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

BULLION MONARCH MINING, INC.'S ANSWER

With Supporting Points and Authorities

DANIEL F. POLSENBERG (SBN 2376)
J. CHRISTOPHER JORGENSEN (SBN 5382)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

CLAYTON R. BRUST (SBN 5234)
KENT ROBISON (SBN 1167)
ROBISON, SHARP,
SULLIVAN & BRUST, P.C.
71 Washington Street
Reno, Nevada 89503
(775) 329-3151

Attorneys for Real Party in Interest Bullion Monarch Mining, Inc.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Bullion Monarch Mining, Inc., is a wholly owned subsidiary of EMX Royalty, Inc., which is publicly traded on the NYSE under the symbol EMX. No publicly traded company owns more than 10% of the parent's stock.

Petitioners are or have been represented by Daniel F. Polsenberg, J. Christopher Jorgensen, Joel D. Henriod, and Abraham G. Smith at Lewis Roca Rothgerber Christie, LLP; and Clayton R. Brust and Kent Robison of Robison, Sharp, Sullivan & Brust, P.C., and by Thomas L. Belaustegui.

Dated this 10th day of February, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Attorneys for Real Party in Interest

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

COURT RULES

STATUTES

TREATISES

OTHER AUTHORITIES

ROUTING STATEMENT

Bullion Monarch Mining, Inc. agrees that the Supreme Court may retain the petition because it arises from a case in business court. NRAP 17(a)(9).[1]

ISSUES PRESENTED

1. Are otherwise timely claims based on continuing breaches of a contract categorically barred merely because a similar complaint—which was filed more than six years earlier and did not seek future damages—was dismissed without prejudice?

2. NRS 11.500 is a savings statute that, in some circumstances, automatically extends the otherwise applicable statute of limitations. Does NRS 11.500 precludes equitable tolling or estoppel?

3. When a district court erroneously dismisses a plaintiff's complaint on the merits, disabling the plaintiff from refiling the complaint in another forum, does the statute of limitations continue to run during the plaintiff's successful appeal?

---

[1] Barrick refers to NRAP 17(a)(1), (a)(13), and (a)(14), apparently in reference to the rule as originally enacted in January 2015. (Pet'n 1.) As amended, NRAP 17 does not presumptively assign writ petitions to the Supreme Court.

4. NRS 11.500(3) purports to require the federal judiciary to finally determine its subject-matter jurisdiction over a case within five years in order to apply its savings effect to that case. Is that restriction constitutional?

STATEMENT OF THE CASE

A. Factual Background

The 1979 Agreement Gives Bullion a 99-Year Royalty

In 1979, Bullion Monarch Company[2] gave several valuable mineral rights to a venture operated by Barrick Goldstrike Mines, Inc.'s predecessor. (1 P. App. 13–33.)[3] *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.* (*Bullion II*), 131 Nev. 99, 101, 345 P.3d 1040, 1041 (2015). The mine operator got the right to develop Bullion's claims, as well as any others the operator acquired in a surrounding eight-mile-by-eight-mile area of interest. (1 P. App. 22–24, 1 R.P. App. 156–58, ¶ 11.) *See also Bullion II*, 131 Nev. at 101, 345 P.3d at 1041. That area of interest covers much of what is known as the Carlin Trend, one of the richest gold and silver deposits in the world. *Id.*

For the venture to be profitable, Bullion agreed to stay out of the area of interest for 99 years, through 2078. (1 P. App. 22–24, 1 R.P.

---

[2] Bullion Monarch Company is the corporate predecessor to Bullion Monarch Mining, Inc. (*See* ECF 224, Order 2:3–6, ER 924.) We refer to both as "Bullion."

[3] "P. App." and "P. Supp. App." refer to petitioner Barrick's appendix and supplemental appendix. "R.P. App." refers to real party in interest Bullion's appendix.

App. 156–58, ¶ 11.) In exchange, Bullion was to receive a royalty on production both from its original claims and from those acquired during that 99-year period in the area of interest. (1 P. App. 17–18, 22–24, ¶¶ 4, 11.)

Barrick Produces Minerals but Does Not Pay Bullion

Barrick confirmed that it or its predecessors had acquired properties in the area of interest and that this land was productive. (*See* 2 R.P. App. 262–69.) Barrick eventually parlayed its interest in all of the original subject property for additional area-of-interest properties from Newmont Gold Co., which then took the original subject property. (2 R.P. App. 302–03, ¶¶ 47–49.) Barrick has produced millions of ounces of gold and other precious metals from the area of interest. (2 R.P. App. 262–69.) Yet Barrick has paid Bullion no royalties. (1 P. App. 8–9.)

B. Procedural Background in Federal Court

Bullion Sues Barrick

After learning that Barrick was responsible for Bullion's royalty payments, Bullion sued in Nevada's federal district court. (1 P. App. 56.)[4]

[4] Bullion originally sued Newmont USA Limited based on Newmont's

Barrick Does Not Claim Common Citizenship with Bullion

As Bullion alleged, the court had jurisdiction over Bullion's state-law claims because Barrick owed far in excess of $75,000 and Bullion and Barrick were citizens of different states—Bullion in Utah and Barrick in Colorado and Nevada. Barrick did not challenge diversity jurisdiction and in fact admitted that it was incorporated in Colorado and did business in Nevada. (2 P. App. 299, 304, ¶¶ 2A, 10; 2 R.P. App. 380, 394, 437, ¶¶ 2A, 10.) *See* 28 U.S.C. § 1332.[5] Apart from a boilerplate affirmative defense,[6] Barrick did not challenge diversity jurisdiction and

---

assurance that it was responsible for Bullion's royalty payments under the 1979 Agreement. (1 R.P. App. 4; 2 P. App. 154.) On June 2, 2009, however, Newmont disclosed a secret agreement with Barrick making *Barrick* responsible for those payments. (1 R.P. App. 8, 10; 5 P. App. 1080–81.) By stipulation, the parties separated the claims against Barrick into a sub-case of the originally filed case against Newmont. (1 R.P. App. 4.) The claims against Newmont were ultimately dismissed on laches grounds, but the claims against Barrick moved forward. (1 R.P. App. 4; 6 R.P. App. 1176.)

[5] Corporations such as Bullion and Barrick can be citizens of up to two states: where they incorporated and where they maintain their "principal place of business." 28 U.S.C. § 1332(c)(1).

[6] Barrick alleged that the parties were "both citizens of the same state." (2 P. App. 352.) Barrick never suggested that it was a citizen of Utah. If anything, it appears that Barrick might have referred to Bullion's representation that it (like Barrick) was "doing business in the State of Nevada at all times relevant hereto." (2 P. App. 299, ¶ 1; 2 P. App. 342, ¶ 1.) By 2009, though, there is no dispute that Bullion did not have its

in fact admitted that it was incorporated in Colorado and did business in Nevada. (2 P. App. 342, 345, ¶¶ 2A, 10; 2 P. App. 284, 287, ¶¶ 2A, 10; *see also* 2 P. App. 359 (parties' joint statement in the case-management report that "[j]urisdiction is not contested").) Barrick never suggested that it was headquartered in Utah; it referred questions about the direction and control of the company on a variety of topics—its contracts, its acquisitions, its relationship to corporate predecessors—to individuals with Barrick Gold Corporation in Canada. (3 P. App. 383–87.)

In 2010, the U.S. Supreme Court decided *Hertz Corp. v. Friend*, which set a new standard: a corporation's "principal place of business" for determining citizenship is the corporation's "nerve center"—the center of direction, control, and coordination. 559 U.S. 77, 97 (2010).

Barrick offered no hint that *Hertz* changed the analysis of its principal place of business. Indeed, in other litigation around this time,[7] Barrick continued to insist not only that it was "a corporation operating and existing under the laws of Colorado," but that a federal court would

---

principal place of business in Nevada. (1 R.P. App. 3:1–4.)

[7] Barrick confirms that its corporate structure did not change from 2009 to 2014. (4 P. App. 715 n.2.)

have diversity jurisdiction over Barrick's third-party complaint against "a Utah nonprofit corporation with its principal place of business in Salt Lake City, Utah" because "the parties are citizens of different states." (3 R.P. App. 518:6–20, 530:6–20.)[8] Had Barrick maintained its principal place of business in Utah, its claim to diversity would have been false.

Barrick Seeks a Dismissal on the Merits under the Rule Against Perpetuities

Far from resisting the federal district court's jurisdiction, Barrick invoked it to have Bullion's complaint dismissed on the merits based on Nevada's rule against perpetuities—a judgment that would have been void had the court lacked jurisdiction. (1 R.P. App. 4:20–24.)

