

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRICK GOLD CORPORATION,

Petitioner,

vs.

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

Respondents,

BULLION MONARCH MINING, INC,

Real Party in Interest.

Case No. 82370

Electronically Filed
Feb 17 2021 05:01 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**OPPOSITION TO MOTION TO
DISMISS PETITION**

AND

**COUNTERMOTION FOR A STAY
PENDING DECISION ON WRIT
PETITION**

I. INTRODUCTION

Bullion Monarch Mining, Inc. ("Bullion") is simply endeavoring to delay review of an untenable specific jurisdiction ruling against Canada-based Barrick Gold Corporation ("Barrick Gold"). Despite the present Petition's merit, the district court refused Barrick Gold's motion to stay proceedings and instead continued with merits discovery, the very assertion of jurisdiction over a foreign company that the Constitution forbids. Hoping to postpone the inevitable, Bullion employs its recently-filed Third Amended Complaint ("TAC") as a delay maneuver, claiming that it moots the Petition and robs this Court of jurisdiction. According to Bullion, Barrick Gold must start over again, file another motion to dismiss, receive the same jurisdictional ruling on the same preexisting claims, and file another writ petition – all while Bullion burdens Barrick Gold with expensive and unnecessary discovery in a foreign forum. The law is rightly otherwise.

The Petition is not moot, and the Court should enter a stay and review it. Personal jurisdiction is determined on a claim-by-claim basis, and the TAC did not substantively alter the district court's jurisdictional ruling on the preexisting claims at issue in the Petition. Review is still proper for the erroneous jurisdictional ruling, and doing so will provide effective relief. The Petition has not been rendered meaningless. On the other hand, allowing the district court to exercise jurisdiction over a foreign parent – accompanied by significant and expensive discovery against

an entity that did not purposefully avail itself of this forum – *is* wrongful and ineffective. This Court should stay the lower court proceedings as they pertain to Barrick Gold while it considers the Petition.

II. STATEMENT OF FACTS

The Petition details the facts. Barrick Gold is the ultimate foreign parent company of separately incorporated subsidiaries, which own and operate mines, including in Nevada. Bullion has been engaged in litigation with some of those Nevada subsidiaries over claims that Bullion is owed royalties from an agreement executed in 1979 (the "1979 Agreement"). Bullion's claims arise from this 1979 Agreement; not the corporate structure or transactions of Barrick Gold and its independent subsidiaries.

Bullion commenced the underlying action in December 2018. Bullion's complaint asserted the same five claims it had litigated for nearly a decade. Namely, based upon the 1979 Agreement, Bullion asserted claims for: (1) declaratory judgment; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) unjust enrichment; and (5) accounting. Because Barrick Gold's contacts with Nevada were based on nothing more than its status as the ultimate foreign parent company of indirect subsidiaries, Barrick Gold immediately moved to dismiss for lack of personal jurisdiction.

Bullion, desperate to improperly keep Barrick Gold in the action, sought and was granted leave to file an amended complaint (the second amended complaint) that included allegations and claims for "constructive trust" and "alter ego and corporate veil-piercing." Yet, Bullion's substantive claims remained unchanged. Thus, Barrick Gold refiled its motion to dismiss for lack of personal jurisdiction.

Subsequently, the district court conducted a hearing on the motion to dismiss, as well as other pending motions to dismiss that argued, among other things, that Bullion's "claim" for "alter ego and veil-piercing" failed to allege fraud with particularity as required under NRCP 9(b). On December 9, 2020, the district court entered its order on the motions. Rather than find that Barrick Gold was subject to personal jurisdiction through its subsidiaries, the district court ultimately concluded that Barrick Gold was directly subject to specific personal jurisdiction in Nevada as result of a 2019 corporate transaction in which Barrick Gold's indirect subsidiaries' then-assets were contributed to a new joint venture subsidiary.

In addition, the district court ordered Bullion to amend its pleading to remove its "claims" for "constructive trust" and "alter ego and corporate veil-piercing" and reorganize them as allegations that meet the particularity requirements of NRCP 9(b). Yet, since the amendments the district court instructed Bullion to make would not change the jurisdictional ruling, Barrick Gold filed this Petition on January 22, 2021.

