IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Case No. 12-cv-00292-RM-KMT

In re MOLYCORP, INC. SECURITIES LITIGATION.

ORDER

When the Court entered its Amended Order ("the Amended Order") (ECF No. 172) on January 28, 2016, ruling on various motions to dismiss, the Court did not anticipate that it would be provided another opportunity to opine on a dispositive motion in the near future. The Court's optimism (or pessimism) in this regard was short-lived, and obviously misplaced, when, on March 17, 2016, the Individual Defendants (as that term is defined in ECF No. 193) filed a Motion for Summary Judgment Dismissing All of Plaintiffs' Claims ("the motion for summary judgment"), pursuant to Fed.R.Civ.P. 56 ("Rule 56"). (ECF No. 193.) Therein, the Individual Defendants explain that the Court should have actually anticipated the motion for summary judgment because the "roadmap" for the same was provided by the Amended Order. (*See id*. at 4.) Specifically, the Individual Defendants cite to footnote 4 of the Amended Order ("footnote 4"), which stated that: "if Defendants merely informed investors that HREEs were present in the Mountain Pass ore, any amount of HREEs present in the ore body may defeat a claim that Defendants materially misrepresented the composition of the ore body, *i.e.*, that it contained HREEs." (ECF No. 172 at 3 n.4.) The Individual Defendants characterize footnote 4 as "guidance," and, having been guided, the Individual Defendants filed the motion for summary judgment because "irrefutable evidence"

verifies that heavy rare earth elements ("HREEs") were present at, and produced from, the Mountain Pass facility. (ECF No. 193 at 4.) The result, the Individual Defendants contend, is that the claims in the First Amended Complaint ("the FAC") (ECF No. 153) are "inactionable as a matter of law," and thus, summary judgment should be granted in their favor. (ECF No. 193 at 4.)

As an initial matter, the Individual Defendants' reliance upon footnote 4 is misplaced. Contrary to the Individual Defendants' assertion in the Proposed Scheduling Order, the use of "may" in the footnote does not mean "will." (*See* ECF No. 179 at 5-6); *see also* New Oxford American Dictionary 1082 (3d ed. 2010) (defining "may" as "expressing possibility").[1] More important, as discussed more fully *infra*, even if "may" did mean "will," this does not mean that the Individual Defendants' evidence is irrefutable. Few things in life are irrefutable,[2] and the Individual Defendants' evidence is no exception. Put simply, footnote 4 does not provide the discovery-free passage to success that the Individual Defendants suggest.

With that reference point, the primary issue raised in the motion for summary judgment is to what extent discovery is warranted. The Plaintiffs assert that discovery is required, preferably pursuant to the Scheduling Order. (*See* ECF No. 198 at 7-9, 18.) The Individual Defendants, even though they argue that the Plaintiffs have failed to meet their burden under Rule 56(d), acknowledge

[1] This statement in the Proposed Scheduling Order is particularly egregious given that the Individual Defendants stated that *this Court* recognized the claims in the FAC would be defeated if there was proof that HREEs were present at Mountain Pass. That may be what the Individual Defendants *wanted* this Court to say, but that is not what was said. Counsel for the Individual Defendants should be careful with their characterizations and word choice in the future.

[2] "Things as certain as death and taxes, can be more firmly believ'd." Daniel Defoe, *The Political History of the Devil* 269 (1726).

(perhaps as an olive branch) that some limited discovery is appropriate.[3] (ECF No. 193 at 20-21; ECF No. 207 at 9-12.) Thus, it is not clear to what extent an inquiry under Rule 56(d) is even needed.[4] However, to make sure that the parties are clear as to how this case will proceed going forward, the Court makes the following points.

First, as indicated *supra*, merely because the Individual Defendants contend that their evidence in support of the motion for summary judgment is irrefutable, does not make it so. In effect, the Individual Defendants wish the Court to accept as undisputed fact that some amount of HREEs exist(ed) at Mountain Pass, and therefore, the claims in the FAC cannot survive. If the Court were to take this approach (i.e., simply adopting the facts of one side) in all of its civil cases, then, yes, the need for discovery, and life itself, would be much simpler. That, however, is not the world in which the Court or the parties live. That being said, Rule 56(d) does require an opposing party to explain how discovery will enable it to rebut the movant's allegations of no genuine issue of fact. *See Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2006). However, to some extent, the Plaintiffs have done this.

---

[3] As such, the Court cannot understand, apart from a purely strategic point of view, why the motion for summary judgment was filed in the first place. As the Individual Defendants assert, theoretically a motion for summary judgment can be filed at any time up to 30 days after the close of discovery. (*See* ECF No. 207 at 3); Fed.R.Civ.P. 56(b). However, that is a double-edged sword. If a motion for summary judgment can be filed at any time before 30 days after discovery, then there was no need for the Individual Defendants to use the motion for summary judgment as a placeholder while discovery is then conducted. Such a process is certainly placing the cart before the horse. Moreover, the real dispute here appears to be with the length of the discovery deadlines set in the Scheduling Order. The Individual Defendants wish for discovery to conclude by the end of June 2016. (ECF No. 207 at 15.) The Scheduling Order, however, has set all discovery to end on April 1, 2017. (ECF No. 181 at 24.)

