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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ARIZONA**
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Terry McGeachy,	
Plaintiff,	**2:16-cv-03348 JWS**
vs.	**ORDER AND OPINION**
Pinto Valley Mining Corp., *et al.,*	**[Re: Motion at Docket 45]**
Defendants.	

I. MOTION PRESENTED

At docket 45 defendants BHP Billiton Limited and BHP Billiton PLC move pursuant to Federal Rules of Civil Procedure 12(b)(2) and (b)(6) for an order dismissing plaintiff Terry McGeachy's ("McGeachy") claims against them. The declaration of Maria Isabel Reuter ("Reuter") supporting the motion is at docket 45-1. McGeachy opposes at docket 52. BHP Billiton Limited and BHP Billiton PLC reply at docket 56. Oral argument was not requested and would not assist the court's resolution of the motion.

II. BACKGROUND

McGeachy worked as a Heavy Duty Mechanic at the Pinto Valley copper mine between 2012 and 2016. He alleges that he was forced to quit because of intolerable and discriminatory working conditions. He is African-American and alleges that his coworkers subjected him to repeated racist aggressions, including the use of racist language and the repeated placement of nooses and other racially-charged objects and

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images near his workspace. His complaint alleges two § 1981 claims—hostile work environment and retaliation[1]—against the nine defendants that allegedly employed him.[2] McGeachy alleges that when he quit his job he was employed by the five Capstone defendants: Pinto Valley Mining Corp.; Capstone Mining Corp.; Capstone PV Mining Corp.; Capstone US Mining Corp.; and Capstone US Acquisitions Corp. He also alleges that before October 11, 2013, he was employed by the four BHP Billiton defendants: BHP Copper, Inc.; Broken Hills Proprietary (USA), Inc.; BHP Billiton Limited; and BHP Billiton PLC.

"BHP Billiton" is a dual-listed company[3] comprised of two parent companies: defendants BHP Billiton Limited and BHP Billiton PLC (collectively, "the BHP Parents"). Defendants BHP Copper, Inc. and Broken Hills Proprietary (USA), Inc. (collectively, "the BHP Subsidiaries") are wholly-owned subsidiaries of the BHP Parents. The BHP Parents filed an initial motion to dismiss at docket 26, arguing that they were not McGeachy's employer. Before the motion was fully briefed, McGeachy filed a First Amended Complaint ("FAC") at docket 30. The BHP Parents' renewed motion to dismiss is currently before the court.

III. STANDARDS OF REVIEW

"Where a defendant moves to dismiss a complaint [pursuant to Rule 12(b)(2)] for lack of personal jurisdiction, the plaintiff bears the burden of establishing that a court has personal jurisdiction over a defendant."[4] If, as here, the motion is based upon

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[1]Doc. 1 (citing 42 U.S.C. § 1981).

[2]*Id.* at 2 ("At all relevant times, Defendants employed McGeachy as a Heavy Duty Mechanic.").

[3]*See Sabo v. Carnival Corp.*, 762 F.3d 1330, 1334 (11th Cir. 2014) ("A dual-listed company (DLC) is a corporate structure that binds two separate corporations into a unified economic enterprise, but allows the participating entities to maintain their individual legal identities.").

[4]*Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

written materials and not an evidentiary hearing, the plaintiff is only required to make a prima facie showing of personal jurisdiction.[5] Uncontroverted allegations in the complaint are taken as true and conflicts between statements contained in affidavits or other written evidence are resolved in favor of the plaintiff.[6]

Rule 12(b)(6), tests the legal sufficiency of a plaintiff's claims. In reviewing such a motion, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party."[7] To be assumed true, the allegations, "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively."[8] Dismissal for failure to state a claim can be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."[9] "Conclusory allegations of law . . . are insufficient to defeat a motion to dismiss."[10]

To avoid dismissal, a plaintiff must plead facts sufficient to "'state a claim to relief that is plausible on its face.'"[11] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

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[5] *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002).

[6] *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010). *See also Schwarzenegger*, 374 F.3d at 800 ("Conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor."); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1351 (3d ed. 1998).

[7] *Vignolo v. Miller,* 120 F.3d 1075, 1077 (9th Cir. 1997).

