6111
Email: ecf@parsonsbehle.com

Attorneys for Barrick Goldstrike Mines Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

000436

BULLION MONARCH MINING, INC.,

Plaintiff,

v.

BARRICK GOLDSTRIKE MINES INC., *et al.*,

Defendants.

Case No. 3:09-cv-0612-ECR-VPC

BARRICK GOLDSTRIKE MINES INC.'S ANSWER TO SECOND AMENDED COMPLAINT

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Defendant Barrick Goldstrike Mines Inc. ("Goldstrike") answers and responds to Plaintiff Bullion Monarch Mining, Inc.'s ("Bullion") Second Amended Complaint [Jury Trial Demanded] ("SAC") as follows:

ANSWER

Goldstrike admits, denies, or otherwise responds to the numbered allegations of Bullion's SAC as follows:[1]

[1] Bullion's Amended Complaint included Barrick Gold Corporation ("BGC") as a defendant. Bullion later voluntarily dismissed its claims against BGC, and BGC is not identified as a defendant in the SAC. As such,

1. Admit.

2. Admit. Barrick notes, however, that Newmont USA Limited ("Newmont") is not a party in the pending action.

2A. Admit.

3. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 3 of the SAC and, therefore, denies the same. Goldstrike asserts, however, that the deadline for amending pleadings was February 24, 2010, and that Bullion should not be allowed to further amend, for the purpose of adding additional parties or otherwise.

4. Goldstrike admits that various parties entered into a document entitled "Agreement" on or about May 10, 1979 (the "1979 Agreement"), and admits that an incomplete copy of that agreement is attached to the SAC as Exhibit 1. Goldstrike specifically asserts that the copy of the Agreement attached thereto is not the same as the version of the Agreement recorded with the Eureka County Recorder's Office, and that the copy of the Agreement attached to the SAC does not contain all of the exhibits attached to the version of the Agreement recorded with the Eureka County Recorder's Office. Goldstrike asserts that the 1979 Agreement speaks for itself and denies the allegations and characterizations set forth in paragraph 4 of the SAC. Goldstrike specifically denies that Bullion is a lawful successor in interest to the Bullion Monarch Company named as a party in the 1979 Agreement and asserts, on information and belief, that Bullion is a new company without standing to enforce the terms of the 1979 Agreement. Goldstrike lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that Newmont is a successor in interest to Universal Explorations, Ltd., and Universal Gas, Inc., and, therefore, denies those allegations. Goldstrike specifically notes, however, that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 4 of the SAC that is not specifically admitted herein.

Goldstrike does not read any of the allegations in the SAC as applying to BGC. Insofar as Bullion intended any of the allegations in the SAC to apply to BGC, however, they are denied.

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5. Goldstrike asserts that the 1979 Agreement speaks for itself and denies the allegations and characterizations set forth in paragraph 5 of the SAC. Goldstrike admits that the "Area of Interest" set forth in the 1979 Agreement is located in Eureka and Elko Counties in the State of Nevada (hereinafter, the "Area of Interest"). Goldstrike denies each and every allegation contained in paragraph 5 of the SAC that is not specifically admitted herein.

6. Goldstrike asserts that the 1979 Agreement speaks for itself and denies the allegations and characterizations set forth in paragraph 6 of the SAC. Goldstrike denies each and every allegation contained in paragraph 6 of the SAC that is not specifically admitted herein.

7. Goldstrike asserts that the 1979 Agreement speaks for itself and denies the allegations and characterizations set forth in paragraph 7 of the SAC. Goldstrike denies each and every allegation contained in paragraph 7 of the SAC that is not specifically admitted herein.

8. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 8 of the SAC and, therefore, denies the same. Goldstrike notes, however, that Newmont is not a party in the pending action.

9. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 9 of the SAC and, therefore, denies the same. Goldstrike notes, however, that Newmont is not a party in the pending action.

9A(i). Goldstrike admits that High Desert Mineral Resources of Nevada, Inc. ("High Desert") executed an Option Agreement with the Bullion Monarch Joint Venture in April 1990, asserts that the Option Agreement speaks for itself, and otherwise denies the allegations and characterizations set forth in paragraph 9A(i) of the SAC. Goldstrike denies each and every allegation contained in paragraph 9A(i) of the SAC that is not specifically admitted herein.

9A(ii). Goldstrike admits that High Desert exercised the option granted it by the Option Agreement, asserts that the correspondence and other documents pursuant to which the option was exercised speak for themselves, and otherwise denies the allegations and characterizations set forth in paragraph 9A(ii) of the SAC. Goldstrike denies each and every allegation contained in paragraph 9A(ii) of the SAC not specifically admitted herein.

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9B. Goldstrike admits that High Desert entered into a joint venture agreement with Newmont on or about December 13, 1991 (the "Newmont HD Joint Venture"), asserts that agreements governing the Newmont HD Joint Venture speak for themselves, and denies the allegations and characterizations of such agreements set forth in paragraph 9B of the SAC. Goldstrike denies each and every allegation contained in paragraph 9B of the SAC that is not specifically admitted herein.

9C. Goldstrike admits that Goldstrike, its corporate predecessors, and/or its affiliates have entered into various agreements with High Desert, the principals of High Desert, and/or entities directly owned by or related to High Desert or its principals, asserts that those agreements speak for themselves, and otherwise denies the allegations and characterizations set forth in paragraph 9C of the SAC. Goldstrike denies each and every allegation contained in paragraph 9C of the SAC that is not specifically admitted herein, and specifically denies that it has any obligations under the 1979 Agreement, as a result of any agreements with High Desert, its principals, or affiliates or otherwise.

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9D. Goldstrike admits that it, its corporate predecessors, and/or its affiliates have entered into various agreements with Newmont, its corporate predecessors, and/or its affiliates, asserts that those agreements speak for themselves, and otherwise denies the allegations and characterizations set forth in paragraph 9D of the SAC. Goldstrike denies each and every allegation contained in paragraph 9D of the SAC that is not specifically admitted herein, and specifically denies that it has any obligations under the 1979 Agreement, as a result of any agreements with Newmont or otherwise.

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9E. Goldstrike admits that a transaction occurred in 1995 pursuant to which High Desert merged with another Barrick entity, that the surviving corporation became Barrick HD, Inc. ("Barrick HD"), and that at the conclusion of the merger, Barrick HD held a 38% interest in the Newmont HD Joint Venture. Goldstrike asserts that the agreements governing the merger speak for themselves and denies the allegations and characterizations of the merger set forth in paragraph 9E of the SAC. Goldstrike further admits that Barrick HD merged into Goldstrike in 1999. Goldstrike asserts that the documents effectuating Barrick HD's merger into Goldstrike

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speak for themselves and denies the allegations and characterizations of the merger set forth in paragraph 9E of the SAC. Goldstrike admits that it is the corporate successor to High Desert but asserts that in 1999, the Newmont HD Joint Venture was terminated and that Goldstrike conveyed away all mining claims and property rights acquired in the High Desert merger.

Goldstrike denies that Goldstrike is responsible for any royalties or obligations due Bullion pursuant to the 1979 Agreement and denies that Goldstrike is a proper party to this litigation. Goldstrike specifically asserts (i) that its alleged liability under the 1979 Agreement is premised entirely on the liability of High Desert, (ii) that, on information and belief, High Desert acquired the mining claims and other property rights that were the subject of the Newmont HD Joint Venture through quit claim or other deeds, (iii) that High Desert never assumed any of the obligations of any of the parties under the 1979 Agreement, and (iv) that there are no facts alleged in the SAC that are sufficient to establish that High Desert (and thus Goldstrike) is successor to any of the parties in the 1979 Agreement or is otherwise bound by the 1979 Agreement. Goldstrike denies each and every allegation contained in paragraph 9E of the SAC that is not specifically admitted herein.

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10. Denied with respect to Goldstrike. Goldstrike specifically asserts that Bullion and Goldstrike are both citizens of the same state and that this Court therefore lacks subject matter jurisdiction over this dispute. Goldstrike is without knowledge or information sufficient to form a belief as to whether the amount in controversy exceeds $75,000 and, therefore, denies the same. Goldstrike denies each and every allegation contained in paragraph 10 of the SAC that is not specifically admitted herein. Goldstrike notes, however, that Newmont is not a party in the pending action.

11. Goldstrike realleges and incorporates herein by reference its answers and responses to paragraphs 1 through 10 of the SAC as set forth above.

12. Admit. Goldstrike specifically asserts, however, that Goldstrike does not owe any royalty obligations to Bullion, under the 1979 Agreement or otherwise. Goldstrike also notes that Newmont is not a party in the pending action.

13. Goldstrike admits that Bullion and Goldstrike have adverse legal positions with respect to this lawsuit. Goldstrike denies that Bullion has any legally protectable interest as to whether it is entitled to a royalty and/or other compensation for mining activities and production from within the Area of Interest. Goldstrike specifically asserts, on information and belief, that Bullion is an entirely new and separate legal entity from the entity that was a party to the 1979 Agreement and denies that Bullion has any legal rights under the 1979 Agreement. Goldstrike further asserts that Goldstrike does not owe any royalty obligations to Bullion, under the 1979 Agreement or otherwise. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 13 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 13 of the SAC that is not specifically admitted herein.

