

Case No. 82370

In the Supreme Court of Nevada

BARRICK GOLD CORPORATION,
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.

Electronically Filed
Mar 10 2021 10:49 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

District Court
Case No. A785913

REPLY BRIEF ON MOTION TO DISMISS PETITION AS MOOT

and

OPPOSITION TO COUNTERMOTION FOR STAY

REPLY BRIEF ON MOTION TO DISMISS PETITION AS MOOT

Barrick Gold Corporation's writ petition is moot. The complaint that Barrick Gold says is insufficient to hale it into Nevada is not the operative complaint. Bullion agrees that many of the same reasons that supported jurisdiction over Barrick Gold in the previous complaint now support jurisdiction under the operative complaint. And Barrick Gold may well be right that the district court "is likely not inclined to change the substantive basis for its ruling." (Ex. A, Barrick Gold Mot. Dismiss, at 2:5–6.) But the fact remains: this writ petition rests on a direct challenge to a superseded pleading, so the petition is nonjusticiable.

A. Barrick's Writ Petition is Moot as a Procedural Matter, Not Because the Previous Order was Incorrect

To be clear, Bullion does not believe that the previous complaint was insufficient: an abstract dissection of the district court's prior order would prove the district court right. But that does not excuse the procedural necessity for Barrick Gold to direct its jurisdictional challenge toward the operative complaint. Barrick Gold cites just one inapplicable case to argue otherwise.

**1. A Challenge to a Continuing
Injunction is Different from a
Challenge to a Superseded Complaint**

Faced with authority from this Court and across the country that an amended or supplemental complaint “supersede[s] all claims for relief alleged in the original complaint,” *McKnight Family, L.L.P. v. Adept Mgmt.*, 129 Nev. 610, 615, 310 P.3d 555, 558 (2013), Barrick Gold musters just one supposedly contrary authority: *Auto Driveaway Franchise Systems, LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670 (7th Cir. 2019). But that case merely confirms the general rule and its application in this case.

Auto Driveaway involved an appeal from a still-valid preliminary injunction, not a challenge based on the superseded complaint itself. *Id.* at 674. That difference is critical. For as long as it remains in effect, a preliminary injunction requires or prohibits specific actions in the real world. In contrast, an order on a motion to dismiss merely determines whether the *operative complaint* suffices for the court to exercise jurisdiction.

And *Auto Driveaway* itself noted this sort of distinction. Initially,

it recognized the general rule that “[o]nce an amended pleading is interposed, the original pleading no longer performs any function in the case.” *Id.* (quoting *Wellness Cmty.-Nat’l v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995) and 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1476 at 556–57, 559 (1990)). The court recognized, however, that preliminary injunctions present special considerations depending on their scope and duration. *Id.* While a preliminary injunction that had been “overtaken by the entry of a permanent injunction” would ordinarily become unreviewable, a preliminary injunction that “*is still in place*, and . . . is still constraining the actions” of the enjoined party may survive an amended pleading that does not disturb the injunction. *Id.* at 674–75.

Nowhere does the *Auto Driveway* court suggest that a superseded complaint itself may be reviewed after its amendment.

2. *Barrick Seeks Review of an Inoperative Complaint, Not an Active Injunction*

Here, even though the district court’s earlier order is substantively correct, this Court cannot review it. With the filing of the amended complaint, the old complaint is no longer “in place,” as a preliminary injunction might be. Barrick Gold must seek review, if at all,

from the operative complaint.

B. Barrick Gold Cannot Avoid the Additional Jurisdictional Support in the New Complaint

Moreover, while nothing in the new complaint undermines the prior ruling that Barrick Gold is subject to jurisdiction in Nevada, the new fraudulent-conveyance claim bolsters that finding.

Even in the previous complaint, it was clear that Barrick Gold had purposefully availed itself of a Nevada forum through, at a minimum, its orchestration of a massive joint venture—the largest of its kind in Nevada. In 2019, Barrick Gold formed a joint venture in Nevada specifically directed at transferring and operating valuable mineral interests in Nevada. (Pet’n 7–8.) But Barrick Gold insists that Bullion’s complaint arises not from that Nevada-directed venture, but solely from a 1979 agreement involving predecessors to one of Barrick Gold’s subsidiaries, an agreement under which Bullion claims royalties. The district court correctly rejected that argument, noting that “[i]f royalties are owed, Bullion is a beneficiary under the Nevada Gold Mines joint venture agreement because of the geographic area covered by the joint venture agreement,” which overlaps with the area in the 1979 agreement. (App. 1250–59.) And that is why Bullion’s contractual and equitable

claims even under the prior complaint sufficed to hale Barrick Gold into this Court.

The fraudulent-conveyance claim provides an even more direct connection to Barrick Gold’s 2019 joint-venture agreements. Bullion alleges that Barrick Goldstrike and/or Exploration conveyed valuable mineral interests at Barrick Gold’s behest without receiving adequate consideration, making Bullion’s royalty insecure. (Ex. A to Mot, at ¶¶ 85–88.) Barrick Gold argues that this claim “is not even levied—nor could it be—against Barrick Gold.” (Opp. 4.) Bullion disagrees, particularly since the allegation is that the transfers were from “entities owned or controlled by Barrick Gold” and considering that the requested remedy—that the transfers “be rescinded and/or voided” (Ex. A to Mot., at ¶ 86)—would have the effect of invalidating the joint-venture agreement to which Barrick Gold is a party. Regardless, the claim is squarely based on Barrick Gold’s transactions in 2019, including Barrick Gold’s joint-venture agreements.

Barrick Gold cannot avoid this jurisdictional basis by forcing this Court to review the prior complaint. Barrick’s petition is moot. Rather than waste judicial resources, this Court should dismiss the petition.

OPPOSITION TO COUNTERMOTION FOR STAY

If this Court dismisses the petition, this Court need not evaluate the alternative request for a stay. But even if this Court declines to dismiss the petition, it should not grant a stay, particularly not at this premature stage.

A. Barrick Gold's Motion is Premature

A party seeking a stay in this Court must demonstrate that moving for relief in the district court “would be impracticable” or that, “a motion having been made, the district court denied the motion or failed to afford the relief requested.” NRAP 8(a)(2).

Here, the district court denied Barrick Gold's motion “without prejudice,” noting that “Barrick may file a renewed motion if the Supreme Court orders an answer to the petition.” (Ex. A to Opp. & Counter-motion.) Bullion submits that the petition should be dismissed or summarily denied, but if this Court is going to order an answer, the district court should have the first opportunity to decide whether to issue a stay.

B. *As Hansen Expressly Holds, this Challenge to Personal Jurisdiction Does Not Require a Stay*

To its credit, Barrick Gold nods to *Fritz Hansen A/S v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 6 P.3d 982 (2000) as a framework for this Court’s stay analysis under NRAP 8(c).

But *Hansen* is oddly absent from Barrick Gold’s discussion of the primary factor in that analysis: whether the object of the petition will be defeated. *See* NRAP 8(c)(1). *Hansen* answers that question conclusively:

[T]he object of the writ petition will not be defeated if the stay is denied. [Barrick Gold] will not waive its jurisdictional defense by answering after its motion to [dismiss] was denied; as [Barrick Gold] timely challenged jurisdiction, Rule 12’s waiver provisions do not apply.

116 Nev. at 657–58, 6 P.3d at 986. The question was a serious one in *Hansen* because, until that point, the Supreme Court had embraced the hoary distinction between general and special appearances: you could enter a “special appearance” to ask the district court to quash service for lack of jurisdiction, but as soon as you answered or asked for any substantive relief, you were deemed to have made a “general appearance” and waived your jurisdictional defenses. *Id.* at 653–55, 6 P.3d at

983–85. With the abolishment of that “trap for the unwary,” *id.* at 656, 6 P.3d at 985, the jurisdictional question is preserved even when the party protesting jurisdiction has to appear and participate in the litigation.

While that was a legitimate question in *Hansen*, that question is now settled: for Barrick Gold to ignore *Hansen*’s holding two decades later is unserious. As this Court in *Hansen* surely understood that personal jurisdiction raises due process concerns, *Hansen* itself rejects the notion that merely having to answer a complaint while preserving a defense to jurisdiction constitutes the kind of “constitutional violation” that “constitute[s] irreparable harm.” *Cf. City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013). Barrick Gold seems to confuse the *object* of the writ petition with the *propriety* of a writ petition. Bullion does not dispute that this Court can evaluate personal jurisdiction questions on a petition for writ of prohibition, but that does not mean the petition’s object is destroyed without a stay. As *Hansen* makes clear, the litigation can proceed without jeopardizing the petition and the ability, ultimately, to vindicate any constitutional rights.

