DISTRICT COURT, PITKIN COUNTY, COLORADO Pitkin Combined Courts 506 East Main Street, Suite E Aspen, Colorado 81611	DATE FILED October 24, 2024 4:22 PM CASE NUMBER: 2021CV30118
Plaintiff: SNOWMASS MINING CO., LLC, an Idaho limited liability company v. **Defendants:** MYSTIC EAGLE QUARRY, LLC, a Colorado limited liability company, ELBRAM STONE COMPANY LLC, a Colorado limited liability company, AVALANCHE CREEK MARBLE AND ALABASTER LLC, a Colorado limited liability company, and ROBERT CONGDON	▲ COURT USE ONLY ▲
	Case No. 2021CV030118 Division 2

OMNIBUS ORDER ON PENDING MOTIONS

This matter is before the court on a variety of motions filed by the parties, including (1) a motion for partial dismissal filed by Defendants, Mystic Eagle Quarry, LLC ("Mystic Eagle"), Elbram Stone Company, LLC ("Elbram Stone"), Avalanche Creek Marble and Alabaster, LLC ("Avalanche"), and Robert Congdon ("Congdon") (collectively, "Defendants") for failure to name indispensable parties and dismissal of Plaintiff, Snowmass Mining Company, LLC ("Snowmass")'s contempt claim; (2) Snowmass' motion for partial summary judgment on aspects of its declaratory judgment claim; (3) Defendants' C.R.C.P. 56(f) motion and amended motion to allow discovery and postpone summary judgment; (4) Defendants' cross-motion for summary judgment; and (5) Defendants' motion to strike an affidavit submitted by Snowmass in support of its motion for summary judgment. The motions are addressed below.

BACKGROUND

This lawsuit is the latest in a series of disputes that have arisen since approximately 2000 and that have found the parties, their family members, and/or their entities in front of this district court, the federal district court for the state of Colorado, and various state and federal administrative agencies. The dispute centers on certain mining claims located in Pitkin County, Colorado, and as pertinent to this case, the dispute centers primarily on claims the court will refer to as the "White Banks Claims."

Snowmass and the Defendants were involved in previous litigation over possession and ownership of the White Banks Claims (among other mining claims) in Pitkin County District Court case 14CV30168 (the "2014 Case") in front of the Hon. Denise Lynch. The court has taken judicial notice of the court file in the 2014 Case in resolving the motions herein. One outcome of the 2014 Case was an order from Judge Lynch quieting title to the White Banks Claims in Snowmass and an order enjoining the Defendants "from entering or occupying the property covered by the White Banks [] Claims to mine or without lawful right." *Entry of Final Judgment*, January 25, 2018 at 3 (the "2018 Order"). The parties to the 2014 Case were the same as those involved in this case, though this case involves an additional defendant entity called Avalanche Creek Marble and Alabaster LLC.

In her order after trial dated June 8, 2017 (the "2017 Order"), Judge Lynch found that Defendant Congdon had discovered an alabaster deposit at the White Banks Claims in 1978, located and perfected his mining claims related to that discovery[1] and later engaged in mining on the claims until approximately 2004. Judge Lynch further found that Congdon had forfeited the

[1] As noted by the Colorado court of appeals in its decision affirming Judge Lynch, a "mining claim" is a parcel of mineral land containing precious minerals. *Snowmass Mining Co., LLC v. Mystic Eagle Quarry, LLC*, 17CA1803 (Unpublished). "Location" is the act of appropriating a mining claim upon the public domain, according to law or established rules. *Id.* at 2, quoting *McFeters v. Pierson*, 24 P. 1076, 1077 (Colo. 1890).

White Banks Claims by operation of law when he failed to pay an annual fee to the Bureau of Land Management (BLM). She found that Julie Skinner, who is Congdon's ex-wife, discovered the forfeiture in May 2005 and began discovery and location work on the White Banks Claims in June 2005 which triggered a 90-day period of exclusive possession. She found that on August 24, 2005, Snowmass successfully and timely perfected the claims that Congdon previously held, and that Congdon's efforts to relocate the White Banks Claims in July and August 2005 were ineffective because the land was not open for location when he tried to relocate them for himself or his entity. Ultimately, Judge Lynch concluded that Snowmass - not Congdon or Mystic Eagle - owned the White Banks Claims and she quieted title to the claims in Snowmass. She thereafter issued a final judgment, the 2018 Order, to that effect. Judge Lynch's judgments were affirmed on appeal. *Id.*

Sometimes history rhymes. In 2020, Snowmass, like Congdon earlier, failed to pay its annual fees to the BLM to maintain the White Banks Claims. In its complaint here, Snowmass makes the factual assertion that after it failed to pay the annual fees, it re-engaged Minex, the mining company that had done the staking and location work in 2005, to redo the staking and location work in 2020 and to record new claims at the same location. Snowmass's complaint alleges that Defendants continue to assert ownership over the White Banks Claims based on "nonexistent" claims and have trespassed onto the property covered by the Claims. For their part, the Defendants dispute through their answer and in the motions practice that Snowmass's 2020 relocation was successful or properly executed.

Snowmass contends that Defendants "have engaged in a campaign involving administrative and legal actions in an attempt to reassert the validity and seniority of [Defendants'] non-existent claims at the White Banks Claims location," including in BLM, Department of the Interior Office of Hearings and Appeals ("OHA") administrative proceedings, in a federal lawsuit

against the U.S. Forest Service, and in an interview with local press asserting, in sum, that Mystic Eagle owns the White Banks Claims and that it "reattained ownership" after Snowmass "allegedly" forfeited the White Banks Claims. Snowmass's complaint alleges that Congdon entered into the mine on one of the White Banks Claims in July 2021 and posed for pictures published by a local newspaper, and that he must necessarily have broken locks securing the mine property to gain that access.

Snowmass seeks relief by way of three claims: (1) a declaratory judgment claim seeking a variety of declarations set forth below; (2) a trespass claim, and (3) a contempt claim under C.R.C.P. 107 for violating the judgment in the 2014 Case.

Snowmass's declaratory judgment claim seeks judicial declarations that (a) Judge Lynch's 2017 Order, 2018 Order, the 2014 Case and the trial record thereof conclusively demonstrate that the White Banks Claims owned by Snowmass are coterminous with and identical to the claims the Defendants claim they own; (b) there is no basis of support for an argument the Defendants have made in front of other tribunals that they own mining claims that only overlap 25-feet with the White Banks Claims; (c) neither Snowmass's inadvertent failure to pay requisite fees in 2020 nor Snowmass's relocation of the White Banks Claims in September 2020 has any effect on the 2017 Order, the 2018 Order, or the 2014 Case, nor do they create on behalf of Defendants any valid claims at the White Banks Claim location; (d) Snowmass continues to hold senior and valid title to the White Banks Claims; and (e) Defendants' representations to the contrary on all of the above are false. Snowmass' second claim is for trespass related to Congdon's entry onto the White Banks Claims, and its third claim is for contempt under C.R.C.P. 107. Snowmass also seeks a permanent injunction barring Defendants from "asserting ownership to any portion of the White Banks Claims, including any manner of holding themselves out as the owners or partial owners of the

White Banks Claims or the mine" and from entering or occupying the property covered by the White Banks Claims to mine or without lawful right.

The Defendants filed one counterclaim for declaratory relief. The counterclaim states that "Plaintiff and Defendants have disputes" regarding "the effect of prior litigation on mining claims owned by Defendants" and about "ownership of Defendants' mining claims" and "ownership of mining claims asserted by Plaintiff" and that these controversies should be resolved by the court. Amended Answer at 9. The court understands this claim to be a claim for declaratory relief.

With that history and context, the court turns to the motions now pending before the court.

DISCUSSION

I. Defendant's Motion for Partial Dismissal for Failure to Name Indispensable Parties and for Dismissal of Snowmass's Contempt Claim to the Extent that the Claim is Based on the Defendants' Protected Statements

In their motion to dismiss, the Defendants seek dismissal of Snowmass's complaint based on Snowmass's failure to join indispensable parties, namely additional individuals whose names appear in a section of one of ten location certificates prepared by an agent for Snowmass when he took steps to relocate the White Banks Claims in 2020. The Defendants recognize in the briefing that dismissal on a failure to join basis is typically not granted and a failure to join is remedied by an order requiring the joinder of the relevant parties. To that end, the Defendants seek an order requiring joinder. Defendants also seek dismissal of Snowmass's contempt claim via C.R.C.P. 12(b)(5) and C.R.S. § 13-20-1101, which is Colorado's anti-SLAPP ("Strategic Lawsuits Against Public Participation") statute. Below, the court will set forth the legal standard applicable to each of the Defendants' contended bases for dismissal, analyze each one, and ultimately conclude that the motions based on failure to join and the anti-SLAPP statute are appropriately denied, but the motion to dismiss Snowmass' contempt claim on Rule 12(b)(5) grounds is appropriately granted.

1. Applicable Law

a. Dismissals Based upon a Failure to Join

A defendant may challenge a plaintiff's failure to join a person necessary for a just adjudication of the issue by way of a motion under C.R.C.P. 12(b)(6). The rule provides that a case may be dismissed if a plaintiff fails to join a party under C.R.C.P. 19, which provides that a person whose presence is necessary to assure complete relief or to protect a legally cognizable interest at stake in an action must be joined as a party. In evaluating a motion to dismiss, a court must accept all averments of material fact contained in a pleading as true and must view those averments in the light most favorable to the non-moving party. *Titan Indem. Co. v. Travelers Prop. Cas. Co. of America,* 181 P.3d 303, 306 (Colo. App. 2007). "In ruling on a dismissal for lack of joinder of an indispensable party, a court may go outside the pleadings and look to extrinsic evidence." *Davis Companies v. Emerald Casino, Inc*., 268 F.3d 477, 482 (7th Cir. 2001); *see also Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994)[2] (the proponent of a motion to dismiss for failure to join a party can be satisfied by providing "affidavits . . . as well as other relevant extra-pleading evidence").