[8] *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

[9] *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

[10] *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

[11] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

defendant is liable for the misconduct alleged."[12] "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."[13] "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'"[14] "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."[15]

IV. DISCUSSION

Although the BHP Parents' motion invokes both Rule 12(b)(2) and (b)(6), the court need not reach the Rule 12(b)(6) argument because the BHP Parents' Rule 12(b)(2) jurisdictional argument is dispositive. "Where, as here, there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits."[16] Arizona Rule of Civil Procedure 4.2(a) authorizes the exercise of jurisdiction to the extent permitted by federal due process requirements.[17] Due process requires that the defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[18]

Federal due process jurisprudence allows the exercise of both general and specific personal jurisdiction. The broader of the two, general personal jurisdiction,

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[12] *Id.*

[13] *Id.* (citing *Twombly*, 550 U.S. at 556).

[14] *Id.* (quoting *Twombly*, 550 U.S. at 557).

[15] *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). *See also Starr*, 652 F.3d at 1216.

[16] *Schwarzenegger*, 374 F.3d at 800.

[17] Ariz. R. Civ. P. 4.2(a).

[18] *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted).

"requires that the defendant have 'continuous and systematic' contacts with the forum state and confers personal jurisdiction even when the cause of action has no relationship with those contacts."[19] "Specific jurisdiction, on the other hand, must be based on activities that arise out of or relate to the cause of action, and can exist even if the defendant's contacts are not continuous and systematic."[20]

A. Specific Jurisdiction

The Ninth Circuit applies a three-prong test for determining whether specific personal jurisdiction exists, under which courts ascertain whether: (1) the non-resident defendant either "purposefully direct[ed] his activities or consummate[d] some transaction with the forum or resident thereof," or "perform[ed] some act by which he purposefully avail[ed] himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim "arises out of or relates to the defendant's forum-related activities;" and (3) the exercise of jurisdiction comports "with fair play and substantial justice, i.e., it [is] reasonable."[21] "The plaintiff bears the burden of satisfying the first two prongs of the test."[22] "If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable."[23]

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[19] *Silent Drive, Inc. v. Strong Indus., Inc.*, 326 F.3d 1194, 1200 (Fed. Cir. 2003) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

[20] *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1017 (Fed. Cir. 2009).

[21] *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987).

[22] *Schwarzenegger*, 374 F.3d at 802.

[23] *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

The first prong of the specific personal jurisdiction test includes two components: purposeful availment and purposeful direction.[24] "A purposeful availment analysis is most often used in suits sounding in contract. A purposeful direction analysis, on the other hand, is most often used in suits sounding in tort."[25] The parties here do not express an opinion as to whether the purposeful availment or purposeful direction analysis applies to § 1981 claims. The court holds that such claims sound in tort[26] and will therefore employ the purposeful direction analysis.

1. Purposeful direction

Purposeful direction is satisfied where the defendant takes actions outside the forum state that are directed at the forum and have effect in the forum.[27] To determine whether purposeful direction exists, the Ninth Circuit employs a three-part "effects" test[28] based on the Supreme Court's decision in *Calder v. Jones*.[29] This test "requires

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[24] *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (the first prong "may be satisfied by purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof.").

[25] *Schwarzenegger*, 374 F.3d at 802 (citations omitted). *See also Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008) ("[W]e have typically analyzed cases that sound primarily in contract . . . under a 'purposeful availment' standard."); *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (analyzing purposeful availment for both tort and contract claims because all claims arose out of a contractual relationship).

[26] *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 670 (1987) (characterizing § 1981 actions as tort actions); *Curtis v. Loether*, 415 U.S. 189, 196 n.10 (1974) ("An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress."); *Burke v. U.S.*, 929 F.2d 1119, 1122 (6th Cir. 1991) (recognizing the "long-held view of the tort-like nature of the injury resulting from unlawful discrimination."); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1255 (10th Cir. 1988) ("[W]e believe an action under § 1981 sounds in tort rather than contract."); *Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 528 (5th Cir. 1980).

[27] *Schwarzenegger*, 374 F.3d at 803.

[28] *Id.*

[29] 465 U.S. 783 (1984).

that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state."[30] The only part of this test in dispute here is the first: whether the BHP Parents committed the intentional act of employing McGeachy. This dispute presents a question of fact.

