FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 27, 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 REGARDING COMPLAINANT'S MOTION TO SET LOCATION OF DEPOSITIONS

As this Court, and more recently the Federal Mine Safety and Health Review Commission,[1] having individually denied Jerritt Canyon Gold, LLC's ("JCG")[2] request for interlocutory review, this matter now moves forward with discovery proceedings to determine, among other matters, if JCG is a successor-in-interest to Veris Gold USA, Inc. ("Veris Gold").

On June 21, 2016, Complainant Daniel Lowe filed a Motion to Set Location for Depositions ("Motion for Depositions").[3] Lowe notes that the "Whitebox Entities," through its

[1] *Varady v. Veris Gold USA, Inc.*, 38 FMSHRC __, slip op. (July 11, 2016); *Lowe v. Veris Gold USA, Inc.*, 38 FMSHRC __, slip op. (July 11, 2016).

[2] JCG, formerly known as WBVG LLC, is located at 545 30th Street, Elko, NV 89801. Its statutory agent is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, DE 19808.

[3] At the behest of Matthew Varady, Lowe's Motion requests that depositions of the same entities he wishes to depose be taken together with the closely related discrimination complaint brought by Varady in Docket No. WEST 2014-307-DM, and that the request is made for efficiency and to expedite both proceedings. The Court agrees with the request. It notes that, aside from the particulars of the discriminatory acts committed by Veris Gold against Varady, and separately against Lowe, that the damages ultimately to be assessed in each case will be different, all other issues regarding discovery, the proper parties to the proceeding, and the role and relationships, if any, between Veris Golid, JCG, the Whitebox Entities, Whitebox Asset Management and Eric Sprott, are shared. Accordingly, because of Lowe's and Varady's identity of interests in terms of these discovery issues, this Order is to be construed to apply fully to the Varady discrimination complaint. A brief order memorializing this determination will be issued in the Varady matter.

Counsel, Fennemore Craig, P.C., has submitted that any such depositions should be held at the Minneapolis, Minnesota offices of Whitebox Entities. For the reasons that follow, the Court holds that any depositions which may need to be held shall be held in Elko, Nevada or via telephone. Lowe and Varady should understand that they bear the costs associated with such depositions.[4] The Court also explains that, as JCG has been added as a party by virtue of the Court's March 14, 2016 Order, Lowe may be able to learn sufficient information through interrogatories,[5] requests for admission, [6] and requests for the production of documents, to establish JCG's status as a successor. Such interrogatories, requests for admission and requests

[4] This is an appropriate moment to again remind both Lowe and Varady that the final outcome of this litigation is unknown. The Court can only rule on subjects before it, but it cannot predict, nor control, what other courts may decide. Due to the element of unpredictability, the Court again encourages the parties to discuss *reasonable and realistic* settlement terms. It is also worth noting that a settlement was reached *post-bankruptcy* in the case of *Morreale v. Veris Gold U.S.A., Inc., et al*, 38 FMSHRC __, slip op. (June 1, 2016) (ALJ), and *Sec'y o/b/o Garcia v. Veris Gold USA, Inc., et al.*, 38 FMSHRC __, slip op. (July 14, 2016) (ALJ).

[5] "It is common in the practice of civil litigation to underestimate the value of interrogatories as a method of discovery. Those who exalt the deposition as the most useful form of discovery often overlook the clear advantages interrogatories have to offer. Interrogatories are a comparatively inexpensive form of discovery. They are an effective means of identifying individuals with personal knowledge of facts relevant to the litigation who may then [still] be deposed. Interrogatories enable a party to flesh out the major facts supporting his or her opponent's case [and they] allow . . . a party to identify the existence of documents, their custodians and their general description. Interrogatory answers can provide all or part of the factual basis to support or oppose a motion for summary judgment . . . ." *Lee v. Flagstaff Industries Corp.*, 173 F.R.D. 651, 652 (D.Md. 1997).