> Rule 19(a) requires joinder of a person subject to service of process if:
>
> (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest.
>
> C.R.C.P. 19(a).

[2] "Because the Colorado Rules of Civil Procedure are patterned after the federal rules, we may also look to the federal rules and decisions for guidance." *Kowalchik v. Brohl*, 2012 COA 49 ¶ 12 n. 3 (looking to federal case law to interpret C.R.C.P. 19).

C.R.C.P. 57(j) and C.R.S. 13-51-115 include similar provisions for declaratory judgment actions such as this action, requiring joinder of all persons "who have or claim any interest which would be affected by the declaration," and state that "no declaration shall prejudice the rights of persons not parties to the proceeding." C.R.S. 13-51-115; C.R.C.P. 57(j).

Whether a potential party is indispensable is a mixed question of law and fact and must be determined on the facts of each case. *Balkind v. Telluride Mountain Title Co*., 8 P.3d 581, 585 (Colo. App. 2000). Factors to consider when evaluating indispensability include: (1) the extent to which a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which prejudice can be lessened or avoided by protective provisions in the judgment, by the shaping of relief, or by other measures; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for non-joiner. *Id.* Injury to the absent party is the most important factor in determining indispensability, but other factors include the danger of inconsistent decisions, avoidance of multiplicity of suits, and the reluctance of a court to render a decision that will not finally settle the controversy before it. *Id.*

The burden of persuasion that a party is indispensable rests upon the party asserting the necessity of joining absent parties. *Williamson v. Downs*, 829 P.2d 498 (Colo. App. 1992); *Gold Hill Development Co., L.P. v. TSG Ski & Golf, LLC*, 378 P.3d 816, 831 (Colo. App. 2015)

Generally, if there has been a failure to join an indispensable party, the court should not dismiss the action, but rather should join that necessary party or allow the plaintiff an opportunity to do so. *Cruz-Cesario v. Don Carlos Mexican Foods*, 122 P.3d 1078, 1081 (Colo. App. 2005); *B.C. Ltd. v. Krinhop*, 815 P.2d 1016, 1018 (Colo. App. 1991). Dismissal is only an appropriate

remedy if a necessary party cannot feasibly be joined and no adequate and legally permissible relief can be fashioned in the party's absence. *Id.*

b. Dismissals Pursuant to C.R.C.P. 12(b)(5)

To survive a Rule 12(b)(5) motion to dismiss, a complaint must state a claim for relief that is substantiated by law and is supported by factual allegations that are plausible. *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (adopting the federal "plausibility standard"); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Factual allegations are plausible if they "allow the court to draw a reasonable inference" concerning the legal elements of the claim. *Ashcroft*, 566 U.S. at 663.

Although the facts alleged do not need to be detailed, a mere recitation of "labels and conclusions" will not suffice. *Twombly*, 550 U.S. at 545, 555. To satisfy the plausibility standard, factual allegations "must be enough to raise a right to relief above the speculative level." *Warne*, 373 P.3d at 591. The plaintiff does not need to demonstrate a probability of success, only a "reasonable expectation" that discovery will uncover enough evidence to support the claim. *Twombly*, 550 U.S. at 545.

In determining the legal sufficiency of a complaint, the trial court "accepts all factual allegations in the complaint as true, viewing them in the light most favorable to the plaintiff." *Norton v. Rocky Mountain Planned Parenthood, Inc*., 409 P.3d 331, 334 (Colo. 2018). Such acceptance does not, however, extend to the plaintiff's legal conclusions. *Id*. In addition to the complaint, the court may consider attached exhibits, documents incorporated therein by reference, or matters proper for judicial notice. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). However, when deciding a motion to dismiss for failure to state a claim, if matters outside the pleading are not excluded by the court, the motion is treated as a summary judgment motion

"and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by C.R.C.P. 56." C.R.C.P. 12(b)(5).

c. Dismissals Based Upon the Anti-SLAPP Statute

C.R.S. §13-20-1101 is commonly known as Colorado's anti-SLAPP statute. *Salazar v. Public Trust Institute*, 522 P.3d 242, 246 (Colo. App. 2022). The statute was an outgrowth of an earlier standard established by the Colorado Supreme Court's decision in *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984) which established a "mechanism to dismiss non-meritorious lawsuits infringing on First Amendment rights." *L.S.S. v. S.A.P.*, 523 P.3d 1280, 1285 (Colo. App. 2022). The anti-SLAPP statute's purpose is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, to protect the rights of persons to file meritorious lawsuits for demonstrable injury." C.R.S. 13-20-1101(1)(b). The statute establishes procedures for resolving special motions to dismiss early in a case, allowing courts to dismiss a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States constitution or the state constitution in connection with a public issue" unless the court determines that the plaintiff has established a reasonable likelihood of prevailing on the claim. C.R.S. §13-20-1101(3). The statute "seeks to balance both parties' constitutionally protected interest in petitioning the government, be it by participating in the legislative process, invoking the government's administrative or executive authority . . . or instigating litigation to protect or vindicate one's interests." *Salazar*, 522 P.3d at 246. The statute is a "mechanism by which a district court can make an early assessment about the merits of claims brought in response to a defendant's petitioning or speech activity." *Id.* at 247.

A court considering a special motion to dismiss must first determine "whether the defendant has made a threshold showing that the conduct underlying the plaintiff's claim falls within the scope of the anti-SLAPP statute – that is, that the claim arises from an act 'in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue." *L.S.S.*, 523 P.3d at 1285. Then, if the first part of the test is satisfied, the court must determine, based on the pleadings and affidavits, "whether the plaintiff has established a reasonable likelihood of prevailing on the claim." *Id.*, citing C.R.S. §13-20-1101(3)(a)-(b).

A special motion to dismiss must be filed "within sixty-three days after service of the complaint, or, in the court's discretion, at any later time upon terms it deems proper." C.R.S. §13-20-1101(5). The time constraint in the anti-SLAPP statute exists to dispose of qualifying cases quickly and to reduce costs for the involved parties. *Hewlett-Packard Co. v. Oracle Corp.*, 239 Cal. App. 4th 1174, 1187, 1190 (Cal. App. 2015).[3] A division of the California Court of Appeals concluded that the purpose of the time limitation within its anti-SLAPP statute was to permit the defendant to "test the foundation of the plaintiff's action before having to devote its time, energy and resources to combating a meritless lawsuit." *San Diegans for Open Gov't v. Har Constr., Inc.*, 240 Cal. App. 4th 611, 624 (2015). More than one California Court of Appeal has noted the "the ironic unintended consequence that anti-SLAPP procedures, enacted to curb abusive litigation, are also prone to abuse." *Olsen v. Harbison*, 134 Cal. App. 4th 278, 283 (2005); see also Cal. Civ. Proc. Code § 425.16(a) (2021) ("The legislature finds and declares that there has been a disturbing abuse of . . . the California Anti-SLAPP Law."). Other courts have raised concerns that a party may file an anti-SLAPP motion merely to "delay meritorious litigation or for other purely strategic

[3] Colorado's anti-SLAPP statute is a relatively recent creature of state statutory law. The statute was modeled after California's anti-SLAPP statute, and California law is therefore instructive to trial courts in Colorado in this context. *L.S.S.*, 523 P.3d 1280 at 1286.

purposes." *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 195 (2005). For example, a panel of the California Court of Appeals concluded that an anti-SLAPP motion was untimely where "instead of attempting to promptly expose and dismiss [the plaintiff's] suit as a SLAPP, defendants chose to devote their time, energy and resources to moving the case from state court to federal court and, after remand from federal court, moving the case from one branch of the superior court to another and then from one judge to another in the chosen branch. This procedural maneuvering consumed seven months or nearly one-third of the court's overall time goal for disposing of a civil case." *Morin v. Rosenthal,* 122 Cal. App. 4th 673, 681 (Cal. App. 2004).

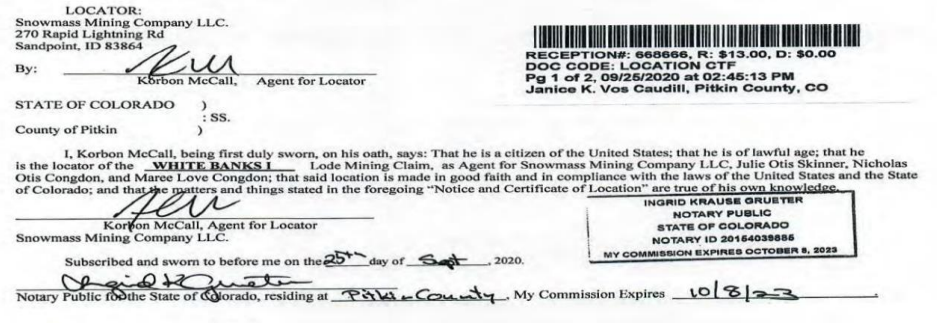
2. Analysis RE: Defendants' Motion to Dismiss

a. Joinder

The court begins with Defendants' joinder-based dismissal motion. The Defendants contend that Snowmass failed to join Julie Skinner, Nicholas Otis Congdon, and Maree Love Congdon as indispensable parties. The Defendants contend that these individuals should be joined because they were included on a location certificate prepared by an individual named Korbon McCall when he sought to relocate the claim entitled "White Banks I" in 2020. The Defendants assert that even if the court does not dismiss on this basis, it should order the joinder of the three individuals listed on the White Banks I location certificate.

