

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

STEVEN MORNINGTHUNDER,

Appellant,

v.

AUGUSTA RESOURCE  
CORPORATION; PHELPS DODGE  
MINING COMPANY; and  
FREEPORT-MCMORAN COPPER &  
GOLD INC.,

Appellees.

2 CA-CV 2008-0008

Pima County Superior Court  
No. C20075129

**ANSWERING BRIEF OF APPELLEES PHELPS DODGE MINING  
COMPANY AND FREEPORT-MCMORAN COPPER & GOLD INC.**

Bradley J. Glass (022463)  
GALLAGHER & KENNEDY, P.A.  
2575 East Camelback Road  
Phoenix, Arizona 85016-9225  
(602)530-8000  
Attorney for Appellees Phelps Dodge  
Mining Company and Freeport-McMoRan  
Copper & Gold Inc.

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## STATEMENT OF THE CASE

This appeal presents two questions for the Court's consideration. The first question is whether the trial court properly dismissed *pro se* Appellant Steven Momingthunder's ("Morningthunder") Complaint pursuant to Rule 12(b)(6)\*\* of the Arizona Rules of Civil Procedure. The second question is whether the trial court properly dismissed Momingthunder's claims against Appellees Freeport-McMoRan Copper & Gold Inc. ("FCX") and Phelps Dodge Mining Company ("PDMC") even though neither filed a motion to dismiss, answered, or otherwise responded to the Complaint.

In regard to the first question, the trial court properly dismissed Momingthunder's Complaint with prejudice pursuant to Ariz. R. Civ. P. 12(b)(6) for three reasons: (1) Morningthunder lacked standing to bring the claims asserted in the Complaint; (2) Morningthunder failed to set forth a single claim in the complaint upon which relief could be granted; and (3) Morningthunder failed to set forth facts to support the claims in the Complaint. Simply put, Morningthunder filed a Complaint that was so flawed, disorganized, and incomprehensible that it failed to set forth any claim upon which the trial court could grant relief. Accordingly, the trial court correctly dismissed the Complaint with prejudice pursuant to Ariz. R. Civ. P. 12(b)(6).

In regard to the second question, the trial court properly dismissed Morningthunder's claims against FCX and PDMC even though neither filed a motion to dismiss, answered, or otherwise responded to the Complaint. Appellee Augusta Resources Corporation ("Augusta") filed a motion to dismiss the Complaint and specifically requested that the Complaint be dismissed in its entirety with prejudice. After reviewing the motion to dismiss, considering the parties' briefing, and conducting oral argument, the trial court determined that Morningthunder's Complaint failed to state a claim upon which relief could be granted. Accordingly, pursuant to Ariz. R. Civ. P. 12(b)(6) the trial court granted the precise relief sought by Augusta and dismissed the Complaint in its entirety with prejudice.

Morningthunder now appeals the trial court's decision to dismiss his Complaint in its entirety with prejudice, and, therefore, the Court has jurisdiction pursuant to A.R.S. § 12-2101(B) (2008).

### **STATEMENT OF FACTS**

On September 7, 2007, Morningthunder filed his Complaint in the Arizona Superior Court in Pima County (the "Complaint"). IR<sup>1</sup> 2 (Apx.<sup>2</sup>

"IR" refers to the Pima County Superior Court's Index of Record.

"Apx." refers to FCX' and PDMC's Appendix filed along with this Response Brief.

Tab A). The Complaint named Augusta, FCX,<sup>3</sup> and PDMC as defendants.<sup>4</sup>

*Id.* Morningthunder completed service of the Complaint on FCX and PDMC on September 17, 2007. IR 4.

It is unclear from the language in the Complaint what exact claims Morningthunder is asserting against the respective defendants. IR 2 (Apx. Tab A). What is clear is that the Complaint does not comply with the requirements of Ariz. R. Civ. P. 8(a) & 10(b), and, therefore, it is confusing and difficult to understand. The Complaint does not contain a short and plain statement of the trial court's jurisdiction over the claims asserted, a

Morningthunder's Opening Brief does not contain any allegations against or references to FCX. Accordingly, it is unclear if Morningthunder is appealing the trial court's dismissal of the claims against FCX. Notwithstanding this fact, FCX will respond to each of Morningthunder's arguments.