C. No Other Factor Calls for a Stay

1. *Barrick Gold’s Bid for a Minimal Showing on the Remaining Factors is Wrong*

Barrick Gold’s misreading of the “object of the petition” infects the rest of its motion. It insists, for example, that “Bullion must show that the relief sought is *unattainable*.” (Opp. & Countermotion 10 (emphasis added) (citing the standard in *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 40 (2004) for appeals from an order denying arbitration).) But a stay is not necessary to preserve the object of the petition, so the heightened standard Barrick Gold advocates does not apply.

2. *The Petition is Meritless: Barrick Gold Orchestrated the Biggest Transfer of Mineral Properties in Nevada History*

Regardless of the standard, Barrick Gold’s petition is unlikely to succeed. *See* NRAP 8(c)(4). Barrick Gold did not merely sit by while its subsidiaries acted. Barrick Gold itself orchestrated and signed the agreements creating Nevada Gold Mines, the Nevada joint venture, and it did so while expressly agreeing to litigate claims under the joint-venture’s operating agreement in Nevada district court. (App. 1250–59.) The result of these agreements appears to be the biggest transfer of

mineral properties, involving the most valuable properties, in Nevada history. This is the essence of purposeful availment.

Bullion's claims arise, in part, from these very agreements: both directly (in the case of royalties owed under the 1979 agreement, which obligation has contractually passed to Nevada Gold Mines under the agreements that Barrick Gold signed) and indirectly (in the case of Bullion's claim seeking rescission of transfers under the joint-venture agreement as fraudulent conveyances).

3. Barrick Gold Seeks to Evade Discovery and Multiply the Proceedings

A stay in these circumstances would serve only to keep Bullion from conducting discovery and obtaining a fair trial. The defendants in this action are inextricably linked—now even represented by all the same attorneys. And many of Bullion's claims arising from the formation of Nevada Gold Mines cannot be fairly adjudicated without the participation of Barrick Gold—who oversaw its creation and implementation. Indeed, experience conducting discovery with Barrick Goldstrike and Exploration has shown only that Barrick subsidiaries are exceedingly unwilling to provide cross-entity information, making it likely that only Barrick Gold will be willing (if compelled) to answer

questions about the negotiations leading to the creation of Nevada Gold Mines and the control and ownership structure of that new entity.

From the timing of Barrick Gold's petition, filed shortly after Bullion moved for leave to amend the complaint, it appears that Barrick Gold wishes to escape its discovery obligations and force Bullion into what will amount to a bifurcated trial against the remaining defendants, with the limited information those defendants are willing to provide.

4. *Barrick Gold Faces No Irreparable Harm*

A stay is unnecessary to prevent irreparable harm. Having to participate in discovery and trial is not the kind of "irreparable harm" that merits a stay. *Hansen*, 116 Nev. at 658, 6 P.3d at 986. Indeed, the litigation is particularly seamless here, as Barrick Gold is represented by the same attorneys, and the overlap among the Barrick entities makes it likely that discovery will be directed toward some of the same witnesses.

This is no different from other situations where discovery proceeds under the operative complaint. Although Barrick Gold could have petitioned from the district court's granting of Bullion's motion to file the

amended complaint if that were such an emergency, Barrick Gold elected not to do so.

CONCLUSION

This Court should dismiss Barrick Gold's petition as moot. But even if it does not, it should deny the request for a stay.

Dated this 10th day of March, 2021.

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 Bullion
Monarch Mining, Inc.*

CERTIFICATE OF SERVICE

I certify that on March 10, 2021, I submitted the foregoing REPLY BRIEF ON MOTION TO DISMISS PETITION AS MOOT AND OPPOSITION TO COUNTERMOTION FOR STAY for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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

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

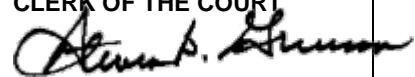
Attorneys for Petitioner

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

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

EXHIBIT A

EXHIBIT A



James J. Pisanelli, Esq., Bar No. 4027
JJP@pisanellibice.com
Debra L. Spinelli, Esq., Bar No. 9695
DLS@pisanellibice.com
Dustun H. Holmes, Esq., Bar No. 12776
DHH@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100
Facsimile: 702.214.2101

PARSONS BEHLE & LATIMER
Michael R. Kealy, Nevada Bar No. 971
Ashley C. Nikkel, Nevada Bar No. 12838
50 West Liberty Street, Suite 750
Reno, Nevada 89501
Telephone: (775) 323-1601
Facsimile: (775) 348-7250
MKealy@parsonsbehle.com
ANikkel@parsonsbehle.com

Brandon J. Mark (*Admitted Pro Hac Vice*)
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: (801) 532-1234
BMark@parsonsbehle.com

Attorneys for Defendant Barrick Gold Corporation

**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 LLC; and DOES 1
through 20,

Defendants.

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

(HEARING REQUESTED)

**BARRICK GOLD CORPORATION'S
MOTION TO DISMISS PLAINTIFF'S
THIRD AMENDED COMPLAINT**

The Court has already ruled that Barrick Gold Corporation ("Barrick Gold") is subject to specific personal jurisdiction in this case. Barrick Gold respectfully maintains that the Court's ruling was in error and promptly filed a petition for writ of prohibition with the Nevada Supreme

1 Court. Nonetheless, Bullion Monarch Mining, Inc. ("Bullion") has now insinuated that this
2 Court's prior ruling is somehow moot and inoperable because it filed a Third Amended Complaint
3 in this action. Although Barrick Gold believes the Nevada Supreme Court is likely to reject
4 Bullion's efforts, out of an abundance of caution, Barrick Gold moves again and renews its
5 motion to dismiss for lack of personal jurisdiction. While the Court is likely not inclined to
6 change the substantive basis for its ruling and since Bullion lent the invitation, the Court should
7 find that Barrick Gold is not subject to personal jurisdiction.

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

10 DATED this 22nd day of February, 2021.

11 PISANELLI BICE PLLC

12 By: /s/ James J. Pisanelli

13 James J. Pisanelli, Esq., Bar No. 4027
14 Debra L. Spinelli, Esq., Bar No. 9695
15 Dustun H. Holmes, Esq., Bar No. 12776
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

16 Michael R. Kealy, Nevada Bar No. 971
17 Ashley C. Nikkel, Nevada Bar No. 12838
18 Brandon J. Mark (*Admitted Pro Hac Vice*)
PARSONS BEHLE & LATIMER
50 West Liberty Street, Suite 750
19 Reno, Nevada 89501

20 *Attorneys for Barrick Gold Corporation*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Because the parties have briefed this issue multiple times, Barrick Gold will attempt to spare the Court from the redundancies of the duplicative briefing Bullion now insists is necessary.¹ As a refresher, Bullion has long insisted that its royalty claims arise from an agreement executed in 1979 (the "1979 Agreement"), which it asserts runs with land and thus, anyone who acquires the Subject Property becomes bound by the 1979 Agreement and the purported obligation to pay royalties on mineral production not only on the Subject Property but also on a very large designated area covering over two hundred and fifty-five square miles (the "Area of Interest" or "AOI").² For over a decade, Bullion has been litigating these claims against Barrick Gold subsidiaries that actually own the land from which the mineral production occurs.

Barrick Gold will never be a proper party subject to jurisdiction in this case. Barrick Gold's sole relation to this venue is the fact that it is a foreign parent company to United States subsidiaries operating in Nevada. This was true a decade ago, and it is true to this day. Nonetheless, in December 2020, after extensive briefing and hearing, the Court entered an order finding Barrick Gold directly subject to specific personal jurisdiction as result of a 2019 corporate transaction in which Barrick Gold's indirect subsidiaries' then-assets were contributed to a new joint venture subsidiary. Barrick Gold respectfully maintains that the Court's ruling was in error and has promptly filed a petition for writ of prohibition with the Nevada Supreme Court.

Yet, in a recent filing with the Nevada Supreme Court, Bullion has taken the position that Barrick Gold's petition, and thus by operation, the Court's jurisdictional ruling, is moot as a result of Bullion's recent filing of a Third Amended Complaint. Bullion's position is rather remarkable as it is the party who advocated for and received a favorable ruling from this Court. Since Bullion claims that this Court is no longer tied to its prior determination, Barrick Gold refiles and renews

¹ Barrick Gold incorporates by reference all prior briefing and arguments made in connection with this issue. The arguments previously presented equally apply to Bullion's third amended complaint.

² The Subject Property and the Area of Interest are both described in the 1979 Agreement.

1 its request for dismissal. Barrick Gold is not subject to jurisdiction in Nevada. This Court should
2 find accordingly.

3 **II. STATEMENT OF FACTS**

4 **A. Bullion Stipulates to Dismiss Barrick Gold from the Federal Action.**

5 Bullion's tortured attempts to drag Barrick Gold into Nevada for the claims presented has
6 already been detailed for the Court. (*See* Barrick Gold's Mot. to Dismiss, on file, Oct. 11, 2019;
7 Barrick Gold's Mot. to Dismiss, on file, July 28, 2020). These efforts date back nearly a decade.
8 Specifically, in June 2009, Bullion amended its complaint in the federal court action filed against
9 Newmont USA Limited to name Barrick Gold and Barrick Goldstrike Mines Inc. ("Goldstrike")
10 as defendants. (*See* Appx. to Barrick Gold's Mot. to Dismiss, on file, July 28, 2020, Ex. A, 1-41.)