14. Admit.

15. Goldstrike admits that Bullion seeks a declaratory judgment but denies that Bullion is entitled to any such judgment against Goldstrike. Goldstrike specifically denies that Bullion is entitled to any royalties from Goldstrike relating to production from within the Area of Interest, pursuant to the 1979 Agreement or otherwise. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 15 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 15 of the SAC that is not specifically admitted herein.

16. Goldstrike realleges and incorporates herein by reference its answers and responses to paragraphs 1 through 15 of the SAC as set forth above.

17. Denied with respect to Goldstrike. Goldstrike specifically denies the suggestion that Bullion is a "party" to the 1979 Agreement. Goldstrike further denies any suggestion that Goldstrike is a "party" to the 1979 Agreement and denies that Goldstrike is obligated to pay Bullion any royalties on mining activities, pursuant to the 1979 Agreement or otherwise. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity

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of the allegations in paragraph 17 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 17 of the SAC that is not specifically admitted herein.

18. Denied with respect to Goldstrike. Goldstrike denies the suggestion that Bullion is a "party" to the 1979 Agreement. Goldstrike further denies any suggestion that Goldstrike is a "party" to the 1979 Agreement, and denies that Goldstrike has any obligations under the 1979 Agreement that could be breached. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 18 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 18 of the SAC that is not specifically admitted herein.

19. Denied with respect to Goldstrike. Goldstrike specifically denies the suggestion that Bullion is a "party" to the 1979 Agreement. Goldstrike further denies any suggestion that Goldstrike is a "party" to the 1979 Agreement, denies that Goldstrike has any obligations under the 1979 Agreement that could be breached, and denies that Goldstrike is liable to Bullion for any damages. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 19 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 19 of the SAC that is not specifically admitted herein.

20. Denied with respect to Goldstrike. Goldstrike specifically denies the suggestion that Goldstrike is a "party" to the 1979 Agreement and denies that Goldstrike has any obligations under the 1979 Agreement which could be breached. Goldstrike further denies that Bullion is a "party" to the 1979 Agreement, denies that Bullion had any legitimate basis to assert claims against Goldstrike under the 1979 Agreement, and denies that Bullion has any right to recover its attorneys' fees against Goldstrike, under the 1979 Agreement or otherwise. Goldstrike specifically asserts that there is no statute, rule, or contractual provision that would allow Bullion

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to recover its fees and costs in this action. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 20 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 20 of the SAC that is not specifically admitted herein.

21. Goldstrike realleges and incorporates herein by reference its answers and responses to paragraphs 1 through 20 of the SAC as set forth above.

22. Admit.

23. Admit.

24. Denied with respect to Goldstrike. Goldstrike specifically denies the suggestion that Bullion is a "party" to the 1979 Agreement. Goldstrike further denies any suggestion that Goldstrike is a "party" to the 1979 Agreement and denies that Goldstrike has any obligations under the 1979 Agreement, implied or otherwise, that could be breached. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 24 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 24 of the SAC that is not specifically admitted herein.

25. Denied with respect to Goldstrike. Goldstrike denies the suggestion that Bullion is a "party" to the 1979 Agreement. Goldstrike further denies any suggestion that Goldstrike is a "party" to the 1979 Agreement, denies that Goldstrike has any obligations under the 1979 Agreement, implied or otherwise, that could be breached, and denies that Goldstrike is liable to Bullion for any damages. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 25 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 25 of the SAC that is not specifically admitted herein.

26. Goldstrike realleges and incorporates herein by reference its answers and responses to paragraphs 1 through 25 of the SAC as set forth above.

27. Denied with respect to Goldstrike. Goldstrike specifically denies that Bullion, which is, upon information and belief, a newly formed entity in 2004 and wholly separate from the Bullion Monarch Company identified as a party to the 1979 Agreement, has any established claims in the Area of Interest or was contractually required to refrain from conducting any mining or exploration activities in the Area of Interest. Insofar as Bullion refrained from doing anything in the Area of Interest it did so voluntarily, and not at the request of Goldstrike or any other party. Goldstrike further denies any suggestion that Goldstrike is a "party" to the 1979 Agreement and denies that Goldstrike has any obligations under the 1979 Agreement, implied or otherwise. Goldstrike further denies that Bullion or the Bullion Monarch Company identified as a party to the 1979 Agreement "allowed" Goldstrike or any of its predecessors in interest to explore and mine in the Area of Interest and specifically asserts that neither Bullion nor the Bullion Monarch Company identified as a party to the 1979 Agreement had any right, under the 1979 Agreement or otherwise, to prevent such exploration and mining by Goldstrike. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 27 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 27 of the SAC that is not specifically admitted herein.

28. Denied with respect to Goldstrike. Goldstrike specifically denies that Bullion, which is, upon information and belief, a newly formed and wholly separate entity from the Bullion Monarch Company identified as a party to the 1979 Agreement, had any property rights in the Area of Interest or refrained from conducting exploration/mining activities in the Area of Interest. Goldstrike further denies any suggestion that Goldstrike is a "party" to the 1979 Agreement or otherwise accepted or obtained anything of value from Bullion. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 28 insofar as they are pled against Newmont and, therefore, denies the

same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 28 of the SAC that is not specifically admitted herein.

29. Denied with respect to Goldstrike. Goldstrike specifically denies that Bullion, which is, on information and belief, a newly formed and wholly separate entity from the Bullion Monarch Company identified as a party to the 1979 Agreement, relinquished any property rights and exploration and mining rights in the Area of Interest, pursuant to the 1979 Agreement or otherwise, or has any reasonable expectation to be paid any royalty for production from the Area of Interest.

30. Denied with respect to Goldstrike. Goldstrike specifically denies that Goldstrike has been enriched, in any way, by Bullion or that Bullion is entitled to be paid anything by Goldstrike. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 30 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 30 of the SAC that is not specifically admitted herein.

31. Denied with respect to Goldstrike. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 31 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 31 of the SAC that is not specifically admitted herein.

32. Denied with respect to Goldstrike. Goldstrike specifically denies that Goldstrike has been unjustly enriched, in any way, and further denies that Goldstrike owes Bullion any compensation. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 32 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 32 of the SAC that is not specifically admitted herein.

33. Denied with respect to Goldstrike. Goldstrike specifically denies that Bullion had any legitimate basis to assert claims against Goldstrike in this lawsuit and denies that Bullion has any right to recover its attorneys' fees in this case. Goldstrike specifically asserts that there is no statute, rule, or contractual provision that would allow Bullion to recover its fees and costs in this action. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 33 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 33 of the SAC that is not specifically admitted herein.

34. Goldstrike realleges and incorporates herein by reference its answers and responses to paragraphs 1 through 33 of the SAC as set forth above.

35. Goldstrike admits that Bullion seeks an accounting but denies that Goldstrike owes Bullion any royalties for Goldstrike's mining activities in the Area of Interest. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 35 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 35 of the SAC that is not specifically admitted herein.

36. Goldstrike admits that Bullion's SAC makes a demand upon Goldstrike to provide accounting records for its mining activities in the Area of Interest, and that Goldstrike refuses to provide the same, but denies that Bullion is entitled to any such accounting records. Goldstrike specifically notes that prior to the filing of its Amended Complaint in June 2009, Bullion had never requested or demanded from Goldstrike, or any affiliated entity, any accounting records or any other types of records or reports. Except through its pleadings, Bullion has never made any such request or demand to Goldstrike or any other related entity. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 36 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies

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each and every allegation contained in paragraph 36 of the SAC that is not specifically admitted herein.

37. Goldstrike admits that Bullion seeks an order from this Court directing Goldstrike to provide an accounting of its mining activities in the Area of Interest but denies that Bullion is entitled to any such accounting from Goldstrike. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 37 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 37 of the SAC that is not specifically admitted herein.

38. Denied with respect to Goldstrike. Goldstrike specifically denies that Bullion had any legitimate basis to assert claims against Goldstrike in this lawsuit and denies that Bullion has any right to recover its attorneys' fees in this case. Goldstrike specifically asserts that there is no statute, rule, or contractual provision that would allow Bullion to recover its fees and costs in this action. Goldstrike is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 38 insofar as they are pled against Newmont and, therefore, denies the same. Goldstrike specifically notes that Newmont is not a party in the pending action. Goldstrike denies each and every allegation contained in paragraph 38 of the SAC that is not specifically admitted herein.

39. Goldstrike denies that Bullion is entitled to any of the relief requested against Goldstrike in the SAC, or any other relief, of any kind or nature whatsoever.

40. Goldstrike generally denies each and every allegation contained within the SAC that is asserted against Goldstrike but is not expressly admitted herein.

FIRST AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over this matter because Bullion and Goldstrike are, upon information and belief, both citizens of the same state.