[4] *See Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2006) (interpreting Rule 56(f), now Rule 56(d), as requiring the summary-judgment nonmovant to "submit an affidavit identifying the probable facts not available and what steps have been taken to obtain these facts and must explain how additional time will enable him to rebut movant's allegations of no genuine issue of fact." (quotation omitted)).

Notably, the Individual Defendants rely upon a "2010 SRK Report" for the proposition that HREEs were present at Mountain Pass. (ECF No. 208 ¶ 8.) In their response to the motion for summary judgment, though, the Plaintiffs contend that the SRK Report is not what it appears. (*See* ECF No. 198 at 16 n.8.) Specifically, the Plaintiffs assert that the SRK Report does not confirm the presence of HREEs, rather, it only provides estimated percentages of rare earth elements at Mountain Pass. (*Id*.) Thus, if the Plaintiffs are able to show that the SRK Report does not confirm the presence of HREEs, the Individual Defendants' evidence may not be as irrefutable as they contend.

Added to this is the Court's own concern with the SRK Report. The Individual Defendants appear to have highlighted various portions of the report. Of most interest to the Court are the portions highlighting references to dysprosium and terbium, which are allegedly HREEs. Those two elements are highlighted twice in the report. (*See* ECF No. 193-6 at 22, 25.) On the latter occasion, they are referenced in regard to historical mining operations at Mountain Pass in the 1980s. (*See id*. at 24-25.) Even if these statements are accurate, the Court does not discern how they are relevant to whether Mountain Pass contained dysprosium and terbium in 2010 or 2011. The SRK Report also states that recoverable amounts of dysprosium and terbium are contained in the mineral bastnasite, and that bastnasite is the primary mineral at Mountain Pass. (*See id*. at 22.) What is not directly said is that dysprosium and terbium were contained at Mountain Pass. That may be what the Individual Defendants want implied from the statement, but, at the very least, it is not irrefutable evidence that dysprosium and terbium existed at Mountain Pass in 2010 or 2011.[5]

[5] The Court also has concerns with the Individual Defendants' assertion that Molycorp, Inc. shipped dysprosium and terbium to a facility in China between 2013 and 2015. (*See* ECF No. 208 at ¶ 9.) This statement relies upon a declaration from the "Director of Mountain Pass Operations," Paul Parasugo, which itself relies upon three exhibits. (*See id*.) Two of those exhibits appear to be shipping records, which, in pertinent part, appear to state that "Heavy Rare Earth Concentrate" was shipped to China. (ECF No. 193-7; ECF No. 193-9.) Although these shipping records may be circumstantial evidence that HREEs

Equally important is the Plaintiffs' reliance, at least in the FAC, on the information provided by a former analytical chemist employed at Mountain Pass. According to the Plaintiffs, the analytical chemist provided information that no HREEs existed at Mountain Pass, referring to "daily ore tests." If the analytical chemist words are true about the daily ore tests, this would appear to refute the Individual Defendants' evidence. As more fully discussed *infra*, substantiation of the analytical chemist's statements will presumably require the unearthing of the daily ore tests, as well as the chemist him or herself.

As a result, the Court believes that there is more than sufficient evidence that is potentially discoverable in this case to rebut the Individual Defendants' assertion of no genuine issue of material fact, and thus, justify discovery. *See Hackworth*, 468 F.3d at 732. Accordingly, the motion for summary judgment (ECF No. 193) is DENIED WITHOUT PREJUDICE to renewing all, some, or none of the arguments therein at the conclusion of discovery.

---

were shipped to China, they are certainly not irrefutable evidence of that fact, especially with respect to whether dysprosium and terbium were so shipped. The third exhibit is cited because it contains a "SEG Transfer Pricing Model" (*See* ECF No. 208 at ¶ 9; ECF No. 193-8 at 7-8). Mr. Parasugo declares that these exhibits show the results of tests which confirming the presence of dysprosium and terbium at Mountain Pass. (*See* ECF No. 193-1 at ¶ 38.) If that is the case, then it will have to be better explained because, first, neither the declaration nor the statement of undisputed facts directly points to any of the test results, and, second, to the untrained eye, the percentages and other numbers in the various documents are unintelligible with respect to their stated purpose. The Individual Defendants also rely upon a second declaration, this one from the President and CEO of Molycorp, Inc., Geoffrey Bedford. (*See* ECF No. 208 at ¶ 10.) Of particular interest to the Court is Mr. Bedford's reliance upon ECF No. 193-13. (*See* ECF No. 193-10 at ¶ 9.) Apparently this exhibit is a spreadsheet prepared with information from Molycorp Inc.'s business records, summarizing the average composition of a HREE composite from Mountain Pass. (*Id*.) The spreadsheet shows the calculated volumes of various elements, including dysprosium and terbium, "*expected* from the total volume" of the composite purchased from Mountain Pass based upon the average composition of samples analyzed. (*Id*.) (emphasis added). At the very least, for the spreadsheet to have any relevance, the Individual Defendants will need to explain from where the analyzed samples were obtained. To the extent that the samples were from Mountain Pass, it would seem that the Individual Defendants would need to provide some form of record of those analyses. Further, it may be necessary for the Individual Defendants to proffer expert testimony as to the relevance of this and any of its other exhibits, given the apparent technical nature of the same. As far as the Court can discern, the Individual Defendants are not proferring Mr. Parasugo or Mr. Bedford as experts.

