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Case No. 961-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER CORPORATION SHAREHOLDER DERIVATIVE LITIGATION	Consol. C.A. No. 961-VCS **REDACTED VERSION** **FILED OCTOBER 27, 2010**

AMC DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR CROSS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR A DETERMINATION THAT PLAINTIFF BEARS THE BURDEN OF PROOF AS TO ENTIRE FAIRNESS

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

S. Mark Hurd (#3297)
Kevin M. Coen (#4775)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200

Attorneys for Defendants Americas Mining Corporation, Germán Larrea Mota-Velasco, Genaro Larrea Mota-Velasco, Oscar Gonzalez Rocha, Emilio Carrillo Gamboa, Jaime Fernando Collazo Gonzalez, Xavier Garcia de Quevedo Topete, Armando Ortega Gómez, and Juan Rebolledo Gout.

OF COUNSEL:

Alan J. Stone (DE Bar No. 2677)
Douglas W. Henkin
C. Neil Gray
Mia C. Korot
MILBANK, TWEED, HADLEY & McCLOY LLP
One Chase Manhattan Plaza
New York, NY 10005
(212) 530-5000

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PRELIMINARY STATEMENT[1]

Plaintiff's Answering Brief is little more than a regurgitation of the argument raised by Plaintiff in his Opening Brief in support of his motion for summary judgment -- that the trading price of SPCC stock is the only factor the Court can consider when determining whether the consideration paid by SPCC for Minera was fair to the minority stockholders of SPCC. Faced with the fact that the transaction was approved by a fully-informed and independent special committee with the help of its independent and knowledgeable advisors, Plaintiff retreats to his argument that, under *Associated Imports, Inc. v. ASG Industries*, No. 5953, 1984 WL 19833 (Del. Ch. June 20, 1984), *aff'd sub nom. Hubbard v. Associated Imports,* 497 A.2d 787 (Del. 1985) (table), the Merger cannot meet the entire fairness standard regardless of who bears the burden of proof. As set forth below and in the AMC Defendants' Opening Brief, Plaintiff's argument fails as a matter of fact and law and the AMC Defendants are entitled to summary judgment.[2]

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1 Capitalized terms not defined herein have the meanings set forth in the AMC Defendants' Answering Brief In Opposition To Plaintiff's Motion For Partial Summary Judgment and Opening Brief In Support Of Their Cross Motion For Summary Judgment Or, In The Alternative, For A Determination That Plaintiff Bears The Burden Of Proof As To Entire Fairness, dated August 10, 2010 ("AMC Def. Br."). Citations to the Plaintiff's Reply Brief In Support Of Its [sic] Motion For Partial Summary Judgment And Answering Brief In Opposition To Defendants' Cross Motions For Summary Judgment, dated September 24, 2010, are in the form "Plaintiff's Answering Brief" or "Pl. Ans. Br."

2 Plaintiff also fails to respond at all to a number of arguments in the AMC Def. Br., *see* Appendix A, thus conceding those arguments.

ARGUMENT

I. DELAWARE LAW DOES NOT REQUIRE THE COURT TO IGNORE ALL OTHER VALUATION METHODS AND CONSIDER ONLY THE TRADING PRICE OF SPCC'S STOCK

Much of Plaintiff's Answering Brief is devoted to reciting various iterations of Plaintiff's argument that *Associated Imports* controls this case in an effort to dodge the AMC Defendants' cross-motion for summary judgment.[3] The AMC Defendants have already refuted that argument: Delaware law does not require directors to use specific valuation techniques in all circumstances or reach specific results, but rather (i) to think carefully about issues put before them, (ii) to seek and rely on expert advice when appropriate, and (iii) not just to accept what anyone — including a market — tells them.[4] As the AMC Defendants demonstrated, Delaware law requires that directors closely examine the companies they value and what drives their value, not put on blinders.[5] Nothing in Plaintiff's Answering Brief refutes the fact that the Special Committee and its advisors used proper tools to consider and evaluate what became the proposed

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3 Plaintiff's reliance on *MacLane Gas Co., L.P. v. Enserch Corp.*, Civ. A. No. 10760, 1992 WL 368614 (Del. Ch. Dec. 9, 1992), is misplaced. *MacLane* was decided under Texas law and involved an exchange offer that was undertaken without the benefit of a special committee with independent advisors. *See id.* at *7 & 12. Moreover, the Court noted that the market price of the securities at issue was not reliable (*id.* at *9) and used a DCF model to determine value after noting that the real worth of an oil company is centered in its reserves (*id.* at *15-22), precisely the point the Special Committee relied on for copper companies. Plaintiff's citation of the cases on page four of its Answering Brief is equally curious. None of those cases contradict the principle that like assets should be valued using like assumptions, which is what the Special Committee did here.

