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	:	**MULTI-DISTRICT LITIGATION 1:18-MD-2824-WJ**
This Document Relates to: No. 1:18-cv-319-WJ	:	

PLAINTIFF THE STATE OF UTAH'S OPPOSITION TO DEFENDANT HARRISON WESTERN CONSTRUCTION CORPORATION'S MOTIONS TO DISMISS

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I. INTRODUCTION

Harrison Western ("HW") and the State of Utah begin at the same place to set forth the factual basis for the motion to dismiss—that on August 5, 2015, the U.S. Environmental Protection Agency ("EPA") and its contractors triggered a massive blowout from the Gold King Mine in southern Colorado, spilling approximately 3,000,000 gallons of contaminated, toxic wastewater into a river system that carried the pollution to Lake Powell in the State of Utah (the "Blowout"). (Dckt. 41 at 1.) HW was the subcontractor for Defendant Environmental Restoration, LLC ("ER"), with expertise in safely opening blocked and flooded mine passages. To that end, HW was heavily involved in the planning to open the Gold King Mine, and EPA and the other contractors relied on its advice.

HW attempts to submit declarations with its motion to place responsibility for the Blowout on EPA and the other contractors, asserting they ignored HW's advice and prevented it from supervising work at the mine. The accuracy of these facts from outside the pleading cannot be ascertained at the pleading stage. HW has asymmetric knowledge of the facts—it was deeply involved in the events leading up to the Blowout, while Utah was not. Resolving these factual issues must await discovery and the relevant responses of EPA and the other contractors.

At this point, the Court may only consider whether it has jurisdiction (which is amply established), or whether Utah has stated a cause of action (where HW's declarations cannot be considered). Thus, the arguments HW puts forth in its motion are unavailing. *First*, HW contends that it is not subject to personal jurisdiction in Utah because all its actions were directed at Colorado. HW ignores the well-pleaded and indisputable facts that (1) all HW's acts were for the purpose of remediating ongoing acid mine drainage that was polluting the waters of

downstream States including Utah, and (2) the risk of a Blowout impacting the downstream states was explicitly spelled out in the EPA Task Order for the work. By submitting extrinsic declarations under the guise of contesting jurisdiction, HW asks this Court to make finding of fact regarding causation and responsibility, and adjudicate the merits of HW's liability for the Blowout before any discovery can take place. That attempt is improper in the Rule 12 context and should be denied.

Second, HW ignores the rule that the factual allegations are construed in the plaintiff's favor, arguing that Utah has somehow alleged that HW was both on-site and not on-site at the Gold King Mine on August 5, 2015. HW's interpretation is based on a stilted and selective reading of Utah's First Amended Complaint ("FAC"), and ignores the allegations about HW's actions *before* that day establishing HW's prima facie liability.

Third, HW's presentation of half the story fails to address the allegations showing it is liable under CERCLA and state laws. The FAC demonstrates that HW was a "covered person" under CERCLA because it (a) conducted operations specifically related to pollution and was therefore an "operator," (b) contracted with ER for transport or disposal of hazardous waste and was thus an "arranger," and (c) was a "transporter" because HW accepted hazardous waste for transport from inside the mine to sites it selected outside the mine. Similarly, HW ignores allegations showing it negligently made a series of incorrect assumptions and conclusions about conditions inside the mine, which led directly to the Blowout and created a public nuisance in Utah. Judge Armijo rejected arguments similar to HW's in this case, and this Court should do so again. HW raises other points directly contradicted by the governing statutes, including arguing that response contractors cannot be held liable for their negligence.

Fourth, HW's reliance on *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) to argue that it is immune from Utah's environmental statutes is misplaced. As explained below, *Ouellette* was concerned that applying an affected state's common law would conflict with the Clean Water Act ("CWA")'s permitting system. Those facts have no application here, where there was no CWA permit for the Gold King Mine, and hence no conflict with the CWA. In addition, Utah seeks to enforce its environmental statutes that do not interfere with a CWA permit, not the common law which *Ouellette* found could potentially interfere with a CWA permit.

Fifth, HW's argument for dismissing Utah's prayer for punitive damages again ignores Judge Armijo's prior ruling on this issue and the authorities holding that a request for damages is not a "claim" subject to dismissal under Rule 12.

Finally, HW filed a "Second" motion to dismiss in violation of the Court's scheduling order. The Court should strike this improper motion.

Based upon the short and plain statement of facts in the pleading establishing the Court's jurisdiction and stating claims for relief, HW's motion should be denied. Fed. R. Civ. P. 8(a).

II. FACTS

Utah's FAC alleges the following facts regarding HW. In 2014, EPA began a removal site evaluation to investigate the possibility of opening the collapsed portal at the Level 7 Adit at the Gold King Mine. (Case No. 1:18-cv-00319-WJ Dckt. 93, FAC ¶ 35.) EPA used the services of contractors under EPA Superfund Technical Assessment and Response Team ("START") and EPA Emergency and Rapid Response Service ("ERRS") contracts. (*Id.*) Defendant ER was the ERRS contractor at the Gold King Mine and Defendant Weston Solutions was the START

contractor. (*Id.* at ¶ 36.) HW is a Colorado corporation that served as a subcontractor to ER under its ERRS contract at the Gold King Mine. (*Id.* at ¶ 12.) HW had independent authority and control to perform its duties and take the necessary actions to perform its work in a safe and proper manner, to avoid a blowout and resulting damages. (*Id.* at ¶ 36.)

When HW began the excavation work in 2014, it observed that seepage was emerging from the backfill at an elevation about six feet above the adit floor. (*Id.* at ¶ 39.) HW presumed that water had accumulated behind the blockage. (*Id.*) HW incorrectly concluded there were six feet of water impounded in the mine because seepage was not occurring higher up on the blockage. (*Id.* at ¶ 40.) HW suspended the work at the Gold King site until 2015 because it had uncovered conditions that required it to plan to treat a greater quantity of water potentially accumulated behind the blockage. (*Id.* at ¶ 41.) HW participated in planning for work to be performed at the Gold King Mine in 2015 and was scheduled to deploy to the mine later in August 2015. (*Id.* at ¶ 36.)

Based on its observations, HW incorrectly assumed that the contaminated water level was below the top of the adit. (*Id.* at ¶ 46.) HW also assumed that, because the mine was draining, it was not under pressure from the contaminated water behind it. (*Id.* at ¶ 47.) Thus, HW believed it was not necessary to directly test for the level or volume of contaminated water behind the blockage. (*Id.* at ¶ 48.)

