

**COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO**

STEVEN MORNINGTHUNDER,

Appellant,

2 CA-CV 2008-0008

v.

AUGUSTA RESOURCE CORP.;
PHELPS DODGE MINING CO.; and
FREEPORT MCMORAN COPPER &
GOLD, INC.,

Appellees.

**APPELLEE AUGUSTA RESOURCE CORP'S
ANSWERING BRIEF**

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STATEMENT OF THE CASE

#1. This case involves a *pro se* litigant, Steven Morningthunder ("Morningthunder") whose Complaint makes assertions on behalf of the Earth, and who claims standing based on the fact that he has "climbed its highest mountain, rafted the rage of its flooding river, tilled its good soil with bared feet, and suffered to extirpate prior threat...." CR-2 at 1.¹ Morningthunder made no specific mention of liability, by Augusta Resource Corp. ("Augusta") in his Complaint. Rather, his Complaint made only three specific references to Augusta, and each failed to allege any wrongdoing by Augusta. CR-2 at 5-6.

#2. Augusta filed a Motion to Dismiss; Alternatively, Motion for More Definite Statement in Compliance with the Rules of Pleading ("Motion to Dismiss"). CR-5. After a hearing on Augusta's Motion to Dismiss, the trial court dismissed Morningthunder's Complaint with prejudice for failure to state a claim upon which relief could be granted. CR-17.

#3. Morningthunder timely appealed from the Superior Court's judgment. CR-18. This Court has jurisdiction pursuant to A.R.S. § 12-2101(B) (2008).

"CR" refers to the Clerk's Index of Record. Other abbreviations used in this Brief are "OB" for Morningthunder's Opening Brief, and "TR" for transcript.

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STATEMENT OF FACTS

A. The Complaint.

#4. Momingthunder's Complaint named Augusta, Freeport McMoRan Copper & Gold, Inc. ("Freeport"), and Phelps Dodge Mining Company ("Phelps") as defendants. CR-2. From the face of Momingthunder's Complaint, it is impossible to ascertain the basis of his claim against Augusta. Momingthunder's Complaint only specifically references Augusta in two paragraphs:

By virtue of the unsustainable nature of present groundwater extraction in the Santa Cruz Valley and the ubiquitous condition of overshoot, plaintiff requests that Augusta Resources be halted in its current preparations to withdraw water from the aquifer, a potential demand that could be met entirely and directly from recharging CAP water with reasonable ingenuity and at an internalized cost more just than a drawdown of our common native aquifer and consequent degradation of physical, as opposed to phantom, carrying capacity, i.e. adverse impact upon the water supply of Farmers Investment Company. Furthermore, in effort to transition the increasing inability of the present economic system, that any future retention of excess profits by Augusta Resources be denied due to the modern nature of resource extraction entailing the drawdown of common heritage fossil energy to extract minerals whose principal use value was created by the geophysical evolution of the Earth, and whose pricing is increasingly based upon scarcity rather than cost of process, those excess profits to be shared from *res ecologica* to *res publica*, both the bearers of externalized costs.

Lastly, plaintiff requests that any attempted resolution to the loss of water supply by Community Water Company as effected through undisclosed negotiation with Augusta Resources under presentation of urgency be considered indicative of imminent and further degradation of native supply, reason for urgency of adjudication, and in an illogic that refuses to confront the perpetrator of that loss, be subordinated to this adjudication, the specific resolution to depend upon how the sought judgments may prevail.

CR-2 at 5-6. These allegations assert no viable legal claim against Augusta.

B. The Hearing.

#5. Augusta filed a Motion to Dismiss on September 28, 2007. CR-5. Augusta's Motion to Dismiss articulated three bases on which the trial court should dismiss the case. CR-5; and TR at 3-4. First, Augusta explained it was impossible to discern what, if any, legal claims Morningthunder was asserting against Augusta. CR-5; and TR at 3. Second, it was similarly impossible to determine what factual claims Morningthunder was making in support of any legal claims. CR-5; and TR at 3. Finally, Augusta argued Morningthunder lacked standing to bring the lawsuit. CR-5; and TR at 3-4.

