IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERICAS MINING CORPORATION, *et al.*, Defendants Below, Appellants, v. MICHAEL THERIAULT, as Trustee for the Theriault Trust, Plaintiff Below, Appellee.	§	No. 29, 2012 On Appeal from the Court of Chancery, Consol. C.A. No. 961
SOUTHERN COPPER CORPORATION, formerly known as Southern Peru Copper Corporation, Nominal Defendant Below, Appellant, v. MICHAEL THERIAULT, as Trustee for the Theriault Trust, Plaintiff Below, Appellee.	§	No. 30, 2012 On Appeal from the Court of Chancery, Consol. C.A. No. 961

REPLY BRIEF OF APPELLANT SOUTHERN COPPER CORPORATION

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Dated: April 19, 2012

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PRELIMINARY STATEMENT

This Court reviews an award of attorney's fees and expenses in light of *all* of the factors described in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980). In rejecting a motion for reargument in *Sugarland*, this Court described its role as a reviewer of fee awards as follows:

> It is often difficult for attorneys engaged in the practice of law to determine what fee a client should be charged. Sometimes, it is equally troublesome for Judges to determine a fair and reasonable fee for lawyers. That is certainly true in this case, which involves highly professional, experienced and competent lawyers who gave an enormous amount of time over a period of seven years to the litigation, and which requires review of an award by a Chancellor who probably has had as much (or more) experience with fee applications as any Judge in our history. *We are much aware of these aspects of the appeal but, in the final analysis, we must meet our own responsibilities as a reviewing Court.*

Sugarland, 420 A.2d at 153 (emphasis added).

In his Combined Answering Brief ("Pl's Ans. Br."), however, Plaintiff invites this Court to largely abdicate that role and defer completely to the trial court so long as that court gave any consideration to each of the *Sugarland* factors.[1] Southern

[1] Plaintiff argues incorrectly that this Court held in 2009 that it will not find an abuse of discretion "[s]o long as the Court of Chancery considers [the *Sugarland*] factors" in making a fee award. Pl's Ans. Br. at 43 (citing *Loral Space & Commc'ns., Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 870 (Del. 2009)). *Loral* said nothing of the sort. Rather it held that the Court of Chancery had not abused its discretion in its consideration of the factors. The abuse of discretion standard requires that the trial court do more than recite the

Copper respectfully requests this Court to decline that invitation and do what it has always done when presented with an appeal of this type -- that is, confirm that: (1) (via *de novo* review) the trial court identified and applied the proper legal standards; (2) the trial court did not abuse its discretion in applying the legal standard to the factual landscape before it; and (3) the fee awarded by the trial court was reasonable. *In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, 1272 (Del. 2005).

This appeal presents a factual scenario of first impression. Southern Copper is aware of no judgment in a breach of fiduciary duty action totaling -- or even approaching -- the $1.347 billion (plus pre-judgment interest) that was awarded here, and Southern Copper is aware of no fee award to counsel in Delaware that amounts to more than a tenth of the $304 million awarded to Plaintiff's counsel here.

As argued in the Opening Brief of Appellant Southern Copper Corporation ("SCC Op. Br."), and as set forth below in response to the contentions of Plaintiff why that fee award should be affirmed, the trial court did not apply the correct legal

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applicable factors. *See Tafeen v. Homestore, Inc.*, 884 A.2d. 502, 506 (Del. 2005) (describing the parameters of the abuse of discretion standard); *cf. EMAK Wordlwide, Inc. v. Kurz*, -- A.3d --, 2012 WL 1319771 (Del. Apr. 17, 2012) (affirming a fee award where the trial judge's 51-page oral ruling "made factual findings supported by the record regarding each [*Sugarland*] factor.").

standard because it fundamentally rejected the declining percentage approach to calculating a fee award. For similar reasons, the trial court also did not properly weigh and apply the *Sugarland* factors when faced with an enormous judgment. These errors resulted in the trial court abusing its discretion and awarding a fee to plaintiff's counsel that is not reasonable. Southern Copper respectfully asks that (if the judgment is affirmed) this Court overturn the trial court's fee award and set a reasonable fee.