From 2011 to 2015, Bullion's claims were moribund as Bullion pursued an appeal in the Ninth Circuit. (1 R.P. App. 5:1–8.) The circuit court certified the rule-against-perpetuities question to this Court,

---

[8] *N. Am. Elec. Reliability Corp. v. Barrick Goldstrike Mines Inc.*, Case No. 3:11-cv-794-LRH-WGC, ECF 5, at 6:6–20, ¶¶ 1, 6, filed Nov. 22, 2011; ECF 17, at 6:6–20, ¶¶ 1, 6, filed Jan. 19, 2012. *See generally Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court*, 127 Nev. 583, 589, 591 n.4, 262 P.3d 699, 702, 703 n.4 (2011) (taking judicial notice of census figures in a writ petition); *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009).

which confirmed that the rule does not apply to an area-of-interest provision in a commercial mining agreement. *Bullion II*, 131 Nev. 99, 345 P.3d 1040. The Ninth Circuit accordingly reversed, reinstating Bullion's complaint. *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.* (*Bullion III*), 600 F. App'x 559, 560 (9th Cir. 2015).

After Barrick Loses its Bid for Summary Judgment, Barrick Questions its Diversity from Bullion

Back before the federal district court—now six years after Bullion filed its complaint and five years after the *Hertz* decision—Barrick tried again to get summary judgment on the merits, both on the preclusive effect of an earlier judgment for Barrick's co-defendant on laches and on the interpretation of the 1979 Agreement. (1 R.P. App. 1:18–20.) Bullion also requested partial summary judgment under the 1979 Agreement. (1 R.P. App. 1:20–22.) The district court denied all the motions and set the case for trial. (1 R.P. App. 1, 16.)

As the parties were preparing the pretrial memorandum, Barrick for the first time alleged that it, like Bullion, was actually a citizen of Utah in 2009, destroying diversity. (3 P. App. 469–70.) Barrick argued that the *Hertz* test put Barrick's nerve center in Salt Lake but that Barrick's attorneys unearthed this fact only after an "investigat[ion]" dur-

ing the process of preparing that memorandum. (3 P. App. 469–70.) Barrick supported its motion with previously undisclosed documents and witnesses purporting to show a Utah connection. (3 P. App. 481.) These new individuals identified as "officers" were never disclosed as having discoverable information under Fed. R. Civ. P. 26(a)(1)(A)(i). The witnesses that Barrick had disclosed during discovery, by contrast, were primarily associated with Nevada. (3 P. App. 383–87; 2 R.P. App. 264–69.) Rich Haddock, who previously identified himself as nonparty Barrick Gold Corporation's general counsel, now revealed that he held various positions with Barrick in Utah, including a seat on Barrick's board of directors in 2009. (3 P. App. 393–94, 482, ¶¶ 3, 8.)

After Jurisdictional Discovery, the Federal District Court Dismisses Bullion's Complaint

Given the complexity of the issue, the district court permitted jurisdictional discovery. The court recognized that if Barrick's control emanated from either Nevada or from Canada, "the parties are diverse, and this Court may continue to exercise diversity jurisdiction over this case." (1 R.P. App. 20:1–4.) Only Utah citizenship would defeat diversity.

Barrick's evidence to support Utah citizenship was cloudy. Some of Barrick's named officers—including its president, vice president of operations, chief financial officer, and tax director—worked in Utah, but a majority of Barrick's other officers did not; a plurality were based in Toronto, Canada. (3 R.P. App. 626–30.) But even these nominal officers rarely took action in Barrick's name; instead, they expressly acted in their roles as officers of a separate regional management company, Barrick Gold of North America, Inc. (BGNA). (3 P. App. 495:9–16, 520–21 (testifying to activities "of the senior leaders . . . at Barrick Gold of North America").) According to Barrick, BGNA made all of the corporate decisions for Barrick, and BGNA was headquartered in Salt Lake. (3 P. App. 495:9–16.) BGNA, in turn, worked "under the directions of Barrick Gold's policies" from Canada. (3 R.P. App. 740–42; *see also* 3 R.P. App. 720.) A slim 3-2 majority of the board was split between Salt Lake and Toronto, but by Barrick's own admission it held no board meetings in 2009. (4 R.P. App. 918–19, 926–30, 973.) By all indications, Barrick held its annual shareholder meeting in Canada. (3 R.P. App. 647–50; 4 R.P. App. 938.)

In contrast, Barrick's general manager in Nevada, John G. Mansanti, was at the top of what Barrick called "senior management" (3 R.P. App. 696, 703–05, 852), overseeing Barrick's 1600 employees and 400–500 subcontractors, and its $670 million operating budget. (3 R.P. App. 701, 702.) He had ten direct reports. (3 R.P. App. 628–30.) He had signature authority to enter into contracts for Barrick without consultation with Salt Lake (3 R.P. App. 746–47; 4 R.P. App. 757, 789), and he purported to sign these contracts as an officer of Barrick. (*E.g.*, 3 R.P. App. 741–47; 4 R.P. App. 758–59, 791–93.)

Although Barrick's Rule 30(b)(6) designees obediently identified Salt Lake as the corporate headquarters (1 R.P. App. 22:13; 4 P. App. 719:3–6), they knew little about Barrick or its organization within "over a hundred" entities of the Barrick family. (3 R.P. App. 606, 609, 610–1; 4 R.P. App. 760, 895, 915–16, 917.) Barrick was also unable to produce much of the evidence related to its "nerve center" because it had been destroyed. (3 R.P. App. 716–18; 4 R.P. App. 981–83.) What documents Barrick did produce were almost entirely marked confidential, requiring

them to be sealed when Bullion sought to introduce them into the record. (*See* 1 R.P. App. 18 n.2.)[9]

Based in part on its miscalculation of the number of officers and directors living in Utah (the Court believed that a majority of officers were in Utah, when only a minority were), the federal district court on November 1, 2018 dismissed Bullion's complaint. (1 R.P. App. 18.) That order is now on appeal to the Ninth Circuit.

C. Procedural Background in State Court

Bullion Refiles in State Court

Pending the Ninth Circuit appeal, Bullion as a precaution promptly refiled this action on December 12, 2018, within the 90-day savings period under NRS 11.500(1)(b). (1 P. App. 1.)

The new complaint differs from the federal action in a couple ways. First, Bullion seeks its production royalties from 2009 through the filing of the new complaint; those royalties were not owed in 2009 because the production had not occurred. (1 P. App. 8–10.) Second, Bullion added other Barrick entities that, based on recent discoveries,

[9] Bullion provisionally filed these materials under seal in the Ninth Circuit, but they became public when Barrick did not object to their unsealing. *See* 9th Cir. R. 27-13(f).

appear to have acquired property within Bullion's area of interest. (6 R.P. App. 1040, ¶ 28.) It appears that Barrick did so deliberately in an attempt to separate the valuable production rights from the entity carrying an obligation to pay Bullion royalties on that production. Barrick never disclosed the acquisitions of its sister companies in the federal litigation.

Barrick Moves for Summary Judgment on What It Characterizes as "the Statute of Repose"

Nevada's savings statute, NRS 11.500, protects plaintiffs whose claims are dismissed in a court without jurisdiction, giving them a chance to refile:

> 1. Notwithstanding any other provision of law, and except as otherwise provided in this section, if an action that is commenced within the applicable period of limitations is dismissed because the court lacked jurisdiction over the subject matter of the action, the action may be recommenced in the court having jurisdiction within:
>
> (a) The applicable period of limitations; or
>
> (b) Ninety days after the action is dismissed,
>
> whichever is later.
>
> 2. An action may be recommenced only one time pursuant to paragraph (b) of subsection 1.

> 3. An action may not be recommenced pursuant to paragraph (b) of subsection 1 more than 5 years after the date on which the original action was commenced.
>
> * * *

In an eight-page motion for summary judgment, Barrick contended that this last subsection limiting a plaintiff's ability to invoke the savings statute is actually a "statute of repose" that bars even otherwise timely claims. (1 P. App. 42.) Bullion disagreed with this characterization of NRS 11.500(3) and explained that, regardless of the savings statute, Bullion's has timely claims through equitable tolling, the rule that tolls claims pending appeal, and Barrick's continuing breaches of its ongoing obligation to pay a "monthly production royalty." (1 P. App. 82; 1 P. App. 18; 1 R.P. App. 152, ¶ 4(E).) Bullion also argued in the alternative that the five-year restriction in NRS 11.500(3) is unconstitutional for violating the separation of powers, the supremacy clause, due process, equal protection, and the right of access to the courts. (1 P. App. 100.) As Bullion explained, once that unconstitutional subsection is severed from the savings statute, Bullion's are also timely under the 90-day refiling period in NRS 11.500(1)(a). (1 P. App. 110.)

Apparently caught unawares, Barrick fumbled to address these arguments in a 33-page reply. (6 P. App. 1234.) Of that, Barrick devoted a little more than a page to the continuing-breach theory, arguing that *Schwartz v. Wasserburger*, 117 Nev. 703, 30 P.3d 1114 (2001) stands for the proposition that filing suit on an installment contract accelerates the statute of limitations, such that a later dismissal will bar refiling on not-yet-accrued breaches. (6 P. App. 1265–66.)