Looking to extrinsic evidence as the court is permitted to do in evaluating such a motion, the attachments to the motions briefing indicate that Mr. McCall completed ten total location certificates in 2020 related to the White Banks Claims. In the text of the location certificates, Mr. McCall represented himself to be "Agent" for the "Locator." The "Locator" was identified in several spots on the certificate as "Snowmass Mining Company, LLC." On one of the ten certificates, Mr. McCall represented himself to be an agent for three additional individuals beyond

Snowmass. The White Banks I certificate is the sole certificate containing the additional individuals' names. Below is the section of the location certificate at issue:



LOCATOR:
Snowmass Mining Company LLC.
270 Rapid Lightning Rd
Sandpoint, ID 83864

By: _____
Korbon McCall, Agent for Locator

RECEPTION#: 668666, R: $13.00, D: $0.00
DOC CODE: LOCATION CTF
Pg 1 of 2, 09/25/2020 at 02:45:13 PM
Janice K. Vos Caudill, Pitkin County, CO

STATE OF COLORADO)
: SS.
County of Pitkin)

I, Korbon McCall, being first duly sworn, on his oath, says: That he is a citizen of the United States; that he is of lawful age; that he is the locator of the WHITE BANKS I Lode Mining Claim, as Agent for Snowmass Mining Company LLC, Julie Otis Skinner, Nicholas Otis Congdon, and Maree Love Congdon; that said location is made in good faith and in compliance with the laws of the United States and the State of Colorado; and that the matters and things stated in the foregoing "Notice and Certificate of Location" are true of his own knowledge.

_____
Korbon McCall, Agent for Locator
Snowmass Mining Company LLC.

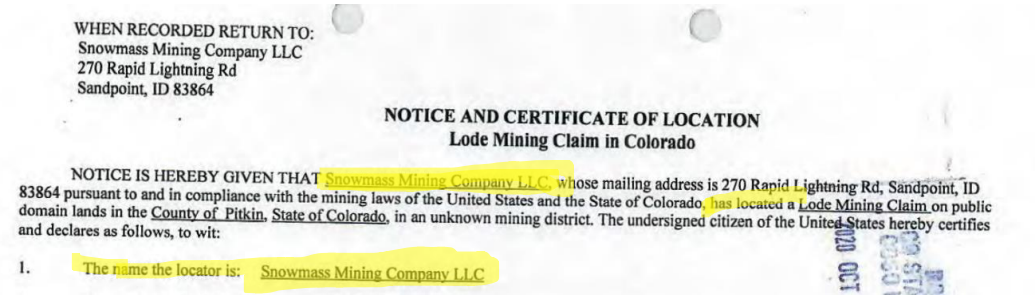
INGRID KRAUSE GRUETER
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20164039885
MY COMMISSION EXPIRES OCTOBER 8, 2023

Subscribed and sworn to before me on the 25th day of Sept, 2020.

_____
Notary Public for the State of Colorado, residing at Pitkin County, My Commission Expires 10/8/23

Defendants argue that Mr. McCall's statement, in the affidavit portion above, that he is "the locator of the White Banks I Lode Mining Claim, *as agent for* Snowmass Mining Company, LLC, *Julie Otis Skinner, Nicholas Otis Congdon, and Maree Love Congdon*" makes those three individuals "co-locators" or "co-owners" of the White Banks I Claim. The Defendants argue that if the White Banks I Claim was properly relocated in 2020, these individuals have an interest in the lawsuit about the White Banks I claim by virtue of being named on the location certificate and, in the Defendants' view, the three individuals should be joined in this lawsuit.

Snowmass disagrees that Mr. McCall made the three individuals co-locators and points out that on the same location certificate, Snowmass Mining Company, LLC is unequivocally identified as the "locator;" twice in the section depicted above, and again expressly in two areas elsewhere on the location certificate as demonstrated below:



WHEN RECORDED RETURN TO:
Snowmass Mining Company LLC
270 Rapid Lightning Rd
Sandpoint, ID 83864

NOTICE AND CERTIFICATE OF LOCATION
Lode Mining Claim in Colorado

NOTICE IS HEREBY GIVEN THAT Snowmass Mining Company LLC, whose mailing address is 270 Rapid Lightning Rd, Sandpoint, ID 83864 pursuant to and in compliance with the mining laws of the United States and the State of Colorado, has located a Lode Mining Claim on public domain lands in the County of Pitkin, State of Colorado, in an unknown mining district. The undersigned citizen of the United States hereby certifies and declares as follows, to wit:

1. The name the locator is: Snowmass Mining Company LLC

Resolving this question depends on principles of mining law and principles of agency. On the former point, being named as a "locator" on a certificate of location is critical to title being vested in that locator. "[T]he standard rule is that legal title [to mining claims] vests in the named locators." 2 Rocky Mountain Mineral Law Foundation, American Law of Mining, 2nd Ed. §31.05, citing *Rush v. French,* 25 P. 816 (Ariz. 1874) and *Whiting v. Straup,* 95 P. 849, 854 (Wyo. 1908) ("when a location is made by one in the name of others the persons in whose name it is made becomes vested with legal title to the claim").

Regarding agency, an "agent" is "one with authority to act on behalf of and bind a principle." *Dworkin, Chambers & Williams, P.C. v. Provo*, 81 P.3d 1053, 1059 (Colo. 2003). "An agent can make his principle responsible for his action if he is acting pursuant to either actual or apparent authority." *First Horizon Merch. Servs., Inc. v. Wellspring Cap. Mgmt., LLC,* 166 P.3d 166, 177 (Colo. App. 2007).

The court concludes that the Defendants have not met their burden of persuasion on this joinder issue. The fact that Korbon McCall represented himself on the White Banks I location certificate as *an agent* for Snowmass Mining Company, LLC, and others, including Julie Skinner, Nicholas Congdon and Maree Love Congdon does not serve the legal function of *vesting title* to the White Banks I Claim in Julie Skinner, Nicholas Congdon, and Maree Love Congdon. Such a representation about agency within the location certificate for the mining claim had no legal effect on title to the claim; Korbon McCall could well have been an agent for all of those people/entities, but his being their agent does not vest title to anything in them. The "locator" is named throughout the location certificate as solely "Snowmass Mining Company, LLC" and nowhere are the three individuals named as additional locators. The court has received no other indication in the briefing that Julie Skinner, Nicholas Congdon, or Maree Love Congdon have an interest, as individuals, in

this lawsuit or that a failure to add them would subject the existing parties to a risk of double, multiple or otherwise inconsistent obligations. Complete relief can be afforded among the existing parties, and there is no basis for requiring Snowmass to join these individuals.

The Defendants' motion to dismiss for failure to join indispensable parties is accordingly DENIED.

b. Motion to Dismiss under C.R.C.P. 12(b)(5)

Defendants move to dismiss Snowmass's contempt claim under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted. The court presumes the factual averments to be true for the purpose of evaluating the motion.

Claims for contempt spring from C.R.C.P. 107, which "governs all contempt proceedings" and "distinguishes between two types of contempt, direct and indirect, and defines the actions constituting contempt to include 'disobedience . . . by any person to . . . any lawful . . . order of the court.'" *In re Marriage of Conners*, 550 P.3d 684, 688 (Colo. 2024); *In re Marriage of Cyr and Kay*, 186 P.3d 88, 91 (Colo. App. 2008) citing C.R.C.P. 107(a)(1). Direct contempt involves conduct that occurs in the judge's presence, while indirect contempt occurs outside of a judge's presence. *In re Parental Responsibilities Concerning A.C.B.*, 507 P.3d 1078, 1083 (Colo. App. 2022). A district court may impose contempt sanctions for failure to comply with court orders. *People v. McGlotten,* 134 P.3d 487, 489-90 (Colo. App. 2005) (district court has inherent authority to issue orders necessary for the performance of judicial functions, including the power to enforce obedience to its orders through contempt sanctions).

A contempt charge is distinct from other types of civil claims. In the contempt realm, for the court "to obtain jurisdiction to punish for contempt outside the presence of the court, it is necessary for the trial court to issue a citation commanding the alleged offender to show cause

why she should not be held in contempt for her behavior." *People v. Proffitt*, 865 P.2d 929, 931 (Colo. App. 1993). "On a charge of contempt, if the trial court does not find sufficient facts alleged to show that a contempt has been committed, the trial court is without jurisdiction to proceed further." *Id.* Denial of a request to issue a contempt citation has been compared to dismissal of a complaint without prejudice for failure to state a claim. *Id.*, citing *In re Marriage of Herrera*, 772 P.2d 676 (Colo. App. 1989).

Rule 107 distinguishes between two types of contempt sanctions: punitive and remedial. C.R.C.P. 107(a)(4),(5). Punitive sanctions are "criminal in nature and are designed to punish 'by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court.'" *Cyr and Kay.*, 186 P.3d at 91, citing C.R.C.P. 107(a)(4). Because the purpose is to punish, and the power to punish for contempt should be used sparingly, "the contemnor's mental state of willful disobedience must be shown." To impose punitive contempt sanctions, the court must enter findings of fact establishing beyond a reasonable doubt (1) the existence of a lawful order of the court; (2) the contemnor's knowledge of the order; (3) the contemnor's ability to comply with the order; and (4) the contemnor's willful refusal to comply with the order. *Id.*

In contrast to punitive contempt sanctions, remedial contempt sanctions are civil in nature and are intended to "force compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform." C.R.C.P. 107(a)(5). "Because the purpose is remedial, and for the benefit of another, it does not matter what the contemnor intended when he or she refused to comply." *Id.*

Remedial contempt sanctions must be supported by findings of fact establishing by a preponderance of the evidence that the contemnor (1) did not comply with a lawful order of the

court; (2) knew of the order; and (3) has the present ability to comply with the order. *Id.* In imposing a remedial contempt sanction, the court must do so "in writing or on the record describing the means by which the person may purge the contempt." *Id.*, citing C.R.C.P. 107(d)(2). The alleged contemnor bears the burden of proving an inability to comply. *Id.*

Here, Snowmass's complaint alleges that the Defendants' "continuous actions and assertions of ownership over the Property are in violation of the [c]ourt's judgment" and the Defendants' actions, including their "(1) false representations to other courts, administrative bodies, the press, and the public regarding their ownership and control of the White Banks Claims; (2) trespass onto the property covered by the White Banks Claims; and (3) disregard and violations of this court's judgment" are all contemptuous behavior pursuant to C.R.C.P. 107(a). Snowmass contends that the Defendants' actions amounted to disorderly or disruptive behavior and disobedience of the court's orders.

