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Gold Standard, Inc. v. American Barrick Resources Corporation; Barrick Resources (USA), Inc.; Texaco, Inc.; Getty Oil Company; And Getty Mining Company : Reply Brief

Utah Supreme Court

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BRIEF

890393

IN THE SUPREME COURT OF THE STATE OF UTAH

GOLD STANDARD, INC.,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	REPLY BRIEF OF APPELLANT
	:	GOLD STANDARD, INC.
	:	
AMERICAN BARRICK RESOURCES	:	
CORPORATION, BARRICK RESOURCES	:	
(USA) INC., TEXACO INC.,	:	
GETTY OIL COMPANY and GETTY	:	Case No. 890393
MINING COMPANY,	:	
	:	Priority No. 10
Defendants.	:	

INTERLOCUTORY APPEAL FROM AN ORDER ENTERED IN
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STATE OF UTAH, BY THE HONORABLE FRANK G. NOEL

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JAN 29 1990

 Court, Utah

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Plaintiff,	:	
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vs.	:	REPLY BRIEF OF APPELLANT
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(USA) INC., TEXACO INC.,	:	
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Plaintiff/appellant, Gold Standard, Inc., submits this brief in reply to the brief of defendants/respondents American Barrick Resources Corporation, Barrick Resources (USA) Inc., Texaco Inc., Getty Oil Company and Getty Mining Company.

ARGUMENT

The courts strictly construe the attorney-client privilege and the work-product exception to discovery in order to prevent their misuse. Yet, the district court in this case permitted the defendants to withhold a document (the "June 11 Agreement") that is part and parcel of the commercial transaction transferring the ownership of the Mercur Mine from Texaco to Barrick and signed in counterpart by six parties to the transaction on a claim of attorney-client privilege or attorney work-product.

In an effort to avoid this error of law, the defendants raise, for the very first time, the assertion that the June 11 Agreement was not part and parcel of the commercial transaction. This assertion is squarely contradicted by the testimony of Stephen Dattels and by the facts of this case. Having disavowed the fact that the June 11 Agreement was part of the commercial transaction, the defendants cite cases that protect confidential disclosures between attorneys and their

clients made for the purpose of securing legal advice. The defendants, however, have not and cannot cite a single case where a court applied the attorney-client privilege or work-product doctrine to preclude discovery of a commercial agreement. In short, the defendants cannot conceal the June 11 Agreement by the simple expedient of funneling it to counsel. Jackson v. Kennecott Copper Corp., 495 P.2d 1254, 1257 (Utah 1972).

I. Because The District Court Erred As A Matter Of Law, The Supreme Court Should Review The Decision De Novo.

The district court erred when it held the June 11 Agreement, an agreement that was part and parcel of a commercial transaction, to be "privileged." R. at 4754. Although the defendants argue that the district court's conclusion can be overturned only if an abuse of discretion or clearly erroneous (Defendants' Brief at 1, 4-5), the decision to protect part of a commercial transaction by way of the attorney-client privilege or work-product doctrine is a pure question of law or, alternatively, a mixed question of law and fact subject to de novo review. See Dole v. Milonas, 889 F.2d 885, 889 (9th Cir. 1989); U.S. v. Gray, 876 F.2d 1411, 1415 (9th Cir. 1989); Tornay v. U.S., 840 F.2d 1424, 1426 (9th Cir.

1988); In re Grand Jury Subpoenas, 803 F.2d 493, 496 (9th Cir. 1986), corrected, 817 F.2d 64 (1987); U.S. v. McConney, 728 F.2d 1195, 1200-05 (9th Cir.), cert. denied, McConney v. U.S., 469 U.S. 824 (1984); and Langdon v. Champion, 752 P.2d 999, 1001 (Alaska 1988).