The District Court Denies the Motion

Unpersuaded by Barrick's briefing, the district court denied the motion. At the hearing, the court did not mince words: "I know what a statute of repose is and this ain't it." (6 P. App. 1289:6.) The court noted that the federal judiciary does not have a five-year rule akin to NRCP 41(e) and in fact abhors "those kind[s] of rules if we were to try to get them to do stuff quickly." (6 P. App. 1299:21–1300:1.) The order denying the motion concluded that

> equitable tolling and NRS 11.500 are not mutually exclusive. If counsel wishes to address the facial constitutionality of portions of NRS 11.500, the Nevada Attorney General's office must be given notice so that can be fully addressed. Given the allegation of continuing breaches, the motion is denied. After the Ninth Circuit Court of Appeals rules, there may be certain other factual issues related to earlier breaches

> that can be raised by a motion for summary judgment, but by the way it has been presented, it is denied.

(P. Supp. App. 1313:27–1314:7.)

SUMMARY OF THE ARGUMENT

Bullion's claims are timely. First, Barrick continues to breach its monthly royalty obligation, entitling Bullion to damages and declaratory relief. Second, a jury could find that Barrick is equitably estopped from invoking the statute of limitations for the time Bullion's claims were in federal court. Third, the six-year limitations period for contractual claims would not have run even under the ordinary rule that suspends the time during a successful appeal. Fourth, Bullions claims are timely under the 90-day refiling period in NRS 11.500(1)(b); the Legislature's attempt to limit its application to five years is unconstitutional on its face and as applied here. Any of these alternative bases justifies the district court's order denying summary judgment. This Court should deny Barrick's petition.

ARGUMENT

PART ONE:

THE MERITS

I.

EVEN IF NOTHING WERE TOLLED, SUMMARY JUDGMENT WOULD BE IMPROPER

The district court's order was straightforward: Say Barrick is right that Bullion is not entitled to any tolling. Bullion still has timely contractual claims for the last six years of breaches under the doctrine of continuing breach, defeating summary judgment.

The petition's attack on the continuing-breach theory is meritless. Barrick's principal case, *Schwartz v. Wasserburger*, 117 Nev. 703, 30 P.3d 1114 (2001), provides no refuge. Bullion did not sue and could not have sued in 2009 for then-future royalty payments, so the discussion of "anticipatory repudiation" in *Schwartz* does not apply here. Regardless, *Schwartz* was wrongly decided and should not be extended here.

A. Bullion Can Recover for the Ongoing Breaches within the Statute of Limitations

1. Repeated, Continuing Breaches of a Periodic Royalty Toll New Limitations Periods

Even where NRS 11.500 does not "save" expired claims, a refiled lawsuit can seek relief from *ongoing harm* within the applicable limitations period. *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 823, 407 P.3d 702, 709 (2017). For example, "where contract obligations are payable by installments, the limitations statute begins to run only with respect to each installment when due." *Clayton v. Gardner*, 107 Nev. 468, 470, 813 P.2d 997, 999 (1991). So under Nevada's six-year statute of limitation for most contract claims, NRS 11.190(1), "only those installments that were due more than six years" before the complaint "are barred by the limitations statute." *Id.* at 471, 813 P.2d at 999.

It is "well-established . . . in the context of gas, oil, and mineral contracts" that such interests "should be construed as divisible contracts, with each underpayment [or nonpayment] giving rise to a separate cause of action." *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 466 (6th Cir. 2013). As in *McKellar v. McKellar*, 110 Nev. 200, 871

P.2d 296 (1994), waiting years or even decades to sue does not waive the plaintiff's right to recover the last six years of nonpayments.

2. Barrick Is Continually Breaching its Monthly Royalty Obligation

Here, Bullion's royalty is "due on the first day of each month" or "no later than FORTY-FIVE (45) days after the date payment for production sales is received." (1 P. App. 18, ¶ 4(E).) Barrick is breaching its agreement, becoming newly and unjustly enriched, and inflicting new harm on Bullion each month that it withholds payment.

B. Bullion's Federal Lawsuit Did Not "Accelerate" the Statute of Limitations for All Possible Future Breaches

The linchpin of Barrick's writ petition is that once Bullion filed suit in federal court, that act constituted an election to sue for all possible future breaches of as-yet-undue royalties, accelerating the statute of limitations seven decades, from 2078 to 2009. From every angle, this is wrong: First, the Bullion could not accelerate its right to future royalty payments because it depends on an unknowable fact: how much gold and other minerals Barrick will produce each month for the next six decades. Second, Bullion did not terminate the contract, as required for

acceleration; Bullion continues to perform its noncompetition covenant. Third, the case on which Barrick relies is wrong: even if a complaint would otherwise accelerate the statute of limitations, once it is dismissed without prejudice it is though it never existed, and does not have any statute-of-limitations consequences.

1. The Doctrine of Anticipatory Breach Does Not Apply to Bullion's Royalty

As even Barrick seems to see, when a defendant repudiates an installment contract, the plaintiff can "declare the entire [debt] due" and sue for future installments only when the debt is for "a specific amount." (Pet'n 16.) *Cf. Clayton*, 107 Nev. at 470–71 & n.3, 813 P.2d at 999 & n.3 (lump sum split into smaller, fixed payments). That was the case in *Schwartz v. Wasserburger*, where the defendant had agreed to buy Mr. Schwartz's partnership interest and to "pay the purchase price in regular six-month installments." 117 Nev. at 705, 30 P.3d at 1115. When the defendant announced that it would stop paying, Mr. Schwartz immediately sued to recover the future, fixed installments, moving the statute of limitations up to the time of the lawsuit. *Id.* at 706–07, 30 P.3d at 1116.

Acceleration is not an option where the right or amount of future payments is contingent. *OK Sales, Inc. v. Canadian Tool & Die, Ltd.*, 08-CV-24-TCK-TLW, 2009 WL 961791, at *8–10 (N.D. Okla. Mar. 31, 2009) (sales commission); *Operators' Oil Co. v. Barbre*, 65 F.2d 857, 860–61 (10th Cir. 1933) (oil royalty). This is generally the case in cases involving mineral, gas, and oil royalties because future payments "depend[] upon three factors . . . unknown" at the time of filing: "the amount of oil [or minerals] which the leases might produce, the amount which [government agencies] would permit to be taken, and the price of oil [or minerals] on dates then in the future." *Operators' Oil Co. v. Barbre*, 65 F.2d 857, 860–61 (10th Cir. 1933). While the plaintiff "is entitled to recover his royalties to date," the defendant's "obligation to pay future royalties remains conditional and dependent upon" future production (or sales), "if any." *Kozak v. Medtronic, Inc.*, CIV.A. H-03-4400, 2006 WL 5207231, at *2 (S.D. Tex. Sept. 28, 2006).

In that situation, the most a plaintiff can do is to request declaratory relief or an accounting; the doctrine of anticipatory repudiation cannot apply to accelerate the plaintiff's right to actual damages. *Kozak v. Medtronic, Inc.*, CIV.A. H-03-4400, 2006 WL 5207231, at *2 (S.D. Tex.

Sept. 28, 2006); *see also Operators' Oil Co.*, 65 F.2d at 860–61; *accord OK Sales, Inc. v. Canadian Tool & Die, Ltd.*, 08-CV-24-TCK-TLW, 2009 WL 961791, at *10 n.12 (N.D. Okla. Mar. 31, 2009).

Here Bullion had no way of knowing in 2009 what Barrick would produce in 2010 through 2018, so it could not then declare any potential royalty payment on that future production "due." And fact questions remain even as to past payments: whether Barrick concealed the existence of production in the area of interest that would toll the statute. *See Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 256, 277 P.3d 458, 464 (2012). Regardless, Barrick's resistance to making future royalty payments is but a "present breach[] with consequences in the future" to which "the doctrine of anticipatory repudiation would not apply." *Wallace Clark & Co., Inc. v. Acheson Indus., Inc.*, 422 F. Supp. 20, 23 n.6 (S.D.N.Y. 1976).[10]

[10] When the nonbreaching party has performed in granting the interest subject to the royalty, "the anticipatory breach by the other party of such an obligation will not justify acceleration of future payments." *Id.*

2. Bullion Relies on the Contract Rather than Terminating It

In addition, the notion that suing on an anticipatory breach of the entire contract accelerates the accrual of the claim, *see Schwartz*, 117 Nev. 703, 30 P.3d 1114, does not apply if the plaintiff elects to "rely on the contract"; "the statute of limitations does not begin to run until the plaintiff has elected to treat the breach as *terminating* the contract." *Romano v. Rockwell Int'l, Inc.*, 926 P.2d 1114, 1120 (Cal. 1996) (emphasis added). If plaintiff elects to continue performance of the contract, the statute of limitations does not begin to run even though the right to sue has accrued. 31 RICHARD A. LORD, WILLISTON ON CONTRACTS § 79:15, at 332 (4th ed. updated July 2019).

