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VIA EMAIL and U.S. MAIL
Ms. Heidi K. Hoffman
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
999 18th Street
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Heidi.Hoffman@usdoj.gov

Re: **Gilt Edge Mine Site**

Dear Heidi:

Thank you again for meeting with us on August 26, 2014. We are following up on that discussion and responding to your presentation on various issues related to CoCa's alleged liability at Gilt Edge and other considerations. This letter also responds to the $22.6 million settlement number you presented at our August 26, 2014 meeting.

Operator Liability

Our August 19, 2014 letter detailed our response to the United States' position and evidence on operator liability. Instead of responding to those arguments, your August 26, 2014 PowerPoint at p. 4 only notes:

> We have a case against CC/CM as an operator under CERCLA and will set forth our arguments in a future Complaint.

This statement is not responsive on the facts and obviously does not advance settlement in this matter on an issue that is critical to the significant gap in our respective perspectives on the facts and on settlement.

Then, on the next page of the presentation, the United States concedes that "CC/CM was not the day-to-day operator at the site" and takes the untenable position, notwithstanding the Supreme Court's decision in *Bestfoods*, that the 8th Circuit "does not require that level of involvement to find a party liable as an operator under CERCLA." For this extraordinary proposition, the United States relies on the 8th Circuit's 2007, post-*Bestfoods* decision in *KC 1986 Ltd. Partnership*. The issue in the *KC 1986 Ltd. Partnership* case was whether an individual who indisputably ran and controlled various companies could be held liable as an operator where the facts established that this individual's approval was required for "any decisions on large expenditures, that he had approved procedures such as rinsing out truck tanks containing herbicides, and he was responsible for making decisions regarding compliance with environmental laws." *KC 1986 Ltd. Partnership*, 472 F.3d 1009, 1020.

In contrast, this case is obviously not about when an individual who ran and controlled various companies can be held directly liable as an operator and there is no evidence that CoCa had any decision-making authority at Gilt Edge under the 1975 Agreement with Cyprus. In fact, all the evidence highlights CoCa's lack of decision-making authority and lack of day-to-day control over either Site activities in general or waste management activities, in particular. The United States' refusal to concede this point and reliance on irrelevant case law raises concerns as to whether the United States truly is interested in settling this matter.

Apportionment and Allocation

The United States' positions on apportionment and allocation are equally perplexing. It is clear from the United States' conceptual site model ("CSM") for the Gilt Edge Site that what is driving the United States' cleanup costs are (1) the historic mining activities that ended in the late 1930s or early 1940s; and (2) Brohm's activities, and particularly an extensive program of open pit mining and heap leaching after 1986. The United States' focus on drillhole volume totally ignores the early activities and underestimates both quantitatively and qualitatively the significance of the latter. You suggest at p. 10 of your August 26, 2014 presentation that ARD generation is not correlated to volume of acid-generating material, citing to various, largely irrelevant variables. What this statement ignores is that, particularly at a site like Gilt Edge, the volume of acid-generating material is much more directly tied to remedial needs than any consideration of drillholes. Presumably, that is why EPA's CSM for the Site does not even mention drillholes.

That CoCa only had a 20% non-operating interest under the 1975 agreement is also an objective fact that is relevant to any division of liability.[1] Further, the 30% v. 70% division we

[1] As contemplated in the 1975 agreement, CoCa and Cyprus each assigned to the other party the transferred interests in the Northwestern Metals and Commonwealth Mining leases. Those assignments appear to have been recorded. Your suggestion at our August 26 meeting that any failure to record these assignments has legal significance is incorrect. Legally, any failure to record is irrelevant to the question of whether the interests were transferred by the 1975 agreement. SDCL §43-28-14.

propose for allocation of owner v. operator liability is supported by case law, some of which we cited in our July 10, 2014 presentation. To suggest as you do at p. 13 of your August 26, 2014 presentation, that these percentages are "arbitrary and biased—no explanation or justification for these percentages," is simply incorrect.

There also is an additional point to be made on the United States' allocation of liability to CoCa as a CERCLA "owner" that I am not sure we have previously addressed. As highlighted by the attached slide from EPA's January 28, 2010 PowerPoint presentation, the Northwestern Metals and Commonwealth Mining leaseholds, together, cover the vast majority of the disturbed area at the Site and, even under the United States' allocation theory, the vast majority of the drillhole volume. CoCa and Cyprus relinquished all their interests in these leases pursuant to the June 1, 1983 Mining Agreement with Lacana. So to claim CoCa was even an "owner" at the Site after 1983 and until 1986[2] could be true only to the extent CoCa held any patented and unpatented mining claims at the far edges of the two leaseholds where the mining activity largely occurred. This should further reduce any "fair share" allocation to CoCa based on ownership.

The United States makes much of its allocation formula as being fair and consistent. First, as noted in our July 10, 2014 presentation, the United States is not bound by the allocation formula used in earlier settlements in the same case. *See, e.g.*, *United States v. Union Elec. Co.*, 934 F.Supp. 324, 331 (E.D. Mo. 1996). In addition, the United States' analysis seems to start from the premise that Cyprus and Homestake believed their $26 million and $4.2 million settlement payments, respectively, to be fair, so why is that not a good enough benchmark for CoCa and Hecla? In fact, there is no reason to think that either Cyprus or Barrick, for Lacana, believed the United States' proposed allocation to be fair. To the contrary, both Cyprus and Lacana each assigned themselves considerably less than 1% of the earth disturbance at Gilt Edge and Cyprus assigned CoCa a 0.0021% share, which is less than 10% of the .0262% share Cyprus assigns itself. *See* Cyprus Mines Corporation's Reply to EPA's Claims and Requests Regarding the Gilt Edge Mine Superfund Site (July 27, 2010) and Barrick's (for Lacana) Gilt Edge Mine (July 27, 2010). There are any number of reasons, ranging from wanting to clear legacy liabilities from the books to the ready availability of insurance coverage proceeds to fund a settlement, that might have led two of the world's largest mining companies to resolve these legacy claims as they did.

