FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 8, 2016

DANIEL B. LOWE, Complainant, v. VERIS GOLD USA, INC., and JERRITT CANYON GOLD, LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-614-DM WE-MD 14-04 Mine: Jerritt Canyon Mill Mine ID: 26-01621

ORDER ON COMPLAINANT'S MOTION TO AMEND TO ADD VARIOUS WHITEBOX ENTITIES AS PARTIES

Before: Judge Moran

Complainant Daniel Lowe has filed a motion to amend his original complaint "so as to join 'Whitebox Entities' to include Whitebox Asset Management, Whitebox Advisors LLC, Wbox 2014-1 Ltd., Jerritt Canyon Gold, LLC,[1] Sprott Mining Inc., and Eric Sprott as successors in interest to Veris Gold USA Inc." Mot. to Deny "Whitebox Entities" Contest of Jurisdictional Authority and Mot. to Deny "Whitebox Entities" Mot. Regarding Compl't's Mot. to Amend at 1 ("Lowe Response"); *see also* Mot. to Amend and Mot. for Expedited Consideration at 1.

Following that motion, on February 16, 2016, counsel on behalf of the Whitebox Entities ("Whitebox Counsel") filed a Special Limited Appearance to contest this Court's jurisdiction and to challenge whether the Court can attach liability against the parties Lowe wishes to join for the acts of discrimination against Lowe committed by Veris Gold USA, Inc. ("Veris Gold"). The Court actually received Lowe's response on February 8, 2016, prior to receiving Whitebox Entities' response. Thereafter, on February 19, 2016, Whitebox Counsel also filed a sur-reply. Lowe then filed a response to the sur-reply.

[1] Lowe's Motion to Amend asserts that Jerritt Canyon Gold, LLC, Whitebox Asset Management, Whitebox Advisors LLC, Wbox 2014-1 Ltd., Sprott Mining Inc., and Eric Sprott are the purchasers of Veris Gold Inc. and the successors in interest to Veris and that the three principals of Jerritt Canyon Gold LLC are Gregory Gibson, Jacob Mercer, and Erik Sprott, as its managers. Mot. to Amend 3.

For the reasons which follow, the Court holds that it has jurisdiction to determine if other entities may be added as successors in interest, but that there is insufficient information in the record to make such a determination and that discovery may be had in furtherance of resolving those issues.[2]

Successorship Basics

The Commission has recognized that, in certain cases, the imposition of liability on a successor is appropriate. *Munsey v. Smitty Baker Coal Co., Inc*., 2 FMSHRC 3463 (1980), *aff'd in part, rev'd in part sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983); *Sec'y of Labor on behalf of Corbin v. Sugartree Corp*., 9 FMSHRC 394 (Mar. 1987), *aff'd sub nom. Terco v. FMSHRC*, 839 F.2d 236 (6th Cir. 1987).

In *Secretary of Labor on behalf of Keene v. S&M Coal Company, Inc.*, 10 FMSHRC 1145 (Sept. 1988), the Commission noted that in

> the cases in which the Commission and the courts have found successorship liability there has been some type of transaction (a "transactional element") with respect to the business between the predecessor and the entity against which liability is being asserted and/or there has been a continuation of activity at the predecessor's site. In *Munsey*, *supra*, for example, the company that was held liable as a successor had acquired leases and mining equipment from the former employer, substantially replacing the predecessor's operation. Similarly, in *Terco*, *supra*, successorship liability attached because there was substantial continuity of business interests at the same site.

Id. at 1152.

The Commission then observed that

> [a]ssumption of the predecessor's position by the successor underlies the successorship cases. For example, in *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), successorship was found where the predecessor company was merged into the acquiring company, a process that also involved the wholesale transfer of the predecessor's employees to the successor. The Court observed that for an employer to be considered a successor, there must be a substantial continuity in the identity of the business enterprise before and after a change. *Wiley, supra*, 376 U.S. at 551. Another example of the acquisition element underlying these cases can be found in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, (1973) which involved a bona fide purchase of a company that had committed an unfair labor

[2] This Order parallels the March 21, 2016, Order issued by this Court in Matthew Varady's discrimination complaint against Veris, WEST 2014-307-DM. Lowe and Varady, both non-attorneys, with each presently proceeding *pro se*, have assisted one another in their respective filings. In this instance their motions to amend, seeking to add Jarrett Canyon Gold as a party were nearly identical submissions. Accordingly, except for minor adjustments, this Order tracks the substance of Varady Order.

