IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ATLANTIC RICHFIELD COMPANY, Plaintiff, v. UNITED STATES OF AMERICA, THE PUEBLO OF LAGUNA, an Indian tribe, and LAGUNA CONSTRUCTION COMPANY, INC., Defendants.	Case No. 1:15-cv-00056-JAP-KK

ATLANTIC RICHFIELD COMPANY'S
RESPONSE IN OPPOSITION TO LAGUNA CONSTRUCTION COMPANY'S
MOTION FOR RECONSIDERATION

Plaintiff Atlantic Richfield Company hereby submits its response in opposition to Defendant Laguna Construction Company's ("LCC") Motion for Reconsideration of the Court's Memorandum Opinion and Order and Order of Partial Dismissal of Plaintiff's Claims Against Laguna Construction Company ("Motion for Reconsideration" or the "Motion").

INTRODUCTION

LCC's Motion is both procedurally improper and substantively wrong. Reconsideration is improper because LCC merely rehashes the same issues raised in its Motion to Dismiss. The only difference is that LCC has now added new arguments it could have made—but chose not to make—in its Motion to Dismiss. The Court should deny the Motion for Reconsideration on this basis alone.

Even if the Court looks to the Motion's substance, it will find LCC's new argument meritless. The narrow definitions of "creditor" that LCC urges on the Court are inconsistent with both the prevailing definition at the time LCC drafted its Plan of Merger and LCC's legal obligations as a New Mexico state corporation. Atlantic Richfield is a "creditor" of LCC based on LCC's conduct before its merger—the conduct that triggered LCC's liability in this case. The Plan of Merger's waiver of immunity therefore includes the claims Atlantic Richfield brings in this lawsuit and the Court should not alter its order reaching that conclusion.

ARGUMENT

I. LCC'S MOTION IS AN INVALID ATTEMPT TO RAISE NEW ARGUMENTS IT COULD HAVE RAISED IN ITS MOTION TO DISMISS.

"[A] motion for reconsideration" is an "inappropriate vehicle[] to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). The case on which LCC relies—*Anderson Living Trust v. WPX Energy Production, LLC*—also recognizes this fundamental tenet. A court should not reconsider an issue where "the party moving for reconsideration waived their right to appeal the alleged error by not raising the appropriate argument." 312 F.R.D. 620, 648 (D.N.M. 2015); *see also id.* at 660 (concluding that a party's "new" and "untimely" argument "failed to provide the Court with a proper basis on which to reconsider or change one of its previous rulings"). This is because the court must "consider the time and expense that the party opposing reconsideration spent in winning the earlier ruling, and should try to prevent that party from having to bear the same impositions again." *Id.* at 648-49.

LCC admits its primary argument for reconsideration is one it could have raised before: "LCC acknowledges that it did not directly counter [Atlantic Richfield's] footnote defining the term 'creditor.'" (Motion at 6.) LCC claims that Atlantic Richfield's argument "was so abbreviated" that "LCC's focus was on different language in the same Article." (*Id.*) But this explains only why LCC *chose not* to counter Atlantic Richfield's argument—LCC does not explain why it *could not* have countered Atlantic Richfield's argument. LCC's decision to ignore an issue it now characterizes as the "critical linchpin" of the Court's holding, (*id.* at 5), undermines rather than supports its Motion for Reconsideration.

LCC's argument that the Court "misapprehended" its position fails for the same reason. (*Id.* at 6.) The Court did not misapprehend LCC's position, because LCC did not assert one. LCC did not respond to an argument and thereby conceded it. The Court only failed to predict that LCC would change its mind.[1]

Next, LCC claims that reconsideration is warranted due to the parties' insufficient investment of "time and energy." (*Id.* at 7.) But LCC recognized the danger lurking in its Plan of Merger and spent nearly three pages in its Reply Brief responding to Atlantic Richfield's arguments. (Doc. No. 63 at 7-10.) The Court also invested substantial time considering the issue, expressly stating in its twenty-page opinion that the argument presented a "close question" and that the Court "d[id] not reach [its] conclusion lightly." (Doc. No. 75 at 8, 10.) And, of

[1] LCC's assertion that the Court "clearly misread[]" the *Amerind* decision also is wrong. (Motion at 12.) The Court appropriately pointed to the difference between the language in LCC's Plan of Merger and the language in the corporate charter in *Amerind* as grounds for rejecting LCC's argument based on *Amerind*. LCC complains that it is "unable to find anywhere in the *Amerind* decision mention of, citation to, or quotation from the Plan of Merger," but that is a non sequitur. The point is that the alleged waiver language in *Amerind* was different than the language at issue here; *Amerind* is not, then, "fundamentally on all fours with this case." (*Id.*)

course, this particular question arose in the context of sovereign immunity arguments by the tribal defendants that consumed over 100 pages of briefing that they had more than six months to draft. (Doc. Nos. 34, 36 (filed May 26, 2015); Doc. Nos. 63, 67 (filed October 28, 2015).) Neither the Parties', nor the Court's, analysis of these issues suffered from a shortage of time and energy.