Morningthunder's claims relate in part to the Twin Buttes Mine, which is owned and operated by Phelps Dodge Sierrita, Inc., a wholly owned subsidiary of Cyprus Climax Metals Company. Cyprus Climax Metals Company is a wholly owned subsidiary of Cyprus Metals Company, which is a wholly owned subsidiary of Cyprus Amax Minerals Company. Cyprus Amax Minerals Company is a wholly owned subsidiary of Phelps Dodge Corporation, which is a wholly owned subsidiary of FCX. Consequently, FCX is a higher tier parent corporation of Phelps Dodge Sierrita, Inc. PDMC is not a higher tier parent corporation of or affiliated with the Twin Buttes Mine. Notwithstanding the fact that Phelps Dodge Sierrita, Inc. is the correct defendant and appellee in regard to claims relating to the Twin Buttes Mine, FCX and PDMC will respond to Morningthunder's appeal, as they did not have an opportunity to raise this issue with the trial court before it dismissed the Complaint in its entirety with prejudice.

Tab A). The Complaint named Augusta, FCX,<sup>3</sup> and PDMC as defendants.<sup>4</sup>

*Id.* Morningthunder completed service of the Complaint on FCX and PDMC on September 17, 2007. IR 4.

It is unclear from the language in the Complaint what exact claims Morningthunder is asserting against the respective defendants. IR 2 (Apx. Tab A). What is clear is that the Complaint does not comply with the requirements of Ariz. R. Civ. P. 8(a) & 10(b), and, therefore, it is confusing and difficult to understand. The Complaint does not contain a short and plain statement of the trial court's jurisdiction over the claims asserted, a

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short and plain statement of any claim showing that Momingthunder is entitled to relief, or a demand for judgment. Instead, the Complaint is so disorganized and indecipherable that FCX and PDMC are unable to summarize Momingthunder's factual assertions against them in a concise manner for this Court - other than to note that the claims appear to relate to groundwater at or near the Twin Buttes Mine.

On October 3, 2007, FCX and PDMC filed a Motion for Extension of Time to Answer or Otherwise Respond to the Complaint ("Motion for Extension"). IR 8 (Apdx. Tab B). The trial court granted the Motion for Extension on October 15, 2007. IR 11 (Apdx. Tab C). Pursuant to the trial court's order, FCX and PDMC had until November 7, 2007 to answer or otherwise respond to the Complaint. *Id.*

After filing its Motion for Extension, FCX and PDMC learned that Augusta had filed a Motion to Dismiss and Alternative Motion for More Definite Statement in Compliance with the Rules of Pleading on September 28, 2007 (the "Motion to Dismiss"). IR 5 (Apdx. Tab D). Augusta moved the trial court to dismiss all of the claims asserted by Mr. Momingthunder pursuant to Ariz. R. Civ. P. 12(b)(6). Specifically, Augusta based its Motion to Dismiss on three arguments: (1) Momingthunder lacked standing to bring the claims asserted in the Complaint; (2) Momingthunder failed to set forth a

single claim in the complaint upon which relief could be granted; and (3) Morningthunder failed to set forth facts to support the claims in the Complaint. In short, Augusta asserted that Morningthunder's failure to comply with the requirements of Ariz. R. Civ. P. 8(a) & 10 and to set forth a single coherent claim rendered the Complaint so defective that it must be dismissed.

-The trial court originally set oral argument on the Motion to Dismiss for November 5, 2007 at 10:00 a.m. IR 6 (Apdx. Tab E). Morningthunder filed a Response in Opposition to the Motion to Dismiss on October 22, 2007. IR 7 (Apdx. Tab F). Augusta filed a Reply in Support of its Motion to Dismiss on October 31, 2007. IR 16. FCX and PDMC did not join in or otherwise respond to Augusta's Motion to Dismiss.

The trial court conducted oral argument on the Motion to Dismiss on November 5, 2007 at 9:30 a.m. two days before the responsive pleading of FCX and PDMC were due.<sup>5</sup> Certified Transcript (Apdx. G). At the conclusion of the oral argument, the trial court dismissed the Complaint in

Counsel for FCX and PDMC did not receive notice that the trial court had moved the oral argument on the Motion to Dismiss from 10:00 a.m. to 9:30 a.m. Accordingly, counsel for FCX and PDMC appeared at 9:45 a.m., which was after the oral argument on the Motion to Dismiss had concluded. Counsel for FCX and PDMC was advised that the Complaint had been dismissed in its entirety as to all parties with prejudice. This is reflected in the Court's Minute Entry. IR 17 (Apdx. Tab H).

its entirety with prejudice pursuant to Ariz. R. Civ. P. 12(b)(6), which was memorialized in a Minute Entry dated November 5, 2007. IR 17 (Apdx. Tab H). Morningthunder filed his Notice of Appeal on December 6, 2007. IR 22. Morningthunder filed his Opening Brief on March 4, 2007.

### **ISSUES PRESENTED**

1. Did the trial court properly dismiss Morningthunder's claims against FCX and PDMC even though they had not moved for dismissal, answered, or otherwise responded to the Complaint?

2. Did the trial court abuse 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<sup>6</sup>**

#### **I. STANDARD OF REVIEW**

The issues presented by this appeal relate to the trial court's decision to grant a 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, 281, 130 P.3d 978, 980 (2006). In making this determination, Arizona appellate courts will 'uphold

<sup>6</sup> Pursuant to ARCAP 13(f), FCX and PDMC incorporate by reference the arguments set forth in Augusta's Answering Brief.

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)).

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, 428 P.2d 990 (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 *Dochery v. Central Ariz. Light and Power Co.*, 45 Ariz. 434, 439, 45 P.2d 656 (1935) (only well-pleaded facts accepted as true, not inferences that are not necessarily implied by such facts)).

Finally, because Morningthunder represents himself, FCX and PDMC acknowledge *that pro se* pleadings generally are viewed with liberality and held to less stringent standards. Nonetheless, *pro se* parties are not relieved

of their obligation to allege sufficient facts to support a cognizable claim.

*See Findlay v. Lewis*, 171 Ariz. 454, 461, 831 P.2d 830, 837 (App. 1992),

*overruled on other grounds*, 172 Ariz. 343, 837 P.2d 145 (1992). The

failure of a *pro se* party to allege such facts is sufficient grounds for

dismissing a complaint.

**II. MORNINGTHUNDER'S OPENING BRIEF IS DEFICIENT AND THE COURT SHOULD EITHER DISMISS THE APPEAL, STRIKE PARTS OF THE OPENING BRIEF, OR DISREGARD THE OBJECTIONABLE PARTS OF THE OPENING BRIEF.**

Before addressing the substantive issues contained in the Opening Brief, FCX and PDMC note several deficiencies in Morningthunder's Opening Brief for the Court's consideration. Specifically, Morningthunder has failed to comply with Rule 13 of the Arizona Rules of Civil Appellate Procedure. While these flaws might normally be fatal and grounds for dismissal, FCX and PDMC recognize that 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. Nonetheless, FCX and PDMC will outline the deficiencies of Morningthunder's Opening Brief and will leave it to the Court's discretion whether such flaws constitute grounds for dismissing Morningthunder's appeal, striking all or part of the Opening Brief, or disregarding the objectionable parts of the Opening Brief- all of

which FCX and PDMC believe are appropriate sanctions for Momingthunder's failure to comply with ARCAP 13.

A. **Morningthunder's Opening Brief does not set forth a coherent statement of the issues as required by ARCAP 13(a)(5).**

Momingthunder's Opening Briefs first major flaw is that it does not comply with ARCAP 13(a)(5), which requires an appellant to provide "[a] statement of the issues presented for review." Momingthunder defines the issues on appeal as follows:

Baseless and clever obtention [sic] of dismissal leaves the fundamental need for adjudication unachieved. Pollution has been caused by the inaction of Phelps Dodge and Augusta resources postures intent devoid of any concern for the integrity of the ecosystem aquifer. The very concept of sustainability is assailed from all sides, and the foundation of the Arizona Groundwater Code is grievously flawed.

The court is called upon to further the Civil commons, and while it might rightly judge me as questionably sufficient in knowledge of law and procedure, that is counterbalanced in that the court will likely have to reach toward my comprehension of exponential resource depletion and the ecological verities within this suddenly finite world.

Morningthunder's Opening Brief, p. 13.

FCX and PDMC do not understand either Morningthunder's statement of the issues or what precise issues Momingthunder is raising on appeal. Similar to his Complaint, Morningthunder's Opening Brief is disorganized, difficult to understand in parts, and totally incomprehensible in other parts.

Consequently, FCX and PDMC are forced to guess what issues Morningthunder has raised. Morningthunder's failure to comply with ARCAP 13(a)(5) and to set forth a concise and coherent statement of the issues has made it difficult for FCX and PDMC to respond to Morningthunder's Opening Brief. Notwithstanding this difficulty, FCX and PDMC have set forth and will brief those issues that they believe are the subject of Morningthunder's appeal pursuant to ARCAP 13(b)(1). In ruling on this appeal, FCX and PDMC request that the Court only consider the issues briefed by FCX, PDMC, and Augusta.

Additionally, to the extent that Morningthunder raises different or additional issues in his Reply Brief, FCX and PDMC request that the Court disregard those issues. *See, e.g., In re Marriage of Pownall*, 197 Ariz. 577, 5 P.3d 911 (App. 2000), *on remand* 2000 WL 35443118 (holding that arguments raised for the first time in a reply brief are deemed waived).

**B. Morningthunder's Opening Brief does not comply with ARCAP 13(a)(6).**

Morningthunder's Opening Brief does not comply with ARCAP 13(a)(6), which requires that an appellant's brief "contain 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." Arizona appellate courts have held that they will not consider issues that are

not properly briefed in compliance with ARCAP 13(a)(6). *See, e.g., State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990), *review denied* (holding that courts will not address arguments on appeal if the appellant's brief does not contain contentions of appellant with respect to issues presented); *Watahomigie v. Arizona Bd. of Water Quality Appeals*, 181 Ariz. 20, 26, 887 P.2d 550, 556 (App. 1994) {citing *Coggins v. Wright*, 22 Ariz. App. 217, 219, 526 P.2d 741, 743 (1974)}.

Morningthunder's Opening Brief is deficient because it does not: (1) raise any coherent issues for review; (2) state any coherent or rational contentions or supporting reasoning for any issues raised; (3) cite any relevant authority in support of his claims; (4) cite to relevant portions of the trial court record that support the issues raised; or (5) address the substance of the trial court's decision to dismiss the Complaint in its entirety with prejudice. Because Morningthunder's Opening Brief is incomprehensible and fails to properly brief a single issue for the Court, FCX and PDMC urge the Court to either dismiss Morningthunder's appeal in its entirety, strike those portions of Morningthunder's Opening Brief that fail to comply with ARCAP 13(a)(6), or disregard the deficient portions of Morningthunder's Opening Brief.

**C. The Appendix to Momingthunder's Opening Brief contains documents that are prohibited by ARCAP 13(d).**

The Appendix to Momingthunder's Opening Brief contains documents that are prohibited by ARCAP 13(d) and citations to those documents. *See, e.g.*, Momingthunder's Opening Brief, p. 6. Specifically, ARCAP 13(d) provides that appendices to briefs may be used when determination of the issues presented requires the study of "constitutional provisions, rules, statutes, regulations or instructions given or refused" and that the relevant parts of those documents may be reproduced in an appendix. Further, ARCAP 13(d) states that an appendix may include additional items from the record or extended quotations from cases and authorities where such quotations are required for proper presentation of the issues. Even given this limitation on the types of documents that can be contained in an appendix, only evidence which was admitted into or part of the record can be considered on appeal. *Schaefer v. Murphey*, 131 Ariz. 295, 640 P.2d 857 (1982).

Momingthunder's Opening Brief contains fourteen documents marked as Tabs #1 through #14, which Morningthunder asserts explain terminology and concepts in the Complaint and Momingthunder's Opening Brief. These documents were referenced in a footnote in Momingthunder's Response in Opposition to the Motion to Dismiss. IR 7 (Apdx. Tab F). The documents

originate from a website that is run by Morningthunder and are excerpts from academic and scientific books referenced by Morningthunder in his Response in Opposition to the Motion to Dismiss, at oral argument on the Motion to Dismiss, and in Morningthunder's Opening Brief. Although the website was cited by Morningthunder in his Response in Opposition, none of the documents were submitted to the trial court or are readily accessible through any resource other than Morningthunder's website. Morningthunder also attached a newspaper article as Tab W that is referenced for the first time on appeal. Because Tabs #1 through #14 and W are academic and scientific articles that were not submitted to the trial court, Morningthunder improperly included them in his Appendix in violation of ARCAP 13(d). Therefore, FCX and PDMC request that such documents either be stricken from Morningthunder's Appendix or that the Court not consider them when ruling on this appeal.

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, FCX and PDMC request that the document either be

stricken from Morningthunder's Appendix or that the Court disregard it when ruling on this matter.

**III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING MORNINGTHUNDER'S CLAIMS AGAINST FCX AND PDMC PURSUANT TO ARIZ. R. CIV. P. 12(B)(6) EVEN THOUGH THEY HAD NOT MOVED FOR DISMISSAL, ANSWERED, OR OTHERWISE RESPONDED TO THE COMPLAINT.**

**A. FCX and PDMC fully complied with the Arizona Rules of Civil Procedure and the Pima County Local Rules.**

Morningthunder asserts that there was a procedural error relating to the Motion to Dismiss due to FCX' and PDMC's alleged failure to comply with the Arizona Rules of Civil Procedure and the Pima County Local Rules and to file an answer or otherwise respond to the Complaint.

Morningthunder's Opening Brief, p. 14. The record reveals that this assertion is without merit.

FCX and PDMC fully complied with their obligations under both the Arizona Rules of Civil Procedure and the Pima County Local Rules. FCX and PDMC were served with the Complaint on September 17, 2007. IR 4. On October 3, 2007, FCX and PDMC timely filed a Motion for Extension. IR 8 (Apdx. Tab B). The trial court granted the Motion for Extension on October 15, 2007 and gave FCX and PDMC an extension to November 7, 2007 to answer or otherwise respond to the Complaint. IR 11 (Apdx. Tab

\*

C). On November 5, 2007, the trial court dismissed the Complaint in its entirety with prejudice. 1R 17 (Apx. Tab H). Because the trial court dismissed the Complaint on November 5, 2007, FCX and PDMC were not required to (and did not) file an answer or otherwise respond to the Complaint. As the record demonstrates, FCX and PDMC fully complied with the Arizona Rules of Civil Procedure and the Pima County Local Rules, and, therefore, Morningthunder's claim that there was procedural error in the trial court relating to the Motion to Dismiss is without merit.

B. The trial court properly granted the Motion to Dismiss in its entirety based upon the specific relief sought in the Motion to Dismiss.

Morningthunder next argues that the trial court erred in dismissing his claims against FCX and PDMC because neither FCX nor PDMC filed a motion to dismiss or joined in Augusta's motion to dismiss. In making this argument, Morningthunder ignores the plain language of the relief sought in Augusta's Motion to Dismiss, which requests:

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.

Motion to Dismiss, p. 1.

The language in the Motion to Dismiss specifically requests that the trial court dismiss the Complaint in its entirety, including all of Momingthunder's claims against FCX and PDMC. The trial court ultimately granted the Motion to Dismiss after reviewing the Motion to Dismiss, Momingthunder's Response in Opposition, Augusta's Reply in Support of the Motion to Dismiss, and the oral argument of the parties. In doing so, the trial court granted the precise relief sought by Augusta in its Motion to Dismiss and dismissed the Complaint in its entirety with prejudice. The trial court's decision to dismiss the claims against FCX and PDMC without their participation was both consistent with the relief sought in the Motion to Dismiss and within the discretion of the trial court. Therefore, Momingthunder's argument to the contrary is without merit and is unsupported by any legal authority to the contrary.

**C. FCX and PDMC did not engage in any *ex parte* communications or hearings.**

**In** his Statement of the Case, Momingthunder asserts that the trial court dismissed his claims against FCX and PDMC with prejudice after either an *ex parte* hearing or communication with the trial court. Momingthunder's Opening Brief, p. 5. Momingthunder does not raise this argument again in his Opening Brief and does not provide any citations or evidence that such a hearing or communication occurred. FCX and PDMC

suspect that Momingthunder used the term *ex parte* without full knowledge of its meaning or of the serious nature of the allegation. However, Momingthunder's assertion is so serious that FCX and PDMC need to address the allegation directly for the Court, without regard to Momingthunder's intent.

The record demonstrates that FCX and PDMC did not engage in any *ex parte* communications with the trial court and that no *ex parte* hearing occurred. In Arizona, *ex parte* refers either to a legal proceeding brought by one person in the absence of and without representation or notification of other parties or to improper unilateral contacts with a court, arbitrator, or represented party without notice to the other party or counsel for that party. *Ex parte* communications and hearings are expressly prohibited in Arizona by the Arizona Rules of Professional Responsibility and established case law. See 17 A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof. Conduct, ER 3.5(a, b), ER 8.4 (a, c); *Matter of Bemis*, 189 Ariz. 119, 938 P.2d 1120 (1997).

Momingthunder's allegation that an *ex parte* hearing or communication occurred in the trial court is not unsupported by the record or any evidence cited by Momingthunder. In fact, the record demonstrates that no *ex parte* hearing or communication occurred. Specifically, the trial

court conducted an oral argument on the Motion to Dismiss on November 5, 2007. At the conclusion of the oral argument, the trial court granted the Motion to Dismiss, which is reflected in a Minute Entry dated November 5, 2007. IR 17 (Apx. Tab H). After the oral argument had concluded, the undersigned counsel for FCX and PDMC, who had not received notice that the trial court had moved the time of the oral argument, appeared at the trial court. The trial court's staff advised counsel for FCX and PDMC that the Complaint had been dismissed with prejudice as to all parties, which is reflected in the Minute Entry. The Minute Entry demonstrates that Morningthunder's claim is without merit.

**IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE MOTION TO DISMISS WITH PREJUDICE.**

The trial court determined that Morningthunder'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) Morningthunder lacked standing to bring suit against the defendants; (2) Morningthunder failed to set forth the legal claims upon which relief could be granted; and (3) Morningthunder failed to allege facts sufficient to support his legal claims. In short, the trial court held that Morningthunder's failure to set forth legal a single coherent 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). The rationale behind the trial court's decision to grant the Motion to Dismiss applied equally to the claims that Momingthunder asserted against Augusta, FCX, and PDMC. Consequently, FCX and PDMC will address each of these arguments as they apply to Morningthunder's claims against them.

**A. The trial court correctly determined that Momingthunder lacked standing to assert claims on behalf of the Earth, the Santa Cruz Valley Ecosystem, the Community Water Company, Farmer's Investment Company, and himself.**

The trial court properly dismissed the Complaint because Momingthunder failed to allege facts in the Complaint sufficient to establish that he has standing to bring suit against FCX and PDMC on behalf of the Earth, Santa Cruz Valley Ecosystem, Community Water Company, Farmer's Investment Company, and himself.

**1. Standing.**

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) (citing *Worth v. Seldin*, All U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975))). 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).

2. Morningthunder does not have standing to bring suit on behalf of the Earth or the Santa Cruz Valley Ecosystem.

In Morningthunder's Opening Brief and Complaint, Morningthunder asserts that he has standing to bring claims against FCX and PDC on behalf of the Earth and the Santa Cruz Valley Ecosystem for an "assault upon the ecosystem." Complaint, p. 1. Morningthunder's standing to bring such claims is explained in the following allegation:

Therefore, having climbed its highest mountain, rafted the rage of its flooding river, tilled its good soil with bared feet, and

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suffered to extirpate prior threat, plaintiff does affirm as native to have merit before this Santa Cruz Valley ecosystem, to be the voice of its unheard injuries, its will to endure and provide sustenance without end to the human and other Earthly beings. The plaintiffs are two, as one voice.

Complaint, p. 1.

In its Response to the Motion to Dismiss and Morningthunder's Opening Brief, Morningthunder failed to identify a single legal authority that allows him to bring claims on behalf of the Earth and the Santa Cruz Valley Ecosystem. No such authority exists. In a similar fact pattern under a different standard, 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, 565-67, 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, Morningthunder 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).

3. Momingthunder does not have standing to bring suit on behalf of the Community Water Company or the Farmer's Investment Company.

Momingthunder next asserts that he has standing to bring claims against FCX and PDC on behalf of the Community Water Company and the Farmer's Investment Company. IR2 (Apdx. A), pp. 1, 3, 4, & 6. Arizona law is clear that Momingthunder does not have standing to bring suit on behalf of either entity as a member or shareholder.

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), *abrogation on other grounds recognized by Franko v. Mitchell*, 158 Ariz. 391, 399-400 n. 1, 762 P.2d 1345, 1353-54 n. 1 (App. 1988); *Johnson v. Gilbert*, 127 Ariz. 410, 412, 621 P.2d 916, 918 (App. 1980), *overruled on other grounds* 213 Ariz. 640, 644 (2006); *Albers v. Edelson Technology Partners L.P.*, 201 Ariz. 47, 31 P.3d 821, 826 (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 *GemstarLtd. 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).

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 failed 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 FCX' and PDMC alleged behavior affected the Community Water Company and Farmer's Investment Company; (3) the alleged duty that FCX and

PDMC 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 behavior of FCX and PDMC. In short, Momingthunder 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. For these collective reasons, Momingthunder does not have standing to bring suit on behalf of either the Community Water Company or Farmer's Investment Company.

4. **Momingthunder failed to allege any distinct or palpable injury to him, and, therefore, does not have standing to bring suit on his own behalf.**

Momingthunder alleges that he has standing to bring claims on his own behalf against FCX and PDMC because "a necessary good for the continuation of his life has been degraded, and remains under prospect of further degradation." IR 2 (Apx. A), p. 2. This is not a sufficient injury to grant Momingthunder standing to bring suit against FCX and PDMC under Arizona law.

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) (citing *Warth*, 422 U.S. at 501).

It is clear that he has failed to allege any specific harm or injury as a result of FCX and PDMC. Because Momingthunder has failed to allege "a distinct and palpable injury" resulting from any conduct of FCX and PDMC, he has no standing to bring any individual claim against either FCX or Momingthunder. *Hull*, 192 Ariz, at 69, 961 P.2d at 1017.