[6] Requests for admissions in Commission proceedings are governed by Commission Rule 58(b), 29 C.F.R. § 2700.58(b) and, so far as practicable, by Federal Rule of Civil Procedure ("FRCP") 36. "Each matter of which an admission is requested shall be separately set forth. . . . An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that [it] has made reasonable inquiry and that the information known *or readily obtainable by the party* is insufficient to enable the party to admit or deny. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. *. . . Proper use of requests for admissions can expedite and streamline litigation by establishing matters not truly in dispute and avoiding the expenditure of time and effort required by other discovery devices*. . . . However, in order to achieve that desired result both parties must fulfill their obligations under the rule. '*Parties may not view requests for admissions as a mere procedural exercise requiring minimally acceptable conduct. They should focus on the goal of the Rules, full and efficient discovery, not evasion and word play*.' . . . *Parties responding to requests, as the rule specifically states, should exercise good faith by admitting or denying parts of requests, and qualifying responses, where appropriate, rather than noting blanket objections*." *Sec'y o/b/o Jenkins v. Durban Coal, Inc.*, 22 FMSHRC 1150, 1151-52 (Sept. 2000) (ALJ) (emphasis added).

for production of documents may be directed at JCG (including under its prior name(s), such as WBVG LLC, to learn what information that entity has regarding its relationship to, and knowledge of, the principals, stockholders, and officers of JCG and the Whitebox Entities, Whitebox Asset Management and Eric Sprott. Using these discovery methods first may save Lowe the expenses associated with depositions.

The Court believes it is useful to step back and review the posture of this case. Veris Gold was found to have discriminated against Lowe in violation of section 105(c) of the Mine Act.[7] *Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337, 2347 (Oct. 2015) (ALJ). Through a bankruptcy proceeding, Veris Gold was sold. Now it must be determined if JCG and potentially other entities involved in the purchase of Veris Gold are successors to Veris Gold. Absent an acknowledgement that JCG and/or the other named entities admit to being successors, discovery must be undertaken to learn of the relationships, if any, between Veris Gold and those other entities, to determine if any or all of them are successors-in-interest. JCG and other potential parties each have an interest in challenging claims that they are successors, as a finding of successorship would mean that the liability for Veris Gold's acts of discrimination could be applied to them. If any of these entities are so determined by the Court to be successors-in-interest, the final phase of this Mine Act proceeding will be to determine those legitimate damages which may be assessed against such entities. Any entity found to be a successor would have an interest in addressing the appropriate damages.[8]

In *Munsey v. Smitty Baker Coal, Inc., et al.*, 2 FMSHRC 3463 (Dec. 1980), the Commission addressed the remedy due to a complainant and who must provide it when the complainant's employer had ceased operations and was purchased by another entity. In *Munsey*, Respondent Smitty Baker Coal had ceased its mining operations and P&P Coal Company had "purchased a lease and equipment from Smitty Baker Coal Company and opened the former Smitty Baker No. 2 Mine; and Ralph Baker [had] incorporated a new mining company, Mason Coal Company, in a different location from that of the former Smitty Baker Coal Company operation." *Id.* at 3463. The Commission held that "Ralph Baker can be ordered to reinstate Munsey at Mason Coal Company; that P&P Coal is a successor to Smitty Baker Coal Company;

[7] One week before presiding in the Lowe case, this Court heard the section 105(c)(3) discrimination case brought by Varady against Veris Gold. In that case, this Court also found that Veris Gold discriminated against Varady in violation of section 105(c) of the Mine Act. *Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037, 2060 (Sept. 2015) (ALJ). Although the specific acts of discrimination in the *Varady* and *Lowe* matters are distinct, in both matters liability has been established against Veris Gold. As noted, the directions in this Order apply equally to Varady's claim.

