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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 PETITION FOR ATTORNEYS' FEES AND EXPENSES

Plaintiff's counsel hereby petitions the Court for an award of attorneys' fees and expenses in the amount of 22.5% of the recovery in this action plus interest on the award until it is paid. In support thereof, plaintiff shows as follows:

INTRODUCTION

The standards for determining an award of counsel fees and expenses in corporate litigation under Delaware law are well established.[1] Fees are awarded when the litigation results in a benefit to a corporation or its stockholders.[2] The amount of the award is left to the broad discretion of the Court.[3]

The "*Sugarland* Factors" that this Court considers in setting a fee are "1) the benefits achieved in the action; 2) the efforts of counsel and the time spent in connection with the case; 3) the contingent nature of the case; 4) the difficulty of the litigation; and 5) the standing and ability of counsel."[4] The benefit conferred is the paramount factor.[5]

[1] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989).

[2] *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966).

[3] *Tandycrafts*, 562 A.2d at 1165*; Chrysler Corp*., 223 A.2d at 386, 389*; Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).

[4] *In Re Cox Communications Inc. S'holders' Litig.*, 879 A.2d 604, 640 (Del.Ch. 2005).

[5] *See Ryan v. Gifford*, 2009 WL 18143 (Del. Ch.) ("The benefit achieved for the Company and the shareholders should be accorded the greatest weight in determining the fees to be awarded.")

Plaintiff respectfully submits that the post-trial $1.9049 billion[6] benefit conferred upon Southern Peru,[7] as well as the other applicable *Sugarland* factors, demonstrates that a 22.5% fee award is appropriate here.

ARGUMENT

A. The Benefit Achieved by the Action

The benefit achieved here is truly unprecedented: a derivative recovery of $1.9049 billion[8] by judgment after trial. Plaintiff's counsel seeks an award of 22.5% of that fund.

1. Fees Should be Assessed as a Percentage of the Common Fund Received by Southern Peru

The defendants are evidently going to argue that since Grupo Mexico, S.A.B. de C.V. ("Grupo") owns 80% of Southern Copper Corporation ("Southern Peru"), the "benefit" here should be viewed as only 20% of the actual recovery that Southern Peru will receive. This contention misunderstands the nature of a derivative suit, ignores the separate corporate existence of Southern Peru, is contrary to Delaware law and policy governing fee awards from a common fund, and simply has not been the approach this Court has used in awarding fees in other derivative cases.

The common fund doctrine provides for a successful litigant to recover a reasonable fee from the fund as a whole.[9] This Court rejected the "look through" approach to awarding fees in

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[6] Plaintiff submits the Court should not have adjusted the market value of the 67.2 million Southern Peru shares in calculating damages to account for a $100 million dividend paid by Southern Peru on March 1, 2005 (a month before the Merger Date) (Dkt #284). Defendants disagree. (Dkt #285). Should the Court decide the issue in plaintiff's favor, the judgment amount, including pre-judgment interest, will be $2.0316 billion.

[7] On October 11, 2005, Southern Peru Copper Corporation changed its name to Southern Copper Corporation.

[8] *But see supra* n.6.

[9] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996).

a derivative case in *Wilderman v. Wilderman*.[10] In *Wilderman*, one of two shareholders of a company obtained a derivative recovery against the other shareholder requiring him to return excessive compensation to the company. In response to plaintiff's fee application, the defendant argued that the "benefit" should not be seen as the full amount of the recovery since the corporation only had two shareholders and the recovery would likely be paid out to them in a dividend.[11] This Court clearly held that "[s]uch a disregard of the corporate entity" would be "clearly inapposite," and that attorneys' fees should be awarded based upon the benefit conferred upon the corporation.[12]

More recently, this Court reiterated this rule in *Carlson v. Hallinan*[13] where a 30% stockholder successfully asserted derivative claims against defendant Hallinan, who was Chairman of the Board and the 65% controlling stockholder, and defendant Gordon, who was a director, officer and a 5% stockholder.[14] Plaintiffs prevailed both on direct and derivative claims.[15] The Court acknowledged that under the common fund doctrine a successful derivative plaintiff is entitled to fees and expenses through proportional contribution from all those who share in a common benefit resulting from plaintiff's efforts.[16] Thus, the Court held that plaintiffs were entitled to fees and expenses based on the full derivative recovery because they had

[10] 328 A.2d 456 (Del. Ch. 1974).

[11] *Id*. at 458.

[12] *Id*. at 458-59 (*citing Keenan v. Eshleman*, 2 A.2d 904 (Del. Ch. 1938)).

[13] 925 A.2d 506, 546-48 (Del. Ch. 2006).

[14] *Id.* at 513-14.