**B. The trial court correctly determined that Momingthunder failed to set forth both a legal claim upon which relief could be granted against FCX and PDMC and facts to support a legal claim.**

The trial court properly dismissed the Complaint because Momingthunder failed to set forth any claim upon which relief could be granted against FCX and PDMC or any facts to support such claims. The allegations in the Complaint are indecipherable because Momingthunder failed to comply with a single one of the requirements of Ariz. R. Civ. P. 8(a) & 10(b). Specifically, the Complaint contains no structure or organization. It does not include a short or plain statement of the grounds upon which the court's jurisdiction depends. It fails to define the statute or common law cause of action that is being asserted. The Complaint fails to set forth any facts to support a viable cause of action against FCX and PDMC. It fails to set forth a demand for judgment against any party that

would entitle Morningthunder to relief. In short, the Complaint totally fails to comply with Ariz. R. Civ. P. 8(a) & 10 and is so defective that it does not set forth a single claim (or facts to support a claim) upon which relief could be granted. For these reasons, the Court properly dismissed Morningthunder's claims in the Complaint against FCX and PDMC.

In his Opening Brief, Morningthunder argues that the trial court erred because he had brought "suit against Phelps Dodge under common law for gross negligence as stated on page 2, lines 14-21, *Complaint*."

Morningthunder's Opening Brief, p. 15. The citation provides:

.. . the latter two as the defendants, to wit, gross negligence in the custodianship of the Twin Buttes Mine, 31° 52" N & 111° 9" W, located in Pima County and adjacent to Green Valley, leaving the open pit Mine without sufficient operating maintenance for an extended period, as a vast exposed rain-driven injection well funneling into itself the mine runoffs due to the excavated depth of the Mine significantly below the static water table level, thus enabling a most unnatural and fast vector of the pollutions under custodianship into the common aquifer.

Additionally, Morningthunder explained the gross negligence claim as follows:

The process of dismissal achieved by Phelps Dodge is entirely off the record, with no moment of open court involving both parties, with no written answer or pleading for dismissal. It would have had to unjustly rely upon the supposition of "indecipherability", for the allegations are undoubtedly in the nature of a valid claim: "thus enabling a most unnatural and fast vector of the pollutions under custodianship into the common aquifer": page 2, line 19-20, *Complaint*, and "Plaintiff

alleges that by defendant's dereliction of duty a necessary good for the continuation of his life has been degraded, and remains under prospect of further degradation", page 3, line 1-3, *Complaint*.

Morningthunder's Opening Brief, p. 12.

A claim of gross negligence is recognized in Arizona. A party is grossly or wantonly negligent if he or she acts or fails to act when he or she knows or has reason to know facts which would lead a reasonable person to realize that his or her conduct not only creates an unreasonable risk of bodily harm to others but also involves a high probability that substantial harm will result. *Armenta v. City of Casa Grande*, 205 Ariz. 367, 373, 71 P.3d 359, 365-66 (App. 2003); *Wilson v. Maricopa County*, 463 F.Supp.2d 987, 999 (D. Ariz. 2006); *Nichols v. Baker*, 101 Ariz. 151, 153, 416 P.2d 584, 586 (1966). Gross negligence differs from ordinary negligence in quality and not degree. *Kemp v. Pinal County*, 13 Ariz. App. 121, 124, 474 P.2d 840, 843 (1970). The Arizona Supreme Court described gross or wanton negligence as follows:

Wanton negligence is highly potent, and when it is present it fairly proclaims itself in no uncertain terms. It is "in the air," so to speak. It is flagrant and evinces a lawless and destructive spirit.

*Scott v. Scott*, 75 Ariz. 116, 122, 252 P.2d 571, 575 (1953)

The present case has none of the elements of gross negligence.

Momingthunder failed to allege that FCX or PDMC had knowledge or reason to know that their actions would create a risk of bodily harm or the high probability that substantial harm would occur. Momingthunder also failed to allege that FCX or PDMC or their employees "created an unreasonable risk of bodily harm to another together with a high degree of probability that substantial harm will result." Nor is there anything "in the air" that "proclaims" the presence of "gross negligence" in this case. In short, Momingthunder failed to plead all of the elements and requirements for a claim for gross negligence against FCX or PDMC.

#### V. CONCLUSION

For the foregoing reasons, FCX and PDMC respectfully request that the Court affirm the decision of the trial court to dismiss Momingthunder's Complaint in its entirety with prejudice pursuant to Ariz. R. Civ. P. 12(b)(6).