Second, in reviewing the pleadings with regard to the motion for summary judgment, specifically, the Plaintiffs' response thereto, the Court has noticed a divergence in the underlying theory for the Plaintiffs' claims. As the Court explained in the Amended Order, there are two statements (made on multiple occasions) at issue in this case: (1) that HREEs were contained at Mountain Pass; and (2) Molycorp, Inc.'s principal products included dysprosium and terbium. (*See* ECF No. 172 at 5-10.) As the Court further explained in the Amended Order, the Plaintiffs believe that these statements are actionable because they were false and misleading. (*Id*.) The Plaintiffs asserted that these statements were false and misleading "because Defendants failed to disclose that dysprosium and terbium did not exist at Mountain Pass and thus were not Molycorp's 'principal products' …." (ECF No. 153 at ¶ 109.) In their response, though, the Plaintiffs assert that these statements were false or misleading because "the amount of HREEs was not sufficient for the purpose of mining and production." (ECF No. 198 at 20.)

Contrary to the Plaintiffs' assertion, this latter reason for why the statements were misleading was not alleged in the Amended Complaint. (*See id*.) The Plaintiffs base this assertion on various paragraphs in the Amended Complaint. (*See id*.) None of them, however, allege, or can be construed as closely alleging, that the "lack of the mine's commercial viability for HREEs render[ed] the challenged statement[s] misleading." (*See id*.) Instead, the Amended Complaint—in a section clearly titled "Materially False and Misleading Statements During the Class Period"—alleged that the statements were misleading because Mountain Pass did not contain HREEs. (ECF No. 153 at 45, ¶ 109.) The same is true of the factual statements that the Plaintiffs contend were omitted; notably, the results of the daily ore tests. (*See id*. at ¶¶ 77-78, 109.) None of these alleged omissions relate

to "commercial viability" of Mountain Pass, but, instead, whether it contained any HREEs.[6] The Plaintiffs also assert that, even if the statement that Mountain Pass contained HREEs was true, the statement is so incomplete as to be misleading. (ECF No. 198 at 8, 19.) As a general matter, the concept that a statement can be misleading because it is a "half-truth" or holds back information is undoubtedly true. However, here, even construing the Amended Complaint in a light most favorable to the Plaintiffs, they only alleged that the challenged statements were misleading because they omitted, or held back, the alleged fact that Mountain Pass did not contain any HREEs.

Under the Private Securities Litigation Reform Act ("the PSLRA"), the Plaintiffs cannot hide from their own allegations. As the Court explained in the Amended Order, the PSLRA requires that a plaintiff allege the reasons why a statement is misleading. (ECF No. 172 at 13-14.) As the Court found, the Plaintiffs satisfied this burden in that they alleged that the statements—about Mountain Pass containing HREEs, and dysprosium and terbium being principal products of Molycorp Inc.—were misleading because Mountain Pass did not contain HREEs. (*Id*. at 18-20, 38-41.) The Court did not find, because it was not pled in the FAC, that the Plaintiffs adequately alleged the statements were misleading because the amount of HREEs at Mountain Pass was insufficient for the purposes of mining and production, or that the Individual Defendants held this alleged fact back.

[6] As a sidenote, the word "viability" is not used in the FAC. While the word "viable" is used once, in a quote from a U.S. Department of Energy report, it is used in the context of explaining how recycling rare earth elements could be "economically viable," which is hardly the point made by the Plaintiffs. (*See* ECF No. 153 at ¶ 73.) In addition, the only use of the word "commercially" is in an industry article stating that the author had wondered how Molycorp, Inc. intended to produce "commercially significant quantities" of HREEs. (*Id*. at ¶ 113.) Apart from the fact that this quote is buried in the part of the FAC related to economic loss, rather than materiality, it is prefaced by the Plaintiffs' explanation that the industry article was one of the examples of investors' negative reaction to "whether HREEs even existed at Mountain Pass." (*See id*.) In other words, when even the material to which the Plaintiffs were citing appeared to concern commercial viability of HREEs at Mountain Pass, rather than whether or not they existed at all, the Plaintiffs chose to ignore the former basis for why the Individual Defendants' statements were misleading, and go for the latter.

