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Case No. 961-CS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER CORPORATION SHAREHOLDER DERIVATIVE LITIGATION	)))))	Consolidated C.A. No. 961-CS

PLAINTIFF'S CORRECTED REPLY TO DEFENDANTS' ANSWERING BRIEFS IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND EXPENSES

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ARGUMENT

Defendants' position is that if plaintiff's counsel take a huge case to trial and achieve a $1.9 billion judgment solely as a result of their efforts and risk, they should get a *quantum meruit* award based on the number of hours they expended in achieving the benefit. Here, defendants would peg this amount at $13.5 million,[1] which includes counsel's expenses and could also be paid in Southern Peru stock. This fee, ***which is equivalent to 0.7% of the $1.9 billion benefit***, defendants say, "would be more than enough to compensate and incentivize plaintiffs' counsel."[2] In fact, defendants suggest that plaintiff's counsel who achieve a $1.9 billion judgment after trial – the largest derivative recovery in this Court's history – should be compensated as if they had settled the case for less than $50 million. Really? Of course not.

The Company acknowledges as it must that the first *Sugarland* factor "is traditionally accorded the most weight,"[3] and that "potential negative incentives might stem from applying a sliding-scale to a fee award as the benefits get larger."[4] Defendants nonetheless ask this Court to slide the fee award scale to virtually zero. It is impossible to reconcile the defendants' recommendation that plaintiff's counsel here receive a fee equaling merely ***0.7%*** for their efforts and success with this Court's precedents[5] and guidance.[6] Instead, Plaintiff's counsel submits that

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[1] The Company suggests $13.5 million; the AMC defendants suggest $13.88 million.

[2] AMC Defendants' Answering Brief in Opposition to Plaintiff's Petition for Attorneys' Fees and Expenses ("AMC Br.") at 2.

[3] Answering Brief of Nominal Defendant Southern Peru Copper Corporation in Opposition to Plaintiff's Petition For Attorneys' Fees and Expenses ("Company Br.") at 6.

[4] Company Br. at 9; *see also In re Emerson Radio S'holder Derivative Litig.*, 2011 WL 1135006, at *4 (Del. Ch.) ("Awarding increasing percentages helps offset representative counsel's natural incentive to shirk.")

[5] *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *14 (Del. Ch.) ("Delaware courts recognize the value of representative litigation. In deal cases, Delaware decisions have sought to align the interests of entrepreneurial plaintiffs' counsel with the classes they represent by granting minimal fees for minimal benefits and major fees for major results.").

its request for 22.5% of the benefit achieved through this litigation is fair and reasonable under *Sugarland* and its underlying policies.

A. The Benefit Achieved: An Unprecedented Post-Trial Damages Award

Defendants arrive at their fee recommendation by contorting the clear language of this Court's post-trial Opinion and by ignoring the most important *Sugarland* factor.[7] They assert that depending on how AMC satisfies the judgment, the value of the judgment would be indeterminate (it "may be nothing"[8] or "would be a balance sheet event"[9]). Next, whatever benefit was achieved was not "attributable solely to counsel's efforts."[10] And finally, because

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[6] *Joseph v. Troy Group, Inc.*, C.A. No. 4676-CS, Strine, C. (Del. Ch. June 29, 2011) at 28 ("If there's ever a case like this, and it's clear that the sole reason a class got $2 billion is because of the lawyers, I got no problem, and I will sleep better than I usually do if the lawyers get 33 percent of $2 billion.").

[7] *See, e.g.*, *Marie Raymond Revocable Trust v. MAT Five LLC*, 980 A.2d 388, 409 (Del. Ch. 2008) ("In Delaware, the benefits achieved in the actions receives the greatest weight in determining the fee award."); *id*. at 410 ("…This court has often approved fee requests of 30% or more of the benefits where the settlement benefits are attributable solely to the litigation."); *In re Nat. City Corp. S'holders Litig.*, 2009 WL 2425389, at *5 (Del. Ch.) ("This Court has consistently noted that the most important factor in determining a fee award is the size of the benefit achieved"); *Ryan v. Gifford*, 2009 WL 18143, at *13 (Del. Ch.) ("The benefit achieved for the Company and the shareholders should be accorded the greatest weight in determining the fees to be awarded."); *Olson v. Ev3, Inc.*, 2011 WL 704409, at *8 (Del. Ch.) ("In determining the size of an award of attorney's fees, courts assign the greatest weight to the benefit achieved"); *J.L.Schiffman and Co., Inc. v. Standard Indus., Inc.*, 1993 WL 271441, at *4 (Del. Ch.) ("The benefits achieved by the litigation constitute the factor generally accorded the greatest weight in this jurisdiction.").