ARGUMENT

I. THE COURT OF CHANCERY MENTIONED EACH OF THE *SUGARLAND* FACTORS BUT DID NOT ADEQUATELY WEIGH THEM.

In its Opening Brief, Southern Copper argued that the trial court failed to weigh adequately each of the *Sugarland* factors. In response, Plaintiff contends that in fact "the Chancellor considered each of the five *Sugarland* factors carefully before concluding that a 15% fee award reasonably compensated Plaintiff's counsel here." Pl's Ans. Br. at 44. Plaintiff's contention, though, fails to address the actual argument that Southern Copper made in its Opening Brief. That argument was that, while the trial court did indeed recite the five *Sugarland* factors in pronouncing its oral ruling, it nevertheless gave essentially dispositive weight to a single one of the factors -- the size of the recovery -- and did not properly evaluate the other four. As a result, the Court below did not adequately weigh whether a fee award of 15% of approximately $2 billion amounted to a windfall, and indeed made clear that, contrary to prior holdings of the Court of Chancery, it did not believe the concept of a "windfall" was useful to the analysis.

Accordingly, the error below stemmed from the trial court's: (1) belief that it is fundamentally inappropriate to reduce (or at least to reduce materially) the percentage of the benefit awarded as the size of the common fund increases; and

(2) failure to weigh adequately whether such a fee was actually reasonable compared to the specific work done by counsel.

A. The Benefit Achieved Was Large, But Does Not By Itself Justify The Fee Award.

Southern Copper's Opening Brief recognized the "unprecedented size of the common fund for litigation in this State . . . ." SCC Op. Br. at 30.[2] Southern Copper has argued that the trial court placed too great an emphasis on the $2 billion amount of the judgment, while giving insufficient weight to the other four *Sugarland* factors. *Id.* at 19-20. This error led the trial court to award an unreasonable fee.

While most of the Plaintiff's arguments on this point are directed to arguments made by the other defendants, one aspect of the "size of the benefit conferred" merits additional explanation. In its Opening Brief, Southern Copper discussed how the large damage award here is primarily the product of a suit challenging a very large transaction. *Id.* at 25-26. In

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[2] Plaintiff's argument that "Southern Peru asserts that the judgment is not a common fund because the Chancellor gave the Defendants the option to satisfy the judgment by the payment of cash or the return or cancellation of stock" is largely beside the point. *See* Pl's Ans. Br. at 46-47. As noted in Southern Copper's Opening Brief, the return of stock would have different economic effects from the straight recovery of cash since the net economic benefit to the minority stockholders would be barely larger than the fee award. SCC Op. Br. at 18 n.8. Nevertheless, as stated in the Opening Brief, "[t]here is little question [that] the benefit [conferred] would be substantial." *Id.* at 18-19. The issue here is whether the benefit -- however it is paid -- supports a fee award of $304 million.

other words, the damages were large because the merger under attack involved a lot of money. In an attempt to counter this argument, Plaintiff argues that the size of the transaction is not the proper focus, but rather, this Court should look to his claim (and the trial court's finding) that Southern Copper had overpaid in the transaction by a factor of more than 50%. *See* Pl's Ans. Br. at 46.

Plaintiff is correct that he advanced such an argument below and that the Court awarded a large percentage of the benefit. But that argument ignores the material consequences of a large award. Had Plaintiff attacked a 50% underpayment on a $100 million merger -- which is still a large transaction -- the damages would amount to only $50 million. Mathematically what drove the size of the judgment and the resulting fees here was the size of the transaction.

Moreover, while the Plaintiff highlights his success in obtaining a large judgment, he fails to wrestle with the fact that according to the Court of Chancery, his failure or inability to prosecute this matter vigorously to a timely conclusion cost Southern Copper additional damages of nearly the same magnitude. *See* SCC Op. Br. at 28 (noting that the damage award was cut by 48%). That loss to Southern Copper should have been taken into account in setting a reasonable fee award, and the contention that counsel was penalized because they did not

get 15% of that amount does not do justice to the issue. The trial court held that Plaintiff left a large amount of money on the table and yet still awarded counsel the largest fee in Delaware history. That cannot be easily reconciled.