HW did not insert a measuring device from a location at a higher elevation from the blockage at the adit to determine the level of contaminated water behind it. (*Id.* at ¶ 49.) HW did not take a measurement to determine the pressure of the contaminated water against the blockage at the adit. (*Id.* at ¶ 50.) HW did not take precautions to design or install containment

measures, including but not limited to a secondary containment system, such as a catch basin of proper size and capability, to prevent an accidental release of large quantities of toxic wastewater from reaching the Animas River. (*Id.* at ¶ 51.) HW also did not take the precaution of developing and implementing emergency response procedures in the event of an accidental release of large quantities of toxic wastewater, to prevent those toxic chemicals from reaching the Animas River. (*Id.* at ¶ 52.) HW did not provide advance warning to other agencies or municipalities of their work so that they could be prepared for an accident. (*Id.*)

HW was required to develop a Health and Safety Plan that complied with OSHA requirements for hazardous waste site operations in 29 C.F.R. § 1910.120 and with EPA regulations for response actions per 40 C.F.R. § 300.700(c)(5)(i). (FAC at ¶ 53.) Its Health and Safety Plan did not comply with these requirements. (*Id.*) HW was subject to various mandatory laws, regulations, and policies that removed or circumscribed their discretion in carrying out the work at the Gold King site, including but not limited to the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 877(b)) and Title 30, Code of Federal Regulations, Part 75 (30 C.F.R. §§ 75.372, 75.388(a)(2), 75.1200). (FAC at ¶ 54.) HW's conduct violated these laws, regulations, and policies.

HW did not accurately measure the level, volume, or pressure of the toxic wastewater behind the blockage before EPA and the other contractors performed the work on August 5, 2015. (*Id.* at ¶ 56.) The persons at the Gold King site on August 5, 2015 have given conflicting accounts regarding the nature and objectives of their work on that day. (*Id.* at ¶ 57.) This conflict was caused by miscommunication among HW, EPA, and the other contractors. (*Id.* at ¶ 58.) As a result, EPA and the other contractors did not clearly understand their work, or how to

safely and properly accomplish the work given the dangers presented by the Gold King site. (*Id.*) HW's intentional actions caused a breach in the adit, which resulted in the August 5, 2015 Blowout. (*Id.* at ¶ 59.) HW's actions and failures to take reasonable and necessary precautions before, during, and after the Blowout were wrongful. (*Id.*) HW had an independent duty and the authority to take the necessary actions and to perform its work in a manner to prevent the Blowout. (*Id.*)

The Blowout released approximately 3,000,000 gallons of hazardous, toxic orange-brown wastewater into the Animas River. (*Id.* at ¶ 60.) Toxic wastes from the Blowout have been and are being transported through the Animas and San Juan River system to Lake Powell in the State of Utah, among other locations. (*Id.* at ¶ 61.) HW knew or should have known that the release of contaminants could and would be transported to the State of Utah to damage its environment, and HW intentionally committed the actions that resulted in the release. (*Id.*) The Blowout has caused environmental, economic, and other damage to the State of Utah, and will require the incurrence of recoverable costs from HW, including but not limited to those for the immediate response, investigation, remediation, restoration, and compensation for damages, and lost environmental values and use. (*Id.* at ¶ 62.)

III. ARGUMENT

A. Harrison Western is Subject to Specific Personal Jurisdiction in Utah.

1. Standard of Review.

Fed. R. Civ. P. 8(a)(1) requires the pleading contain only a short and plain statement of the grounds for the Court's jurisdiction. The plaintiff bears the burden of establishing personal jurisdiction, but "where there has been no evidentiary hearing, as in this case, and the motion to

dismiss for lack of jurisdiction is decided on the basis of affidavits and other written material, the plaintiff need only make a prima facie showing that jurisdiction exists." *Rusakiewicz v. Lowe*, 556 F.3d 1095, 1100 (10th Cir. 2009) (internal quotes and ellipses omitted). "All factual disputes are resolved in favor of the plaintiffs when determining the sufficiency of this showing." *Id.*

To establish personal jurisdiction, Utah must show "first, that jurisdiction is authorized under Utah law and, second, that the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment." *Id.* The first prong is satisfied because, as HW concedes, Utah's long-arm statute allows exercise of personal jurisdiction "to the fullest extent permitted by the due process clause of the Fourteenth Amendment . . . ." UTAH CODE ANN. § 78B-3-201(3). (Dkt. 41 at 10.)

"This collapses the Utah standard into the more general 'due process' standard for jurisdiction." *Rusakiewicz*, 556 F.3d at 1100. As shown below, the second prong of the test is also satisfied. The Fourteenth Amendment allows specific personal jurisdiction where a defendant has "minimum contacts" with the forum state. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008). This standard requires "first, that the out-of-state defendant must have 'purposefully directed' its activities at residents of the forum state, and second, that the plaintiff's injuries must 'arise out of' defendant's forum-related activities." *Id.* at 1071. In the tort context, courts find purposeful direction if three elements are satisfied: (1) the defendant took an intentional action, that was (2) expressly aimed at the forum state, with (3) knowledge that the brunt of the injury would be felt in the forum state. *Id.* at 1072, *citing Calder*

v. Jones, 465 U.S. 783 (1984). "Additionally, exercising personal jurisdiction over defendants must always be consistent with traditional notion of fair play and substantial justice. *Id.* at 1071.

2. Harrison Western Purposefully Directed Its Conduct at Utah.

a) Harrison Western took intentional acts.

As discussed in the "Facts" section above, Utah's FAC alleges that HW took a number of intentional acts. During and after its 2014 visit to the Gold King site, HW intentionally (but incorrectly) concluded there were only six feet of toxic wastewater impounded in the mine, the water was not under pressure and was below the top of the adit, and that it was not necessary to test for the level or volume of the water behind the blockage. (FAC ¶¶ 40, 46-48.) HW intentionally developed a Health and Safety Plan that did not comply with applicable law. (*Id.* at ¶ 53.) HW intentionally caused miscommunication among HW, EPA, and the other contractors, which led to the Blowout. (*Id.* at ¶ 58.)

The FAC also alleges that HW wrongfully and intentionally failed to act in a number of ways. HW intentionally failed to insert a measuring device behind the blockage to determine the water level, volume, and pressure behind the blockage. (*Id.* at ¶¶ 49-50, 56.) HW intentionally did not design or install sufficient containment measures, or adopt sufficient emergency response procedures, to prevent an accidental release from the mine from reaching the Animas River. (*Id.* at ¶¶ 51-52.) HW intentionally did not provide advance warning to other agencies or municipalities so they could be prepared for an accident. (*Id.* at ¶ 52.)