11 In response, Barrick Gold immediately moved to dismiss for lack of personal jurisdiction.
12 (*See* Appx. to Barrick Gold's Mot. to Dismiss, on file, July 28, 2020, Ex. B, 42-60).
13 Barrick Gold's motion established through supporting evidence that Barrick Gold had no presence
14 in Nevada, had no contacts with Nevada, Barrick Gold and its subsidiaries observed all corporate
15 formalities and properly maintained their separate corporate existence, and therefore Barrick Gold
16 was not subject to jurisdiction in Nevada. (*See* Appx. to Barrick Gold's Mot. to Dismiss, on file,
17 July 28, 2020, Ex. C, 61-64).

18 From the very beginning, Barrick Gold has been nothing but forthcoming to Bullion
19 concerning Barrick Gold and its subsidiaries' structure. Indeed, as Barrick Gold informed Bullion
20 back in 2009, Goldstrike is a wholly-owned subsidiary of Barrick Gold Exploration Inc.
21 ("Exploration"). Exploration, in turn, is a wholly-owned subsidiary of ABX Financeco Inc.
22 ("ABX"), and ABX is a wholly-owned subsidiary of Barrick Gold. (*Id.*)³ Yet, as the evidence
23 submitted in support of Barrick Gold's motion to dismiss in the federal action established,
24 Barrick Gold and its subsidiaries observed all corporate formalities and properly maintained their

25 ³ As the Court will recall, Bullion initially named ABX here, *only to dismiss ABX after*
26 *wasting significant time and resources in jurisdictional discovery to uncover what was publicly*
27 *available and known to Bullion long ago*. That is, the corporate formalities were upheld and
28 ABX was not subject to jurisdiction in Nevada, and not subject to liability related to the royalty
claims in this action. *Bullion's naming of Barrick Gold is no different*. In fact, Barrick Gold is
further removed than ABX.

1 separate corporate existence. (*Id.*) Instead of contesting any of these facts or making any sort of
2 assertion that Barrick Gold was subject to jurisdiction, Bullion voluntarily dismissed
3 Barrick Gold. (*See* Appx. to Barrick Gold's Mot. to Dismiss, on file, July 28, 2020,
4 Ex. D, 65-67.)

5 **B. Bullion Conducts Jurisdictional Discovery in the Federal Case that Confirms**
6 **Barrick Gold Does Not Control the Day-to-Day Operations of Its Subsidiaries**
and Properly Respects Their Corporate Separateness.

7 Confirming as much, after dismissing Barrick Gold, Bullion decided to proceed solely
8 against Goldstrike (the then-owner of the land and mineral rights). During the federal case – as
9 part of the subject-matter jurisdiction issue that later arose in that action – Bullion conducted
10 wide-ranging jurisdictional discovery.⁴ And, Bullion subsequently used that jurisdictional
11 discovery to suggest that Barrick Gold improperly controlled the activities of its subsidiaries,
12 effectively making its subsidiary's headquarters "Toronto, Canada – the headquarters of [their]
13 ultimate corporate parent." (*See* Appx. to Barrick Gold's Mot. to Dismiss, on file, July 28, 2020,
14 Ex. E, 68-77.) Of course, had Bullion established that Barrick Gold's Toronto headquarters
15 controlled the activities of Goldstrike, Bullion could have maintained the case in federal court.
16 But the federal court rejected Bullion's contention, finding that the "unrebutted evidence tends to
17 show that [Goldstrike's] executives in Salt Lake City – not Toronto – directed and controlled
18 [Goldstrike's] activities." (*Id.*)⁵

19 The jurisdictional discovery in federal court conclusively established that Barrick Gold
20 respects its subsidiaries' separate corporate existence and does not improperly control them. For
21 example, the former general manager of the Goldstrike mine in Nevada, John Mansanti, testified

22 ⁴ As the Nevada Supreme Court has made clear, if a party had the benefit of discovery from
23 a prior litigation before filing the complaint and still fails to allege facts indicating the court might
24 have jurisdiction, then jurisdictional discovery is properly denied. *Tricarichi v. Coop.*
25 *Rabobank, U.A.*, 135 Nev. 87, 98, 440 P.3d 645, 654 (2019) (finding that the district court did not
abuse its discretion in denying jurisdictional discovery because the plaintiff had the benefit of
discovery from a prior proceeding and still failed to allege facts indicating the court might have
jurisdiction).

26 ⁵ Bullion appealed this decision to the Ninth Circuit. Yet, after the matter was fully briefed,
27 Bullion voluntarily dismissed the appeal and any challenge to the federal court's ruling, preferring
28 instead the new forum of Nevada state courts. (*See* Appx. to Barrick Gold's Mot. to Dismiss, on
file, July 28, 2020, Ex. F, 78-79.)

1 that management in Toronto "very rarely" directs activities across its subsidiaries. The directives
2 that originate at Barrick Gold usually relate to improving efficiency, such as centralizing the
3 purchase of truck tires, or standardizing practices, such as supply-chain management. (*See Appx.*
4 *to Barrick Gold's Mot. to Dismiss*, on file, July 28, 2020, Ex. G, Mansanti Dep. Tr., Dec. 20,
5 2017, 66:12–20; Ex. H, Measom Dep. Tr., March 21, 2018, 11:18-12:13; Ex. I, Astorga Dep. Tr.,
6 March 20, 2018, 36:3-17.) As an example, Barrick Gold has standard processes and policies for
7 tracking and reporting "non-routine spending and capital management." (*See Appx. to*
8 *Barrick Gold's Mot. to Dismiss*, on file, July 28, 2020, Ex. J, Bolland Dep. Tr., March 21, 2018,
9 51:25-52:5.) However, these policies are communicated to Barrick Gold's subsidiaries through
10 regional management. (*See Appx. to Barrick Gold's Mot. to Dismiss*, on file, July 28, 2020, Ex. I,
11 *Astorga Dep. Tr.* 35:15-36:2, 36:18-20; Ex. J, Bolland Dep. Tr. 13:20-14:5.)

12 Mr. Mansanti, Goldstrike's former general manager, estimated that Barrick Gold of
13 North America Inc.'s ("Barrick North America") Salt Lake City-based management controlled
14 corporate decisions for Goldstrike "98, 99 percent of the time." (*See Appx. to Barrick Gold's*
15 *Mot. to Dismiss*, on file, July 28, 2020, Ex. G, Mansanti Dep. Tr. 67:1-10.) Barrick Gold was not
16 involved in setting the budgets for Barrick North America or for Goldstrike, and Barrick Gold
17 never overruled Barrick North America's budget decisions, including its budgeting for Goldstrike.
18 (*See Appx. to Barrick Gold's Mot. to Dismiss*, on file, July 28, 2020, Ex. H,
19 *Measom Dep. Tr.* 22:13-25, 44:16-45:11.) Barrick North America was "much more" involved in
20 setting Goldstrike's budget than Barrick Gold was, and none of Barrick North America's operating
21 capital came from Barrick Gold. (*Id.* at 46:4-8, 47:25-48:2.)

22 Barrick North America's Director of Technical Services, Andy Bolland, and its
23 Contract Supervisor, Tony Astorga, both testified that they never communicated with
24 Barrick Gold personnel as part of their jobs. (*See Appx. to Barrick Gold's Mot. to Dismiss*, on
25 file, July 28, 2020, Ex. J, Bolland Dep. Tr. 17:9–11; Ex. I, Astorga Dep. Tr. 35:9-14.) Likewise,
26 Barrick North America's former CFO, Blake Measom, testified that he had no reporting
27 relationship to Barrick Gold. (*See Appx. to Barrick Gold's Mot. to Dismiss*, on file, July 28,
28 2020, Ex. H, Measom Dep. Tr. 12:12-14.) Goldstrike's former general manager testified that

1 during regular conference calls with the other managers of Barrick's North American mines and
2 regional management in Salt Lake City, no one from Barrick Gold participated. (*See* Appx. to
3 Barrick Gold's Mot. to Dismiss, on file, July 28, 2020, Ex. G, Mansanti Dep. Tr. 16:12-17:15.) In
4 response to the direct question of whether Barrick Gold had more "oversight and control" over its
5 North American subsidiaries than Barrick North America had over them, Mr. Bolland testified
6 "definitely not." (*See* Appx. to Barrick Gold's Mot. to Dismiss, on file, July 28, 2020, Ex. J,
7 Bolland Dep. Tr. 60:10-19.)