B. The Time and Effort of Counsel Does Not Support The Fee Award, And Plaintiff Makes No Argument To The Contrary.

As former Chancellor Chandler recognized: "To make it economically rational for [plaintiffs' attorneys] to take future cases, the fee must give them their normal hourly rate (the lost opportunity cost), a risk premium, plus a *modest* 'incentive' premium . . . ." *Seinfeld v. Coker,* 847 A.2d 330, 337 (Del. Ch. 2000) (emphasis added). The incentive premium here was far from "modest." Indeed, words such as "extraordinary," "unprecedented" and "astounding" do not begin to capture the nature of this premium.

In its Opening Brief, Southern Copper observed -- and Plaintiff has not disputed -- that no Delaware decision has ever suggested that an award of attorneys' fees award of anywhere close to 66 times counsel's opportunity costs (that is, fees at their ordinary rates plus actual expenses) is necessary to provide incentive for plaintiffs' counsel to prosecute tough representative litigation through trial. SCC Op. Br. at 20-24. Analyzing the time and effort of counsel is the critical step in determining whether a potential fee indicated by a straight

application of the percentage of the fund method is reasonable rather than a windfall for plaintiffs' counsel. *Seinfeld*, 847 A.2d at 338 ("In cases such as this one, where the percentage of the fund corresponds to more than $2,500 per hour, [the] failure [to take hourly rates into consideration] may result in a windfall.").

In response to Southern Copper's arguments on this point, Plaintiff first contends that the trial court was aware that the fee resulted in an implied hourly rate of $35,000 and nevertheless found that such a fee was reasonable. *See* Pl's Ans. Br. at 50. While it is true that the trial court performed the calculation, and noted that the resulting implied hourly rate totaled over $35,000 per hour, it did not explain how such an unprecedented implied hourly rate was "reasonable" in light of existing Delaware authority. *See In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 733-35 (3d Cir. 2001) (finding an abuse of discretion when the district court gave only cursory attention to some of the relevant factors in fashioning a fee award). Likewise, Plaintiff has not offered any argument or authority for why awarding a fee with such an astounding implied hourly rate is appropriate under the facts here.

Instead, Plaintiff maintains that under the principles set forth in *Sugarland*, the trial court does not "need to determine how much time was spent on the various phases of the litigation

in order to fix a reasonable fee." Pl's Ans. Br. 50. That statement accurately quotes *Sugarland*, but it does not deal with the actual issues here. Southern Copper does not argue that the Court should have looked at how much time was spent on each issue or done a line-by-line review of Plaintiff's bills as the lodestar method might have required. Rather, it contends that calculating and considering the implied hourly rate *is* a critical component in determining of whether the resulting fee is reasonable. This can be seen by the repeated use in *Sugarland* of the implied hourly rate to demonstrate that the fee award was reasonable given the effort expended by counsel to generate the result. *Sugarland,* 420 A.2d at 152 n.10, 153 n.1, 153 n.2; *see also Abercrombie*, 886 A.2d at 1273, 1274 (noting the relevance of time spent and the value of using implied hourly rate as a cross check); *Seinfeld*, 847 A.2d at 337-38 ("The importance of hourly rates is reflected in *Sugarland*'s second factor . . .").

The second primary argument Plaintiff makes on this point relates to the "incentives" discussed in the *Seinfeld* opinion. *See* Pl's Ans. Br. at 50-52. The Plaintiff argues that if the Courts of Delaware only compensate counsel for their "opportunity costs," such a "policy would seriously misalign the interests of the attorney and client" and would "perverse[ly]" incentivize plaintiffs' counsel to engage in "churning of

wheels" and "devoting unnecessary hours" to litigation. *Id.* at 51. This contention both misconstrues Southern Copper's argument and asserts as "facts" matters that cannot be credited.