As a result, the Plaintiffs may not proceed past the motion-to-dismiss stage of this proceeding on one theory, while fighting summary judgment on another, untested theory. *See New Jersey Div. of Inv. v. Sprint Corp.*, 758 F. Supp. 2d 1186, 1207-08 (D. Kan. 2010) (refusing to permit the plaintiff to "radical[ly]" amend its complaint where new allegations would significantly expand and turn on its head the plaintiff's initial theory, and would allow the plaintiff to bypass the PSLRA's pleading requirements); *In re St. Jude Med., Inc., Sec. Litig.*, 629 F. Supp. 2d 915, 921 (D. Minn. 2009) (citing cases, and refusing to allow further amendment of the plaintiffs' claims because "[p]laintiffs survived a motion to dismiss in light of the theories they, themselves, chose; they may not now evade Congress's PSLRA mandates by switching horses midstream and pursuing a new theory.").

In addition, the Plaintiffs new theory for why the Individual Defendants' statements were misleading significantly expands their claim, as well as the resulting discovery. Notably, under the FAC, discovery should involve whether Mountain Pass contained any HREEs, and, if so, whether it contained dysprosium and terbium. Discovery in this regard would also obviously include inquiry into the testing procedures used to obtain the results that HREEs did or did not exist at Mountain Pass. Under the theory proposed in the response, however, whether or not Mountain Pass contained HREEs is largely irrelevant, as the focus of that theory is the quantity of elements present, and whether that quantity could be reasonably described as commercially viable. This would obviously then involve further discovery, and dispute, into quantifying a commercially viable amount of HREEs.[7] Moreover, as the industry analyst's report in the FAC suggests, the theory that Mountain

[7] This does not even approach the legal question whether the use of the phrases "contained" or "principal products," in the context they were used, could be construed by a reasonable investor as misleading for omitting that HREEs were allegedly insufficient at Mountain Pass for commercial production. This is in addition to the potential problem with the "principal products" statement identified in the Amended Order. (*See* ECF No. 172 at 20-21.)

Pass did not contain commercially viable amounts of HREEs was more than available at the time the FAC was filed, and thus, could have quite easily have been alleged therein. For whatever reason, the Plaintiffs chose not to proceed down that avenue. To put it simply, having made their bed, the Plaintiffs must lie in it, for better or worse.

Third, and finally, is the scope and length, of the above-mentioned discovery. As an initial matter, the Court is deeply concerned with the parties' collective conduct at even this early stage in the discovery process. Ordinarily, this Court does not need to intervene at such an early stage in civil cases before it. The Court notes that all of the parties are represented by well qualified attorneys, all of who should know far better than to engage in dilatory or downright obstructive conduct.

Requests for Production and ESI

One example of this is in the passing of responsibility for the production of documents. The Individual Defendants assert that they do not control Molycorp, Inc. ("Molycorp") and do not possess any of Molycorp's documents. (ECF No. 207 at 2 n.2, 10; *see also* ECF No. 199-12 at 6-7.) In other words, the Individual Defendants pass the buck of providing those documents to Molycorp itself. Molycorp on the other hand does not appear to like this transfer of responsibility, asserting, in a letter responding to a subpoena to produce documents, that it is a non-party, and thus, the subpoena should avoid imposing an undue burden upon it. (*See* ECF No. 199-8 at ¶¶ 6, 8, 16, 17.) As far as the Court can discern from the record, the production of documents from Molycorp has been far from immediate. This appears to be due, in part, to the fact that, from March 30, 2016, it would take a vendor 9 to 11 weeks to restore Molycorp's electronically stored information ("ESI"). (*See* ECF No. 199 at ¶ 32.)

As an initial matter, it is, at best, disingenuous for the Individual Defendants to assert that they do not have *any* control over Molycorp's production of documents. The factual basis of the motion for summary judgment is premised entirely upon two declarations from *Molycorp* employees (most notably, the President of Molycorp), along with purported test results from Mountain Pass; documents that could only have been obtained from Molycorp Thus, irrespective of the issue of control, the Individual Defendants appear to not have any problem with obtaining documents and declarations from Molycorp, while the Plaintiffs do not have such ease of access. This is untenable from a fairness, as well as an evidentiary standpoint, and the Court has various avenues in which to correct it. *See* Fed.R.Civ.P. 37. The Court forewarns that, upon a proper showing, to the extent the parties have not received similar access to the *relevant* documents in Molycorp's purported sole control, the Court may exclude *any* documents or declarations originating from Molycorp, including the documents and declarations attached to the motion for summary judgment.

The Court adds further that the Individual Defendants cannot hide behind Molycorp's non-party status. To the extent that *any relevant* non-privileged documents are in the possession of the Individual Defendants, irrespective of whether or not Molycorp also possesses those documents, the Individual Defendants are required to turn them over to the Plaintiffs.