[8] The speculative nature of defendants' argument stems from their unwillingness to say how they intend to satisfy the judgment. Grupo Mexico apparently intends to let the current market price of shares of Southern Peru dictate the currency in which it will satisfy the judgment. This gaming, and the speculation it creates, is reason alone to reject defendants' argument that the currency which defendants choose to satisfy the judgment should bear on the attorneys' fee award to plaintiff's counsel.

[9] AMC Br. at 6.

[10] Company Br. at 15.

the benefit is so "speculative,"[11] plaintiff's attorneys' fees should be assessed on a *quantum meruit* basis,[12] rather than as a percentage of the fund.

Hogwash.

Defendants simply ignore reality when they characterize a $1.9 billion post-trial judgment as "some sort of a corporate benefit."[13] Unlike cases like *Loral Space*, which involved benefits which may have been difficult to quantify,[14] here the Court ordered that the "remedy, therefore, amounts to $1.263 billion," plus interest until the judgment is satisfied.[15] The fact that the Court gave Grupo Mexico various means by which it "may satisfy the judgment"[16] does not mean that the size of the judgment (or the benefit conferred) rests in Grupo Mexico's hands.

This is true as a matter of law, equity, and practice. Legally, if Grupo Mexico satisfies the judgment by returning stock to the Company, the stock would have the same value as the monetary judgment – $1.9 billion.[17] Indeed, defendants' arguments to the contrary are

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[11] *Id*. at 12.

[12] *Id*. at 14.

[13] *Id*. at 12.

[14] As this Court is well aware, the equitable remedy crafted in *Loral Space* reformed the terms of preferred stock held by a controlling stockholder. As the Court noted, it could not "value the benefit in a precise way." *In re Loral Space and Communications Inc. Consol. Litig.*, C.A. No. 2808-VCS, Strine, V.C. (Del. Ch. Dec. 22, 2008) (Transcript) at 72. Had the litigation resulted in a quantifiable common fund, the fee issue would have been "easier…because the fund is there and you can just take a percentage." *Id.* at 74.

[15] *In re Southern Peru Copper Corp. S'holder Derivative Litig.*, --- A.3d ----, 2011 WL 4907799, *43 (Del. Ch.).

[16] *Id*.

[17] Based on the Company's own business practices, the value of the returned stock may even exceed the cash value of the judgment. The Company has an aggressive share repurchase program which its Board of Directors recently increased from $500 million to $1 billion. According to Southern Peru's most recent quarterly statement, Southern Peru spent $148 million in the second quarter of 2011 to repurchase 4.6 million shares of common stock. *See* Southern Copper Corporation Form 10-Q, filed with the SEC on November 9, 2011 at 27 (available at http://www.sec.gov/Archives/edgar/data/1001838/000110465911062516/a11-25690_110q.htm).

remarkably similar to the arguments that left them liable at trial – "obscuring the fundamental fact that [shares in] the NYSE-listed company ha[ve] a proven cash value."[18] Whether the stock is held by AMC or Southern Peru, the stock could easily be liquidated into cash.[19] In equity, if Southern Peru determines not to monetize the stock that ***may be*** returned to it, that is Southern Peru's choice, and a choice that cannot be used to manipulate the amount of fees paid to plaintiff's counsel. And practically, defendants' "what if" argument ignores that this Court intends to fix the attorneys' fee award prior to the judgment being satisfied. Thus, defendants' suggestion that the attorneys' fee award should vary based on how Grupo Mexico satisfies the judgment is simply impracticable.

Nor should defendants have the option of paying plaintiff's counsel in stock. Again, defendants are using the market to dictate an outcome most favorable to them. Setting aside the fact that 22.5% of approximately 70.6 million shares would be a significant block of stock for a non-issuer and non-broker to liquidate, plaintiff's counsel should not be required to assume the risk that Southern Peru's stock price (described repeatedly as "volatile" during the trial) will remain strong in the interim. Moreover, plaintiff's counsel should not be required to take a substantial stake in a controlled company where the controlling stockholder has twice in the past three years been held to have breached its fiduciary duties to investors. Plaintiff's counsel highly

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As a result of the trial judgment, if AMC chooses to return stock, Southern Peru will receive more than fifteen times the number of shares it repurchased in the second quarter of 2011 (more than 70.6 million shares). To repurchase the same number of shares on the market Southern Peru would have to spend more than $2.273 billion, based on the average $32.32 per share paid in the second quarter. *Id*. Southern Peru's own business practices establish that a return of stock is plainly a very valuable benefit to the Company.