Southern Peru did not argue below, and does not argue here, that successful contingency fee cases should normally be restricted to their opportunity costs -- that is, hourly rates plus expenses. Although such awards might be appropriate in particular circumstances, that will not be the case under most sets of facts. To put it bluntly, of course contingency counsel should be awarded above-hourly rate fees to take into account the contingency risk. And, of course good work and success should be awarded an additional incentive premium. That is what Chancellor Chandler said in *Seinfeld*, which accurately reflects this Court's opinions on the subject. Thus the question posed in Southern Peru's Opening Brief was not whether the fee award here should provide a premium over counsel's hourly rates -- of course it should -- but rather, *was the premium that was awarded excessive*? Plaintiff's first argument is thus no more than a red herring.

Plaintiff's second argument is even more disappointing. Plaintiff appears to say that any approach other than a mechanical application of the percentage of the benefit test -- and an affirmance here -- will result in unethical conduct by future representative counsel. Here is the essence of

Plaintiff's argument: "Nor should this Court encourage gamesmanship and deliberate inefficiency by plaintiffs' lawyers who want to try a big case, simply to justify their potential fees." Pl's Ans. Br. at 52. The unstated premise in this contention is that representative plaintiffs' lawyers will deliberately inflate their claimed hours by "churning" and engaging in other unethical behavior in order to justify larger fees.

Perhaps some non-Delaware lawyers would do that. Perhaps some already do. But we do not believe that *any* Delaware firm would knowingly tolerate such a practice either from themselves or their co-counsel. Moreover, even if such a thing happened, the Court of Chancery has proven itself adept at ferreting out unnecessary fees, unreasonable fee applications and other forms of gamesmanship or dishonesty. *See, e.g., Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*, 986 A.2d 370, 397 (Del. Ch. 2010) (rejecting a fee application: "I regard the number of hours claimed as facially implausible, and I do not credit it.").

In short, speculation that some lawyers might betray their trust if the $304 million fee here were to be reduced is baseless. It also misses the point. Southern Copper is not arguing that the lodestar method should replace the *Sugarland* test. Rather, it argued below and reiterates here that looking at the hours worked is *an integral part of the Sugarland test*

and provides an important reasonableness check on fee awards that normally will work in conjunction with the declining percentage standard.

The problem in this case, though, is that the Court below gave very little (if any) credence to the implied hourly rate, reasonableness check or the declining percentage standard. After explaining at length why a declining percentage should not be applied in cases with large judgments, it nevertheless did so (albeit in a limited way). That contradiction between practice and theory demonstrates that a declining percentage standard is in fact *necessary* -- and deserved more extensive and far less negative consideration from the trial court in fashioning a proper award. Similarly, it mentioned the $35,000 implied hourly rate but did not think it was important compared to the benefit gained. Had the Court applied the declining percentage standard from the start, and then performed a real reasonableness check based upon counsel's opportunity costs, it could not have awarded a fee anywhere near $300 million.

C. The Difficulty and Complexity of the Case Does Not Support The Fee Award.

As Southern Copper pointed out in its Opening Brief, although this litigation challenged a very large transaction, the litigation was not overly complex or difficult relative to matters of the same type in this jurisdiction. SCC Op. Br. at

24-26. In this case, the discovery burden was relatively light and the trial only involved six witnesses over the course of four partial trial days. *See id.* at 9. To support its contention that this factor weighed in favor of the unprecedented fee award, Plaintiff points to the fact that it faced a vigorous defense and a trial court that was initially skeptical of its damages theory. *See* Pl's Ans. Br. at 52-53. These factual recitations are correct, but Plaintiff does not provide any explanation how the hurdles he faced were so difficult that his success warrants or supports the unprecedented fee award approved by the trial court.

Was this an easy case? Of course not. It was hard fought, but many, many hard-fought cases are tried in this jurisdiction every year. The only thing that sets this case apart was the amount of money at issue, and Plaintiff has made no effort to show how the complexity of this litigation measures up to other cases where nine-figure fee awards have been granted. *See* SCC Op. Br. at 26 (listing litigation metrics found in other cases where fee awards greater than $100,000,000 have been granted). As Southern Copper argued in its Opening Brief, this factor does not weigh in favor of this fee award, and indeed, helps demonstrate how the fee awarded was not reasonable under the circumstances.