Here, in contrast to the original complaint in *Schwartz*, Bullion never alleged or sought to prove that it anticipated a breach of future payments. Instead, Bullion alleged that Barrick "materially breached the terms of the Agreement," that "Bullion has suffered general and special damages," and that "Bullion has not been paid for the amount it has enriched Defendants." (2 P. App. 305, 307; 2 R.P. App. 400, 402, ¶¶ 18, 19, 30.) Even Bullion's accounting claim looks only to "royalties owed to Bullion for mining activities of Defendants in the Area of Inter-

est" (2 P. App. 307, 2 R.P. Ap. 402, ¶ 35), not some prediction of future harm. Far from treating Barrick's past nonpayment as an anticipatory breach of the entire contract, Bullion elected to continue performance by honoring, to this day, its bargain to refrain from competition in the area of interest.

3. A Complaint that Is Dismissed Without Prejudice Does Not Accelerate the Statute of Limitations

Because *Schwartz* does not apply to contingent royalties, Bullion's complaint is viable. Regardless, the dictum in *Schwartz* that a complaint accelerates the statute of limitations even when it is dismissed without prejudice is wrong and should not be extended here.

a. NEITHER PARTY CAN RELY ON A COMPLAINT THAT IS DISMISSED WITHOUT PREJUDICE

A dismissal without prejudice saves plaintiffs from preclusion and other doctrines, *see Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054 n.27, 194 P.3d 709, 713 n.27 (2008), while normally saving defendants against an argument that a subsequently filed complaint relates back to the filing date of the original complaint. Unless NRS 11.500(1) applies, it is as though the complaint never existed.

Wheble v. Eighth Judicial District Court, 128 Nev. 119, 272 P.3d 134 (2012), on which Barrick relies, exemplifies this parity. There, after plaintiffs' medical-malpractice complaint was dismissed for failure to attach a medical-expert affidavit, plaintiffs filed a second complaint and tried to invoke NRS 11.500(1)'s savings provision. *Id.* at 121, 272 P.3d at 136. This Court disagreed, noting that the complaint was "void ab initio and never legally existed," so no action was ever "commenced" under NRS 11.500(1). *Id.* at 123, 272 P.3d at 137. The dismissal without prejudice made it as though plaintiffs had never filed an initial complaint.

b. SUING IN A COURT WITHOUT JURISDICTION IS NOT A BINDING ELECTION OF REMEDIES

The "acceleration" rule that *Schwartz* adopted was developed to help plaintiffs whose claims would otherwise be premature. *See Franconia Assocs. v. United States*, 536 U.S. 129, 144 (2002); *Total Control, Inc. v. Danaher Corp.*, 359 F. Supp. 2d 387, 394–95 & n.7 (E.D. Pa. 2005) ("It acts to extend the statutory period and allows plaintiffs to recover damages incurred prior to the statutory period." (citing *Thorpe v. Schoenbrun*, 195 A.2d 870 (Pa. 1963); 31 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 79:21, at 361 (4th ed. 2004)). It does not super-

sede the general rule that a plaintiff who sues in the wrong forum is free to recommence the suit in a forum with jurisdiction as though the first suit had not happened. *Kerr v. Merit Sys. Protection Bd.*, 908 F.3d 1307, 1314–15 (Fed. Cir. 2018); *Harrison v. Gemdrill Int'l, Inc.*, 981 S.W.2d 714, 718 (Tex. App. 1998); 28A C.J.S. *Election of Remedies* § 35 (2019).

c. A COMPLAINT THAT IS DISMISSED WITHOUT PREJUDICE DOES NOT ACCELERATE A STATUTE OF LIMITATIONS

Apart from *Schwartz*, Bullion is aware of no case holding "that a dismissed suit has a decisive legal effect on starting the statute of limitations period, but zero effect on its tolling"—such that once a plaintiff elected to sue on the contract, it was "lock[ed] into" an accelerated statute of limitations, even if that suit was later dismissed without prejudice. *See Ramona Inv. Grp. II v. United States* (*Ramona II*), 12-652C, 2014 WL 7129717, at *2–4 (Fed. Cl. Dec. 15, 2014).

The one other court to have confronted such an argument called it "[g]rasping at straws" and "logically incoherent and patently unfair." *Id.* (quoting *Ramona Inv. Grp. v. United States* (*Ramona I*), 115 Fed. Cl. 704, 707–08 (2014)). In *Romona Investments*, the United States tried to

argue that the plaintiff's claim for an anticipatory breach accrued at the time the plaintiff initially filed suit, even though that suit was later dismissed without prejudice under Fed. R. Civ. P. 41(a). *Id.* at 3. The court disagreed, noting that this would upend the rule that "[t]he effect of a dismissal without prejudice is to place the plaintiff in the same legal position it would have been in if he had never brought the suit." *Id.* (quoting *Standard Space Platforms Corp. v. United States*, 38 Fed. Cl. 461, 467 (1997)); *see also Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 923 (7th Cir. 2003). The court balked at the United States' assertion "that the filing of a suit based on an anticipatory repudiation is somehow an exception to this rule—that the statute of limitations here continued to run, rendering the [second] complaint . . . untimely." *Ramona II*, 2014 WL 7129717, at *2–4. That argument "is flatly wrong." *Id.* (distinguishing a court's jurisdiction to consider collateral issues, such as sanctions, from the "nullifying effect of a dismissal on an underlying dispute").

While *Ramona Investments* involved a voluntary dismissal, there is no reason to treat a dismissal without prejudice for lack of subject-matter jurisdiction any differently. *Gookins v. County Materials Corp.*,

119-CV-00867-JPH-MJD, 2019 WL 3253666, at *2–3 (S.D. Ind. July 18, 2019) (applying *Ramona Investments*' reasoning to an involuntarily dismissal under forum non conveniens), *report and recommendation adopted*, 2019 WL 5884148 (S.D. Ind. Nov. 12, 2019). To the extent *Schwartz* treats a dismissal without prejudice as having any "decisive legal effect," *Pettit v. Mgmt. Guidance, Inc.*, 95 Nev. 834, 835, 603 P.2d 697, 698 (1979), it is wrong.

C. Bullion's Claims for Prospective Relief, Including Declaratory Relief, Remain Timely

Barrick is equally wrong in its brand-new argument that Bullion's right to declaratory relief in 2009 started the clock on claims for as-yet-nonexistent damages, too. Its sole authority, *City of Fernley v. State, Department of Taxation*, says the opposite: even when a retrospective relief is barred, prospective "injunctive and declaratory relief" cannot be. 132 Nev. 32, 42–44, 366 P.3d 699, 706–07 (2016); *see also McCormick v. Bisbee*, 401 P.3d 1146 n.3 (Nev. 2017) (unpublished disposition) (applying *Fernley* outside of *Fernley*'s separation-of-powers context). That is because a declaratory-relief claim does not have its own statute of limitations that cuts off an otherwise timely claim for damages; rather, "the right to declaratory relief continues until the right to coercive

relief, as between the parties, has itself been extinguished." *Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167, 1192–93 (Md. Ct. Spec. App. 1997) (discussing cases). An early right to declaratory relief does not trigger the statute of limitations on damages claims. *Id.* (citing *W. Cas. & Sur. Co. v. Evans*, 636 P.2d 111, 114 (Ariz. 1981)); *see also Maguire v. Hibernia Sav. & Loan Soc.*, 146 P.2d 673, 681 (Cal. 1944); *Jaffe v. Carroll*, 110 Cal. Rptr. 435, 439 (Cal. Ct. App. 1973).

Here, because Bullion's claims for Barrick's continuing, periodic breaches are not otherwise barred, Bullion still has viable claims for declaratory and other prospective relief. Bullion's prior request for prospective relief in a complaint that was dismissed without prejudice on jurisdictional grounds does not cut off Bullion's right to seek that relief or Bullion's timely claims for damages now.

II.

BULLION'S CLAIMS ARE EQUITABLY TOLLED

A statute of limitations does not always run unimpeded from the time the action accrues. The limitations period, even after it has begun, may be tolled or suspended by statute (*e.g.*, NRS 11.280–.350) or by

judge-made tolling doctrines, *e.g.*, *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826–27, 673 P.2d 490, 492 (1983).

Here, all of Bullion's claims are timely under the doctrine of equitable tolling and estoppel.

A. NRS 11.500(3) Does Not Bar Equitable Tolling after a Dismissal from Federal Court

This Court has long recognized that equity has a role to play, even in the application of a statute of limitations. NRS 11.500(3) does not override those ordinary principles.

