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

In re: Gold King Mine Release in San Juan County, Colorado on August 5, 2015	No. 1:18-md-02824-WJ
This document relates to No. 1:18-cv-00744	

Motion under Rule 12, Fed. R. Civ. P.,
on behalf of
Defendants Salem Minerals, Inc. and San Juan Corp.

Preliminary statement

This Motion is made on behalf of Defendants Salem Minerals, Inc. and San Juan Corp. ("Salem" and "San Juan") pursuant to Rule 12, Fed. R. Civ. P., and the Court's Order, October 1, 2018 (MDL Doc. #115).

The *Allen* complaint

1. The *Allen* Complaint, Doc. #1 in No. 1:18-cv-00744, seeks recovery for events occurring after the August 5, 2015 blowout at the Gold King Mine in Colorado. The Complaint is filed on behalf of approximately 278 individual plaintiffs, all alleged to be members of the Navajo Nation. Of these plaintiffs, 165

are alleged to be New Mexico residents, 103 reside in Utah, nine reside in Arizona, and one resides in Colorado.

2. The *Allen* Complaint contains only one reference to Salem Minerals, Inc. ("Salem") and one reference to San Juan Corp. ("San Juan"). In paragraph 302 it is alleged that Salem owned or owns the mine that forms the basis of this complaint, but the pleading notes that "it seems that San Juan Corp. is the actual owner of the Gold King Mine, not Salem Minerals." (¶ 302). In paragraph 303 it is alleged that San Juan at relevant times "owned and owns the Gold King Mine." (¶ 303).

3. Named defendants include the Environmental Protection Agency ("EPA"), the United States, three EPA contractors, and three related mining entities: Kinross Gold Corp., Kinross Gold U.S.A., Inc., and Sunnyside Gold Corp. (¶¶ 297-306). Plaintiffs then allege:

> The Defendant corporations fit into two groups. The "Contractor Defendants" were EPA's contractors for the negligent work at the Gold King Mine site: Environmental Restoration, Weston Solutions, and Harrison Western. The "Owner Defendants" were mine owners who generated the toxic waste and negligently created the dangerous conditions at the site: Kinross, Kinross USA, Sunnyside Gold and Gold King Corp."

Complaint ¶ 307, *Allen* Doc. #1. By Plaintiffs' express allegation, neither Salem nor San Juan fits into either Defendant group.

4. The Complaint relates the history of the Gold King Mine and other nearby workings and describes EPA's 2014 and 2015 site evaluation efforts. (*Allen*

Complaint ¶¶ 308-53). No mention is made of Salem or San Juan in these passages. Continuing, the Complaint briefly alleges actions by the "Defendants," namely: failure to notify downstream residents (¶¶ 354, 359), duty to exercise reasonable care in investigations (¶ 357), and violation of industry standards in their activities (¶ 358). The First Claim (against "All Defendants") alleges that the "Defendants" knew or should have known about the potential for contamination at the Gold King Mine and had a duty to exercise reasonable care in their investigations. (¶¶ 362, 363). It then spells out specific breaches of duty by EPA and the Contractor Defendants. (¶ 364). It mentions the English case of *Rylands v. Fletcher* and avers a "negligent release of stored water that damages downstream interest holders." (¶ 365). It asserts the negligent violation of various Colorado, New Mexico, and federal statutes concerning effluent limitations. (¶¶ 366-68). It alleges torts by Kinross, Kinross USA, and Sunnyside Gold. (¶ 370). Finally, it alleges joint and several liability and proximate cause by the "Defendants." (¶ 371). In the entirety of the Complaint's allegations of tortious conduct, Salem and San Juan are not mentioned by name.

Argument

a. Failure to state a claim.

5. As to Salem and San Juan, the allegations of the Complaint cannot escape dismissal. Salem and San Juan—or, perhaps, only San Juan—are said to be

owners of the Gold King Mine site. There is no further allegation of any actions by Salem or San Juan connected to the blowout of August 5, 2015. There is no assertion that Salem or San Juan had any part in the actions of EPA or the EPA Contractors, who were alleged to have caused the blowout, or in actions by the mining Defendants, who were alleged to have bulkheaded the Sunnyside Mine and the American Tunnel. Such a Complaint cannot survive dismissal as to Salem and San Juan.