D. The Contingent Nature of the Representation Does Not Support The Fee Award.

While Plaintiff's counsel undertook this representation on a fully contingent basis, and deserves to be compensated for doing so, the contingency risk they bore in this matter does not indicate that a fee 66 times their time and expenses is a reasonable fee under the circumstances. In its Opening Brief, Southern Copper demonstrated how this case differed substantially from other cases where courts have awarded nine-figure fee awards in that the two law firms involved in this litigation did not "bet their firms" on this single case. *See* SCC Op. Br. at 26-27. Indeed, the fact that the average annual time spent on this matter by full-time attorneys averaged only 48 hours per year and Plaintiff's two primary Delaware lawyers were able to appear in over 125 other actions over the course of this litigation demonstrates that Plaintiff's counsel here did not take any greater-than-normal contingency risk.

E. The Standing and Ability of Counsel Does Not Support The Fee Award.

As noted in Southern Copper's Opening Brief, there is no question that Plaintiff's counsel are experts in this field. SCC Op. Br. at 28. But in fairness, they were also sharply criticized by the trial court for their long delays, and the trial court should have weighed that delay more heavily when considering their fee. *See id.*

II. THE TRIAL COURT COMMITTED ERROR BY FAILING TO RIGOROUSLY APPLY A "DECLINING PERCENTAGE" ANALYSIS TO A BILLION DOLLAR COMMON FUND.

In its Opening Brief, Southern Copper detailed the reasoning, policy and authority that support the argument that as the size of a common fund grows larger, the only way to arrive at a reasonable fee award is by awarding a correspondingly smaller percentage of the fee. In cases such as this in which the judgment is in the billions of dollars the fee should normally be measured in single digit percentages. *Id.* at 28-31. Plaintiff has not argued that the authority in Southern Copper's Opening Brief is either wrong or inapplicable to this dispute; rather he argues in response that this Court should not require the use of such a "mandatory methodology." Pl's Ans. Br. at 55.

For the reasons stated herein, Southern Copper believes that such a standard is necessary to ensure that the resulting fee is reasonable. That might not be the situation in every case, such as where the resulting fee would not confer appropriate risk and incentive premia, but we submit that it should be mandated in cases such as this. *See Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1048 (Del. 1996) (discussing recognition of the "emerging judicial consensus" in favor of the declining percentage standard).

Plaintiff also argues that despite the trial court's statements disparaging the declining percentage standard, it nonetheless did award a declining percentage by reducing the 22% sought to an award of 15% of the common fund. Pl's Ans. Br. at 55-56. It is difficult to discern from the trial court's ruling, however, whether the Court actually applied the declining percentage standard or whether the reduction in percentage was a reflection of the trial court cutting back the percentage based on factors unrelated to the size of the fund. *Compare* A2859:4-15 (noting "[m]aybe I am embracing what is a declining thing") *with* A2853:12 - A2854:14 (noting that Plaintiff's prosecutorial strategy would "impel me to reduce the percentage that I am awarding . . ."). Regardless, based upon the entire ruling one can have little doubt that what the Court called the "declining thing" could only have played a small role in the Court's conclusions and that it did not give the declining percentage standard the weight that is required by either precedent and logic.

The trial court's fundamental rejection -- but limited application -- of the declining percentage principle, however, does point out an inescapable truth. There is simply no way for a trial court to arrive at a reasonable fee award in "mega-fund" cases if it does not apply a declining percentage to that damages number. We saw that here, when even a Court that

fundamentally disagrees with the principle nevertheless may have applied it when the numbers got too large. That apparent application of the declining percentage standard demonstrates that the trial could not follow its stated logic completely. The reason for this is that the while the trial court in theory believes in unlimited attorneys' fees, even it finds some awards to be excessive -- a windfall -- when faced with them in practice.