> practice. Issuance of a reinstatement and back-pay order was upheld against the acquiring company, which occupied the site where the unfair practice had occurred.

Id.

Clearly, the "transactional element," at least as to Jerritt Canyon Gold, LLC, ("JCG") has been conceded. This led to the Court's determination adding that entity as a Respondent in its March 14, 2016, Order. *See* Order on Compl't's Mot. to Amend, Mar. 14, 2016. Whether other entities may be shown to have such transactional elements, and therefore be added as successors, is a subject of this Order, though, as explained below, conclusions about the status of those entities are not presently possible.

Apart from determining if a company occupies the position of a successor is the separate issue of determining whether such a successor should be liable to remedy the unlawful discrimination of its predecessor. For that determination, the Commission has followed the courts and has approved consideration of nine specific factors:

> (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production and (9) whether he produces the same products.

Keene, 10 FMSHRC at 1153 (quoting *Munsey*, 2 FMSHRC at 3465-66).

The Commission has further noted that

> the key factor for determining successorship liability is whether there is a substantial continuity of business operations. This question is fact intensive and must be resolved on a case-by-case basis. *Howard Johnson, Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 256 (1974). In *Sugartree*, 9 FMSHRC at 398, the Commission emphasized that factors (3) through (9) provide the framework for analyzing whether there is a continuity of business operations and work force between the successor and its predecessor.

Id. (citing *Munsey*, 2 FMSHRC at 3467; *Sugartree*, 9 FMSHRC at 398).

Similarly, in *Secretary of Labor on behalf of Zambonino v. Colonial Mining Materials, LLC*, 36 FMSHRC 1239 (May 2014) (ALJ), an administrative law judge determined a mine operator was a successor and liable for the complainant's termination. That judge noted that in *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973), the Supreme Court determined that

> the successor company acquired the predecessor *with notice of unfair labor practice litigation*, and continued the business without substantial interruption or change in operations, employee or supervisory personnel, [and then] upheld the Board's order requiring the successor to reinstate with back-pay an employee discharged by the predecessor company. Both companies were held jointly and severally liable for the back-pay award.

Zambonino, 36 FMSHRC at 1259 (emphasis added).

> The judge took note that the Supreme Court also expressed that
>
> [t]o further the public interest involved in effectuating the policies of the Act and achieve the 'objectives of national labor policy, reflected in established principles of federal law,' we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.
>
> 'In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, 'It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.' When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices.'

Id. at 1260 (quoting *Golden State Bottling*, 414 U.S. at 171 n.2 (quoting *Perma Vinyl Corp.*, 164 N.L.R.B. 968 (1967) (footnotes omitted), *enforced sub nom., U.S. Pipe and Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968))).

The Motion and Responses

Lowe's Motion to Amend[3] states that Veris Gold began its bankruptcy proceeding in June 2014, which was after Lowe had filed his discrimination complaint in November 2013. Mot. to Amend 1-2. Lowe asserts that

> Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott had knowledge of the Complainant's discrimination action before the Commission because Jerritt Canyon Gold LLC . . . [was] represented by the same law firm as Veris Gold USA Inc., Goicoechea, Di Grazia, Coyle and Stanton, Ltd., and in particular both were represented by Attorney David M. Stanton.

Id. at 4. Lowe adds that "[a] business filing with the State of Nevada – Secretary of State's Office filed on June 9, 2015 states that the age of the company, Jerritt Canyon Gold LLC., was 4 months old," and Lowe therefore contends that "Jerritt Canyon Gold LLC., had been [in] operation since March of 2015 and that the Registered Agent was the law firm of Goicoechea, Di Grazia, Coyle and Stanton, Ltd." *Id.* at 4-5.

The motion asserts that

> [t]here has been a 100 % continuity of business operations between Veris Gold USA Inc. and Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott. The same surface mill has operated without any hiatus by Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott. Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott are engaged in all of the exact same operations (crushing, screening and processing gold ore) as Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott use the exact same equipment.