SECOND AFFIRMATIVE DEFENSE

Bullion's SAC fails to state claims against Goldstrike upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

Bullion lacks standing to assert any claims arising out of or relating to the 1979 Agreement because Bullion is not, upon information and belief, a party to the 1979 Agreement or a lawful successor in interest to or assignee of any party to the 1979 Agreement.

FOURTH AFFIRMATIVE DEFENSE

The 1979 Agreement cannot be enforced by Bullion because Bullion is not, upon information and belief, a party to the 1979 Agreement and has not, upon information and belief, provided any consideration thereunder.

FIFTH AFFIRMATIVE DEFENSE

Bullion's claims under the 1979 Agreement are, upon information and belief, barred and precluded due to the lack of mutuality of obligation.

SIXTH AFFIRMATIVE DEFENSE

Bullion's claims under the 1979 Agreement are, upon information and belief, barred and precluded due to a total or partial failure of consideration.

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SEVENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded because Goldstrike is not a party to the 1979 Agreement or a lawful successor in interest to or assignee of any party to the 1979 Agreement.

EIGHTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are barred and precluded insofar as the covenants in the 1979 Agreement do not run with the land.

NINTH AFFIRMATIVE DEFENSE

The 1979 Agreement is void, and cannot be enforced by Bullion, insofar as the 1979 Agreement violates the rule against perpetuities.

TENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded by the doctrine of adverse possession.

ELEVENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded because the 1979 Agreement constitutes an unreasonable restraint on alienation.

TWELFTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded by the applicable statutes of limitation.

THIRTEENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are barred and precluded insofar as Bullion Monarch failed to mitigate its damages.

FOURTEENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded by the doctrines of laches, waiver, estoppel, acquiescence, and/or unclean hands.

FIFTEENTH AFFIRMATIVE DEFENSE

Goldstrike is not liable under any alleged contract between Bullion and Universal Explorations, Ltd. and/or Universal Gas, Inc. because neither Goldstrike nor any of its predecessors in interest voluntarily assumed that alleged contract or any of its alleged provisions, terms, conditions, promises, or covenants.

SIXTEENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded by the doctrines of *res judicata*, collateral estoppel, issue preclusion, or claim preclusion.

SEVENTEENTH AFFIRMATIVE DEFENSE

Bullion's claims against Goldstrike are, upon information and belief, barred and precluded because of the failure of privity of contract.

EIGHTEENTH AFFIRMATIVE DEFENSE

Goldstrike reserves the right to modify its defenses or set forth additional affirmative defenses as they become known to Goldstrike during the course of these proceedings.

WHEREFORE, Goldstrike prays that all of Bullion's claims against Goldstrike be dismissed, with prejudice.

Dated: March 5, 2010

PARSONS BEHLE & LATIMER

By: /s/ Michael P. Petrogeorge
Michael R. Kealy
Francis M. Wikstrom
Michael P. Petrogeorge
Brandon J. Mark
Attorneys for Barrick Goldstrike Mines Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2010, a true and correct copy of **BARRICK GOLDSTRIKE MINES INC.'S ANSWER TO SECOND AMENDED COMPLAINT** was filed electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means. I further certify on this date, that I also mailed a copy of the same, via U.S. Mail, postage prepaid, to the following:

Clayton P. Brust, Esq.
ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, NV 89503

/s/ Michael P. Petrogeorge

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EXHIBIT 9

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EXHIBIT 9

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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.

BARRICK GOLDSTRIKE MINES, INC. and DOES I-X, inclusive,

Defendant(s).
_____/

CASE NO. **CV-N-09-00612-ECR-VPC**

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CASE MANAGEMENT REPORT

1. Statement of The Nature of the Case

The claims and defenses in this case are similar to those in the related Bullion v. Newmont matter (Case No. 3:08-cv-00227-ERC-VPC). Succinctly, Bullion is alleging claims for relief against Barrick for failure to pay royalties owed for production from mining claims and properties in the Carlin Trend area. The alleged obligations to pay royalties arises from a 1979 Agreement between Bullion and other entities not parties to this litigation. Specifically, paragraph 11 of the 1979 Agreement an Exhibit A-2 (Ex.A-2) delineates an approximate 256 square mile area of interest. Plaintiff alleges that any properties Barrick and its predecessors acquired within the Area of Interest from the approximate period of 1991 through

1999 are subject to the royalty provisions. Barrick has generally denied the allegations in Plaintiff's complaint and has asserted 18 affirmative defenses.

2. Description of the Principal Factual and Legal Disputes

The factual and legal disputes in this matter included, but are not limited to, whether the Area of Interest provision is a burden on the Subject Property, and runs with the land, whether Barrick is contractually bound as a successor to a party to the 1979 Agreement, the impact if any of subsequent agreements and transfers of the properties at issue, whether Plaintiff's claims are barred by the doctrine of laches, the applicability of the other affirmative defenses, and the nature and extent of Barrick's holdings in the Area of Interest acquired from 1991 through 1999. Finally, the amount of production from any Barrick holdings in the Area of Interest acquired form 1991 through 1999, will likely be at issue.

3. Jurisdictional Basis for the Case

This case was initially removed on the basis of diversity pursuant to 28 U.S.C. §1332. Plaintiff is a citizen of the State of Utah. Barrick Goldstrike Mines, Inc, is a Colorado corporation and has been doing business in Nevada at all times relevant thereto. The amount in controversy exceeds $75,000.00. Jurisdiction is not contested.

4. Parties

All parties have been served and Defendant has filed an answer.

5. Additional Parties/Amend Pleadings

At this point, neither party expects to add additional parties to the case or otherwise amend the pleadings.

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6. Contemplated Motions

Plaintiff and Defendant anticipate filing motions for summary judgment and/or partial summary adjudication.

7. Any Pending Motions

There are no current pending motions in this matter.

8. The status of Related Cases Pending

Discovery in the related Bullion v. Newmont case is closed except for Bullion's ability to depose Newmont's employees regarding remaining unaddressed FRCP 30(b)(6) categories and documents disclosed by Newmont toward the end of the discovery. Both Bullion and Newmont have filed motions for summary judgment and/or partial summary adjudication. Those motions are pending.

9. Any Further Supplemental Discussion of Necessary Discovery

a. The extent, nature, and location of discovery anticipated by the parties;

Plaintiff expects to travel as needed to Defendant's representative's locations to depose them. Consistent with the Court's prior orders regarding depositions in the related case, Plaintiff will make its representatives available for deposition either in the Reno, Nevada area or where they reside as appropriate. Each party also expects to conduct written discovery (interrogatories, request for admissions, and request for production of documents). Expert discovery is also expected.

b. Suggested revisions, if any, to the discovery limitations imposed by the Federal Rules of Civil Procedure and LR 26(1)(e);

At this point, the parties do not have any suggested revisions to the discovery limitations imposed by Federal Rules of Civil Procedure and LR 26(1)(e) except as provided herein.

c. The number of hours permitted for each deposition, unless extended by the parties.

The standard seven hour limitation on depositions should be sufficient.

10. Disclosure or Discovery of Electronically Stored Information ("ESI")

The parties have not had any discussion on issues related to the disclosure or discovery of electronically stored information. However, the parties both contemplate the possibility that some limited amount of electronically stored information (primarily related to production data) may be subject to discovery.

11. Issues Related to Claims of Privilege or Work Product

The parties have already entered into and agreed to adopt the Stipulated Confidentiality Protective Order that was issued in the Bullion v. Newmont.

12. Discovery/Scheduling Plan

The parties propose the following Scheduling Plan: Last day for fact discovery and expert depositions shall be May 25, 2010; last day for disclosure of expert witnesses pursuant to FRCP 26(a)(2)(A)-(C) shall be February 24, 2010; last day for disclosure of rebuttal experts shall be March 24, 2010; last day to file and serve dispositive motions shall be June 28, 2010; and the last day by which the parties shall have engaged in good faith settlement talks shall be June 7, 2010

13. Jury Trial and Whether it Has Been Contested.

Plaintiff has requested a jury trial. Defendant has not contested the jury trial request.

14. The Estimated Length of Trial

Fourteen days.

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15. The Prospects for Settlement, Including Request of the Court For Assistance in Settlement Efforts

The parties have not discussed the possibility of settlement. It appears the parties' views of this matter differ greatly and discovery will be necessary prior to meaningful settlement discussions.

16. Any other matters that will aid the court and parties in resolving this case in a just, speedy, and inexpensive manner as required by Fed.R.Civ.P. 1.

At this time, the parties have not identified any other matters that will aid the Court and/or parties in resolving this case in a just, speedy, and inexpensive matter.

DATED this 24th day of November, 2009.

ROBISON, BELAUSTEGUI, SHARP & LOW

By _____
Clayton P. Brust, Esq.

Attorneys for Plaintiff
Bullion Monarch Mining, Inc.

DATED this 25th day of November, 2009.

PARSONS BEHLE & LATIMER

By _____
Michael Kealy, Esq.

Attorneys for Defendant
Barrick Goldstrike Mines, Inc.