Unfortunately, the trial court did not attempt to reconcile its theory and practice, which Southern Copper respectfully submits would have led it to conclude that its theory was mistaken. For this reason, Southern Copper urges this Court to find it was an error for the trial court not to complete such an analysis, and that its failure to do so led to the award of an unreasonable fee.

III. RULE 1.5(a) PLACES A CAP ON PERMISSIBLE ATTORNEYS' FEES.

Rule 1.5(a) of the Rules of Professional Conduct also puts a limit on the size of fee awards. Plaintiff vigorously disputes this point, but his argument is based upon a misreading of the Opening Brief. In his Answering Brief, Plaintiff asserts that Southern Copper "brazenly" (or "desperately") "accuse[d] the Chancellor of violating Rule 1.5(a) . . . ." Pl's Ans. Br. at 52. No such accusation was made, though, because the issue is not whether there was a violation of Rule 1.5(a) but whether the Rule was applied appropriately. Indeed, the Chancellor could not possibly have "violated" Rule 1.5(a) since he was not receiving a fee. Nor could counsel have violated the Rule since the fee was set by the Court.

The issue therefore is not whether someone "violated" Rule 1.5(a) -- no one did -- but whether the Court below properly recognized and addressed the limitations on fees established by that Rule. As stated in Southern Copper's Opening Brief, the answer to that question is "no." SCC Op. Br. at 32. The Court below erred by not looking through the lens of Rule 1.5(a) to evaluate the reasonableness of the fee award. *In re Digex, Inc. S'holders Litig.*, Del. Ch., C.A. No. 18336, at 137, Chandler, C. (Apr. 6, 2001) (TRANSCRIPT) (SCC Op. Br. Ex. F) ("But secondly, and equally importantly, [the Court's obligation to review the reasonableness of fees] flows from the Court's obligation to ensure that attorneys meet

their ethical obligations [under Rule 1.5(a)] to charge a reasonable fee.").

Rule 1.5(a) applies to evaluating the reasonableness of the fee award for two reasons. First, it serves as the foundation for the uncontested principle that any fee awarded by the trial court under the common benefit doctrine must be *reasonable*, and indeed, the *Sugarland* factors are derived from the same source as the Rule and its predecessors. *Mahani v. EDIX Media Grp., Inc.*, 935 A.2d 242, 245-46 (Del. 2007) (holding that "[t]o assess a fee's reasonableness, case law directs the judge to consider the factors set forth in the Delaware Rules of Professional Conduct . . ."); *Aveta, Inc. v. Bengoa*, 2010 WL 3221823, at **4-6 (Del. Ch. Aug. 13, 2010) (recognizing the "powerful family resemblance" that the factors in Rule 1.5(a) have to the *Sugarland* factors and noting that "[c]onvergent jurisprudential evolution produced virtually identical lists," and finding no reason to distinguish between the two).

Second, Rule 1.5(a), in dictating that any attorneys' fee must be reasonable, sets a ceiling on the compensation Delaware lawyers may receive. *See Digex*, at 148 (rejecting a proposed fee award as "too high . . . under the Rules of Professional Responsibility"). This requirement stands in contrast to the potentially uncapped fees that bankers and other financiers may

potentially charge, to which the trial court pointed in its ruling. *See* SCC Op. Br. at 32-34.

None of that means that plaintiffs attorneys are not permitted to be rewarded for success if their client prevails on the merits. Rule 1.5(a) does mean, however, that the sky cannot be the limit for attorneys. As professionals and officers of the Court there are limits on lawyers' compensation, and the court below failed to take that into account in its ruling.

CONCLUSION

For the foregoing reasons, and those set forth in Southern Copper's Opening Brief, Southern Copper respectfully requests that (if the judgment is affirmed) this Court overturn the trial court's fee award and set a fee award that is reasonable.

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Dated: April 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on April 19, 2012, a copy of the foregoing Reply Brief of Appellant, Nominal Southern Copper Corporation was caused to served upon the following counsel of record by LexisNexis File & Serve.

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