This is not meant to lay the blame solely at the Individual Defendants' door. Most notably, the Plaintiffs have not aided the speedy receipt of documents with their overly broad requests for documents. For example, the Plaintiffs sought all documents related to Mountain Pass, this case, and the presence of HREEs at any Molycorp facility, as well as documents sent to or from any state or federal agency. (*See* ECF No. 199-12 at 8-9, 11, 21.) Even under the Plaintiffs' expanded theory, these requests would require the production of untold number of documents entirely irrelevant to this

case. If the Plaintiffs wish discovery to proceed efficiently, this is not the way to approach the process. The same is true of the search terms the Plaintiffs wish to use in sifting through Molycorp's ESI. For example, the Court cannot see, from either a relevance standpoint or simply a desire to proceed through discovery efficiently, why the Plaintiffs need to run a search for terms such as "Geological Survey," "USGS," "DOE," or "DOD." (*See* ECF No. 199-13 at 2.)[8] To the extent that the Plaintiffs and the Individual Defendants cannot come to a consensus on the search terms within seven (7) days of entry of this Order, they are ORDERED to inform U.S. Magistrate Judge Kathleen Tafoya of the same, and the Magistrate Judge will then resolve the dispute for them, as well as any other ESI disputes. The Court reminds the parties that efficiency is of the essence.

The SEC Documents

Turning to additional specific disputes, the Plaintiffs are not entitled to discovery from the U.S. Securities and Exchange Commission ("the SEC") at this juncture. The Plaintiffs seek production of documents that Molycorp gave to or received from the SEC in connection with a SEC investigation into the company. (ECF No. 203-1 at 8.) As the SEC asserts in its opposition to a subpoena for these documents, the same are thus in the possession of Molycorp (*See* ECF No. 202 at 1.) As a result, the Court does not believe that the SEC is the appropriate source for these documents, at least not at this point. The Court also agrees with the SEC that it should not be burdened with having to produce documents from a company that it investigated, when the company itself possesses the same documents (*see id*. at 8), at least not when it has not been shown that the

[8] Other search terms are plainly appropriate however, including, "float test," "ore test," "dysprosium," and "terbium." To the extent that the Individual Defendants argue that *any* search through ESI is inappropriate (ECF No. 215 at 3), the Court disagrees. Although test results may be the best form of evidence to establish whether HREEs, including dysprosium and terbium, were present at Mountain Pass, this does not mean that persuasive evidence cannot be found in other documents, including Molycorp, Inc.'s ESI.

company cannot produce them. The Court further notes that, although the Plaintiffs assert that the relevance of the SEC documents is not disputed (ECF No. 210 at 6), the Plaintiffs have not yet explained why the documents are relevant, other than stating that the Individual Defendants conceded the relevance of the documents at the motion-to-dismiss stage of this case (*see* ECF No. 203-1 at 15, 70). First, to the extent the Individual Defendants conceded anything, this was only in order to respond to an argument from the Plaintiffs that the SEC's investigation was relevant. (*See id*. at 70.) Second, the SEC investigation was not relevant at the motion-to-dismiss stage; the only thing relevant at that point was the sufficiency of the allegations in the FAC.

In any event, the Court believes that production of the entire SEC file is overly broad. In other words, to the extent that there are documents in the SEC file that are relevant to this case, then they will be produced in response to the Plaintiffs' requests for production. For example, if a document exists, showing the test results for HREEs at a relevant point in time from Mountain Pass, that document will be produced in the normal course of discovery. Or, if an employee at Molycorp received an email from the SEC asking for evidence that Mountain Pass contained HREEs, that email will be ensnared in the production of ESI. There is no need for those documents or any other relevant document to be produced from the SEC file, as that production en masse will also likely produce reams of irrelevant information. Put simply, the Plaintiffs are only entitled to *relevant* information; the best source for that is the Individual Defendants and Molycorp. As a result, the Court DENIES the Plaintiffs' motion to compel compliance with subpoena (ECF No. 203-1 at 2-3), as well as the Plaintiffs' motion for hearing on the same (ECF No. 203).

Scope of Discovery

In a declaration in support of their response to the motion for summary judgment, the Plaintiffs seek discovery as to four topics: the elements present in, and that could be feasibly

extracted from, Mountain Pass; the quantities of those elements; Molycorp's principal products; and what investors understood to be the meaning of the principal products statement. (ECF No. 199 at ¶ 44.) In light of the Court's finding *supra*, that the Plaintiffs claims are constrained by the allegations in the FAC, these topics are irrelevant.[9]

The relevant topic here is whether Mountain Pass contained HREEs. (*See* ECF No. 153 at ¶ 109.) That is true for *both* of the allegedly misleading statements. To repeat, in the FAC, the Plaintiffs alleged that the statements—about HREEs being contained at Mountain Pass, and Molycorp's principal products including dysprosium and terbium—were "materially false and misleading when made because Defendants failed to disclose that dysprosium and terbium did not exist at Mountain Pass and thus were not Molycorp's 'principal products'…." (*Id*.) To confirm that the lack of dysprosium and terbium (or HREEs in general) was the sole basis for the claims related to these statements, the Plaintiffs then alleged that this assertion was confirmed by certain information from confidential witnesses; specifically, the results of "daily tests" conducted between 2008 and 2011, showing that there were no HREEs at Mountain Pass; "float tests" conducted during the same period that did not identify any "significant quantities" of HREEs; and one of the witnesses stating that Mountain Pass "never produced any HREEs" between 2008 and 2011. (*See id*.)