Bullion filed its TAC on February 8, 2021. *See* Mot., Ex. A. The TAC includes substantively the same five claims that arise from the 1979 agreement. Similarly, with few deviations, the TAC rearranges the same allegations that had previously been included in Bullion's purported claims for "constructive trust" and "alter ego and corporate veil-piercing." Lastly, the TAC includes a meritless fraudulent transfer claim that is not levied – nor could it be – against Barrick Gold.

Bullion now moves this Court to dismiss the Petition, claiming it is moot because "the operative complaint" is the TAC. Mot. at 3-6. As detailed below, Bullion's TAC does not alter the basis for the district court's erroneous conclusion that Barrick Gold is subject to personal jurisdiction and must therefore defend itself in a Nevada despite never purposefully availing itself of this forum.

III. ARGUMENT

A. Bullion's TAC Does Not Moot the Petition.

"The burden of demonstrating mootness is a heavy one." *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008). "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted).

An amended pleading does not automatically moot pending appellate proceedings. *See Auto Driveaway Franchise Sys., LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670, 674 (7th Cir. 2019). The test is whether the revised

pleadings "affected the substantive basis for the district court's order" or affected the petitioner's "basic grievance." *Id.* at 675. Amendments that "affect only some of the claims . . . normally leave[] the underlying dispute undisturbed." *Id.* at 674.¹

For example, in *Auto Driveway Franchise Systems, LLC*, the Seventh Circuit reviewed whether an amended complaint mooted an interlocutory appeal from a preliminary injunction. The Seventh Circuit explained "[p]ractically speaking, the question for us in this case is what might be gained by either party from our review of the challenged order." *Id.* The Seventh Circuit concluded that "[a] quick look reveals the new pleadings . . . had no effect on [plaintiff's] basic grievance." *Id.* at 675. Moreover, the court reasoned, "[r]eal-world consequences would attend anything we were to do with it, whether affirmance, modification, or dissolution. That is the definition of a live controversy." *Id.* at 675.

Bullion asserts that the TAC is a "subsequent event" sufficient to moot Barrick Gold's Petition. Mot. at 3-6. But Bullion's TAC does not alter the substantive

¹ The case law Bullion relies upon is distinguishable and inapplicable. For example, *Ireland v. Wynkoop*, 36 Colo. App. 205, 539 P.2d 1349 (1975), involved an appeal of the district court granting a motion to dismiss directed at the original complaint. Here, the district court did not grant Barrick Gold's motion to dismiss with leave for Bullion to fix any jurisdictional issue. The district court denied the motion finding that Barrick Gold was subject to specific personal jurisdiction. Similarly, *Ex parte Puccio*, 923 So. 2d 1069 (Ala. 2005), the district court did not rule upon the first motion to dismiss, but rather granted leave to amend. Thus, the appellate court made the unremarkable observation that the first motion to dismiss was moot. Here, the district court ruled upon the motion to dismiss and entered an order denying Barrick Gold's motion to dismiss. This is the order that Barrick Gold seeks the Court to review. Bullion's TAC does not somehow moot the district court's jurisdictional order.

basis for the district court's jurisdictional ruling or impact the questions presented in the Petition. There is no question that the Court can grant effective relief to either party by affirming or reversing the district court's jurisdictional ruling, irrespective of Bullion's TAC.

The district court held that Barrick Gold was directly subject to specific jurisdiction, not general jurisdiction. PA 1250-59. Without general jurisdiction, "specific jurisdiction requires a claim-specific analysis, as a nonresident defendant lacking continuous and systematic contacts with the forum state could not 'reasonably anticipate being haled into court' on claims unrelated to the defendant's forum state contacts, and thus haling them into court on those unrelated claims would violate their due process rights." *Gatekeeper Inc. v. Stratech Sys., Ltd.*, 718 F. Supp. 2d 664, 667–68 (E.D. Va. 2010) (collecting cases); *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 458, 282 P.3d 751, 754 (2012) (similar).