4 *See* AMC Def. Br. at 20-28.

5 Contrary to Plaintiff's suggestion (Pl. Ans. Br. at 26-27), that Cerro and Phelps Dodge later sold their stock in an underwritten offering is irrelevant. As Plaintiff acknowledges, neither Cerro or Phelps Dodge received the "market price" — they were paid a discount. Pl. Ans. Br. at 18.

Merger before recommending it.[6] And nothing in Plaintiff's Answering Brief takes issue with the fundamental principle Plaintiff tries to ignore: like assets should be valued using like assumptions. That is precisely what the Special Committee did and precisely what Plaintiff's proposed expert did not do.[7]

Plaintiff's proposed expert failed to conduct any analysis of the value of SPCC and asserted that neither he nor anyone else could possibly know the meaning of SPCC's stock price or the reasons that it traded at a particular level.[8] Recognizing the problem that creates, Plaintiff spends 3½ pages of his brief trying to refute an argument that no defendant made, claiming that Prof. Schwartz derived a "pie in the sky" long-term copper price he used to value Minera.[9] Among the problems with Plaintiff's argument are:

- Prof. Schwartz did not opine that any particular long-term copper price was definitively responsible for the price at which SPCC traded at any time. Instead, he demonstrated that given the primary variables that impact the value of copper companies,[10] it was likely that the market was using a long-term copper price higher than $0.90/pound to price SPCC toward the end of 2004.[11] The reason was simple — a DCF valuation of SPCC using reasonable

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6 Plaintiff's attempt (Pl. Ans. Br. at 23) to distinguish *Paramount Commc'ns Inc., v. Time Inc.*, Civ. A. Nos. 10866, 10670, 10935, 1989 WL 79880 (Del. Ch. July 14, 1989), is unavailing. That *Paramount* involved different facts, as most cases do, does not limit the applicability of its underlying principle that it is not appropriate to rely on a company's stock price when the board has reason to believe that it may be mis-valued, nor does Plaintiff say anything to contradict the Special Committee's specific views about that issue here.

7 Plaintiff's assertion that the AMC Defendants "do not refute" the valuation performed by Plaintiff's proposed expert (Pl. Ans. Br. at 28) is simply false. *See* AMC Def. Br. at 15-17.

8 *See* AMC Def. Br. at 22-23.

9 *See* Pl. Ans. Br. at 10-13.

10 Mr. Beaulne and Prof. Schwartz agree that copper prices are significantly responsible for the value of a copper company. *See* Beaulne Report at 12-13 (Montejo Aff. Ex. 4); Schwartz Report ¶¶ 13-15 (Montejo Aff. Ex. 7).

11 *See* Schwartz Report ¶¶ 41-43 & Ex. 2 (Montejo Aff. Ex. 7).

assumptions results in a valuation of SPCC significantly below SPCC's market price unless a long-term copper price greater than $0.90/pound is used.[12]

- To the extent Plaintiff's argument is based on anything, it is based on opinions that are not contained in Plaintiff's proposed expert report (or any other expert report).[13]

- Plaintiff's argument is a total mischaracterization of Prof. Schwartz's analysis: Prof. Schwartz's central point was that both Minera and SPCC should be valued on the basis of the same set of relevant assumptions, and Prof. Schwartz showed that the Merger was fair whether the long-term copper price was assumed *for both companies* to be $0.90/pound, $1.30/pound, or any number in between. Not surprisingly, much of the "analysis" that Plaintiff offers suffers from the same problems that plague Plaintiff's main theory — the upper portion of the table on page 11 of Plaintiff's Answering Brief tries to compare valuations for SPCC based on a market price and for Minera based on a DCF without harmonizing the assumptions on which those valuations are based.