8 In short, the mandate from Barrick Gold to its United States subsidiaries was clear in that
9 they would operate as their own "business" and "make the decisions as to how that business is
10 operated" on "[v]irtually everything," including decisions relating to the deployment of "capital,"
11 "personnel," and "production," all the way to "creating budgets" and "reporting." (*See* Appx. to
12 Barrick Gold's Mot. to Dismiss, on file, July 28, 2020, Ex. H, Measom Dep. Tr. 12:4-11.)

13 **C. Barrick Gold Remains the Ultimate Foreign Parent Company.**

14 Barrick Gold is a Canadian corporation headquartered in Toronto. (*See* Appx. to
15 Barrick Gold's Mot. to Dismiss, on file, July 28, 2020, Exs. K-L, 149-155.) Barrick Gold is the
16 ultimate parent company of a worldwide group of separate subsidiaries, and it remains without
17 any contacts in Nevada except through those subsidiaries. None of Barrick Gold's officers live in
18 Nevada, with the majority (all but one) living in Toronto. Barrick Gold's Board of Directors holds
19 its meetings mostly, if not exclusively, in Toronto, and Barrick Gold's corporate records are
20 maintained there. (*Id.*)

21 Barrick Gold does not itself own any properties or mines, and it does not itself engage or
22 operate mines or engage in processing activities in Nevada or anywhere else within the
23 United States. (*Id.*) Because Barrick Gold itself does not conduct business in Nevada,
24 Barrick Gold is not (and never has been) registered to do business as a foreign corporation in
25 Nevada. (*Id.*) Consistent with this fact, Barrick Gold does not have any employees, offices,
26 telephone listings, or any bank accounts in Nevada, and it does not pay any Nevada taxes directly.
27 (*Id.*)

1 Rather, Barrick Gold's contact with and presence in Nevada is through a lengthy chain of
2 separately incorporated U.S. subsidiaries with their own corporate existence. (*Id.*) When Bullion
3 filed this lawsuit and up until July 2019, the mines and properties that Bullion alleged were
4 subject to its royalty claims were owned by Goldstrike and Exploration. (*Id.*)

5 Like all parent companies, Barrick Gold exerts some degree of supervision over its
6 subsidiaries. (*Id.*) Yet, Barrick Gold's involvement does not transgress the boundaries of
7 appropriate oversight typically involved in a parent-subsidary relationship. (*Id.*) Barrick Gold
8 has, for example, never directed the mining operations or processing activities of any of its
9 indirect subsidiaries operating in Nevada. (*Id.*) Instead, day-to-day management of the various
10 mining operations in Nevada is the responsibility of Barrick Gold subsidiaries that historically
11 were in turn managed through a regional structure. (*Id.*) Barrick Gold's involvement is that of a
12 typical parent corporation, including setting general policy and direction for its subsidiaries,
13 monitoring their performance, supervising their budget decisions, requiring approval for large
14 financial transactions and decisions, and issuing consolidated corporate and financial reports. (*Id.*)

15 Consistent with its role as the parent to indirect subsidiaries operating in Nevada,
16 Barrick Gold obviously would have some involvement in the early-2019 decision to combine its
17 subsidiaries' mining assets and operations in Nevada with those of a competitor,
18 Newmont Goldcorp Corporation ("Newmont"), to form a new joint venture company.
19 Specifically, on March 10, 2019, Barrick Gold and Newmont entered into an
20 Implementation Agreement that caused and governed their respective subsidiaries' contribution
21 and combination of their mining assets and operations in Nevada in the new joint venture. (*See*
22 Appx. to Barrick Holding's Mot. to Dismiss, on file, Aug. 6, 2020, Ex. E.)

23 On July 1, 2019, the transaction closed establishing Nevada Gold Mines, LLC ("NGM"), a
24 Delaware limited liability company, with a massive mining operation comprising eight mines,
25 along with their associated infrastructure and processing facilities in Nevada. (*See* Appx. to
26 Barrick Holding's Mot. to Dismiss, on file, Aug. 6, 2020, Ex. F.) All assets and liabilities part of
27 the transaction were contributed to and assumed by NGM. (*Id.*) Thus, as it stands today, NGM is
28 the entity that owns the vast land and mineral rights and operates the mines in Nevada from which

1 Bullion claims it is owed an AOI royalty stemming from the 1979 Agreement. (*See* Appx. to
2 Barrick Holding's Mot. to Dismiss, on file, Aug. 6, 2020, Exs. E-G) As such, NGM assumed
3 liability (if any) that may stem from Bullion's AOI royalty claims related to the 1979 Agreement.
4 (*Id.*)

5 NGM is owned by Barrick Nevada Holding LLC ("Barrick Holding") and Newmont USA
6 Limited. (*See* Appx. to Barrick Holding's Mot. to Dismiss, on file, Aug. 6, 2020, Ex. G.)
7 Barrick Holding, a Delaware limited liability company, maintains a 61.5% membership interest in
8 NGM. (*Id.*) In turn, various Barrick Gold's U.S. subsidiaries, including Goldstrike and
9 Exploration, received a membership interest in Barrick Holding for the conveyance of their
10 respective assets. (*Id.*) Barrick Gold remains the ultimate parent company of these indirect
11 subsidiaries but owns no direct membership interest in NGM or Barrick Holding, and still does
12 not operate any mines or own any property in Nevada. (*See* Appx. to Barrick Gold's Mot. to
13 Dismiss, on file, July 28, 2020, Exs. K-L, 149-155.) All entities remain separate and independent,
14 with their own corporate existence. (*Id.*)

15 **D. Bullion's Continuous Quest to Manufacture a Basis to Improperly Bring**
16 **Barrick Gold into this Action.**

17 ***1. Barrick Gold moves to dismiss; Bullion seeks leave to amend.***

18 Following the dismissal of its federal cases, Bullion commenced the current action in this
19 Court in December 2018. (*See* Bullion's Compl., on file, Dec. 18, 2020.) Bullion's complaint
20 asserted the same five claims it asserted in the federal case. Remarkably, despite voluntarily
21 dismissing Barrick Gold long ago, Bullion's complaint sought to once again bring Barrick Gold
22 into the mix.

23 Bullion's complaint also named Exploration and ABX as defendants. As the Court knows,
24 ABX moved to dismiss for lack of personal jurisdiction, and the Court granted Bullion's request
25 to conduct jurisdictional discovery. (*See* Minute Order, on file, Apr. 22, 2019.) After wasting
26 significant time and energy, the jurisdictional discovery confirmed that ABX was merely an entity
27 in the Barrick corporate family chain with no relation to the asserted royalty claims, and Bullion
28

1 abandoned ABX as a defendant. Ironically, Barrick Gold is even further removed from Bullion's
2 royalty claims.

3 In any event, the substantive and jurisdictional basis for naming Barrick Gold remained
4 deficient. The only specific allegations in the complaint about Barrick Gold were:
5 (1) Barrick Gold "is an Ontario corporation doing business in Nevada at all times relevant
6 hereto," and (2) "Barrick Gold is – and at all relevant times was – the 100% owner of ABX." (*See*
7 Bullion's Compl., on file, Dec. 18, 2020.) After Bullion belatedly effectuated service, Barrick
8 Gold moved to dismiss for lack of personal jurisdiction in October 2019. (*See* Barrick Gold's Mot.
9 to Dismiss, on file, Oct. 11, 2019.) Barrick Gold's motion established that Barrick Gold still had
10 no contacts in Nevada sufficient to confer personal jurisdiction. (*Id.*) In response, Bullion
11 confessed that Barrick Gold itself has no contacts with Nevada (a fact it knows from the
12 jurisdictional discovery it already conducted) but now insisted that Barrick Gold was subject to
13 jurisdiction in Nevada through its subsidiaries' contacts under either an alter ego or agency theory.
14 (*See* Bullion's Opp'n., on file, Nov. 12, 2019.) The problem for Bullion at the time was its
15 complaint failed to allege a single fact to support these newly-manufactured contentions.

16 Acknowledging its defective pleading, Bullion sought leave to (again) amend its
17 complaint to include new allegations to support supposed claims for "constructive trust," and
18 "alter ego and corporate veil-piercing," and NGM as a defendant. (*See* Bullion's Mot. for Leave,
19 on file, Nov. 2, 2019.) In its briefing, Bullion framed the transaction and formation of NGM as
20 support for jurisdiction over Barrick Gold under an agency or alter ego theory; not that
21 Barrick Gold was supposedly now directly subject to specific personal jurisdiction in Nevada.
22 (*Id.*) Noting Nevada's liberal policy permitting amendments, the Court granted Bullion's request
23 to file its proposed amended complaint. (*See* Order, on file, May 21, 2020.)

