Honorable Leif B. Erickson
Federal Magistrate Judge
Missoula Division
Russell E. Smith Courthouse
201 East Broadway, Room 370
Missoula, MT 59802

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CABINET RESOURCES GROUP,

Plaintiff,

vs.

ASARCO, INC., STERLING MINING COMPANY, and GENESIS, INC.,

Defendants.

CAUSE NO. CV 02-209-M-DWM

ORDER

On November 30, 2003, Plaintiff filed a motion for sanctions and costs "expended due to Defendant ASARCO's improper failure to admit that it deposited barrels in the Troy Mine impoundment." For the reasons herein stated,

IT IS HEREBY ORDERED that the motion is GRANTED and that ASARCO, Inc. shall pay to Plaintiff its costs, including attorney fees, expended as a consequence of the failure of ASARCO to admit it had deposited barrels in the Troy Mine impoundment. Plaintiff shall submit to ASARCO, within 20 days of this order, a statement itemizing its claimed fees and costs. ASARCO shall have 10 days thereafter to pay such fees and costs. Should ASARCO object to either the amount or the items claimed it may file such objection with the court after first certifying that it has made a good

faith attempt to resolve such objection with Plaintiff.

DONE and DATED this 22nd day of January, 2004.

Leif B. Erickson
United States Magistrate Judge

Background:

Request for Admission no. 1 of Plaintiff's First Discovery Requests asked ASARCO to admit that it had deposited barrels in the tailings pond and impoundment dike at the Troy Mine during the time that the Troy Mine was operating. ASARCO responded May 12, 2003, with a simple denial. The response was signed by John P. Davis, counsel for ASARCO, and included a verification signed by Donald Robbins, Director of Environmental Services of ASARCO on its behalf.

On May 15, 2002, Plaintiff requested entry onto the impoundment at the Troy Mine and thereafter, employing the services of Echotech Geophysical, did enter and conduct investigations during the period July 14-18, 2003. A copy of its report was provided to ASARCO on September 8, 2003. Thereafter Plaintiff advised ASARCO of its desire to depose Lee McKinney, who had been the mill superintendent at the Troy Mine from 1983 through 1993. The deposition was set for October 23, 2003. On October 14, 2003, counsel for ASARCO, John Davis, called Plaintiff's counsel and advised that McKinney had told Davis that

barrels had in fact been deposited in the impoundment at the Troy Mine and that ASARCO would be filing an amended response to Plaintiff's discovery requests. The amended answer was filed on October 17, 2003.

In its motion, Plaintiff contends it should be awarded its costs and fees because ASARCO failed to meet its duty to conduct a reasonable inquiry as required under Fed R. Civ. Pro. 26(g) and improperly failed to admit that it had deposited barrels, thereby entitling Plaintiff to its reasonable expenses under Fed R. Civ. Pro. 37(c).

Applicable law:

The relevant parts of Rule 26(g) state that an attorney or party signing a discovery request thereby certifies that "to the best of the signers knowledge, information and belief, formed after a reasonable inquiry, the...response...is (A)consistent with these rules,...; (B) not interposed for any improper purpose,... and (C) not unreasonable...given the needs of the case,... and the importance of the issues at stake in the litigation." The rule goes on to provide for an appropriate sanction, including payment of reasonable expenses incurred because of the violation, including attorney's fees, if the certification is found to have been made "without substantial justification." Fed R. Civ. Pro. Rule 26 (g)(3).

Rule 37(c)(2) provides in relevant part that "If a party fails to admit...the truth of any matter as requested...and if the

party requesting the admissions thereafter proves...the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney' fees. The court shall make the order unless it finds that ... (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, ..."

Discussion:

Here, there is no question that ASARCO initially failed to admit that it had deposited barrels in the Troy Mine impoundment. The issue under Rule 26(g) is whether it made a "reasonable inquiry" prior to submitting the initial answer, and the issue under Rule 37 is whether it had a "reasonable ground" to believe it would prevail on the matter.

ASARCO suggests that it did conduct a reasonable investigation, relying on the holding in *St Paul Reinsurance Co. LTD, et al. v. Commercial Financial Corp., et al*, 198 F.R.D. 508, 515 (N.D. Iowa, 2000) that an exhaustive investigation is not required, that the reasonableness of its investigation must be measured against such factors as the number and complexity of the issues; the location, nature, number and availability of potentially relevant witnesses, the extent of past working relations between the attorney and the client, especially in related or similar litigation, and, finally, the time available to conduct an investigation. ASARCO notes its conduct is to be

measured as of the time of the signing of the document as opposed to later revelations, and that all doubts are to be resolved in its favor. *Id.*

I will apply these standards in considering the reasonableness of ASARCO's conduct.

1. The entire thrust of this case is relatively simple, did or did not ASARCO deposit barrels containing hazardous waste in its impoundment at the Troy Mine. The request for admission here did not include the issue of hazardous waste, but certainly went to a key component, ie, the deposit of barrels. Hence, there is only one real issue and it is certainly not a complex one.