#6. As with the Complaint, at the hearing Morningthunder was unable to articulate a basis for his claim against Augusta. Morningthunder responded he had provided sufficient information to understand what legal claims he asserted,

because he had given Augusta access to his "crib sheet" and had given Augusta access to the Internet. TR at 4. Further, Momingthunder noted he was not seeking money from Augusta, and made several references to a bear trap. TR at 5. Specifically, Momingthunder stated:

You're looking at a bear trap, buddy [addressing the trial court]. And you better watch out, because that's a bear trap if you go on in and tear up that land. You destroy the environment, you destroy the ecosystem, with not a quid of concern for what you do. That's a bear trap. I'm worried. I'm saying that's a bear trap and you better watch out. And I'm asking you to prevent them from going into that bear trap.

TR at 5.

#7 Regarding factual claims, Momingthunder declared "[w]hat I have as factual claims is what they have let to be known through public hearings. Now what their intensions of what they publicly state to be, I do not know. I only have what the public information is." TR at 5. Momingthunder did not address, directly or indirectly, whether he had standing. TR at 5-7.

C. Morningthunder's Opening Brief.

#8 In his Opening Brief, Momingthunder incredibly accuses the trial court of having difficulty understanding him due to "the fact that English was not the first language of the court. .. ." OB at 12. When addressing Augusta's

assertion the Complaint was indecipherable, Momingthunder accuses Augusta of "not bothering] to read to the bottom of [his] memorandum," and again references his crib sheet, which he made available by providing an internet address, which leads to sixteen other internet addresses. OB at 6. In his Statement of the Case, Momingthunder, for the first time, states he seeks injunctive relief against Augusta for "its preparations that will devastate [his shared agricultural] enterprise." OB at 4.

#9. In his Statement of Facts, Momingthunder admits he intentionally chose not to use the word injunction in the Complaint, to avoid the possibility of having to post a bond. OB at 8-9. Momingthunder further explains he attempted to request injunctive relief by discussion of "the concept of overshoot, carrying capacity, and phantom carrying capacity." OB at 9.

ISSUE PRESENTED

#10. Whether the trial court abused its discretion in granting Augusta's Motion to Dismiss the Complaint in its entirety with prejudice pursuant to Ariz. R. Civ. P. 12(b)(6).

ARGUMENT

A. Standard of Review.

#11. The issues presented by this appeal relate to the trial court's decision to grant Augusta's Motion to Dismiss pursuant to Ariz. R. Civ. P. 12(b)(6). A trial court's decision to grant a defendant's motion to dismiss will be upheld by Arizona appellate courts as long as its decision was not an abuse of discretion. *Dressier v. Morrison*, 212 Ariz. 279, 282, 130 P.3d 978, 980 (2006). In making this determination, Arizona appellate courts will "uphold dismissal only if **the** plaintiff[] would not be entitled to relief under any facts susceptible of proof in the statement of the claim." *Id.* {quoting *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308,311(1996)}.

#12. Since the Complaint was dismissed by the trial court at the pleading stage for failure to state a claim, the Court must review the well-pleaded facts alleged in the complaint as true. *Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 389, 121 P.3d 1256, 1259 (App. 2005) {citing *Shannon v. Butler Homes*, 102 Ariz. **312**, 315, 428 P.2d 990, 993 (1967)} (holding the court will accept as true only well-pleaded facts). However, the Court does not need to accept as true allegations consisting of conclusions of law, inferences, or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences, or unsupported conclusions

