IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

**AMC DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND EXPENSES**

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## PRELIMINARY STATEMENT

The Court directed Plaintiff's counsel to seek a "responsible" and "conservativ[e]" fee award. Despite this clear direction, Plaintiff's counsel has asked this Court to award approximately $428.2 million in attorneys' fees and expenses, over $130 million more than the benefit that arguably would be conferred on SPCC's minority stockholders as a result of the Court's Opinion. This amount is more than ***123 times*** Plaintiff's counsel's lodestar and would represent an unprecedented rate of more than ***$49,000 per hour***. Plaintiff's counsel's request is unreasonable, unsupported by Delaware law, and seeks an impermissible windfall.

The Opinion allows AMC to satisfy the Judgment in cash, by returning stock to SPCC, by allowing the cancellation of shares AMC received in the Merger, or any combination of those methods. If AMC decides to return shares or allow their cancellation it would be a balance sheet event that would only change the percentages of each shareholder's ownership of SPCC but would not result in any direct cash payments to SPCC or any minority shareholder. Therefore, there would be no tangible, common-fund benefit conferred.[1] If, however, AMC decides to satisfy the Judgment by paying cash, the benefit conferred by the litigation is at most $360.6 million, not $1.9 billion, because only 20% of the Judgment would benefit SPCC's

[1] Any benefit to the minority stockholders resulting from the cancellation or return of shares would be marginal at best. Indeed, if the shares are returned or canceled, AMC would go from owning 80% of the Company's outstanding shares to owning 78%. This slight reduction in AMC's controlling interest does not justify a $428 million attorneys' fee award.

minority shareholders.[2] Plaintiff's counsel, however, have requested $428.2 million, 12.5% more than the total amount of any cash payment that would be allocable to the minority shareholders. But the imbalance is even worse, because Plaintiff's counsel will be paid out of the Judgment, which means it will come "off the top." Thus, if granted, Plaintiff's counsel's $428.2 million fee would be subtracted from the $1.9 billion judgment leaving $1.472 billion, 20% of which – or $294.97 million – would benefit the minority stockholders, ***45.2% less*** than the requested fee.

The AMC Defendants respectfully submit that, in light of these facts, the most reasonable method of awarding fees here would be to use a multiple of Plaintiff's counsel's lodestar, which also reflects the benefit actually conferred. The AMC Defendants respectfully submit that the Court should use a lodestar multiplier of no more than four, which would be more than enough to compensate and incentivize plaintiffs' counsel without awarding the types of windfalls courts seek to avoid.

## FACTUAL BACKGROUND

This lawsuit arises out of a stock-for-stock merger (the "Merger") between Southern Peru Copper Corporation ("SPCC")[3] and Minera Mexico ("Minera"). Trial was held from June 21-24, 2011. At trial, the following individuals testified for the AMC Defendants: (i) Luis Miguel Palomino Bonilla; (ii) Harold Handelsman; (iii) Armando Ortega; (iv) Raul Jacob; and (v) Eduardo Schwartz (the AMC Defendants' expert). The only individual that testified for

[2] AMC owns 80% of SPCC's stock. If AMC pays the Judgment in cash, that percentage will remain unchanged and SPCC would dividend the cash it receives back to all shareholders — 80% would be returned to AMC and 20% would be paid to the minority shareholders, each of whom might owe applicable income or other taxes on the amount received.

[3] After the Merger SPCC changed its name to Southern Copper Corporation.

the Plaintiff was his expert, Daniel Beaulne. The parties also submitted documentary evidence and transcripts of the depositions that had been conducted.

The Court issued the Opinion on October 14, 2011. The Court determined that the Merger was unfair to SPCC's minority stockholders and ordered "Grupo Mexico"[4] to pay $1.263 billion in damages, plus interest.[5] The Court held that AMC can satisfy the judgment by paying cash to SPCC or agreeing to return to SPCC the number of SPCC shares necessary to satisfy the damage award. The Court provided that if AMC opts to satisfy the judgment by returning shares or allowing their cancellation, the number of shares that AMC must return or allow to be canceled shall be calculated by dividing the value of the judgment by the average closing price of SPCC's stock in the 20 trading days prior to the issuance of the Opinion. AMC has not yet determined whether it would satisfy the judgment with cash, returned shares, canceled shares, or a combination thereof.