Reviewing the complaint and presuming its allegations of fact to be true, the court observes that Snowmass did not specify whether it seeks remedial or punitive contempt sanctions via its contempt claim. Assuming it seeks both, as to punitive sanctions, i.e., sanctions designed to punish, the complaint lacks allegations of fact pertinent to two of the required elements of a contempt claim for punitive sanctions, namely that (1) Defendants had the ability to comply with the order; and (2) the Defendants willfully refused to comply with the order. To the extent that the contempt claim seeks punitive sanctions, the court finds that it does not state a claim upon which contempt relief can be granted and it is properly dismissed without prejudice under Rule 12(b)(5).

As to remedial sanctions, i.e., to compel compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform, Snowmass's

complaint similarly has a gap in critical factual allegations. It lacks alleged facts that would demonstrate that the Defendants have the "present ability to comply" with Judge Lynch's order(s).

Moreover, with regard to the potential for contempt sanctions to imposed for arguments or statements the Defendants make in front of different tribunals, the court continues to have serious First Amendment concerns (raised first in its order on Snowmass's motion for injunctive relief) about entering a contempt order prohibiting Defendants from making communications before they are made. The court is not persuaded that the entry of contempt sanctions, punitive or remedial, would be an appropriate use of the court's contempt power, particularly where it appears undisputed that the mining claims underlying Judge Lynch's orders were forfeited by operation of law by Snowmass in 2020. This forfeiture does not mean Judge Lynch's orders have no purpose or effect, nor would it excuse the alleged 2019 trespass by Defendants or their agents. But the likelihood of the court invoking its contempt power to punish or to force compliance with orders about since-forfeited mining claims is low. Were this before the court on a motion for issuance of a contempt citation – which are motions that come before the court with some frequency -- the court would exercise its discretion to decline to issue a citation. Given Snowmass's failure to allege critical elements of a contempt claim – whether one for punitive or remedial sanctions - and given the court's disinclination to invoke its contempt power in this context, no citation to show cause shall issue, and the Defendants' motion to dismiss the contempt claim on Rule 12(b)(5) grounds is properly granted. The claim is dismissed without prejudice.

c. Anti-SLAPP

Given the court's grant of the Defendants' motion to dismiss the contempt claim on Rule 12(b)(5) grounds above, the court finds the Defendants' anti-SLAPP motion to be rendered moot. However, even if the motion is not moot, the court finds that it was untimely filed.

Snowmass filed its complaint in December 2021. The Defendants removed the case to the federal district court for the District of Colorado three weeks later and accepted service in January 2022. The federal district court remanded this case to this court on March 20, 2023. The Defendants filed an amended answer in this court on May 31, 2023. The Defendants filed their anti-SLAPP motion on July 13, 2023. The Defendants contend that they were awaiting the federal district court's decision on whether to remand the case to this state court. But the Defendants do not explain why they waited another 114 days after remand to file the motion, after they had accepted service and had filed an answer and an amended answer. The court finds that the Defendants did not comply with the anti-SLAPP statute's requirement that such a motion "must" be filed within 63 days after service of the complaint and declines to exercise its discretion to allow the Defendants' late filing.

The court finds the Defendants' anti-SLAPP motion is moot. Even if it were not moot, the motion would be properly denied as untimely filed.

II. Defendants' C.R.C.P. 56(f) Motion and Amended Motion to Allow Discovery and Postpone Summary Judgment

As discussed below, Snowmass seeks summary judgment on aspects of its declaratory judgment claim. Snowmass seeks a declaration on summary judgment that Defendants do not have valid mining claims at the location of the White Banks Claims. Defendants oppose summary judgment and seek to conduct discovery on the issue of whether Snowmass validly relocated its claims after forfeiture in 2020. In particular, the Defendants seek to conduct depositions and subpoena material from the BLM regarding Snowmass's alleged relocation of the White Banks Claims.

a. Applicable Law

Under C.R.C.P. 56(f), "should it appear from the affidavits of a party opposing [a] motion [for summary judgment] that the opposing party cannot for reasons stated present by affidavit facts essential to justify its opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." C.R.C.P. 56(f). In other words, Rule 56(f) allows a party who cannot produce facts essential to its opposition to a motion for summary judgment to submit an affidavit explaining why it cannot do so. *Stokes v. Denver Newspaper Agency, LLP*, 159 P.3d 691, 696 (Colo. App. 2006).

Whether to grant or deny a request for discovery under Rule 56(f) is a matter of the trial court's discretion and on appeal is reviewed for an abuse of that discretion. *A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy*, 93 P.3d 598, 604-605 (Colo. App. 2004). A trial court abuses its discretion in denying a Rule 56(f) request "where the movant has demonstrated that the proposed discovery is necessary and could produce facts that would preclude summary judgment. *Bailey v. Airgas-Intermountain, Inc*., 250 P.3d 746, 751 (Colo. App. 2010).

"In order to avoid the precipitous and premature grant of judgment against the opposing party, C.R.C.P. 56(f) affords an extension of time to utilize discovery procedures to seek additional evidence before the trial court rules on a motion for summary judgment. *Id*., quoting *Sundheim v. Board of County Comm'rs*, 904 P.2d 1337, 1352 (Colo. App. 1995). But if the movant for a Rule 56(f) continuance fails to demonstrate that the proposed discovery could produce material facts, the trial court may deny it. *Id*., citing *A-1 Auto*, 93 P.3d at 604. The request must be specific, not conclusory. *Id*. A trial court does not abuse its discretion where an affidavit submitted in support of a Rule 56(f) motion "failed to identify any specific facts which would create a genuine issue

material fact, let alone identify what steps had been taken to obtain such facts and a plan for the future." *Id*., quoting *Garcia v. United States Air Force*, 533 F.3d 1170, 1179-80 (10th Cir. 2008).

The 10th Circuit has declared[4] that "[t]he protection afforded by Rule 56(f) is an *alternative* to a response in opposition to summary judgment" rather than an opportunity to address evidentiary deficiencies raised in the summary judgment merits briefing." *Pasternak v. Lear Petroleum Expl. Inc.,* 790 F.2d 828, 833 (10th Cir. 1986) (emphasis in original). "[A] party ordinarily may not attempt to meet a summary judgment challenge head-on but fall back on Rule 56(f) if its first effort was unsuccessful." *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1235 (10th Cir. 2007). Where a party has responded to a motion for summary judgment, that party waives any option it might have had to proceed under the [federal counterpart to Rule 56(f)]." *Villa v. Bd. of Cnty. Comm'rs of Arapahoe County*, 931 F.2d 900 *4 (10th Cir. 1991) (unpublished).

b. Analysis

Defendants contend in the Rule 56(f) briefing, in error, that Snowmass seeks summary judgment on "its three claims - for declaratory relief, for trespass, and for contempt." To the contrary, the briefing is clear that Snowmass seeks the entry of summary judgment on a discrete aspect of its declaratory judgment claim, namely, that Defendants do not have valid claims at the White Banks Claims location. As discussed below, the court will rule on aspects of Snowmass's declaratory judgment claim because the decision is based upon events and issues that have already been addressed and adjudicated by this district court. In particular, based on Judge Lynch's existing orders and existing law, the court can conclude as a matter of law that the relocation efforts

[4] When Colorado rules are similar to the federal rules, the court appropriately looks to federal courts for guidance. *McDaniels v. Laub,* 186 P.3d 86, 87 (Colo. App. 2008). The federal Rule is F.R.C.P. 56(d), which provides as follows: When Facts are Unavailable to the Nonmovant**.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

undertaken by Congdon in 2005 did not have the legal impact of creating in Mystic Eagle or any other entity a "junior" claim that became "senior" when Snowmass forfeited its claims in 2020. That is, the ground where Defendants purported to locate their claims was not open to location in August 2005 as provided by law, as determined by Judge Lynch, and as affirmed on appeal. As discussed below, because the land was not open to location in 2005, the Defendants' claimed location from that time was void ab initio. None of these conclusions required inquiry into the validity of Snowmass's asserted relocation of its claims in 2020, so no discovery on the 2020 relocation issue is or was necessary before resolving Snowmass' motion for partial summary judgment and granting it, in part. And, the Defendants opted to and were able to substantively respond to Snowmass's motion for summary judgment in any event. The Defendants failed to demonstrate that the proposed discovery is necessary and could produce facts that would preclude summary judgment on the discrete issue sought by Snowmass.

Accordingly, the Defendants' motion for a Rule 56(f) continuance for discovery is DENIED.

III. Defendants' Motion to Strike Portions of Affidavits

The Defendants move to strike portions of an affidavit signed by Julie Skinner (the "Skinner Affidavit") and filed by Snowmass in connection with its motion for partial summary judgment.

1. Applicable Law

Pursuant to C.R.C.P. 12(f), the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading, motion or paper.

