

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 21, 2016

SECRETARY OF LABOR, MSHA,  
on behalf of **JENNIFER MORREALE**,  
Complainant,

v.

VERIS GOLD U.S.A., INC., and its  
successors,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-793  
MSHA Case No.: WE MD 14-13

Mine: Jerritt Canyon Mill  
Mine ID: 26-01621

## BRIEFING ORDER

Before: Judge Simonton

This discrimination case is before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c).<sup>1</sup> On March 8, 2016 the Commission reopened and remanded this matter to the court for further proceedings and stated that,

The Judge shall consider Morreale's motion to amend her complaint to add Jerritt Canyon Gold, LLC; Eric Sprott; and Whitebox Asset Management as successors in interest.

March 8, 2016 Commission Order WEST 2014-793, 5.

Jerritt Canyon Gold (JCG) has previously noted that they acquired the Jerritt Canyon Mill mine from Veris Gold U.S.A (Veris) under section 363(f) of the U.S. Bankruptcy Code. 11 U.S.C. 363(f) (mandating that, under certain conditions, a bankruptcy trustee may sell property of a bankrupt corporation "free and clear of any interest in such property.") As such, JCG has argued that the "free and clear" provisions of section 363(f) asset sales completely bar recovery attempts against JCG vis a vis successorship liability. See *Garcia v. Veris*, WEST 2014-905 Stay Order, 2 (March 4, 2016) (ALJ Simonton). The Secretary of Labor has joined JCG in this position. *Id.* The complaining miner in this matter, Ms. Jennifer Morreale, does not.

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<sup>1</sup> The court detailed this docket's protracted procedural history in a recent order denying the Complainant's self-filed application for temporary reinstatement. In summary, the parties reached a finalized settlement agreement on February 20, 2015 in which the Respondent agreed to pay a civil monetary penalty and separate personal payment to the Complainant. The court approved the settlement agreement on February 27, 2015. However, the listed Respondent failed to honor the agreement and the Jerritt Canyon Mill mine was sold to Jerritt Canyon Gold (JCG) in a section 363(f) asset sale free and clear of all liabilities in June 2015. The Complainant filed a motion to reopen with the Commission and subsequently filed a motion to amend, formally naming JCG, Eric, Sprott, and Whitebox Asset Management as successors-in interest.

The court acknowledges that the correct interaction of bankruptcy law and the Commission's successorship doctrine must be definitively answered at some point. However, the Commission declined to address this issue of first impression in their remand order above. Additionally, in a detailed decision that named JCG as a *potential* successor in interest to Veris, a fellow Commission ALJ has recently held that section 363(f) asset sale protection should not necessarily bar recovery of section 105(c) discriminations claims against bona-fide successors in interest. *Varady v. Veris*, WEST 2014-307, 17 (March 4, 2016) (ALJ Moran).

With this present legal ambiguity in mind, the most prudent course of action is to first resolve the factual question of JCG's successorship status before proceeding to potential bankruptcy protection issues. *Varady*, WEST 2014-307, 17 (stating that successorship findings should precede consideration of enforcement issues); See also *Sec'y of Labor o/b/o Michael L. Price and Joe John Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1528-30 (August 1990) (holding that section 362(b) of the U.S. Bankruptcy code permits the Commission to make liability determinations separate and apart from enforcement concerns governed by other jurisdictions).

In her self-filed motion to amend before the Commission, the Complainant alleged that the primary controller of JCG, Eric Sprott, also controlled Whitebox Investments, the DIP lender that approved the parties' February 20, 2015 settlement agreement. Morreale Motion to Amend, 5. Morreale has also stated that news reports indicate that JCG has maintained the same on-site personnel, equipment, and operation methods since it assumed control of the Jerritt Canyon Mill mine in June 2015. *Id.* at 6-7. In a separate docket, JCG has argued that it does not meet the Commission's successorship test, relying primarily on JCG's newly formed corporate identity and changes in upper level management at the Jerritt Canyon Mill mine. JCG March 1, 2016 Response, 13-14, *Garcia v. Veris* WEST 2014-905. The Secretary has to date declined to provide any input on JCG's successorship position. Sec'y March 1, 2016 Response, 7, *Garcia v. Veris* WEST 2014-905. Veris has not responded to any of this court's orders since June 17, 2015.

Thus, further discovery into the facts of JCG's acquisition and operation of the Jerritt Canyon Mill mine is necessary to determine if JCG, Eric Sprott and Whitebox Asset Management are liable as successors in interest for the conduct of Veris. Accordingly, the Complainant<sup>2</sup>, Veris, and JCG (as well as Eric Sprott and Whitebox Asset Management) are directed to promptly begin discovery regarding JCG's, Eric Sprott's and Whitebox Asset Management's relationship to Veris.

No later than June 1, 2016, the parties shall file briefs regarding JCG's, Eric Sprott's and Whitebox Asset Management's relationship to Veris as successors in interest under the Commission's successorship test. See *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980) (adopting a nine factor successorship test), *aff'd* in relevant part sub nom. *Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983). Within their responses, the parties shall also respond to the following questions:

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<sup>2</sup> The court has recently directed the Complainant to submit all filings through the Secretary pursuant to the normal operation of section 105(c)(2) proceedings.

- 1) Did JCG management learn of the finalized settlement agreement between the Secretary, Ms. Morreale, and Veris prior to JCG's purchase of the Jerritt Canyon Mill mine?
- 2) Did JCG management learn of any pending 105(c) discrimination claim against Veris Gold USA prior to JCG's purchase of Veris?
- 3) What percentage of Veris Gold USA did Eric Sprott and his subsidiary holdings, own and/or control prior to JCG's acquisition of the Jerritt Canyon Mill mine?
- 4) What percentage of JCG does Eric Sprott and his subsidiary holdings own and/or control?
- 5) What percentage of Veris employees employed at the Jerritt Canyon Mill mine did JCG rehire following their assumption of mining operations in June 2015?
- 6) What percentage of Veris supervisory agents at the Jerritt Canyon Mill mine were retained by JCG? In addition to senior management personnel, the Commission generally considers supervisors with production and safety responsibilities agents of the operator. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328-31 (Mar. 2009) (affirming ALJ holding that onsite foremen who conducted safety examinations and assigned tasks were agents of the operator).
- 7) Has JCG substantially altered production methods at the Jerritt Canyon Mill mine?

The parties are strongly encouraged to submit supporting documentation and/ or affidavits to substantiate their positions. The parties are directed to reserve arguments concerning the correct application of bankruptcy law for future proceedings.

### **ORDER**

The Complainant, Veris Gold U.S.A., and JCG<sup>3</sup> are **ORDERED** to submit briefs on the successorship issues outlined above no later than June 1, 2016.



David P. Simonton  
Administrative Law Judge

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<sup>3</sup> Briefs may also be submitted by Eric Sprott and Whitebox Asset Management at their election as necessary.

Distribution: (U.S. First Class Mail)

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