With respect to attorneys' fees, the Court held that any attorneys' fees shall be paid out of the total award. The Court directed the parties to try to reach agreement on a "responsible fee" and specifically directed Plaintiff's counsel to be "conservative" and take into account their delays in litigating this case.[6] The Opinion specifically noted that Plaintiff's counsel was dilatory in their prosecution of this case and directed that the proposed fee take that

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[4] Grupo Mexico is not a defendant in this action. Although the Court referred to Grupo Mexico and AMC collectively in the Opinion (*see* Opinion at 5 n.2), this memorandum only refers to AMC.

[5] The AMC Defendants respectfully disagree with the Court's decision that the Merger was not entirely fair, but will address their arguments to the Supreme Court.

[6] That direction was consistent with the rule that an attorney seeking compensation "must show that he contributed to the beneficial results of the litigation" and that even such a showing can be counteracted by other factors the trial court may consider. *See Sanders v. Wang*, 2001 WL 599901, at *2 (Del. Ch. May 29, 2001).

into consideration. Although the AMC Defendants attempted to reach an agreement with Plaintiff's counsel regarding a proposed fee award, the parties were too far apart to do so.

The market's reaction to the Opinion is not consistent with Plaintiff's counsel's views of the size of the benefit to SPCC that would result from the damage award set forth in the Opinion. Although Plaintiff's counsel did not submit any evidence relating to the reaction of SPCC's share price to the Opinion — more specifically, Plaintiff's counsel did not submit an event study to ascertain what that reaction was — the AMC Defendants have conducted such an analysis. The AMC Defendants' event study indicates that SPCC's stock price showed no statistically significant reaction to the Opinion and that the changes in SPCC's stock price following the issuance of the Opinion correlate with changes in the broader markets and copper prices.[7]

On October 28, 2011, Plaintiff's counsel submitted the Petition. In their cover letter to the Court, Plaintiff's counsel argued that the decision on an award of fees and expenses should be made before the AMC Defendants' appeal to avoid piecemeal litigation. On October 31, 2011, the Court informed counsel that it intends to decide Plaintiff's counsel's fee request before appeal and directed the parties to submit a briefing schedule with respect to the Petition. This is the AMC Defendants' opposition to the Petition.

[7] *See* Affidavit of James C. Meehan, dated November 11, 2011 ¶¶ 8-13 & Exh. 2.

## ARGUMENT

### I. LEGAL STANDARD

The touchstone of any attorneys' fee award is reasonableness.[8] The purpose of granting attorneys' fees in cases like this is to "produce[] appropriate incentives without a significant risk of producing socially unwholesome windfalls."[9] In determining whether a fee award is reasonable, Delaware courts consider the six factors articulated in *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980) (the "*Sugarland* factors"): (i) the size of the benefit conferred; (ii) the efforts of counsel and the time spent in connection with the case; (iii) the contingent nature of the litigation; (iv) the relative complexities of the litigation; and (v) the standing and ability of counsel involved. Delaware courts also consider how the fee demand compares to other fee awards.[10] Because the plaintiff's attorneys' role changes from one of a fiduciary to their clients to a claimant against the recovery created for their clients, a court's review of attorney fee applications must be more than "cursory."[11] That is especially so here, given that no Plaintiff has ever so much as made an appearance before the Court, expressed an opinion regarding this litigation, or expressed an opinion regarding the Petition.

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8 *See Gelobter v. Bressler*, 1991 WL 236226, at *3 (Del. Ch. Nov. 6, 1991) ("An attorney's fee award represents a discretionary determination of compensation that is reasonable under all the circumstances.").

9 *Seinfeld v. Coker*, 847 A.2d 330, 333-34 (Del. Ch. 2000).

10 *Boyer v. Wilmington Materials, Inc.*, 1999 WL 342326, at *2 (Del. Ch. May 17, 1999).

11 *Goodrich v. E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1045 (Del. 1996).