24 After filing its amended complaint on June 29, 2020, Bullion sought leave to amend again,
25 to add Barrick Holding – the holding company whose sole purpose is to hold a membership
26 interest in NGM – as a defendant. (*See* Order, on file, July 15, 2020.) The Court again granted
27 Bullion leave to amend on July 14, 2020. (*Id.*)

1 **2. *The Court's jurisdictional ruling.***

2 After the Court granted Bullion's successive motions for leave to amend, Bullion finally
3 filed its second amended (and then-operative) complaint on July 14, 2020. (*See* Bullion's Second
4 Amended Complaint, on file, July 14, 2020.) Barrick Gold again moved to dismiss for lack of
5 personal jurisdiction. (*See* Barrick Gold's Mot. to Dismiss, on file, July 28, 2020.)

6 In response, Bullion suggested for the first time that Barrick Gold was directly subject to
7 specific personal jurisdiction in Nevada because of the transaction and formation of NGM. (*See*
8 Bullion's Combined Opp'n., on file, Aug. 21, 2020.) Barrick Gold's reply pointed out the many
9 errors with Bullion's contention, including the fact that Bullion's royalty claims in no way arise
10 from this 2019 transaction, as confirmed by the fact that Bullion named Barrick Gold as a
11 defendant nearly a decade ago, and again in December 2018, for these very same claims relating
12 to the 1979 Agreement. (*See* Barrick Gold's Reply, on file, Sept. 8, 2020.)

13 After conducting a hearing on Barrick Gold's motion to dismiss as well as other pending
14 motions to dismiss, the Court issued its decision on all pending motions to dismiss. (*See* Order re
15 Motions to Dismiss, on file, Dec. 9, 2020.) The Court denied Barrick Gold's motion to dismiss
16 finding that Barrick Gold was subject to specific personal jurisdiction in Nevada as a result of the
17 transaction and formation of NGM in 2019. (*Id.*) In addition, the Court ordered Bullion to amend
18 its pleading to remove its "claims" for "constructive trust" and "alter ego and corporate
19 veil-piercing" and reorganize them as allegations that meet the particularity requirements of
20 NRCP 9(b). (*Id.*)

21 **3. *Barrick Gold files a writ petition, while Bullion files a third amended***
22 ***complaint and asserts the Court's prior ruling is moot.***

23 On January 25, 2021, Barrick Gold promptly filed a writ of prohibition challenging the
24 Court's denial of the motion to dismiss for lack of personal jurisdiction pursuant to
25 NRCP 12(b)(2), Case No. 82370. On February 8, 2021, Bullion filed its Third Amended
26 Complaint in this action. (*See* Bullion's Third Amended Complaint ("TAC"), on file, Feb. 8,
27 2021.) The TAC includes substantively the same five claims that arise from the 1979 Agreement.
28 (*Id.*) Similarly, with few deviations, the TAC rearranges the same allegations that had previously

1 been included in Bullion's purported claims for "constructive trust" and "alter ego and corporate
2 veil-piercing." (*Id.*) Lastly, the TAC includes a meritless fraudulent transfer claim that is not even
3 levied – nor could it be – against Barrick Gold. (*Id.*)

4 A few days after filing the TAC, Bullion filed a motion to dismiss Barrick Gold's Petition
5 with the Nevada Supreme Court. Bullion insisted that Barrick Gold's Petition and thus, in turn, the
6 Court's prior jurisdictional ruling, was moot by the filing of the TAC. (*See* Ex. A, Bullion's Mot.
7 to Dismiss.) Although Barrick Gold disputes this notion and has filed an opposition to Bullion's
8 attempts to have the Nevada Supreme Court delay or avoid reviewing the Court's jurisdictional
9 ruling, out of an abundance of caution, Barrick Gold renews and seeks once again dismissal for
10 lack of personal jurisdiction. (*See* Ex. B, Barrick Gold's Opp'n.)

11 Bullion's TAC does not add anything from a jurisdictional perspective that this Court has
12 not already considered. The undisputed evidence previously submitted (and incorporated here)
13 unquestionably demonstrates that Barrick Gold is not directly or indirectly subject to personal
14 jurisdiction here. The only real change in Bullion's TAC is in the inclusion of a "fraudulent
15 conveyance" claim. Although this claim is, quite frankly, frivolous and without any legal merit
16 whatsoever, from a jurisdictional analysis as it pertains to Barrick Gold it changes nothing. There
17 still remains no reason for Barrick Gold to be a party to this action. Bullion seeks a royalty on
18 gold from Nevada. The subsidiaries that own that gold are in Nevada, and have been named in
19 this case.

20 **III. ARGUMENT**

21 **A. Barrick Gold Is Not Directly Subject to Personal Jurisdiction in Nevada.**

22 Bullion bears the burden of making a *prima facie* showing of personal jurisdiction over
23 Barrick Gold by "competent evidence of essential facts" that, if true, would support jurisdiction.
24 *Trump v. Eighth Jud. Dist. Ct.*, 109 Nev. 687, 692, 857 P.2d 740, 743 (1993). "[F]or personal
25 jurisdiction purposes, a court may not assume the truth of allegations in a pleading which are
26 contradicted by affidavit." *In re W. States Wholesale Nat. Gas Litig.*, 605 F. Supp. 2d 1118, 1130
27 (D. Nev. 2009) (citation omitted). "Jurisdiction over a nonresident defendant is proper *only if* the
28 plaintiff shows that the exercise of jurisdiction satisfies the requirements of Nevada's long-arm

statute and does not offend principles of due process." *Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. 368, 374, 328 P.3d 1152, 1156 (2014) (emphasis added). Because Nevada's long-arm statute is coterminous with the federal constitutional limits, a defendant must have such "minimum contacts" with Nevada that it could reasonably anticipate being haled into court in the state, consistent with "traditional notions of fair play and substantial justice." *Arbella Mut. Ins. Co. v. Eighth Jud. Dist. Ct.*, 122 Nev. 509, 512, 134 P.3d 710, 712 (2006) (internal marks omitted).

Courts analyze personal jurisdiction over a non-resident defendant under two theories: general and specific personal jurisdiction. *Viega*, 130 Nev. at 375, 328 P.3d at 1156. As discussed below, Bullion has not, and cannot, make a prima facie showing that Barrick Gold is subject to either general or specific jurisdiction.

1. Bullion has previously conceded that Barrick Gold is not subject to general jurisdiction.

"With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction." *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (internal quotations omitted). "Typically, a corporation is 'at home' only where it is incorporated or has its principal place of business." *Viega*, 130 Nev. at 376-77, 328 P.3d at 1158. "Those affiliations have the virtue of being unique – that is, each ordinarily indicates only one place – as well as easily ascertainable." *Daimler AG*, 571 U.S. at 137; *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.").

Bullion has previously conceded that there is no basis for finding that Barrick Gold is subject to general jurisdiction in Nevada. (*See Hr'g. Tr.*, on file, Sept. 22, 2020, 38:14-15) ("So Mr. Pisanelli is right; we are talking about specific jurisdiction . . .") This concession is for good reasons as Barrick Gold is a corporation organized under the laws of Canada, with its principal place of business in Ontario, specifically Toronto. (*See Appx. to Barrick Gold's Mot. to Dismiss*,

on file, July 28, 2020, Exs. K-L, 149-155.) It does not have any officers in Nevada. (*Id.*) It does not have any employees, offices, equipment, operations, or property in Nevada; it pays no taxes in Nevada; and it does not conduct any mining, exploration, or similar activities in Nevada. (*Id.*) Thus, however characterized, Barrick Gold's contacts with Nevada are not so "continuous and systematic" as to make it "at home" in Nevada such that it is subject general jurisdiction for all purposes.

2. *Barrick Gold is not subject to specific jurisdiction.*

Unlike a general jurisdiction analysis that looks at the defendant's activities in their entirety, "specific jurisdiction is proper only where the cause of action arises from the defendant's contacts with the forum." *Fulbright & Jaworski v. Eighth Jud. Dist. Ct.*, 131 Nev. 30, 37, 342 P.3d 997, 1002 (2015) (internal quotation marks omitted). More specifically, for Nevada courts to exercise specific personal jurisdiction over a nonresident defendant: (1) the defendant must purposefully avail itself of the privilege of acting in the forum state or purposefully direct its conduct towards the forum state,⁶ and (2) the cause of action must arise from the defendant's purposeful contact or activities in connection with the forum state, such that it is reasonable to exercise personal jurisdiction. *Dogra v. Liles*, 129 Nev. 932, 937, 314 P.3d 952, 955 (2013); *Arbella*, 122 Nev. at 513, 134 P.3d at 712-13.