from such facts or legal conclusions alleged as facts. *Id.* {citing *Docery v. Central Ariz. Light and Power Co.*, 45 Ariz. 434, 439, 45 P.2d 656, 658 (1935) (only well-pleaded facts accepted as true, not inferences that are not necessarily implied by such facts)). Moreover, only the facts alleged in the complaint may be considered in reviewing a trial court's decision to dismiss for failure to state a claim. *Cullen v. Koty-Leavitt Ins. Agency, Inc.*, 216 Ariz. 509, 515, 168 P.3d 917, 923 (App. 2007). The dismissal must be upheld "if, as a matter of law, the plaintiff would not be entitled to relief on any interpretation of those facts." *Id.* (quoting *Doe ex rel. Doe v. State*, 200 Ariz. 174, 24 P.3d 1269, 1270 (2001)). Further, the Court cannot "speculate about hypothetical facts that might entitle the plaintiff to relief." *Id.*

B. Momingthunder's Opening Brief Fails to Comply Rule 13 of the Arizona Rules of Civil Appellate Procedure and is Therefore Deficient.

#13. Before addressing the substantive issues contained in Momingthunder's Opening Brief, Augusta notes several deficiencies in Momingthunder's Opening Brief under Rule 13 of the Arizona Rules of Civil Appellate Procedure for the Court's consideration. Specifically, Momingthunder's Opening Brief does not comply with ARCAP 13 as follows:

#14. 1. Momingthunder fails to set forth a coherent statement of the issues presented as required by ARCAP 13 (a)(5). Augusta does not understand either

Morningthunder's statement of the issues or what precise issues Morningthunder is attempting to raise on appeal;

#15. 2. Morningthunder fails to provide a coherent statement of "the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes and parts of the record relied upon," as required by ARCAP 13(a)(6); and

#16. 3. Morningthunder's Appendix contains documents that are prohibited by ARCAP 13(d). Specifically, none of the documents attached to the Opening Brief (submitted as Tabs #1 through #14) were submitted to the trial court. *See Schaefer v. Murphey*, 131 Ariz. 295, 640 P.2d 857 (1982) (only evidence admitted into or part of the record can be considered on appeal).²

#17. While these flaws might normally be fatal and grounds for dismissal, Augusta recognizes Morningthunder is acting *pro se* in this appeal and the Court may be willing to wholly or partially overlook his failure to comply with ARCAP 13. Accordingly, Augusta relies upon the Court's discretion to determine whether

Additionally, Morningthunder attached a revised copy of his Complaint that he "modified from the original with the incorporation of line numbering and the correction of Augusta Resources, Inc. to Augusta Resources Corporation" as Tab C. Because the document was not filed with or before the trial court, Augusta requests the document either be stricken from Morningthunder's Appendix or the Court disregard them when ruling on this matter.

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such flaws constitute grounds for dismissing Momingthunder's appeal, striking all or part of the Opening Brief, or disregarding the objectionable parts of the Opening Brief - all of which are appropriate sanctions for Momingthunder's failure to comply with ARCAP 13.

C. The Trial Court Did Not Abuse its Discretion in Granting Augusta's Motion to Dismiss with Prejudice.

#18. The trial court determined that Momingthunder's Complaint failed to set forth a claim upon which relief could be granted, and granted Augusta's Motion to Dismiss for three reasons: (1) Momingthunder failed to allege facts or set the legal claims upon which relief could be granted; and (2) Momingthunder lacked standing to bring suit against the defendants. In short, the trial court held that Momingthunder's failure to allege sufficient facts or set forth a single coherent legal claim rendered the Complaint so defective that it had to be dismissed for failing to state a claim upon which relief could be granted pursuant to Ariz. R. Civ. P. 12(b)(6).

1. Momingthunder's Complaint is Indecipherable and Fails to Allege Facts or Set Forth Legal Claims Upon Which Relief Can Be Granted.