At our meeting on August 26, 2014, you suggested that, in fact, for purposes of a settlement with CoCa and Hecla, the equities really do not matter and the United States' primary concern is consistency across your Gilt Edge settlements. As noted above, using the Cyprus and Lacana settlements as mathematical benchmarks for consistency would only make sense if Cyprus and Lacana settled because they thought the United States' allocation to them was appropriate and correct and, further, would be appropriate to apply to CoCa. There is no shred of evidence to support this assumption. Additionally, that the United States insists that CoCa must

[2] See note 3.

pay a $5 million settlement premium is not consistent with any formula and is also unsupported by the facts.[3]

The other problem with the United States' formula is that it completely ignores the litigation risks the United States confronts in trying to pin a large share of liability on CoCa for CoCa's very limited involvement and seeking to enforce a CERCLA judgment against Hecla based on an accounting error and theories of liability not otherwise supported by the evidence. These litigation risks are several and real and differ significantly from the litigation risks the United States would have faced if it had sued Cyprus and Lacana—both companies clearly were site operators and both companies were obviously capable of funding any judgment the United States might obtain. This is but one of the many reasons why consistency across the governments' Gilt Edge settlements is inappropriate and why the United States should acknowledge both the many differences between CoCa and Cyprus' roles at the Site and the differences in litigation risk.

Given all of these considerations, CoCa and Hecla simply cannot justify paying the eight-figure settlement the United States has insisted is required to resolve the governments' claims at Gilt Edge. CoCa and Hecla are willing, however, subject to approval by their respective boards of directors, to pay eight figures—namely $10 million dollars, to resolve the governments' claims at both Gilt Edge and the Nelson Tunnel. While there are certain differences in the on-the-ground facts at the two sites, there are also several, important commonalities. CoCa's involvement at both sites was limited to a small amount of exploration work, where someone other than CoCa had day-to-day responsibility for the work performed. CoCa also lacks the assets to satisfy a substantial judgment at either site. For that reason alone, we have every reason to believe that the United States intends to use again at Creede the same facts it alleges against Hecla at Gilt Edge. Hecla must settle those facts once and for all now. The Company cannot and will not pay a premium to settle those facts multiple times at multiple sites.

We understand that because the remedy at the Nelson Tunnel has not been selected, there could be an issue in settling the Nelson Tunnel claim and monetizing EPA's likely future cost. However, unless Hecla Mining Company's subsidiary, Rio Grande Silver, Inc. ("RGS"), is able to accommodate the interests of the United States and the State of Colorado in pumping down

[3] The United States at one point claimed that CoCa should pay $5 million because it agreed to indemnify Northwestern Metals, a lessor/owner at Gilt Edge. We explained in our July 10, 2014 presentation why any indemnity from CoCa to Northwestern Metals is irrelevant here. At our August 26 meeting, the United States continued to press for a $5 million "premium," claiming that CoCa must have held some ownership interest after 1986, based on the 1988 quitclaim deed to from CoCa to Brohm. The law is quite clear that the quitclaim deed is not proof of ownership. 26 Am. Jur. 2d, Deeds, §276. Otherwise, there is no evidence we know of that CoCa did anything but divest itself of all its remaining property interests in 1986, pursuant to the June 1986 Acquisition Agreement with Gilt Edge Inc. We also have previously explained to you that the grant of a quitclaim in the circumstances here is a common practice and accommodation in the mining industry to support title transfers. In fact, the 1986 Acquisition Agreement, in paragraph 1, requires CoCa to cooperate precisely in this regard.

the Creede underground workings, the only other currently viable remediation option, and the worse-case option, is a perpetual pump and treat system. The cost of such a system can be readily monetized based on standard cost information and experience elsewhere. Additionally, other opportunities for RGS and EPA collaboration at the Nelson Tunnel should be explored in a settlement context. Thus, that the remedy for the Nelson Tunnel has not yet been selected need not be obstacle to a two site settlement.

Finally, the United States has suggested from time-to-time that Hecla has, in the past, on various occasions, shirked its cleanup responsibilities. This simply is not the case. Hecla agreed to a $263 million settlement in the Coeur d'Alene Basin because it was a reasonable, albeit painful, compromise. At Grouse Creek, which the United States continues to point to as relevant to Hecla's liability at Gilt Edge, Hecla spent over $100 million on reclamation and cleanup, when Grouse Creek's total failure as a producing mine almost destroyed the company. Hecla steps up when the obligation is legally and fairly the Company's responsibility and the outcome is reasonable. But given the Company's size and longevity, Hecla cannot and will not settle these claims on unfair and unreasonable terms.

We understand the United States interest in moving these settlement discussions to closure and stand ready to do our part.

Sincerely yours,

Elizabeth H. Temkin

EHT/jli
cc: Andrea Madigan, EPA
Amelia Piggott, EPA
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