1. Parties Can Be Equitably Estopped from Asserting the Statute of Limitations

When a plaintiff has been misled or deceived into not filing suit in the proper forum, equitable tolling and estoppel provide crucial escape valves "to prevent the unjust technical forfeiture of causes of action." *State, Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 738, 265 P.3d 666, 671 (2011) (quoting *Lantzy v. Centex Homes*, 73 P.3d 517, 523 (Cal. 2003)); *see also Siragusa v. Brown*, 114 Nev. 1384, 1394, 971 P.2d 801, 807 (1998); *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 801 P.2d 1377 (1990) (recognizing the principle of estoppel but declining to apply it on the facts). Barring a claim for a proce-

dural technicality "will be looked upon with disfavor." *Copeland*, 99 Nev. at 826, 673 P.2d at 492.[11]

The "interests of justice" are the overriding consideration. *Masco*, 127 Nev. at 738, 265 P.3d at 671. In *Masco*, during a tax audit of a commercial cabinet company, the auditor assured the company that the tax department would consider its request for a refund as part of the audit. But the audit assessed only a deficiency, ignoring the refund request. By the time the company sued for a refund, the statute of limitations on some of the tax periods had expired. This Court held that those claims were equitably tolled, however: although Masco was "a large company with the apparent resources and wherewithal to investigate whether it might need to formalize its refund request," the auditor's assurances "lulled Masco into a false sense of security." *Id.* Importantly, the tax department was not prejudiced because, having "fully investigated the matter," the additional time from tolling did not impair the department's "ability to contest or investigate the matter." *Id.* at 739, 265 P.3d at 672; *see also City of N. Las Vegas v. State, Local Gov't Em-*

[11] *See also Shaffer v. Debbas*, 21 Cal. Rptr. 2d 110, 115 (Cal. Ct. App. 1993) (actual inducement, not "bad faith or [an] inten[tion] to mislead the plaintiff," is all that is necessary).

ployee-Mgmt. Relations Bd., 127 Nev. 631, 640–41, 261 P.3d 1071, 1077 (2011).

2. Equitable Tolling Applies to Cases Dismissed from Federal Court for Lack of Diversity

Equitable tolling can properly save a case refiled in state court after a dismissal from federal court for lack of diversity. In *Mojica v. 4311 Wilshire, LLC*, for example, an injured California citizen sued a California corporation in federal court. 31 Cal. Rptr. 3d 887, 888 (Cal. Ct. App. 2005). Without diversity, the federal court dismissed the action. The plaintiff refiled in California state court, but the defendant argued that the statute of limitations had expired and that equitable tolling could not save it. The Court of Appeal disagreed: filing the federal action gave the defendants notice of the claim, the plaintiff brought the federal action reasonably and in good faith, and tolling would not cause defendants prejudice "in gathering and preserving evidence for its defense." *Id.* at 889. In particular, the court noted that

> [a] plaintiff's seeming misanalysis of the facts or the law, particularly in a relatively esoteric area such as federal jurisdiction, does not amount to the sort of bad faith found to thwart equitable tolling. That type of bad faith typically involves trifling with the courts or the other party. . . . Nothing in the complaint sug-

> gests appellant was toying with the court or the parties.

Id. Moreover, the defendants' belief that "the federal complaints were so obviously defective in lacking diversity jurisdiction that they could not fathom" a "need to gather and preserve evidence" did not constitute prejudice:

> [T]he federal complaints involved the same elevator, the same accident, and the same injuries as the state court action. That respondents did not take appellant's federal litigation seriously does not mean they did not know what liability was potentially at stake. Hence, their prejudice argument fails.

Id.; *see also* 43 CAL. JUR. 3D *Limitation of Actions* § 152.

A "mistake in the selection of a court having questionable or defective jurisdiction should not defeat tolling of the statute when all other purposes of the statute of limitations have been satisfied." *Galligan v. Westfield Ctr. Serv., Inc.*, 412 A.2d 122, 124–25 (N.J. 1980) (applying equitable tolling to claim that had been dismissed from federal court for lack of diversity) (citing *Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424 (1965)). Even "a jurisdictionally deficient complaint" suffices to "alert[] defendants to the possibility of having to defend against the allegations," impairing "neither the defendants' ability to litigate nor the

court's capacity to adjudicate." *Id.*; *accord Negron v. Llarena*, 716 A.2d 1158, 1164 (N.J. 1998); *cf. also Torres v. Parkview Foods*, 468 N.E.2d 580, 583–84 (Ind. Ct. App. 1984) (applying equitable tolling to refiled claims in circumstances where saving statute did not apply).

3. Whether Equitable Tolling or Estoppel Applies Depends on the Facts

Barrick wrongly argues that a savings statute supplants equitable doctrines by relying on two inapposite cases. In *Burr v. Trinity Medical Center*, the North Dakota Supreme Court cautioned that when there is an applicable statute, courts should tread carefully and apply equity only when the legal remedy is inadequate or "the equitable remedy is better adjusted to render complete justice." 492 N.W.2d 904, 908 (N.D. 1992). North Dakota had never adopted equitable tolling, and the court was "not convinced" that it should do so in that case, but the court nonetheless went on to show why the plaintiff would lose as a matter of law under that doctrine. *Id.* at 910. Moreover, a defendant could be estopped from asserting a statute of limitations, but the absence of statements from the defendants that "prevented her from filing the action in state court within the prescribed time limits" made estoppel simply inapplicable. *Id.* at 908–09.

What the North Dakota Supreme Court describes as equitable estoppel mirrors what this Court has described as circumstances that merit equitable tolling. *See Masco*, 127 Nev. at 738, 265 P.3d at 671 (tolling the statute of limitations where the defendant "lulled a party into a false sense of security").

Nor does *Laugelle v. Bell Helicopter Textron, Inc.* categorically bar equitable tolling or estoppel. *See* CV 10C-12-054 PRW, 2014 WL 2699880, at *5 (Del. Super. Ct. June 11, 2014). There, the plaintiff advanced just one ambitious argument, that "filing within the statute of limitations period in a court lacking jurisdiction will toll the statute of limitations for a subsequent filing in an appropriate court outside of the statutory limitations period." *Id.* The plaintiff's position was that because the defendant had notice of the prior suit, "it would be fair" to toll the statute while the case was pending in a court without jurisdiction. That, of course, would make a savings statute unnecessary in *every* case. And plaintiff's proposal did not account for equity, at all. There is no indication that the Delaware court would have rejected a less sweeping proposition—i.e., the normal application of equitable tolling doctrines.

Here, Barrick is arguing an equally perverse position: the savings statute should make it *impossible* to save some claims, regardless of the equities.

4. NRS 11.500 Was Passed with the Understanding that Equitable Tolling Could Apply

Even those who opposed the passage of Nevada's savings statute (to give litigants a *categorical* right to refile after dismissal from federal court) recognized that equitable tolling would allow such refiling at the district court's discretion. 6 P. App. 1132 (statement of attorney Michael Pagni) (statement of attorney Michael Pagni). No one supporting or opposing the bill suggested that the limitation in NRS 11.500(3) would override equitable tolling.

B. Equitable Tolling Is Necessary Here

This case cries out for equitable tolling. Barrick repeatedly assured Bullion and the federal district court that it was diverse from Bullion. Equitable tolling would cause Barrick no prejudice, and the interests of justice demand it.

1. Barrick Concealed its Purported Utah Citizenship

Barrick repeatedly represented that it was diverse from Bullion and other Utah corporations. (2 P. App. 359; 3 R.P. App. 518:6–20, 530:6–20.)

2. Barrick's Purported Utah Citizenship Was Not Known or Apparent

Bullion was not lax, and as it had no indication that Barrick was a citizen of Utah, it reasonably relied on Barrick's representations. *Copeland*, 99 Nev. at 826, 673 P.2d at 492. Barrick's own attorneys admitted that they discovered Barrick's "true" Utah citizenship only in preparing the pretrial memorandum. (3 P. App. 469–70.) The declaration of Rich Haddock that became the basis for Barrick's motion departed significantly from his testimony in 2010. Back then, he said he was vice president and general counsel for a different entity, Barrick Gold Corporation, omitting any ties to Barrick. (3 P. App. 393–94.) It was on the basis of Haddock's representations that Barrick Gold Corporation filed a motion to dismiss for lack of personal jurisdiction in 2009, arguing that it was completely separate from Barrick and that it had no dealings in Nevada. (3 P. App. 368 (citing 227 ECF No. 70, 71, Exhibit

25–26).) Only with Barrick's new motion did Mr. Haddock claim that he was based in Utah, that he has held various positions with Barrick since 1997, and that he was a corporate director for Barrick in 2009. (3 P. App. 482, ¶¶ 3, 8; *cf.* 3 P. App. 383–87.)

3. Whether Barrick Really Was a Utah Citizen Remains Unresolved

To this day, after extensive jurisdictional discovery, it remains at best unclear whether Barrick was a Utah citizen in 2009.

"[C]lothing [a person] with the indicia of a corporate officer" by giving them apparent authority to act turns that person into a de facto officer under ordinary agency principles. *Kuehn v. Kuehn*, 642 P.2d 524, 525–26 (Colo. App. 1981); *see also Dixon v. Thatcher*, 103 Nev. 414, 417, 742 P.2d 1029, 1031 (1987) (discussing apparent authority).

And here, Mansanti as Barrick's general manager in Nevada exercised the authority of a *de facto* principal officer under ordinary agency principles—both in how Barrick conceived of his role internally (3 R.P. App. 696, 703–05, 852) and in his representation to the world that he was an "officer" of Barrick (3 R.P. App. 741–47; 4 R.P. App. 758–59, 791–93.)