[15] *Id.* at 548. The Court held the plaintiffs were not entitled to fees for the successful direct claims that only benefitted the individual plaintiff. *Id.* at 547.

[16] *Id.* at 546-547, citing D. Wolfe & M. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, §9.5[a].

enforced important corporate rights.[17] The Court ordered the payment of attorneys' fees and expenses notwithstanding the fact that defendants owned 70% of the corporation and the derivative recovery was to be distributed proportionately to all stockholders upon Court-ordered dissolution of the corporation.[18] The Court found that the public policy rationale behind the common fund doctrine, including requiring the persons who benefit to contribute to the costs of the suit and incentivizing stockholders to bring derivative suits to enforce the rights of the corporation as a whole, supported the award of fees and expenses even where the derivative recovery was to be distributed directly to the stockholders in a dissolution.[19]

This case differs from *Carlson* in that Southern Peru does not intend to dissolve, and the judgment will thus remain with the Company. Southern Peru will receive the entire judgment, and all stockholders, including Grupo and the minority stockholders, will benefit from the increased value of the corporation. Southern Peru will receive 100% of the derivative recovery; it should not pay attorneys' fees and expenses as if it had only received 20% of the recovery.

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[17] *Id*. at 547.

[18] *Id*.

[19] *Id. See also Goodrich*, 681 A.2d at 1044 (assessing fees out of the entire fund spreads the cost burden proportionately); *Levien v. Sinclair Oil Corp*., 1975 WL 1952, at *3 (Del. Ch.) (refusing to treat a multi-million dollar derivative judgment against a 97% controlling stockholder as only a recovery of the minorities' 3%); *Taormina v. Taormina Corp.*, 78 A.2d 473, 476 (Del. Ch. 1951) ("The relief to be obtained in a derivative action is relief to the corporation in which all stockholders, whether guilty or innocent of the wrongs complained of, shall share indirectly. Indeed, it is doubtful whether the result would be different even if the suing stockholder owned all of the stock of the wronged corporation."); *Keenan*, 2 A.2d at 253 (court will not permit recovery in derivative case to be diminished by an amount in proportion to defendants stockholdings because that would amount to transforming a derivative action into a direct action).

Indeed, in prior cases, this Court has not reduced the monetary benefit of a derivative recovery because the payor was also the majority stockholder.[20]

Similarly, all stockholders, including Grupo, should indirectly contribute to the fees and expenses. Given Grupo's culpability, there is nothing inequitable in requiring Grupo, as Southern Peru's majority stockholder, to bear most of the resulting cost of the litigation. To exclude 80% of the derivative recovery from the common fund because Grupo owns 80% of Southern Peru would effectively penalize plaintiff's counsel for litigating against a corporate controller, and unfairly reward the wrongdoer with an undeserved financial benefit.

Defendants' position that for fee purposes a derivative recovery should be treated as allocable to particular stockholders simply finds no support in Delaware law. Individual stockholders have no right to any pro-rata or other interest in the corporation's assets, including the recovery plaintiff has obtained for the Company.[21] Thus, Grupo cannot claim, in effect, that it owns 80% of the recovery Southern Peru receives. Basically, defendants want to treat this case as a direct action for purposes of the fee award. They cannot do that. The form and consequences of a derivative action cannot be ignored or disregarded.

Accordingly, the "common fund" created by this litigation is $1.9049 billion.[22] Defendants' argument that this amount should be reduced by 80% for purposes of determining

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[20] *See Thorpe v. CERBCO, Inc.*, 1997 WL 67833, at *5 (Del. Ch.) (Court awarded attorneys' fees equal to 33% of full amount of the judgment plus pre-judgment interest notwithstnding judgment was against the company's 60% stockholder); *In re Emerson Radio Shareholder Derivative Litig.*, 2011 WL 1135006, at *4 (Del. Ch.) (Court awarded a percentage of the total $3 million paid by the 60% majority stockholder to settle derivative litigation with no discount for the payor's ownership interest).

[21] *Norte & Co. v. Manor Healthcare Corp.*, 1985 WL 44684, at *3 (Del. Ch.) (stating "the corporation is the legal owner of its property and the stockholders do not have any specific interest in the assets of the corporation").

[22] *But see supra* n.6.

an appropriate attorneys' fee is wrong as both a matter of law and policy, and should be disregarded.

2. The Percentage Sought by Counsel is Reasonable

So, what is a fair fee award in the largest class or derivative judgment ever obtained in this Court?