LCC's secondary argument—"ask[ing] the Court to reconsider its elevating the Plan of Merger language over the explicit language of LCC's federal corporate charter"—is yet another violation of the rules for reconsideration. A party moving for reconsideration faces a difficult task when it "essentially asks the Court to grant the movant a mulligan on its earlier failure to present persuasive argument and evidence." *Anderson Living Trust*, 312 F.R.D. at 648. That is precisely what LCC does in this section of its Motion, and again it admits as much. (Motion at 12 (describing LCC's own prior arguments, the Court's rejection of those arguments, and then making the same arguments based on the same case law).) These arguments are no more persuasive now than they were when the Court first rejected them and LCC's attempt at a "mulligan" is improper.[2]

Because LCC seeks merely to relitigate the arguments in its Motion to Dismiss, it fails to satisfy the standard for reconsideration, and this Motion should be denied. If, however, the Court is inclined to revisit the merits of its ruling, Atlantic Richfield addresses them below.

[2] LCC's Motion for Reconsideration presents an additional procedural problem. LCC apparently filed this Motion rather than answering Atlantic Richfield's Complaint. But a motion for reconsideration does not obviate the need to answer. *See* Fed. R. Civ. P. 12(a)(4) (tolling the responsive pleading deadline where a motion to dismiss is filed, but not for any other motions). The time for LCC's answer is now past. *See id.*

II. THE COURT'S RULING IS CORRECT.

The Court correctly held that LCC's Plan of Merger waived its sovereign immunity as to Atlantic Richfield's claims in this case.

A. LCC's Plan of Merger contains an unequivocal waiver of sovereign immunity.

LCC's expanded definition of "creditor" from Black's Law Dictionary at the time of the Plan of Merger's drafting actually undermines its argument. That definition includes the following:

- One who has a right to require the fulfillment of an obligation or contract.
- One to whom money is due ....
- [O]ne who has any legal liability upon a contract, express or implied, or in tort ....
- [E]very one having right to require the performance of any legal obligation ....

(*See* Motion at 9.) These broad definitions are consistent with the most obvious alternative source for defining "creditor"—the U.S. Bankruptcy Code. The term "creditor" there is defined as any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10). "Claim," in turn, is defined to include any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. *Id.* § 101(5).[3]

[3] Creditors—including the United States—frequently file claims in bankruptcy for CERCLA liabilities. *See, e.g., In re Chateaugay Corp.*, 944 F.2d 997, 999 (2d Cir. 1991). (holding that CERCLA response costs "are pre-petition 'claims,' dischargeable in bankruptcy, regardless of when such costs are incurred, as long as they concern a release or threatened release of hazardous substances that occurred before the debtor filed its Chapter 11 petition.").

These inclusive definitions easily encompass Atlantic Richfield's claims in this case. As the Bankruptcy Code contemplates, Atlantic Richfield asserts a "right to payment" against LCC that arises, primarily, from the conduct of LCC before it executed the Plan of Merger. Likewise, as Black's Law Dictionary contemplates, Atlantic Richfield asserts "a right to require the fulfillment of an obligation." That obligation arises not just from CERCLA, but also from the Agreement to Terminate Leases. The Pueblo—LCC's sole shareholder and the source of its immunity—agreed that LCC would share the Pueblo's responsibility for "the cleanup, reclamation, or other environmental remediation action" at the Jackpile Site. (Doc. No. 1-2, §§ 3(a)(i) and 6(b).) Even though Atlantic Richfield has not asserted breach of contract claims against LCC, the Agreement to Terminate Leases is another source of the obligations LCC had with respect to the Site. *See, e.g.*, *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 299 F.3d 1019, 1027-28 (9th Cir. 2002) (holding that a contract may be considered when apportioning CERCLA liability without actually enforcing the contract itself). Because LCC and the Pueblo claimed to have fulfilled those obligations as early as 1995, all or nearly all of Atlantic Richfield's rights arise from LCC's pre-merger conduct.