6. The Supreme Court has recently emphasized that a plaintiff must support legal claims with factual allegations as to the actions of a defendant, to survive a motion to dismiss. The *Allen* Plaintiffs' conclusory language, alleging that negligence occurred but failing to state what party did what act, does not state a claim on which Plaintiffs are entitled to proceed to discovery and go to trial:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . *Sanjuan* v. *American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

7. The Supreme Court has underscored the necessity to plead factual content supporting conclusory allegations of liability:

> A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. . . .

8. It is not enough to allege that a defendant was negligent or is somehow liable, without alleging the facts that make out a plausible case:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 555 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d at 157-158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not "show[n]"--"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption

> of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 678-679 (2009).

9. Here, the pleadings state nothing as fact against Salem and San Juan, specifically, except that they, or one of them, owned the Gold King Mine. Otherwise, the allegations against them are only unsupported conclusions. To assert broadly, as Plaintiffs do, that "Defendants" acted negligently gives only a conclusion and fails to identify specific conduct by specific entities. Such a complaint defies the Supreme Court's explicit requirement of factual allegations creating a plausible claim of liability.

10. To be sure, the Complaint alleges that unspecified "Defendants" caused the release that injured the Plaintiffs. As to Salem and San Juan , such pleading is inadequate. "The Complaint impermissibly lumps all of the Defendants together." *Rich v. Maidstone Financial, Inc.*, 2001 U.S. Dist. LEXIS 3167 (S.D.N.Y. 2001). Salem and San Juan are not alleged to have acted as contractors, nor are they claimed to be among the mining Defendants. They are clearly distinct Defendants and are entitled to notice of the charges being made, not against the Defendants collectively, but against Salem and San Juan, specifically. Plaintiffs must name names and specify acts. Rule 8, Fed. R. Civ. P., prohibits a pleading that alleges

actions by "the Defendants" collectively, without distinguishing individual parties. See *1-800-411-I.P. Holdings v. Ga. Injury Ctrs., LLC*, 71 F. Supp. 3d 1325, 1330 (S.D. Fla. 2014) ("Lumping" runs afoul of the pleading standard where it denies a defendant notice of the specific claims against it.).

11. Thus, in *Pierson v. Orlando Regional Healthcare Systems, Inc.*, 619 F. Supp.2d 1260 (M.D. Fla. 2009), *aff'd*, 451 Fed. Appx. 862 (11th Cir. 2012), the court dismissed a complaint that lumped numerous defendants into groups, against which allegations were made:

> "Although [Rule 8] does not demand that a complaint be a model of clarity or exhaustively present the facts alleged, it requires, at a minimum, that a complaint give each defendant 'fair notice of what the plaintiff's claim is and the ground upon which it rests.'" Atuahene v. City of Hartford, 10 F. App'x 33, 34 (2d Cir. 2001) (quoting Ferro v. Ry. Express Agency, 296 F.2d 847, 851 (2d Cir. 1961)). In Atuahene, the court held that "[b]y lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, [the plaintiff's] complaint failed to satisfy this minimum standard." id. The Amended Complaint in the instant case suffers from these same flaws. The grouping of Defendants as "Peer Review Defendants" does not afford these Defendants fair notice of the basis for the claims against them, especially considering that as to some of these Defendants, no role in the peer review process is even generally described.

Pierson, 619 F. Supp. 2d at 1273. The *Allen* Complaint falls far short of adequate notice pleading as to Salem and San Juan.

12. Although Plaintiffs mention the rule of *Rylands* v. *Fletcher* (Complaint at ¶ 365), the *Allen* Complaint alleges no facts, as to Salem or San Juan, that create

liability under the principles of that case. Moreover, *Rylands v. Fletcher* is not the law in Colorado. Instead, negligence must be shown. *Liber v. Flor*, 160 Colo. 7, 18 (1966); *North Sterling Irrigation District v. Dickman*, 59 Colo. 169, 171-72 (1914); *Bishop v. Brown*, 14 Colo. App. 535, 538, 545-46 (1900). The *Allen* Complaint should be dismissed.

b. Absence of personal jurisdiction.