## II. PLAINTIFF'S COUNSEL'S FEE DEMAND IS UNREASONABLE

### A. Plaintiff's Counsel's Fee Demand Is Greater Than The Benefit Conferred On SPCC's Minority Stockholders

Plaintiff's counsel argues that the benefit achieved in this case is $1.9049 billion, the dollar amount used in the Court's Judgment (including interest). Although the amount used in the Judgment for calculation purposes is $1.263 billion plus interest, the monetary benefit actually conferred on SPCC and SPCC's minority stockholders may be nothing depending upon how AMC decides to satisfy the Judgment.

The Opinion specifically allows AMC to satisfy the Judgment in cash, by returning stock to SPCC, by allowing the cancellation of shares it received in the Merger, or any combination thereof.[12] If AMC elects to return or cancel SPCC shares, this would increase the percentages of each shareholder's ownership of SPCC (and decrease AMC's percentage ownership) but it would not result in a cash payment to SPCC or any other benefit *to SPCC*. It would be a balance sheet event. Thus, the Opinion specifically contemplated that the Judgment might be satisfied in a way that would not result in the creation of a common fund. This fact is critical because, in circumstances such as these where there is no common fund, courts give greater consideration to counsel's lodestar in determining an appropriate fee award.[13] The fact that the Opinion expressly permits this result and the fact that SPCC's market price exhibited no reaction to the Opinion counsel in favor of awarding fees on a *quantum meruit* basis. As set

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[12] AMC has not decided how it intends to satisfy the Judgment and does not anticipate making that determination until the Delaware Supreme Court decides the appeal.

[13] *See Louisiana State Emps. Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *9 (Del. Ch. Sept. 19, 2001); *In re First Interstate Bancorp Consol. S'holders Litig.*, 756 A.2d 353, 359-60 (Del. Ch. 1999), *aff'd*, 755 A.2d 388 (Del. 2000) (TABLE); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 856-57 (Del. Ch. 1998).

forth below, Plaintiff's counsel is not entitled to anywhere near $428 million when calculated on a *quantum merit* basis.

As an initial matter, corporations, of course, have no interest in who owns their stock. To the extent the Judgment is satisfied by reapportioning ownership of SPCC between AMC and the minority shareholders, no benefit will be conferred *on SPCC*. The benefit (*i.e.*, an increase in the percentage of their ownership interest) will be conferred solely on the minority stockholders. This benefit, moreover, will be marginal. If AMC elects to satisfy the judgment by returning or cancelling shares, it will go from owning 80% of the Company's outstanding shares to owning 78%. Plaintiffs have offered no evidence that this marginal decrease in AMC's controlling interest confers a benefit on SPCC or the minority stockholders sufficient to justify a $428 million fee award.

The rationale justifying attorneys' fees in a successful derivative action, moreover, is that "where a litigant has conferred a common *monetary benefit* upon an identifiable class of stockholders, all of the stockholders should contribute to the costs of achieving that benefit."[14] That is, the fee is paid by those who benefit from the award they receive — the fee award is not designed "to saddle the unsuccessful party with the expenses but to impose them on the class that has benefitted from them and that would have had to pay them had it brought the suit."[15]

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[14] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 850 (Del. Ch. 1998).

[15] *Weinberger v. UOP*, 517 A.2d 653, 655 (Del. Ch. 1986); *see also Hall v. Cole*, 412 U.S. 1, 5-6 (1973) ("Fee shifting is justified in [common fund] cases, not because of any 'bad faith' of the defendant but, rather, because 'to allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense."); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."). Indeed, the Court specifically held that the AMC Defendants do not have to pay whatever attorneys' fee the

If, by contrast, AMC were to pay the Judgment in cash, 20% of the cash paid to SPCC could be paid through a dividend to the minority shareholders because AMC owns 80% of SPCC's stock.[16] Therefore, at most, the pre-tax monetary benefit of the Judgment to SPCC's minority shareholders could be approximately $380.6 million, not $1.9 billion.[17]

Recognizing this issue,[18] Plaintiff's counsel argues that the "common fund doctrine provides for a successful litigant to recover a reasonable fee from the fund as a whole" – notwithstanding the fact that there may be no fund – and that the amount upon which fees should be awarded should not be reduced to reflect the reality of Grupo Mexico's 80% ownership of SPCC.[19] This argument ignores the unique situation presented here.

