

COPY

SEP2 82007

PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

FENNEMORE CRAIG, P.C.
Ali J. Farhang (SBA # 19456, PCC # 65507)
One South Church Avenue
Suite 1000
Tucson, AZ 85701-1627
Telephone: (520) 879-6800
Email: afarhang@fclaw.com

Attorneys for Defendant
Augusta Resource Corporation

SUPERIOR COURT OF ARIZONA
PIMA COUNTY

STEVEN MORNINGTHUNDER,

No. C20075129

Plaintiff,

**MOTION TO DISMISS;
ALTERNATIVELY, MOTION FOR
MORE DEFINITE STATEMENT IN
COMPLIANCE WITH THE RULES OF
PLEADING**

v.

AUGUSTA RESOURCES, INC.;
FREPORT MCMORAN COPPER &
GOLD, INC.; and PHELPS DODGE
MINING COMPANY;

(ORAL ARGUMENT REQUESTED)

Defendants.

(Assigned to Hon. Paul E. Tang)

Pursuant to Rule 12(b)(6), Ariz.R.Civ.P., Defendant Augusta Resource Corporation ("Augusta"), incorrectly named as Augusta Resources, Inc. in the Complaint, requests that the Court dismiss Plaintiff Steven Morningthunder's Complaint with prejudice, on the grounds that his Complaint fails to state a claim upon which relief may be granted. Alternatively, pursuant to Rules 8(a), 10(b), and 12(e), Ariz.R.Civ.P., Augusta moves that Plaintiff be required to provide a more definite statement and comply with the rules of pleading.

This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

2 I. BACKGROUND

3 Plaintiff filed his Complaint on September 7, 2007 naming Augusta, Freeport
4 McMoran Copper & Gold, Inc. ("Freeport"), and Phelps Dodge Mining Company
5 ("Phelps") as defendants. Plaintiff's Complaint is wholly indecipherable. Plaintiff
6 apparently makes assertions on behalf of the earth and claims standing based on the fact
7 that he has "climbed its highest mountain, rafted the rage of its flooding river, tilled its
8 good soil with bared feet, and suffered to extirpate prior threat...." Complaint at p. 1.

9 Despite the lack of clarity of Plaintiff's Complaint, one aspect is clear - Plaintiff
10 makes no specific allegations of liability against Augusta. Plaintiff generally alleges "that
11 by defendants' dereliction of duty a necessary good for the continuation of life has been
12 degraded, and remains under prospect of further degradation...." Complaint at p. 2.
13 Plaintiff also refers to a transgression committed by an unnamed party, Cyprus Amax
14 Minerals Co., as well as Phelps and Freeport. Complaint at p. 1. Plaintiff does not
15 include Augusta in this list of culpable parties. Instead, the only specific mention of
16 Augusta, on page 5, fails to allege, *inter alia*, any wrongdoing by Augusta whatever.

17 II. ARGUMENT

18 a. Standard of Review for Motion to Dismiss

19 A Rule 12(b) motion to dismiss for failure to state a claim, which assumes the
20 complaint's allegations are true, attacks the legal sufficiency of the complaint. *Parks v.*
21 *Macro-Dynamics, Inc.*, 121 Ariz. 517, 519, 591 P.2d 1005, 1007 (App. 1979); *see also*
22 *SmileCare Dental Group v. Delta Dental Plan of Cal, Inc.*, 88 F.3d 780, 783 (9th Cir.
23 1996) (A claim may be dismissed either because it asserts a legal theory that is not
24 cognizable as a matter of law or because it fails to allege sufficient facts to support a
25 cognizable legal claim.).¹ Dismissal is appropriate if "as a matter of law... plaintiff's

26 For purposes of this Motion, Rule 12(b)(6) of the Federal Rules of Civil Procedure is identical to its Arizona

1 would not be entitled to relief under any interpretation of the facts susceptible to proof."
2 *Fidelity Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 222 \ 4, 954 P.2d 580, 582
3 (1998); *see also Southwestern Paint & Varnish Co. v. Ariz. Dep't of Env'tl. Quality*, 191
4 Ariz. 40, 41, 951 P.2d 1232, 1233 (App. 1997), *aff'd in part*, 194 Ariz. 22, 976 P.2d 872
5 (1999) (holding dismissal for failure to state a claim is proper when plaintiff cannot prove
6 any set of facts justifying relief). The test is whether enough is stated to entitle the pleader
7 to relief on some theory of law susceptible of proof under the allegations made. Daniel J.
8 *McAuliffe*; *Arizona Civil Rules Handbook*, 8 (2006 ed.).