Because the BHP Parents have submitted a declaration stating that they did not employ McGeachy,[31] McGeachy must set forth evidence of facts that, if true, would contradict the BHP Parents' evidence.[32] To this end, McGeachy attached to the FAC numerous documents that McGeachy received from his employer that list his employer as "BHP Billiton." For example, his job application references the employment relationship between "BHP Billiton and its employees."[33] And his employment offer letter states that he was being offered a job "with BHP Billiton, Pinto Valley Operation,"[34] that "BHP Billiton offers a comprehensive range of benefits,"[35] and that compliance with "[t]he BHP Billiton Charter, the Code of Business Conduct[,] and other key policies [that] can be found on the BHP Billiton intranet . . . is a condition of continued employment with BHP Billiton."[36] Although

McGeachy's evidence is insufficient. It merely shows that his employer used the BHP Billiton name to refer to itself, not that either BHP Billiton Limited or BHP Billiton

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[30] *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002).

[31] Doc. 45-1 at 2–3 ¶¶ 6–8.

[32] *See Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995) (To "make a prima facie showing of jurisdictional facts" to defeat a motion to dismiss that is decided without an evidentiary hearing, "the plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant.").

[33] Doc. 30-1 at 8.

[34] *Id.* at 15.

[35] *Id.*

[36] *Id.* at 16.

PLC actually owned or operated the mine where he worked. What matters for present purposes is the identity of McGeachy's actual employer, not what his employer called itself. The only evidence in the record on that point comes from the Reuter declaration, which states that BHP Copper, Inc. owned the Pinto Valley Operation and Broken Hill Proprietary (USA), Inc. issued McGeachy's paychecks.[37] Because McGeachy lacks evidence showing that the BHP Parents employed him, his purposeful direction argument fails at the first part of the *Calder* effects test.

2. Imputing the BHP Subsidiaries' Actions to the BHP Parents

Having failed to show that the BHP Parents are subject to this court's jurisdiction through their own actions, McGeachy attempts to show that the BHP Subsidiaries' actions may be imputed to the BHP Parents under an alter ego theory.[38] Under this theory, courts in certain limited circumstances will pierce the corporate veil and impute a subsidiary's local contacts to a foreign parent.[39] "The alter ego test is designed to determine whether the parent and subsidiary are 'not really separate entities,' such that one entity's contacts with the forum state can be fairly attributed to the other."[40]

In federal-question cases such as this, district courts apply federal common law when determining whether they "can exercise personal jurisdiction over a party based on alter ego theory."[41] To satisfy the alter ego test under federal law, the plaintiff must

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[37]Doc. 45-1 at 2 ¶ 6.

[38]In passing McGeachy also argues that the BHP Parents and BHP Subsidiaries were his joint employers, doc. 52 at 9 (quoting *E.E.O.C. v. Pac. Mar. Ass'n*, 351 F.3d 1270, 1275 (9th Cir. 2003)), and that the BHP Subsidiaries acted with apparent authority. *Id.* at 10 (citing *Miller v. Mason-McDuffie Co. of S. California*, 739 P.2d 806, 810 (Ariz. 1987)). McGeachy's hasty arguments are unavailing because he does not discuss the elements of either doctrine or apply those elements to the facts of this case.

[39]*See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1071 (9th Cir. 2015).

[40]*Id.* (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001)).

[41]*Johnson v. Serenity Transportation, Inc.*, 141 F. Supp. 3d 974, 984 n.1 (N.D. Cal. 2015). *See also Ranza*, 793 F.3d at 1073 (applying federal law). *But see Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 769 n.3 (9th Cir. 1992) (noting strong

show “(1) that there is such unity of interest and ownership that the separate personalities [of the parent and subsidiary] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.”[42] The first prong is only satisfied where the parent exercises such “pervasive control” over the subsidiary that the latter is properly viewed as a “mere instrumentality of the former.”[43] It is not enough that the parent wholly owns the subsidiary or that both corporations share management personnel.[44] Such pervasive control may be found where, for example, the parent “uses its subsidiary ‘as a marketing conduit’ and attempts to shield itself from liability based on its subsidiaries’ activities,”[45] or “dictates ‘[e]very facet [of the subsidiary’s] business-from broad policy decisions to routine matters of day-to-day operation[.]’”[46] It is not found where the two corporations observe their respective corporate formalities[47] or where the parent does not direct the subsidiary’s routine day-to-day operations.[48]

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presumption that state law should be incorporated into federal common law when corporation law is at issue). Even if Arizona law applies, the result here would be the same because the alter ego doctrine is substantially the same under federal and Arizona law. *Compare Ranza*, 793 F.3d at 1073 (federal alter ego test asks whether (1) there is sufficient unity of interest and ownership and (2) maintaining corporate formalities would result in fraud or injustice), *with Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 728 (Ariz. 1991) (Arizona law applies the same test).