### B. The Time And Effort Expended By Plaintiff's Counsel Does Not Support Their Fee Request

Courts often look to the hours plaintiffs' counsel worked on a case as a "crosscheck" against a fee demand to ensure that the fee award correlates with a reasonable

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Court might award. *See* Opinion at 104. Focusing on any benefit to SPCC's minority shareholders is necessary to give effect to this specific decision by the Court.

[16] SPCC does not require the cash for its operations, and likely would dividend out any cash received pursuant to the Judgment.

[17] *See, e.g.*, *Lane v. Head*, 566 So. 2d 508, 512 (Fla. 1990) (finding that the benefit conferred by the litigation was the 25% allocable to the minority shareholders and stating "[t]he fact that the action was derivative, based on a right inhering in the corporation and not [plaintiff], in no sense alters this conclusion"); *Lewis v. Great Western United Corp.*, 1978 WL 2490, at *8 (Del. Ch. Mar. 28, 1978) (when "the fee is to be allocated by the Court out of funds which would otherwise belong to others, such generosity must not be unreasonably practiced at the enforced expense of others.").

[18] The AMC Defendants' counsel specifically identified this as one of the AMC Defendants' objections to the fee Plaintiff's counsel proposed before Plaintiff's counsel filed the Petition.

[19] Petition at 2.

hourly rate.[20] Courts do this to guard against awarding windfalls to plaintiffs' counsel. Here, awarding anything close to the fees Plaintiff's counsel seeks would result in exactly the type of windfall Delaware courts seek to avoid.

Plaintiff's counsel purports to have worked 8,597 hours on this case since inception. Plaintiff's counsel's fee demand translates to an effective blended rate of more than $49,000 per hour, 78 times the hourly rate of the highest paid partner on this case and 142 times the hourly rate for junior associates. The Petition does not cite and Defendants are not aware of any case in Delaware (or elsewhere) that has approved anything close to an hourly rate of $49,000.[21] Attorneys' fees are supposed to compensate Plaintiff's counsel for lost opportunity costs and provide modest risk and incentive premia. Plaintiff's counsel's fee demand exceeds any reasonable measure of an appropriate incentive premium and is anything but "modest." Clearly recognizing the disparity between the fee demand and the time and effort expended in this case, Plaintiff's counsel argues that the hours worked should have "minimal significance"

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[20] *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*, 986 A.2d 370, 396 (Del. Ch. 2010).

[21] Hourly rates for monetary-benefit cases appear to range anywhere from $500 to, on rare occasions, $4000 per hour. *See Berger v. PuBCo Corp.*, 2010 WL 2573881, *1 (Del. Ch. June 23, 2010) (hourly rate of $3,450 is "within the range of hourly rates found among Court of Chancery monetary-benefit cases"); *Brinckerhoff*, 986 A.2d at 396 (using hours worked as a cross-check for fee award and determining that an effective hourly rate of $1000 was reasonable); *Franklin Balance Sheet Inv. Fund v. Crowle*y, 2007 WL 2495018, at *4 n.73 (Del. Ch. Aug. 30, 2007) (awarding fee that represented a "high hourly rate" of $4023); *In re Cox Commc'ns Inc. S'holders' Litig.*, 879 A.2d 604 (Del. Ch. 2005) (rejecting as unreasonable plaintiffs' request for $4.95 million in fees, which would have represented an hourly rate of approximately $2000; final award translated to an hourly rate of approximately $552 per hour); *In re Abercrombie & Fitch Co. S'holders Derivative Litig.*, 886 A.2d 1271, 1273-74 (Del. 2005) (approving multiplier of 2.39 times fees and rejecting request for a 14.33 multiplier as "far beyond" what courts had approved); *Seinfeld*, 847 A.2d at 338 (reducing fee award from 20% to 10% of common fund because hourly rate of $2600 was "much more than necessary to maximize future plaintiffs' incentives to bring meritorious cases and to litigate them efficiently").