HW submits extrinsic evidence in the form of declarations that further admit to HW's intentional actions. HW admits it undertook various "work and services in connection with the Gold King Mine" that were directed toward the reopening and reclamation of the Mine. (Dckt.

41-3 at ¶¶ 9-10.) HW admits it visited the Mine in late July 2014, discussed opening the mine, and prepared a plan to re-open the Mine based on those discussions. (*Id.* at ¶¶ 4-5.) HW admits it visited the mine again on September 11, 2014 "to evaluate and assess the mine conditions and, if appropriate, to begin the work necessary to prepare the mine for re-opening . . . ." (*Id.* at ¶¶ 9-10.) HW admits it made observations and came to conclusions about the conditions behind the blockage, which were communicated to and discussed with ER. (*Id.* at ¶¶ 10-14.) HW admits it drafted a new work plan, shared that plan with ER prior to the Blowout, and that the plan was made part of ER's own plan. (*Id.* at ¶¶ 17-20.) In short, the uncontroverted evidence in the FAC, and HW's own proffered affidavits, demonstrate that HW took intentional acts and the first element is therefore satisfied.

b) Harrison Western's intentional acts were expressly aimed at Utah.

HW contends that all the acts described above were aimed solely at the State of Colorado. But HW has not controverted the FAC's well-pleaded facts that HW was aware of the risks involved in the work it performed and the observations and judgments it made about conditions at the Gold King site—including, as described in the ERRS contract task order: "Conditions may exist that could result in a blow-out of the blockage and cause a release of large volumes of contaminated mine waters and sediment from inside the mine, which contain concentrated heavy metals." (FAC at ¶ 37.) Indeed, HW's proffered declarations describe how it altered its original plans in an attempt to address this risk, having found the amount of water behind the blockage "was likely greater than what HW and ER were prepared to safely handle or treat." (Dckt. 41-4 at ¶ 13.)

HW cannot plead ignorance as to the laws of gravity and hydrology. In the event of a Blowout, a risk HW of which was indisputably aware, there was only one place for the toxic mine waste go—downhill into Cement Creek, and from there into the Animas River, which flows into the State of New Mexico, the Navajo Nation, and then into the State of Utah. (FAC at ¶ 1.) As an allegedly "experienced and expert mine services subcontractor" (Dckt. 41 at 3), HW was well aware of the consequences should its conduct lead to a Blowout. Just as the downstream communities stood to benefit from HW's intentional acts if they were performed without negligence (*e.g.*, by remediating ongoing seepage from the Gold King Mine), those communities were likewise directly in harm's way when HW's intentional acts were performed negligently and led to the Blowout. *Dudnikov*, 514 F.3d at 1078 ("actions that 'are performed for the very purpose of having their consequences felt in the forum state' are more than sufficient to support a finding of purposeful direction under *Calder*.") (*quoting Finley v. River N. Records, Inc.*, 148 F.3d 913, 916 (8th Cir. 1998)). These downstream communities were therefore the "focal point" of HW's conduct. *Dudnikov*, 514 F.3d at 1074; *Calder*, 465 U.S. at 789.

c) Harrison Western knew the brunt of the injury would be felt in Utah.

In *Dudnikov*, the 10th Circuit acknowledged that "there is some overlap" between *Calder*'s second and third elements, distinguishing the elements as follows: "the 'express aiming test focuses more on a defendant's intentions—where was the 'focal point' of its purposive efforts—while the latter requirement concentrates on the consequences of the defendant's actions—where was the alleged harm actually felt by the plaintiff." 514 F.3d at 1074-75. The foregoing discussion demonstrates that, in this case, Utah's allegations satisfying the "focal point" element likewise satisfy the "brunt of the injury" element. HW's intentional conduct was

aimed at remediating mine waste pollution affecting downstream communities like Sovereign Plaintiffs, which were thus the "focal point" of HW's efforts. By the same token, HW knew that the brunt of any harm caused by its negligent or wrongful conduct would be felt by those same downstream communities—the laws of gravity and hydrology made this result a certainty. HW's conduct thus satisfies all three "purposeful direction" factors.

3. Utah's Injuries Arise Out of Harrison Western's Contacts with Utah.

"Having determined that defendants 'purposefully directed' their activities at the forum state, due process requires [the Court] next to ask whether [Utah's] injuries 'arise out of' [HW's] contacts with the forum jurisdiction." *Id.* at 1078 (internal quotations omitted). There is no question that Utah's claims arise out of HW's contacts with Utah described above. Utah's uncontroverted and well-pleaded facts allege that HW caused the Blowout by intentionally (but incorrectly) concluding there were only six feet of toxic wastewater impounded in the mine, the water was not under pressure and was below the top of the adit, and that it was not necessary to test for the level or volume of the water behind the blockage. (FAC at ¶¶ 40, 46-48.) Utah also alleges that HW intentionally caused miscommunication between itself, EPA, and the other contractors, which led to the Blowout. (*Id.* at ¶ 58.)

Utah likewise alleges that HW intentionally failed to take reasonable actions that would have prevented the Blowout or mitigated its harms, including failing to insert a measuring device behind the blockage, failing to design or install sufficient containment measures, failing to adopt sufficient emergency response measures, failing to provide advance warning to downstream entities, and failing to develop an adequate Health and Safety Plan. (*Id.* at ¶¶ ¶¶ 49-52, 56, 58.) These allegations are sufficient to establish a "substantial connection" with Utah. *Burger King*

Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); *Smith v. Cutler*, 504 F. Supp. 2d 1162, 1170 (D.N.M. 2007) (Johnson, J.) (holding that defendant "should have reasonably anticipated being haled into New Mexico courts" because his conduct as alleged was "directed at New Mexico residents").

4. Harrison Western Has Not Carried Its Heavy Burden of Showing that Exercising Personal Jurisdiction Over It Would Be Unreasonable.

Because Utah has established that HW purposefully directed its activities at Utah, "it is incumbent on [HW] to 'present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Pro Axess, Inc. v. Orlux Distrib., Inc*., 428 F.3d 1270, 1280 (10th Cir. 2005). While there are factors courts weigh in determining whether defendants have carried this burden, Utah submits that this analysis is unnecessary here. *See, e.g., OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1095 (10th Cir. 1998). HW has not analyzed these factors in its moving papers or made any showing at all regarding whether subjecting it to personal jurisdiction in Utah would be "unreasonable." As a result, HW has waived argument on this point and failed to carry its burden. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007); *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994).