Meanwhile, Barrick's nominal "officers" were not centralized in Utah and never exercised any theoretical authority to take the reins from Mansanti. A majority of them lived outside Utah, and a plurality were in Toronto. (3 R.P. App. 623–27; 4 R.P. App. 918–19, 926–30.) The residences of the board of directors (three in Salt Lake, two in Toronto) is irrelevant because the board held no meetings in 2009. (4 R.P. App. 918–19, 926–30, 973.) Worse, the delay in Barrick's revelation prejudiced Bullion's ability to show that Barrick was not a Utah citizen. Barrick admitted that, in bringing the motion to dismiss eight years late, it had destroyed the evidence that supposedly would have shown direction from the officers in Salt Lake to Barrick's general manager and other employees in Nevada. (3 R.P. App. 716–18; 4 R.P. App. 981–83.)

This is far from the mistake of naming a *known* nondiverse party, though even that was excused in *Mojica* as a good-faith "misanalysis of the facts or the law" in the "relatively esoteric area" of federal jurisdiction. 31 Cal. Rptr. 3d 887, 888 (Cal. Ct. App. 2005). Here, Barrick "lulled [Bullion] into a false sense of security." *Masco*, 127 Nev. at 738, 265 P.3d at 671. And even so, Bullion has a good-faith appeal that the

district court *erred* in locating Barrick's nerve center in Utah. It would be inequitable to fault Bullion for not reaching that conclusion in 2009.

4. Barrick Is Not Prejudiced

This case was headed to trial. Barrick knew that it was being sued for substantial damages, and the parties collected tens of thousands of documents and preserved the testimony of dozens of witnesses. For a decade, Barrick has known about these claims and has had an unrestricted "ability to contest or investigate the matter." *Masco*, 127 Nev. at 739, 265 P.3d at 672. Barrick is not prejudiced.

C. Equitable Tolling or Estoppel Cannot Be Denied as a Matter of Law

Bullion believes that the relevant procedural history establishes Bullion's right to equitable tolling as a matter of law. But if there remain any questions of fact or discretion, on summary judgment this Court must assume resolve those questions in Bullion's favor. *See Copeland*, 99 Nev. at 826–27, 673 P.2d at 492 (equitable tolling presented question of fact precluding summary judgment).

Here, there is at least a fact question as to whether Barrick's actions induced Bullion not to refile its claims in state court, and whether

the timing of its motion to dismiss—after it believed that Nevada's savings statute would not apply and after Barrick had destroyed much of the documentary evidence that would establish its nerve center for federal jurisdiction—should estop Barrick from raising the statute of limitations now. Under those circumstances, the district court correctly denied summary judgment.

III.

THE CONTRACTUAL CLAIMS ARE TIMELY UNDER THE SUSPENSION RULE

Even without equitable tolling, Bullion's contractual claims are timely under ordinary principles for calculating a statute of limitations.

A. Time Limitations Are Automatically Tolled Pending an Appeal

If an action is filed and dismissed, the plaintiff's appeal suspends the limitations period for the claims in the dismissed complaint:

> During the pendency of an appeal, any time limitations are tolled. A plaintiff cannot be penalized for exercising a right to challenge the trial judge in such a situation.

Massey v. Sunrise Hosp., 102 Nev. 367, 370–71, 724 P.2d 208, 210 (1986). In *Massey*, for example, the plaintiffs did not bring their claims

against one defendant (a hospital) to trial while they appealed under Rule 54(b) the dismissal of their claims against a different defendant (a doctor). Because NRCP 41(e) requires claims to be tried within five years, the district court dismissed the complaint.[12] This Court reversed, analogizing an appeal necessitated by a dismissal to a stay, which suspends time limitations: "[f]or a court to prohibit the parties from going to trial and then to dismiss their action for failure to bring it to trial is so obviously unfair and unjust as to be unarguable." *Id.* at 370–71, 724 P.2d at 210 (quoting *Boren v. City of North Las Vegas*, 98 Nev. 5, 638 P.2d 404 (1982)).

This makes sense, especially in light of Nevada's rule that a judgment maintains its preclusive effect during an appeal. *Edwards v. Ghandour*, 123 Nev. 105, 117, 159 P.3d 1086, 1094 (2007), *abrogated on other grounds by Five Star Capital v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008). That rule aims to keep all challenges to the judgment in one place—the appeal from the judgment:

---

[12] Although NRCP 41(e) grants an additional three years following a remand for a "new trial," in *Massey* "[t]here had never been an *initial* trial on the merits of the case." 102 Nev. at 369–70, 724 P.2d at 209–10.

> Any errors in a judgment are best addressed in the context of an appeal, during which the judgment can be carefully considered.

Id.[13] So the judgment bars any attempt to file or refile a claim pending the appeal. *Id.* In a similar vein, litigation malpractice claims are tolled throughout any appeals of the underlying litigation. *Kim v. Dickinson Wright, PLLC*, 135 Nev., Adv. Op. 20, at 9, 442 P.3d 1070, 1075 (2019) (citing *Branch Banking & Tr. Co. v. Gerrard*, 134 Nev., Adv. Op. 106, 432 P.3d 736, 738 (2018)).

B. No Statute of Limitations Ran During Bullion's Successful Appeal on the Rule against Perpetuities

Here, for more than four of the nine years that this case was in federal court, Bullion was appealing an erroneous judgment on the rule against perpetuities. Bullion was disabled from doing anything with its claims against Barrick from February 7, 2011, when the federal district court dismissed the complaint under the rule against perpetuities (ECF 115, 116, 118, Exhibit 1), until May 20, 2015, when the district court received the mandate from the Ninth Circuit to reinstate Bullion's com-

[13] *See also Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 20, 293 P.3d 869, 872 (2013) (decisions of a federal court is sitting in diversity have "the same claim-preclusive effect as a state court decision in the state in which the federal court sits").

plaint (ECF 137; 9th Cir. Doc. 49, Exhibit 1). *See Bullion III*, 600 F. App'x 559.[14] During these four years, Bullion could not have filed a complaint in state court: the federal district court's judgment held that Bullion had no claims.

To reward Barrick for advancing an incorrect legal position that took more than four years to fix on appeal would be "so obviously unfair and unjust as to be unarguable." *See Massey*, 102 Nev. at 370–71, 724 P.2d at 210. Any statute of limitations was suspended during Bullion's successful appeal.

Accounting for the four-year suspension, the contractual claims that Bullion had in 2009 were timely refiled in 2018. NRS 11.190(1).

IV.

THE FIVE-YEAR EXCEPTION OF NRS 11.500(3) IS UNCONSTITUTIONAL

Saving statutes are a common way of preventing plaintiffs from losing their right to sue in the correct court after a dismissal based on filing in the wrong court. *See* James M. Beck, *What Does Your Dismis-*

[14] Plus, Barrick does not dispute that, until the decision in *Hertz*, Bullion could not have done anything to discover the jurisdictional "defect" because it *was* diverse under then-controlling Ninth Circuit precedent.

sal Without Prejudice Mean?—A 50 State Survey of Savings Statutes, DRUG & DEVICE LAW (Oct. 18, 2018), https://www.druganddevicelawblog.com/2018/10/guest-post-what-does-your-dismissal-without-prejudice-mean-%E2%88%92-a-50-state-survey-of-savings-statutes.html (identifying savings statutes in all but six states). But the arbitrary restriction in NRS 11.500(3)—applying the saving statute only to cases dismissed in under five years—is unconstitutional, both facially and as applied.

A. NRS 11.500(3) Is Not a Statute of Repose

First, let us clear up Barrick's misconception: NRS 11.500(3) is not a statute of repose.

1. What Is a Statute of Repose?

A real statute of repose *overrides* a statute of limitations. *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775 n.2, 766 P.2d 904, 906 n.2 (1988). "Such a statute seeks to give a defendant peace of mind by barring delayed litigation, so as to prevent *unfair surprises* that result from the revival of claims that have remained dormant for a period during which the evidence vanished and memories faded." *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014) (citing *Underwood Cotton*

Co. v. Hyundai Merch. Marine (Am.), Inc., 288 F.3d 405, 408–09 (9th Cir. 2002) and *Joslyn v. Chang*, 837 N.E.2d 1107, 1112 (Mass. 2005)).

Nevada's construction-defect statute of repose (now NRS 11.202), for example, cuts off liability for construction defendants who would otherwise "be subject to liability for many years after they had lost control over the improvement or its use or maintenance." *Nev. Lakeshore Co., Inc. v. Diamond Elec., Inc.*, 89 Nev. 293, 511 P.2d 113 (1973) (footnote omitted) (citing *Rosenberg v. Town of North Bergen*, 293 A.2d 662 (N.J. 1972)).

2. This Is Not a Statute of Repose

Unlike a statute of repose, NRS 11.500(3) *acquiesces* to claims that are otherwise timely. Even if it were constitutional, it merely sets a limit on when the savings statute comes into operation:

> An action may not be recommenced ***pursuant to paragraph (b) of subsection 1*** more than 5 years after the date on which the original action was commenced.