This Court has repeatedly indicated that a large monetary recovery after trial in hard-fought litigation is the type of "benefit" under the *Sugarland* test that should result in a fee award calculated as a substantial percentage of the benefit. For example, in *Lewis v. Engle*,[23] this Court explained that:

> I have a little different viewpoint on trimming back percentages of plaintiffs' lawyers when big amounts are recovered. I don't get it. I really don't. If some plaintiff's lawyer goes to trial and wins a $10 billion recovery, I will say right now, that's when I am most likely to award 33 percent. I just am. Why? Because that's when the real risk has been taken.[24]

Similarly, in *In re American International Group, Inc. Consolidated Derivative Litigation*,[25] this Court awarded plaintiffs' counsel a fee award equal to 22.5% of the $90 million common fund in a derivative settlement. In doing so, the Court explained:

> [S]ometimes it's forgotten when folks see things like this is that big fees, when much is achieved, they're deserved, particularly when much is at risk. The plaintiffs as a collective put in thousands of hours which could have come to naught.
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> And so it's a big fee, but I think it's important – and I've said this before and I will continue to say it – that, you know, you don't reduce people's fees because they gain much. You should, in fact, want to create an incentive for real litigation. That's what benefits diversified investors, when people will take, you know, good

[23] C.A. No. 497-VCS, Strine, V.C. (Del. Ch. Dec. 29, 2004) (Transcript).

[24] *Id*. Tr at 22.

[25] C.A. No. 769-VCS, Strine, V.C. (Del. Ch. Jan. 25, 2011) (Transcript).

> cases and actually prosecute them and take risk. What doesn't benefit investors is simply the filing of a case every time there's a valuable business opportunity and simply having a handout and getting a toll.[26]

Likewise, in *In re Telecorp. PCS, Inc. Shareholder Litig.*,[27] this Court awarded fees in the amount of 30% of a $47,000,000 cash settlement arrived at on the eve of trial. The fee was contested and the Court flatly rejected the objector's argument that there should be a declining percentage when the recovery is large. The Court indicated that it may well have awarded up to 35% had the case actually be tried rather than settled:

> [O]ne of the reasons I think 30 percent is a fairly logical stopping point [for fees awarded in connection with a settlement] is that there might well be a rationale for actually giving 33 percent or something somewhat higher after a fully-litigated trial. That is contrary to the sort of declining percentage. I would tend not to decline a percentage in a mega case.
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> I don't get the declining percentage. But I could see holding out the full measure of 33 to maybe 35 percent – I don't know what prevailing norms are for tort lawyers – to hold that out that there's a promise actually if you go to trial, it will be at the highest end of the range. I would think that would be the time we would wish to be the least parsimonious.[28]

Plaintiff submits that the Court's reasoning in *Lewis*, *AIG*, and *Telecorp* is the correct approach because limiting fee awards in large cases would create a strong disincentive to take the huge risk of trying large cases. For example, how would lawyers be incentivized to take a potential billion dollar case to trial if they know that if they win a billion dollars they will get the same fee award as they would have if they settled the case for $200 million? It is clear that such a declining percentage approach would misalign the interests of the lawyers and those they represent.

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[26] *Id*. at 9:17-10:17.

[27] C.A. No. 19260-VCS, Strine, V.C. (Del. Ch. Aug 20, 2003) (Transcript).

[28] *Id*. at 102-103.

Many federal courts similarly have held that a declining percentage in large cases "creates the perverse incentive for Class Counsel to settle too early for too little."[29] Instead, the *Allapattah* court awarded attorneys' fees equal to a flat 31 1/3% of a common fund exceeding $1 billion. Further, as one leading commentator has noted, there is authority for ***increasing*** the percentage as the recovery grows larger:

> In contrast, to provide a sufficient financial fee-award incentive to maximize the recovery achieved, at least one court has adopted an intended fee schedule with an upward scale as the recovery increases. In *American Continental Corporation/Lincoln Savings & Loan Securities Litigation*, Judge Bilby, before any decision on the merits, set forth the level of fees that would be awarded in the event that plaintiffs were ultimately successful. Significantly, the court stated that it would award 25% of the first $150 million and 29% of any class recovery in excess of $150 million.[30]

In the Opinion in this case, the Court indicated that plaintiff's counsel should be conservative in connection with a fee application due to the pace of the litigation. We understand the Court's admonition and, in considering what percentage award would be appropriate, we reduced the request from the one-third award previously discussed by almost a third. In order to confirm the reasonableness of the resulting figure, we looked to the second largest derivative recovery in this Court (the largest prior to this case). In *Teachers' Retirement Sys. of Louisiana v. Greenberg*,[31] there was a derivative cash settlement of $115 million on the eve of trial. Plaintiff's counsel had agreed with its client at the outset of the case to limit any fee petition to 22.5% so that was what was requested and it was what this Court awarded.[32] In

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[29] *Allapattah Services, Inc. et al. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1213 (S.D.Fla. July 6, 2006).