[18] *Southern Peru*, 2011 WL 4907799, at *1.

[19] *Id*. at *1 ("The . . . billion [dollar number] was a real number in the crucial business sense that everyone believed that the NYSE-listed company could in fact get cash equivalent to its stock market price for its shares.").

suspects that counsel for defendants has been paid in cash; so too should plaintiff's counsel. This is a derivative case in which the litigation conferred a quantifiable monetary benefit on the corporation and as such the corporation should be required to pay the fee award in cash.

Defendants feebly argue that plaintiff's counsel's efforts were not the actual cause of the $1.9 billion judgment they achieved.[20] They are forced to make such a strained argument only because the precedents clearly dictate that a *quantum meruit* analysis is only applicable when the benefit achieved is hard to define,[21] or the court is unable to parse the cause of the benefit with precision.[22] Their analogy between *Cox Communications*[23] and this litigation, however, is like comparing a Kabuki dance to hand-to-hand combat.

Finally, as anticipated, the AMC defendants argue that even if a percentage of the common fund is used to calculate attorneys' fees, the Court must take into account "the unique situation presented here," *i.e.*, for purposes of calculating attorneys' fees, the common fund must be reduced to account for Grupo Mexico's 80% ownership of Southern Peru. Plaintiff's counsel specifically addressed this argument in their petition. Plaintiff's counsel cited well-settled authority rejecting the claim that the presence of a controlling stockholder – which is hardly a unique situation – diminishes the value of a recovery to the company on whose behalf the

[20] AMC Br. at 14-15; Company Br. at 15-16.

[21] *See Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *8 (Del. Ch.) ("In determining the size of an award of attorney's fees, courts assign the greatest weight to the benefit achieved by the litigation. When the benefit achieved is unquantifiable, however, courts often find the *quantum meruit* approach most equitable."); *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *8 (Del. Ch.) ("In cases where the benefit created is not quantifiable, the *quantum meruit* approach is often appropriate.")

[22] *See La. State Employees' Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *6 (Del. Ch.) (awarding fees under *quantum meruit* where it was "impossible . . . to indentify precisely the degree to which this lawsuit caused [the benefit].")

[23] Company Br. at 15 n. 44; AMC Br. at 10, n.23.

derivative action is brought.[24] The AMC defendants do not address any of the cases cited by plaintiff's counsel.[25] Defendants offer no legal basis to depart from this Court's long-standing practice of calculating attorneys' fees based on the common fund as a whole.[26] Under *Sugarland* and its progeny, plaintiff's counsel's request for 22.5% of that benefit is conservative in relation to the percentage range this Court has repeatedly said is warranted post-trial.

B. Time and Effort Expended By Counsel

Defendants focus their challenge to plaintiff's counsel's fee petition on the "time" expended by counsel. The number of hours expended by plaintiff's counsel in securing a victory at trial should have little bearing on this Court's analysis of the appropriate fee. Counsel's time is relevant as a "cross check" on the reasonableness of an attorneys' fee request in the ***settlement*** context, where counsel has chosen to ***compromise*** his claims. As any compromise is made at the expense of the class which counsel seeks to represent, the settlement context presents the possibility of "different incentive problems, including the risk of cheap early settlements."[27]

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[24] Plaintiff's Petition for Attorneys' Fees and Expenses at 3-6.

[25] Instead, defendants altogether abandon Delaware law to rely on a single case from the State of Florida, *Lane v. Head*, 566 So.2d 508 (Fla. 1990). *Lane* interpreted a partial-contingency fee agreement under a Florida fee statute and Florida case law. *Lane's* holding should have no bearing on this Court's application of *Sugarland* under the facts of this case. Defendants also cite *Lewis v. Great Western United Corp.*, 1978 WL 2490 (Del. Ch.), *see* AMC Br. at 8, n.17, which is completely inapposite. In *Lewis*, the court withheld a portion of plaintiffs' counsel's fees pending a determination by certain stockholders as to whether they would participate in the settlement or seek appraisal of their shares. 1978 WL 2490, at *9.

[26] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996); *see also* Plaintiff's Petition for Attorneys' Fees and Expenses at 4, n.19.