In the context of the parent-subsidary relationship, there is a distinction between jurisdiction based on the parent company's direct availment and jurisdiction based on the imputed contacts of its subsidiaries, such as by alter ego or an agency theory. *Sonora Diamond Corp. v. Superior Court*, 99 Cal. Rptr. 2d 824, 856 (Cal. Ct. App. 2000); *Viega*, 130 Nev. at 375, 328 P.3d at 1157 (recognizing that direct availment is distinct from an imputed-contacts analysis). Under a theory of specific personal jurisdiction directed at a parent corporation, the inquiry "is not whether justification exists to disregard the subsidiary's corporate existence or whether the subsidiary is an agent of the parent but rather whether the parent for all intents and purposes has done an act in the forum state of a nature as to make reasonable the forum state's exercise of

⁶ Where, as here, the claims sound in contract, courts apply a "purposeful availment" analysis. *See Picot v. Weston*, 780 F.3d 1206, 1212 (9th Cir. 2015).

jurisdiction over the parent with respect to that act and its consequences." *Sonora*, 99 Cal. Rptr. 2d at 856.

Barrick Gold has not purposefully availed itself of the privileges and law of Nevada and Bullion's claims in no way arise from Barrick Gold's contacts with this forum.⁷ Previously, this Court determined that Barrick Gold purposefully availed itself as a result of two 2019 agreements: (1) the Implementation Agreement between Barrick Gold and Newmont, which integrated their respective subsidiaries' mining assets and operations in Nevada, and (2) the subsequent Limited Liability Agreement, which formed NGM. Respectfully, this ruling was in error. These agreements and Barrick Gold's role as a parent company in the corporate transaction does not constitute contacts by which Barrick Gold purposefully availed itself of the benefits and protection of Nevada.

It is well settled that a parent corporation does not purposefully avail itself of privileges of doing business in Nevada by forming and owning an independent subsidiary that conducts business here. *Viega*, 130 Nev. at 381, 328 P.3d at 1160; *McCulloch Corp. v. O'Donnell*, 83 Nev. 396, 399, 433 P.2d 839, 840 41 (1967); *Sonora*, 99 Cal. Rptr. 2d at 841-42. The mere fact that Barrick Gold was involved in the "process" and "implementation" of forming NGM is not conduct outside the normal expectation of the parent-subsidiary relationship sufficient for purposeful availment. *Sonora*, 99 Cal. Rptr. 2d at 842 (parent company's involvement in the formation of the mine operation was not conduct outside the normal expectations of the subsidiary relationship). Simply put, Barrick Gold did not purposefully avail itself of the privileges and laws of Nevada through its involvement as a parent company in the formation of NGM.

Nor does Bullion's claims arise from these agreements. *See Arbella*, 122 Nev. at 515-16, 134 P.3d at 714 ("[T]he claims must have a specific and direct relationship or be intimately

⁷ Again, Barrick Gold realizes the Court previously ruled that (1) Barrick Gold purposefully availed itself of the privileges and law of Nevada though the 2019 transactional agreements that formed NGM, (2) Bullion's AOI royalty claims "arise in part from these agreements," and (3) "the forum-selection clause in the joint venture agreement shows that it is not unreasonable for the Court to exercise its jurisdiction." Yet, it is Bullion who is now insisting this order no longer has any application or bearing in this case.

related to the forum contacts." (internal quotations omitted)). Bullion's claims arise from the 1979 Agreement; not the agreements that led to the creation of NGM. *Sonora*, 99 Cal. Rptr. 2d at 848 (parent company's involvement in the process and formation of a subsidiary had no relation or connection to plaintiff's claims over a contract for endowment payment from the mine). Had Bullion's claims arisen from these 2019 agreements, then it would not have named Barrick Gold as a defendant nearly a decade ago in the federal litigation nor included Barrick Gold in the original complaint in this matter in December 2018, months before the agreements were executed.

Moreover, Bullion's inclusion of a meritless "fraudulent conveyance" claim in the TAC does nothing to cure this jurisdictional error. Bullion's own factual recitation for this claim is not levied against Barrick Gold. (*See* TAC ¶ 85, "Goldstrike, Exploration, and other entities owned or controlled by Barrick Gold transferred property") Nor could Bullion make such an assertion as Barrick Gold was neither the transferee nor the transferor. Further, "Nevada law does not recognize [fraudulent transfer] claims against nontransferees under theories of accessory liability." *Contra Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). Stated slightly differently, Bullion's purported "fraudulent conveyance" claim does not cure the deficient jurisdictional hook to bring Barrick Gold into this action.

B. Barrick Gold Is Not Indirectly Subject to Personal Jurisdiction in Nevada.

Bullion asserted in prior briefings and realleged in its Third Amended Complaint that Barrick Gold is purportedly subject to jurisdiction here through its subsidiaries. (*See* TAC ¶ 12, "[T]he jurisdictional contacts of Goldstrike are attributed to . . . Barrick Gold . . . as each of these defendants is the agent or alter ego of Goldstrike.") Under the law, "corporate entities are *presumed separate*, and thus, the mere existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries' minimum contacts with the forum." *Viega*, 130 Nev. at 375, 328 P.3d at 1157 (quotations and citations omitted) (emphasis added); *LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 902, 8 P.3d 841, 845 (2000). The Nevada Supreme Court has "emphasized that '[t]he corporate cloak is not lightly thrown aside.'" *LFC Mktg. Grp., Inc.*, 116 Nev. at 903-04,

1 8 P.3d at 846 (quoting *Baer v. Amos J. Walker, Inc.*, 85 Nev. 219, 220, 452 P.2d 916, 916 (1969)).
2 "Subsidiaries' contacts have been imputed to parent companies only under *narrow exceptions* to
3 this general rule, including alter ego theory and, at least in cases of specific jurisdiction, the
4 agency theory." *Id.* (emphasis added).

5 In other words, it is not Barrick Gold's burden to show that it is a separate and distinct
6 legal entity from its subsidiaries. The law presumes as much. Instead, it is Bullion's obligation to
7 produce some evidence to overcome this presumption so that the corporate cloak may be thrown
8 aside. Bullion cannot remotely come close to making such a showing.

9 ***1. Bullion cannot make a prima facie case on the alter ego doctrine for***
10 ***jurisdictional purposes.***

11 "The alter ego theory allows plaintiffs to pierce the corporate veil to impute a subsidiary's
12 contacts to the parent company by showing that the subsidiary and the parent are one and the
13 same." *Viega*, 130 Nev. at 376, 328 P.3d at 1157. The law requires Bullion to go beyond the
14 pleadings and proffer some competent evidence supporting a finding of alter ego to support
15 jurisdiction. *Trump*, 109 Nev. at 693, 857 P.2d at 744 (explaining that the plaintiff "may not
16 simply rely on the allegations of the complaint to establish personal jurisdiction."). Despite
17 multiple rounds of briefing and jurisdictional discovery, Bullion has failed to present even the
18 slightest bit of evidence that would support a finding that Barrick Gold's indirect subsidiaries are
19 its alter ego.

20 Importantly, a parent-subsidary relationship does not on its own establish that two entities
21 are alter egos. *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1021 (9th Cir. 2017); *Bonanza*
22 *Hotel Gift Shop, Inc. v. Bonanza No. 2*, 95 Nev. 463, 466, 596 P.2d 227, 229 (1979) ("A mere
23 showing that one corporation is owned by another, or that the two share interlocking officers or
24 directors is insufficient to support a finding of alter ego."). Instead, "[i]t must further be shown
25 that the subsidiary corporation is so organized and controlled, and its affairs are so conducted that
26 it is, in fact, a mere instrumentality or adjunct of another corporation." *Bonanza*, 95 Nev. at 466,
27 596 P.2d at 229 (quotations and citations omitted).

1 To prove alter ego for jurisdictional purposes, Bullion must make a *prima facie* case on
2 the alter-ego doctrine, which includes the following requirements: "(1) the corporation must be
3 influenced and governed by the person asserted to be the alter ego; (2) there must be such unity of
4 interest and ownership that one is inseparable from the other; and (3) the facts must be such that
5 adherence to the corporate fiction of a separate entity would, under the circumstances, sanction
6 fraud or promote injustice." *Polaris Indus. Corp. v. Kaplan*, 103 Nev. 598, 601, 747 P.2d 884,
7 886 (1987); *Williams*, 851 F.3d at 1021 (noting that plaintiff must make out a *prima facie* case on
8 the alter ego requirements for personal jurisdiction).

9 In assessing these requirements, courts look at whether there has been "co-mingling of
10 funds, undercapitalization, unauthorized diversion of funds, treatment of corporate assets as the
11 individual's own, and failure to observe corporate formalities." *Polaris*, 103 Nev. at 601,
12 747 P.2d at 887. On the contrary, "evidence that the corporation existed as an ongoing enterprise
13 engaged in legitimate business suggests no fraudulent intent or injustice to support piercing the
14 corporate veil." *In re W. States Wholesale Nat. Gas Litig.*, 605 F. Supp. 2d at 1133.