Id. at 5.

As to this assertion, the Court would observe that Complainant is making *allegations* in support of his claim that the parties he wishes to add are successors. The Court notes that with its previous order, issued March 14, 2016, Jerritt Canyon Gold, as the acknowledged new owner of the Jerritt Canyon Mill, has been added as a party. However, as to the other entities and individuals Complainant seeks to add, Complainant apparently does not realize that his assertions about their involvement with Jerritt Canyon Gold, and previously with Veris Gold, are not evidence of such claims. Instead, evidence to support Lowe's claims about the relationship of those other entities and individuals with Veris Gold and JCG must be established. Discovery is the initial means to learn about the nature of the relationship of those other entities and individuals with Veris Gold and JCG. Discovery vehicles include official records, requests for admissions, interrogatories, stipulations, and depositions.

[3] Complainant Lowe's motion also requests expedited consideration. As this case is one of many dockets before the Court and as the Court has already issued many rulings regarding Lowe's Complaint, the request to expedite is DENIED.

Complainant also asserts that

> [t]he vast majority of Jerritt Canyon Gold LLC's employees are all former Veris Gold USA Inc.'s employees and are engaged in the same types of job classifications as they were when they worked for Veris Gold USA Inc. The transfer from one company to the other is likened to flipping a light switch at the time of the sale date. At the stroke of midnight all to the Veris Gold USA Inc.'s employees became Jerritt Canyon Gold LLC's employees with a very minor exception of less than approximately five employees. According to a local newspaper article the number of employees effected [sic] in the transfer of ownership was approximately 400 employees.

Mot. to Amend 5-6. This assertion is also not evidence.

The same deficiencies exist with regard to items 6 through 9 of Complainant's Motion; they are assertions of the claims made in those items, not evidence thereof.[4] *See id.* at 6.

The Court has urged Complainant, following the determination that he was discriminated against by Veris Gold, to make efforts to find legal counsel in support of his efforts to establish that these various entities should be determined to be successors and to present a well-founded claim for his submission of damages. It again urges Complainant to make efforts to secure legal counsel. While retaining counsel would not assure a successful outcome, it can be stated with some confidence that continuing to proceed without such counsel, in these complex legal matters, presents a disadvantage. The Court will not, and cannot, act as if it were Complainant's attorney in fact, as the Court cannot operate in such dual, and conflicting, roles. Discovery and how to conduct it effectively are Complainant's burdens.

Further, it is difficult for the Court to appreciate why such efforts to obtain legal counsel have apparently not been made, as Complainant has a judgment of discrimination in hand and attorney's fees would be recoverable for the efforts to hold a successor liable, if such attorney is successful in that effort. Such attorney's fees would not diminish the recovery of the respondent's damages at all, as they are a separate line item for a respondent's damages in discrimination claims. However, the Court is *not* suggesting that Complainant retain an attorney on a fee basis, as the cost would be prohibitive and the final outcome remains uncertain. Another arrangement would be on a contingency basis under which the attorney would be able to file for such attorney's fees plus be entitled to a share of any damages. These are matters for Complainant and an attorney to work out, not the Court. The benefit for Complainant would be having the expertise and skill provided by legal counsel.

The Court will now address the responses from "the Whitebox Entities," as provided through the limited appearance of its counsel, the law firm of Fennemore Craig, P.C.

[4] The motion concludes with Complainant's citation to case law, which he maintains support his claim that these entities should be deemed successors. Such legal conclusions cannot come about until the facts supporting such a claim have been adduced.

The "Whitebox Entities," which are defined in counsel's response as Whitebox Asset Management, Whitebox Advisors LLC, WBox 2014-1 Ltd, and any other Whitebox entity or individual including Jacob Mercer and Jeff Sterling, assert that the Whitebox Entities did not purchase any of assets of Veris Gold, and do not operate the Jerritt Canyon Gold mine or mill. Special Limited Appearance on Behalf of Whitebox Entities to Contest Jurisdiction in Resp. to ALJ's Order Regarding Sec'y's Mot. for Reconsideration and Compl't's Mot. to Amend at 1 ("Whitebox Response").