NRS 11.500(3) (emphasis added). Paragraph 1(b) is the 90-day savings period after dismissal. But paragraph 1(a) continues to allow claims that are timely under the "applicable period of limitations"—including

claims that are timely due to equitable tolling. In that circumstance, there is no need even to rely on the 90-day savings period in 1(b).

One comment in the legislative history does not override the statutory language. Solicitor General Jeff Parker suggested that subsection 3 "provided in essence a statute of repose." (6 P. App. 1121, 1128.) He was wrong.

B. The Five-Year Limit Violates the Separation of Powers

1. The Legislature Cannot Dictate Court Procedure

"The separation of powers doctrine is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government." *Berkson v. LePome*, 126 Nev. 492, 498–99, 245 P.3d 560, 564–65 (2010) (citing *Secretary of State v. State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004)); NEV. CONST. art. 3, § 1(1). Separation of powers forbids the Legislature from interfering in judicial functions, including the "inherent ability of the judiciary to manage litigation and finally resolve cases." *Id.*; *see also Borger v. Dist. Court*, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004) (quoting *Goldberg v. Eighth Judicial Dist. Court*, 93 Nev. 614, 616, 572 P.2d 521, 522 (1977)).

The Legislature thus cannot enact a rule of court procedure. In *Berkson v. LePome*, for example, the court invalidated NRS 11.340, which attempted to alter the preclusive effect of a judgment. 126 Nev. at 500, 245 P.3d at 566. It did not matter that "claim and issue preclusion are legal doctrines rather than procedural rules per se": "these legal doctrines are nonetheless subject to the same constitutional separation of powers analysis as this court's procedural rules." *Id.*

2. The Five-Year Limit Impermissibly Tries to Dictate Court Procedure

NRS 11.500(3) oversteps the line. It is one thing to give plaintiffs a substantive right to bring suit within a specific time, as subsection 1 does. It is quite another to effectively dictate *how quickly* a court must resolve questions of subject-matter jurisdiction, and to punish plaintiffs whose cases are not resolved quickly enough.

The five-year rule in NRCP 41(e), the inspiration for NRS 11.500(3), is a rule of civil procedure for a reason. This Court, in its rulemaking capacity, can tell district courts how quickly to move litigation along. The Legislature cannot.

C. The Five-Year Limit Violates the Supremacy Clause

Worse, the Legislature is telling the *federal* judiciary how to manage its cases, penalizing it for not addressing its jurisdiction quickly enough.

1. States Cannot Disfavor the Choice of a Federal Forum

Federal and state courts "are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Claflin v. Houseman*, 93 U.S. 130, 136–37 (1876).

Thus, under the Supremacy Clause, state legislatures cannot disfavor rights provided under federal law or in federal courts. *Haywood v. Drown*, 556 U.S. 729, 735–36 (2009). In *Haywood*, the U.S. Supreme Court struck down a New York statute that divested its state courts of jurisdiction over both federal antidiscrimination claims and similar state claims. *Id.* at 738–40. Although the law may have appeared "evenhanded" on its face, that disguised an impermissible motive to disfavor claims protected under federal law:

> [H]aving made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the court-

> house door to federal claims that it considers at odds with its local policy. A State's authority to organize its courts, while considerable, remains subject to the strictures of the Constitution.

Id. at 739, 740–41 (footnote and citations omitted).

2. NRS 11.500(3) Impermissibly Disfavors a Federal Forum

Here, having allowed Nevada's district courts hear claims first brought in another court without subject-matter jurisdiction, the Legislature cannot shut the courthouse door to claims that it thinks the federal judiciary ought to have resolved more quickly.

Even if five years were a facially neutral (though arbitrary) limit, it is not hard to see how that limit is crafted to commandeer, or steer claims away from, federal courts. The five-year rule in NRCP 41(e) is unique to Nevada. *See* Advisory Committee Notes to 2019 Amendments. Whatever other docket pressures face federal courts, the U.S. Supreme Court has not elected to subject the federal judiciary to such a five-year rule. Indeed, the Legislature knew that "[i]n federal law, a case could take up to seven years to get through," so the five-year rule in subsection 3 "would be more restrictive than the federal law." (6 P. App. 1130–31 (statement of attorney Ernie Adler).) Yet NRS 11.500(3),

by design and in practice, disfavors federal judges who take too long to recognize or rule on a defect in diversity jurisdiction, with the penalty falling on plaintiffs. (6 P. App. 1131 ("Those claims did not have to go to federal court.").) Such an intrusion into the procedure of the federal judiciary violates the Supremacy Clause.

D. The Five-Year Exception to NRS 11.500 Violates Due Process and Equal Protection

It is hard to imagine a more poorly thought-out amendment to an otherwise commendable statute. As subsection 3 lacks even a rational basis for punishing plaintiffs whose claims are dismissed from federal court after more than five years, it violates due process and equal protection.

1. Arbitrary Discrimination among Similarly Situated Plaintiffs Violates Equal Protection and Due Process

Both equal protection and due process invalidate arbitrary legislation. The U.S. Constitution guarantees everyone "the equal protection of the laws," U.S. CONST. amend. XIV, and the Nevada Constitution, following the federal law on equal protection, requires all laws to be "general and of uniform operation throughout the State." NEV. CONST. art.

4, § 21; *see Laakonen v. District Court*, 91 Nev. 506, 538 P.2d 574 (1975). "Although the equal protection clause does not deny the state legislature the power to classify, such classifications must be reasonable," "not arbitrary." *State Farm Fire & Cas. Co. v. All Elec., Inc.*, 99 Nev. 222, 224–25, 660 P.2d 995, 997–98 (1983), *disapproved of on other grounds by Wise v. Bechtel Corp.*, 104 Nev. 750, 766 P.2d 1317 (1988). Likewise, "[s]ubstantive due process guarantees that no person shall be deprived of life, liberty or property for arbitrary reasons." *Allen v. State, Pub. Emp. Ret. Bd.*, 100 Nev. 130, 134, 676 P.2d 792, 794 (1984).

Even a statute of repose that does no more than exclude a class of defendants from its protection can violate equal protection. *Id.* In *State Farm v. All Electric*, this Court held that singling out architects and contractors from the protection of a statute of repose was arbitrary, and thus unconstitutional. *Id.*[15]

[15] The Legislature fixed the equal protection problem by extending the statute to everyone involved in the "design, planning, supervision or observation of construction, or the construction." *Wise v. Bechtel Corp.*, 104 Nev. 750, 766 P.2d 1317 (1988) (citing NRS 11.202).

2. Subsection 3 Was Poorly Conceived

Subsection 3, the "Parker Amendment," owes its name to Jeff Parker, then solicitor general. By his own admission, "he had only been in the position of Solicitor General for a week and a half." (6 P. App. 1128.) He could not identify a single state that had enacted restrictions comparable to those he was proposing: he admitted that "he had only reviewed two such statutes given the time limitations he had had"—and those covered "different factual scenarios." (6 P. App. 1129.) He concocted some of the language for the amendment (limiting the savings statute to dismissals based on subject-matter jurisdiction) just "the previous day." (6 P. App. 1129.)

3. The Purported Interests Subsection 3 Seeks to Serve Are Illegitimate

The legislative history does not contain a coherent rationale for the five-year limit, but it appears to stem from concerns that the state was facing a lot of "criminal or inmate litigation, civil rights actions, and also cases such as the Yucca Mountain litigation." (6 P. App. 1128 (statement of General Parker).) There is no legitimate government interest, however, in disfavoring or eliminating claims by inmates and

others subject to civil-rights violations. *See Haywood v. Drown*, 556 U.S. 729, 739–41 (2009).[16]

In addition, subsection 3 was explicitly seen as a way to engraft NRCP 41(e) onto other courts. As originally introduced, AB 40 would have allowed refiling after a dismissal "on any ground other than the merits." (6 P. App. 1135.) Some feared that a plaintiff whose claims were dismissed for lack of prosecution under NRCP 41(e) could just refile and begin anew. (6 P. App. 1158–59.) But again, subjecting *other* jurisdictions to something like Rule 41(e) is not a legislative function at all, and not a legitimate state interest.

4. Subsection 3 Does Nothing to Accomplish its Goals

Even if these goals were legitimate, the five-year rule is not rationally related to them. There is no basis for assuming that federal courts take longer to decide subject-matter jurisdiction in criminal and civil-rights cases than in "complex litigation." (6 P. App. 1130–31 (statements of Mr. Oceguera and Mr. Adler).) And as enacted, AB 40

[16] To the extent the amendment aimed to eliminate the Yucca Mountain litigation in particular, that would violate the separation of powers. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 n.17 (2016).

permitted refiling only after dismissals for lack of subject matter jurisdiction, eliminating the concern about follow-on suits after a dismissal for want of prosecution. Because that problem was already solved, the five-year restriction in subsection 3 would perforce apply *only* to claims that had been diligently prosecuted.

5. Subsection 3 Undermines the Overall Purpose of NRS 11.500

If NRS 11.500(3) is constitutional, then NRS 11.500(1)(b) is worthless.