II. The June 11 Agreement Was Part And Parcel Of The Business Arrangement That Transferred Ownership Of The Mercur Mine.

After briefing and oral argument before the district court and after opposing Gold Standard's petition for an interlocutory appeal, the defendants assert, for the first time, that the June 11 Agreement was not part and parcel of the sale of the Mercur Mine. It was only "[o]ut of an abundance of caution," they maintain, that Barrick's counsel disclosed the existence of a document that "may come within the purview of" the question asked of Mr. Stephen Dattels: "whether the Stock Purchase Agreement reflected the entire agreement between Barrick and Texaco with respect to the acquisition of the Mercur Mine?" Defendants' Brief at 13. Undoubtedly, it was also out of that same "abundance of caution" that the defendants chose not to reveal the existence of the June 11 Agreement in any of the privilege logs supplied to Gold Standard or in their responses to interrogatories propounded by

Gold Standard. See Gold Standard's Brief at 3-4. And it must have been "[o]ut of an abundance of caution" that Barrick's counsel failed to provide the foundational information promised with respect to the June 11 Agreement to counsel for Gold Standard for nearly five months. See id., Fact No. 7.

Barrick's counsel had to identify the June 11 Agreement because it was responsive to the question of what other documents were part and parcel of the Mercur transaction. Based on that response, Gold Standard asked the district court to compel Barrick to produce the June 11 Agreement on the grounds that it was part and parcel of a commercial transaction, a fact that the defendants never disputed in prior briefing or oral argument. Following an adverse ruling by the district court, Gold Standard petitioned for an interlocutory appeal on the grounds that the June 11 Agreement was part and parcel of a commercial transaction. Again, the defendants did not deny this fact in opposing the petition. Now the defendants, in their brief to the Court, contend for the first time that the June 11 Agreement was not part and parcel of the commercial transaction for the sale of the Mercur Mine. As a matter of procedure, the defendants should not now be permitted to raise this issue.

Nevertheless, the evidence in this case clearly demonstrates that the June 11 Agreement was a necessary

condition to the sale of the Mercur Mine. Had defendants raised this issue in the court below, Gold Standard would have offered the following evidence:

- 1) That Barrick's consultants, Kilborn Engineering, urged in a December 12, 1984 Report that any "bid on the Mercur project . . . be qualified to encompass . . . validity of Gold Standard claim." Exhibit 734, attached as Appendix "A."
- 2) That Barrick's early offers to Texaco required a "90-day period within which it can substantiate and validate . . . Gold Standard claim." Exhibit 424, attached as Appendix "B."
- 3) That on April 16, 1985, Barrick's Stephen Dattels noted that "Texaco was put on notice Gold Standard believes they have a first right of refusal." Exhibit 746, attached as Appendix "C."
- 4) That Mr. Dattels testified: "I asked, as did my counsel, for a warranty with respect to Gold Standard as well as other matters, and we asked that we be indemnified with respect to any breach of these warranties." Deposition of Stephen R. Dattels at 279, attached as Appendix "D."

- 5) That Gold Standard's counsel asked Mr. Dattels if he could point to the provisions in the Stock Purchase Agreement that he understood reflected "the indemnity by Texaco to Barrick for Gold Standard's claims," to which Mr. Dattels responded, after reading portions of the Stock Purchase Agreement: "There's something else I have to check in this agreement that might relate to this, if I can find it. You'll have to give me a minute." Id. at 298.
- 6) That after checking with counsel, counsel represented: "off the record, Mr. Dattels and I have had a conversation about some additional contractual material that may be responsive to your question. However, I have advised him that that particular document is lawyer's work product and that he is not permitted for that reason to respond to it." Id.
- 7) That in order to clarify that the additional document which Mr. Dattels and counsel discussed was part and parcel of the sale of Mercur, Gold Standard's counsel inquired:

MR. BURTON: In that connection, Gordon and Mr. Dattels, is there any written document in addition to the purchase agreement of May 15th which contains terms or conditions relative to Barrick's acquisition of the Mercur Mine from Texaco?

MR. ROBERTS: That document I'm referring to [the June 11 Agreement] is a document, and it does have provisions in it that relate to this--

Id. at 298-99 (emphasis added).

- 8) That, in order to obtain non-recourse financing from Bank of America, with which to acquire the Mercur Mine, Barrick needed to satisfy the bank that the mine could support the requested financing and that Barrick would have clear title to the mine. See Exhibits 1808 and 1932, attached as Appendices "E" and "F," respectively. To that end, Barrick obtained an ore reserve report on June 11, 1985, a Kilborn technical evaluation of the mine on June 11, 1985, and a waiver from Gold Company of America purportedly releasing Barrick from any obligation to acquire Mercur for Gold Company, again on

June 11, 1985. See Exhibits 436, 437, and 383, attached as Appendices "G," "H," and "I," respectively. Then, with the June 11 Agreement, the Bechtel Report, the Kilborn Report, and the Gold Company waiver, Barrick met with the bank on June 13, 1985, in order to secure financing. Exhibit 1928, attached as Appendix "J."