B. Utah Has Stated Valid Claims Against Harrison Western.

1. Standard of Review.

Similarly, Fed. R. Civ. P. 8(a)(2) requires the pleading contain only a short and plain statement of the claim showing the entitlement to relief. When ruling on a motion to dismiss for failure to state a claim, a court must assume the truth of the facts alleged in the complaint and determine whether they are sufficient to raise more than a speculative right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). "The nature of a Rule 12(b)(6) motion tests the

sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). A complaint's sufficiency is a question of law, and on a 12(b)(6) motion, a court must accept as true all well-pleaded factual allegations, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (citation omitted). The controlling issue in considering a 12(b)(6) motion to dismiss is whether the plaintiff is entitled to present evidence in support of the claim, not whether the plaintiff will ultimately prevail on his claims. *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

2. Utah's Allegations Regarding Harrison Western Are Internally Consistent.

Professing that it is unable to make sense of Utah's allegations against it, HW argues that those allegations should not be taken as true. (Dckt. 41 at 17.) But Utah's allegations are entirely consistent and straightforward— HW's confusion is of its own making. At the outset, the FAC does not allege HW was physically present at the Gold King Mine on August 5, 2015. (FAC at ¶ 85.) HW therefore argues it could not have made assumptions about conditions inside the mine, taken actions to measure such conditions, or designed and adopted containment measures, and similar actions *at any time prior to the Blowout*.[1] (Dckt. 41 at 18-20.) That

[1] HW also argues in passing that the allegations against it are "false." (Dckt. 41 at 20.) That argument is improper on a 12(b)(6) motion—a court must accept as true all well-pleaded factual allegations. *See Tellabs, Inc.*, 551 U.S. at 322. It is not the Court's role or Utah's duty at this stage of the pleadings to pick and choose which facts submitted by HW are true or not. That must await fact discovery where the veracity of the factual representations can be confirmed. HW elsewhere attempts to present its version of the content of settlement communications, which are wholly inadmissible. Fed. R. Evid. 408. To comply with the rule, Utah does not

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illogical leap is contradicted by the facts in the pleading and unsupported by HW's declarations (even if they could be considered under Rule 12(b)(6)).

HW's argument ignores the settled rule that, in the Rule 12(b)(6) context, the complaint's allegations are viewed in the light most favorable to the plaintiff and all reasonable inferences are drawn in the plaintiff's favor. *See Tellabs, Inc.*, 551 U.S. at 322. Instead, HW tries to invert the rule and contort Utah's allegations to say that all HW's alleged actions had to have taken place on August 5, 2015. The plain language of the FAC defeats this contention—the paragraphs in question do not state that the Contractor Defendants' actions and omissions took place on any particular day. Thus, a broad reading of the FAC alleges that, on August 5, 2015 *or at some time beforehand*, HW:

- Assumed the water level was below the top of the adit (¶ 46);
- Assumed the mine was not under pressure (¶ 47);
- Believed it was not necessary to test the level or volume of the water (¶ 48);
- Did not insert a measuring device into the adit to determine the water level (¶ 49);
- Did not measure the pressure of the water inside the adit (¶ 50);
- Did not design or install sufficient containment measures (¶ 51);
- Did not develop or implement sufficient emergency response procedures (¶ 52);
- Did not provide advance warning of its work to downstream entities (*id.*).

There is nothing about these actions that is inconsistent with HW being physically absent from the site on August 5, 2015. Moreover, the extent of HW's communication with the other

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respond to correct the misstatements or to provide the complete context of those communications.

defendants who were on site that day is unknown at this early stage of the litigation. For example, it is entirely possible that HW was informed by phone or email about conditions at the mine on August 5, 2015 prior to the Blowout, and made certain assumptions or conclusions that were communicated to the EPA On-Site Team that led to the Blowout. In any event, the extent of HW's knowledge and involvement are disputed issues of material fact that cannot be resolved on a Rule 12(b)(6) motion to dismiss—the facts must be further developed through discovery.

HW's Motion also fails to address many of the factual allegations against it. For example, HW does not contend that any of the following allegations are contradictory or nonsensical:

- While on site in 2014, HW observed seepage emerging from the backfill, presumed that water had accumulated behind the blockage, and incorrectly concluded there were six feet of water impounded in the mine (¶¶ 39-40);
- HW suspended the work in 2014 because conditions required it to treat a greater quantity of water than previously anticipated (¶ 41);
- HW failed to develop a Health and Safety Plan that complied with OSHA and EPA regulations (¶ 53);
- HW's actions described in the FAC violated several laws, regulations, and policies (¶ 54).

These allegations, taken as true, support a reasonable inference that HW is liable to Utah under CERCLA, state tort law, and Utah's state statutes.

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3. Utah Has Pled Facts Sufficient to State a Claim That Harrison Western is Liable as an Operator, Arranger, and Transporter under CERCLA.

Judge Armijo's ruling on February 12, 2018 provides a detailed analysis considering and rejecting each of EPA's contractor ER's arguments to dismiss the CERCLA claims against it. EPA Contractor HW ignores that ruling, failing to contest how the same reasoning applies to the same CERCLA arguments it raises here. Because there is no reason to revisit that ruling, HW's arguments should similarly be rejected.

a) Utah's allegations create a reasonable inference that Harrison Western had the requisite control over its activities at Gold King Mine to be liable as a CERCLA operator.

"[U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility," or who "manage[s], direct[s], or conduct[s] operations specifically related to pollution" or the "leakage or disposal of hazardous waste." *United States v. Bestfoods*, 524 U.S. 51, 66 (1998); *see also Clean Harbors, Inc. v. CBS Corp.*, 875 F. Supp. 2d 1311, 1329 (D. Kan. 2012) (holding that CERCLA "contemplates operator liability if [a plaintiff] can merely show [that a defendant] managed, directed, or conducted [relevant] operations"). "For one to be considered an operator, then, there must be some nexus between that person's or entity's control and the hazardous waste contained in the facility." *Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 928 (5th Cir. 2000) (*quoting Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992)), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009). Whether an entity is an operator under CERCLA involves "a fact-intensive inquiry

requiring consideration of the totality of the circumstances." *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir. 2000).