[8] Both Lowe and Varady have submitted multiple damage claims. The Court has made no ruling on those claims yet. At the appropriate time, rather than sifting through and comparing their multiple damage submissions, the Court will require one final itemized claim of damages sought by each complainant. The Court also notes and has informed the complainants that some of the claims made are not within recognized Mine Act discrimination damages. Therefore, the Respondents will have an interest in challenging some of those claims.

and that Ralph Baker, Smitty Baker Coal Company, and P&P Coal Company are jointly and severally liable for the illegal discrimination against Glenn Munsey." *Id.*, *aff'd Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983).

On the subject of successorship, the Commission further held in *Munsey* that Mason Coal was liable for Baker's discrimination against the complainant. The Commission stated:

> [It] must afford such affirmative relief as will best restore Munsey to the position in which he would have been but for the illegal discrimination. We hold that on the facts of the case reinstatement by Ralph Baker at Mason Coal Company, with such seniority and benefits as Munsey would have had if the illegal discrimination had not occurred, is an appropriate remedy in order to fully compensate Munsey for the effects of the illegal discrimination he suffered.

Id. at 3464. The Commission noted that

> the protections of other [] [labor] statutes have been construed to include the liability of bona fide purchasers and other successors for their predecessors' acts of discrimination. *E.g.*, *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973); *U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968); *International Technical Products*, 249 NLRB No. 183, 104 LRRM 1294 (1980).

Id. at 3465.

With that in mind, the Commission held that in appropriate cases the successorship doctrine should also be applied in Mine Act cases. In determining whether a new business entity is a successor employer, the Commission held that nine factors should be considered:

> 1) [W]hether 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 product.

Id. at 3465-66 (citing *EEOC v. MacMillan Bloedel Containers, Inc.* 503 F.2d 1086, 1094 (6th Cir. 1974)).

Applying these factors, as relevant to Lowe's (and Varady's) discovery, the questions each would likely have regarding JCG, would be: First, whether JCG "had notice of the charge of discrimination and possible liability at the time of its acquisition of the predecessor's business operations." *Munsey*, 2 FMSHRC at 3466. This would include whether the owners of Veris Gold and JCG discussed Lowe's (or Varady's) discrimination complaints during the negotiations

on the purchase of Veris Gold; whether any of the new owners knew of the Lowe (or Varady)[9] litigation. It is noted that a successor's knowledge of the litigation is sufficient; knowledge of liability is not necessary.[10] It is with regard to this factor that it is proper for Lowe to be able to learn of the connections, if any, between owners, operating officials, officers and management of Veris Gold and JCG and Eric Sprott, and the Whitebox Entities. If, through discovery or through statements already made by counsel, or through the bankruptcy process, there are links between Veris Gold and JCG, not only would this bear on the first factor but, in the event that this Court were to find that JCG is a successor and liable for Lowe's damages, such links may also give any bankruptcy or federal district court pause about the bankruptcy process that occurred in this instance, if asked by JCG to negate such liability under the rubric that the bankruptcy order immunized the successor from all liability. This Court has spoken previously to this point.[11]

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[9] As noted, but with an application of common sense for obvious differentiation between the cases, where Lowe's name is mentioned in connection with the issues of successorship and any links between JCG, Eric Sprott, and the Whitebox Entities, the reference applies equally to Varady's discrimination complaint.

[10] The Commission's view of a successor who tries to avoid liability for a predecessor's acts of discrimination is that it can "protect itself by either an indemnification clause or a lower purchase price in the takeover agreement." *Munsey*, 2 FMSHRC at 3466 (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 185 (1973)).

[11] As this Court noted in its April 8, 2016 Order on Complainant's Motion to Amend to Add Various Whitebox Entities as Parties, it observed that:

> [T]he Purchaser and Debtors happily agreed that none of the factors which would point toward a successorship were present, [it also added that it] would be surprised to learn that the bankruptcy courts engaged in any detailed review of those claims. Rather, [such bankruptcy courts] 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. 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, [I]f 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.