EXHIBIT 10

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EXHIBIT 10

PARSONS BEHLE & LATIMER

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Attorneys for Barrick Goldstrike Mines Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

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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)

MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and LR 8-1, Defendant Barrick Goldstrike Mines Inc. ("Goldstrike") moves this Court for an order dismissing this action because this Court lacks jurisdiction over the matter. This case is in federal court based on alleged diversity jurisdiction under 28 U.S.C. § 1332. However, because Plaintiff Bullion Monarch Mining, Inc. ("Bullion") and Goldstrike were citizens of the same state (Utah) when this case was initiated against Goldstrike in 2009, this Court does not have subject-matter jurisdiction over the case. Under the circumstances, the Court must dismiss the claims without prejudice. Accordingly, Goldstrike requests that the Court enter an order dismissing the suit.

Dated: September 8th, 2017

PARSONS BEHLE & LATIMER

By: /s/ Brandon J. Mark
Francis Wikstrom, Esq.
Michael Kealy, Esq.
Michael P. Petrogeorge, Esq.
Brandon J. Mark, Esq.
Attorneys for Defendant
Barrick Goldstrike Mines Inc.

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MEMORANDUM IN SUPPORT OF MOTION

INTRODUCTION

Subject-matter jurisdiction can never be waived, and the parties and Court have a continuing duty to ensure that the Court has jurisdiction over the matter at all stages of litigation. Federal courts are courts of limited jurisdiction as defined by the United States Constitution and the congressional delegation of authority within those constitutional limits.

This case must be dismissed for lack of subject-matter jurisdiction because Plaintiff Bullion and Defendant Goldstrike were both citizens of Utah when Bullion sued Goldstrike in 2009. The issue has eluded the parties and Court until now because at the time Bullion filed its Amended Complaint adding Goldstrike—and the Court and parties initially assessed jurisdictional issues—the Ninth Circuit Court of Appeals was applying the wrong standard to determine a corporation's "principal place of business" under the diversity jurisdiction statute. Under the Ninth Circuit's prior, incorrect standard, which focused on the location of a corporation's operations, Goldstrike's principal place of business was thought to be Nevada. But the United States Supreme Court's subsequent ruling in *Hertz Corporation v. Friend*, 559 U.S. 77 (2010), confirmed that a corporation's principal place of business is actually the location of the company's headquarters and "nerve center." Applying the correct standard, Goldstrike's principal place of business in 2009 was Utah. Because Bullion was also a citizen of Utah at the time, there was no diversity of citizenship.

Regrettably, the jurisdictional defect was not recognized until Goldstrike began to consider the jurisdictional statement in anticipation of drafting a joint Pretrial Order. The Court's local rules require the parties' joint Pretrial Order to include a "statement of the basis for this court's jurisdiction with specific legal citations." LR 16-3(b)(2). Thus, when this Court recently ordered the parties to submit their joint pretrial order, Goldstrike looked at the jurisdiction issues

with fresh eyes. After reviewing the deficient jurisdictional allegations in Bullion's Second Amended Complaint, recognizing the Supreme Court's ruling in *Hertz Corporation* altered the original Ninth Circuit analysis, and investigating the facts relating to Goldstrike's nerve center in 2009, it became evident that the Court lacked jurisdiction over the case. Because the Court never properly had jurisdiction over the case—and does not now have jurisdiction—the Court's only option is to dismiss the action.

STATEMENT OF FACTS

In 2009, Bullion amended its Complaint in the Newmont Litigation to add Goldstrike as a defendant.

In 2008, Bullion filed the original Complaint against only Newmont USA Limited ("Newmont"). (*Bullion Monarch Mining, Inc. v. Newmont USA Limited*, Case No. 3:08-cv-00227-ECR-VPC, ECF 1 (references to filings in the Newmont litigation are "227 ECF ##").) Bullion asserted the Court had subject-matter jurisdiction over the lawsuit due to the diversity of citizenship between Bullion, a Utah citizen (both state of incorporation and principal place of business), and Newmont, a citizen of Colorado (state of incorporation) and Nevada (principal place of business).

In 2009, Bullion and Newmont stipulated to the addition of Goldstrike as a defendant in the case. In the Amended Complaint adding Goldstrike as a party, Bullion alleged that "Barrick Goldstrike Mines, Inc. . . . is a Colorado corporation and has been doing business in Nevada at all times relevant hereto." (Am. Compl. ¶ 2A, 227 ECF 48.) None of Bullion's allegations addressed Goldstrike's principal place of business.

At the time, the Ninth Circuit used a "place of operations" test to determine corporate citizenship.

At the time Bullion filed its Amended Complaint in the Newmont litigation adding Goldstrike as a party, the Ninth Circuit Court of Appeals erroneously applied a two-part test to

determine the principal place of business of a corporation for diversity jurisdiction purposes. The Ninth Circuit first looked at "the place of operations test," which "is the state containing a substantial predominance of corporate operations." *Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026, 1028 (9th Cir. 2009) (internal marks omitted). Only "[i]f no state contain[ed] a substantial predominance of corporate operations" did the Ninth Circuit "apply the 'nerve center' test, which locates the corporation's principal place of business in the state where the majority of its executive and administrative functions are performed." *Id*. (internal marks omitted).

Under the Ninth Circuit's then-existing but incorrect test, it appeared that Goldstrike's principal place of business was Nevada because Nevada was where the majority of its mining and processing operations were carried out. Nevertheless, in its Answer, Goldstrike's first affirmative defense was that "[t]his Court lacks subject matter jurisdiction over this matter because Bullion and [Goldstrike] are, upon information and belief, both citizens of the same state." (Answer 11 (227 ECF 69).)

Shortly after Goldstrike was added to the Newmont lawsuit, the parties agreed to sever Bullion's claims against Goldstrike into a separate matter with a different case number. Since 2009, this matter has proceeded solely between Bullion and Goldstrike based on alleged diversity jurisdiction.

In 2010, the Supreme Court held that the "nerve center" test determined corporate citizenship.

In 2010, the United States Supreme Court ruled that the Ninth Circuit had been using the wrong test to determine a corporation's principal place of business. *Hertz Corp. v. Friend*, 559 U.S. 77 (2010). Rather than focus on where a corporation's operations were located, as in the Ninth Circuit's previous test, the Supreme Court held in *Hertz Corporation* that a corporation's principal place of business is the state where it has its corporate "nerve center" or headquarters—that is, where high-level corporate decisions are made.

Goldstrike's nerve center in 2009 was in Utah.

Under the proper test articulated in *Hertz Corporation*, Goldstrike was a citizen of Utah in 2009 because that is where all of the executive-level decisions for Goldstrike were made at that time. In 2009, Goldstrike's principal corporate officers—including the officers with primary control over Goldstrike's corporate policies and direction—were located in Salt Lake City. (Declaration of Rich Haddock, September 5, 2017, ¶ 6, Exhibit A hereto.) Specifically, Gregory Lang, Goldstrike's President and CEO, Blake Measom, its Chief Financial Officer, Mike Feehan, its Vice-President of Operations ("Operations Director"), and Paul Judd, its Tax Director, were all located in Salt Lake City. (*Id*.) None of Goldstrike's corporate officers were located in Nevada. (*Id*.)

Additionally, in 2009, a majority of Goldstrike's board of directors were located in Salt Lake City. None of Goldstrike's directors were located in Nevada. (*Id*. ¶ 8.)

While day-to-day mining operations were directed by an onsite General Manager in Nevada in 2009, all corporate policies and strategic decisions were made at Goldstrike's headquarters in Salt Lake City. (*Id*. ¶ 7.) Goldstrike's officers in Salt Lake City made corporate decisions regarding budgeting, land and property acquisitions, long-term strategy and planning, and all other executive-level decisions. (*Id*. ¶ 9.)

Specifically, Goldstrike's management in Salt Lake City controlled and supervised all of the major corporate functions in 2009, including (a) production and processing projections and targets for Goldstrike's mines, as well as unit-cost targets; (b) detailed capital reviews; (c) tax policy; (d) coordination of mine operations and mine management; (e) technical issues relating to mine plans, production, processing, geology, and maintenance; (f) human resources, including decisions regarding salaries and adjustments, short- and long-term bonuses, bonus structure, health insurance, pensions, and other employee benefits; (g) legal issues, including contracting,

litigation, and environmental issues; (h) accounting and control functions; (i) federal land permitting issues; (j) equipment inventories and allocation of equipment; (k) land issues, such as ensuring the payment of property taxes and the maintenance of mining claims, leases, and other real property interests; (l) environmental policies, including environmental targets and goals for Goldstrike's environmental management system; (m) security policies and objectives; (n) information technology issues; (o) supply-chain management and purchasing functions; (p) business and process improvement initiatives; (q) communications and corporate social responsibility functions; and (r) payroll. (*Id.* ¶ 10.)