- The remainder of Plaintiff's new analysis purports to say something about the values of SPCC and Minera based on single-year EBITDA forecasts. But Plaintiff cites nothing that would allow the valuation of a long-lived asset such

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12 Plaintiff also ignores the fact that the long-term copper price Prof. Schwartz used was below the spot price at the end of 2004 and is less than half the average copper spot price since then. As Appendix B shows, the copper spot price passed $1.25/pound before the end of 2004 and has increased since, with an average of $2.77/pound from January 2005 through the end of September 2010. *See also* Public Aff. Ex. L.

And despite conceding that "Minera had larger and longer-lived copper mines than SPCC," Plaintiff makes a roundabout suggestion that Minera's reserves were somehow "suspect." *See* Pl. Ans. Br. at 12 & n.14. But Plaintiff cites no admissible evidence that there were any problems with Minera's reserves and Plaintiff chose not to challenge any of the reserve data used by the Special Committee.

13 Indeed, Plaintiff's assertion that certain things "were the attributes for which the market rewarded SPCC" (Pl. Ans. Br. at 13) cannot be reconciled with Beaulne's assertions that "no one can point to exactly what is impacting the price of a stock because it's traded on the market. And no one knows exactly what people are doing when they're trading the stocks with all the factors that they're considering when they're making the trades of a stock" (Beaulne Tr. 109:17-23 (Confidential Coen Aff. Ex. 6)) and "I'm not sure what assumptions market participants are doing when they're buying and selling shares" (*Id.* at 116:6-8).

> as a copper company to be based on such short-term data.[14] The Special Committee and its experts did not do that, and neither did any of the proposed experts in this case. And this new theory still suffers from the same apples-to-oranges problem, because no effort was made to harmonize the assumptions in the two sets of forecasts.[15] So this is not just another apples-to-oranges comparison, but also a willfully blind one.

The Court should therefore ignore the valuation-related arguments in Plaintiff's Answering Brief.

II. THE SPECIAL COMMITTEE'S APPROVAL OF THE MERGER SHIFTS THE BURDEN TO PLAINTIFF

As set forth in the AMC Defendants' Opening Brief and below, the Special Committee was independent and disinterested and its eight-month evaluation, negotiation, and ultimate approval of the Merger shifts the burden to Plaintiff to show that the Merger was not entirely fair. Plaintiff has not shown any genuine issues of material fact that would preclude shifting the burden.

A. The Special Committee Was Independent And Disinterested

Plaintiff does not dispute that the Special Committee members had no affiliation with Grupo Mexico and no financial interest in the Merger. Rather, Plaintiff argues that the Special Committee was not independent because it "failed to negotiate in the best interests of the minority shareholders" by (i) allowing Grupo Mexico to "buy[] the votes of Cerro and Phelps Dodge"[16] and (ii) "approv[ing] the Minera Transaction without any knowledge of the terms that

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14 Indeed, this new theory is inconsistent with Plaintiff's own citations. *See MacLane*, 1992 WL 368614, at *15-22.

15 *See* Proxy at 30-39 (Public Coen Aff. Ex. D).

16 Pl. Ans. Br. at 26.

[it was] approving."[17] Not only is Plaintiff wrong about the standard, but the allegations he relies on are not supported by the record.

1. The Registration Rights Agreements Were Not Tied To The Founders' Votes

Contrary to Plaintiff's unsupported assertion, the Special Committee did not "abandon the opportunity to negotiate" the registration rights.[18] When the Cerro registration rights agreement was presented to the Special Committee on October 18, 2004, the Special Committee objected to Grupo Mexico's attempt to condition the registration rights on Cerro's agreement to vote in favor of the proposed Merger.[19] The Special Committee then ensured that the agreement was re-drafted to provide that Cerro would vote *in accordance with the Special Committee's recommendation.*[20] Moreover, the Cerro agreement contained a provision providing that, if the Special Committee withdrew its recommendation to the SPCC Board approving the Merger, Cerro would *not* vote in favor of the proposed Merger. Thus, contrary to

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17 *Id.* at 28.