#19. Momingthunder's Complaint is incomprehensible, fails to assert facts **on** which relief could be granted and in no manner complies with the rules of

pleading. *See* Ariz. R. Civ. P., Rules 8(a) & 10(b). For example, the Complaint generally alleges "that by defendants' dereliction of duty a necessary good for the continuation of life has been degraded, and remains under prospect of further degradation" CR-2 at 2. The Complaint also references a transgression allegedly committed by an unnamed party, Cyprus Amax Minerals Co, as well as Phelps and Freeport, but it does not include Augusta in this list of culpable parties. CR-2 at 1. Indeed, the Complaint **fails to allege any wrongdoing by Augusta whatsoever.** CR-2 at 5-6.

#20. During the Superior Court's hearing on Augusta's Motion to Dismiss, Augusta noted Morningthunder's Complaint contained no allegation of wrongdoing against Augusta. TR at 4. Augusta also explained the Complaint lacked legal claims and well-plead facts to support any legal claims. TR at 3.

#21. Even at the hearing, Morningthunder could point to no facts to support legal claims. In response, Morningthunder merely stated he had provided notes, internet access, and his crib sheet. TR at 4. He implied Augusta should have attempted to understand his Complaint by perusing what would have amounted to countless internet pages. TR at 5. Morningthunder admitted he was making "no claims for money against August Resources," and failed to explain either what relief he sought or from what wrongdoing he sought relief. TR at 5. Rather,

Momingthunder asked the court to "prevent [Augusta] from going into that bear trap." TR at 5.

#22. Momingthunder's assertions regarding factual claims are at best cryptic. First he alleged he did not know "what their intentions of what they publicly state to be." TR at 5. Next, he stated he had "the public information And [he knew] that is an ecological disaster waiting to happen." TR at 5. Such statements are overbroad, conclusory allegations, not specific facts on which relief could be granted.

#23. Morningthunder's Opening Brief also fails to articulate any comprehensible claims against Augusta.³ In his Statement of the Issues, Momingthunder asks the Court to "further the Civil commons" and asserts "Augusta [R]esources postures intent devoid of any concern for the integrity of the ecosystem aquifer." OB at 13. For the first time, Momingthunder also mentions he seeks injunctive relief against Augusta for some indefinite "preparations that will devastate [his shared agricultural] enterprise." OB at 4.

⁵ A significant portion of Morningthunder's Opening Brief pertains to alleged wrongdoing by Phelps. Augusta respectfully declines to directly address those parts of Morningthunder's Opening Brief, and instead, incorporates by reference pursuant to 17B A.R.S. Civil Appellate Procedure Rules, Rule 13(f) those portions of Phelps' Answering Brief related to those allegations.

#24. Based on the lack of factual information and cryptic references to preparations, Augusta is still unable to decipher any wrongdoing Morningthunder might be alleging against Augusta. Assuming Morningthunder does seek injunctive relief, he certainly has not followed the procedure required by Rule 65 of the Arizona Rules for Civil Procedure. Because Morningthunder has failed to articulate a comprehensible claim against Augusta, and has not followed the required procedure to obtain injunctive relief, Morningthunder's Complaint was appropriately dismissed with prejudice and accordingly Morningthunder's appeal should be denied. *York v. Huerta-Garcia*, 36 F.Supp.2d 1231, 1234-35 (S.D. Cal. 1999) (recognizing "even *a pro se* complaint is subject to dismissal if the pleading fails to reasonably inform the adverse party of the asserted cause of action").⁴

2. Morningthunder Lacks Standing to Bring a Case on Behalf of the Earth, the Community Water Company, the Upper Santa Cruz Valley Ecosystem or Farmer's Investment Company.

#25. Arizona courts require "persons seeking redress in Arizona courts [to] first establish standing to sue." *Bennett v. Brownlow*, 211 Ariz. 193, 195, 119 P.3d 460, 462 (2005). This requirement "ensures that courts refrain from issuing

⁴ Rule 12(b)(6) of the Federal Rules of Civil Procedure is identical to its Arizona counterpart.

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advisory opinions, that cases be ripe for decision and not moot, and that issues be fully developed between true adversaries." *Id.* at 196, 119 P.3d at 463.