Here, Utah has alleged that HW was directly involved in conducting operations at the facility. ER subcontracted with HW because HW had "the experience and expertise necessary to safely excavate the Gold King Mine adit." (FAC at ¶ 85.) HW deployed to the Gold King Mine in 2014 and conducted excavation work there. (*Id.* at ¶ 39.) When it determined that there was more water in the mine than HW was prepared to treat, HW decided to suspend its work there until 2015 so that HW could create a new plan for opening the adit. (*Id.* at ¶ 41.) HW was responsible for designing and installing sufficient containment measures, and for developing and implementing sufficient emergency response procedures, to address the possibility of a Blowout at the site. (*Id.* at ¶¶ 51-52.) HW was also responsible for developing a Health and Safety Plan for work at the site that complied with OSHA and EPA regulations. (*Id.* at ¶ 53.) In light of its role as the experienced and expert subcontractor for work inside the mine, the Court may reasonably infer that HW was responsible for determining conditions inside the mine before excavation work commenced, such as the level, volume, and pressure of the water impounded inside. (*See id.* at ¶¶ 46-50.) HW had independent authority and control to perform its duties and take necessary actions to perform its work in a safe and proper manner to avoid the Blowout. (*Id.* at ¶ 36.)

Because HW was the experienced and expert subcontractor for work inside the mine, the Court may reasonably infer that HW had control over and/or provided critical input to the plan created on August 4, 2015 to conduct excavation activities at the Gold King Mine. (*See id.* at ¶ 44.) It is unclear whether the objective of this plan was to create an opening at the adit or to

scratch the earth around the adit. (*Id.* at ¶ 57.) The Court may reasonably infer that the objective was to scratch the earth around the adit, and may further reasonably infer that HW (as the relevant expert) approved or directed this work remotely by phone, email, or otherwise. All of these specific, non-conclusory factual allegations state a claim that HW "*conduct[ed] operations* specifically related to [the] pollution," and therefore Utah has sufficiently stated a claim that HW is liable as an operator. *Bestfoods*, 524 U.S. at 66 (emphasis added).

b) Utah's allegations create a reasonable inference that Harrison Western's conduct establishes CERCLA arranger liability.

HW argues that Utah has not stated a claim for "arranger" liability because Utah has (supposedly) not alleged facts to show (a) HW intended to dispose of the toxic wastewater in the Gold King Mine, (b) HW arranged for the transport or disposal of the wastewater by others, and (c) HW otherwise affirmatively introduced a hazardous substance into the environment. (Dckt. 41 at 27-29.) But HW fails to address the relevant test for arranger liability in the 10th Circuit. As Judge Armijo ruled in rejecting the same argument by EPA's other contractor, ER, the elements of arranger liability in the 10th Circuit are: "(1) the party must be a 'person' as defined in CERCLA; (2) the party must 'own' or 'possess' the hazardous substance prior to the disposal; and (3) the party must, "by contract, agreement or otherwise,' arrange for the transport or disposal of such hazardous substances." *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1279 (10th Cir. 2017). (Case No. 1:16-cv-00465-WJ-LF Dckt. 203 ["Feb. 12 Order"] at 28.)

It is apparent that HW's arguments do not challenge the first two elements under *Chevron Mining*, that HW is a "person" under CERCLA and that HW "owned" or "possessed" the wastewater prior to its disposal. It is equally apparent that HW's first and third arguments are irrelevant to *Chevron Mining*'s third element, whether the party arranged for transport or

disposal of the wastewater "by contract, agreement or otherwise." Whether HW "intended to dispose of" the wastewater, or whether HW "otherwise affirmatively introduced" the wastewater into the environment, say nothing about whether HW made a contract or agreement for transport or disposal of the wastewater.

HW's remaining argument, that Utah has not alleged facts to show HW arranged for transport or disposal by others, fails because those facts appear on the face of the FAC. Utah alleges that "Environmental Restoration subcontracted with Defendant Harrison Western for mining services at the Gold King Mine." (FAC at ¶ 36.) The purpose of this subcontractor relationship was to fulfill ER's obligations under its EPA ERRS contract. (*See id.*) The EPA task order for that contract provided that ER was to perform "incremental de-watering and removal of such blockages to prevent blowouts." (*Id.* at ¶ 37.) "De-watering" the mine adit—in other words, discharging or placing the hazardous wastewater somewhere else outside the mine so it can be treated and disposed of—fits squarely within the statutory definitions of "transport" and "disposal." 42 U.S.C. § 9601(26) ("The terms 'transport' or 'transportation' means the movement of a hazardous substance by any mode . . ."); *id.* at (29); *id.* at § 6903(3) ("The term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land or water so that such . . . hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."). By alleging that ER and HW entered a contract, pursuant to which ER disposed of and transported hazardous waste, Utah has adequately alleged that HW is liable as an arranger under CERCLA.

c) Utah's allegations create a reasonable inference that Harrison Western's conduct establishes CERCLA transporter liability.

CERCLA imposes "transporter" liability on any person who "accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . ." 42 U.S.C. § 9607(a)(4). The Tenth Circuit has acknowledged that "transporter liability is predicated on site selection by the transporter." *United States v. Hardage*, 985 F. 2d 1427, 1435 (10th Cir. 1993). Although some circuits have adopted language requiring a transporter to "actively and substantially" participate in site selection, *see, e.g., Tippins Inc. v. USX Corp*, 37 F. 3d 87, 90 (3d Cir. 1994), the Tenth Circuit has not adopted such language.[2] In *Kaiser*, the Ninth Circuit held that "[w]hether a transporter moves hazardous material from one parcel of land to another, or whether he simply takes the material from a contaminated area on one parcel and disposes of it on an uncontaminated area of the same parcel, he has spread contamination." 976 F.2d at 1342. Regardless of which of these formulations applies, Utah's allegations are more than adequate to support transporter liability for HW.