Second, among the factors to consider in determining if successorship applies, is the ability of the predecessor to provide relief. Lowe is entitled to learn whether Veris Gold has accounts which remain active and the amount of money in them. This is relevant to any monetary award which Lowe may be able to establish as due to him as a consequence of his illegal discharge. However, as Lowe seeks reinstatement, and Veris Gold is no longer in active mining operations, it cannot provide complete relief to him.[12]

The third factor, whether there has been a substantial continuity of business operations, as noted by the Commission, "has been termed the 'successorship keystone.'" *Munsey*, 2 FMSHRC at 3467. An aspect of this factor for Lowe to learn about is the existence and length of any hiatus between the closing of the business under Veris Gold and the reopening by JCG as an alleged successor. This should be simple to determine through interrogatories or requests for admission or the production of documents from JCG. Local newspaper accounts about the operation at the mill may also be used to inform about this issue.

The fourth factor, whether JCG uses the same plant as Veris Gold is plainly apparent, and Lowe should be able to formalize that fact through a request for an admission from JCG to determine whether JCG substantially replaced Veris Gold's operation at the Jerritt Canyon Mill.

The fifth factor, whether JCG uses the same or substantially the same work force as Veris Gold, should be determinable through interrogatories, if not by JCG's admission. Thus, Lowe is entitled to discover the list of employees working at Veris Gold at the time it ceased its operations and the list of employees JCG had when it took over the mining operations at the Jerritt Canyon Mill, including those employees hired by JCG in the immediate months after it took over the Veris Gold operation, for comparison with the predecessor's employment force. This information will enable Lowe to compare the number and identity of employees who worked for Veris Gold with those hired by JCG, a potentially useful comparison, both in raw numbers and by percentage.

The sixth factor, whether JCG uses the same or substantially the same supervisory personnel should also be determinable through interrogatories, if not by JCG's admission. The Court's comments about the fifth factor, above, apply in a similar fashion to learning about this factor.

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38 FMSHRC 866, 872 (Apr. 2016) (ALJ).

[12] An important distinction between the Lowe and Varady litigation is that Varady did not seek reinstatement. Lowe seeks reinstatement. At this post-liability stage, Varady cannot now change his mind and seek reinstatement. The remedy in the case of Lowe would include lost wages, accrued benefits and seniority along with an offer of reinstatement or a settlement amount in lieu of reinstatement. As occurred in the *Garcia* and *Morreale* discrimination litigations, the parties are free to negotiate a settlement as to fair compensation and the Court again strongly encourages this path as a sound way to reach a resolution of the Lowe and Varady matters. This will require reasonableness on both sides.

The seventh factor, whether under JCG the same jobs exist under substantially the same working conditions, should also be determinable through interrogatories, if not by JCG's admissions.

The eighth factor whether JCG uses the same machinery, equipment and methods of production as Veris Gold, should also be determinable through interrogatories, if not by JCG's admissions.

The ninth factor, whether JCG produces the same product, is almost certainly determinable through a request for admission, though interrogatories would likewise be available to overcome any recalcitrance.

It may also be appropriate, if the facts support it, for JCG to simply acknowledge that, under Commission jurisprudence, it is a successor-in-interest to Veris Gold. This would be consonant with JCG's primary asserted defense—that the bankruptcy court's determination insulates it from liability from the discrimination against Lowe.

Even if such an admission is not made, it is important for the parties to appreciate, especially for Lowe, as he is not an attorney, that the assessment of whether the new owner is a successor entity *does not require* that all nine factors must be established by the Complainant. This has special relevance with regard to the first factor,[13] because even if the evidence is inconclusive, consideration of the other factors may warrant a finding that JCG is a successor entity.[14]

Once information regarding these nine factors has been acquired and assembled, Lowe will be in a position to move for summary judgment on the issue of JCG's status as a successor to Veris Gold. If there are legitimate material factual disputes impacting the ability to make a determination of JCG's status as a successor, a hearing may be necessary. In making such a determination the Court notes that the Commission has stated "the resolution of any question concerning successorship involves 'striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee.'" *Munsey*, 2 FMSHRC at

[13] In *Morreale*, 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." 38 FMSHRC 889, 889 (Apr. 2016) (ALJ).