Further, an inclusive definition of "creditor" that preserves liability for LCC's pre-merger conduct is the definition that LCC's Plan of Merger requires. When a New Mexico corporation merges, "the surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged . . . . Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by the merger or consolidation." N.M.S.A. § 53-14-6(E). The statute thus contemplates that a "creditor" is anyone holding a "liability[y]" or "obligation" of "the corporations so merged." The Plan of

Merger, as it must, contains the requisite statutory language and thereby evidences an intent to preserve all "liabilities and obligations" arising from the conduct of LCC up to that point.

LCC's proposed alternative definitions of creditor fail in the face of these authorities. First, LCC cannot re-define "creditor" in a way that would "impair" the "liabilities and obligations" it owes to Atlantic Richfield. LCC chose to incorporate its initial incarnation pursuant to state law and it therefore is subject to the state law requirement that the post-merger LCC corporation be "responsible and liable" to Atlantic Richfield. *See Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1149 (10th Cir. 2012) (observing that a tribal corporation incorporated pursuant to state law "voluntarily subject[s] [itself] to the authority of another sovereign"). Had LCC not preserved creditors' claims in its Plan of Merger—and thereby waived sovereign immunity for those claims—its merger presumably would not have been approved. *See* N.M.S.A. § 53-14-4(B) (requiring that the New Mexico Secretary of State "find[] that the articles conform to law").[4] Second, the smattering of narrower definitions of "creditor" offered by LCC bear no relation to this case. (Motion at 9-10 (citing dictionaries not in effect at the time of the Plan of Merger's drafting and a 1934 New Jersey state court opinion).) The inclusive definition prevailing at the time of the Plan of Merger and that is codified in U.S. bankruptcy law and necessary to preserve the legality of LCC's merger is the only definition LCC could have intended.

[4] Had its Plan of Merger not been approved, LCC New Mexico either would have continued to exist, or LCC could have dissolved it. In either case, Atlantic Richfield's claims would have been preserved. (*See* Doc. No. 75 at 19 ("[I]f LCC New Mexico had been dissolved, New Mexico's survivorship statute would preserve ARCO's causes of actions against it.").)

B. LCC's corporate charter does not nullify the express waiver in its Plan of Merger.

LCC's argument on this point is a virtual cut-and-paste of the arguments in its prior briefing. (*Compare* Motion at 11-17 *with* Doc. No. 34 at 6-12 *and* Doc. No. 63 at 7-9.) Because the Court has already rejected the same arguments based on the same authorities, (*see* Doc. No. 75 at 15-17), little more needs to be said here. Suffice to say, however, that if LCC were correct that immunity could be waived only by following the procedures in its corporate charter, it would render meaningless the entirety of the disputed provision in LCC's Plan of Merger. That would include not only the "creditor" clause, but also the portion the Court has found—and LCC does not dispute—"contains a clear waiver of immunity for pending lawsuits." (Doc. No. 75 at 15 (quoting Merger Documents at 7-8).) Fundamental canons of construction preclude such a result. *Erwin v. United Ben. Life Ins. Co.*, 371 P.2d 791, 794 (N.M. 1962) ("By every sound rule of construction, [an] instrument should be interpreted ... to give a sensible meaning and effect to all its provisions; and so as to avoid rendering portions of it contradictory and inoperative, by giving effect to some clauses to the exclusion of others.").[5] A natural reading of LCC's Plan of Merger preserves Atlantic Richfield's claims against LCC, as the Court correctly found.

CONCLUSION

Based on the foregoing reasons and authorities, the Court should deny LCC's Motion for Reconsideration in its entirety.

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[5] For similar reasons, Atlantic Richfield does not agree the "all debts, liabilities and duties" clause may be enforced against LCC "only as if they had been incurred or contracted by Federal LCC; that is, subject to unwaived sovereign immunity." (Motion at 6 n.4.) Such a construction makes the assumption of LCC New Mexico's liabilities meaningless and contrary to New Mexico law. However, because the "creditor" clause contains no such qualifying language, the Court did not reach this issue previously, and need not do so now. (*See* Doc. No. 75 at 12-13.)

Respectfully submitted this 15th day of April, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 15, 2016, the foregoing **ATLANTIC RICHFIELD COMPANY'S RESPONSE IN OPPOSITION TO LAGUNA CONSTRUCTION COMPANY'S MOTION FOR RECONSIDERATION** was served via the Court's ECF system upon:

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