18 **REDACTED**

19 Proxy at 21, 23 & 26 (Public Coen Aff. Ex. D).

20 *Id.* at 10 & 26; **REDACTED** **REDACTED**

Plaintiff's assertion, at the time the Merger was approved by SPCC's board, there was no guarantee that at least two-thirds of the SPCC shares would vote in favor of it.[21]

2. **The Special Committee Was Fully Informed**

Plaintiff does not seriously contest that the Special Committee was fully informed. Indeed, Plaintiff can not point to a single piece of information that it believes was hidden from the Special Committee. Rather, Plaintiff attempts to put a new spin on its argument that the Special Committee (and now the Court) was required to look at only SPCC's trading price to determine whether the Merger was fair by arguing that the Special Committee approved the Merger without knowledge of the value of SPCC's stock. This argument is incorrect as a factual matter. **REDACTED**

REDACTED

REDACTED [22]

Moreover, Plaintiff's contention that the Special Committee relied exclusively on the October 21, 2004 presentation and fairness opinion in approving the Merger[23] ignores the eight months the Special Committee spent negotiating and evaluating the transaction, which is detailed in the uncontested descriptions in the Proxy **REDACTED**

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21 *Id.* Plaintiff ignores the undisputed fact that the registration rights agreement with Phelps Dodge was not entered into until two months after the Special Committee approved the proposed Merger. *See id.* at 10 & 26-27.

22 **REDACTED**

23 Pl. Ans. Br. at 28.

REDACTED [24] Plaintiff's reliance on a footnote in the AMC Defendants' Opening Brief in support of his contrary assertion is misplaced. The AMC Defendants did not state that the Special Committee relied exclusively on the October 21, 2004 presentation and fairness opinion. Rather, the AMC Defendants made the point that the interim analyses Plaintiff so often referred to in his Opening Brief reflected specific points in the Special Committee's process, rather than anyone's final analysis or opinion.

Finally, Plaintiff's reliance on *Gelfman v. Weeden Investors L.P.*, 859 A.2d 89 (Del. Ch. 2004), is misplaced. In *Gelfman*, there was no special committee, no independent advisors, no consideration of such devices (or apparently even alternatives to the substantive actions that were taken), information about what was being done was seemingly withheld from outside investors, and there appears to have been direct self-dealing.[25] Indeed, the Court stated that the reason for its finding of bad faith was that it could not imagine any good faith basis for what was done.[26] In short, nothing about what the defendants did in *Gelfman* resembles this case, and *Gelfman* highlights everything the Special Committee here got right.[27] The missteps the Court relied on in *Gelfman* show what the Special Committee did *correctly* here.[28]

B. The Special Committee Had Real Bargaining Power And Used It

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[24] Proxy at 13-39 (Public Coen Aff. Ex. D); **REDACTED** **REDACTED**

[25] *See id.* at 93-95, 101-04, 108, 118-25.

[26] *See id.* at 124.

[27] Plaintiff attempts to rely on a quotation from *Gelfman*, but makes no attempt to explain its context. The language Plaintiff misleadingly quotes discusses whether the conduct at issue fell within specific contractual language that is not present in this case.

[28] *Compare, e.g., id.* at 122 (discussing the "total absence of any attempt to determine the fair market value of a Weeden unit and the relationship of that value to book value") *with* AMC Def. Br. at 34-39 (discussing in detail the work the Special Committee and its independent advisors did to fully understand the values of both Minera and SPCC).

Plaintiff's contention that the Special Committee had no real bargaining power because the Special Committee's mandate was to "evaluate" the transaction ignores the undisputed facts that the Special Committee had the power to negotiate the proposed Merger and did just that.[29] Indeed, the board resolutions that created the Special Committee gave the Special Committee broad authority to evaluate the transaction "in such manner as the special committee deems to be desirable and in the best interest of the stockholders of the corporation," and that is exactly what the Special Committee did.[30]

First, there is no dispute that the Special Committee had the power to walk away from the transaction. Indeed, Plaintiff concedes that the Special Committee threatened to walk away from the negotiations in order to induce Grupo Mexico to improve the terms of the transaction.[31] **REDACTED**

REDACTED

REDACTED [32]

REDACTED

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29 *In re Tele-Commc'ns, Inc. S'holders Litig.*, Civ. A. No. 16470, 2005 WL 3642727, at *9 (Del. Ch. Dec. 21, 2005) ("A special committee's clear understanding of its own mandate is an important factor facilitating the knowledgeable and careful fulfillment of its purpose."). In light of the record and the relevant legal framework, it is unclear why Plaintiff tries to rely on Mr. Garcia's testimony (Pl. Ans. Br. at 32) — Mr. Garcia was not on the Special Committee.

30 PX 78; *see also* Proxy at 16 (Public Coen Aff. Ex. D).

31 Pl. Ans. Br. at 32.

32 **REDACTED**

REDACTED [33] The Special Committee's power and willingness to walk away from the transaction demonstrates that the Special Committee functioned properly.[34]

Nor does Plaintiff contest the facts that the Special Committee (i) negotiated various concessions for the minority shareholders, including a reduction in the number of shares to be issued, a reduction in how much debt would be assumed, the payment of a special dividend, post-closing corporate governance protections, and indemnification of SPCC for pre-Merger claims and (ii) approved the proposed Merger because it believed it was a good deal for SPCC's minority shareholders. Instead, apparently recognizing the lack of support for his argument, Plaintiff again retreats to the argument that "the Special Committee agreed to pay $3.1 billion of stock for an asset worth less than $2 billion" to suggest that the benefits obtained by the Special Committee do not matter.[35] As set forth in the AMC Defendants Opening Brief, Plaintiff's argument fails as a matter of fact and law.[36]

C. The Special Committee's Advisors Were Qualified And Independent

There is no evidence in the record that the Special Committee's advisers were not qualified and independent. Although Plaintiff apparently disagrees with the Special Committee's

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33 **REDACTED**

34 *See Gesoff v. IIC Industries Inc.*, 902 A.2d 1130, 1146 (Del. Ch. 2006) (observing that a special committee's mandate "should include the power to fully evaluate the transaction at issue, and, ideally, include what this court has called the "critical power" to say "no" to the transaction); *In re First Boston, Inc. S'holders Litig.*, Civ. A. No. 10338, 1990 WL 78836, *7 (Del. Ch. June 7, 1990) ("It is that power [to say no] and the recognition of the responsibility it implies by committees of disinterested directors, that gives utility to the device of special board committees in charge of control transactions.").

35 Pl. Ans. Br. at 29.

36 *See* AMC Def. Br. at 20-28; *see also* supra pp. 2-4.

selection of advisors,[37] Plaintiff does not dispute that the Special Committee retained experienced and competent U.S. and Mexican legal advisors, financial advisors, and mining consultants and relied on their advice.[38] Instead, Plaintiff advances the wholly-unsupported argument that the Special Committee's advisers were conflicted. As set forth below, this argument is meritless.

1. The Special Committee's Financial Advisers Were Not Influenced By Grupo Mexico

Plaintiff argues that Goldman Sachs's retention was preordained because REDACTED

REDACTED

REDACTED [39] This argument is nonsensical. When the Special Committee was established in February 2004, it considered five investment banks before selecting Goldman Sachs as financial adviser.[40] **REDACTED**

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37 Plaintiff has provided no evidence that the results of the Special Committee process would have been different with different advisors. For example, although Plaintiff claims the Special Committee should have retained JPMC instead of Goldman Sachs, it says nothing about the fact that JPMC suggested the same relative valuation methodology the Special Committee actually used. *See* AMC Def. Br. at 9 n.49.

38 *See Gesoff*, 902 A.2d at 1147.

39 Pl. Ans. Br. at 33. Plaintiff's attempt to undermine the Special Committee's selection of Goldman Sachs by suggesting that Goldman Sachs lacked mining experience is similarly unavailing. **REDACTED**

REDACTED

40 **REDACTED**

REDACTED [41] Each of the financial institutions prepared presentation materials which the Special Committee considered. REDACTED

REDACTED

REDACTED [42] There is no evidence that Grupo Mexico had any influence whatsoever regarding the Special Committee's selection of Goldman Sachs.[43]

Plaintiff also argues that the engagement of A&S was somehow inappropriate because "A&S's engagement letter was executed by SPCC's president on behalf of the Special Committee" and the Special Committee did not negotiate the engagement letter.[44] But the fact that A&S's engagement letter was executed by SPCC's president did not impair A&S's ability to

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41 REDACTED

42 REDACTED

43 Even if Plaintiff had offered any such evidence, it would not matter because Plaintiff has not (and cannot) demonstrated that the retention of Goldman Sachs negatively affected the Special Committee process.

44 Pl. Ans. Br. at 34-35.

assist the Special Committee, nor does Plaintiff even try to argue otherwise.[45] In addition, Plaintiff's suggestion that SPCC negotiated the engagement letter with A&S is not supported by the record. REDACTED

REDACTED

REDACTED [47]

2. **The Special Committee's Legal Advisers Were Not Conflicted**

In an entirely new argument, Plaintiff now contends that the Special Committee's selection of legal counsel was "dubious" because Mr. Handelsman recommended the three law firms that the Special Committee interviewed and the Special Committee selected Latham & Watkins despite its "close ties to the Pritzker interests."[48] Plaintiff, however, does not contend that Latham & Watkins was conflicted based on its relationship with the Pritzkers or that that relationship somehow deprived the Special Committee of knowledgeable or independent

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45 A&S's engagement letter was addressed to both Mr. Ortega and Mr. Ruiz (the chairman of the Special Committee). PX 150.

REDACTED REDACTED

47 *See,* REDACTED Plaintiff's contention that Grupo Mexico "dictated the composition of the A&S team ... by removing from the team a former SPCC employee who Grupo claimed had an outstanding legal dispute with the Company" (Pl. Ans. Br. at 30) again misstates the record. It was the Special Committee, not Grupo Mexico, that decided to remove the former SPCC employee from the team.

REDACTED

REDACTED Plaintiff does not challenge in any way the basis for the Special Committee's decision.

48 Pl. Ans. Br. at 36.

counsel. The fact that Mr. Handelsman, an experienced M&A lawyer, recommended three well-known, reputable law firms for the Special Committee to consider and, after interviewing the firms, the Special Committee selected Latham & Watkins, does not create a conflict for Latham & Watkins. Other than claiming that Latham "steered the process in favor of Cerro to ensure that Cerro received its registration rights,"[49] for which he provides no evidence at all, Plaintiff fails to identify any reason to question the Special Committee's choice of U.S. counsel.

D. Plaintiff's Belated Attempt To Allege Non-Disclosures In Connection With The Proxy Are Insufficient To Defeat The AMC Defendants' Cross-Motion

Plaintiff does not dispute that a majority of SPCC's minority shareholders voted in favor of the Merger.[50] Nor does he dispute that the operative complaint contains no disclosure claim, that no plaintiff ever sought to amend the operative complaint, and that no plaintiff ever sought to enjoin the closing of the Merger. Instead, Plaintiff argues that he found the basis for a claim that the Proxy was materially misleading during discovery and that there are "a slew" of misstatements or omissions in the Proxy Statement.[51] The flaws in that response include:

- It runs headlong into Vice Chancellor Lamb's discussion of how Plaintiff's counsel mishandled this case. This Court has a strong preference that disclosure claims relating to a proposed merger be addressed *before* a shareholder vote.[52] Plaintiff's argument is years too late.

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49 *Id.*

50 Plaintiff's contention that the vote was a foregone conclusion given that Cerro and Phelps Dodge has agreed to vote in accordance with the Special Committee's recommendation is wrong (*see supra* § II.A.1.a) and misses the point. The point is that SPCC's outstanding minority stockholders who voted for the Merger, including Sousa, collectively thought the Merger was beneficial. Even if the Class A Common Shareholders (which includes Cerro and Phelps Dodge) are taken out of the equation, approximately 99% of the outstanding common stock holders who voted voted in favor of the Merger. *See* 2005 10Q at 25 (Montejo Aff. Ex. 3).

51 Pl. Ans. Br. at 2-3.

52 *See In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 356-63 (Del. Ch. 2008).

- Although he claims that there are "a slew" of misstatements or omissions, Plaintiff identifies only one.[53] But Plaintiff's own discussion makes clear that what Plaintiff claims should have been disclosed *was* disclosed.[54]

- Plaintiff's assertion that *he* "discovered" anything is absurd. Plaintiff made clear during his deposition that he had no idea about or involvement with the discovery his counsel pursued.[55] And the few specific things Plaintiff relies on were pleaded in the operative complaint and/or disclosed in the Proxy Statement.[56] None of them were "discovered" at all.

Plaintiff's much-belated attempt to assert disclosure claims is far too little and far too late, and cannot prevent the burden of proof as to entire fairness from being shifted to Plaintiff.

III. PLAINTIFF CANNOT DEMONSTRATE THAT THE MERGER WAS UNFAIR

As demonstrated in the AMC Defendants' Opening Brief and above, Plaintiff has the burden to demonstrate that the Merger was not entirely fair.[57] Plaintiff has not come close to meeting this burden.