given the "magnitude" of the judgment.[22] In other words, Plaintiff's counsel asserts that how much or little they did, and how it fit into what the Court decided, are irrelevant, an argument that is inconsistent with *Sugarland*, fee award jurisprudence generally, and public policy against awarding windfalls.[23]

SPCC has performed an analysis of attorneys' fee awards in other cases with large judgments or settlements, and that analysis confirms that courts do not award windfalls like Plaintiff's counsel seeks here. SPCC's analysis shows that in cases with settlement or judgment amounts greater than $1 billion, the average lodestar multiplier (including expenses) is 3.88. Likewise, the average award as a percentage of recovery (including expenses) is 9.65%. In these large recovery cases, plaintiffs' counsel averaged more than 181,000 hours, more than 21 times the number of hours claimed here, and the average hourly rate awarded was $1,218.40, nearly 41 times less than what Plaintiff's counsel seeks here. This data suggests that Plaintiff's counsel's request is unreasonable and over-reaching using every metric courts typically use to assess fee award requests.

The only support for the 8,597 hours Plaintiff's counsel purportedly expended on this case are affidavits from Ronald Brown and Lee Rudy, which include summary charts setting forth the attorneys who worked on the case, their hourly rates, and the total number of hours they worked. Plaintiff's counsel submitted no time sheets or other contemporaneous time records to

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[22] Petition at 9.

[23] *See In re Cox Commcn's, Inc. S'holders Litig.*, 879 A.2d at 640 (noting that the magnitude of the judgment is not necessarily commensurate with the supposed benefit conferred; "the size of the supposed benefit is largely a product of the size of the transaction itself … I have absolutely no reason to believe the plaintiffs are responsible for more than a very small amount" of that benefit).

support or explain the attorney time billed on this matter.[24] Therefore, there is no way for the AMC Defendants or the Court to evaluate whether the hours are in fact accurate or reasonable.[25] And the staffing — at least 45 personnel, not counting the third firm that disappeared from the case[26] — and its top-heavy structure (12 partners and 9 associates) is curious given how little work was done and how long Plaintiff's counsel delayed the case. However, even assuming that staffing was appropriate, the Petition equates to an average of 191.04 hours per time keeper *for the entirety of the case*, or just 27.96 hours per person per year for the case, raising the question "what was Plaintiff's counsel doing for the six years and ten months the case was pending?" This is likely why Plaintiff's counsel submitted summaries instead of actual time records — time records would confirm that nothing happened for significant parts of the litigation. This is yet another reason why such an exorbitant fee award is inappropriate here — it takes no account of how little Plaintiff's counsel did for so long.

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[24] Delaware law requires plaintiffs' counsel to show not only the number of hours spent on the litigation, but also (i) who worked on them; (ii) the specific tasks performed; and (iii) the hourly rate of the person performing the task. *See, e.g., Fox v. Chase Manhattan*, 1986 Del. Ch. LEXIS 356, at *2 (Jan. 9, 1986). Plaintiff's counsel have failed to provide sufficient documentation to support their fee request.

[25] *In re SS&C Techs., Inc. S'holders Litig.*, 2008 WL 3271242, at *3 (Del. Ch. Aug. 8, 2008) ("[c]ourts generally exclude excessive, redundant, duplicative or otherwise unnecessary hours" when determining whether a fee demand is reasonable) (internal quotations and citations omitted).

[26] Although nowhere mentioned in the Petition, there was a third plaintiffs' firm (now known as Abraham, Fruchter & Twersky, LLP ("AFT") involved in the litigation for the first 5 years (compare D.I. 171 (AFT listed as counsel) with D.I. 283 (AFT no longer listed as counsel)), and the Petition makes no mention of what that firm did, why it is no longer involved with the case, how that happened, and what (if any) arrangement for sharing fees with that firm might exist.