Goldstrike's corporate officers in Salt Lake City also decided how to allocate capital among various Goldstrike projects. (*Id.* ¶ 11.) For example, in 2009, management in Salt Lake City made the decision to fast-track a pilot project to test a new processing method. That led to a demonstration plant a few years later and then, in 2014, to the opening of the world's first total carbonaceous matter (TCM) plant at Goldstrike, a $620 million dollar project. (*Id.*)

In 2009, Goldstrike's management in Salt Lake City also conducted a comprehensive review of the mining operations plans for Goldstrike to ensure the mining plans achieved strategic objectives, which included decisions regarding mining rates, gold production, and review of capital spending. The review included a detailed analysis of total expenditures, as well as the evaluation of specific line items. Goldstrike's Salt Lake City management modified the plans to ensure they aligned with corporate goals and objectives. (*Id.* ¶ 12.)

Similarly, in 2009, Goldstrike's Salt Lake City management made all decisions regarding when and how to buy energy, Goldstrike's second largest expense. These included whether to build Goldstrike's own power plant, and exit the Nevada utility service, or to buy electricity from the grid. (*Id.* ¶ 13.)

In 2009, management in Salt Lake City also controlled key personnel decisions. Goldstrike's onsite General Manager was selected and supervised by Goldstrike's officers from Salt Lake City. Goldstrike's management in Salt Lake City approved all of the other managers at the Goldstrike mine site who answered to the General Manager, which included eight department/division managers. (*Id*. ¶ 14.)

Taken together, the evidence indisputably establishes that in 2009, Goldstrike's management in Salt Lake City made the corporate-level decisions and that none of those decisions were made by personnel in Nevada. As a result, in 2009, Goldstrike's headquarters and nerve center were in Salt Lake City, Utah. (*Id*. ¶¶ 5, 15.)

ARGUMENT

1. The diversity jurisdiction statute requires complete diversity of citizenship between all plaintiffs and all defendants.

There exists a "bedrock principle that federal courts have no jurisdiction without statutory authorization." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005). Bullion asserts that the Court has jurisdiction based on the parties' diversity of citizenship under 28 U.S.C. § 1332(a)(1). This provision "require[s] complete diversity of citizenship"—that is, "diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978) (emphasis in original).

1.1 When an amended complaint adds parties, courts assess the citizenship of the newly added parties at the time of the amendment. Complete diversity must remain following the addition of the parties by amendment.

Although typically "[d]iversity jurisdiction depends on the state of things when the initial complaint is filed," there is an exception for "newly added defendants." *Drevaleva v. Alameda Health Sys.*, No. 16-CV-07414-LB, 2017 WL 2462395, at *5 & n.31 (N.D. Cal. June 7, 2017) (internal marks omitted). "With respect to [the defendants] that the plaintiff has added in [an]

amended complaint, diversity jurisdiction depends on the facts as they stood when the *amended* complaint was filed." *Id*. (emphasis in original); *China Basin Properties, Ltd. v. Allendale Mut. Ins. Co.*, 818 F. Supp. 1301, 1303 (N.D. Cal. 1992) ("In the case of an amended complaint which joins new parties, however, the diversity must exist at the time of the amendment." (citing *Lewis v. Lewis*, 358 F.2d 495, 502 (9th Cir. 1966)).

In this case, Bullion filed its Amended Complaint adding Goldstrike in June 2009. (227 ECF 48.) In August 2009, the Court granted Bullion's motion to sever its claims against Goldstrike into this separate litigation, resulting in a suit solely between Bullion and Goldstrike. (227 ECF 118.). Thus, diversity jurisdiction depends on the facts as they stood in 2009.

1.2 **Bullion bears the burden of establishing the Court's jurisdiction with competent evidence.**

"The burden of persuasion for establishing diversity jurisdiction . . . remains on the party asserting it." *Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

Even though Bullion's original Amended Complaint (and all subsequent complaints) failed to properly plead diversity jurisdiction because it lacked allegations about Goldstrike's principal place of business, here Goldstrike raises a "factual attack" on jurisdiction because it "contests the truth of the plaintiff's factual allegations" by "introducing evidence outside the pleadings." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (internal marks omitted). "When the defendant raises a factual attack, the plaintiff must support [its] jurisdictional allegations with 'competent proof,'" *id*. (quoting *Hertz Corp.,* 559 U.S. at 96–97), "under the same evidentiary standard that governs in the summary judgment context," *Leite*, 749 F.3d at 1121. Bullion therefore "bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met." *Id.*

1.3 **Under the diversity jurisdiction statute, a corporation is a citizen of the state where it has its principal place of business, which is the location of the corporation's headquarters or "nerve center."**

For diversity of citizenship purposes, a corporation is a citizen of the state where it is incorporated, as well as a citizen "of the State . . . where it has its principal place of business." 28 U.S.C. § 1332(c)(1). In 2010, in *Hertz Corporation v. Friend*, the Supreme Court articulated "a single, more uniform interpretation" of the phrase "principal place of business." 559 U.S. at 92. In so doing, the Court considered and rejected the Ninth Circuit's previous approach based on where a corporation has its operations. *Id*. at 91–92, 94. Rather, the Court held that the "nerve center" test applied. *Id.* at 92-93; *Harris v. Rand*, 682 F.3d 846, 851 (9th Cir. 2012).

Under the properly applied nerve center test, a corporation's "principal place of business" is "the place where the corporation's high level officers direct, control, and coordinate the corporation's activities." *Hertz Corp.*, 559 U.S. at 80. "A corporation's 'nerve center,' usually its main headquarters, is a single place." *Id.* at 93.

2. In 2009, Goldstrike's headquarters and nerve center were in Salt Lake City, which made Goldstrike a citizen of Utah, not Nevada.

Under the properly applied nerve center test, it is beyond dispute that Goldstrike's principal place of business in 2009 was Salt Lake City, Utah. As set forth above and in the supporting declaration of Rich Haddock, Goldstrike's management in Salt Lake City made all of the executive-level decisions in 2009. Goldstrike's President and Chief Executive Officer, its Chief Financial Officer, its Operations Director, its Tax Director, and the heads of its legal and accounting departments, among others, were located in Salt Lake City in 2009, as were the majority of Goldstrike's corporate board members. None of its board members or corporate officers were located in Nevada.

This Court's ruling in *Dawson v. Richmond American Homes of Nevada, Inc.*, No. 2:12-CV-01563-MMD, 2013 WL 1405338 (D. Nev. Apr. 5, 2013), illustrates well how the nerve

center test should be applied in this case. In *Dawson*, the plaintiff argued that the defendant, Richmond, had its principal place of business in Nevada in part because it was the "the site of Richmond's homebuilding operations." *Id*. at *2. But even though Nevada was the principal location of Richmond's operations, this Court found that Colorado was Richmond's principal place of business because most of its officers and directors were located in Denver, "[s]ignificant corporate decisions [were] 'subject to review and approval' in Denver," and "the company's 'primary administrative operations' and use of 'marketing and promotional material' [occurred] in Denver." *Id.* This Court concluded that despite Richmond's president managing day-to-day operations from Nevada, Denver was the defendant's nerve center because it was "the place where Richmond's 'officers direct, control, and coordinate the corporation's activities.'" *Id.* at *2 (*quoting Hertz Corp.*, 559 U.S. at 92-93). This Court correctly concluded that the place where Richmond's corporate decisions were made, not the place of its operations, determined its principal place of business. The same analysis applies even more strongly to Goldstrike because Goldstrike's president managed its operations from Salt Lake City.

2.1 **Goldstrike's officers and directors were located in Salt Lake City.**

The location of a corporation's officers and directors is a significant factor in determining a corporation's nerve center. As the Supreme Court noted in *Hertz Corporation*, a corporation's nerve center is "the place where the corporation's high level officers direct, control, and coordinate the corporation's activities." 559 U.S. at 80 (internal marks omitted).

In 2009, none of Goldstrike's officers or directors were located in Nevada. (Haddock Decl. ¶¶ 6, 8.) *See Corral v. Homeeq Serv. Corp.*, No. 2:10-CV-00465, 2010 WL 3927660, at *4 (D. Nev. Oct. 6, 2010) (deciding that defendant corporation did not have its principal place of business in Nevada because none of its officers were located there). Rather, in 2009, Goldstrike's key officers and most of its directors were located in Salt Lake City, including Goldstrike's

President/CEO, CFO, Operations Director, Technical Director, and Tax Director. (Haddock Decl. ¶ 6.) *See Broughton v. Smith's Food & Drug Ctrs., Inc.*, No. 2:14-CV-01849-GMN-NJ, 2015 WL 1137751, at *2 (D. Nev. Mar. 13, 2015) (concluding that defendant's principal place of business was Utah because "[d]efendant's corporate officers work at the corporate headquarters in Salt Lake City, Utah"); *Aspiras v. Adams & Assocs., Inc.*, 2017 WL 2992456 (C.D. Cal. July 14, 2017) (determining principal place of defendant's business was Nevada based in part on where key corporate officers were located).

2.2 **Goldstrike's major corporate functions were managed and directed from Utah**.

In 2009, all of Goldstrike's major corporate decisions and functions were managed and directed from its Salt Lake City headquarters, including control over budgeting and finance, technical and operational direction of mining plans and mining operations, the allocation of capital, equipment, labor, and other resources, direction of ore processing, decisions regarding key operational managers and all human resource functions, and management of legal, land, permitting, tax, accounting, and environmental issues. Salt Lake City–based management made the executive-level decisions for every aspect of Goldstrike's operations.