As it does throughout its brief, HW focuses on the wrong part of Utah's FAC when it argues it cannot be a transporter because it was not physically present at Gold King Mine on the day of the Blowout. (Dckt. 41 at 30.) HW ignores the allegations that it substantially contributed to selecting a site prior to the Blowout. (*E.g.*, FAC at ¶ 70 ["Leading up to and at the time of the Blowout, . . ."].) As discussed above, HW subcontracted with ER to perform

[2] HW's argument that Utah must allege "active[] and substantial[] participat[ion]" is therefore an incorrect statement of the law in the Tenth Circuit.

reclamation work at the Gold King Mine under an ERRS contract. (*Id.* at ¶ 36.) That work involved "incremental de-watering" of the mine, i.e. transporting the wastewater from inside the mine to a site outside the mine for treatment and disposal. (*See id.* at ¶ 37.) After on-site conditions in 2014 revealed that EPA and the Contractor Defendants were unprepared to treat the quantity of water potentially impounded within the mine, HW revised its plan for removing and treating that water. (*See id.* at ¶ 41.) As "the subcontractor with the experience and expertise necessary to safely excavate the Gold King Mine adit," the Court may reasonably infer that HW actively and substantially participated in planning for how to perform that work, including selecting the location outside the mine to which the wastewater would be transported. (*Id.* at ¶ 85; *see also id.* at ¶ 70.) These allegations satisfy *Twombly*'s notice pleading requirement to allege more than "a formulaic recitation of the elements" with regard to HW's selection of the site, or participation in the selection of the site, for the treatment and disposal of wastewater inside the mine.

4. Utah Has Adequately Alleged that Harrison Western's Negligence Caused the Blowout.

HW briefly argues Utah has failed to allege facts supporting a claim of negligence, but again the allegations are more than sufficient from the face of the FAC. HW also argues that all Utah's CERCLA claims against it should be dismissed because HW is a "response action contractor" that cannot be liable under CERCLA unless it was negligent.[3] Because the two issues overlap on this point, Utah will address them together.

[3] In a footnote, HW claims "[a] CERCLA 'response action contractor' *cannot also be a strictly-liable* "covered person," such as a CERCLA "operator," "arranger" or "transporter." (Dckt. 41 at 30, fn. 5 (emphasis added.) While HW is correct that response action contractors

(Footnote continues on next page.)

"Under Colorado law, 'a claimant alleging negligence of another party must establish the existence of a duty, a breach of that duty, causation, and damages.'" *Bd. of Cty. Com'rs of Cty. of La Plata, Colo. v. Brown Grp. Retail, Inc.*, 598 F.Supp.2d 1185, 1194 (D. Colo. 2009) (*quoting Redden v. SCI Colo. Funeral Servs., Inc.*, 38 P.3d 75, 80 (Colo. 2001)). HW does not discuss the elements as articulated above, but instead broadly argues Utah has failed to allege facts to show (1) "any negligence or gross negligence" by HW, (2) that such negligence or gross negligence caused the Blowout, and (3) that it was foreseeable that "'EPA's On Site Team' would independently 'create' and implement its own excavation plan" prior to HW's return to the site. (Dckt. 41 at 32-33.)

Utah has pled a prima facie claim of negligence and gross negligence against HW. Under the first element, Utah alleges that HW had duties to (1) "design and plan [its] tasks, including but not limited to those to oversee, manage, maintain, and regulate the Gold King Mine and Sunnyside Mine with reasonable care," (2) "conduct all investigations and work activities at the mines with reasonable care" including following all applicable standards and regulations, and (3) "take reasonable precautions in case of an accidental release." (FAC at ¶ 82; *see also* ¶ 59.)

Under the second element, Utah alleges that HW breached these duties by incorrectly assuming that only six feet of wastewater were impounded in the mine (*id.* at ¶¶ 40, 46) and that

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(Footnote continued from previous page.)

are not "strictly liable" under CERCLA by operation of 42 U.S.C. § 9619(a)(2), HW is wrong as a matter of law that such contractors cannot be "covered persons" under CERCLA. For example, Judge Armijo found that courts have "held Contractor Defendants liable as CERCLA operators." (Feb. 12 Order at 19 [collecting cases].) *See also Kaiser*, 976 F.2d at 1341-42 (rejecting the argument that "a contract can *never* be liable as an operator"); *KFD Enters., Inc. v. City of Eureka*, No. C 08-4571 MMC, 2010 WL 4703887, at *3 (N.D. Cal. Nov. 12, 2010) (denying contractor's motion to dismiss claims of CERCLA operator liability). HW has no answer to Judge Armijo's ruling.

the wastewater in the mine was not under pressure (*id.* at ¶ 47); failing to measure the level, volume, and pressure of the wastewater in the mine (*id.* at ¶¶ 48-50); failing to take precautions against an accidental blowout, including designing and installing a sufficient secondary containment system and catch basin (*id.* at ¶ 51); failing to develop and implement emergency response procedures in the event of a Blowout, or to provide advance warning of its work to downstream entities (*id.* at ¶ 52); and failing to develop a legally compliance Health and Safety Plan for the work (*id.* at ¶ 53).

Utah further alleges that HW breached the duties listed above by causing miscommunication among EPA and its Contractors regarding the nature of the work performed on August 4 and 5, 2015 at the Gold King Mine, which led to the EPA On Site Team using a backhoe excavator to remove earth in and around the adit and trigger the Blowout. (*Id.* at ¶¶ 57-58.) Finally, Utah alleges HW breached the duties above by allowing excavation work to proceed at the adit without HW being on site. (*Id.* at ¶ 85.)

The third element, causation, is established by Utah's allegation that, as a result of the breaches described above, the EPA On Site Team "did not clearly understand their work, or how to safely and properly accomplish the work given the dangers presented by the site." (*Id.* at ¶ 58.) The fourth element appears at paragraph 62, "[t]he Blowout has caused environmental, economic, and other damage to the State of Utah . . . ," and in any event HW does not appear to contest that the damage element is satisfied. The foregoing discussion amply refutes HW's contention that Utah has not pled a claim for negligence or how that negligence caused the Blowout.

HW's third argument, that HW could not foresee that the EPA On Site Team would create and implement their "own" plan before HW was scheduled to return to the site, is flawed for at least two reasons. First, the argument improperly assumes facts outside the four corners of the FAC, or more charitably, construes the FAC in a manner most favorable to HW and most unfavorable to Utah. *Smith*, 561 F.3d at 1098. The allegation in question reads as follows: "On August 4, 2015, EPA, DRMA, Environmental Restoration, and Weston Solutions ("EPA On Site Team") created a plan to conduct excavation activities at the Level 7 Adit." (FAC at ¶ 44.) HW unilaterally reads additional words into this allegation to say that "'EPA's On Site Team' would *independently* 'create' and *implement its own* excavation plan . . . ." (Dckt. 41 at 33 [emphasis added].)

Taking the FAC as a whole and construing its provisions in the light most favorable to Utah, the plan created on August 4, 2015 was *not* independent of HW's involvement or input. Rather, the plan relied on (erroneous) observations, assumptions, and conclusions HW made about conditions inside the mine when it visited the site and conducted work there in 2014. (*See* FAC at ¶¶ 39-41.)