One of the permissible goals of NRS 11.500 was to avoid dual filings in state and federal court: the doctrine of equitable tolling alone, "with its numerous judicially created hurdles," did not provide "the necessary security to . . . prevent[] a cautious attorney from filing a corresponding state court action." (6 P. App. 1127–28 (statement of Daniel Ebihara).) Sometimes, diversity presents a hard question. Guaranteeing plaintiffs the right to refile in state court in the event that they miscalculated the diversity question would ease congestion in state courts and give them both "time in which to determine whether or not to refile" and "confidence in knowing that claims that had been filed in a timely manner could not be challenged on the basis of the expiration of limita-

tions at the time of refiling." (6 P. App. 1126 (statement of Assemblyman Oceguera).)

But because federal courts do not have a deadline for resolving cases, and because defects in subject-matter jurisdiction can be raised at any time, the insertion of subsection 3 eliminates the confidence that a later-dismissed claim can be refiled in state court. Because no one knows in advance whether the 90-day savings period will be available, a prudent plaintiff *in every case* would have to file a duplicate action in state court. Far from having a rational basis, subsection 3 undermines the very purpose of a savings statute.

6. Subsection 3 Applies Only in the Most Unjust Circumstances

The five-year rule is not just arbitrary and capricious. In fact, it will generally have an effect only when it is least fair to apply it—for example, when the defendant has not disclosed facts that would alert the plaintiff to a diversity problem. Because subject-matter jurisdiction can be raised at any time, defendants who are unsure of their chances on the merits have an incentive to wait until the five years has expired, then spring the subject-matter-jurisdiction objection on the plaintiff at the eve of trial or after an unfavorable judgment. In addition, even a

decision at the district-court level that diversity exists can be overturned—years later—on appeal to the circuit court or U.S. Supreme Court. That is most likely to happen when the diversity question is close, or the diversity analysis flips based on a change in the law. *See, e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (abrogating the Ninth Circuit's standard in *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495 (9th Cir. 2001)).

Here, it benefitted Barrick to raise subject-matter jurisdiction only after the five years expired and after Barrick lost summary judgment and was headed to a trial on the merits.

* * *

Bullion's counsel has not identified any state that limits the application of a savings statute based on how long the case was pending in federal court. While this is not dispositive to the constitutional analysis, it is telling that no other state has found a five-year limit necessary for the effective functioning of a savings statute or to vindicate any state interest.

There is no "reasonable basis for treating" defendants in a case that has been pending in federal court for more than five years "as a

distinct and separate class for the purpose of granting immunity from suit" from defendants in a case that the federal courts resolve more quickly. *See All Elec.*, 99 Nev. at 224–25, 660 P.2d at 997–98. Depriving plaintiffs of a state-court forum based on with which their federal judge recognizes a diversity defect is an arbitrary deprivation. *See Allen*, 100 Nev. at 134, 676 P.2d at 794. The five-year limit of NRS 11.500(3) is unconstitutional.

E. The Five-Year Limit Violates the Right of Access to the Courts

1. Access to the Courts Is a Fundamental Right

The U.S. Supreme Court recognizes "the fundamental constitutional right of access to the courts." *Lewis v. Casey*, 518 U.S. 343, 346 (1996) (quoting *Bounds v. Smith*, 430 U.S. 817, 828 (1977)). In Nevada, this right extends to all litigants, not just the indigent. *Sullivan v. Eighth Judicial Dist. Court*, 111 Nev. 1367, 1371, 904 P.2d 1039, 1041 (1995); NEV. CONST. art. I, § 3 ("The right of trial by jury shall be secured to all and remain inviolate forever.").

2. Subsection 3 Arbitrarily Denies Access to the Courts

Subsection 3 denies this right. Barrick below did not even try to argue otherwise. (6 P. App. 1234.) One of the consequences of having a system of federal courts with limited jurisdiction to resolve state-law claims is that sometimes federal courts will leave those claims for resolution in state court. Although the Legislature can limit or eliminate substantive causes of action, it cannot close its doors to claims solely on the basis that they were raised in a federal court that did not immediately recognize the jurisdictional defect.

F. The Subsection Fails, Leaving Just the 90-Day Savings Period in Subsection 1

Subsection 3 is easily severed from the rest of NRS 11.500. Eliminating that unconstitutional restriction, NRS 11.500(1) provides an unimpeded right to refile within 90 days, as Bullion did here.

PART TWO:

THE IMPROPRIETY OF WRIT RELIEF

Barrick's arguments for a dismissal based on Nevada's savings statute are meritless. But they are also inappropriate for resolution in a petition for extraordinary relief.

Barrick repeatedly emphasizes that "when there are *only* legal issues presented that are dispositive of the suit, *and not questions of fact*, a writ petition is appropriate." (Pet'n 11 (emphasis added).) But here, there are thorny fact questions that, the district court appropriately found, preclude summary judgment. The district court saw the continuing breaches as a straightforward basis for denying Barrick's motion; Barrick's hasty reply on this point was not persuasive, and Barrick did nothing to further develop the record in the district court.[17]

Even if it had properly developed its argument, Barrick does not show why the district court's denial of summary judgment on the statute of limitations merits advisory mandamus. The district court's al-

[17] Barrick insists that Bullion's *entire* complaint must be dismissed and has never sought any alternative relief.

ternative grounds make the statutory question—whether NRS 11.500(3) extinguishes equitable tolling—academic. To answer it, even hypothetically, this Court would have to confront NRS 11.500(3)'s constitutional defects—defects that Bullion briefed below but that Barrick elected to ignore in its petition.[18] And in this interlocutory posture, Barrick jumps in front of the Ninth Circuit, which has not decided the question that started this whole process: whether the federal district court has subject-matter jurisdiction. This Court should not disrespect the authority of the federal judiciary by directing a premature judgment so as to preclude the Ninth Circuit from ever reaching the jurisdictional question.

The last time this Court was asked to weigh in on NRS 11.500 when the issue was not dispositive, this Court declined. *Archon Corp.*, 133 Nev. at 825, 407 P.3d at 710. The same reasons apply here:

> [I]t would not promote sound judicial economy to grant extraordinary writ relief at this point in the

---

[18] Barrick knew that constitutionality was a significant issue in the district court and should have briefed the issue in its petition. Barrick's election not to do so forfeits its right to do so in reply.

And while the district court incorrectly believed that the Attorney General would have to be notified of the challenge in district court (NRS 3.241 contemplates notification only *after* the district court's constitutional ruling), the Attorney General is receiving concurrent notification of this answer. NRAP 44.

> proceeding. The district court denied [Barrick's] motion [for summary judgment] without prejudice, declining to entertain its NRS 11.500 argument "at this time." [Barrick] will have further opportunity to present its full legal argument to the district court at summary judgment, or to this court on appeal or, even, in another writ petition, depending on discovery and the eventual substantive motion practice that may ensue.

Id.[19]

[19] *See also Double Diamond v. Second Judicial Dist. Court*, 131 Nev. 557, 566, 354 P.3d 641, 647 (2015) (Pickering, J., concurring) ("proper occasions for employing advisory mandamus are hen's-teeth rare: it is reserved for blockbuster issues, not merely interesting ones" (quoting *In re Bushkin Assocs., Inc.*, 864 F.2d 241, 247 (1st Cir. 1989))).

CONCLUSION

Barrick is desperate to keep Bullion from getting a trial on the merits. Barrick seeks to weaponize its own mistaken positions on diversity and the rule against perpetuities, and asks this Court to give a dismissal without prejudice preclusive effect—including as to claims that were not and could not have been raised in the prior complaint. Here, however, law and equity align, preserving some of Bullion's claims even if NRS 11.500(3) were constitutional—and all of them, because it is not.

This Court should deny the petition.

Dated this 10th day of February, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)

By: */s/ Abraham G. Smith*
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

CLAYTON R. BRUST (SBN 5234)
KENT ROBISON (SBN 1167)
ROBISON, SHARP,
SULLIVAN & BRUST, P.C.
71 Washington Street
Reno, Nevada 89503
(775) 329-3151

Attorneys for Real Party in Interest Bullion Monarch Mining Inc.

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 11,059 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 10th day of February, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys *for Real Party in Interest*

CERTIFICATE OF SERVICE

I certify that on February 10, 2020, I submitted the foregoing BULLION MONARCH MINING, INC.'S ANSWER for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Michael R. Kealy
Ashley C. Nikkel
PARSONS BEHLE & LATIMER
50 West Liberty Street, Suite 750
Reno, NV 89501

Brandon J. Mark
PARSONS BEHLE & LATIMER
201 S. Main Street, Suite 1800
Salt Lake City, UT 84111

James J. Pisanelli
Debra L. Spinelli
Dustun H. Holmes
Kirill V. Mikhaylov
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101

Attorneys for Barrick Goldstrike Mines, Inc.

Attorneys for Barrick Gold Corporation

Honorable Elizabeth Gonzalez
Department 11
EIGHTH JUDICIAL DISTRICT COURT
200 Lewis Avenue
Las Vegas, Nevada 89155

Aaron D. Ford
NEVADA ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP