Court File No. CV-10-8577-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

MARCIA LUZMILA RAMÍREZ PIEDRA,
JAIME POLIVIO PÉREZ LUCERO and
ISRAEL PÉREZ LUCERO

Plaintiffs

and

TSX INC., TSX GROUP INC.,
WILLIAM STEARNS VAUGHAN and
JOHN GAMMON

Defendants

Court File No. CV-10-8575-00CL

A N D B E T W E E N:

MARCIA LUZMILA RAMÍREZ PIEDRA,
JAIME POLIVIO PÉREZ LUCERO and
ISRAEL PÉREZ LUCERO

Plaintiffs

and

COPPER MESA MINING CORPORATION,
WILLIAM STEARNS VAUGHAN and
JOHN GAMMON

Defendants

Court File No. CV-10-8576-00CL

A N D B E T W E E N:

MARCIA LUZMILA RAMÍREZ PIEDRA,
JAIME POLIVIO PÉREZ LUCERO and
ISRAEL PÉREZ LUCERO

Plaintiffs

and

COPPER MESA MINING CORPORATION,
WILLIAM STEARNS VAUGHAN and
JOHN GAMMON

Defendants

PLAINTIFFS' RESPONDING FACTUM
(Copper Mesa Defendants' Motion to Strike Out Statement of Claim)

March 12, 2010

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PART I – OVERVIEW

1. Motions to strike out the Plaintiffs Statements of Claim are brought by William Stearns Vaughan, John Gammon (the "Directors") and Copper Mesa Mining Corporation (the "Copper Mesa Defendants") under rule 21.01(1)(b) of the *Rules of Civil Procedure*.

2. These Motions to Strike the Statements of Claim must fail:

   a. Numerous courts have held that directors of corporations are liable for their tortious conduct even when acting in the course of their duties as directors. This principle extends to both negligent acts and omissions.

   b. Vaughan and Gammon committed various intentional acts and omissions as directors that caused the Plaintiffs to be assaulted and threatened.

   c. The Pleadings sufficiently set out how Vaughan and Gammon are proximate with the Plaintiffs, and how the harm suffered by the Plaintiffs was foreseeable.

   d. In any event, the test to strike out a claim is stringent. A claim will only be struck when it is plain, obvious and beyond doubt that the claim cannot succeed at trial. This stringent test is not met.

3. The motions should be dismissed.

PART II – SUMMARY OF FACTS

4. The Defendants William Stearns Vaughan ("Vaughan") and John Gammon ("Gammon") reside in Ontario are or were at the relevant times directors of Copper Mesa Mining Corporation ("Copper Mesa" formerly Ascendant Copper Corporation).

Statement of Claim dated March 3, 2009 (CV-09-373561) now CV-10-8576-00CL ["Statement of Claim 2009"], at paras. 19, 20.; Motion Record of the Defendants Copper Mesa Mining Corporation, William Stearns Vaughan and John Gammon ["Copper Mesa Defendants MR"], Tab 4 at p. 108

Copper Mesa Mining Corporation

5. Copper Mesa is a small Canadian junior mining corporation that was incorporated in 2005. Copper Mesa's corporate goal was to explore three mining concessions, known collectively as the Junín Property, located in the Intag region of the Republic of Ecuador, as a hoped-for first step towards the construction of a large open-pit copper mine.

Statement of Claim 2009, at paras. 22-25; Copper Mesa Defendants MR, Tab 4, p. at 109

Ascendant Copper Corporation, Prospectus: Initial Public Offering, dated October 14 2005, at pp. 6-7 ["Prospectus"]; Responding Motion Record of the Plaintiffs ["Plaintiffs RMR"], Tab 1[1]

6. Copper Mesa's business was limited, and focused almost exclusively on the development and exploration of the Junín Property. At the material time, all of Copper Mesa's main assets and operations were in Ecuador. In order to meet the technical requirements of Ecuadorian mining law, Copper Mesa conducts its business in Ecuador through Ecuadorian subsidiaries. Copper Mesa had complete control over the technical, operational, managerial and financial activities of all relevant subsidiaries at all times. Gerald Davis, a director and the Chief Executive Officer ("CEO") of Copper Mesa, was also the CEO of all relevant subsidiaries.

Statement of Claim 2009, at paras. 22,-26; Copper Mesa Defendants MR, Tab 4, at pp. 108-109

Prospectus at pp. 5-7; Plaintiffs RMR, Tab 1

7. The Board of Directors of Copper Mesa formed corporate practices and had *de facto* control over the technical, operational, managerial and financial activities of all relevant subsidiaries at all times.

Statement of Claim 2009, at para. 21; Copper Mesa Defendants MR, Tab 4, at p. 108.

Widespread Community Opposition was a Major Barrier to Copper Mesa's Operations

8. Members of communities located near the proposed Junín project were and are opposed to mining in their community. Their opposition stems from a desire to prevent environmental degradation, negative social impacts and the loss of livelihood they fear

[1] This document is incorporated in the pleadings as it was specifically referred to and relied on in the Statements of Claim in all three Actions. See e.g. *Robinson v. Rochester et al.*, 2010 ONSC 463 (CanLII) at para. 19, PBA, Tab 18

will come with mining activities. This local opposition is widespread and sustained, and forced the first owners of the mining concessions to leave the area in 1997.

Statement of Claim 2009, at paras. 16, 24; Copper Mesa Defendants MR, Tab 4. pp. 107, 109

9. The widespread and sustained local opposition to the Junín Project was a substantial and potentially crippling barrier to Copper Mesa's exploration and mining activities. In particular, Copper Mesa was impeded from accessing the area around the Junín Project because community members had blocked the primary access road to Junín. This opposition threatened the viability of the project. The Board and management engaged in extensive discussions regarding how to deal with this problem.

Statement of Claim 2009, at paras. 29, 94; Copper Mesa Defendants MR, Tab 4, at pp. 110, 129-130

Prospectus, at pp. 1-2; Plaintiffs RMR, Tab 1

10. In an attempt to eliminate community opposition to the project, Copper Mesa, through the actions of its subsidiaries, and agents, engaged in a campaign of intimidation, harassment, threats and violence. These efforts included creating a non-profit organization called "Corporation for the Development of Garcia Moreno ("CODEGAM") in order to delegitimize and suppress opposition to mining. Tactics employed by CODEGAM included physically assaulting individuals who attended anti-mining meetings, issuing death threats against leaders of the community opposition to mining, bringing fraudulent criminal charges against prominent mining critics, and advocating for the expulsion of community leaders from the region. These tactics were also employed by individuals under the control of Copper Mesa.

Statement of Claim 2009, at paras. 29-31; Copper Mesa Defendants MR, Tab 4, at pp. 110-111

Actions of William Stearns Vaughan

11. Vaughan joined Copper Mesa's Board of Directors on June 2, 2006, and attended several board meetings during the remainder of 2006.

Statement of Claim 2009, at paras. 19, 99; Copper Mesa Defendants MR, Tab 4, at pp. 108, 132.

12. Vaughan had knowledge of the risk of harm to the Plaintiffs prior to the assaults and threats that are at issue in this lawsuit. The pleadings state:

a. Vaughan knew or should have known of past violent confrontations that occurred prior to his directorship that were perpetrated by individuals under Copper Mesa's control;

b. Vaughan had access to, and would have reviewed, corporate documents that discuss allegations of violence committed on behalf of Copper Mesa, including Copper Mesa's Prospectus;

c. The Board on which Vaughan sat extensively discussed and considered the on-going conflict in Junín, the major barriers facing Copper Mesa's operation, and allegations of violence and threats of violence made against the corporation;

d. Vaughan was or should have been aware of the numerous and widely published reports on various junior mining companies that have committed violence against local opposition to mining in developing countries through the use of private security forces.

Statement of Claim 2009, at para. 95; Copper Mesa Defendants MR, Tab 4, pp. at 130-131

13. Prior to the assaults of December 2, 2006 and despite his "knowledge of the specific danger posed by Copper Mesa", Vaughan, among other acts:

a. approved corporate practices intended to eliminate widespread opposition to the proposed Junín Project, including practices relating to security forces;

b. approved funding to security forces and other individuals under Copper Mesa's control who had in the past and were likely in the future to assault and threaten members of the community opposed to the Junín Project;

c. failed to institute proper corporate policies and practices so as to prevent threats and assaults from being committed by individuals under Copper Mesa's control; and

d. failed to raise concerns about and investigate reported past incidents of violence committed by individuals under Copper Mesa's control.

Statement of Claim 2009, at para. 94; Copper Mesa Defendants MR, Tab 4, p. 129

14. After Vaughan's appointment to the Board of Directors, security forces under Copper Mesa's control increased their presence and activity in Junín, and increasingly employed tactics of intimidation that included uttering threats of physical violence to community members opposed to the proposed Junín Project. Further, on November 1, 2006, armed members of the security forces used tear gas, guard dogs and machetes to disrupt an anti-mine protest and to disperse the crowd, which included children.

Statement of Claim 2009, at paras. 44-45; Copper Mesa Defendants MR, Tab 4, at p. 115

15. On December 2, 2006, security forces under the control of Copper Mesa and armed with restricted weapons including shotguns, handguns and anti-personnel pepper-spray, attacked a small group of unarmed men and women near Junín. In this attack, the security forces shot at Marcia Ramírez and pepper-sprayed her point-blank in the face and shot Israel Pérez in the leg.

Statement of Claim 2009, at paras. 49-52; Copper Mesa Defendants MR, Tab 4, p. 116

16. Around this date, Polivio Pérez received various death threats issued by individuals under the control of Copper Mesa.

Statement of Claim 2009, at para. 54; Copper Mesa Defendants MR, Tab 4, p. 117

Actions of Gammon and Vaughan

17. John Gammon joined Copper Mesa's Board of Directors on February 27, 2007. As explained above regarding Vaughan's knowledge, Gammon had knowledge of the risk of harm to the Plaintiffs prior to the assaults and threats that occurred in June and July of 2007.

Statement of Claim 2009, at paras. 20, 112; Copper Mesa Defendants MR, Tab 4, at pp. 108, 135

18. On April 27, 2007, Carlos Zorrilla, a community member from the Junín area, met with Vaughan and with Gammon in Toronto, Ontario to ensure that they were aware of the violence, death threats and physical assaults committed by individuals under the control of Copper Mesa. Zorrilla showed Vaughan and Gammon photographs that depicted Copper Mesa security forces pepper-spraying an unarmed group of women and children, and drawing and shooting their guns. He further told them of the likelihood of future violence, and asked for their commitment that the violence would stop.

Statement of Claim 2009, at paras. 55-58; Copper Mesa Defendants MR, Tab 4, at p. 117

19. Prior to threats and assaults that occurred in June and July 2007, and despite their knowledge of the specific danger posed by Copper Mesa, Vaughan and Gammon, among other things:

a. approved corporate practices intended to eliminate widespread opposition to the proposed Junín Project;

b. approved funding to individuals under Copper Mesa's control who had in the past and were likely in the future to assault and threaten members of the community opposed to the Junín Project;

c. failed to institute proper corporate policies and practices so as to prevent threats and assaults from being committed by individuals under Copper Mesa's control; and

d. failed to raise concerns about and investigate reported past incidents of violence committed by individuals under Copper Mesa's control.

Statement of Claim 2009, at para. 113; Copper Mesa Defendants MR, Tab 4, at pp. 137-138

20. The threats and violence continued. On and around June 23, 2007, individuals under the control of Copper Mesa issued death threats against Polivio Pérez, and on July 31, 2007, Polivio Pérez was assaulted by individuals under Copper Mesa's control. As a result of these threats and assaults, Polivio Pérez was placed under police protection.

Statement of Claim 2009, at paras. 59-62; Copper Mesa Defendants MR, Tab 4, at p. 118

PART III – ISSUES AND THE LAW

The Test to Strike a Claim is Stringent

21. The test for striking out a Statement of Claim is a "stringent one with a difficult burden for the defendants to meet". Pursuant to Rule 21.01(1)(b), a court should only strike a pleading if it is "plain and obvious, and beyond doubt" that the facts, taken as proved, do not disclose a reasonable cause of action. "If there is a chance that the plaintiff might

succeed", the plaintiff's claim should not be struck out. Neither the novelty of the cause of action nor the potential for the defendant to mount a strong defence should prevent the claim from proceeding. "Only if the action is certain to fail because it contains a radical defect" should the claim be struck out.

> ***Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at paras. 32-33; Book of Authorities of the Plaintiffs ["PBA"], Tab 1**
> ***Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* 82 O.R. (3d) 321 at para. 8 (C.A.); PBA, Tab 2.**

22. There is no "elevated standard" for sustaining a pleading against directors – the "plain, obvious and beyond doubt" test set out in *Hunt v. Carey* applies to all rule 21 motions, and is consistently applied by courts including when claims are made personally against directors of corporations.

> ***Anger v. Berkshire Investment Group Inc.* [2001] O.J. No. 379, at para. 8 (C.A.); PBA, Tab 3**
> ***Festival Hall Developments Ltd. v. Wilkings*, [2009] O.J. No. 2400, at para. 14 (Sup.Ct.); PBA, Tab 4**

23. The Defendants Vaughan and Gammon cite comments made by the court in *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*, and in *ADGA Systems International Ltd v. Valcom Ltd* that suggest that the court should take a 'hard look' at pleadings that include claims against directors in their personal capacity. These comments are merely a caution to the court that claims against directors individually are often improperly brought in order to gain tactical advantage and leverage in cases where the main claim is against the corporation. In such cases, the court should take special care to ensure that the pleadings actually do meet the "plain, obvious and beyond doubt" test.

> ***ADGA Systems International v. Valcom* (1999), 43 O.R. (3d) 101 at paras. 9, 43 (C.A.); PBA, Tab 7.**
> ***Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*, [2001] O.J. No. 1068 at paras. 9-11 (Sup. Ct.) ["*Abdi Jama*"]; PBA, Tab 5**

24. The stringent "plain, obvious and beyond doubt" standard, however, still governs.

25. The case at bar is not the sort of case about which the court has expressed concern. As the Defendants note in their factum, the primary claims in these Actions are made against the directors, and not against the corporation. As such, the concerns voiced in *Anger* and

ADGA regarding claims against the directors being used to gain discovery rights or leverage in a primary lawsuit against a corporation do not arise in this case.

> **Factum of the Defendants Copper Mesa Mining Corporation, William Stearns Vaughan and John Gammon (Defendants' Rule 21 Motion, returnable March 25, 2010) ["Copper Mesa Defendants Factum"] at para. 54.**
> ***ADGA Systems International v. Valcom*, at paras. 9, 43 ; PBA, Tab 7**
> ***Abdi Jama*, at para. 9; PBA, Tab 5**

26. In any event, the statements of claim properly plead all elements necessary to sustain a pleading for personal director's liability.

It is Not "Plain and Obvious and Beyond Doubt" that Vaughan and Gammon Do Not Owe a Duty of Care to the Plaintiffs

27. The test on these motions is whether the court can unequivocally find that Vaughan and Gammon did not and could not owe a duty of care to the plaintiffs. If the court cannot so find, the motions should be dismissed.

> ***Anger v. Berkshire Investment Group Inc.*, at para. 9; PBA at Tab 3.**

28. There are numerous precedents affirming that claims against directors of the sort made in this case should proceed to trial.

29. The Ontario Court of Appeal has repeatedly held that directors are liable for their tortious conduct even if they are acting in the course of their duties and in accordance with the best interests of the corporation.

> ***ADGA Systems International v. Valcom*, at para. 18; PBA, Tab 7**
> ***Anger v. Berkshire Investment Group Inc.*, at para. 11; PBA, Tab 3**
> ***Lana International Ltd., v. Menasco Aerospace Ltd.* (2000), 50 O.R. (3d) 97, at paras. 44, 45 (C.A.); PBA, Tab 8**
> ***NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 at para. 44 (C.A.); PBA, Tab 9**

30. "Tortious conduct" can include negligent conduct, whether in the form of acts or omissions, and may include the failure to properly carry out duties as directors.

> ***Brodie v. Thompson Kernaghan & Co.* (2002), 27 B.L.R. (3d) 246, at para. 17 (Sup.Ct.); Plaintiffs BOA, Tab 10**
> ***Berger v. Willowdale A.M.C.*, [1983] O.J. No. 2959, at paras. 24, 26, 34, 35 (C.A), leave to appeal to S.C.C. refused, [1983] S.C.C.A. No. 353; PBA, Tab 11**
> ***Suguitan v. McLeod*, [2002] O.J. No. 878, at paras. 9, 12 (Sup.Ct.); PBA, Tab 12**
> ***Lana International Ltd., v. Menasco Aerospace Ltd.*, at para. 45; PBA, Tab 8**

31. For example, in *Brodie v. Thompson Kernaghan & Co.*, the court refused to strike a claim against a director for failing to properly supervise a corporate employee who placed investments into a fund that was inappropriate for the plaintiff. The court stated that "the *ADGA* decision applies here notwithstanding that the tort alleged is negligence and that Mr. Valentine is not alleged to have done anything outside his capacity as a representative of the corporation."

> ***Brodie v. Thompson Kernaghan & Co.*, at paras. 15-21; PBA, Tab 10**

32. In *United Canada Malt Ltd. v. Outboard Marine Corp. of Canada*, the court affirmed that the omissions of directors may be personally actionable:

> [T]he allegation that the individual directors knew of the existence of an environmental problem such as alleged to have existed here and did nothing to alert the plaintiff of the risk posed to the plaintiff's operation, such that the plaintiff was subsequently harmed, is sufficient on the surface to found a reasonable cause of action against those individual directors.
>
> ***United Canada Malt Ltd. v. Outboard Marine Corp. of Canada*, (2000) 48 O.R. (3d) 352 at paras. 4-5, 14 (Sup. Ct.); Plaintiffs BOA, Tab 13**

33. Further, a recent judgement by the Alberta Court of Queens Bench, affirmed by the Alberta Court of Appeal, relied heavily on Ontario cases to hold a director personally liable for "creat[ing] and maintain[ing] corporate policy which predictably sustained a seriously dangerous working environment". The court further held:

> Serious dangers were reasonably foreseeable, were reducible and avoidable by Epton taking reasonable steps within his capacity and authority as director. It lay easily within his power to reduce or avoid those dangers. Epton's approach addressed virtually none of such dangers but allowed them to continue and even grow.
>
> ***Nielsen Estate v. Epton* (2006), 13 B.L.R. (4th) 209 (A.B.Q.B) , at para. 611; aff'd 277 D.L.R. (4th) 267 (C.A.); PBA, Tab 14**

The Plaintiffs Have Pleaded All Necessary Elements to Maintain the Actions Against Vaughan and Gammon

34. The Plaintiffs have specifically pleaded that Vaughan and Gammon intentionally and consciously engaged in tortious actions and omissions which caused harm to the Plaintiffs, and further that Vaughan and Gammon permitted and condoned the threats of violence and acts of violence that are at the heart of these actions.

> **Statement of Claim 2009, at paras. 100, 118, 134, 136-137; Copper Mesa Defendants MR, Tab 4, at pp. 132, 139, 145-146**

35. Further, the Plaintiffs have pleaded:

> [D]espite the Defendants Vaughan and Gammon's **knowledge of the specific danger** posed by [the Company] to members of the Junín community and their powers and authority as directors as well as the ultimate control over corporate policies that was exercised by directors, Vaughan and Gammon:
>
> a) **operated the company in a manner that created a high risk of violence** against community members opposed to the proposed Junín Project;
>
> b) **approved** corporate policies and **practices intended to eliminate widespread opposition** to the proposed Junín Project, including policies and **practices relating to the Ascendant/Copper Mesa Group Security Forces**;
>
> c) **approved funding for Security Forces** and other agents and affiliates of the Ascendant/Copper Mesa Group **who had in the past and were likely in the future to assault and threaten** members of the community opposed to the Junín Project;
>
> d) failed to adequately supervise the executive of [the Company];
>
> e) **failed to institute proper corporate policies and practices** so as **to prevent threats and assaults from being committed** by the Ascendant/Copper Mesa Group's employees, Security Forces, agents or affiliates;
>
> f) failed to join recognized corporate social responsibility governance frameworks aimed at the protection of human rights (such as the Voluntary Principles on Security and Human Rights), and failed to ensure the implementation and fulfillment of the requirements of such governance frameworks; and
>
> g) **failed to raise concerns about and investigate reported past incidents of violence**, and in particular, failed to inquire as to why the Ascendant/Copper Mesa Group was employing off-duty or ex-members of the Ecuadorian military in Junín, as they had promised Carlos Zorrilla they would. [Emphasis added]
>
> **Statement of Claim 2009, at paras. 95, 113; Copper Mesa Defendants MR, Tab 4, at pp. 130, 137-138.**

36. The pleadings set out particularized claims against both Vaughan and Gammon, state their individual acts and omissions, and are more than sufficient to survive a motion to strike.

The Cooper-Anns Test

37. If the Actions do raise a "novel" negligence claim, the court should apply the *Cooper-Anns* test to determine whether a person owes a duty of care to another person. Under this test, the court asks: (1) whether the parties are in a relationship of sufficient proximity and foreseeability that a *prima facie* duty of care is owed; (2) if so whether the duty is limited or negated by policy considerations.

> ***Anger v. Berkshire Investment Group Inc.*, at para. 12; PBA, Tab 3**

38. The Ontario Court of Appeal has held that both proximity factors and policy factors are often fact driven, and that it is usually not possible to determine these factors without the benefit of a factual record.

> Both the proximity and the policy factors are fact driven. . . .To attempt to apply policy considerations in a vacuum, and without the benefit of a record, would be contrary to the principles upon which our case law has long been understood to develop. . . .The court does not develop the law, including policy considerations, in order to strike a claim. That should only be done after a trial.
>
> ***Anger v. Berkshire Investment Group Inc.*, at para. 13, 15; PBA, Tab 3**
>
> ***Festival Hall Developments Ltd. v. Wilkings*, at paras. 15, 33; PBA, Tab 4**

39. In any event, and as will demonstrated below, the parties in the case at bar are sufficiently proximate, the harm was foreseeable, and there are no policy reasons that could negate the duty of care owed by the Defendants.

Proximity and Foreseeability

40. The Defendants in their factum do not engage in the *Cooper-Anns* analysis, and instead rely on the alleged absence of a "factual nexus" between the harms inflicted on the Plaintiffs and the personal acts or omissions of Vaughan and Gammon. It is not clear from the sources cited that a "factual nexus" is a particular legal test. The absence of the test from the majority of cases on directors' liability is notable.

> ***Brodie v. Thompson Kernaghan & Co.* at para. 21; PBA, Tab 10**
>
> **Copper Mesa Defendants' Factum at para. 43**

41. On a rule 21 motion, the first stage of the *Cooper-Anns* test is concerned with whether the Defendants can establish that it is plain and obvious and beyond doubt that the pleadings do not disclose a relationship of sufficient proximity and foreseeability between the plaintiff and the defendant such that a legal duty of care should be recognized.

> ***Cooper v. Hobart* at para. 30; PBA, Tab 16**
>
> ***Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)*, at para. 8,9; PBA, Tab 2.**

42. The factors which satisfy the requirement of proximity are diverse and depend on the circumstances of the case. There is no single rule, or factor or definitive list that can be applied in every case.

> ***Cooper v. Hobart* at para. 35; PBA, Tab 16**

43. The pleadings disclose several important factors which, taken together, strongly indicate that Vaughan and Gammon are in a legally proximate relationship with the plaintiffs on the particular facts of this case, that the harm flowing from Vaughan and Gammon's acts and omissions was foreseeable, and further that there is a "factual nexus" between Vaughan and Gammon's acts and omissions and the harm suffered by the plaintiff. It is certainly not "plain and obvious" that there is no proximate relationship or no "factual nexus".

44. In particular, the Plaintiffs have pleaded the following:

a. Copper Mesa is a very small company, with few employees and limited operations.

Statement of Claim 2009, at paras. 22-25, 94, 112; Copper Mesa Defendants MR, Tab 4, at pp. 108-109, 94

Ascendant Copper Corporation, *Prospectus: Initial Public Offering*, dated October 14 2005 ["Prospectus"], pp. 5-6; Plaintiffs' Responding Motion Record ["Plaintiffs RMR"], Tab 1

b. The directors of Copper Mesa had very specific corporate goals. The corporation's primary if not exclusive purpose was to explore and develop one particular project (the Junín Project) located in one specific geographic area. If the operation was successful, it would result in significant financial returns for the corporation and for Vaughan and Gammon.

Statement of Claim 2009, at paras. 28, 135-139, 143-147; Copper Mesa Defendants MR, Tab 4, at pp. 110, 144-145, 147-148

Prospectus pp. 1, 7; Plaintiffs RMR, Tab 1

c. The directors' corporate goals were was blocked by one problem. Exploration and development of the Junin project was hampered by widespread and sustained local opposition to the mine, and in particular, a group of community members who had blocked the primary access road. This problem was significant, and the question of how to resolve the problem was extensively discussed and considered by the board of directors.

Statement of Claim 2009, at paras. 29, 94, 112, 135; Copper Mesa Defendants MR, Tab 4, at pp. 110, 129-130, 135-137, 145.

Prospectus, p. 10; Plaintiffs RMR, Tab 1

d. The corporate response to this problem was to engage in a campaign of intimidation, harassment, threats and violence aimed at eliminating local opposition to mining. Organizations associated with Copper Mesa targeted individuals with death threats, assaulted opponents to the mine, and initiated false criminal charges against prominent anti-mining critics.

Statement of Claim 2009, at paras. 29-33, 43-46; Copper Mesa Defendants MR, Tab 4 at pp. 110-111, 115

e. Upon joining the board, Vaughan and Gammon had or ought to have had specific knowledge of all of the above, including the nature of Copper Mesa's business, the major barriers to successful operation, the past violent response to opposition to the project, and the serious risk that individuals would continue to be threatened and harmed in the future.

Statement of Claim 2009, at paras. 94, 112; Copper Mesa Defendants MR, Tab 4 at pp. 129-130, 137-138.

f. Vaughan and Gammon intentionally and consciously engaged in acts and omissions that were intended to eliminate local opposition to the mine. As described above, these acts and omissions include: approving corporate practices intended to eliminate widespread opposition to the mine; approving practices relating to security forces that were intended to eliminate widespread opposition to the mine; approving funding for security forces; failing to investigate previous incidents of violence; failing to institute proper corporate policies and practices to prevent future threats and assaults despite knowledge of past incidents of violence; and otherwise condoning threats of violence and acts of violence.

Statement of Claim 2009, at paras. 95, 97, 100, 113-114, 118, 134-137; Copper Mesa Defendants MR, Tab 4 pp. 130-131, 131, 132, 137-138, 139, 145-146.

g. Vaughan and Gammon specifically met with Carlos Zorrilla, a member of the local community, at which time they made representations that they would not be a part of illegal and unethical activities, and would request an explanation as to why their company was employing ex-members of the Ecuadorian military in Junín. The Plaintiffs have pleaded that these representations demonstrate that Vaughan and Gammon recognized and acknowledged their legal duties to the Plaintiffs.

Statement of Claim 2009, at paras. 55- 58, 111, 113; Copper Mesa Defendants MR, Tab 4 at pp. 117, 135, 137-138.

h. Despite these representations, Vaughan and Gammon committed acts and omissions which caused violent attacks against Israel Perez and Marcia Ramirez in December 2006, and the further violent attack and death threats against Polivio Perez in June and July 2007.

Statement of Claim 2009, at paras. 100, 118; Copper Mesa Defendants MR, Tab 4 at pp. 132, 139

45. The above factors indicate a relationship between the parties that is both proximate and foreseeable, and further disclose a close "factual nexus" between the acts and the omissions of Vaughan and Gammon, and the harms suffered by the Plaintiffs. These allegations are sufficient to give rise to a *prima facie* duty of care owed by Vaughan and Gammon. At the very least, it is not plain and obvious that the claims cannot succeed.

United Canada Malt Ltd. v. Outboard Marine Corp. of Canada, at para 14; PBA, Tab 13

No Policy Reasons Negate a Prima Facie Duty of Care

46. The Defendants have not raised any policy considerations that negate the *prima facie* duty of care owed by Vaughan and Gammon.

47. There are no policy considerations that negate the *prima facie* duty of care owed by Vaughan and Gammon.

48. In any event, courts should be circumspect about using policy concerns to determine, without a Statement of Defence, and without any evidence, that it is plain and obvious that there is no cause of action.

***Haskett v. Equifax Canada Inc.*, at paras. 24, 52; PBA, Tab 6**

The Case at Bar is Fundamentally Different than <u>Abdi Jama</u>

49. The Defendants rely heavily on the lower court case of *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd*, released in 2001.

50. The facts of *Abdi Jama*, however, are so different from the case at bar that there are not any useful parallels between the two cases.

51. In *Abdi Jama*, the plaintiffs alleged that a McDonald's employee placed a severed rat head in a sandwich, which was then partially consumed by the plaintiff. In addition to naming the assistant manager of the restaurant and McDonald's Canada in the lawsuit, the plaintiff also named the two most senior directors of McDonald's Canada and the two most senior directors of McDonald's USA for negligence in failing to implement adequate policies and procedures that would have prevented the "rogue employee" from putting a rat head in a customer's sandwich.

Abdi Jama, at paras. 2, 7, 8, 12; PBA, Tab 5

52. The motions judge noted that McDonald's Canada employs 70,000 people and McDonald's U.S. operates 27,000 restaurants in 119 countries. He held that forming and implementing general corporate policies and procedures regarding food safety at the top of a corporation that operates thousands of restaurants "has little, if anything, to do with the prevention of indiscriminate actions of rogue employees intent on contaminating a particular sandwich." Given the apparent remoteness of the directors, and a general concern about the tendency for plaintiffs to inappropriately bring claims against officers and directors in order to gain leverage in the primary claim against the corporation, the motions judge found that the harm suffered and the actions and omissions alleged lacked a "factual nexus", and struck the claim.

Abdi Jama, at paras. 9, 12, 18; PBA, Tab 5

53. The Defendants rely on *Abdi Jama* to argue that the case at bar should be similarly struck.

Defendants Factum, at paras. 43-45

54. The allegations made out in these claims and those made in *Abdi Jama* are fundamentally different. In particular, the factors of proximity and foreseeability that are present in the case at bar were entirely absent in *Abdi Jama*. The most important of these factors are:

a. Copper Mesa is a small corporation with only one primary project;

b. local community opposition to this mining project was the primary problem facing the corporation;

c. the corporate response to this problem was to engage in a campaign of violence and intimidation;

d. Vaughan and Gammon had or should have had knowledge regarding both the community opposition to the mining project, and the corporate response.

55. *Abdi Jama* would be analogous if McDonald's owned only one restaurant that employed few employees, if this restaurant had a history of placing rat heads in hamburgers, if the corporate directors were aware of the history of placing rat heads in hamburgers and knew that such behaviour was likely to continue, and if the directors condoned the placement of rat heads in hamburgers as part of a corporate strategy to deal with a major problem facing the corporation.

Responses to Other Issues Raised by the Defendant's Factum

56. In their factum, the Defendants are concerned that the claims allege the direct liability of Vaughan and Gammon, but do not allege the direct liability of Copper Mesa or its subsidiaries. They suggest that this "raises the spectre" that the claims are actually an attempt to pierce the corporate veil. They state that the absence of any direct claim for corporate liability is "notable".

Defendants Factum, at para. 54.

The claims against Vaughan and Gammon do not involve the corporate veil

57. With respect, the claims have nothing to do with the corporate veil. The Plaintiffs have pleaded direct and independent causes of action in negligence against Vaughan and Gammon. The corporate veil does not shield directors from personal liability for their own tortious conduct, even if this conduct was directed in a *bona fide* manner to the best interests of the company. As the Ontario Court of Appeal explained in *ADGA Systems International Ltd. v. Valcom*, where a plaintiff establishes an independent cause of action

against the directors of a company, the corporate veil is not threatened and the *Salomon* principle remains intact.

***ADGA Systems International v. Valcom*, at para 10, 18; PBA, Tab 7**

58. Further, as the Court commented in *ADGA*, it is no defence to an allegation of tortious conduct on the part of a director to point out that the plaintiffs could have made similar claims against the company or its subsidiaries, or that these other parties may also be liable. In *Berger v. Willowdale*, for instance, the fact that a tort claim against the corporation was barred by provisions of the *Workman's Compensation Act* did not prevent liability from being imposed on the president of the company.

***ADGA Systems International v. Valcom*, at paras. 19-20; PBA, Tab 7**
***Berger v. Willowdale*, at para. 39; PBA, Tab 11**

59. The corporate veil cannot be invoked as a barrier to be erected between the alleged wrongdoers (in this case, Vaughan and Gammon) and the injured Plaintiffs. Once it is established on the pleadings that the Defendants owed a personal duty of care to the Plaintiffs, they may not escape from liability simply by saying that they are company directors.

***ADGA Systems International v. Valcom*, at para. 22; PBA, Tab 7**

60. The question on these motions is not whether personal liability can be "imposed" on directors – directors, like everyone else, are responsible for their own negligent actions and omissions. Rather, the question is whether, assuming the facts in the pleadings are true, is it plain and obvious that Vaughan and Gammon cannot possibly have owed the Plaintiffs a duty of care.

The pleadings are sufficient

61. The pleadings are thorough and address all the material facts necessary to sustain a claim of negligence against Vaughan and Gammon. The negligent conduct of both Vaughan and Gammon is particularized, identified and attributed to the individual Defendants.

***United Canada Malt Ltd. v. Outboard Marine Corp. of Canada*, paras. 10-14; PBA, Tab 13**
***Aird v. Harmony House of Kirkland Lake*, paras. 25-26; PBA, Tab 15**

62. If the Defendants believe that further detail is required to enable a proper statement of defence, the proper motion is for particulars, not a motion to strike out the Statement of Claim.

> I would note that this is not a motion for particulars. It is therefore not a question whether the plaintiff has given the necessary or desired specifics of the claim but rather whether there is fundamentally any claim at all against the moving parties. In other words, it is not a question of the artfulness of the pleadings but whether the pleading contains, to use the words of Madam Justice Wilson, a "radical defect" such that the underlying causes of action are not sustainable on the facts of the pleading as drafted.
>
> ***United Canada Malt Ltd. v. Outboard Marine Corp. of Canada*, para. 8; PBA, Tab 13**

63. Even if the pleadings in their current form did not disclose a valid cause of action against Vaughan and Gammon (which, it is submitted, they do), the appropriate order is to strike the relevant paragraphs with leave to amend. Leave to amend will only be refused in the clearest of cases. For example, even in the case of *Abdi Jama* where the court expressed doubts as to whether a proper claim could be fashioned, the plaintiffs were nonetheless given leave to amend their claim against the directors.

> ***Abdi Jama*, at para. 30; PBA, Tab 13**

64. Finally, a direct claim is only made against Vaughan and Gammon and not the corporation for the reasons explained below. In other cases, if the claims against the directors are struck, the claims regarding the same harm and often the same or similar conduct will proceed against the corporation. In this case, if the claim against the directors is struck, the action will come to an end against all Copper Mesa Defendants, and the Plaintiffs will not have their day in court.

Why the corporation has not been sued directly

65. The Defendants accurately point out that neither Copper Mesa nor its subsidiaries have been sued directly.

> **Defendants Factum, at para. 54.**

66. The Plaintiffs have not directly sued Copper Mesa or its subsidiaries because of what Supreme Court Justice Ian Binnie has described as "statutory and common law obstacles" which are "unnecessary or arbitrary in their operation" and that serve to prevent domestic courts from "play[ing] a useful role in remedying international human rights abuse" committed by transnational corporations.

Justice Ian Binnie, "Legal Redress for Corporate Participation in International Human Rights Abuses: a Progress Report" (2009) 38:4 *The Brief* 44 ["Legal Redress"] at p. 50; PBA, Tab 17

67. Justice Binnie, quoting United Nations Special Representative on Business and Human Rights Professor John Ruggie, has noted that globalization, and in particular, the "ever-expanding reach of global trade, concomitant, global economic interdependency, the increasing economic influence of transnational companies, and the increasing political influence of such companies in war-torn and economically depressed in which the latent risk of human rights is highest" has created "governance gaps that provide the permissive environment for wrongful acts of all kinds without adequate sanctioning or reparation."

Justice Ian Binnie, "Legal Redress" at p. 45; PBA, Tab 17

68. He further noted that the host states of transnational corporations, "often have little incentive to regulate" and even when they do, "the political influence of transnational companies particularly in conflict-ridden and economically underdeveloped countries, may be such that a state has little real power to impose its will".

Justice Ian Binnie, "Legal Redress" at p. 45; PBA, Tab 17

69. Justice Binnie goes on to say that part of this "governance problem" relates to laws that currently exist in Canada that prevent appropriate legal accountability:

> [A]t a very practical level, domestic law reform is needed if domestic courts are to play a useful role in remedying international human rights abuse. For example. . . **statutory and common-law obstacles to veil-piercing exist and these may inappropriately shield parent companies from liability in respect of subsidiaries**; and there can be **inordinate difficulty in establishing jurisdiction (especially where liberal use is made of the doctrine of *forum non conveniens*)**. In some cases, there will be good reason to limit or deny the possibility of civil recovery. However, **as a general matter the state duty to protect [human rights] means that a concerted effort be made to eliminate barriers to recovery that are unnecessary or arbitrary in their operation.** [Emphasis added]

Justice Ian Binnie, "Legal Redress" at p. 50; PBA, Tab 17

70. This "concerted effort" has not yet happened, and the "unnecessary or arbitrary" barriers for foreign plaintiffs attempting to seek remedies for harms done to them by companies controlled and financed in Canada, but with operations elsewhere, remain formidable. For these reasons, no attempt was made to directly sue either Copper Mesa or its subsidiaries directly in Canada or anywhere else, not because they did not commit wrongful acts for which they should be held legally accountable, but because potential

formal legal hurdles, which the Plaintiffs submit are inappropriate in an era of globalization, made this an ineffective avenue for redress.

71. These larger issues raised by Justice Binnie, however, do not, in the Plaintiffs' submissions, detract from the claims validly made in this case against the directors. What is before the court in this case is the well-established principle that directors owe personal duties of care when acting in their capacity as directors. Application of this well-established principle in this case will encourage Canadian corporate actors who conduct business in the developing world to act responsibly and in accordance with international human rights norms. As Justice Idington of the Supreme Court of Canada said 91 years ago, "the sooner presidents of companies realize that they have duties, the better for themselves and their fellow men."

Lewis v. Boutilier (1919), 52 D.L.R. 383 at para. 27 (S.C.C.); Book of Authorities of the Defendants Copper Mesa Mining Corporation, William Stearns Vaughan and John Gammon, Tab I

***Berger v. Willowdale*, at para. 31; PBA, Tab 11**

PART IV – ORDER REQUESTED

72. The Plaintiffs seek:

a. An order that Vaughan, Gammon and Copper Mesa's motions to strike be denied; and

b. Costs of the motions.

All of which is respectfully submitted this 12th day of March, 2010.

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