13. Salem and San Juan are both Colorado corporations (Complaint, *Allen* Doc. #1, ¶¶ 302, 303). The law of personal jurisdiction over a nonresident defendant is familiar: Plaintiffs must allege some action by the nonresident defendant that constitutes "some purposive conduct directed at the forum state," *Whiting v. Hogan*, 855 F.Supp.2d 1266, 1280 (D.N.M. 2012), *quoting from Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008). Thus, a plaintiff must show "three salient factors that together indicate 'purposeful direction.'" *Shrader v. Biddinger*, 633 F.3d 1235, 1239 (10th Cir. 2011). Those factors are "(a) an intentional action . . . that was (b) expressly aimed at the forum state . . . with knowledge that the brunt of the injury would be felt in the forum state." *Id.; Dudnikov*, 514 F.3d at 1072*; Old Republic Ins. Co.v. Continental Motors, Inc.*, 877 F.3d 895, 907 (10th Cir. 2017). The facts must establish that the defendant took "*intentional actions that were expressly aimed at*

that forum state." *Dudnikov*, 514 F.3d at 1077 (*emphasis original*). No such facts are asserted here as to Salem or /san Juan.

14. Salem and San Juan show herein that a plaintiff may not validly charge a defendant in a pleading that groups or "lumps" different parties together, referring only to "Defendants." (*supra* at 3-7). The only acts by Salem and San Juan, specifically, that are validly alleged are ownership of the Gold King Mine, which is in Colorado. No tortious actions are alleged. Since no "purposive conduct" by either such Defendant directed at New Mexico is validly alleged, there is no basis for personal jurisdiction, and the *Allen* Complaint must be dismissed as to Salem and San Juan.

c. The suit against Salem and San Juan is barred by the Colorado statute of limitations.

15. Under decisions such as *North Carolina v. TVA*, 615 F.3d 291 (4th Cir. 2010), and *International Paper v. Ouellette*, 479 U.S. 481 (1987), in a suit over an interstate contamination event, the applicable law is the law of the source state, *i.e.*, here, Colorado. This Court has so ruled. *New Mexico v. United States EPA*, 310 F.Supp.3d 1230, 1266-70 (D.N.M. 2018). The Colorado period of limitations in a tort case is two years from the occurrence of the tort, under Colo. Rev. Stat. §13-80-102. The *Allen* Complaint was filed on August 3, 2018, more than two years after the release, which occurred on August 5, 2015. The tort suit against Salem and San Juan is barred by the Colorado statute of limitations.

d. Clean Water Act preemption.

16. Tort claims under the law of the affected state, involving a discharge of water and contaminants from a point source, and consequent interstate pollution, are preempted by the Clean Water Act, 33 U.S.C. § 1251 *et seq*., under controlling Supreme Court precedents. (*e.g.*, *International Paper Co. v. Oullette*, 479 U.S. 481 (1987)). This Court has upheld such a defense. *New Mexico,* 310 F.Supp.3d at 1266-70. It is irrelevant that there was no Clean Water Act permit in effect at the Gold King Mine. This Court has held: "However, regardless of whether there was a permit for a particular discharge, allowing affected state tort law to apply to nonpermitted discharges in source states would conflict with the CWA's citizen suit provisions. *Ouellette*, 479 U.S. at 497-98 & n.18 (recognizing that plaintiffs alleged that IPC was violating the terms of its permit)." *New Mexico,* 310 F. Supp.3d at 1269.