[30] ALBA CONTE, 1 *Attorney Fee Awards*, 3d Ed., § 2.9 (Database Updated October 2008) (citation omitted) (hereinafter "ALBA CONTE").

[31] C.A. No. 20106, Strine, V.C. (Del. Ch. Dec. 17, 2008) (Transcript).

[32] The retainer agreement in this case authorized counsel to seek up to 30% of any monetary recovery.

granting the fee application, the Court noted that "this isn't a generous award."[33] Since 22.5% was considered conservative in *Greenberg*, we feel that the percentage award here should not be smaller where a far bigger and better result was obtained, and where it was obtained after trial (as opposed to settlement).

B. Time and Effort Expended By Counsel and Contingent Nature of the Litigation

Plaintiff's counsel prosecuted this action on an entirely contingent basis.[34] Plaintiff's counsel worked a total of approximately 8,597 hours on this case since inception.[35] Plaintiff's counsel also incurred out-of-pocket expenses of approximately $1,117,816 in pursuit of this Action.[36] Most of these expenses (nearly 80%) were expert witness fees that plaintiff's counsel paid out-of-pocket.

In a situation involving a recovery of the magnitude at issue here after trial, we submit that "hours" worked should have minimal significance in connection with this Court's broad discretion in applying the *Sugarland* factors. Nevertheless, the substantial investment of time and money (more than $1 million in expenses, for example) to take this case through trial where plaintiff's counsel might have received nothing is a factor that suggests that an award of 22.5% of the benefit is reasonable.

C. The Complexity of the Litigation

This was a difficult and complex case. There was a special committee composed of individuals with impressive resumes. The valuation issues were complex. Discovery involved

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[33] *Id*., Tr. at 8:22.

[34] *See Ryan*, 2009 WL 18143, at *13 ("This Court has recognized that an attorney may be entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis.")

[35] *See* Affidavit of Ronald A. Brown, Jr. at ¶4.

[36] *See* Affidavit of Ronald A. Brown, Jr. at ¶7.

extensive world travel. And this was certainly not a case that was any sort of "slam dunk." The defendants appeared convinced throughout the case that they had virtually no chance of losing. Obtaining this result in a case in which defendants openly proclaim to have been "shocked"[37] further demonstrates that this was a difficult and complex case, and further supports plaintiff's request for a 22.5% fee after trial.

D. The Standing and Skill of Counsel

Plaintiff's counsel are well known to the Court and, as such, we leave the assessment of this factor to the Court.

CONCLUSION

The application of the *Sugarland* factors here shows that a fee award in the amount of 22.5% of the monetary recovery after trial is reasonable and appropriate. This is by far the largest monetary recovery ever obtained in a contingent class or derivative action in this Court and, as such, the "benefit conferred" prong of the *Sugarland* test certainly supports a 22.5% fee award. The other factors, while taking on much less significance given the unprecedented benefit, also support the 22.5% fee request.

For all of the foregoing reasons, plaintiff's counsel's petition for an award of attorneys' fees and expenses in the amount of 22.5% of the recovery in this case plus interest on the award at the legal rate until paid should be granted.

[37]http://www.google.com/url?sa=X&q=http://newsandinsight.thomsonreuters.com/Legal/News/2011/10_-_October/%241_3bn_Grupo_ruling_is_Strine_v__Goldman,_ex-Wachtell_partner/&ct=ga&cad=CAcQAxgAIAAoAjAAOABApoj59ARIAVgBYgVlbi1VUw&cd=YXCXuAGvaJE&usg=AFQjCNFmpAELxIxmtfnpl0xX3XxTqPjoUw

PRICKETT, JONES & ELLIOTT, P.A.

By: /s/ Ronald A. Brown, Jr.
Ronald A. Brown, Jr. (DE Bar No. 2849)
Marcus E. Montejo (DE Bar No. 4890)
1310 King Street
Wilmington, Delaware 19801
(302) 888-6500
Attorneys for Plaintiff

OF COUNSEL:

Lee D. Rudy
Eric L. Zagar
James H. Miller
KESSLER TOPAZ
MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

Dated: October 28, 2011

CERTIFICATE OF SERVICE

I, Ronald A. Brown, Jr., do hereby certify on this 28th day of October, 2011, that I caused a copy of 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:

S. Mark Hurd, Esquire
Kevin M. Coen, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
Wilmington, Delaware 19801

Richard L. Renck, Esquire
Ashby & Geddes
500 Delaware Avenue
Wilmington, Delaware 19801

/s/ Ronald A. Brown, Jr.
Ronald A. Brown, Jr. (DE Bar No. 2849)