15 Here, there is no basis to pierce the corporate form of Barrick Gold or any of its
16 subsidiaries operating in Nevada. Barrick Gold scrupulously maintains a separate accounting for
17 each of its subsidiaries according to generally accepted accounting principles, none of
18 Barrick Gold's subsidiaries' funds have been improperly "diverted" to anyone, Barrick Gold does
19 not treat its subsidiaries' assets as its own, and Barrick Gold and its subsidiaries carefully maintain
20 all necessary formalities, including separate boards, officers, bank accounts, and corporate
21 records. (See Appx. to Barrick Gold's Mot. to Dismiss, on file, July 28, 2020,
22 Exs. K-L, 149-155); see *Bonanza*, 95 Nev. at 467, 596 P.2d at 230 (subsidiary was not the
23 alter ego of a parent corporation when the two entities maintained separate corporate books and
24 accounts, held separate directors' meetings, recorded separate minutes with full corporate
25 formalities, and had independent headquarters).

26 ***Perhaps most importantly, there is no evidence or allegation that any of Barrick Gold's***
27 ***subsidiaries are undercapitalized, that Barrick Gold has looted the assets of its subsidiaries, or***
28 ***that recognizing their separate corporate forms will work a fraud or injustice. Bonanza,***

95 Nev. at 467, 596 P.2d at 230; *Viega*, 130 Nev. at 383, 328 P.3d at 1162 (Pickering, J., concurring in result) (noting that alter-ego theory did not apply because the parent "did not loot or damage [subsidiary's] solvency"). On the contrary, all of Barrick Gold's subsidiaries are adequately capitalized for their purposes. (See Appx. to Barrick Gold's Mot. to Dismiss, on file, July 28, 2020, Exs. K-L, 149-155.) Bullion's contention that adherence to presumption of corporate separateness would sanction fraud or promote injustice is unavailing. The subsidiaries that own the land and the minerals from which Bullion seeks a royalty are named defendants in this action and, by Bullion's own allegations, they are the only parties that could possibly be subject to liability.⁸ Indeed, for this very reason this Court has already determined that Bullion's alter ego allegations are "premature" and they would only "become a more relevant issue if [NGM] and [Goldstrike] do not have assets to satisfy a judgment." (See Order re Motions to Dismiss, on file, Dec. 9, 2020.)

2. ***Bullion cannot make a prima facie case on its agency theory.***

Again, under Nevada law, Barrick Gold and its subsidiaries are *presumed separate*. *Viega*, 130 Nev. at 378, 328 P.3d at 1158. Moreover, it is well established that "the relationship between a parent company and its wholly owned subsidiary necessarily includes some elements of control." *Id.* Accordingly, contrary to Bullion's wishful thinking, "neither ownership nor control of a subsidiary corporation by a foreign parent corporation, without more, subjects the parent to the jurisdiction of the state where the subsidiary does business." *Id.*

In *Viega*, the Nevada Supreme Court explained that when a plaintiff like Bullion claims a Nevada court has jurisdiction over a foreign parent corporation based upon an agency theory related to its subsidiaries, the plaintiff must establish more than that the parent company exerts some control over the subsidiary. *Id.* at 378, 328 P.3d at 1158. Instead, a plaintiff must show that

⁸ Even if a court determines that one entity is the alter ego of the other, the foreign entity's activities in the forum jurisdiction must still meet the general jurisdiction requirements of being essentially "at home," which Bullion has conceded does not exist here. *Daimler AG*, 571 U.S. at 136 ("Even if we were to assume that [the domestic subsidiary] is at home in California, and further to assume that [its] contacts are imputable to [the foreign parent corporation], there would still be no basis to subject [the parent] to general jurisdiction in California, for [the parent's] slim contacts with the State hardly render it at home there.").

1 the parent company's control is *so pervasive* that it veers "into management by the exercise of
2 control over the internal affairs of the subsidiary and the determination of how the company will
3 be operated on a day-to-day basis such that the parent has moved beyond the establishment of
4 general policy and direction for the subsidiary and in effect taken over performance of the
5 subsidiary's day-to-day operations in carrying out that policy." *Id.* at 379, 328 P.3d at 1159
6 (quotations and citations omitted).⁹

7 After setting forth this exacting standard, the *Viega* court identified the degree of control
8 that a parent corporation may exercise over its in-state subsidiary without turning that subsidiary
9 into an "agent" for personal jurisdiction purposes, including requiring "approval from [the parent
10 corporation] before entering into any large financial transactions," implementing "consolidated
11 reporting, and shared professional services," requiring the subsidiary to submit "monthly reports
12 to [the parent corporation] for review by [the parent's] management board," and "supervising the
13 subsidiary's budget decisions, and setting general policies and procedures." *Id.* at 380, 328 P.3d
14 at 1160 (collecting cases). Moreover, the court rejected claims, like those asserted in Bullion's
15 complaint, that the foreign parent company was an agent of its subsidiaries because it referred to
16 all "of the Viega entities simply as Viega, a unified global enterprise with operations in America,
17 sharing the same corporate logo." *Id.*

18 Barrick Gold supervises its subsidiaries to the same degree that the *Viega* court found was
19 insufficient. For example, while Barrick Gold monitors its subsidiaries' performance, supervises
20 their budget decisions, requires approval for large financial transactions, issues consolidated
21 corporate and financial reports, and establishes general policies and procedures, it leaves

22 ⁹ In *Daimler AG*, the United States Supreme Court rejected an agency theory of general
23 jurisdiction. *Daimler AG*, 571 U.S. at 155-56. Similarly, the Nevada Supreme Court's decision in
24 *Viega* indicated that an agency theory is only applicable for specific personal jurisdiction. *Viega*,
25 130 Nev. at 376, 328 P.3d at 1157 ("Subsidiaries' contacts have been imputed to parent companies
26 only under narrow exceptions to this general rule, including alter ego theory and, *at least in cases*
27 *of specific jurisdiction, the "agency" theory.*"). It should be noted, however, that the Ninth Circuit
28 subsequently interpreted the United States Supreme Court decision in *Daimler AG* as having
rejected the agency theory for purposes of establishing specific personal jurisdiction. *Williams v.*
Yamaha Motor Co., 851 F.3d 1015, 1024 (9th Cir. 2017) (indicating that the rationale set for in
Daimler AG would seem to undermine application of the agency test even in specific jurisdiction
cases).

1 day-to-day management to its subsidiaries themselves, including over their mining and processing
2 operations, personnel, and legal affairs. (*See* Appx. to Barrick Gold's Mot. to Dismiss, on file,
3 July 28, 2020, Exs. K-L, 149-155.) Bullion offers nothing more than what *Viega* rejected.

4 In *Viega*, the Nevada Supreme Court cited extensively to *Sonora*, a case similar to this
5 one. In *Sonora*, a California school district sued a Nevada corporation ("Sonora") and its
6 Canadian parent ("Diamond") over a contract by which Sonora, the subsidiary, purchased a gold
7 mine from the district in exchange for, among other things, annual payments secured by a royalty.

8 The court found that Diamond, the parent corporation, had been formed shortly before the
9 purchase of the mine "for the purpose of acquiring and developing the" mine. *Sonora*,
10 99 Cal. Rptr. 2d at 832. Although Sonora and Diamond maintained separate boards and officers,
11 the court found that "[t]here is and has been an overlap of individuals serving as directors and
12 officers of both companies" and Sonora's board often met at the offices of Diamond in Toronto,
13 Canada. *Id.* The court further noted that Diamond, a publicly traded company, consolidated all
14 of its subsidiaries' information into its annual reports and failed to distinguish between Diamond
15 and its subsidiaries concerning their ownership of the mine in question – often suggesting that
16 Diamond owned the mine directly. *Id.* at 832. Sonora's corporate records were maintained at
17 Diamond's offices in Toronto. *Id.* at 833. Furthermore, when Sonora sold some property near the
18 mine in exchange for a promissory note, Sonora assigned the note to Diamond to reduce Sonora's
19 inter-company debt to Diamond. *Id.* When Sonora needed to borrow money to finance the
20 mining activities, Diamond guaranteed the loans. *Id.* Sonora was, at times, "dependent on . . . the
21 intercompany loans from Diamond" to cover operating costs. *Id.*

22 Addressing the agency theory of imputing contacts, the *Sonora* court recognized that
23 Diamond certainly exercised control over Sonora, but the question was whether such control was
24 "so pervasive and continual that the subsidiary may be considered nothing more than an agent or
25 instrumentality of the parent." *Id.* at 838. And, importantly, given the factual allegations here,
26 the court concluded that "such common characteristics as interlocking directors and officers,
27 consolidated reporting, and shared professional services" **do not** "trespass the boundaries of
28 legitimate ownership and control of the subsidiary." *Id.* at 838. As the court noted, "Diamond's

1 monitoring of Sonora Mining's performance, supervising Sonora Mining's budget decisions, and
2 setting general policies and procedures to be followed by Sonora Mining" are all "*appropriate,*
3 *normal involvement by a parent corporation,*" either in isolation or in aggregate. *Id.* at 845
4 (emphasis added). Similarly, financial transactions between a parent corporation and its
5 subsidiary, such as start-up capital from the parent and debt payments by the subsidiary, do not
6 make the parent liable for its subsidiary's contacts where such transactions are "separately
7 recorded, maintained in the records of each, documented as intercompany loans and similar
8 arrangements, and dealt with as legitimate obligations." *Id.* at 843.