#26. The Arizona Supreme Court has held that "the question of standing in Arizona is not a constitutional mandate since we have no counterpart to the 'case or controversy' requirement of the federal constitution," *Fernandez v. TakataSeat Belts, Inc.*, 210 Ariz. 138, 140, 108 P.3d 917, 919 (2005) (quoting *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. In Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985)), and, therefore, when addressing questions of standing "we are confronted only with questions of prudential or judicial restraint." *Id.* Nonetheless, the Arizona Supreme Court has established a rigorous standing requirement. *Id.* "To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury." *Id.* (quoting *Sears v. Hull*, 192 Ariz. 65, 69, 961 P.2d 1013, 1017 (1998)). The Arizona Supreme Court will consider the merits of a case without such an injury "only in exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur. The paucity of cases in which [the Arizona Supreme Court has] waived the standing requirement demonstrates both [its] reluctance to do so and the narrowness of this exception." *Id.* (quoting *Hull*, 192 Ariz. At 71, 961 P.2d at 1019).

#27. Momingthunder has failed to establish his standing to bring this lawsuit. Indeed, the stated bases in the Opening Brief are as incomprehensible as his Complaint. For example, the first paragraph of Momingthunder's Complaint states he could not bring a lawsuit sooner due to a "lack of standing before the court of the ecosystem." CR-2 at 1. He then explains he could appropriately bring a lawsuit, apparently on behalf of the Earth, because he has "climbed its highest mountain, rafted the rage of its flooding river, tilled its good soil with bared feet, and suffered to extirpate prior threat." CR-2 at 1. He further argues "[t]he plaintiffs are two, as one voice." CR-2 at 1. Additionally, Momingthunder's next paragraph asserts standing as a resident of Green Valley and as a member of Community Water Company. CR-2 at 1.

#28. In Momingthunder's Opening Brief, however, he states he filed his Complaint "on behalf of the Upper Santa Cruz Valley ecosystem for the benefit of that ecosystem. . . ." OB at 4. Later, in his Statement of Facts, Momingthunder argues his standing should have been "patently clear from the affirmation on page 4, line 14, of the *Complaint* . . . of being 'a shareholder of Farmers Investment Company', [sic] and the emphasized reference to 'adverse impact upon the water supply of Farmers Investment Company', [sic] page 1, line 23 & 24. *Plaintiff's Memorandum*." OB at 10 (emphasis removed). These two references were located

in completely separate documents. Additionally, Morningthunder fails to explain his reference to being a shareholder of Farmer's Investment Company was buried in the following incoherent, single-sentence paragraph:

Plaintiff as a shareholder of Farmers Investment Company opines alone that allowing its legally apportioned aquifer to be encroached upon without compensation, as evidenced *res ipsa* in the drilling at expense [sic] of the Mine custodian a well proximate to the Santa Cruz River to replace two distant producing wells nearest to the Mine and belonging to Community Water Company that were abandoned in retreat before defendants' breach of pollution, should in the delivery of justice not be considered in itself *modus vivendi*, but rather, an interim arrangement to be subsumed in the court's more extensive adjudication, *res ecologica*, leading therefrom to *res publica*.

CR-2 at 4.

#29. No authority exists which would grant Morningthunder standing to sue under any grounds he asserts. For example, the United States Supreme Court has held that "ecosystem nexus," under which a person who uses any part of a continuous ecosystem may be considered adversely affected by the activity, does not provide a basis for standing to challenge the activity at issue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565, 112 S. Ct. 2130, 2139 (1992). This is the exact type of injury alleged by Morningthunder in the Complaint. Consequently,

pursuant to the *Lujan* holding, Momingthunder does not have standing to bring claims on behalf of the Earth or the Santa Cruz Valley Ecosystem, and therefore, the trial court properly dismissed those claims pursuant to Ariz. R. Civ. P. 12(b)(6).