### C. The Other *Sugarland* Factors Likewise Demonstrate That Plaintiff's Counsel's Fee Request Is Unreasonable.

#### 1. Plaintiff's Counsel's Assertion That The Litigation Was Complex Does Not Support The Requested Fee

Before filing the Petition, Plaintiff's counsel argued not that this case was complex, but that it was very simple – a fact that militates against a large fee award.[27] Indeed, this case involved what Plaintiff's counsel argued was a straightforward breach of fiduciary duty claim.[28] Although the issues in this case were by no means trivial, they were not the type of novel and complex legal issues that have justified larger fee awards in other cases. For example, there was only one arguably significant discovery dispute (involving the Special Committee Defendants, not the AMC Defendants), the trial was short and not marked by substantial evidentiary disputes, and there were relatively few witnesses. Moreover, as the Court recognized, the primary evidentiary difficulties in the case were of Plaintiff's counsel's making.[29]

Despite their prior statements about the simplicity of this case, Plaintiff's counsel now argues that the case was difficult and complex because: (i) the Special Committee had impressive resumes; (ii) the case involves valuation issues; (iii) the case required world travel; and (iv) the AMC Defendants were shocked by the Court's Opinion. That argument does not support an enhanced fee award:

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[27] *Berger*, 2008 WL 4173860, a*2 ("Although the benefits were substantial, the litigation was not overly complex or novel. This militates against a larger attorneys' fee award.").

[28] *See, e.g.*, Plaintiff's Opening Brief in Support of Their [sic] Motion For Partial Summary Judgment at 36 ("This case turns on simple concepts."); *see also Franklin Balance Sheet Inv. Fund*, 2007 WL 2495018, at *13 (Del. Ch. Aug. 30, 2007) ("[a]llegations of breach of fiduciary duties and waste based on such self-interested transactions are commonplace in shareholder litigation" and do not weigh in favor of an enhanced fee award).

[29] *See, e.g.*, Opinion at 3.

- That the Special Committee has impressive resumes has nothing to do with the complexity of the case. Indeed, Plaintiff's counsel paid no significant attention to the Special Committee members' backgrounds before or during the trial, and really only addressed one member of the Special Committee as part of their case in chief (Mr. Handelsman).

- That Plaintiff filed a motion for partial summary judgment with respect to the valuation methodology used by the Special Committee and the AMC Defendants' expert belies Plaintiff's counsel's newfound assertion that the case involved complex valuation issues — seeking summary judgment as a plaintiff is an indication of a belief that a case can be resolved as a matter of law, not that the case is complex. Indeed, Plaintiff previously argued that the case involved "simple concepts" (*supra* note 28) and turned on one case, *Associated Imports, Inc. v. ASG Industries, Inc.*, 1984 WL 19833 (Del Ch. June 20, 1984).[30]

- The fact that this case involved travel to Mexico and Peru also has nothing to do with the complexity of the case and was simply a function of where the defendants were located. Depositions of their nonresident, individual defendants are typically taken at the location of their residence and the deposition of a corporation through its officers is taken at the principal place of business of the corporation. Plaintiff's counsel traveled to Peru and Mexico because that is where the witnesses whose depositions they wanted to take resided or maintained their principal places of business.

- Finally, the fact that the AMC Defendants were shocked by the Court's decision does not reflect the purported complexity of the case.

### 2. The Contingent Nature Of Counsel's Engagement Does Not Support Plaintiff's Counsel's Fee Demand

Although Plaintiff's counsel prosecuted this action on an a contingent basis, this does not support Plaintiff's counsel's request for such an exorbitant fee award. Any reward for their risk-taking should be commensurate with the benefit conferred on the SPCC's minority stockholders and balanced against their dilatory prosecution of the case. Moreover, there was no competition for this representation: Immediately after the three complaints were filed, the only

[30] Notably, *Associated Imports* is not cited once in the Opinion.

three firms that filed complaints[31] organized themselves so that all had some sort of role in the case, and the Court was not faced with competition for the lead plaintiff and lead counsel roles. Thus, once they had filed this litigation, there was little risk that Plaintiff's counsel would not get some sort of fee award if they pursued the case and won. Applying a reasonable multiplier to the lodestar will more than compensate them for their risk of litigating this case on a contingent basis.