Here, the district court's jurisdictional ruling was necessarily limited to the claims advanced in the second amended complaint, and this Court will review the district court's rulings on a per-claim basis. Those claims and the district court's reasoning remain substantively undisturbed by the amended pleading. For example, the TAC includes substantively the same five claims contained within the second amended complaint: (1) declaratory judgment; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) unjust enrichment; and

(5) accounting. *See generally* TAC. A ruling from this Court will provide meaningful and effective relief as to those claims.

The TAC merely added a few allegations that are immaterial to the district court's analysis of the existing claims and rearranged the same allegations that had previously been included in purported claims for "constructive trust" and "alter ego and corporate veil-piercing" in the second amended complaint.² The TAC also added a new fraudulent transfer claim but it does not impact the erroneous jurisdictional holding against Barrick Gold. This claim is not even levied against Barrick Gold. *See* TAC ¶ 85 ("Goldstrike, Exploration, and other Barrick entities conveyed and transferred all of their mineral interests to Nevada Gold."); *see also Contra Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015) ("Nevada law does not recognize [fraudulent transfer] claims against nontransferees under theories of accessory liability.").³

The TAC does not expound on any new or different jurisdictional connections that would justify hailing Barrick Gold into a Nevada court. Unless Bullion admits

² Barrick Gold intends to move to dismiss again, and file another writ petition if necessary. Alternatively, this Court could hold the Petition in abeyance, and stay other proceedings, pending the district court's ruling on the forthcoming motion to dismiss.

³ Bullion also claims that it included "greater specificity" with regards to its "allegations of fraud in connection with alter ego and constructive trust." Mot. at 6. Although this is simply not true, it is irrelevant for the Court's review of the district court's jurisdictional ruling. The district court did not find that Barrick Gold was subject to personal jurisdiction based upon an alter ego or agency theory.

that the TAC completely changed its jurisdictional theory, or concedes error because the district court's ruling lacked a sufficient factual basis, Bullion cannot legitimately argue that the amendments affect the prior ruling or the issues presented in this Petition. Its silence on this point is telling proof of an attempt at delay. The substantive basis for the district court's jurisdictional ruling has not been altered, and the Petition is not moot. *See Auto Driveaway*, 928 F.3d at 674 (no mootness if amendments "affect only some of the claims . . . normally leav[ing] the underlying dispute undisturbed").

At minimum, this Court should deny the motion to dismiss and address the mootness issue as part of full briefing. The Court has taken this approach in similar situations. *See Order*, Case No. 79555 (Feb. 13, 2020) (denying motion to dismiss preliminary injunction appeal as moot based on an amended counterclaim because "the issues are substantially intertwined with the merits of the appeal and are not appropriate for resolution on a motion to dismiss").

B. A Stay of Proceedings as it Relates to Barrick Gold is Warranted.

When deciding whether to grant a stay, this Court generally considers the following factors: (1) whether the object of the writ petition will be defeated if the stay is not granted, (2) whether petitioner will suffer irreparable or serious injury if the stay is denied, (3) whether a real party in interest will suffer irreparable or serious injury if the stay is granted, and (4) whether petitioner is likely to prevail on the

merits in an appeal. NRAP 8(c); *Fritz Hansen A/S v. Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). All of these factors weigh in favor of granting a stay of further proceedings in the district court.⁴

Without issuing a stay, the object of the Petition will be defeated and Barrick Gold will suffer irreparable harm. Barrick Gold will be subjected to the burdens and inconvenience of litigating in a forum in which it has not purposefully availed itself, and it will be forced to endure the costly and time-consuming litigation burdens that it is seeking to avoid through its Petition. Being dragged into a court and forced to litigate in a venue without personal jurisdiction inflicts a constitutional violation and constitutes irreparable harm. *See Consipio Holding, BV*, 128 Nev. at 458, 282 P.3d at 754; *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013).

In contrast to Barrick Gold, Bullion cannot point to any harm it would face because a "mere delay in pursuing . . . litigation does not constitute irreparable harm." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 40 (2004). Any delay here rests with Bullion. It has failed to meet basic personal jurisdiction requirements – because there are none – to hale Barrick Gold into both federal and Nevada state court for the better part of a decade.

⁴ NRAP 8(a)(1) is satisfied. *See* Exhibit A.