- 9) That the sale of the Mercur Mine closed on June 28, 1985.

Had defendants attempted to argue below that the June 11 Agreement was "not directed at the June 1985 sale" as they now contend (Defendants' Brief at 13), they would never have been able to support their claim. Having failed to raise this issue below, defendants cannot now dispute that the June 11 Agreement was an integral condition, the execution of which was necessary to Barrick's acquisition of the Mercur Mine.

III. The Attorney-Client Privilege And Work-Product Doctrine Do Not Protect Documents Created And Executed As Part Of Commercial Transactions.

The defendants claim that the June 11 Agreement is protected by the attorney-client privilege. According to the defendants, the purpose of the attorney-client privilege is "to

encourage full and frank communication between attorneys and their clients." Defendants' Brief at 7. Where six parties to a sales transaction sign an agreement to allocate the risks or costs associated with a third party's claim, they are not engaging in full and frank communications with attorneys; they are executing a commercial agreement. That agreement does not become attorney-client privileged by the simple expedient of funneling it to counsel. Jackson, 495 P.2d at 1257.

The defendants likewise claim that the Agreement is protected by the work-product doctrine. According to the defendants, the purpose of the work-product doctrine is "to allow parties to avail themselves of an opposing lawyer's work product." Defendants' Brief at 8. Clearly, the defendants executed this agreement to consummate the sale of the mine, a non-litigation purpose. Gold Standard seeks the June 11 Agreement to establish the negotiations for and terms of the sale. Gold Standard seeks the document as evidence in support of its claims that the defendants intentionally denied Gold Standard its rights and interests. Gold Standard is not attempting to avail itself of the defendants' legal research.

IV. There Is No Support For Extending The Attorney-Client Privilege Or The Work-Product Doctrine To An Agreement Entered Into As Part Of A Commercial Transaction.

The defendants ask the Court to protect the June 11 Agreement by asserting that, while it is in the nature of a retainer agreement, it contains confidential communications and attorney work-product. Certainly retainer agreements are not privileged. See Salstone v. General Felt Industries, 1986 W.L. 13738, *2-3 (N.D. Ill. 1986) (attached as Appendix "K"); Bailey v. Meister Brau, Inc., 55 F.R.D. 211, 214-15 (N.D. Ill. 1972); Oppenheimer v. Oscar Shoes, Inc., 488 N.Y.S.2d 693, 695 (App. Div. 1985); People v. Belge, 399 N.Y.S.2d 539, 539-40 (App. Div. 1977).

But the June 11 Agreement is not simply a retainer agreement possibly containing protected matter; it is an agreement signed in counterpart as part of a commercial transaction. Because the law does not shield otherwise protectable matter contained in a commercial agreement, the defendants cannot cite a single case in which a court has protected a document, in the nature of a retainer agreement, created and executed as part of a sales transaction, under either the attorney-client privilege or the work-product doctrine.

CONCLUSION

To extend the protection afforded by the attorney-client privilege or work-product doctrine to the June 11 Agreement would set a precedent that would allow all manner of commercial agreements, whether legal, illegal, or evidence of illegality, to be funneled to counsel. In this case, unless the Court reverses the decision of the district court, Gold Standard will be prevented from putting before the jury key evidence of how defendants structured the transaction for the transfer of the Mercur Mine without regard to and in violation of Gold Standard's rights. Gold Standard has a right to put that evidence before the trier of fact.

For the foregoing reasons, Gold Standard respectfully requests the Court reverse the decision of the district court.

DATED this 28 day of January, 1990.

JONES, WALDO, HOLBROOK & McDONOUGH

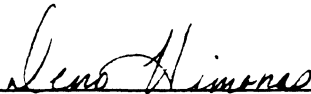
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29 day of January, 1990, I caused four (4) copies of the foregoing REPLY BRIEF OF APPELLANT GOLD STANDARD, INC. to be hand delivered, to:

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