[27] *See Seinfeld v. Coker*, 847 A.2d 330, 336-37 (Del. Ch. 2000) (comparing effect of percentage of fund methodology on attorneys who engaged in "hotly contested litigation" against attorneys who "settled quickly"); *id*. at 339 ("***Settlements*** in class and derivative actions sometimes raise difficult problems regarding the appropriate level of compensation for class or derivative counsel.") (emphasis added). *See also Franklin Balance Sheet*, 2007 WL 2495018, at *13-14 (utilizing "backstop check" where, although plaintiffs' counsel expended 1,047 hours on the case, the action "the fact that Plaintiffs' underlying action never progressed beyond the motion to

Where the interests of lawyer and client might diverge, courts thus appropriately exercise vigilance to assure that a fee request in this context will not represent a "windfall." But where counsel has not compromised, and indeed has taken the case through judgment, there is no risk that the interests of lawyer and client have diverged. No matter how large a fee is awarded post-trial, it is not a "windfall."

Merriam-Webster defines a "windfall" benefit as one which is "unexpected" or "unearned."[28] Though large, the fee sought here would be neither unexpected nor unearned. Plaintiff's counsel litigated this matter through trial with the understanding that if they lost they would receive nothing. If they won, they expected that their efforts would be rewarded with a significant fee which would be measured as a percentage of the benefit they created. Counsel made this investment, and took this risk, while aware of the clear incentives often reiterated by this Court.[29]

Defendants also inappropriately collapse the "time and effort" factor into a single "lodestar" analysis. "This factor has two separate but related components: (i) time and (ii) effort."[30] "More important than hours is effort, as in what plaintiffs' counsel actually did."[31]

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dismiss stage warrants a reduction in the percentage rate used in calculating fees, as this Court has a history of properly awarding lower percentages of the benefit where cases have settled well before trial."); *In re Nat. City Corp.*, 2009 WL 2425389, at *5 (noting the "omnipresent threat that plaintiffs would trade off settlement benefits for an agreement that the defendant will not contest a substantial fee award.") (internal citations and quotations omitted).

[28] Merriam-Webster Dictionary (Online Edition) (available at http://www.merriam-webster.com/dictionary/windfall).

[29] Plaintiff's Petition for Attorneys' Fees and Expenses at 6-8.

[30] *Del Monte*, 2011 WL 2535256, at *12; *Sugarland Indus., Inc. v. Thomas*, 420 A.2d at 142, 149 (Del. 1980).

[31] *Del Monte*, 2011 WL 2535256, at *13 (internal quotations and citation omitted).

"The time (*i.e.*, hours) that counsel claim to have worked is of secondary importance."[32] This is especially true here, where counsel took the case to trial and won. Counsel's "efforts" here were substantial. While the Court has criticized plaintiff's counsel for delays early on in the prosecution of the case, it also noted the "vigor with which [plaintiff's] counsel have prosecuted the case since it was transferred to my docket."[33] And in recognition of the Court's admonitions, plaintiff's counsel have reduced this Court's presumptive 33% post-trial fee award by nearly one-third.

Moreover, "counsel should not be penalized" for litigating their case efficiently and winning.[34] Sometimes less is more. Plaintiff's valuation analyses consumed both his claim of unfair dealing and unfair price, and plaintiff was either right or wrong on the issue. Post-trial, the Court has ruled that plaintiff was right. That result is the prism through which plaintiff's counsel's time and effort should be viewed. Countless hours could have been expended on additional depositions, third-party discovery, or needless motion practice, but none of those hours would have altered the plaintiff's basic theory of the case. To adopt defendants' "lodestar"-based analysis would promote inefficiencies this Court has often discouraged.

Plaintiff's counsel put forth the time and effort necessary to win at trial. As noted below, plaintiff's counsel invested all of that effort without any indication at all that the case would settle, *i.e.*, this is not a case where litigation was pursued with some type of floor recovery assumed. The litigation simply took as many hours as it took, and plaintiff's counsel never

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[32] *Id.* at *12.

[33] *Southern Peru*, 2011 WL 4907799, at *3, n.5.

[34] *See Olson*, 2011 WL 704409, at *15 (giving "no weight to the hours expended" in "achieving complete victory"); *Anderson Clayton*, 1988 WL 97480, at *1 ("We have, for good reasons having to do with efficiency and incentives, resisted the tendency to make hours expended in the effort a central inquiry.") (*citing Sugarland*).

modeled its conduct on an expectation that it would need to justify a possible fee request on the number of hours expended. Plaintiff's counsel respectfully submits that when that effort results in a decisive win for plaintiff after trial,[35] the number of ***hours*** should count for much less than the ***quality*** of counsel's "time and effort."