Pursuant to C.R.C.P. 56, affidavits supporting summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show

affirmatively that the affiant is competent to testify to the matters stated therein." C.R.C.P. 56(e). An affidavit supporting summary judgment "must contain evidentiary material which, if the affiant were in court and testifying on the witness stand, would be admissible as part of his testimony." *People v. Hernandez & Assocs., Inc*., 736 P.2d 1238, 1240 (Colo. App. 1986).

Relevant evidence is admissible; irrelevant evidence is inadmissible. C.R.E. 402. Relevant evidence is defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." C.R.E. 401. Witnesses may testify to relevant evidence that is rationally based on the perception of the witness, is helpful to a clear understanding of the witness's testimony or the determination of a fact in issue and is not expert testimony. C.R.E. 701. A witness must have personal knowledge of a matter before he may testify to that matter. C.R.E. 601. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. *Id.*

Hearsay is defined as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c); *see People v. Huckleberry,* 768 P.2d 1235, 1241 (Colo.1989). An out-of-court statement offered, not for the truth of the matter it asserts, but solely to show its effect on the listener, is not hearsay. *People v. Rodriguez,* 888 P.2d 278, 287 (Colo. App. 1994); *People v. Robinson*, 226 P.3d 1145, 1151 (Colo. App. 2009). Affidavits containing hearsay that would be admissible under some exception may be considered in ruling on a motion for summary judgment. *Timroth v. Oken*, 62 P.3d 1042, 1048 (Colo. App. 2002), *rev'd on other grounds by Bd. of Comm'rs v. Timroth*, 87 P.3d 102 (Colo. 2004).

2. Analysis

The Defendants move to strike the Skinner Affidavit and an affidavit to which it refers executed by Greg Shiffrin, which was filed in connection with Snowmass's motion for preliminary injunction but not submitted in connection with Snowmass's motion for partial summary judgment. Defendants contend that the following paragraph from Julie Skinner's affidavit is inadmissible and should be stricken because it lacks foundation, contains hearsay, and is vague:

> In particular, certain individuals/entities have indicated an interest in investing in Snowmass's anticipated mining operations at the White Banks Claims in some fashion but have been hesitant to do so at least in part owing to the representations by Mr. Congdon described in paragraph 2 above have been finally resolved.
>
> Skinner Affidavit at ¶3.

In opposing Defendants' motion to strike, Snowmass contends that the Skinner Affidavit and the Schifrin Affidavit to which the Skinner Affidavit refers were included in the briefing as "background information," not to establish the lack of any genuine issue of material fact for summary judgment purposes. Snowmass also asserts that the Affidavits are referenced in the motion for summary judgment not for the truth of the matter asserted but rather as context for the reasons Snowmass initiated this lawsuit. Snowmass contends that the Affidavit should not be stricken in any event because Ms. Skinner has an evidentiarily sufficient basis of knowledge, as an owner of Snowmass and through her involvement in this litigation and in the 2014 Case, regarding efforts to secure investors and operationalize Snowmass's mining activities and the impediments the business has faced because of Defendants' alleged activities and statements. Snowmass asserts that the affidavit does not contain any hearsay statements, but rather recites events and circumstances of which Ms. Skinner has become aware and which have impacted her business.

The court agrees with Snowmass and declines to strike the Affidavits. To be sure, in resolving Snowmass's motion for partial summary judgment, the court has not found the need to rely on or refer to Ms. Skinner's paragraph 3 statement. However, the Affidavits do not need to be stricken under Rule 12; the record supports a conclusion that Ms. Skinner has personal knowledge of the events in the above-quoted paragraph and that her statements were not merely "upon information and belief" but rather were based upon her status as an owner of Snowmass who has come into this knowledge. If Ms. Skinner were testifying in court, the statement would be admissible to explain its effect on Skinner, to explain subsequent actions she might have taken, and to provide context to her testimony. The statement is not so vague as to require exclusion; were this a trial, the Defendants would be free to explore the statement on cross-examination, but the statement is based on sufficient personal knowledge and would be admissible to provide context and to explain Ms. Skinner's subsequent actions.

The court will accordingly exercise its discretion to DENY the Defendant's motion to strike.

IV. Snowmass's Motion for Summary Judgment on Aspects of Its Declaratory Judgment Claim

In its motion for partial summary judgment, Snowmass asks the court to hold and declare that Defendants "have no valid mining claims at the location of Snowmass's White Banks Claims."

1. Applicable Law

A court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." C.R.C.P. 56(c); *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 467 P.3d 287, 291

(Colo. 2021) A material fact, for purposes of applying C.R.C.P. 56(c), is one that would impact the outcome of the case. *City of Aurora v. ACJ Partnership*, 209 P.3d 1076, 1082 (Colo. 2009).

The moving party bears the initial burden of showing that there is no genuine issue of material fact to be resolved at trial. *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997). If this initial burden is met, then the burden shifts to the nonmoving party to demonstrate the existence of a triable issue of fact. *Id; City of Longmont v. Colorado Oil and Gas Association*, 369 P.3d 573, 578 (Colo. 2016). In determining whether summary judgment is proper, the court must resolve any doubts about whether a triable issue of fact exists against the moving party and grant the nonmoving party the benefit of "all favorable inferences that may be drawn from the undisputed facts." *AviComm, Inc. v. Colorado Pub. Utilities Comm'n*, 955 P.2d 1023, 1029 (Colo. 1998); *Planned Parenthood,* 467 P.3d at 291.

The trial judge's proper function at the summary judgment stage is not "to weigh the evidence and decide what occurred, but to determine whether or not a genuine issue exists for the jury." *Andersen v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007), *as modified on denial of reh'g* (June 11, 2007). Summary judgment is "a drastic remedy" that is only warranted when it is clear the requirements of C.R.C.P. 56(c) have been met. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1339-1440 (Colo. 1988); *Planned Parenthood*, 467 P.3d at 291.

Colorado has adopted the Uniform Declaratory Judgments Law, § 13-51-101, *et seq.,* C.R.S., which the supreme court has incorporated into C.R.C.P. 57. Both the statute and the rule "are intended to provide a method to relieve parties from uncertainty and insecurity with respect to their 'rights, status, and other legal relations." *Vail Sierra Condominium Ass'n v. Field Corp.*, 878 P.2d 161, 164 (Colo. App. 1994); *Constitution Assoc. v. N.H. Ins. Co.,* 930 P.2d 556, 560-61 (Colo. 1996).

However, a declaratory relief claim does not, standing alone, afford any remedies. It merely resolves the respective obligations of the parties. Further relief needs to be sought under a different theory or theories to afford a remedy. "The primary purpose of the declaratory judgment procedure is to provide a speedy, inexpensive, and readily accessible means of determining actual controversies which depend on the validity or interpretation of some written instrument or law." *Toncray v. Dolan*, 593 P.2d 956, 957 (Colo. 1979); C.R.C.P. 57(k); *Tidwell v. Bevan Properties, Ltd*., 262 P.3d 964, 968 (Colo. App. 2011). A declaratory judgment is a binding adjudication that establishes the rights and other legal relations of the parties "without providing for or ordering enforcement." *Tidwell*, 262 P.3d at 968. Thus, an action for declaratory judgment seeks only a declaration of the existing rights between the parties and does not seek any further relief.

I. Analysis

Resolution of whether the court can declare on summary judgment that the Defendants have no mining claims at the White Banks Claims requires the evaluation of several sub-issues as detailed below.

a. Standing

In the briefing on this motion as well as on the Defendants' motion for a Rule 56(f) continuance, Snowmass and the Defendants each assert that the other does not have "standing" in this lawsuit or to make various arguments. Defendants claim that Snowmass lacks standing to seek the legal relief it does because Snowmass forfeited the White Banks Claims in 2020 and, according to Defendants, Snowmass "does not currently own mining claims" because it did not properly relocate them. Snowmass asserts that Defendants themselves lack mining claims and lack standing to challenge the validity of Snowmass's 2020 relocation. The court disagrees with both Snowmass and Defendants on their standing arguments.

In order to have standing, a plaintiff must establish (1) an "injury in fact" (2) to a "legally protected interest." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004); *Hickenlooper v. Freedom from Religion Foundation, Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). Whether a plaintiff has standing to sue is a question of law. *Reeves-Toney v. School Dist. No 1. In City and County of Denver*, 442 P.3d 81, 85 (Colo. 2019). In determining whether standing has been established, the court is to accept as true all material allegations of fact in the complaint. *Id.*

It is settled law that "traditional standing principles do not apply to defendants." *Mortg. Invs. Corp. v. Battle Mountain Corp.*, 70 P.3d 1176, 1182 (Colo. 2003), *as modified on denial of reh'g* (June 9, 2003). "[O]nce a plaintiff has established standing and the defendants have been haled in to court by the plaintiff, the only role for the defendants is to defend against the suit." *People ex rel Simpson v. Highland Irr. Co.*, 893 P.2d 122, 127 (Colo. 1995). As noted by Judge Taubman in his dissent in *People ex rel J.C.S*, the supreme court's limitation of standing principles to plaintiffs "makes sense because, once a lawsuit is filed against a defendant, the defendant should be free to challenge the proceedings against him or her on any appropriate grounds, and if those grounds are not meritorious, the plaintiff will ordinarily prevail." 169 P.3d 240, 250 (Colo. App. 2007).