[14] Again as in *Morreale*, and relevant to the first successorship factor, this Court agrees that Lowe is entitled through discovery to learn the answers to the following questions: 1) Did JCG management learn of the litigation between Lowe or Varady prior to JCG's purchase of the Jerritt Canyon Mill mine? 2) Did JCG management learn of any other pending 105(c) discrimination claims against Veris Gold USA prior to JCG's purchase of Veris Gold? 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? and 4) What percentage of JCG does Eric Sprott and his subsidiary holdings own and/or control? *See* 38 FMSHRC 889, 890 (Apr. 2016) (ALJ).

3468 (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. at 181). As a matter of the Mine Act's aim of rectifying discrimination, the Commission noted that it "has been stated '[w]here the harm to the discriminatee and to the national policy that would flow from a finding of no successorship is great, a substantial amount of harm to the new employer must and will be tolerated.'" *Id.* (quoting *Brown v. The Evening News Association*, 473 F. Supp. 1242, 1246 (E.D. Mich. 1979), and *Golden State Bottling Co.*, 414 U.S. at 181).[15]

The Court notes that a fellow administrative law judge took the same approach—resolving the factual question of JCG's successorship status before proceeding to potential bankruptcy issues—as this Court in another discrimination complaint brought by a different former employee of Veris Gold. *See Morealle*, 38 FMSHRC 889 (Apr. 2016) (ALJ).[16]

Regarding discovery generally, as alluded to earlier, the Court is of the view that much, if not all, of the information Lowe will need to learn about Whitebox Entities' relationships, if any, to Veris Gold and JCG should be available through interrogatories and requests for admissions of Veris Gold and JCG. The Commission's procedural rules speak to these subjects.[17] Fennemore

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[15] The Court recognizes that *Munsey* arose under the predecessor act to the Mine Act, the 1969 Coal Act. As the Commission observed, "Congress declared in section 2(a) of the 1969 Coal Act that the first priority and concern of all in the coal mining industry must be the health and safety of the miner. Section 110(b) was intended to support and enhance the protection of miners." *Munsey*, 2 FMSHRC at 3469. This led the Commission to conclude that, to meet that objective, and to achieve a full remedy, it was important to hold a successor jointly and severally for illegal acts of discrimination of a predecessor. *Id.* The anti-discrimination provision of the Coal Act applies with equal force to the Mine Act.

[16] In one respect, the Court takes a different view than that expressed by the judge in *Morealle*. There, the judge ordered "further discovery into the facts of JCG's acquisition and operation of the Jerritt Canyon Mill mine . . . to determine if JCG, Eric Sprott and Whitebox Asset Management are liable as successors in interest for the conduct of Veris." *Morealle*, 38 FMSHRC at 890. This Court believes that, unlike JCG's likely successorship status, it is very unlikely that Eric Sprott and Whitebox Asset Management would be liable as successors in interest. Liability against Sprott and Whitebox Asset Management would seem to be barred absent a showing that the corporate veil of JCG should be pierced—a tall order to meet. However, as noted, learning about Sprott's and Whitebox Asset Managment's relationship to JCG and any relationships or commonality they had with Veris Gold would be informative in assessing the applicability of the first factor, whether JCG, as the potential successor company, had notice of the charge. Accordingly, it is important for Lowe to learn, through discovery, about JCG's, Eric Sprott's and Whitebox Asset Management's relationship to one another and to Veris Gold.