Moreover, the FAC alleges HW began creating a new plan for opening the mine after its 2014 visit, on the basis of those erroneous conclusions. (*Id.* at ¶ 41.) The Court may reasonably infer that the EPA On Site Team relied in part on this new plan from HW in forming the plan on August 4, 2014. Indeed, and as discussed above, the Court may reasonably infer that HW was aware of, provided input to, and/or approved the August 4 plan because HW was the expert and experienced contractor for this type of work at the site and was retained for that express purpose.

(*See id.* at ¶ 85.) In short, HW's argument fails because the FAC, construed favorably to Utah, alleges HW's negligent actions contributed to the August 4 plan.

HW's argument also misses the mark because it myopically focuses on the events of August 4-5, 2015, rather than consider the rest of the FAC. For example, Utah alleges that HW negligently failed to measure the conditions inside the mine prior to beginning work there, negligently concluded (without sufficient information) that the water level was below the roof of the adit and that the water was not under pressure, and failed to take various measures to prepare for the eventuality of a Blowout. (*Id.* at ¶¶ 40, 46-53.)

Thus the question is not, as HW puts it, whether HW could have foreseen that the On Site Team would make a new plan and act on it without HW; the question is whether it was foreseeable that negligently performing (or failing to perform) the actions listed above would lead to a Blowout. And as discussed more fully in Section III.A.2.b. above, that risk was explicitly spelled out in the ERRS contract: "Conditions may exist that could result in a blow-out of the blockages and cause a release of large volumes of contaminated mine waters and sediment from inside the mine, which contain concentrated heavy metals." (*Id.* at ¶ 37.) Utah's allegations regarding HW's duties, the breach of those duties, and the foreseeability of the resulting harm are more than adequate to state a claim for negligence.

5. Utah Has Adequately Alleged a Claim for Public Nuisance Against Harrison Western.

"A public nuisance is the doing or failure to do something that injuriously affects the safety, health, or morals of the public or works some substantial annoyance, inconvenience, or injury to the public. Specifically, under Colorado common law, land uses that cause pollution constitute a nuisance." *Dept. of Health v. The Mill*, 887 P.2d 993, 1002 (Colo. 1994). HW does

not appear to contest that the pollution released by the Blowout constitutes a public nuisance under the above definition—it rather argues that it cannot be held responsible for the nuisance. (Dckt. 41 at 33-34.)

HW again briefly argues that Utah's nuisance allegations are insufficient by focusing exclusively on HW's supposed non-involvement with the August 4, 2015 plan and the work done on August 4-5, 2015. The foregoing discussion of negligence (Section III.A.4., *supra*) amply demonstrates that HW's argument lacks merit. First, the Court may reasonably infer that HW was involved in and to a substantial degree responsible for the August 4, 2015 plan. And second, HW's actions and failures to act (FAC at ¶¶ 40, 46-53) caused the EPA On Site Team to "not clearly understand their work, or how to safely and properly accomplish the work given the dangers presented by the site." (*Id.* at ¶ 58.) In the Colorado Supreme Court's language, HW's actions and failures to act "injuriously affected the safety, health and morals of the public [and] work[ed] some substantial annoyance, inconvenience, or injury to the public." *Dept. of Health*, 887 P.2d at 1002. HW's motion to dismiss should be denied as to Utah's claim for public nuisance.

6. Harrison Western is Subject to Utah's Environmental Statutes.

Despite its wrongful conduct contributing to a Blowout that deposited 3,000,000 gallons of toxic waste into the State of Utah's waters and land, HW contends it cannot be liable under Utah's environmental statutes because such liability is preempted by the CWA, citing *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). But as with CERCLA, Congress enacted the CWA to supplement and preserve State laws protecting the environment, except where they imposes effluent standards that are incompatible with the CWA standards in a permit

issued under its National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342; *see generally EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205-208 (1976) (describing NPDES system). Thus, the CWA expressly preserves such state-law remedies with at least two separate savings clauses. *First*, Section 1370 entitled "State authority," provides that:

> nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; . . . or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1370. *Second*, Section 1365(e) entitled "Statutory or common law rights not restricted," provides: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." *Id.* at § 1365(e).

In its Fifth Cause of Action, Utah pleads that HW violated the Utah Water Quality Act, UTAH CODE ANN. § 19-5-101 *et seq.*, which makes it unlawful to discharge a pollutant into the waters of the State and authorizes the Director of Utah's Division of Water Quality to bring a civil action against any person who violates the statute. *Id.* at §§ 19-5-107, 19-5-115(7). The Utah Solid and Hazardous Waste Act (Utah's Sixth Cause of Action), *id.* at § 19-6-101 *et seq.*, authorizes the Director of the Division of Waste Management and Radiation Control to bring a civil action against any person who has contributed to the handling or disposal of any solid or hazardous waste that presents an imminent and substantial danger to health or the environment. *Id.* at § 19-6-115. In the language of the savings clauses, the statutes are "limitation[s]

respecting discharges of pollutants" and Utah is exercising its "right . . . to seek enforcement" of those "effluent standard[s] or limitation[s]," and therefore its claim fits within these definitions.

In arguing that the CWA preempts Utah's statute, HW does not and cannot show the foundational fact that there was a NPDES permit allowing the discharge from the Gold King Mine of three-million gallons of toxic contaminants, or any discharge at all. HW therefore fails to show that the CWA's careful permitting scheme applies in this case.

HW's reliance upon *Ouellette* is therefore misplaced, where a group of Vermont plaintiffs sought to hold a New York polluter liable under Vermont common law for pollution that flowed across the state border on Lake Champlain into Vermont. 479 U.S. 481, 483-84 (1987). Because the polluter had a permit for its discharges under the CWA, the Court found that "application of an affected State's nuisance law to a point source in another State would constitute a serious interference with the implementation of the Act." *Id.* at 482. The Court therefore held "[t]he Act pre-empts *the common law of an affected State* to the extent that that law seeks to impose liability on a point source in another State." *Id.* at 481 (emphasis added). The scope of that preemption is expressly limited with the Court applying a functional test:

> Our conclusion that Vermont nuisance law is inapplicable to a New York point source does not leave respondents without a remedy. *The CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act.* The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State.

Id. at 497 (emphasis added).