The Response maintains that the Whitebox Entities had no involvement with Debtor Veris Gold entities[5] prior to filing of bankruptcy proceedings on June 9, 2014; were not creditors or equity holders of Veris Gold entities; and were not officers, directors, or control persons of Veris Gold entities. *Id.* at 2. Jerritt Canyon Gold, LLC, was the purchaser of Veris Gold's assets. *Id.* However, the Response relates that "WBox 2014-1 Ltd." loaned $12 million to Veris Gold for "their post-petition operations." *Id.*

The Response then identifies Deutsche Bank as the "first position secured creditor" of the debtors, and informs that the bank declined to advance funds to keep the debtors in business, post-petition.[6] *Id.* The Response then asserts that post-petition financing was approved by bankruptcy courts around October 6, 2014, with WBox 2014-1 Ltd. loaning $12 million to the debtors, then increasing that loan to $15 million in May 2015, secured by a "first position priming lien" on all of debtors' assets. *Id.* The recounting of events by the Response then informs that the sale process was approved in November 2014, but no buyer was found. *Id.* Following that, the Response advises that WBVG LLC, *an affiliate of WBox 2014-1 Ltd*, made an offer to purchase Veris Gold assets and *after notice and hearing*, that sale was approved. *Id.* at 2-3. Thereafter, WBVG LLC changed its name to Jerritt Canyon Gold LLC. *Id.*

The Response further asserts that Complainant had notice of Veris Gold's bankruptcy, both actual and constructive. *Id.* at 3. The Response states written notice was given in the Sale Motion and hearing and also in the notice of entry of sale order in June 2015. *Id.* As to the written notice given in the Sale Motion and hearing, the Response, pointing to Paragraph G of the Sale Order, advises that the order found that "the Secretary of Labor, Inspector of Mines, EEOC, MSHA and OSHA and any known claimants that have asserted Claims against the

[5] The bankruptcy proceedings concerned not only Veris Gold USA, Inc., but also Veris Gold Corp., Queenstake Resources, Ltd., and Ketza River Holdings, Ltd. (collectively, "Veris Gold entities"). *See* Whitebox Resp. Ex. A, at 1.

[6] The Response also asserts that Deutsche Bank, with $80 million in secured claims, and Small Mine Development, with an asserted $40 million of secured claims, and various unidentified "environmental creditors," asserting $20 million in penalties, all received no funds for the payment of their claims from the sale of the assets. Whitebox Resp. 3. This seems unimaginable, if the Response is suggesting that two significant creditors, with $120 million in secured claims, walked away from the bankruptcy proceeding with nothing. **Whitebox Counsel is directed by the Court to address this issue.**

Debtors were given actual notice of the Sale Motion and hearing." Whitebox Resp. 3. It is not clear that Complainant was one of those known claimants given actual notice.[7]

The Response then points to the Sale Order and its statement that

> [t]he transactions contemplated under the Agreement do not amount to a consolidation, merger or de facto merger of the Purchaser and the Debtors and/or the Debtors' estates, there is not substantial continuity between the Purchaser and the Debtors, there is no common identity between the debtors and the Purchaser, there is no continuity of enterprise between the Debtors and the Purchaser, the Purchaser is not a mere continuation of the Debtors or their estates, and the Purchaser does not constitute a successor to the Debtors or their estates.

Whitebox Resp. 4 (quoting Sale Order at 9, *In re Veris Gold Corp.*, No. 14-51015-gwz (Bankr. D. Nev. June 4, 2015), ECF No. 318 [hereinafter "Sale Order"]).

Thus, the Purchaser and Debtors happily agreed that none of the factors which would point toward a successorship were present. This Court would be surprised to learn that the bankruptcy courts engaged in any detailed review of those claims. Rather, they more likely accepted in good faith that those representations were made to them in good faith and grounded in fact, as opposed to being mere assertions. As mentioned in its Order of March 14, 2016, it is this Court's understanding that bankruptcy courts of necessity rely upon the representations of the parties and the monitor. Depending upon what is learned about the relationships between Veris Gold, Jarrett Canyon Gold, the Whitebox Entities, and the various individuals who may have commonality among those enterprises, the bankruptcy courts may have been misled.[8]

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[7] It does appear to be admitted that the Complainant filed a Motion to stay the Sale on June 15, 2015, that the motion was denied and that Complainant did not appeal the Sale order. Whitebox Resp. 3-4.