3. **The Standing And Ability Of Counsel**

The AMC Defendants do not contest the standing and ability of Plaintiff's counsel, but nevertheless submit that this factor does not entitle Plaintiff's counsel to the fee award they seek. The standing and ability of counsel are primarily reflected in the hourly rates they are able to command in the market for legal services, and those rates should be the primary determinant of the fees they are awarded; using reasonable lodestar multipliers to award premia where warranted is the most reasonable way of keeping fee awards tethered to reality and from becoming windfalls.[32] Plaintiff's counsel's experience and familiarity with Delaware law should make them keenly aware that their fee demand is unreasonable.

Despite Plaintiff's counsel's standing and ability, they can hardly claim that the case was won solely through their efforts. Indeed, the Court's analysis is primarily based on arguments never made by Plaintiff's counsel and which the AMC Defendants would have rebutted had they been afforded an opportunity to do so. Moreover, as the Court noted throughout its Opinion, Plaintiff's counsel did not prosecute this case with the same alacrity that

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[31] This is yet another reason the sudden, never-explained disappearance of the third firm from the case is interesting.

[32] *In re Loral Space and Commc'n Inc. Consol. Litig*., C.A. No. 2808-VCS (Del. Ch. Dec. 22, 2008) (Transcript) at 76-77.

the Court of Chancery expects from plaintiffs' counsel in representative litigation.[33] Thus, the traditional *Sugarland* factors favor a substantial discount on the fee Plaintiff's counsel seek.

### D. Plaintiff's Counsel's Fee Demand Is Unreasonable Compared To This Court's Precedent

Plaintiff's counsel's demand for such a huge percentage of the alleged benefit is inconsistent with Delaware precedent. In determining an appropriate fee award, Delaware courts routinely apply a sliding scale approach such that as the size of the benefit increases, the percentage of the benefit used to derive attorneys' fees decreases. In *Goodrich v. E.F. Hutton Group Inc*., 681 A.2d 1039, 1048 (Del. 1996), the Delaware Supreme Court expressly noted that the Court of Chancery properly recognized "the merit of emerging judicial consensus that the percentage of recovery awarded should 'decrease as the size of the common fund increases.'" This sliding scale approach is consistent with the underlying policy of granting fee awards that "produce[] appropriate incentives without a significant risk of producing socially unwholesome windfalls."[34] As explained by Chancellor Chandler in *Seinfeld v. Coker*, "a point exists at which these incentives are produced, and anything above that point is a windfall. In other words, if a fee of $500,000 produces these incentives, in a particular case, awarding $1 million is a windfall, serving no other purpose than to siphon money away from stockholders and into the hands of their agents."[35]

Plaintiff's counsel argues that 22.5% of the alleged benefit is reasonable because that same percentage was considered conservative in *Teachers' Retirement Sys. of Louisiana v.*

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33 *See, e.g.*, Opinion at 3, 4, 6 at n.5, 43 and 43 at n. 66, 95, 97 and 98.

34 *Seinfeld*, 847 A.2d at 333-34, 337.

35 *Id*. at 335.

*Greenberg*, C.A. No. 20106-VCS (Del. Ch. Dec. 17, 2008) (Transcript).[36] This argument ignores the other *Sugarland* factors and the fact that *Greenberg* involved a stipulated amount of attorneys' fees. *Greenberg* was a derivative action brought on behalf of American International Group, Inc. and its shareholders alleging breaches of fiduciary duty and self dealing by certain former officers and directors of AIG. The parties settled on the eve of trial after prolonged negotiations. The settlement provided for the monetary recovery of $115 million and attorneys' fees equal to 22.5% of the recovery. The Court approved the settlement as well as the stipulated fee award. Most important for the purposes of this case, in approving the stipulated attorneys' fees, which amounted to $28,063,959.97 (3.64 times the lodestar in that case), the Court cross-checked the award with the plaintiffs' hourly fees.[37] Notably, the hourly rate came out to approximately $1,340 per hour, well within the realm of hourly rates deemed reasonable in determining fee awards.[38] Moreover, Plaintiff's counsel's contention that the percentage award should not be smaller than what the Court approved in *Greenberg* because it was obtained after trial as opposed to settlement is equally without merit. This argument ignores the principles of *Goodrich* and *Seinfeld* and the binary nature of the dispute in this case.