9 Given that the principal asset was an active gold mine, the *Sonora* court also looked at
10 which entity – Sonora or Diamond – was responsible for managing the day-to-day operations of
11 the mine. The court noted that there was "no evidence that Diamond directed or participated in
12 the methods or means by which Sonora Mining performed th[e mining] function" or of "any
13 direct involvement by Diamond in any 'on the site' operational decisions." *Id.* at 845. The court
14 observed that even though Diamond employees would occasionally assist Sonora with its mining
15 activities, those contacts were rare and isolated. *Id.* In short, the court concluded that
16 notwithstanding Diamond's involvement in the business affairs of its subsidiary, that involvement
17 did not transgress the boundaries of appropriate oversight and management.

18 Here, Barrick Gold's involvement with its subsidiaries is even more attenuated than
19 Diamond's. For example, Barrick Gold has been the ultimate parent company of the
20 Barrick family of companies for decades – it was not formed to acquire and develop any mine in
21 Nevada (or anywhere else for that matter). Additionally, while Barrick Gold certainly monitors
22 the financial performance of its subsidiaries, it has not directly provided regular capital infusions
23 to its Nevada subsidiaries, as Diamond did with Sonora. (*See* Appx. to Barrick Gold's Mot. to
24 Dismiss, on file, July 28, 2020, Exs. K-L, 149-155.) While Diamond centralized management
25 and record-keeping functions at its Toronto headquarters, even for Sonora's board of directors,
26 Barrick Gold has historically had a far less centralized management structure, allowing its
27 subsidiaries to manage its mining interests in a diffused regional structure. (*See, e.g.,* Appx. to
28

1 Barrick Gold's Mot. to Dismiss, on file, July 28, 2020, Ex. I, Astorga Dep. Tr. 35:15-36:2,
2 36:18-20; Ex. J, Bolland Dep. Tr. 13:20-14:5.)

3 Barrick Gold has never directed the mining activities of any of its subsidiaries around the
4 world, including those operating in Nevada. While Barrick Gold has provided global policies
5 relating to things like supply-chain management and purchasing, it has never told any of its mines
6 how to conduct their day-to-day mining operations, much less assumed direct control over them.
7 (*See, e.g.*, Appx. to Barrick Gold's Mot. to Dismiss, on file, July 28, 2020, Ex. G,
8 Mansanti Dep. Tr., Dec. 20, 2017, 66:12-20; Ex. H, Measom Dep. Tr., March 21, 2018,
9 11:18-12:13; Ex. I, Astorga Dep. Tr., March 20, 2018, 36:3-17.)

10 But there is more. Even if the Nevada subsidiaries are assumed to be Barrick Gold's
11 agents (they are not), Bullion has still failed to allege, and cannot show, that this purported agency
12 has any nexus to the claims. *Viega*, 130 Nev. at 381, 328 P.3d at 1160 ("And even if, as the HOA
13 asserts, American Viega is German Viega's agent for American operations and the face of
14 American marketing, the HOA has not shown that that particular agency has resulted in the basis
15 for the claims at issue here"); *Dogra*, 129 Nev. at 937, 314 P.3d at 955 ("Nevada may
16 exercise specific jurisdiction over a nonresident defendant if the defendant purposefully avails
17 himself or herself of the protections of Nevada's laws, or purposefully directs her conduct towards
18 Nevada, and the *plaintiff's claim actually arises from that purposeful conduct.*") (emphasis
19 added).

20 **C. Exercising Jurisdiction over Barrick Gold is not reasonable.**

21 "[Q]uestions involving personal jurisdiction mandate an inquiry whether it is reasonable to
22 require the defendant to defend the particular suit which is brought there." *Trump*, 109 Nev.
23 at 700-01, 857 P.2d at 749 (citations and quotations omitted). "Factors relevant to this inquiry are:
24 (1) the interstate judicial system's interest in obtaining the most efficient resolution of
25 controversies; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in
26 obtaining convenient and effective relief; and (4) the interest of the several states in furthering
27 substantive social policies." *Id.* Moreover, where an international defendant is concerned, a court
28 must also "consider the procedural and substantive policies of other nations whose interests are

1 affected by the assertion of jurisdiction by the [Nevada] court." *Asahi Metal Indus. Co. v.*
2 *Superior Ct. of California, Solano Cty.*, 480 U.S. 102, 115 (1987)

3 Bullion has previously suggested, and the Court determined that, "the forum-selection
4 clause in the [Limited Liability Company Agreement for NGM] shows that it is not unreasonable
5 for the Court to exercise its jurisdiction in this case." (*See* Order re Motions to Dismiss, on file,
6 Dec. 9, 2020.) Respectfully, the forum selection clause in the NGM Limited Liability Company
7 Agreement – an agreement to which Bullion is not a party and has no rights – is not relevant to
8 whether it is reasonable for Barrick Gold to defend against Bullion's specific lawsuit seeking AOI
9 royalties pursuant to the 1979 Agreement. The forum selection clause in the NGM Limited
10 Liability Company Agreement expressly provides that the parties, including Barrick Gold, were
11 only agreeing to jurisdiction in Nevada for disputes among themselves relating to that specific
12 agreement and the rights and obligations of the parties to that agreement. (*See* Appx. to
13 Barrick Holding's Mot. to Dismiss, on file, Aug. 6, 2020, Ex. F.) Indeed, the Nevada forum
14 selection clause in the NGM Limited Liability Company Agreement provides no more support to
15 the reasonableness of specific jurisdiction over Barrick Gold in this case than the Canadian forum
16 selection clause in the NGM Implementation Agreement supports the unreasonableness of
17 exercising specific jurisdiction over Barrick Gold in this case. (*See* Appx. to Barrick Holding's
18 Mot. to Dismiss, on file, Aug. 6, 2020, Ex. E.)

19 Subjecting Barrick Gold to jurisdiction here merely because it is the ultimate foreign
20 parent company of subsidiaries operating in Nevada would be unreasonable and also contrary to
21 the corporate business structures created by the Nevada Legislature. Bullion's claims are
22 premised on the notion that it is owed royalty from mineral properties in Nevada. Barrick Gold
23 does not own any land or operate any mines in Nevada. Importantly, ***Bullion does not – and***
24 ***cannot – show that it needs to drag a foreign corporation into this case to achieve a remedy.***
25 The subsidiaries – *i.e.*, the separate corporate entities that operate in and do business in Nevada
26 and that own the land purportedly subject to Bullion's AOI royalty claim - have been named in
27 this case. Moreover, and importantly given the spurious arguments that the remedies of
28 constructive trust and alter ego are needed here to protect Bullion, there is no evidence that any of

these subsidiaries are undercapitalized in the event of an adverse result. *See F. Hoffman-La Roche, Ltd. v. Superior Court*, 30 Cal. Rptr. 3d 407, 424-25 (Cal. Ct. App. 2005) (finding that it was unreasonable to subject a foreign parent company to jurisdiction where the plaintiff was not left without a remedy and no jurisdictional barrier to pursue their claims against the subsidiaries with no hint of evidence the subsidiaries were incapable of responding to damages). Just because Bullion wants the foreign parent in the case does not mean that there is a legal basis for it. There is not. And just because Bullion wants the foreign parent in this case does not mean it is reasonable to haul the foreign parent into court here. It is not.

IV. CONCLUSION

Barrick Gold is not (and never was) subject to personal jurisdiction in Nevada. Barrick Gold should be dismissed from this action.

DATED this 22nd day of February, 2021.

PISANELLI BICE PLLC

By: /s/ James J. Pisanelli

James J. Pisanelli, Esq., Bar No. 4027
Debra L. Spinelli, Esq., Bar No. 9695
Dustun H. Holmes, Esq., Bar No. 12776
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Michael R. Kealy, Nevada Bar No. 971
Ashley C. Nikkel, Nevada Bar No. 12838
Brandon J. Mark (*Admitted Pro Hac Vice*)
PARSONS BEHLE & LATIMER
50 West Liberty Street, Suite 750
Reno, Nevada 89501

Attorneys for Barrick Gold Corporation

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Pisanelli Bice PLLC, and that on the 22nd day of February, 2021, I filed a true and correct copy of the foregoing **BARRICK GOLD CORPORATION'S MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT** with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification to all registered users as follows:

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

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

Clayton P. Brust, Esq.
ROBISON, SHARP, SULLIVAN & BRUST, P.C.
71 Washington Street
Reno, NV 89503

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169

/s/ Kimberly Peets
An employee of Pisanelli Bice PLLC