[8] In the Court's estimation, some aspects of the bankruptcy proceeding involving at least the monitor, Veris Gold, and Jerritt Canyon Gold are disconcerting. The Court's concerns, which are not yet conclusions or findings, stem in part from yet another discrimination action against Veris in which there was a settlement agreement between Veris and discrimination complainant Jennifer Morreale. A Commission Order involving that case informs there was a settlement agreement in February 2015 with Morreale within which agreement "Veris Gold represented that it had received *approval from a bankruptcy monitor* to make the [settlement] payment, as the operator had previously filed U.S. Chapter 15 bankruptcy proceedings concurrent with Canadian bankruptcy filings and was subject to the financial oversight of a bankruptcy monitor." *Sec'y of Labor on behalf of Morreale v. Veris Gold USA, Inc.*, 38 FMSHRC ___, slip op. at 2, No. WEST 2014-793-DM (Mar. 8, 2016) (emphasis added). However, Morreale was never paid, the settlement agreement never lived up to, and in June 2015, the presiding judge in that case learned "that the bankruptcy monitor overseeing the bankruptcy proceedings had withheld payment to both the Secretary [of Labor] and Ms. Morreale pending the resolution of an asset sale of the mine by the operator to a separate entity, Jerritt Canyon Gold, LLC." *Id.* Given the above-mentioned dates, it can be stated with some confidence that the bankruptcy monitor must have

Further, a case such as this lays bare the problems identified by the law review commentaries when 11 U.S.C. § 363(f) proceedings supplant those brought under § 1141(c), despite the former's narrower language and the absence of the procedural protections which are available under the latter, all as cited in the Court's previous Order on Complainant's Motion to Amend, issued March 14, 2016. For example, if through discovery, it is shown that there are individuals who had financial or management interests in Veris, Jarrett Canyon Gold and/or the Whitebox Entities, such linkage could be troublesome and point to the appropriateness of holding others accountable as successors.

As if the foregoing proclamations advanced by the Response were not enough, the Response then lards:

> *Furthermore*, Paragraph 38 of the Sale Order *concludes* that there is no "successor" liability as to the Purchaser. The sale was free and clear of any successor liability. [The Sale Order] expressly *rules*: . . . The Purchaser is not a "successor" to the Debtors or their estates by reason of any theory of law or equity, and the Purchaser shall not assume, nor be deemed to assume, or in any way be responsible for any liability or obligation of any of the Debtors and/or their estates including, but not limited to, any bulk sales law, successor liability, transferee liability, derivative liability, vicarious liability or any other liability or responsibility of any kind or character for any Liens, Claims, or Interests against the Debtors or against an insider of the Debtors, or similar liability except as otherwise expressly provided in the Agreement, whether known or unknown as of the Closing, now existing or hereafter arising, fixed or contingent, asserted or unasserted, or liquidated or unliquidated.

Whitebox Resp. 4 (emphasis added) (footnote omitted) (quoting Sale Order at 21).

Though the above language crafted by the purchaser and debtor would seem to have created an insurmountable barrier to successorship claims, that is, if one accepts the lawyering employed and disregards due process concerns and the issues concerning the propriety of using § 363, instead of § 1141(c), additional barriers were nevertheless employed. Paragraphs N and Q of the Sale Order provide that the term "claims" captures successor or transferee liability and that the parties would not have entered into their agreement if the purchaser acquired the property with such claims. *Id.* at 5.

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been fully aware of Matthew Varady's discrimination complaint in Docket No. WEST 2014-307-DM, and been aware of, and likely approved, Veris' employing legal counsel to defend that complaint during the June 8 through 10, 2015, hearing held before this Court in Elko, Nevada. Similarly the monitor was likely fully aware of the present complaint brought by Lowe against Veris, which was heard by this Court on June 18, 2015, and that the monitor approved the legal defense fees associated with that matter as well, until it became clear that Veris would not prevail in either matter. Thus, it seems reasonable to conclude that money was flowing freely for the legal defense of Veris in both the Varady and Lowe matters, but stopped once it became clear that Veris would be held accountable for its discrimination against those miners. The Court doubts that the bankruptcy courts were fully apprised of these doings.