[42]*Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996) (internal quotation omitted).

[43]*Ranza*, 793 F.3d at 1073 (internal quotation omitted).

[44]*Id.*

[45]*Unocal Corp.*, 248 F.3d at 926 (quoting *United States v. Toyota Motor Corp.*, 561 F.Supp. 354, 359 (C.D.Cal.1983)).

[46]*Id.* (quoting *Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Servs., Inc.*, 253 Cal. Rptr. 338, 344 (Cal. Ct. App. 1988)).

[47]*Id.*

[48]*Ranza*, 793 F.3d at 1075.

McGeachy points to the following facts and allegations that support his argument that the court should disregard corporate formalities and impute the BHP Subsidiaries' contacts to the BHP Parents: (1) McGeachy's employment documents discussed above reference the "BHP Billiton" name and logo and not a subsidiary's name or logo; (2) some directors and officers of the BHP Subsidiaries also work for the BHP Parents; (3) Broken Hills Proprietary (USA), Inc. has no revenue from outside operations and therefore the BHP Parents must be indirectly paying the salaries of BHP Copper, Inc.'s employees; (4) BHP's filings with the SEC state, among other things, that "BHP Billiton" operates "as a single economic entity, run by a unified Board and management team"[49] and that BHP Billiton's Charter, Code of Business Conduct, and Group Level Documents prescribe to employees "what we will do and how we will do it;"[50] and (5) BHP Billiton held a memorial for a worker who died at the Pinto Valley mine.[51] Based on the above facts, McGeachy argues that the BHP Subsidiaries are "mere shells."[52]

Accepting this evidence as true and viewing it in the light most favorable to McGeachy, it is insufficient to support this court's exercise of jurisdiction. McGeachy has not shown that the BHP Parents direct the BHP Subsidiaries' day-to-day operations, nor has he shown that the parties have failed to observe their separate corporate formalities. In accord with the Ninth Circuit's decision *Ranza*, McGeachy's evidence does not show the pervasive control necessary to establish an alter ego relationship.[53]

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[49]Doc. 30 at 18 ¶ 80.A.

[50]*Id.* at ¶ 80.C.

[51]*Id.* at 19 ¶ 82.

[52]Doc. 52 at 13.

[53]Because McGeachy has not satisfied the "unity of interest and ownership" prong of the alter ego test, the court need not address the "fraud or injustice" prong. *See Ranza*, 793 F.3d

B. General Jurisdiction

Alternatively, McGeachy argues that the BHP Parents are subject to general personal jurisdiction in Arizona. "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[54] "The standard for general jurisdiction 'is an exacting standard, as it should be, because a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.'"[55]

McGeachy's general jurisdiction arguments are essentially the same as his specific jurisdiction arguments. He argues that the BHP Parents employed him or, alternatively, that the alter ego doctrine applies. These arguments fail for the same reasons discussed above.

C. Jurisdictional Discovery

Finally, McGeachy requests "leave to take expedited discovery on the issue of jurisdiction."[56] This request is subject to the court's discretion.[57] "Discovery may appropriately be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary."[58] McGeachy does not identify the discovery he might request or the subject matter or

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at 1075 n.9.

[54] *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (quoting *Int'l Shoe*, 326 U.S. at 317).

[55] *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1224 (9th Cir. 2011) (quoting *Schwarzenegger*, 374 F.3d at 801).

[56] Doc. 52 at 16.

[57] *Boschetto*, 539 F.3d at 1020.

[58] *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977).

matters to which his discovery would pertain. He merely states that the Reuter declaration contains "a number of assertions that McGeachy has not had an opportunity to investigate."[59] Because McGeachy has not articulated a basis for questioning any facts in the Reuter declaration, he has demonstrated little more than a "hunch that [discovery] might yield jurisdictionally relevant facts."[60] As such, McGeachy's request is denied.

V. CONCLUSION

Based on the preceding discussion, Defendants' motion at docket 45 is GRANTED. Defendants BHP Billiton Limited and BHP Billiton PLC are hereby dismissed from this case.

DATED this 24th day of July 2017.

/s/ JOHN W. SEDWICK
SENIOR JUDGE, UNITED STATES DISTRICT COURT

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[59]Doc. 52 at 16.

[60]*Boschetto*, 539 F.3d at 1020.