Numerous district courts in this circuit, including this Court, have recognized that the place where a corporation carries out critical administrative functions is likely the corporation's nerve center. For example, in *Dawson*, this Court recognized that the location of the defendant's "primary administrative operations" weighed in favor of that being the corporation's headquarters. 2013 WL 1405338, at *2. Likewise, in *Peich v. Flatiron West, Inc.*, Case No. 5:16-cv-00540, 2016 WL 6634851, at *1 (C.D. Cal. Sept. 9, 2016), the court looked at where the corporation's "executive officers administer[ed] the corporation's payroll, human resources, accounting, financing, and legal functions" to determine its headquarters.

That Goldstrike carried out all of its major corporate functions in Salt Lake City only serves to confirm that the "place of actual direction, control, and coordination" was Utah in 2009. *Hertz Corp*., 559 U.S. at 97.

2.3 **Because Goldstrike was a citizen of Utah in 2009, as was Bullion, this Court lacks subject-matter jurisdiction over this matter.**

Because Goldstrike's principal place of business in 2009 was Utah, Bullion destroyed complete diversity when it amended its Complaint to add Goldstrike as a defendant and no diversity jurisdiction existed when the action against Goldstrike was later severed. As a result, the Court must dismiss the action for lack of jurisdiction. Fed. R. Civ. P. 12(h)(3).

CONCLUSION

For the reasons set forth above, this Court should dismiss the action without prejudice.

Dated: September 8, 2017

PARSONS BEHLE & LATIMER

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September 2017, a true and correct copy of the foregoing MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION, was served on the following electronically via the ECF system:

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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)

DECLARATION OF RICH HADDOCK IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

I, Rich Haddock, declare as follows:

1. I am over eighteen years of age and have personal knowledge of the facts stated in this declaration. If called upon to do so, I could testify as to the matters set forth herein.

2. I am currently Senior Vice President and General Counsel for Barrick Gold Corporation ("Barrick Gold"), the ultimate parent corporation of Defendant Barrick Goldstrike Mines Inc. ("Goldstrike").

3. Since 1997, I have held various positions with Barrick Gold and Goldstrike. All of these positions have included involvement in the operations and management of Goldstrike.

4. Goldstrike is a Colorado corporation formed in 1973.

5. In 2009, Goldstrike's corporate headquarters were in Salt Lake City, Utah, specifically at 136 East South Temple, Suite 1800.

6. In 2009, Goldstrike's principal corporate officers—including the officers with primary control over Goldstrike's corporate policies and direction—were located in Salt Lake City. Specifically, Gregory Lang, Goldstrike's President and Chief Executive Officer, Blake Measom, its Chief Financial Officer, Mike Feehan, its Vice President over Operations ("Operations Director"), and Paul Judd, its Tax Director, were all located in Salt Lake City. None of Goldstrike's corporate officers were located in Nevada.

7. While day-to-day mining operations were directed by an onsite General Manager in Nevada in 2009, corporate policy and strategic decisions were made at Goldstrike's headquarters in Salt Lake City, Utah.

8. In 2009, a majority of Barrick Goldstrike's board of directors were located in Salt Lake City. At that time, I was a corporate director of Goldstrike, and I was located in Salt Lake City. None of Goldstrike's directors were located in Nevada.

9. In 2009, Goldstrike's officers in Salt Lake City, Utah, made corporate decisions regarding budgeting, land and property acquisitions, long-term strategy and planning, and all other executive-level decisions.

10. Goldstrike's management in Salt Lake City controlled and supervised all of the major corporate functions for Goldstrike in 2009. For example:

a. Management in Salt Lake City set production and processing projections and targets for Goldstrike's mines, as well as unit-cost targets.

b. Detailed capital reviews were conducted by Goldstrike's management in Salt Lake City, including by Blake Measom, John Cash, the Manager of Mine Engineering, and others.

c. Decisions regarding tax policy, an important part of Goldstrike's business, were directed and controlled from its Salt Lake City office by its Tax Director, Paul Judd.

d. Mike Feehan, Goldstrike's Operations Director, initiated weekly mine management meetings from Salt Lake City and coordinated mine operation issues from that office.

e. Technical decisions regarding Goldstrike's mine plans and production, processing, geology, and maintenance were reviewed and revised by management in Salt Lake City, including by John Cash and the other technical leads.

f. Goldstrike's human resource functions were handled in Salt Lake City, including decisions regarding salaries and adjustments, short and long-term bonuses, bonus structure, health insurance, pensions, and other employee benefits. Bonuses were approved by management in Salt Lake City.

g. Goldstrike's legal issues, including contracting, litigation, and environmental issues, were handled by my department from Salt Lake City. Indeed, when I first became involved in this suit, I was located in the Salt Lake City office.

h. Goldstrike's Salt Lake City-based Controller, Curtis Caldwell, managed Goldstrike's accounting functions.

i. Goldstrike's federal land permitting issues were handled in Salt Lake City.

j. Goldstrike's management in Salt Lake City performed evaluations of equipment inventories and made decisions regarding the allocation of equipment.

k. Goldstrike's landman, Cy Wilsey, handled all land issues, such as ensuring the payment of property taxes and the maintenance of mining claims, leases, and other real property interests, from Salt Lake City.

l. Goldstrike's management in Salt Lake City decided environmental policies, including environmental targets and goals for Goldstrike's environmental management system.

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m. Goldstrike's management in Salt Lake City established and communicated security policies and objectives.

n. Information technology issues were prescribed and managed by Goldstrike's management from Salt Lake City.

o. Supply chain and purchasing functions were performed in Salt Lake City.

p. Business and process improvement initiatives started with Goldstrike's management in Salt Lake City.

p. Goldstrike's communications and corporate social responsibility functions were directed by Goldstrike's management Salt Lake City.

q. The Salt Lake City headquarters performed payroll functions for Goldstrike.

11. Other major corporate decisions, such as allocating capital among various Goldstrike projects, were made by Goldstrike's corporate officers in Salt Lake City, Utah. For example, in 2009, management in Salt Lake City made the decision to fast-track a pilot project to test a new processing method. That led to a demonstration plant a few years later and then, in 2014, to the opening of the world's first total carbonaceous matter (TCM) plant at Goldstrike, a $620 million dollar project.

12. In 2009, Goldstrike's Salt Lake City-based management reviewed and modified the mining operations plans for Goldstrike, as management does every year, to ensure the mining plans achieved strategic objectives. Such reviews included decisions regarding mining rates, gold production, and review of capital spending (including total expenditures and evaluation of specific line items).

13. Energy costs are the second largest operating cost for Goldstrike. In 2009, all decisions regarding when and how to buy energy, including whether to build Goldstrike's own power plant, and exit the Nevada utility service, or to buy electricity from the grid, were made by management in Salt Lake City. The manager of Goldstrike's power plant reported to Goldstrike's Operations Director, Mike Feehan, in Salt Lake City.

14. In 2009, management in Salt Lake City also controlled key personnel decisions. Goldstrike's onsite General Manager was selected and supervised by Goldstrike's officers from Salt Lake City. All of the other managers at the Goldstrike mine site who answered to the General Manager, which included eight (8) department/division managers, were approved by Goldstrike's management in Salt Lake City.

15. In short, in 2009, corporate-level decisions for Goldstrike were made by management residing in Salt Lake City, and none of those decisions were made by personnel in Nevada.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 5th day of September, 2017.

Rich Haddock

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September 2017, a true and correct copy of the foregoing DECLARATION OF RICH HADDOCK IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION, was served on the following electronically via the ECF system:

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EXHIBIT 11

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EXHIBIT 11

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).

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.)

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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

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[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).

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

[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

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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.

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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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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: March 15, 2019 Hearing Time: In Chambers

DEFENDANT GOLDSTRIKE'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO STAY PROCEEDINGS

Defendant Barrick Goldstrike Mines, Inc. ("Goldstrike"), through counsel of record, Parsons Behle & Latimer, hereby submits this reply in support of its motion 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 (the "Federal Case").

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I.
INTRODUCTION

Despite relying on inapposite rules, Bullion concedes that the core standard for Goldstrike's motion to stay is whether the benefits of a stay to the parties, court, and others outweighs the possible downsides. Here, Goldstrike has identified a number of objective, concrete, and tangible benefits of the Court entering a short stay of these proceedings to allow Bullion to finish the Federal Case, including avoiding this Court having to unnecessarily retread the same ground as the Federal Case and the distinct possibility of conflicting interlocutory orders in two simultaneously ongoing cases.

On one thing, the parties seem to agree: "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." (Opp'n to Mot. to Stay at 10.) While Bullion casually acknowledges that this Court will have to reconsider all of the dispositive issues in the Federal Case, Bullion's Opposition reveals the significance of that admission. Attached to Bullion's Opposition at Exhibits 2, 4, and 5 are *just some* of the briefs the parties have filed on *just one* of numerous motions for summary judgment in the Federal Case—totaling about 163 pages (and excluding the thousands of pages of exhibits filed with that motion).