[17] 29 C.F. R. § 2700.58 provides:

> (a) *Interrogatories*. Any party, without leave of the Judge, may serve written interrogatories *upon another party*. A party served with interrogatories shall answer each interrogatory separately and fully in writing under oath within 25

Craig, P.C., (with locations in Arizona, Nevada, and Colorado, but not Minnesota) is representing Whitebox Entities and has submitted a letter, and later, a response to Complainant's Motion to set Location of Depositions, dated June 24, 2016, that any depositions of Whitebox Entities should be conducted at that entity's Minneapolis, Minnesota offices. The letter and a subsequent response to the Complainant's motion ask the Court to look FRCP 45(c) as to the proper location for a non-party deposition.[18] That provision is invoked for the purpose of requiring that any deposition of Whitebox Entities be held within 100 miles of Minneapolis, Minnesota.

However, the Response acknowledges that the Mine Safety Review Commission's procedural rules provide, at 29 C.F.R. §2700.57(a), for the testimony of any person, including a party, by deposition or written interrogatories. Further, 29 C.F.R. §2700.57(b), provides that "[i]f the parties are unable to agree, the time, place, and manner of taking depositions shall be governed by order of the judge." Accordingly, the Court need not be guided by the FRCP on this question. However, FRCP Rule 30 offers an alternative to the Court having to resort to ordering that depositions be conducted in Elko, Nevada, by allowing "Remote Means" for a deposition:

> days of service unless the proponent of the interrogatories agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to an interrogatory shall state the basis for the objection in its answer. (b) *Requests for admissions***.** Any party, without leave of the Judge, *may serve on another party* a written request for admissions. A party served with a request for admissions shall respond to each request separately and fully in writing within 25 days of service, unless the party making the request agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to a request for admissions shall state the basis for the objection in its response. Any matter admitted under this rule is conclusively established for the purpose of the pending proceeding unless the Judge, on motion, permits withdrawal or amendment of the admission. (c) *Request for production, entry or inspection.* Any party, without leave of the Judge, *may serve on another party* a written request to produce and permit inspection, copying or photocopying of designated documents or objects, or to permit a party or his agent to enter upon designated property to inspect and gather information. A party served with such a request shall respond in writing within 25 days of service unless the party making the request agrees to a longer time. The Judge may order a shorter or longer period for responding. A party objecting to a request for production, entry or inspection shall state the basis for the objection in its response.

(Emphasis added).

[18] The Response on behalf of Whitebox Entities does not speak to the location for any depositions of Jerritt Canyon Gold, LLC, Sprott Entities or Sprott individuals. Whitebox Response, at 2. However, the same principles described above would be applied.

> The parties may stipulate—or *the court may* on motion *order—that a deposition be taken by telephone or other remote means.* For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

Fed. R. Civ. P. 30 (emphasis added). *See, e.g.*, *Schoenherr v. Smith*, 2013 WL 2239304, (E.D. MichMay 21, 2013); *Gee v. Suntrust Mortgage, Inc.*, 2011 WL 5597124, at *2 (N.D. Cal. Nov. 15, 2011).

Should the other means of discovery prove insufficient, the Whitebox Entities and Lowe are directed to confer to see if they can stipulate to have the deposition be taken by telephone or other remote means and to so advise the Court of the outcome of their conference.

As expressed above, the Court is not sure that depositions are needed at this point in order for Lowe to learn, and as a potential consequence establish, JCG's status as a successor-in-interest, because interrogatories, requests for admissions, and requests for production of documents may be sufficient. However, learning about JCG's status as a successor may not be enough if, as noted above, Lowe is unable, through such discovery, to learn of the connections, if any, between owners, operating officials, officers and management of Veris Gold and JCG, and Eric Sprott, and the Whitebox Entities. It bears repeating that if it is learned that any individuals or entities were connected with Veris Gold and then through discovery or through statements already made by counsel or through the bankruptcy process, there are links between Veris Gold and JCG, not only would this bear on the first successorship factor but, in the event that this Court were to find that JCG is a successor and liable for Lowe's damages, such links may also give any bankruptcy or federal district court pause about the bankruptcy process that occurred in this instance, if asked by JCG to negate such liability as this Court may find.