In a recent filing, the Individual Defendants seek a protective order to limit the scope of discovery. (ECF No. 215.) One of the areas to which the Individual Defendants wish discovery limited is "[w]hether Molycorp's risk factor representation to investors about the lack of an established market for the principal rare earth products it would be producing was a false statement." (*Id*. at 1.) The Court is not perfectly sure what this means, or, at least not what it means in relation

[9] In addition, the Court cannot understand how discovery from Molycorp, Inc. or the Individual Defendants would help with respect to the last request.

to discovery. It certainly could be interpreted as encompassing far more discovery than the Individual Defendants probably intend. In any event, it misses the point. The point here is whether the statement alleged in the FAC—on this occasion, the one involving Molycorp's principal products—is false or misleading. In the FAC, the *only* reason alleged for the principal products statement being misleading was that Mountain Pass did not contain dysprosium and terbium.[10] Therefore, that is the fact (presumably still disputed) discovery will be centered upon.

In that regard, one relevant area of discovery on this topic would be the testing procedures used to determine whether HREEs were present at Mountain Pass, and the results of any relevant tests conducted. With respect to relevance in this regard, the Court notes that the relevant *time period* is, at least, the Class Period (i.e., February 7, 2011 through November 10, 2011), as well as time leading up to the Class Period (i.e., test results preceding the challenged statements that may have been used as a basis for making the statements). Tests or mining procedures that took place in the 1980s, and, most likely, the early 2000s, are irrelevant.

The Plaintiffs also seek to take a deposition of a Molycorp representative in order to obtain further information on the location of discoverable facts, including whether Molycorp preserved evidence for this case. This request is unnecessary at this stage in proceedings. As the Court stated *supra*, it expects the parties and Molycorp to cooperate with the discovery process in this case. To the extent such cooperation does not occur, the Court has a wide range of tools with which to level-

[10] A simple meander through the FAC demonstrates this. The term "principal products" is first used in the FAC's third paragraph. There the Plaintiffs alleged that "[w]hen investors expressed any concern about whether dysprosium and terbium *existed* at Mountain Pass during the Class period, Defendants also falsely assured them that those concerns were unfounded." (ECF No. 153 at ¶ 3) (emphasis added). Every other reference to "principal products" is made in the same context: whether dysprosium and terbium existed, not whether they were commercially viable. (*See id*. at ¶¶ 4, 72, 75, 77, 80, 81-83, 109, 115, 155, 157.)

out any lopsided discovery. The Individual Defendants have been more than forewarned that all non-privileged documents relevant to this case should have been preserved and must be made available to the Plaintiffs.

In their reply in support of the motion for summary judgment, the Individual Defendants assert that key documents have been or will be produced from Molycorp (ECF No. 207 at 10.) With respect to the "LIMS database," this resource appears to be very important to the Plaintiffs' claims. (*See* ECF No. 153 at ¶ 79.) Thus, to the extent it has not been already, the Court expects the LIMS database to be produced in full with respect to all relevant data. As for the production records attached to the reply (ECF No. 207-1), like many of the other spreadsheets the Individual Defendants have provided, these may mean something to a trained eye, but at present the Court can not determine that they amount to irrefutable evidence of the presence of HREEs at Mountain Pass. The exhibit attached to the reply apparently includes production records for a "heavy rare earth concentrate" shipped to China. (*See* ECF No. 207 at 6 n.6.) If that is the case, the Individual Defendants will need to explain where. The only possible reference to heavy rare earth elements that the Court can discern is the abbreviation "HREO," which may stand for heavy rare earth oxide.[11] (*See* ECF No. 207-1 at 2.) Whether HREO means the same thing as HREC is not clear. In addition, it is not clear whether HREO or HREC is the same thing as HREE. Given that the challenged statements in the FAC involve HREEs, rather than HREOs or HRECs, this may be important.

Depositions

Both parties also bring up depositions in this case. (*See* ECF No. 199 at ¶ 47; ECF No. 207 at 10.) The Court agrees that the Plaintiffs are entitled to depose the respective Individual

[11] The only apparent reference to a "concentrate" is the abbreviation LREC, which presumably means light rare earth concentrate. (*See* ECF No. 207-1 at 2.)

Defendants, the declarants supporting the motion for summary judgment, as well as any other individuals disclosed under Fed.R.Civ.P. 26(a)(1). (*See* ECF No. 199 at ¶ 47.) The Scheduling Order should be used to determine the number and length of these depositions. (*See* ECF No. 181 at 17.)

This leaves proposed depositions of four specific witnesses: the two confidential witnesses relied upon in the FAC, and the two declarants who supported the motion for summary judgment, Paul Parasugo and Geoffrey Bedford. The Plaintiffs wish to stay the depositions of all of these witnesses while awaiting discovery of relevant documents. (*See generally* ECF No. 217.) The Plaintiffs wish to depose all of the witnesses as soon as possible because (1) with respect to the confidential witnesses, there is no reasonable basis to delay their depositions, and (2) with respect to Mr. Parasugo and Mr. Bedford, it is necessary to "memorialize" their testimony as both individuals may soon be working outside of the country. (ECF No. 217 at 4-5 & n.2.)