In reality, the effort to bring this case "up to speed" with the Federal Case will require an immense amount of time and resources from the parties, their counsel, and this Court. Even assuming no new discovery is allowed, the parties and their counsel will have to re-brief all of the past summary judgment motions (and other significant motions) previously decided in the Federal Case, which, if history is any guide, will itself consume many months, if not years, of time. Then, this Court will have to hold a lengthy hearing (or several) to address all of the many motions the parties will have to file. Only then will this Court be in a position to issue a ruling on the numerous dispositive and evidentiary rulings Bullion concedes the Court will have to decide again.

Bullion also concedes that all of this effort and work will be completely wasted if it prevails on its pending appeal in the Federal Case, and wasted effort may be the least concern in light of the very real possibility that this Court could reach different conclusions about the meaning and application of Nevada law to the claims and defenses in this case, resulting in conflicting standing orders in two tribunals asserting jurisdiction over the case at the same time. Indeed, as discussed below, it is Bullion's stated intention to do exactly that—to have this Court rule differently than the federal court on the case dispositive issues. One benefit of a short stay is not only avoiding the real and substantial work that the Court and parties will have to repeat, which could all be for naught, but having to later sort through a thorny knot of conflicting rulings.

Balanced against those very real benefits of a stay is nothing more than Bullion's rote argument that "justice delayed is justice denied." But Bullion can point to nothing to suggest that a short delay will tangibly harm its ability to prosecute its case or obtain "justice." Bullion cannot, for example, suggest that evidence will be lost in the meantime or that a delay will make obtaining the requested relief more difficult. Absent real, concrete prejudice to Bullion from the requested stay, the articulable benefits tip the scales in favor of a stay.

II.

RESPONSE TO BULLION'S STATEMENT OF PURPORTED FACTS

Bullion spends the bulk of its discussion of the history of this case attempting to convince the Court that the federal courts have jurisdiction and about the merits of its claims instead of addressing the standard that applies to the instant motion. Indeed, Bullion basically concedes all of Goldstrike's factual statements concerning the identical nature of Bullion's current case and claims and the Federal Case. Bullion also appears to agree that this case can proceed, following a short stay to wait for a final resolution in the Federal Case, without any real harm to Bullion's interests.

Indeed, Bullion fails to identify any contrary facts suggesting that, from a practical perspective, Bullion will suffer actual prejudice from a stay.

With respect to Bullion's mischaracterizations about the federal court's jurisdiction and the merits of its claims, which are not before the Court on this motion, Goldstrike will not attempt to respond to each one. However, a few responses are necessary.

First, Bullion never gave up "valuable mineral rights"; the 1979 Agreement, attached to Bullion's Opposition, says that "Bullion *purports* to own a royalty interest." (Ex. 1 to Opp'n to Mot. to Stay at 1 (emphasis added).) Bullion claims that in exchange for these purported royalty interests, a joint venture involving other parties agreed to give Bullion a 1% royalty on any mining activity both from the original mining claims (the "Subject Property"), along with a 1% royalty on properties that might be acquired in a larger area of interest. However, the 1979 Agreement says that only one party, "Universal, as operator" of the joint venture, made any promises to Bullion relating to the area of interest. (Ex. 1 to Opp'n to Mot. to Stay at 10–11.) The area-of-interest obligations were not an obligation of the venture itself and did not attach to the Subject Property. Although the 1979 Agreement has a boilerplate "assigns and successors" provision, that clause only becomes relevant when there are, in fact, successors or assigns. The joint venture established by the 1979 Agreement was expressly terminated in 1984 and there is no successor to "Universal, as operator" thereunder. (Ex. 4 to Opp'n to Mot. to Stay at 7.) Thus, the boilerplate language is inapposite.

In any event, there was never an assignment of Universal's area-of-interest obligations to Goldstrike or its predecessors. (Ex. 4 to Opp'n to Mot. to Stay at 6–10.) After the Subject Property went through two different joint ventures—one formed in 1984 and the second in 1986, both of which superseded and terminated the prior venture and neither of which involved Bullion—the Subject Property was bought by High Desert Mineral Resources, Inc. (*Id.*) Contrary to Bullion's

assertion, although the Option Agreement required High Desert Mineral Resources to assume the obligations of the 1986 venture (not the obligations of Universal, as operator) "at the Closing," and although High Desert did in fact expressly assume a number of other obligations from the venture at the time of closing, the 1986 venture never assumed the obligations of Universal, as operator, under the 1979 Agreement's area-of-interest provision. As such, the 1986 venture never identified the area-of-interest provision in the 1979 Agreement as an obligation of the 1986 venture that High Desert Mineral Resources was required to assume, and thus High Desert Mineral Resources did not assume any such obligations at closing. (*Id*. at 9–11.) Simply put, there is no evidence that High Desert Mineral Resources ever assumed the obligations of "Universal, as operator" under the area-of-interest provision in the 1979 Agreement.[1]

From 2009 until last year, Bullion litigated its claims against Goldstrike in the wrong forum. Bullion says Goldstrike admitted in its Answer in the federal case that it was incorporated in Colorado and that it did business in Nevada, but neither of those two facts has any legal significance to the relevant question of Goldstrike's "principal place of business"[2]—as the federal court concluded. In reality, the Ninth Circuit Court of Appeals had decided in 2009, when Bullion first filed its claims against Goldstrike, that a corporation's "principal place of business" for citizenship purposes was governed by a test ("place of operations") that made Goldstrike a citizen of Nevada. A few years later, however, the U.S. Supreme Court overruled the Ninth Circuit and decided that a

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[1] There are two separate royalty obligations set forth in the 1979 Agreement. The first royalty obligation attached to the Subject Property itself. Newmont, as the present owner of the Subject Property, has already paid Bullion tens of millions for its mining activities on the Subject Property. The second royalty obligation was the obligation of "Universal, as operator" to pay royalties on properties it (Universal) subsequently acquired in the area of interest. Although Bullion attempted to also require Newmont to pay royalties on other holdings within the area of interest under the 1979 Agreement's area-of-interest provision, Bullion's claims against Newmont were dismissed by the United States District Court for Nevada as untimely under the doctrine of laches.

[2] Moreover, Goldstrike's first affirmative defense in its Answer was that the court lacked jurisdiction because of a potential lack of diversity of citizenship between the parties.

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different test applied—the "nerve center" test—which put Goldstrike's principal place of business, and thus its citizenship, in Utah. Regrettably, Goldstrike did not discover the jurisdictional problem until the Federal Case was in an advanced stage. As the plaintiff, however, it was always Bullion's sole burden to ensure its claims were brought in the correct forum. So for all of its criticism of Goldstrike over its handling of the jurisdictional problem, it was always Bullion's responsibility to ensure jurisdiction was proper—it was never Goldstrike's. If any party bears blame and responsibility for the circumstance in which Bullion now finds itself, it is not Goldstrike.

III.

ARGUMENT

A. THE CONSIDERATIONS FOR GRANTING A STAY OF AN ADVERSE JUDGMENT ON APPEAL ARE INAPPOSITE TO GOLDSTRIKE'S MOTION.

Although, as noted above, Bullion effectively concedes that the applicable standard governing this motion requires the Court to balance the competing interests of the parties and the judicial system to achieve the most efficient resolution of the suit, Bullion erroneously suggests that Rule 8 of the Nevada Rules of Appellate Procedure applies. (Opp'n to Mot. for Stay at 5.) But that rule only applies to proceedings before the Nevada appellate courts, not proceedings pending before this Court. NRAP 1(a) ("These Rules govern procedure in the Supreme Court of Nevada and the Nevada Court of Appeals.").

Because Bullion relies on an inapplicable rule, its argument that Goldstrike lacks "standing" to seek a stay misses the point. Goldstrike is not seeking to stay an adverse judgment pending an appeal, the circumstance addressed by NRAP 8. *See also Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948) (case cited by Bullion addressing supersedeas stays of judgments pending an appeal). Bullion offers no support for the notion that the strict rules governing stays of adverse judgments during appeal have any bearing on motions invoking this Court's inherent authority and discretion to

control its docket. *See John Peter Lee, Ltd. v. Eighth Judicial Dist. Court of State*, No. 66465, 2016 WL 327869, at *3 (Nev. Jan. 22, 2016) (unpublished) (noting that Nevada courts "have inherent authority to stay [legal] malpractice suits, holding them in abeyance pending resolution of underlying litigation" (citing *Beal Bank, SSB v. Arter & Hadden, LLP,* 42 Cal. 4th 503 (Cal. 2007))).

Similarly, Bullion's formalistic argument that Goldstrike cannot "exploit" the possibility of a reversal in the Federal Case to argue for a stay is based on Bullion's unfounded idea that NRAP 8 applies here. (Opp'n to Mot. for Stay at 7 n.4.) As discussed below, Goldstrike does not seek to "exploit" a reversal—Goldstrike believes the Ninth Circuit Court of Appeals will ultimately affirm the judgment—but as with any appeal, there remains at least the possibility that Bullion may prevail, sending the case back to the federal district court. It is appropriate for this Court to account for that possibility in formulating the best path forward in this case.