9 The court's review is limited to the contents of the complaint. *See Allarcom Pay*
10 *Television, Ltd. v. Gen Instrument Corp.*, 69 F.3d 381, 385 (9th Cir. 1995). In
11 determining the sufficiency of a pleading on a Rule 12(b) motion, the court will consider
12 all *well* pleaded facts to be true, but conclusions of law or unwarranted deductions are not
13 credited. *Aldabbagh v. Ariz. Dept. of Liquor Licenses*, 162 Ariz. 415, 417, 783 P.2d 1207,
14 1209 (App. 1989); *Folk v. City of Phoenix*, 27 Ariz.App. 146, 149, 551 P.2d 595, 598
15 (1976). A court should grant a motion if it appears certain that the plaintiff would not be
16 entitled to relief under any state of facts susceptible of proof under the claim stated. *Lakin*
17 *Cattle Co. v. Engelthaler*, 101 Ariz. 282, 284, 419 P.2d 66, 68 (1966).

18 Augusta acknowledges that even if its request for Rule 12(b)(6) dismissal is
19 granted, Plaintiff may be given an opportunity to amend the Complaint, if such
20 amendment will cure its defects. *Republic Nat 7 Bank of New York v. Pima County*, 200
21 Ariz. 199, 205 U 23, 25 P.3d 1, 7 (App. 2001); *Sun World Corp. v. Pennysaver, Inc.*, 130
22 Ariz. 585, 589, 637 P.2d 1088, 1092 (App. 1981). Augusta shall rely upon the discretion
23 of the Court in this regard.

24 **b. Plaintiff's Pro Se Status Should Not Deter Dismissal.**

25 Based upon the significant deficiencies in Plaintiff's Complaint, dismissal of this
26 counterpart.

1 action would not be an overly draconian measure, even in light of Plaintiff's *pro se* status.
2 Although Augusta acknowledges that *pro se* pleadings are viewed with liberality and held
3 to less stringent standards, unrepresented plaintiffs are not relieved of their obligation to
4 allege sufficient facts to support a cognizable claim. *See Findlay v. Lewis*, 171 Ariz. 454,
5 461, 831 P.2d 830, 837 (App. 1992), *overruled on other grounds*, 172 Ariz. 343, 837 P.2d
6 145 (1992); *see also Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996).

7 c. **In the Alternative, Plaintiff Should be Required to Provide a More**
8 **Definite Statement Regarding the Nature of His Claims.**

9 Even if this Court declines to dismiss Plaintiff's Complaint, the Complaint is
10 written in such a manner that Augusta is unable to respond and is left to guess as to the
11 actual claims Plaintiff may be asserting against Augusta. "If a pleading to which a
12 responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably
13 be required to frame a responsive pleading, the party may move for a more definite
14 statement before interposing a responsive pleading." Ariz.R.Civ.P. 12(e) (2007); *see also*
15 *Huish v. Lopez*, 70 Ariz. 201, 205, 218 P.2d 727, 730 (Ariz. 1950). A defendant may
16 move for a more definite statement if there is any doubt as to what is meant by the
17 allegations of the complaint. *Markel v. Transamerica Tide Ins. Co.*, 103 Ariz. 353, 357,
18 442 P.2d 97, 101 (1968), *overruled on other grounds by Burch & Cracchiolo, P.A. v.*
19 *Pugliani*, 144 Ariz. 281, 697 P.2d 674 (1985).

20 The granting of a motion for a more definite statement lies in the sound discretion
21 of the court. *Shill v. Jones*, 21 Ariz. 465, 467, 190 P. 77, 78 (Ariz. 1920). The motion
22 should be granted when the complaint is wholly uninformative as to the basis of the claim.
23 2A James Wm. Moore et al., Moore's Federal Practice f12.18(1) (2d ed. 1996).

24 Plaintiff sets forth allegations that are so vague and ambiguous that Augusta cannot
25 reasonably frame a responsive pleading. At a minimum, Plaintiff should be required to
26 comply with the rules of pleading and adequately detail the nature of his claims.

1 **III. CONCLUSION**

2 For the foregoing reasons, Augusta respectfully requests that this Court dismiss
3 Plaintiff's Complaint with prejudice. Alternatively, Augusta moves this Court for an
4 order requiring Plaintiff to submit an amended complaint in compliance with the pleading
5 requirements of the Arizona Rules of Civil Procedure, and with a more definite statement
6 of the nature of his claims, within fifteen (15) days of the Court's Order. Should Plaintiff
7 fail to do so, Augusta respectfully requests the Court dismiss Plaintiff's Complaint, with
8 prejudice.


9 DATED this 28th day of September, 2007.

10

FENNEMORE CRAIG, P.C.

11

12

By 
Ali J. Farhang
Attorneys for Defendant
Augusta Resource Corporation

13

14

15

16

COPY of the foregoing mailed
this 28th day of September, 2007 to:

17

Steven Morningthunder
345-A South Paseo Sarta
Green Valley, AZ 85614

18

19

Plaintiff Pro Se

20

21

22

23

24

25

26