2. The location, nature, number and availability of relevant witnesses poses more of a problem. In its February 26, 2003, Rule 26(d) initial disclosure statement the Plaintiff identified 46 potential witnesses. I would not expect ASARCO to contact each and every one. At the same time I would expect a corporate entity faced with discovery requests to at least make a genuine effort to identify those witnesses who were most apt to be in a position to know the answer. In this respect ASARCO contends it did make an effort to contact someone who had worked at, and had knowledge about, the mill. According to the affidavit of Scott Thomas, Associate General Counsel for ASARCO, upon receipt of a copy of the discovery requests he contacted Chris Pfahl, an employee of ASARCO, "with extensive knowledge of the operating history and the

personnel associated with the Troy Mine". Mr. Pfahl, in turn, contacted Bruce Clark because "he had a wealth of knowledge about the operation of the Troy Mine" and had been a long-term employee at the Mine. Mr. Clark could not recall any barrels being deposited at the mine "at any time while he was employed at that faculty (sic)" Pfahl aff. at p. 2. Mr. Pfahl also contacted three other individuals known to him to be knowledgeable about the Troy Mine operations, D.H. Rust, W.C. Rust and J.E. Howard. They likewise had no knowledge of ASARCO depositing barrels in the impoundment. Mr. Pfahl concludes by noting that he had no "indication" that LeRoy McKinney had any unique knowledge of barrel deposits, nor did he even know Mr. McKinney's whereabouts.

The affidavit of Mr. Clark has also been provided to the court where he verifies the information he provided Mr. Pfahl, that he was unaware of deposit of barrels at the Troy Mine.

In considering whether the foregoing demonstrates that ASARCO made a reasonable inquiry I am struck by two obvious omissions. There is no indication what particular employment any of these affiants or their sources had at the mine. While there is the broad statement that Mr. Clark and the others relied on had worked at the Troy Mine for a number of years and hence had a wealth of knowledge, there is nothing to indicate that they were engaged in any of the operation that would give them any specific knowledge about whether or not barrels had been placed in the impoundment. I find it is not enough to say that you have talked to some

employees without going the extra step of making sure you are talking to the right employees. I think it fairly obvious that you would at least take a look at your organizational chart and determine who it is on that chart that would make the kinds of decisions that may include depositing barrels in the impoundment. ASARCO has not demonstrated that this occurred. To the contrary, it appears they did not approach at least one of the people who, based on his position as mill superintendent, would be most apt to have that information, Mr. McKinney. As pointed out by Plaintiff, it wanted to depose Mr. McKinney first based on that very fact, that because of his position he would be the most apt to have such knowledge.

As to the availability of Mr. McKinney, it appears he had worked for ASARCO and then its successor up to just recently and, in fact, had retired in the area of his last employment. I suspect he receives a retirement check from his employer and so a quick glance at its own records should have allowed ASARCO to readily determine at least an address for him and to make contact. It is thus disingenous for Mr. Pfahl to claim ignorance of Mr. McKinney's existence or whereabouts, the duty to make a reasonable inquiry requires just that, an inquiry. That ASARCO did not apparently attempt to contact someone, like Mr. McKinney, who would be expected to have more than passing knowledge of the mill, resulted in the incorrect response which then led Plaintiff to

expend the funds it now seeks to have reimbursed.

3. I do not have specific information as to the working relationship between counsel and client in this instance. However, it is clear that corporate counsel became involved and assumed the task of retrieving the information which led to the answer. This factor does not weigh in favor of Defendant consequently.

4. The time available to conduct an investigation would not appear to be a factor. A review of the docket sheet does not indicate that ASARCO at any time requested additional time in order to answer the requests for admission or complained of being unable to contact Mr. McKinney or someone else in a comparable position.

Conclusion:

While I appreciate that counsel Davis took what he considered appropriate steps to learn from his client whether barrels had been deposited in the Troy Mine impoundment, I do not find that a reasonable inquiry was made considering the facts discussed above. While Mr. Davis may have felt, based on his prior dealings with ASARCO, that he could count on its personnel to undertake to find the facts sought, I do not find that reliance to constitute substantial justification for certification as to the accuracy of the response. Accordingly I find a violation of Rule 26(g).

I likewise find a violation of Rule 37. Again the issue is

whether ASARCO had a reasonable ground to believe it might prevail on the matter. Applying the same facts it seems clear that in order to meet the criteria for a reasonable ground to admit or deny, a corporate party must make inquiry of someone in a particular position to know, ie, a Mr. McKinney, because he was mill superintendent during the relevant time period, or someone in an equal managerial position, perhaps the plant manager. This did not occur. To allow ASARCO to make less than a diligent effort to ascertain the truth of the matter would serve to defeat the purpose of the rule which, as noted in *Marchand v. Mercy Medical Center*, 22 F.3d 933 (9th Cir. 1994), is intended to encourage "attorneys and parties to identify undisputed issues early to avoid unnecessary costs. Failure to identify those issues wastes the resources of parties and courts." *Id.* at 936. Enforcement of the sanction is mandatory. *Id.*

One final note. I am not a fan of the hyperbole contained in Plaintiff's reply brief. It adds nothing to the argument but length. To the contrary, a simple statement of the salient facts accompanied by the relevant law is to be admired. By way of example, there is a story told of Judge Russell Smith. When he was in private practice he wrote a brief in support of a motion to dismiss which read simply "The court is without jurisdiction" citing to a case on point. Plaintiff wrote a long and tiresome response to which attorney Smith replied, "The court is still without jurisdiction" citing to the same case. He prevailed. He should be emulated.