C. Contingent Nature of the Litigation

Defendants note that plaintiff's counsel faced "little risk that [they] would not get some sort of fee award if they pursued the case and won."[36] That's quite an "if" – to receive a fee, all we had to do was "win." The same defendants who never meaningfully offered to settle the case now oddly pretend that a nearly $2 billion plaintiff's verdict was a fairly likely outcome. They quote plaintiff's counsel's arguments during trial that the case was simple as proof that the case was, in fact, simple.[37] And they recommend that plaintiff's counsel receive a ***four times*** multiple of their "lodestar," as a numeric representation of the contingent risk that plaintiff's counsel actually bore.

Defendants' retrospective analysis of the strength and simplicity of the case that they just lost should carry no weight. If defendants truly thought during trial that the risk of a plaintiff's verdict was actually four to one, they would have offered plaintiff hundreds of millions of dollars to settle. They did not do so. Defendants instead argued that the case posed insurmountable obstacles for plaintiff: a special committee comprised of directors who claimed to be sophisticated, independent and disinterested, and who retained blue-chip advisors; eight months of alleged negotiations between the special committee and Grupo Mexico; and a stock price

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[35] *Southern Peru*, 2011 WL 4907799, at *23 (the burden of proof "matters little because I am not stuck in equipoise about the issue of fairness.").

[36] AMC Br. at 14.

[37] AMC Br. at 12. These words are only now, for the first time in this litigation, apparently accepted by defendants as true.

reaction to the deal that purportedly indicated fairness. No court had found for a plaintiff at trial on similar facts. Moreover, none of the Court's pre-trial rulings indicated that victory was likely. Instead, the Court denied plaintiff's motion for partial summary judgment, dismissed the special committee defendants from the case, and increased the uncertainty by holding off allocation of the burden of proof until after trial. During the trial, this Court made several pointed comments about plaintiff's slim likelihood of success, which resonated with plaintiff's counsel and caused us to redouble our efforts. Defendants appeared more and more confident as the trial progressed, and now proclaim to be "shocked" at the verdict. For defendants now to pretend that these events were all an inexorable prelude to an unsurprising plaintiff's verdict is absurd.

Plaintiff's counsel here invested millions of dollars of time and over a million dollars in expenses by pressing this case through trial and appear likely to incur significant additional time and expense defending the verdict on appeal. Plaintiff's counsel sought not a cheap "disclosure settlement," or to claim "shared credit" with a special committee, but to challenge the terms – the substance – of the special committee's conclusions at trial. Plaintiff's counsel respectfully submits that the risk premium here should reflect the enormous amount of risk undertaken in plaintiff's counsel's all-in approach that has resulted in a nearly $2 billion recovery for Southern Peru.

D. The Complexity of the Litigation

Defendants describe this case as a "fairly ordinary entire fairness case."[38] Plaintiff's counsel has tried quite a few entire fairness cases and respectfully submits that there is no such thing. It is true that plaintiff pared his theory of the case down to a basic fundamental point, but this point was certainly not "simple." Tellingly, this Court's post-trial opinion is 105 pages long.

[38] Company Br. at 22.

But at this stage in the proceedings, plaintiff's counsel respectfully submits that the Court is best positioned to decide whether the complexity of this litigation supports the fee award requested.

E. The Standing and Skill of Counsel

Defendants dismiss plaintiff's counsel's skill and instead credit the Court for their loss. They describe plaintiff's victory as "primarily based on arguments never made by Plaintiff's counsel and which the AMC Defendants would have rebutted had they been afforded the opportunity to do so."[39] Rather than respond to the substance of defendants' argument, plaintiff's counsel respectfully submits that to the extent the Court found plaintiff's counsel's theory of the case, litigation strategy, discovery efforts, briefing, presentation at trial and post-trial briefing and argument to be effective and helpful, or to the extent that counsel's efforts persuaded the Court to rule for plaintiff, or perhaps even changed the Court's view of one or more aspects of the case, such effort is worthy of an award of attorneys' fees proportionate to the largest recovery ever obtained in a contingent class or derivative action in this Court.

[39] AMC Br. at 14.

CONCLUSION

Plaintiff's counsel respectfully submit that, given their proper weight in light of the historic post-trial award of damages conferred to Southern Peru as a result of plaintiff's counsel's prosecution of this action, the *Sugarland* factors support a fee award in the amount of 22.5%. Accordingly, plaintiff's counsel respectfully requests that their petition for an award of attorneys' fees and expenses be granted.

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CERTIFICATE OF SERVICE

I, Ronald A. Brown, Jr., do hereby certify on this 18th day of November, 2011, that I caused a copy of Plaintiff's Corrected Reply to Defendants' Answering Briefs in Opposition to Plaintiff's Petition for Attorneys' Fees and Expenses to be served via eFiling through LexisNexis File and Serve to counsel for the parties as follows:

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