To avoid a stay, Bullion must show that the relief sought is unattainable – a burden Bullion cannot satisfy. *See id.* But Barrick Gold's burden "does not [require] show[ing] a probability of success on the merits;" instead, Barrick Gold "must present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Hansen*, 116 Nev. at 659. As demonstrated in the Petition, established precedent clearly shows there is no personal jurisdiction over Barrick Gold here. Thus, on balance, the equities weigh in favor of granting a stay. *Id.*

IV. CONCLUSION

For these reasons, Barrick Gold respectfully requests that this Court deny Bullion's Motion to Dismiss and grant a stay of the district court proceedings as to Barrick Gold pending these writ proceedings.

DATED this 17th day of February 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Pisanelli Bice PLLC, and that on the 17th day of February 2021, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **OPPOSITION TO MOTION TO DISMISS PETITION AND COUNTERMOTION FOR A STAY PENDING DECISION ON WRIT PETITION** to:

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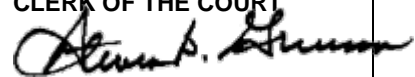
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EXHIBIT A



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DISTRICT COURT

CLARK COUNTY, NEVADA

BULLION MONARCH MINING, INC.,

Plaintiff,

v.

BARRICK GOLDSTRIKE MINES, INC.;
BARRICK GOLD EXPLORATION INC.;
BARRICK GOLD CORPORATION;
NEVADA GOLD MINES, LLC; BARRICK
NEVADA HOLDING LC; and DOES 1
through 20,

Defendants.

Case No.: A-18-785913-B
Dept. No.: XI

**NOTICE OF ENTRY OF ORDER
DENYING BARRICK GOLD
CORPORATION'S MOTION TO STAY
PENDING WRIT PETITION**

Date of Hearing: February 1, 2021

Time of Hearing: 9:00 a.m.

PLEASE TAKE NOTICE that an "Order Denying Barrick Gold Corporation's Motion to Stay Pending Writ Petition" was entered in the above-captioned matter on February 17, 2021, a true and correct copy of which is attached hereto.

DATED this 17th day of February, 2021.

PISANELLI BICE PLLC

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Pisanelli Bice PLLC, and that on the 17th day of February, 2021, I caused to be e-filed/e-served through the Court's CM/ECF system a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** which sent electronic notification to all registered users:

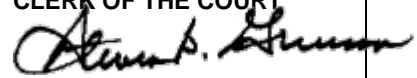
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DISTRICT COURT
CLARK COUNTY, NEVADA

BULLION MONARCH MINING,
INC.,

Plaintiff,

vs.

BARRICK GOLDSTRIKE MINES,
INC.; BARRICK GOLD
EXPLORATION INC.; BARRICK
GOLD CORPORATION; NEVADA
GOLD MINES LLC; BARRICK
NEVADA HOLDING LLC; and DOES
1 through 20,

Defendants.

Case No. A-18-785913-B

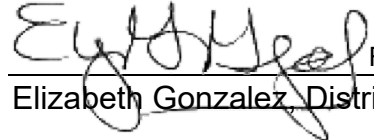
Dep't No. ● XI

**ORDER DENYING BARRICK GOLD
CORPORATION'S MOTION TO STAY
PENDING WRIT PETITION**

Hearing Date: February 1, 2021
Hearing Time: 9:00 a.m.

On February 1, 2021, this Court held a hearing on "Barrick Gold Corporation's Motion to Stay Pending Decision on Writ Petition on an Order Shortening Time," filed on January 28, 2021 (the "Motion"). Having considered the Motion, Plaintiff's Opposition, filed on January 29, 2021, and oral argument,

1 this Court DENIES the Motion without prejudice. Barrick may file a renewed
2 motion if the Supreme Court orders an answer to the petition.