As for the confidential witnesses, based upon the parties' most recent pleadings, it appears that the Plaintiffs finally divulged the identity of those witnesses on May 11, 2016. (*See* ECF No. 215 at 5; ECF No. 217 at 4 n.2.)[12] The problem now is when those witnesses should be deposed. On this front, the Court agrees with the Individual Defendants that there is no reason to delay the depositions of the confidential witnesses any further. The Plaintiffs appear to assert that, because the confidential witnesses and Mr. Parasugo were senior employees of Molycorp, their work will be in Molycorp's possession. (*See* ECF No. 217 at 11.)

However, this argument misses the important distinction between the two sets of witnesses. Notably, the declarants are witnesses for the Individual Defendants, while the Plaintiffs relied upon

[12] As such, the Plaintiffs' conduct is far from a model of efficiency or even an exemplar from which the Individual Defendants could hope to aspire.

the confidential witnesses in the FAC. As such, the Plaintiffs should be more than aware of the basis for the confidential witnesses' versions of the facts. To the extent the Plaintiffs are not, that is not the fault of the Individual Defendants, or due to a lack of documents received from Molycorp. Thus, if the Individual Defendants believe that they are ready to depose the confidential witnesses, there is no reason for that to be stopped, and the Court will not tolerate any obstruction in allowing those depositions to take place.[13] The Court further notes that, unlike the summary-judgment declarants, no party has alleged that the confidential witnesses will be unavailable for later deposition testimony in the event discovery sheds new light on their prior testimony. The Plaintiffs assert that the Individual Defendants "have provided no assurance that any of the four proposed nonparty deponents … will stipulate to appearing for a second deposition." (ECF No. 217 at 12.) However, at least with respect to the confidential witnesses, that is not the Individual Defendants' responsibility, and, more important, the Plaintiffs can use the power of a subpoena to ensure the confidential witnesses' attendance. *See* Fed.R.Civ.P. 30(a)(1).[14]

The same is not true, though, of Mr. Parasugo and Mr. Bedford. These individuals are undoubtedly proposed witnesses for the Individual Defendants, and, at this juncture, their sole witnesses. Understandably, therefore, the Plaintiffs will likely want to depose them, perhaps vigorously. In order to do that, the Plaintiffs will require relevant documents from Molycorp so that

---

[13] To be specific, in their response to Plaintiffs' motion for protective order, the Individual Defendants state that an attorney for one of the confidential witnesses could arrange for a deposition of the witness between June 7 and June 9, 2016. (ECF No. 220 at 6.) If those dates are still available for the confidential witness, there is no reason why the deposition cannot take place then.

[14] As such, except if the Individual Defendants do not stipulate to further depositions (in which case this Court can order the taking of the deposition(s)), there will be no need for "additional motion practice" as to when further depositions may occur. (*See* ECF No. 217 at 14); Fed.R.Civ.P. 30(a)(2)(A)(ii). Further depositions may occur, at least with respect to the confidential witnesses, whenever the Plaintiffs are ready for them.

the Plaintiffs can test the accuracy of Mr. Parasugo and Mr. Bedford's assertions that HREEs, including dysprosium and terbium, were present at Mountain Pass. Based upon the Individual Defendants' concession that the Plaintiffs may conduct additional depositions of Mr. Parasugo and Mr. Bedford (*see* ECF No. 215 at 5 n.2), the Court assumes that the Individual Defendants do not contest this. The problem appears to be that Mr. Parasugo and Mr. Bedford may leave this country for work elsewhere, and thus, their testimony may be lost for all parties. (*See id*.)

The Court acknowledges this problem, but, at the same time, fairness to all of the parties must also be considered. Put differently, at summary judgment, the Court can only consider admissible evidence. Fed.R.Civ.P. 56(c)(2). If the Individual Defendants intend to rely upon Mr. Parasugo and Mr. Bedford's deposition testimony in support of any summary judgment motion, and those individuals end up being unavailable for further deposition once the Plaintiffs' receive relevant discovery, then it is an open question whether their deposition testimony can be considered at summary judgment. *See* Fed.R.Civ.P. 32(a)(4) (providing that a party may use an unavailable witness' deposition testimony if the witness is outside the United States or more than 100 miles from the trial); Fed.R.Civ.P. 32(b) (providing that an objection may be made to the admission of deposition testimony that would be inadmissible if the witness were present and testifying); *see also Alfonso v. Lund*, 783 F.2d 958, 961 (10th Cir. 1986) ("the admission of deposition testimony lies within the trail court's discretion"); *Reeg v. Shaughnessy*, 570 F.2d 309, 317 (10th Cir. 1978) (same).[15] This is particularly the case here where the Individual Defendants should be more than

[15] Although the analogy may be somewhat strained, if either or both Mr. Parasugo and Mr. Bedford were present at trial, but the Plaintiffs were in the same position as they are now, i.e., with a lack of discovery material to cross examine those witnesses, the Court doubts that their testimony would be admissible. In addition, to be admissible as presently submitted, the Individual Defendants would need to show that Mr. Parasugo and Mr. Bedford's testimony was permissible lay witness testimony.

able to obtain available witnesses, expert or otherwise, to explain the evidence purportedly showing that HREEs existed at Mountain Pass.