#30. In addition, Momingthunder has no standing to bring claims against Augusta on behalf of the Community Water Company and the Farmer's Investment Company. Arizona law is clear that Momingthunder does not have standing to bring suit on behalf of either entity as a member or shareholder.

#31. In Arizona, a stockholder generally may not bring an action individually for wrongs done to a corporation, even where all the stock in a corporation is owned by a sole shareholder. *Schroeder v. Hudgins*, 142 Ariz. 395, 398, 690 P.2d 114, 117 (App. 1984); *Johnson v. Gilbert*, 127 Ariz. 410, 412, 621 P.2d 916, 918 (App. 1980); *Albers v. Edelson Technology Partners L.P.*, 201 Ariz. 47, 31 P.3d 821 (App. 2001) (citing *Funk v. Spalding*, 74 Ariz. 219, 223, 246 P.2d 184, 186 (1952)). Several exceptions to this general rule exist in Arizona. For example, shareholders may maintain a direct action when: (1) the relationship between the shareholders and a wrongdoer is separate from the shareholders' status as shareholders or their ownership interest in the corporation; (2) the wrongdoer owes a duty to the shareholders for some reason other than their status as shareholders; or (3) the injuries or damages were sustained by individual

shareholders rather than by the corporation. *Id.* (citing *Gemstar Ltd. v. Ernst & Young*, 183 Ariz. 148, 157, 901 P.2d 1178, 1187 (App. 1995), *vacated on other grounds*, 185 Ariz. 493, 917 P.2d 222 (1996)); *see generally* William Meade Fletcher, *13 Fletcher Cyclopaedia of the Law of Private Corporations* § 5939, at 23 (Timothy P. Bjur & James Solheim perm. ed. rev. vol.1995).

#32. Pursuant to the well-established Arizona rule, Morningthunder does not have standing to bring suit on behalf of either Community Water Company or the Farmer's Investment Company as a member or shareholder of those entities. Additionally, even if one of the exceptions to this general rule applied (and they do not), Morningthunder failed to allege any facts that entitle him to utilize such exceptions and to bring a claim on behalf of either Community Water Company or the Farmer's Investment Company. Specifically, Morningthunder's Complaint fails to allege any facts relating to: (1) Morningthunder's interest in and relationship to the Community Water Company and Farmer's Investment Company; (2) the manner in which Augusta's alleged behavior affected the Community Water Company and Farmer's Investment Company; (3) the alleged duty that Augusta owed to the Community Water Company and Farmer's Investment Company; and (4) the alleged injuries or damages that were sustained by the Community Water

Company and Farmer's Investment Company as a result of the alleged behavior of Augusta.

#33. In short, Morningthunder failed to allege any facts in the Complaint relating to the Community Water Company or Farmer's Investment Company that would give him standing to bring suit on their behalf or upon which relief could be granted. Accordingly, for these collective reasons, Morningthunder does not have standing to bring suit on behalf of either the Community Water Company or Farmer's Investment Company.

#34. Finally, Morningthunder has also failed to identify a distinct or palpable injury or in any manner describe how he is the aggrieved party in this case. As noted above, the Arizona Supreme Court has established a rigorous standing requirement. *Fernandez*, 210 Ariz, at 140, 108 P.3d at 919. "To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury." *Id.* (quoting *Hull*, 192 Ariz, at 69, 961 P.2d at 1017). Indeed, Morningthunder has failed to allege he was injured by any alleged conduct by Augusta.

CONCLUSION

#35. Neither Morningthunder's Complaint nor his Opening Brief state an intelligible legal claim against Augusta. Further, Morningthunder fails to assert proper standing. For the foregoing reasons, Augusta requests this Court affirm the

decisions of the trial court to dismiss Momingthunder's Complaint in its entirety with prejudice. Augusta further requests its costs and fees for frivolous appeals under Rule 11, Arizona Rules of Civil Procedure and A.R.S. § 12-349.

RESPECTFULLY SUBMITTED this 14th day of April, 2008.

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