3
4
5  February 16, 2021
6 Elizabeth Gonzalez, District Court Judge
7

8
9 Respectfully submitted by:

Approved as to form and content by:

10 LEWIS ROCA ROTHGERBER CHRISTIE LLP

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11 By: /s/ Abraham G. Smith

By: /s/ Debra L. Spinelli

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25 *Holding LLC, Nevada Gold Mines*
26 *LLC, Barrick Goldstrike Mines, Inc.,*
27 *and Barrick Gold Exploration Inc.*
28

Kimberly Peets

From: Debra Spinelli
Sent: Tuesday, February 16, 2021 4:03 PM
To: Kimberly Peets
Subject: Fwd: Bullion/Barrick proposed order denying stay

Sent from my iPhone

Begin forwarded message:

From: "Smith, Abraham" <ASmith@lrrc.com>
Date: February 16, 2021 at 3:59:35 PM PST
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Subject: RE: Bullion/Barrick proposed order denying stay

CAUTION: External Email

Sehr gut. I thought we had submitted this one, but apparently not, so please go ahead.

Danke,

Abraham G. Smith

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COVID-19 questions?
Connect to our **Rapid Response Team**
for answers and resources.

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to you, matters to us.

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Subject: RE: Bullion/Barrick proposed order denying stay

[EXTERNAL]

Hi Abe –

Did you happen to submit this order to the court for signature? We see that the subsequent motion to seal/redact was signed and filed, but there doesn't appear a docket entry/filing for this one. As you can expect, we'd like to get this order (German capitalized nouns and all) signed and entered without further delay.

Thanks,
Debbie

From: Polsenberg, Daniel F. <DPolsenberg@lrrc.com>
Sent: Tuesday, February 2, 2021 11:46 AM
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Cc: Clay Brust (CBrust@rssblaw.com) <CBrust@rssblaw.com>; Helm, Jessica <JHelm@lrrc.com>; Jorgensen, J. Christopher <CJorgensen@lrrc.com>; Kapolnai, Emily <EKapolnai@lrrc.com>; Kelley, Cynthia <CKelley@lrrc.com>; Kent Robison <KRobison@rssblaw.com>
Subject: RE: Bullion/Barrick proposed order denying stay

CAUTION: External Email

She must be German.



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Subject: RE: Bullion/Barrick proposed order denying stay

You like more capital letters than I do, but we'll roll with it.

From: Debra Spinelli <dls@pisanellibice.com>

Sent: Tuesday, February 2, 2021 10:54 AM

To: Smith, Abraham <ASmith@lrrc.com>; Dustun Holmes <DHH@pisanellibice.com>; James Pisanelli <jip@pisanellibice.com>; Brandon J. Mark (BMark@parsonsbehle.com) <BMark@parsonsbehle.com>; Ashley C. Nikkel <ANikkel@parsonsbehle.com>; Michael R. Kealy <MKealy@parsonsbehle.com>
Cc: Polsenberg, Daniel F. <DPolsenberg@lrrc.com>; Clay Brust (CBrust@rssblaw.com) <CBrust@rssblaw.com>; Helm, Jessica <JHelm@lrrc.com>; Jorgensen, J. Christopher <CJorgensen@lrrc.com>; Kopolnai, Emily <EKopolnai@lrrc.com>; Kelley, Cynthia <CKelley@lrrc.com>; Kent Robison <KRobison@rssblaw.com>

Subject: Re: Bullion/Barrick proposed order denying stay

[EXTERNAL]

Abe -

With the very few and minor edits in the attached, you may apply my e-signature.

Thanks,

Debbie

From: Smith, Abraham <ASmith@lrrc.com>
Sent: Monday, February 1, 2021 2:12 PM
To: Dustun Holmes; Debra Spinelli; James Pisanelli; Brandon J. Mark (BMark@parsonsbehle.com); Ashley C. Nikkel; Michael R. Kealy
Cc: Polsenberg, Daniel F.; Clay Brust (CBrust@rssblaw.com); Helm, Jessica; Jorgensen, J. Christopher; Kapolnai, Emily; Kelley, Cynthia; Kent Robison
Subject: Bullion/Barrick proposed order denying stay

CAUTION: External Email

Friends,

Attached is Bullion's proposed order denying the motion for stay. Please let us know whether we may attach your e-signature.

Very best,

Abraham G. Smith

Partner
702.474.2689 office
702.949.8398 fax
asmith@lrrc.com

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for answers and resources.

Lewis Roca
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