Here, the allegations in Snowmass's complaint establish that it has standing to sue. Accepting the allegations in its complaint as true as the court must in this context, the following allegations are sufficient to establish Snowmass's standing: Snowmass alleges that it owns mining claims at the location of the White Banks Claims. Snowmass asserts that after the 2020 forfeiture, it re-engaged Minex, the mining company that had done the staking and location work in 2005, to "redo the staking and location work and to record new claims at the same location as the White Banks Claims." Snowmass's complaint further details the orders received in its favor in the 2014

Case related to the White Banks Claims, which included an injunction precluding Congdon and the other defendants from entering the White Banks Claims without lawful right and factual determinations about, among other things, Congdon's failed relocation efforts in 2005. Snowmass's complaint alleges that the Defendants have undertaken activities and arguments contrary to Snowmass's legally protected interests in the White Banks Claims and the existing court orders. By virtue of its asserted present ownership of the White Banks Claims and its interest in the court orders addressing, among other issues, Snowmass's successful and Defendants' unsuccessful efforts to locate the claims in 2005, Snowmass has adequately alleged an injury in fact to a legally protected interest and therefore has standing to sue in this lawsuit.

As for the Defendants, the law is clear that traditional standing principles do not apply to them in the context of this lawsuit. Therefore, contrary to Snowmass's assertions, the Defendants do not have to establish "standing" in order to challenge Snowmass's factual and legal assertions, including Snowmass's contention that it validly relocated the claims in 2020. Snowmass haled the Defendants into court in this lawsuit, and in so doing, rendered the Defendants free to challenge the proceedings on any appropriate grounds.

b. Did Defendants Have "Junior" Claims That Were Revived when Snowmass Forfeited its Claims in 2020?

The Defendants assert that when Snowmass forfeited its claims in 2020, Mystic Eagle had junior claims to the White Banks Claims by virtue of Congdon's relocation efforts in 2005 which were made valid and senior by Snowmass' forfeiture. The court rejects this assertion as a matter of law.

As stated unequivocally by Judge Lynch in her 2017 Order, the Defendants' purported relocation in 2005 took place during the 90-day window when the land was not available for location because of Snowmass's earlier-in-time location. This decision was affirmed by the Court

of Appeals, because a person's discovery of a valuable mineral deposit triggers a ninety-day "holding" period, during which that person can perfect his mining claim by completing the location requirements and filing a certificate of location with the county. During the ninety-day period, the discoverer is entitled to "exclusive possession of the 'ground claimed' in the discovery notice." *Snowmass Mining Co.*, at 2; *Erhardt v. Boaro*, 113 U.S. 527, 534-35 (1885); C.R.S. §34-43-103. Once the claim is perfected, the locator has the "exclusive right" to possess the land and extract the minerals, subject to federal and state regulation. *Snowmass Mining Co.* at 4; *McFeters v. Pierson*, 24 P. 1076, 1077 (1890). As a result, after Mr. Skinner posted the discovery notice in early June 2005, the ground was held for 90 days and, according to Judge Lynch:

> [N]o other person could come in and make a claim or relocate a claim. When Mr. Congdon filed his location certificates on August 5, 2005, the White Banks Claims were not open to location by Mr. Congdon or any other claimant. [Snowmass] had until August 29 of 2005 to complete the acts of location and no one could come in and make a claim during this time period, including Mr. Congdon.
>
> 2017 Order at 17.

Once Mr. Skinner had staked/posted location certificates on ground within the claims in June 2005, because those posted notice papers served as location notices under C.R.S. § 34-43-106(b), third parties, including Defendant Congdon whose prior claims were forfeited, were prohibited from initiating a location on the same ground. *See* 2 Rocky Mt. Mineral L. Foundation, American L. of Mining, 2d Ed., § 33.03[2] (LexisNexis Matthew Bender 2015), citing *Erhardt,* 113 U.S. at 534 ("In effect, posting withdraws the ground from claimed location by others" and during the "period of time allowed for completion of the location, a subsequent locator cannot initiate a location in the area within which the first claimant is protected").

This conclusion is supported by the United States Supreme Court's decision in *Swanson v. Sears*, 224 U.S. 180 (1912), which provides that "[a] location and discovery on land withdrawn

quaod hoc from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right" and that a contradictory claim would not become valid by reason of the subsequent forfeiture of the valid claim. 224 U.S. at 181-82. Efforts to establish a "contradictory right" on land covered by a "valid and subsisting mining claim" are void ab initio. *Id.* at 182. The Defendants acknowledged this principle of law in their proposed findings of fact and conclusions of law submitted in the 2014 Case, when they stated, "[t]o locate a claim on federal land, the land must be open to mineral entry. Lands on which minerals have already been located are not open to mineral entry and no additional claims may be located on those lands." *Defendants' Proposed Findings of Fact, Conclusions of Law, and Order,* May 5, 2017, ¶128.

Applied to the adjudicated facts in the 2014 Case, Congdon's 2005 attempted relocation was void and of no legal effect. Congdon's entry onto ground covered by Snowmass's claims in August 2005 in order to stake his entity's own claims leaves him in the same position as the plaintiff in *Sears,* which was characterized as follows: "[h]is entry was a trespass, his claim was void, and the defendant's forfeiture did him no good." *Id.*

The authority cited by the Defendants for the proposition that its invalid 2005 claims spontaneously became valid claims upon Snowmass's failure to pay the annual fees, the *Del Monte* and *Lavagnino* cases, are inapposite and unpersuasive. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.* is factually distinguishable from this case. 171 U.S. 55 (1989). In *Del Monte*, the parties had claims that did not overlap completely, and the court addressed whether a junior claim might be valid in areas that did not overlap. *Id.* at 70. The court determined that the junior claim was valid and did not need to be relocated. *Id.* at 85. But crucially, in *Del Monte,* there was no dispute as to the underlying validity of the junior claim, except as related to the overlap. Here, Judge Lynch determined that "no other person could come in and make a claim or relocate

a claim" during the 90-day period in which Congdon attempted to do so, and insofar as Defendants attempted to do just that, i.e., to locate the White Banks Claims in the same place as Snowmass had located claims (as they argued they had in the 2014 Case), they failed. The *Del Monte* case does not lend support to the Defendants' arguments here.

The Defendants also cite *Lavagnino v. Ulig,* 198 U.S. 443 (1905), as support for the concept that with the enactment of 30 U.S.C. §30, a junior claim can become senior upon forfeiture of a senior claim. But the Supreme Court subsequently expressly recognized the limitations of *Lavagnino*; in deciding *Sears* in 1912*,* the Court acknowledged that its reasoning in *Lavagnino* was contrary to the principle that a "location and discovery on land withdrawn *quoad hoc* from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right" and explained that in *Farrell v. Lockhart*, 210 U.S. 142 (1908), the *Lavagnino* "language was qualified and the older precedents recognized as in full force." 224 U.S. at 182. The court finds that *Lavagnino* does not control and is unpersuaded by its reasoning in any event.

Once Mystic Eagle forfeited its original claims, its right of possession was lost and it could not "reclaim the ground or reacquire any interest in the claim by resumption of work or any act short of making a new location." 2 Rocky Mountain Mineral Foundation, American Law of Mining, 2d. Ed. §46.01[7]. Judge Lynch recognized as much in her 2017 Order when she rejected Congdon's contention that he had resumed work on his forfeited claims in 2005, observing that "If Mr. Congdon wanted to keep the claims he had to perform all the acts of location all over again." The court of appeals agreed, observing that "it is undisputed that Congdon forfeited the Claims; his land was therefore 'open to location' and "[o]nce a claim is forfeited, the original locator must relocate the claim anew." *Snowmass Mining*, 2017CA1803 at ¶21. Again, as provided

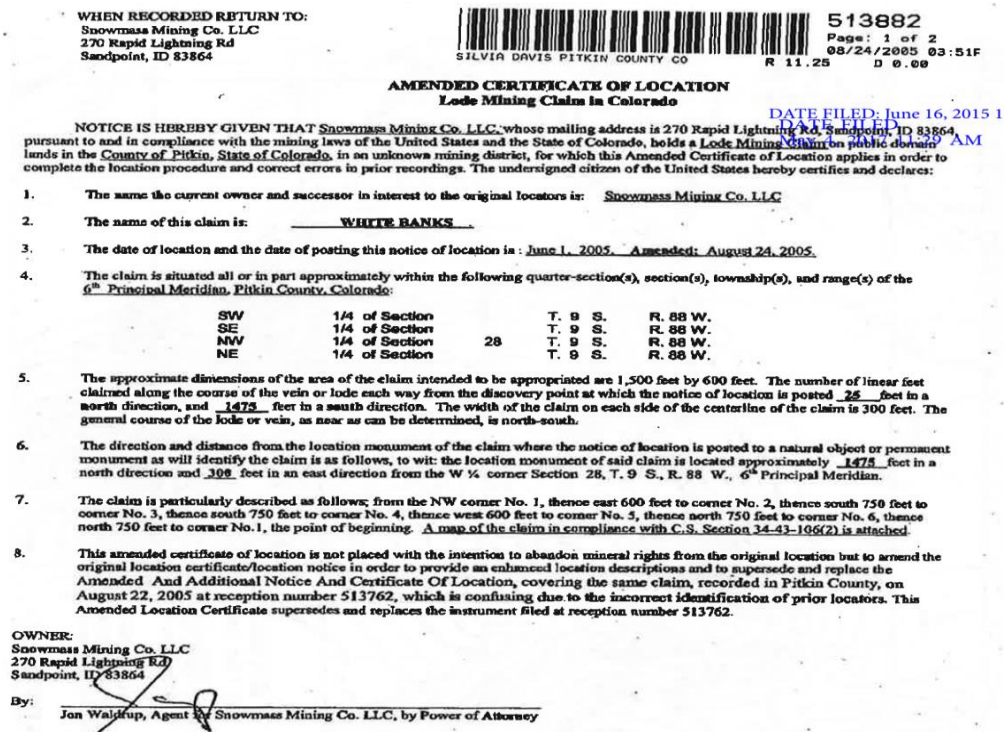
in *Sears*, Congdon's efforts to locate the White Banks claims in 2005 after Snowmass had already located them were void ab initio and of no legal force and effect. 224 U.S. at 182. Because the Defendants did not have claims to the White Banks Claims in 2005, such non-existent claims could not have been resuscitated, made senior, or reinstated by Snowmass's 2020 forfeiture.

c. Legal Description in the Quiet Title Case and Claim/Issue Preclusion

The Defendants also contend that Judge Lynch's decree quieting title in the 2014 Case was essentially defective because Snowmass did not provide the court, and Judge Lynch did not include, a legal description of the boundaries of the White Banks Claims in the judgment and decree. Defendants use this purported flaw to assert that the White Banks Claims and Defendants' asserted mining claims were and are not coterminous but rather only overlap by 25 feet at the northern boundary of the Snowmass claims and the southern boundary of Mystic Eagle's claims. The court concludes that Defendants' first contention – that Judge Lynch's orders lack an adequate legal description - is without merit. The Defendants' second contention – that the Defendants' asserted mining claims were not coterminous with Snowmass' White Banks Claims and only overlap the White Banks Claims by 25 feet – was clearly no raised during the 2014 Case and may well be unavailing in this case, though final resolution of the applicability of claim and issue preclusion is premature for the reasons detailed below.

On the first issue, the court concludes that Snowmass clearly provided the court in the 2014 Case with a legal description of the boundaries of the White Banks Claims and Judge Lynch clearly quieted title to the White Banks Claims, as described by both parties at trial and on appeal, in Snowmass. The testimony and evidence established at the trial in the 2014 Case that Minex prepared amended location certificates ("Amended Certificates") identifying the boundaries of Snowmass' White Banks Claims and recorded and filed them in Pitkin County and with the Bureau

of Land Management on August 24, 2005. They were admitted at trial as Exhibit 73. An example of one of the Amended Certificates is depicted below:



WHEN RECORDED RETURN TO:
Snowmass Mining Co. LLC
270 Rapid Lightning Rd
Sandpoint, ID 83864

513882
Page: 1 of 2
08/24/2005 03:51F
SILVIA DAVIS PITKIN COUNTY CO
R 11.25 D 0.00

AMENDED CERTIFICATE OF LOCATION
Lode Mining Claim in Colorado

DATE FILED: June 16, 2015 1
[illegible] AM

NOTICE IS HEREBY GIVEN THAT Snowmass Mining Co. LLC, whose mailing address is 270 Rapid Lightning Rd, Sandpoint, ID 83864, pursuant to and in compliance with the mining laws of the United States and the State of Colorado, holds a Lode Mining Claim on public domain lands in the County of Pitkin, State of Colorado, in an unknown mining district, for which this Amended Certificate of Location applies in order to complete the location procedure and correct errors in prior recordings. The undersigned citizen of the United States hereby certifies and declares:

1. The name the current owner and successor in interest to the original locators is: Snowmass Mining Co. LLC
2. The name of this claim is: WHITE BANKS
3. The date of location and the date of posting this notice of location is : June 1, 2005. Amended: August 24, 2005.
4. The claim is situated all or in part approximately within the following quarter-section(s), section(s), township(s), and range(s) of the 6th Principal Meridian, Pitkin County, Colorado:

SW	1/4 of Section		T. 9 S.	R. 88 W.
SE	1/4 of Section		T. 9 S.	R. 88 W.
NW	1/4 of Section	28	T. 9 S.	R. 88 W.
NE	1/4 of Section		T. 9 S.	R. 88 W.

5. The approximate dimensions of the area of the claim intended to be appropriated are 1,500 feet by 600 feet. The number of linear feet claimed along the course of the vein or lode each way from the discovery point at which the notice of location is posted 25 feet in a north direction, and 1475 feet in a south direction. The width of the claim on each side of the centerline of the claim is 300 feet. The general course of the lode or vein, as near as can be determined, is north-south.
6. The direction and distance from the location monument of the claim where the notice of location is posted to a natural object or permanent monument as will identify the claim is as follows, to wit: the location monument of said claim is located approximately 1475 feet in a north direction and 309 feet in an east direction from the W ¼ corner Section 28, T. 9 S., R. 88 W., 6th Principal Meridian.
7. The claim is particularly described as follows; from the NW corner No. 1, thence east 600 feet to corner No. 2, thence south 750 feet to corner No. 3, thence south 750 feet to corner No. 4, thence west 600 feet to corner No. 5, thence north 750 feet to corner No. 6, thence north 750 feet to corner No.1, the point of beginning. A map of the claim in compliance with C.S. Section 34-43-106(2) is attached.
8. This amended certificate of location is not placed with the intention to abandon mineral rights from the original location but to amend the original location certificate/location notice in order to provide an enhanced location descriptions and to supersede and replace the Amended And Additional Notice And Certificate Of Location, covering the same claim, recorded in Pitkin County, on August 22, 2005 at reception number 513762, which is confusing due to the incorrect identification of prior locators. This Amended Location Certificate supersedes and replaces the instrument filed at reception number 513762.

OWNER:
Snowmass Mining Co. LLC
270 Rapid Lightning Rd
Sandpoint, ID 83864

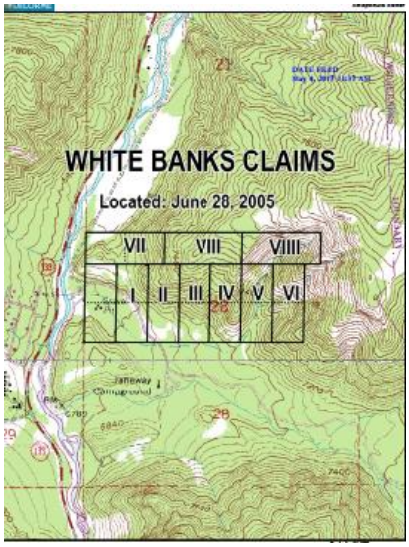
By: _____
Jon Waldrup, Agent for Snowmass Mining Co. LLC, by Power of Attorney

Judge Lynch declared in her 2017 Order that "[Snowmass's] August 24, 2005 location certificates are valid and are senior to Mr. Congdon's August 5, 2005 location certificates." Judge Lynch quieted title to the land covered by the Amended Certificates in favor of Snowmass, stating as follows:

> [T]he court finds and concludes that [Snowmass] properly relocated the White Banks Claims, their location certificates filed on August 24, 2005 are valid and are senior to those filed by Mr. Congdon and title to the White Banks Claims is quieted in Plaintiff, Snowmass Mining Company, LLC.

Based on a review of Judge Lynch's orders, the court of appeals order, and the 2014 Case case file, it is clear that the dispute in the 2014 Case was over title to the White Banks Claims and whether Snowmass or Mystic Eagle/Congdon had validly located the claims after Congdon's fees-based forfeiture. The 2014 Case never involved a dispute over dueling locations of the White

Banks Claims nor did it involve any argument or evidence by Defendants that their "White Banks Claims" overlapped by only 25 feet with Snowmass's asserted "White Banks Claims." Examples illustrating this conclusion abound, including the fact that the Defendants asserted as an undisputed fact in a motion for summary judgment prior to trial in the 2014 Case that Snowmass and Mystic Eagle "*both claim title* to ten separate unpatented lode mining *claims known as the White Banks Claims* . . . located in Pitkin County, Colorado, adjacent to Avalanche Creek Road, Forest Service Road 310, between the towns of Carbondale and Redstone on United States Forest Service lands." Exhibit 25 at 3-4 (emphasis added). The Defendants wrote in their proposed findings of fact and conclusions of law after trial that "at its heart, this case is to quiet title in the White Banks Claims . . ." and sought the "entry of declaratory judgment in its favor quieting title to the White Banks Claims." *Defendants' Proposed Findings of Fact, Conclusions of Law, and Order,* May 5, 2017 at 12-13. Witnesses, counsel, and the court referred to a map depicting the claims during trial, and the same map (depicted below) appeared in the Defendants' proposed findings after trial:



Id. at 2.

Throughout 2017 Order and 2018 Order, Judge Lynch referred to the disputed claims as the White Banks Claims, just as the parties did in the motions practice and at trial. There was not

a need for Judge Lynch to further describe the geographic location of the White Banks Claims in her orders because she specifically referenced the Amended Certificates in her orders, which were, again, admitted at trial and were recorded public documents. Defendants filed a C.R.C.P. 59 motion after Judge Lynch issued her 2017 Order, and therein made several contentions about errors of law and fact made by Judge Lynch but consistently referred to the "White Banks Claims" without challenging the geographic location or asserting that their White Banks Claims only overlapped 25 feet with the White Banks Claims Judge Lynch had, at that point, entered orders quieting title in Snowmass. The Defendants' prayer for relief in their ultimately unsuccessful post-trial motion read as follows:

> [T]his Court should amend its judgment, in the form of the proposed Order attached hereto, to hold that Plaintiff is not entitled to title to the White Banks Claims, and instead title should be quieted in favor of Defendant Mystic Eagle Quarry LLC.
>
> *Motion to Amend the Findings and the Judgment*, July 6, 2017, at 16.

The Defendants' proposed order related to the above motion included language reading simply: "Title to the White Banks Lode Claims is quieted in Defendant Mystic Eagle Quarry, LLC." *Proposed Order RE: Motion to Amend the Findings and the Judgment* at 1.

Defendants appealed Judge Lynch's orders, and, on appeal, Defendants referred to the dispute as being over "an area covered by ten White Banks lode mining claims (the 'Claims') in a national forest." They did not challenge the court's findings about the geographical location of the White Banks Claims. The Defendants pointed out in their appellate brief that Julie Skinner used the same location descriptions and maps of claims that had been located and filed by Congdon in 1991. The Defendants never raised a boundary issue, a geographical location issue, or a 25-foot overlap issue on appeal. In short, the geographic location of the White Banks Claims which went

unchallenged by Defendants at trial or on appeal, was adjudicated and declared by the court in the 2014 Case.