Plaintiff's counsel also cites *Lewis v. Engle*, C.A. No. 497-VCS, *In re American International Group, Inc. Consolidated Derivative Litigation*, C.A. No. 769-VCS, and *In re Telecorp PCS, Inc. Shareholder Litigation*, C.A. No. 19260-VCS in support of their argument

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[36] Petition at 8-9.

[37] The disparity between the lodestars here and in *Greenberg* underscores how little work Plaintiff's counsel did here as compared to the plaintiffs' counsel in *Greenberg*. In *Greenberg*, the fee requested was just slightly over 3.5 times the overall lodestar.

[38] *Greenberg*, C.A. No. 20106-VCS (Del. Ch. Dec. 17, 2008) (Transcript), at 8 ("So I think that the premium – I think that the hourly rate is something less than $1500 an hour. My memory is 1340, or something like that.").

that 22.5% is reasonable.[39] Like *Greenberg*, however, the hourly rate implied by the fee awards in these cases (each of which was vigorously litigated by plaintiffs' counsel) was far below what Plaintiff's counsel seek here. In *AIG*, the fee represented an hourly rate of $1,138, in *Lewis* it was more than $1,000, and in *Telecorp* it was $2,600-2,611.[40] The decisions cited in the Petition thus underscore the unreasonableness of their $49,000 per hour request.

## III. A REASONABLE FEE AWARD WOULD BE NO MORE THAN FOUR TIMES PLAINTIFF'S COUNSEL'S LODESTAR

The most reasonable method to calculate Plaintiff's counsel's fee award would be to use a multiplier of the lodestar, as this Court did in *In re Loral Space and Communications Inc. Consolidated Litigation*, C.A. 2808-VCS, and direct the fee to be paid out of the benefit conferred to SPCC's minority shareholders. A reasonable multiplier here would be no more than four times the lodestar (the same multiplier used in *Loral*).[41] That would result in a fee award of no more than $13.88 million, which would represent an effective hourly rate of no more than $1,614.32, more than enough to recognize the result for SPCC's minority shareholders, account for the incentives such awards are intended to foster, and account for the way Plaintiff's counsel

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[39] Petition at 6-7.

[40] *See In re Telecorp. PCS, Inc. S'holder Litig*., C.A. No. 19260-VCS (Del. Ch. Aug. 20, 2003) (Transcript) at 69; *Lewis v. Engle*, C.A. No. 497-VCS (Del. Ch. Dec. 29, 2004) (Transcript) at 24; *In re American Intn'l Grp., Inc. Consol. Derivative Litig*., C.A. No. 769-VCS (Del. Ch.) (Plaintiff's Mem. of Law in Support of Their Mot. For Approval of Settlement and Award of Attorneys' Fees and Expenses) at 19.

[41] This would fulfill several principles: It accounts for the large absolute value of the Judgment and the fact that only 20% of it is allocable to the minority shareholders, it takes into account the fact that this case went to trial, it more closely aligns the award with the interests of the minority shareholders Plaintiff's counsel purported to represent, it is consistent with the awards in other cases, it accounts for how Plaintiff's counsel handled the case, and it does not create a windfall. In short, it fulfills all the factors courts consider in awarding attorneys' fees generally and the specific factors this Court indicated should be considered here.

failed to prosecute this case. And such an award would be consistent with the fee awards in other cases in which there are large judgments or settlements.

## CONCLUSION

The AMC Defendants respectfully submit that Plaintiff's counsel's fee demand is unreasonable and should not be granted. To the extent the Court believes it should award a fee at this juncture, the AMC Defendants respectfully submit that a multiplier of no more than four times Plaintiff's counsel's lodestar be used to determine an appropriate fee, to which Plaintiff's counsel's expenses would then be added.

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November 11, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on November 11, 2011, I electronically filed and caused to be served by LexisNexis File and Serve a copy of the foregoing **AMC DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND EXPENSES** on the following counsel of record:

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