17. Neither may conventional choice-of-law principles direct the application of New Mexico law. This Court has ruled: "[T]he application of affected-state law would frustrate the carefully prescribed CWA regulatory system. This interference would occur, of course, whether affected-state law applies as an original matter, or whether it applies pursuant to the source State's choice-of-law principles. Therefore if, and to the extent, the law of a source State requires the application of affected-state substantive law on this particular issue, it would be

preempted as well." *Ouellette*, 479 U.S. at 499 n. 20, *quoted in New Mexico*, 310 F. Supp.3d at 1267.

e. Preemption by CERCLA, 42 U.S.C. § 9613(h).

18. Claims for money damages and injunctive relief to abate a nuisance are also precluded by the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") provision, 42 U.S.C. § 9613(h), which bars federal jurisdiction to entertain a challenge to removal or remedial action by EPA. In the interest of brevity, Salem and San Juan adopt the argument in the Mining Defendants' first motion to dismiss (MDL Doc. # 42, at 29-33), which presents the facts of record and the legal argument demonstrating the application of § 9613(h) to this case. Section 9613(h) also bars claims for money damages. *New Mexico v. General Electric Co.*, 467 F.3d 1223, 1249-50 (10th Cir. 2006).

f. Punitive damages are unavailable.

19. The *Allen* plaintiffs seek punitive damages against Salem and San Juan. (*Allen* Complaint, *Allen* Doc. #1, Prayer for Relief). Salem and San Juan are validly alleged only to have owned the Gold King Mine; all other claims are inadequately pleaded. (see Point (a), *supra*). The Mining Defendants' first motion to dismiss (MDL Doc. #42 at 38-41) demonstrates that punitive damages are unavailable here. Ownership of a mine, standing alone, clearly would not support punitive damages.

g. The allegation of joint and several liability is unsupported.

20. The *Allen* Plaintiffs seek imposition of joint and several liability. (Complaint, Allen Doc. #1, at ¶ 371). However, Colorado law applies to this case under precedents such as *Ouellette* and the Court's ruling in *New Mexico.* (Point(c), *supra*). 27. See Prayer, ¶ (4). Colorado has repealed any tort liability on joint and several principles. Colo. Rev. Stat. § 13-21-111.5(1). See *New Mexico,* 310 F. Supp.3d at 1269-70 and note 22. The request should be stricken.

h. If the Complaint is not dismissed, the Court should direct a more definite statement.

21. Should the Court conclude that the *Allen* Complaint may not be dismissed, Salem and San Juan ask, alternatively, that the Court require the *Allen* Plaintiffs to make a more definite statement of the factual and legal grounds of Salem and San Juan's alleged liability pursuant to Rule 12(e). Salem and San Juan are only alleged, by name, to have been owners of the Gold King Mine property, which fact alone cannot state a tort claim. They cannot fairly be required to mount a costly and complex multiyear defense, where the claimants have not even presented an express allegation of the facts claimed to create their liability.

22. Case management also calls for a more definite statement. This case is clearly a complex multiparty dispute. Unless the issues affecting Salem and San Juan can be more sharply defined, they must undertake, unguided, extensive discovery and expert preparation concerning the possible causes and impact of the

release. Thus, the Court would be thrust into the job of managing extensive discovery about the liability of Salem and San Juan without even having a clear statement of the claims against them.

23. In such a situation, courts have emphasized the utility of a motion for a more definite statement in narrowing the issues and, thus, making the litigation significantly more efficient. District Judge Browning recently summarized the function of a motion for a more definite statement:

> LAW REGARDING MOTIONS FOR A MORE DEFINITE STATEMENT UNDER RULE 12(e)
>
> Rule 12(e) of the Federal Rules of Civil Procedure permits a party to file a motion for a more definite statement when that party is required to file a response to a pleading, but the pleading is so vague or ambiguous that a response cannot reasonably be expected to be framed. See Moya v. Schollenbarger, 465 F.3d 444, 446 n.2 (10th Cir. 2006)("If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading."). A motion for more definite statement may only be made before filing a responsive pleading and not after. See Fed. R. Civ. P. 12(e). . . . A motion for a more definite statement is used to provide a remedy only for an unintelligible pleading, rather than to correct inaccurate assertions, add precision, or flesh out a lack of detail. See Coffey v. McKinley Cnty., No. CIV 09-0028, 2009 U.S. Dist. LEXIS 94612, 2009 WL 3208209, at *2 (D.N.M. Sept. 11, 2009)(Browning, J.); Bannister v. Coronado Fin., Inc., No. CIV 07-620, 2008 U.S. Dist. LEXIS 42379, 2008 WL 2323518, at *10 (D.N.M. Jan. 17, 2008)(Browning, J.); Frazier v. SE. Penn. Transp. Auth., 868 F. Supp. 757, 763 (E.D. Pa. 1994). The Supreme Court of the United States has held that, "[i]f a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement

> under Rule 12(e) before responding." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).

Bank of America., N.A. v. Lebreton, 2015 U.S. Dist. LEXIS 64339, *41-42, 2015 WL 2226266 (D.N.M. Apr. 20, 2015).

24. In *Garrett v. Cassity* the court specifically relied upon the needs of litigation efficiency to require a more definite statement:

> Most of all, however, the Court finds that in the circumstances of this highly complex case, involving numerous Plaintiffs and Defendants and a wide array of factually distinct claims, requiring Plaintiffs to identify the parties in interest behind Plaintiff SDR's claims is an appropriate means of streamlining this litigation in order to more efficiently resolve Plaintiffs' claims, which is surely in the interest of both parties.

Garrett v. Cassity, 2010 U.S. Dist. LEXIS 134776, *74-75, 2010 WL 5392767(E.D. Mo. Dec. 21, 2010). Other cases support the use of a Rule 12(e) motion to clarify the factual or legal grounds upon which the Plaintiff relies. *Coffey v. McKinley County*, 2009 U.S. Dist. LEXIS 94612 (D.N.M. Sept. 11, 2009)(Rule 12(e) motion is proper when the "defendant cannot reasonably determine the issues requiring a response," at *4); *Cheeks v. Fort Myer Construction Corp*., 71 F. Supp. 3d 163, 168 (D.D.C. 2014)(Pleadings "alleging a variety of bad acts without factual support or clear allegation which, if any, defendant engaged in said bad acts are insufficient" and justify a Rule 12(e) order.).

25. Before this case proceeds further, fairness toward Salem and San Juan and efficient pretrial management both require that the *Allen* Plaintiffs clarify the factual and legal bases of their claims against Salem and San Juan:

> "[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."

Associated General Contractors v. Carpenters, 459 U.S. 519, 528 n. 17, *quoted in Twombly*, 550 U.S. at 558.

26. Fundamental fairness, as elucidated in recent decisions of the Supreme Court, requires that Salem and San Juan not be thrust into the costly and multifaceted preparation of a multiparty environmental tort case, without some basis to conclude that the facts could possibly support their liability. At present, the *Allen* Plaintiffs are unable to make such a claim. Salem and San Juan ask that the pleading be dismissed against them or, alternatively, that Plaintiffs be required to make a more definite statement of their liability.

Conclusion

27. The *Allen* Plaintiffs have failed to present a Complaint that satisfies the requirement of Rule 8(a)(2) for a "short and plain statement of the claim showing that the pleader is entitled to relief." The allegations are unspecific as to what party performed what actions, and Salem and San Juan are entitled to know the claims that they must face. The Complaint is barred as against Salem and San Juan

based upon the Colorado period of limitations, preemption by the Clean Water Act, and preempted by CERCLA, 42 U.S.C. § 9613(h). The Plaintiffs cannot overcome these deficiencies, and the *Allen* Complaint should be dismissed

Respectfully submitted,

/s/_____

Lindsay A. Lovejoy, Jr.
Law Office of Lindsay A. Lovejoy, Jr.
Attorney for Defendants
Salem Minerals, Inc. and
San Juan Corp.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800
(505) 983-4508 (fax)
lindsay@lindsaylovejoy.com

Certificate of Service

The undersigned certifies that on the 1st day of November, 2018, he filed the foregoing Motion electronically through the CM/ECF System, thereby causing all parties of record to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

/s/ _____
Lindsay A. Lovejoy, Jr.