B. GOLDSTRIKE IS NOT ASKING THE COURT TO DISMISS THIS SUIT, ONLY STAY IT.

In addition to applying the wrong rule and consulting the wrong legal authority, Bullion misconstrues the remedy that Goldstrike seeks. While Bullion argues that courts permit "parallel" proceedings, the issue in the cases cited by Bullion was whether parallel claims should be *dismissed*, not whether it was appropriate to stay such claims to allow identical claims to proceed in a different forum. *See Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922) (noting only that a parallel case is "not precluded").[3] Goldstrike is not asking this Court to "bow out" of the case, it is only asking for a brief stay to allow Bullion's appeal in the Federal Case to run its natural course. (Opp'n to Mot. for Stay at 6 (citing *Burns v. Watler*, 931 F.2d 140, 146 (1st Cir. 1991).) As *Burns* recognized, the question of whether a court should dismiss parallel claims is a different question

[3] Bullion's remaining legal authority is immaterial. *N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs*, 129 Nev. 682, 687, 310 P.3d 583, 587 (2013) (addressing the political question doctrine).

from whether "the simultaneous filing of actions in the federal and state fora would support the stay of proceedings in" one of the fora. 931 F.2d at 147.

Similarly, Bullion's suggestion that Goldstrike is somehow "judicially estopped" from seeking a stay is without merit. Among other requirements, judicial estoppel only applies when a party attempts to advance "two positions [that] are *totally inconsistent*." *Deja Vu Showgirls v. State, Dep't of Tax.*, 130 Nev. 711, 717, 334 P.3d 387, 391 (2014) (emphasis added). Here, there is nothing inconsistent with Goldstrike pointing out that the federal courts lack jurisdiction over the case while also insisting that Bullion complete its litigation in the federal forum by seeing its appeal through before litigating identical claims in state court. Indeed, if any party is taking "totally inconsistent" positions, it is Bullion—it is arguing in the Federal Case that its claims are properly before the federal courts, yet it asks this Court to proceed with the exact same claims based on the assumption that its claims were properly dismissed from federal court. To reiterate, Goldstrike is not asking this Court to deprive Bullion of a forum, it is merely asking the Court to wait a modest period for final resolution of Bullion's Federal Case.

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C. PRACTICAL CONSIDERATIONS OF EFFICIENCY AND CONVENIENCE ARE APPROPRIATE FACTORS FOR THE COURT TO CONSIDER

Bullion directs this Court's attention to *Burns v. Watler*, which addresses circumstances under which federal courts may abstain from—that is, decline jurisdiction over—a case also pending in state court. 931 F.2d 140 (1st Cir. 1991). While federal courts also have a strong policy in favor of exercising the jurisdiction they are afforded, *id*. at 146, the U.S. Supreme Court has recognized that they may decline to exercise jurisdiction when a parallel state case exists, consistent with "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," *Co. River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976) (internal marks omitted). The *Colorado River* abstention factors recognized by

federal courts are essentially the same familiar factors that govern whether a stay is appropriate in this Court, including "the inconvenience of the [respective] forum[s]; the desirability of avoiding piecemeal litigation; the order in which the forums obtained jurisdiction . . . ; and whether the [existing] forum will adequately protect the interests of the parties." *Burns*, 931 F.2d at 146 (internal marks omitted).

Here, these same factors weigh heavily in favor of a stay. First, Bullion chose the federal forum initially, so it is not inconvenient to insist that Bullion complete its litigation in that forum before litigating parallel proceedings before this Court.[4] Second, requiring Bullion to first exhaust its original Federal Case before turning its attention to a second, overlapping case, avoids piecemeal litigation. Third, the federal forum "obtained jurisdiction"[5] nearly ten years before this Court—another factor weighing in favor of a brief stay. Fourth, and finally, the federal forum is more than capable of protecting any rights Bullion may have, and Bullion does not suggest otherwise.[6]

Furthermore, *Burns* recognizes the real, practical problems that simultaneous parallel litigation can cause on the orderly administration of justice. If cases proceed in parallel, the "*res judicata* effect of the state court judgment [c]ould preclude further litigation in the federal forum," or vice versa, at some point in the future. 931 F.2d at 143. Depending on how the parties view their

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4 If Bullion truly wished to litigate its claim in this forum instead, it always has the option of dismissing its pending appeal in the Federal Case. Bullion's argument that a stay is inappropriate because there is nothing happening in the federal district court (Opp'n to Mot. for Stay at 6) ignores that there is a significant amount of work currently happening at the appellate level. Indeed, Bullion's opening brief is due in just a few weeks—on April 1—pursuant to its requested extension, and Goldstrike's brief is due 30 days later.

5 Although the federal court never properly asserted jurisdiction over the case, Bullion's appeal challenges that finding. Thus, until that appeal is exhausted, this factor weighs in favor of deferring to the Federal Case.

6 Bullion attempts to invert this factor, suggesting that "pressing forward" in this case will not affect its appeal in the Federal Case. (Opp'n to Mot. for Stay at 8.) The question before this Court is not whether proceeding in this case will affect the appeal—no one has suggested otherwise.

chances in the respective fora, this situation can lead to a "race to judgment," with each party seeking to prosecute and reduce its preferred action to judgment in order to establish the res judicata effects in the other case. *See Weiner v. Shearson, Hammill & Co*., 521 F.2d 817, 820 (9th Cir. 1975).

Indeed, this appears to be Bullion's strategy. It admits that the parties "will no doubt bring some of the[] same arguments to this Court as were brought to the federal district court, including the[parties'] respective requests for summary judgment on the application of the area-of-interest royalty provision." (Opp'n to Mot. for Stay at 10.) Bullion's stated goal is to have this Court reconsider all of the motions for summary judgment in the Federal Case, consisting of hundreds of pages of briefs and thousands of pages of exhibits,[7] in the hope "this Court [will] grant one of those motions"—putting it in direct conflict with the Federal Case. (*Id*. at 10.) Given the well-established principles of comity, *see Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 751, 137 P.3d 1161, 1164 (2006), this Court should not be eager to create a conflict with the rulings of the federal courts while the case remains pending before them.

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D. NUMEROUS OTHER PROBLEMS MAY ARISE FROM SIMULTANEOUS PARALLEL LITIGATION.

The "race to judgment" risks creating a number of difficult legal conflicts and pitting the federal courts against the state courts in their adjudication of the issues. The axiom that "haste makes waste" applies here.

Contrary to Bullion's argument that "there is no scenario in which a stay would lead to a quicker resolution of Bullion's claims," a stay is the only way to avoid what could become a case-derailing knot of conflicting rulings. (Opp'n ot Mot. for Stay at 10.) Under any scenario in which

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[7] A very small sample of the parties' briefing on those issues is attached to Bullion's Opposition at Exhibits 2, 4, and 5.

the Ninth Circuit Court of Appeals sides with Bullion, the ultimate resolution of Bullion's claims will be greatly streamlined and expedited if this Court does not wade into the proceedings in the meantime.

In the event this Court makes *any* determination on *any* of these issues that is different from the rulings in the Federal Case, it will be to one party's advantage to remain in this forum and likely in the other party's interest to return to federal court. If the Ninth Circuit reverses, the parties and *both courts* will be forced to spend a tremendous amount of time and effort determining which of the two should now handle the claims, with the parties likely pointing in different directions in light of how the Court resolves issues in the meantime. Avoiding the resolution of those issues will alone save a significant amount of time and expedite the resolution of Bullion's claims.

While Bullion cavalierly claims that "any question of abstention" can be resolved in the future (Opp'n to Mot. for Stay at 9 n.6), it will not be so easy to determine the appropriate forum in the event this Court proceeds with Bullion's claims and the Ninth Circuit ultimately reverses. And whichever forum is ultimately chosen, one trial court's efforts will have been a complete waste.

E. BULLION IDENTIFIES NO ACTUAL PREJUDICE FROM A STAY.

While the foregoing discussion highlights all of the reasons why a modest stay will result in the efficient administration of justice and avoid unnecessary conflicts between state and federal courts, Bullion can identify no concrete, actual prejudice from such a stay. A mere lapse of time is not enough.

Although Bullion's Complaint in this case names new parties, it advances the same claims and same theories of liability under the same alleged contract against those entities. The other defendants who have been served have filed separate motions to dismiss for various deficiencies. However, because Bullion's principal claims continue to be against Goldstrike and because

Bullion's core legal theories and claims are all at issue in the Federal Case, a partial stay would make little sense and would result in the type of piecemeal litigation that all courts seek to avoid.

Finally, Goldstrike notes that all of the supposed prejudice from a stay could be avoided if Bullion dismissed its appeal and committed to litigating in just one forum. Bullion spends considerable effort attempting to convince the Court that this forum is more favorable to its interests, yet it continues to press its claims in the Federal Case. If Bullion truly believes its interests are better served in this forum, it is entirely within Bullion's power to make that happen.

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: March 8, 2019.

PARSONS BEHLE & LATIMER

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