The issue of JCG's participation in these proceedings

In separate letters, JCG, through the law firm representing it, Dorsey & Whitney LLP, and Attorneys Mark R. Kaster and Annette Jarvis, advised that it would not be participating in successorship and damages proceedings in the Varady and Lowe matters. Letter from Mark R. Kaster and Annette Jarvis, (Mar. 18, 2016); Letter from Mark R. Kaster and Annette Jarvis, (Mar. 28, 2016). The Court does not read those letters as blanket declinations because in the Varady letter it was framed as a decision to seek discretionary review of the decision adding JCG as a party and, in the Lowe letter, the declination was specifically described as a decision not to participate "at this time," opting for discretionary review there as well. **Accordingly, JCG's attorneys are therefore directed within seven (7) days of this Order to state whether they will be participating in the successorship and damages proceedings in the Varady and Lowe matters.** If JCG decides not to participate, the Court, upon taking notice of such evidence as Lowe may present on the successorship issue, would find JCG in default on the issue of successorship and will then require Varady and Lowe to separately provide a final submission on the damages claim which the Court will then review and rule upon.

Concluding Remarks

The Bankruptcy Court's appointed monitor itself identifies a sufficient cast of players in the purchase of Veris Gold to warrant a full understanding of their relationships, pre and post Veris Gold's operations. On May 25, 2015, Ernst & Young, as the Bankruptcy Court's[19] appointed monitor, presented its "Sixteenth Report of the Monitor." The Report advises that the DIP lender's wholly owned subsidiary, WBVG, LLC is the DIP Purchaser. Sixteenth Report of the Monitor, at ¶15. The DIP Purchaser has disclosed that, at the closing, the DIP Lender will sell a majority of the membership interest in the DIP Purchaser to 2176423 Ontario Ltd., a company wholly owned by Eric Sprott, or one of his affiliate entities. Mr. Sprott is a holder of a pre-petition royalty interest against the Petitioners and one of his wholly owned entities holds over 20% of the Petitioners' equity. *Id.* at ¶16. The Report relates that on May 8, 2015, the monitor received an "expression of interest" ("EOI") identified only as the "EOI Party" seeking to acquire the Jerritt Canyon Mining Operations. That EOI and later a "Revised EOI" was presented to the DIP. A third EOI was also presented, but it too was not supported by the DIP. The monitor acknowledged that "[w]hile the DIP Lender's lack of support for the various EOIs might be perceived *as a potential conflict of interest*, the Monitor remains of the view that the Credit Bid Transaction is the appropriate course of action at this late stage of the proceedings." *Id.* at ¶39 (emphasis added).

The Court is fully aware of JCG's continual invocation of the Bankruptcy Court's statements that JCG takes on none of the baggage created by Veris Gold's acts of discrimination. However, as this Court has stated more than once, it believes there were significant procedural and substantive problems with that bankruptcy process and that discrimination is akin to a tort and as such is not the type of activity that bankruptcy law was intended to insulate corporations from escaping. Lowe and Varady have the right to identify, through discovery, whether JCG is a successor entity under Commission precedent and may employ requests for admission, interrogatories, and depositions to determine that. The Complainants also have a right, per the discussion above, to learn the names and interests of those officers and shareholders comprising WBox 2014-1 Ltd, WBVG LLC, Jerritt Canyon Gold LLC, Whitebox Advisors LLC, the Whitebox Entities and Veris Gold.[20]

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

[19] In this instance, that "Court" refers to the Supreme Court of British Columbia.

[20] The response from the Whitebox Entities informs that there is no such entity as "Whitebox Asset Mgmt," but MSHA Mine Data Retrieval System lists such an entity, along with Eric Sprott.

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