The Defendants' failure to challenge the geographic location of the White Banks Claims at all stages of the 2014 case and their failure to assert their 25-foot overlap argument is legally significant because such positions would have constituted an affirmative defense or a compulsory counterclaim under C.R.C.P. 13(a), which provides, in relevant part:

> A pleading shall state as a counterclaim any claim which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.
>
> C.R.C.P. 13(a).

The purpose of Rule 13 is to prevent a multiplicity of lawsuits arising from a single set of circumstances. *Grynberg v. Phillips*, 148 P.3d 446, 449 (Colo. App. 2006). A party who fails to plead a claim properly classified as a compulsory counterclaim is barred from raising that claim in a later action against a person who was a plaintiff or in privity with a plaintiff in the prior action. *Id.* at 448. The court is to apply the "logical relationship" test to determine whether claims arise out of the same transaction or occurrence. *In Re Estate of Krotiuk*, 12 P.3d 302, 304 (Colo. App. 2000). The logical relationship test evaluates "whether the subject matter of the counterclaim is logically related to the subject matter of the initial claim." *Id.*

The Rule of Civil Procedure pertaining to quiet title actions, Rule 105, likewise contemplates a *complete* adjudication of the rights of all parties to the action. C.R.C.P. 105(a) (decree declaring title in any party "grants full and adequate relief so as to *completely determine the controversy* and enforce the rights of the parties) (emphasis added). Because the relief in a quiet title action is full and final, "it is incumbent upon all parties to raise any claims, issues or

defenses that may affect the court's adjudication of rights in the subject property as all rights are to be determined in a single action." *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 609 (Colo. 2005).

The doctrines of claim preclusion (also known as res judicata) and issue preclusion (also known as issue preclusion) are consistent with the above rules and "protect[] litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Id.* at 608. The doctrines serve to ensure the "conclusive resolution of disputes." *Montana v. U.S.*, 440 U.S. 147, 153 (1979). Under the doctrine of claim preclusion, a second judicial proceeding is precluded by a previous judgment if there is: (1) finality of the first judgment; (2) identity of subject matter; (3) identity of claims for relief; (4) identity or privity between parties to the actions. *Id.* Claim preclusion applies to claims decided and also claims that could have been raised in the prior proceeding. *Lobato v. Taylor*, 70 P.3d 1152, 1165 (Colo. 2003). Claim preclusion is an affirmative defense and the party asserting its application to a claim bears the burden of establishing all of its necessary elements. *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008).

Issue preclusion precludes re-litigation of an issue when "(1) the issue is identical to an issue actually and necessarily adjudicated at a prior proceeding; (2) the party against whom estoppel is asserted is a party or in privity the party in the prior proceeding; (3) there was a final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." *City & Cty. of Denver v. Block 173 Assoc.*, 814 P.2d 824, 831 (Colo. 1991).

Snowmass contends that the Defendants are barred by the above doctrines from raising their 25-foot overlap or boundary dispute claim in this case. Snowmass cites the decision of an

administrative law judge (ALJ) in September 2020 who concluded that Defendants were barred by such doctrines from repackaging their arguments as a boundary dispute when title to the White Banks Claims had been conclusively established in the 2014 Case. Exhibit 10 ("OHA Order"). The ALJ's rationale appears sound, but his determination about the applicability of the claim and issue preclusion doctrines appears to have been made before it was understood that Snowmass had failed to pay its yearly assessment fees in 2020 for the White Banks Claims that had been adjudicated in the 2014 Case. In order for issue and/or claim preclusion to apply and bar a claim or argument, the underlying subject matter must be "identical." And here, the court cannot conclude – at this stage, at any rate - that the subject matter is identical. The 2020 iteration of the White Banks Claims is objectively different than the 2005 iteration of such claims because they have different operative dates and necessarily different facts underlying the location/attempted locations. The facts underlying Snowmass's 2005 location (and Congdon/Mystic Eagle's failure on that score) have been adjudicated, but the facts pertaining to the 2020 location have not. Whether Snowmass successfully relocated the claims in 2020 is a central fact question in this case and it is not susceptible to resolution as a matter of law, despite the parties' pages of argument on the question in the summary judgment briefing. And, the Defendants' contentions regarding a 25-foot overlap or other boundary disputes related to the "White Banks Claims" may well be ultimately unavailing, but given the lack of identity of subject matter in this case as compared to the 2014 Case due to Snowmass's need to re-locate its claims in 2020, the court cannot find that the Defendants' boundary and overlap arguments are barred by claim or issue preclusion at this stage.

These fact issues also preclude the court from going as far as Snowmass requests it go on its declaratory judgment claim, which is a declaration that Defendants have "no claims" at the location of the White Banks Claims. They Defendants may well not, and as set forth above, they

do not have claims based on Congdon's attempted 2005 location when the land was not open for location, but Snowmass's motion for summary judgment was premised in large part on the application of claim and/or issue preclusion, and the court cannot find as a matter of law at this stage that the doctrines apply.

In sum, the court finds and concludes as follows on the following discrete aspect of Snowmass's declaratory judgment claim: To the extent that Defendants' claim of title or interest to the White Banks Claims is based upon Congdon/Mystic Eagle's 2005 location efforts as adjudicated in the 2014 Case, such efforts were void ab initio and did not create a junior claim status in Defendants when Snowmass failed to pay its yearly assessment to the BLM.

V. Defendants' Cross-Motion for Summary Judgment on Snowmass' Trespass Claim

The Defendants' cross-motion for summary judgment seeks summary judgment on Snowmass's trespass claim. The basis for the Defendants' motion for summary judgment is their allegation that Snowmass failed to effectively relocate the White Banks Claims after forfeiture in 2020 because the 2020 location certificates described "amended locations" on forfeited claims and the alleged relocation had other deficiencies. Defendants contend that because Snowmass's re-location was ineffectual, Snowmass has no property right on which to base its trespass claim.

1. Applicable Law

The law applicable to motions for summary judgment is set forth above.

To establish a claim for trespass, a plaintiff must demonstrate by a preponderance of the evidence that (1) plaintiff was the owner or in lawful possession of property; and (2) the defendant(s) intentionally entered upon or caused another to enter upon that property. COLJI 18:1, Trespass – Elements of Liability; *Hugunin v. McCunniff*, 2 Colo. 367 (1874); *Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007); *Wal-Mart Stores, Inc. v. United Food &*

Commercial Workers Int'l Union, 382 P.3d 1249 (Colo. App. 2016) ("The elements of the tort of trespass are a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property.").

2. Analysis

The Defendants' motion for summary judgment is based primarily on the asserted effect of Snowmass's failure to pay its maintenance fees in 2020. Defendants assert that because Snowmass forfeited the claims by failing to pay maintenance fees in 2020 and allegedly failed in certain respects to properly relocate the claims, Snowmass does not have a property right in the White Banks Claims to which to tether a trespass claim.

Snowmass responds by asserting that Congdon himself has admitted, in affidavit fashion, to a trespass to the White Banks Claims in 2019, which Snowmass contends creates an issue of material fact precluding summary judgment on its trespass claim. Exhibit 1 to Snowmass's response to the Defendants' motion for summary judgment is an "Affidavit of Annual Assessment Work" signed by Congdon in August 2019 and filed with the Pitkin County Clerk and Recorder. It asserts that Congdon had performed work of "at least $100 per claim" in the form of "development, labor, and improvements, or equivalent value added" on ten purported mining claims at the White Banks location in 2019. The work attested to included fencing repair, inspection and maintenance of corner monuments, underground maintenance and safety work, and sampling. According to Snowmass, the date of Congdon's affidavit in August 2019, which was after Judge Lynch's orders but before the 2020 lapse in maintenance fees, and the work Congdon asserts he did on the White Banks Claims during this timeframe is sufficient to create a material issue of fact related to Snowmass's trespass claim which precludes the entry of summary judgment. The court agrees with Snowmass and will decline to enter summary judgment on the trespass claim.

Additionally, as to an alleged trespass by Congdon in 2021 or thereafter, whether Snowmass successfully relocated the claims in 2020, and thereby had a protected property interest therein, is a disputed issue of material fact. Snowmass contends that they successfully relocated the claims. Exhibit 8; Exhibit 9. Defendants contend that Snowmass did not. *See, e.g.,* Affidavit of Robert Congdon Opposition to Motion for Summary Judgment at ¶19-21, 27-29. If the claims were successfully located in 2020 as Snowmass asserts, their trespass claim is susceptible to resolution in Snowmass's favor. If Snowmass did not, the opposite is true. Resolving that question is not appropriate on summary judgment and Defendants' motion will therefore be DENIED.

CONCLUSIONS

Defendants' motion to dismiss for failure to join indispensable parties is DENIED.

Defendants' motion to dismiss Snowmass' contempt claim on Rule 12(b)(5) grounds is GRANTED.

Defendants' motion to dismiss on SLAPP grounds is deemed moot and, if not moot, DENIED as untimely filed.

Defendants' motion pursuant to C.R.C.P. 56(f) is DENIED.

Defendants' motion to strike is DENIED.

Snowmass's motion for partial summary judgment on aspects of its declaratory judgment claim is GRANTED IN PART as set forth above.

Defendants' motion for summary judgment on Snowmass' trespass claim is DENIED.

The status conference scheduled for October 25, 2024, is VACATED in light of the court's entry of these orders. The parties are welcome to contact the court for a status conference once they have had an opportunity to review the within order and are ready to determine next steps.

Dated this 24th day of October, 2024.

By the court:

Anne K. Norrdin
District Court Judge