Even with that, more efforts to protect against such claims were layered onto those already described, as the Response then points to Paragraph 39 of the Sale Order. That paragraph lists, in the fashion employed by the other provisions, just discussed, any other conceivable soul[9] as being "forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing such Liens, Claims, or Interests . . . against the Purchaser or any affiliate, successor or assign thereof, or the Assets." *Id.* at 5 (quoting Sale Order at 21).

The Response concludes with the assertion that *only* the U.S. Bankruptcy Court can address the issues raised by the Complainant and that this Court has no jurisdiction over the Whitebox Entities. Yet, while asserting that this Court has no jurisdiction, Whitebox simultaneously requests attorneys' fees and costs for having to file its response. *Id.* at 6. The request for attorneys' fees is DENIED.

Subsequent to its Response, the Whitebox Entities then filed a Special Limited Appearance on Behalf of Whitebox Entities for Sur Reply to Complainant's Motion to Amend ("Whitebox Sur-reply"). For the most part, the Sur-reply reasserts its previous arguments or those made by Jarrett Canyon Gold in its responses. These include the claim that this Court has no jurisdiction over successorship vis-à-vis findings of Mine Act discrimination. Whitebox Sur-reply 1-2. Again, the Sur-reply from the Whitebox Entities points to the Order Approving the Sale. However, regarding that Order Approving Sale, through the process of discovery, as conducted by Complainant, not the Court, it is necessary to learn who drafted the Order approving the sale, the date that order was presented to the court(s), the circumstances of that presentation, including the party or parties who presented the Order to such bankruptcy court(s), the parties present at that presentation, the record, including any transcripts, of any inquiry

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[9] Displaying lawyering that frequently causes public revulsion, in stating that "to make sure the Purchaser [is] protected from further actions," the Whitebox Entities Response points to this passage from Paragraph 39 of the Sale Order which provides:

> Except to the extent expressly included in the Assumed Liabilities or to enforce the Agreement or Permitted Encumbrances, pursuant to Bankruptcy Code Sections 105 and 363, all persons and entities, including but not limited to, the Debtors, the Monitor, all debt security holders, equity security holders, the Debtors' employees or former employees, governmental, tax and regulatory authorities, lenders, parties to or beneficiaries under any benefit plan, trade and other creditors asserting or holding Liens, Claims, or Interests of any kind or nature whatsoever against, in or with respect to any of the Debtors or the Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, senior or subordinated), arising under or out of, in connection with, or in any way related to the Debtors' business prior to the Closing Date or the transfer of the Assets to the Purchaser, shall be forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing such Liens, Claims, or Interests whether by payment, setoff, or otherwise, directly or indirectly, against the Purchaser or any affiliate, successor or assign thereof, or the Assets.

Whitebox Resp. 5 (quoting Sale Order at 21-22).

between the bankruptcy court(s) and those presenting the Order for the courts' approval, whether this occurred only by written submissions or through a hearing, if any hearing in fact occurred, and the date the Order was approved.

The Whitebox Entities repeat that they are not "miners, operators, or employers that fall within the definitions and jurisdiction of FMSHA." Whitebox Sur-reply 2. But, they admit that "WBox 2014-1 Ltd. owns 20% of the membership interest [which the Sur-reply characterizes as analogous to 20% shareholder of a corporation] in Jerritt Canyon Gold, LLC, not the assets."[10] Whitebox Sur-reply 3. In this regard, the Sur-reply contends that

> the Whitebox Entities did not purchase, do not have title to and do not own any of the assets previously owned by Veris Gold, do not operate the mine or mill previously operated by Veris Gold and do not employ any employees previously employed by Veris Gold at the mine or mill [and that] . . . **[t]here are no facts or law that could be used to find or conclude that any of the Whitebox Entities are the successor of Veris Gold.**

Id. at 2 (emphasis added). The Court agrees with the last quoted statement but adds the important qualifier, "at least for now." This is because, until discovery occurs, a definitive statement about that claim cannot be made.

The Sur-reply then speaks to the role of Jacob Mercer, described as a manager of Jerritt Canyon Gold, LLC, and states that being a manager or a member of a limited liability company does not make such a person liable for the debts or obligations of such a company. *Id.* at 3-4. The balance of the Sur-reply repeats previous contentions and concludes with the assertion that Nevada common law is to be applied to determine successor liability and that such state law does not speak to the issue of whether a member or manager of a purchaser would be subject to such liability as a successor.[11] *Id.* at 4-5.

Lowe filed a short response to the Whitebox Sur-reply, asserting that the Mine Safety and Health Review Commission has the final jurisdictional authority in this matter, not the United States Bankruptcy Court. Lowe's response admits that he did not appeal the bankruptcy court's adverse ruling to his motion to stay the sale, but stated that "[o]nce denied there was nothing new to provide to the Bankruptcy Court where a reasonable and prudent person could believe that they could reasonably prevail and therefore no appeal was made." Compl't's Reply to Resp't's "Sur Replay" at 3 ("Lowe Resp. to Sur-Reply").

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[10] The Sur-reply adds that it is not correct that "one of the Whitebox Entities purchased purchased 20% of the assets and that Jerritt Canyon Gold LLC purchased 80%." Whitebox Sur-reply 3. Instead, it is stated that WBox 2014-1 Ltd. owns 20% of the *membership interest* in Jerritt Canyon Gold LLC, which it characterizes as akin to 20% of the stock of a corporation. *Id.*

[11] As with its Response, the Whitebox Entities' Counsel seeks attorney's fees and costs for filing its Sur-reply. Consistent with the Court's ruling in the Whitebox Entities' Counsel seeking such fees for its Response, this request is similarly DENIED.

Discussion

In order to determine the appropriate parties potentially to be added as successor entities and to determine if liability as successors is warranted, it is necessary to pull back the covers, so to speak, in order to fully understand the relationship(s), if any, between Jarrett Canyon Gold, the "Whitebox Entities," Veris Gold, and the owners of those entities, in order to determine if they share common identities. This is a purpose of discovery, which the complainant is entitled to utilize.

Commission Procedural Rule 56(b) states that "[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence *or appears likely to lead to the discovery of admissible evidence*." 29 C.F.R. § 2700.56(b) ("emphasis added"). That provision allows parties to use depositions, written interrogatories, requests for admissions, and requests for documents or objects to obtain such information. A party served with interrogatories and requests for production must answer within 25 days of service and must state the basis for any objections in its answer. 29 C.F.R. §§ 2700.58(a), (c).

In addition, it has also been observed that:

> [f]or procedural questions not regulated by the [Mine] Act, [the Commission's] Procedural Rules, or the Administrative Procedure Act," the Federal Rules of Civil Procedure guide Commission Judges as "far as practicable." 29 C.F.R. § 2700.1(b). Guidance, though, does not require strict adherence. See Rushton Mining Co., 11 FMSHRC 759, 765 (May 1989) (observing "[Commission] Procedural Rule 1(b) reserves to the Commission considerable discretion in deciding whether and to what extent it is to be 'guided' by a particular Federal Rule of Civil Procedure.")
>
> Like the Commission's rules, the Federal Rules of Civil Procedure establish a broad discovery regime. *See Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964) ("We enter upon determination of this construction with the basic premise 'that the deposition-discovery rules are to be accorded a broad and liberal treatment' to effectuate their purpose that 'civil trials in federal courts no longer need to be carried on in the dark.'") (quoting *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947)). Notwithstanding recent changes intended to involve courts' fine tuning of overabundant discovery, Federal Rule 26(b)(1) continues to authorize parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location or persons who know of any discoverable matter." Fed. R. Civ. P. 26(b)(1). Like the Commission's rules, the Federal Rules' regime also specifies that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to discovery of admissible evidence."

Greyeagle Coal Co., 35 FMSHRC 3321, 3324 (Oct. 2013) (ALJ).