IV. PLAINTIFF IS NOT AN ADEQUATE REPRESENTATIVE

Plaintiff argues that what he does or does not do or know is essentially irrelevant for assessing adequacy, arguing that the relevant inquiry is whether a derivative action is being maintained for the benefit of shareholders. Plaintiff asserts that "there is no question" this action is being maintained for the benefit of shareholders because he testified that this action is for the

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53 Pl. Ans. Br. at 23 ("[T]he Proxy utterly fails to disclose to SPCC stockholders the value of Minera Mexico, SPCC, or the implied value of SPCC common stock that was used as consideration in the Minera Transaction.").

54 For example, Plaintiff concedes that "a reasonable stockholder" would be "capable of deriving" the implied equity value of Minera based on the information provided in the Proxy. *Id.* at 24.

55 Theriault Tr. 99:15-100:21 (Confidential Coen Aff. Ex. 1).

56 *Compare* Pl. Ans. Br. at 24-25 (claiming that the proxy fails to disclose the "value of Minera Mexico, SPCC, or the implied value of SPCC common stock that was used in consideration in the Minera Transaction") *with* Proxy at 34-38 (discussing and explaining relative valuation); *see also supra* note 54.

57 *See* AMC Def. Br. at 20-42.

"underdog[s]" and because his counsel have spent money litigating the case.[58] Plaintiff's argument highlights why Plaintiff is an inadequate representative.

The first problem with Plaintiff's argument is that it reads the adequacy requirement out of existence. Plaintiff can guess what his father's reasons for buying or selling SPCC stock or participating in this lawsuit might have been — he did that quite often during his deposition[59] — but he does not know what his father did or why. And of course Plaintiff cannot even guess about Sousa.

Plaintiff's response — that he is entitled to rely on counsel — proves the AMC Defendants' point. Counsel has no more knowledge about what Plaintiff's father or Sousa did than Plaintiff does. Moreover it was counsel's choices that got this case where it is: Counsel chose which plaintiff to designate lead, which complaint to pursue, which claims to waive and which ones to pursue, not to assert disclosure claims, not to seek to prevent the Merger from closing, to let discovery lapse for years, to drop Lemon Bay, to substitute Plaintiff,[60] and so on — which is what led to Vice Chancellor Lamb's comments about how this case has been pursued.[61] For Plaintiff to rely on that record is to concede inadequacy.[62] If Plaintiff is an

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58 Pl. Ans. Br. at 37.

59 **REDACTED** *see also* Pl. Ans. Br. at 41 (citing instances of Plaintiff's speculation).

60 It is unclear whether counsel even knew that Plaintiff's father and Sousa had died until counsel decided they would rather take their chances with one of the other plaintiffs than let Lemon Bay respond to the AMC Defendants' discovery requests. And Plaintiff is simply wrong about how the defendants responded to Lemon Bay's motion to withdraw. *Compare* Pl. Ans. Br. at 39 ("Defendants never opposed Lemon Bay's motion to withdraw") *with* Docket No. 66 (letter to the Court noting that the AMC Defendants opposed that motion).

61 Plaintiff's response to what Vice Chancellor Lamb said — that defendants are somehow to blame for not having sought discovery of Plaintiff's father earlier (Pl. Ans. Br. at 41

(footnote continued...)

"adequate" representative, then there is no such thing as an "inadequate" representative. It is simply not true that any representative is better than none at all.[63]

Nor can Plaintiff clear the low hurdle he tries to set for himself. More than fifteen months after (i) taking over for his father in this litigation and (ii) assuming the role of lead plaintiff, Plaintiff testified that he had not "formed any opinions yet" about the case.[64] Beyond the fact that he has no personal knowledge about anything relevant to the case, Plaintiff does not even know whether he agrees with the allegations in the Complaint, to the extent he even read them or understands them, nor does he have any motivation to investigate the claims.[65] There cannot be a substantial likelihood that the action is being maintained for the benefit of the shareholders if Plaintiff does not even know what that means or whose side he should be on. Plaintiff's reliance on *In re Fuqua Industries, Inc. Shareholder Litigation*, 752 A.2d 126 (Del. Ch. 1999), and *TD Banknorth Shareholder Litigation*, C.A. No. 2557, 2008 WL 2897102 (Del.

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n.43) — is incomprehensible. Lemon Bay was the lead plaintiff selected by Plaintiff's counsel had selected and the AMC Defendants directed their discovery requests at Lemon Bay until Lemon Bay withdrew, at which point those requests were directed to Plaintiff.

62 Plaintiff tries to rewrite history by suggesting that he was involved in the main part of discovery in the case. *See* Pl. Ans. Br. at 39. But nothing in the record supports that, and Plaintiff's testimony shows that he had no idea what discovery was going on in the case or when. *See* **REDACTED**

63 *See, e.g., Rattray v. Woodbury Cnty.*, 614 F.3d 831, 836 (8th Cir. 2010) ("A failure of the putative class representative to assure the court that it will vigorously pursue the interests of class members is a sufficient basis to deny certification.") (citation omitted); 7A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1766, at 373 (3d ed. 2005) ("the failure of the representative … otherwise to prosecute the action is a clear indication that the named party is not an adequate representative").

64 **REDACTED**

65 At the time of his deposition, *fifteen months after he substituted in as Plaintiff for his father*, Plaintiff had made little, if any, effort to investigate the allegations and claims in the Complaint. **REDACTED**

REDACTED

Ch. July 29, 2008), to justify relying on counsel is thus misguided. Neither case suggests that counsel can entirely supplant the role of the representative plaintiff in an action, as has occurred here. Although the plaintiffs in *Fuqua* and *TD Banknorth* relied heavily on their counsel, they had an understanding of the basic facts of the cases and the bases for the claims in the complaints, neither of which is the case here.[66]

Simply put, there are neither witnesses nor evidence Plaintiff can proffer to explain why **REDACTED** **REDACTED** or why Sousa voted in favor of the Merger. Plaintiff's suggestion that the post-announcement purchases by the Theriault Trust were consistent with Plaintiff's father's investment strategy[67] is just a guess, unsupported by any admissible evidence, and certainly not enough to withstand summary judgment.

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66 *Fuqua,* 752 at 134, 136; *TD Banknorth*, 2008 WL 2897102, at *3. Not only did the Plaintiff in *TD Banknorth* understand his claims, he kept in regular contact with his counsel and kept himself apprised of the filings in the case. *Id.* at * 4. **REDACTED** **REDACTED**

67 Pl. Ans. Br. at 41.

CONCLUSION

For the reasons set forth herein and in the AMC Defendants' Brief, the AMC Defendants respectfully request that the Court grant judgment in favor of the AMC Defendants and deny Plaintiff's motion in its entirety.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Kevin M. Coen
S. Mark Hurd (#3297)
Kevin M. Coen (#4775)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200

Attorneys for Defendants Americas Mining Corporation, Germán Larrea Mota-Velasco, Genaro Larrea Mota-Velasco, Oscar Gonzalez Rocha, Emilio Carrillo Gamboa, Jaime Fernando Collazo Gonzalez, Xavier Garcia de Quevedo Topete, Armando Ortega Gómez, and Juan Rebolledo Gout.

OF COUNSEL:

Alan J. Stone (DE Bar No. 2677)
Douglas W. Henkin
C. Neil Gray
Mia C. Korot
MILBANK, TWEED, HADLEY
& McCLOY LLP
One Chase Manhattan Plaza
New York, NY 10005
(212) 530-5000
October 15, 2010

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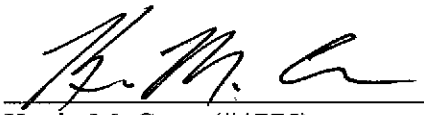
CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2010, I electronically filed and caused to be served by LexisNexis File and Serve a REDACTED VERSION OF AMC DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR CROSS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR A DETERMINATION THAT PLAINTIFF BEARS THE BURDEN OF PROOF AS TO ENTIRE FAIRNESS upon the following counsel of record:

Ronald Brown, Jr., Esquire
Marcus E. Montejo, Esquire
Prickett, Jones & Elliott
1310 King Street
Wilmington, DE 19801

Richard I. G. Jones, Jr., Esquire
Ashby & Geddes
222 Delaware Avenue
Wilmington, DE 19801

Raymond J. DiCamillo, Esquire
Richards, Layton & Finger, P.A.
One Rodney Square
Wilmington, DE 19801



Kevin M. Coen (#4775)