Ultimately, though, it is up to the Individual Defendants whether they wish to rely upon Mr. Parasugo and Mr. Bedford's deposition testimony (and the explanations they provide with respect to the physical evidence), while running the risk of seeing that testimony excluded at summary judgment. If they decide to take that course, then the Court discerns no harm in the Individual Defendants deposing Mr. Parasugo and Mr. Bedford whenever they choose. For all of these reasons, the Plaintiffs' motion for a protective order (ECF No. 217) is DENIED.

Length of Discovery

Hopefully, this leaves one final matter: the length of discovery. In the Scheduling Order, fact discovery was set to end on January 15, 2017, and expert discovery set to end on April 1, 2017. (ECF No. 181 at 24.) The Individual Defendants want all discovery to end on June 27, 2016. (ECF No. 207 at 12.) Based on everything the Court has read, heard, and reviewed so far in this case, it is disinclined to change the dates set in the Scheduling Order. Neither the Plaintiffs nor the Individual Defendants have demonstrated to any degree that they can be expected to engage in a more efficient and speedy discovery process than the one envisaged in the Scheduling Order. To the extent the parties are able to resolve their differences and act like the well qualified attorneys the Court knows them to be, the Court has no problem with the discovery schedule being amended to reflect that new found persuasion.[16] But, the Court leaves that, first, to the parties, and, then, for the Magistrate Judge to decide. For now, the deadlines in the Scheduling Order remain.

[16] One date to which the deadlines should not be amended, though, is June 27, 2016. Using March 30, 2016 as the point when Molycorp, Inc.'s vendor began resuscitating electronic documents, and the alleged 9-11 weeks it would take said vendor to bring those documents back to life, 9 weeks would place the parties at the very beginning of June, while 11 weeks would bring the case to the middle of June. How the Plaintiffs are meant to begin reviewing those documents, determine which to use for depositions and summary judgment, depose the Individual Defendants' witnesses, obtain expert witness(es), receive and/or disclose expert report(s), depose and/or defend expert witness(es), and obtain transcript(s) of all of these depositions, in at most four weeks and as little as two, is beyond the Court.

Furthermore, so there is no confusion, the Individual Defendants appear to be under the assumption that if the motion for summary judgment is denied, discovery may begin again after that denial. (*See* ECF No. 207 at 10.) The Court *supra* denied the motion for summary judgment without prejudice to renewal at the conclusion of discovery. The Court meant the *conclusion* of discovery. In other words, when or if any future motion for summary judgment is filed, there will be no more discovery after that point. The Individual Defendants seek to have this *entire* case dismissed. (*See* ECF No. 193 at 21.) Thus, the Court advises the Individual Defendants that, if they wish to file a motion for summary judgment anew, they bring their best shot for having this case dismissed; they will not get another opportunity before trial.

Accordingly, for all of the reasons set forth herein, the Court:

(1) DENIES defendant's motion for summary judgment (ECF No. 193) WITHOUT PREJUDICE to renewing all, some, or none of the arguments therein at the conclusion of discovery;

(2) to the extent that the Plaintiffs' response to the motion for summary judgment can be construed as a Rule 56(d) motion for time to conduct discovery, GRANTS the motion to the extent that the Plaintiffs will be allowed time to conduct discovery;

(3) DENIES the Plaintiffs' motion to compel compliance with subpoena (ECF No. 203-1 at 2-3);

(4) DENIES the Plaintiffs' motion for hearing (ECF No. 203);

(5) DENIES AS MOOT the Individual Defendants' motion for protective order (ECF No. 215) in light of the findings and instructions herein; and

(6) DENIES the Plaintiffs' motion for protective order (ECF No. 217).[17]

The Plaintiffs and the Individual Defendants shall have seven (7) days from the entry of this Order to come to a consensus on ESI search terms. Should they fail to do so, they are ORDERED to immediately inform Magistrate Judge Tafoya of the same, and the Magistrate Judge will then resolve the dispute for them, as well as any other ESI disputes.

The Scheduling Order (ECF No. 181) remains in full force and effect.

SO ORDERED.

DATED this 25th day of May, 2016.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

[17] To the extent the parties are concerned that they did not get an opportunity to file further pleadings in support of their respective motions for protective orders, there is no prejudice. Other than certain very recent updates in the status of discovery, all of the factual allegations and legal arguments raised in those motions and the Individual Defendants' response have been more than fully aired in the pleadings on the record. The Court did not need further regurgitation of these matters in order to reach its findings herein.