The Way Forward

The information provided by both sides on the issue of determining which entities, (beyond Jarrett Canyon Gold, which was added as a party pursuant to the Court's March 14, 2016, Order),[12] may be considered as successors, has largely consisted of assertions. Complainant, it would seem, has two options. One is to pursue only Jarrett Canyon Gold to establish that entity as a successor to Veris Gold. The other would be to learn more about the various other entities Complainant believes should also be deemed as successors. Under both approaches, discovery needs to occur, beginning with the basics by Complainant seeking information from those entities, to include the identification all the owners of Veris Gold, its officers, the management individuals running that mine, and stockholders, and then seeking the same identifying information from each of the Whitebox Entities, including WBVG LLC, an affiliate of WBox 2014-1 Ltd, which later changed its name to Jerritt Canyon Gold LLC. There needs to be a full understanding of the various entities, including the individuals which embody and comprise them, all with the purpose of ascertaining if there are threads of commonality between some or all of those entities as, for example, if names associated with Veris Gold reappear with Jarrett Canyon Gold and the Whitebox Entities. If such commonalities appear, this would tend to show that the sale of Veris was not an arms-length transaction. If present, given that Veris was trying to avoid being saddled with a pattern of violations designation by MSHA not long before opting for bankruptcy and was also facing multiple discrimination claims, *see Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037, 2050 (Sept. 2015) (ALJ), such relationships could be considered in evaluating successorship claims.

[12] Complainant Lowe has provided business records from MSHA showing Jerritt Canyon Gold LLC as beginning operations at the Jerritt Canyon Mill on the day following the cessation of Veris Gold USA, Inc.'s operation at that Mill, with Veris Gold's operation at that Mill ending on June 23, 2015, and Jerritt Canyon Gold LLC's operation starting on June 24, 2015. Current Mine Information, Mine Safety and Health Administration, http://arlweb.msha.gov/drs/drshome.htm#MID (input "2601621" in the MSHA Mine ID searchbox). The same MSHA records list "WBOX 2014-1 LTD; Eric Sprott" as the "Current Controller." *Id.* Although Lowe also listed other sources as associated with Whitebox entities, including http://www.corporationwiki.com and LinkedIn, which list Jacob Mercer as the Senior Portfolio Manager at Whitebox Advisors LLC, and Greg Gibson and Eric Sprott, as managers for Jerritt Canyon Gold LLC, and http://www.bloomberg.com, which lists other information about executives for Whitebox Advisors, LLC, these sources and others of that ilk (e.g., Bizapedia, http://www.foxrothschild.com) are insufficient to establish the information contained in them for purposes of this proceeding.

Based upon the Court's comments to the Response, *supra*, one would anticipate that Complainant would also want to discover a host of details such as the dates of bankruptcy court hearings, the participants in such hearings, the parties given notice of such hearings, and the transcripts of such proceedings before any bankruptcy court involved with this matter and the aforementioned relationships, if any, between Veris Gold, and the Whitebox entities, including Jarrett Canyon Gold LLC, formerly known as WBVG LLC.[13]

To that end, the Court **ORDERS and DIRECTS** Fennemore Craig, P.C., Whitebox Counsel, as the representative for the Whitebox Entities, including Whitebox Asset Management, Whitebox Advisors LLC, WBox 2014-1 Ltd, to provide the service address for those entities to the Court and Complainant within 10 days of the date of this Order to enable Complainant to pursue discovery of Jarrett Canyon Gold, the Whitebox Entities, and such individuals related to those entities.

William B. Moran
Administrative Law Judge

[13] Failure to respond to discovery requests may have consequences. The Commission's rules require that discovery requests be responded to fully and in writing within 25 days of service unless the party initiating discovery agreed to a longer time. 29 C.F.R. § 2700.58. While that procedural rule does not itself deem unanswered requests as admitted, an order to compel discovery may follow and Federal Rule of Civil Procedure 36(a) provides additional guidance on this issue. *See, e.g., Gray v. North Fork Coal Corp.*, No. KENT 2010-430-D, 2013 WL 4648492 (FMSHRC Aug. 22, 2013); *Sw. Quarry & Materials*, 26 FMSHRC 116 (Feb. 2004) (ALJ); *Hamilton v. Stone Mountain Trucking Co*., 6 FMSHRC 2300 (Sept. 1984) (ALJ).

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