Thus, HW is wrong that *Ouellette* forecloses the Utah statutory claims. First, *Ouellette* concerned *common law* claims—the issue of whether an affected State's *statutes* apply to

pollution in its State waters that was generated in another State was not before the Court and therefore was not decided. Second, HW does not show there is an NPDES permit for the Gold King Mine discharge. Even if there was, there is no conflict between Utah's statutory claims and the CWA regulatory scheme because Utah's lawsuit does not require standards of effluent control that are incompatible with an NPDES permit under the CWA—the CWA would never allow dumping of 3,000,000 gallons of toxic waste into a river. Thus, the Court's concern in *Ouellette* that application of an affected State's common law would interfere with implementing the CWA is not implicated in this case.

HW may argue in reply that the Utah environmental statutes only apply to pollution in "waters of the State," but that is exactly what Utah seeks to do here. Utah's FAC alleges that "[t]oxic wastes from the Blowout have been and are being transported through the Animas and San Juan River system to Lake Powell in the State of Utah, among other locations. (FAC at ¶ 61.) Utah's Causes of Action under its environmental statutes are specifically directed at pollutants from the Blowout that "are present or persist in the State of Utah's soil, sediment, and waster . . . ." (*Id.* at ¶¶ 108, 114.) It is indisputable that a State has broad powers to regulate pollution in its own waters, and the CWA allows the States to have a significant role in protecting their own natural resources. *See* 33 U.S.C. § 1251(b); *Ouellette*, 479 U.S. at 489-90.

C. Utah Does Not Seek Reconsideration of Judge Armijo's Order at this Time.

In her Order on ER's prior Motion to Dismiss and Motion to Strike, Judge Armijo held that Colorado state tort law applied to New Mexico and Navajo Nation's allegations of joint and several liability for their state tort law claims. (Feb. 12 Order at 68.) To be consistent with its position that this Order should apply to HW, and while reserving its rights for appellate

purposes, Utah does not seek reconsideration of Judge Armijo's Order at this time on any issue, including joint and several liability.

D. Utah's Allegations Warrant Punitive Damages.

1. Utah's Request For Punitive Damages Is Not a Claim And Cannot Be Dismissed Under Fed. R. Civ. P. 12(b)(6).

HW asks this Court to dismiss Utah's prayer for punitive damages based on Rule 12(b)(6). But the controlling issue in considering a 12(b)(6) motion is whether the plaintiff is entitled to present evidence in support of the claim, not whether the plaintiff will ultimately prevail on the claim. *See Neitzke*, 490 U.S. at 327. The FAC does not bring separate *counts* or *claims* for punitive damages, nor would it be appropriate for it to do so. Because a request for punitive damages is a separate cause of action, such a request cannot be the subject of a Rule 12(b)(6) motion. *See, e.g.*, *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 353 (E.D.N.Y. 2007) (holding that "a motion for failure to state a claim properly addresses the cause of action alleged, not the remedy sought. It is the court that will craft any remedy."). Judge Armijo has already considered and rejected HW's argument in her Order on ER's first motion to dismiss. (Feb. 12 Order at 37, 67-68.) In addition, Rule 9(g) requires special damages, such as punitive damages, to be "specifically stated." Fed. R. Civ. P. 9(g). Hence, the Sovereigns' requests for punitive damages are not only appropriate, but mandatory, and HW's motion on this issue is inappropriate at this stage.

2. Punitive Damages are Appropriate under the Facts Alleged.

Because Utah's prayer for punitive damages cannot be dismissed under Rule 12(b)(6), it is unnecessary to address HW's additional argument (made in a single, conclusory sentence) that Utah's FAC contains no allegations sufficient to establish that HW's conduct met the standard

for an award of punitive damages. C.R.S. § 13-21-102(1)(a) (punitive damages require an injury "attended by circumstances of fraud, malic, or willful and wanton conduct"). Nevertheless, Utah will briefly respond to point out that its FAC does, in fact, contain sufficient allegations for a punitive damages award. Utah alleges HW "acted maliciously, wantonly, recklessly, and with conscious disregard of the known risks of injury to others, including the State of Utah." (FAC at ¶ 88.) The other facts support this allegation: HW's course of conduct led to it taking wrongful actions, and wrongfully failing to take actions (*id.* at ¶¶ 40, 46-53), that caused great harm to Utah, despite the fact that HW possessed the expertise and experience to know that these actions and inactions were wrongful (*id.* at ¶ 85), and despite the fact that it was *explicitly made aware of the risk that its wrongful conduct could trigger a Blowout*. (*Id.* at ¶ 37.) Utah's FAC contains ample support for its prayer for punitive damages.

E. The Court Should Strike Harrison Western's Purported "Second Motion to Dismiss" As Improper.

In violation of this Court's orders, HW has filed a "Second Motion to Dismiss" Utah's FAC, which purports to join and incorporate by reference every argument made in the Motions to Dismiss filed by the other Contractor Defendants and by the Mine Owner Defendants. (Dckt. 48.) Accordingly, HW's Second Motion should be stricken because this Court's carefully-drafted Initial Case Management Order authorized HW to file only *one* Rule 12(b) Motion to Dismiss. (*See* Dckt. 34 at 4 ["Defendant Harrison Western Corporation may file *a* Rule 12 motion to dismiss . . . ."] [emphasis added].) HW's Second Motion is also untimely under the Court's Order: any Rule 12(b) Motion was to be filed "within 30 days of entry of this Order," a period which expired on July 25, 2018. (*Id.* at 3.) HW's Second Motion was filed nine days after the cutoff, on August 3, 2018. (Dckt. 48.) The tardy filing also creates confusion regarding

the due date for Utah's opposition to HW's Motions, which the Court set as "30 days after service of the motions." (Dckt. 34 at 4.) These violations of the Court's Orders are prejudicial and the Court should strike or otherwise deny HW's Second Motion to Dismiss.

To the extent that the Court is nonetheless inclined to consider HW's Second Motion, and to avoid repetition, Utah hereby incorporates by reference the briefs filed by Sovereign Plaintiffs in opposition to the motions to dismiss filed by the Contractor Defendants (filed on August 24, 2018) and by the Mine Owner Defendants (to be filed) as if fully set forth herein, to oppose HW's Second Motion.

IV. CONCLUSION

For all of the reasons discussed herein, HW's motion to dismiss should be denied in its entirety.

Dated: August 24, 2018

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CERTIFICATE OF SERVICE

I hereby certify on August 24, 2018, the foregoing document was filed via the U.S District Court of New Mexico's CM/ECF electronic filing system and a copy thereof was served via the CM/ECF upon all counsel of record.

Dated: August 24, 2018

/s/ Holly Hickish
Holly Hickish