



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. )  
 (and related appeal) )

Nos. 29, 2012 & 30, 2012  
On Appeal from the Court of  
Chancery,  
Consol. C.A. No. 961-CS

**APPELLANTS' MOTION FOR REARGUMENT**

Appellants Americas Mining Corporation ("AMC") and nominal defendant Southern Copper Corporation ("Southern Peru") respectfully request reargument on the narrow question whether the relevant "benefit" for calculating attorney fees in a derivative case against a majority stockholder is properly defined as the entire judgment nominally paid to the company, even though the defendant through its stock ownership is the beneficiary of 81% of the recovery, thus reducing to 19% the true economic "benefit" from the suit. By approving fees assessed on this basis, the Court's opinion appears to hold *sub silentio* that derivative actions are excepted from the usual rule that fees in "percentage of recovery" cases are based on the actual economic benefit created by counsel's efforts. Appellants submit that there is no basis for such an exception, particularly where the derivative action is an "entire fairness" case designed to protect the interests of minority stockholders, and where the exception would produce outsized awards (here, \$305 million) relative to actual benefit (here, \$386 million).<sup>1</sup> Given this and another recent Chancery Court ruling using the same flawed approach, *In re Emerson*

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<sup>1</sup> This point was addressed by the parties in their briefing, see AMC Op. Br. 32, SCC Op. Br. 12 n.5 & 18-19 n.8, Pl's Ans. Br. 47, but was not discussed in the Court's opinion.

*Radio S'holder Deriv. Litig.*, C.A. No. 3392-VCL, 2011 WL 1135006, at \*4 (Del. Ch. Mar. 28, 2011), the Court should clarify the issue.

1. Although AMC owns 81% of Southern Peru, the Chancellor awarded 15% of the total award to the company as attorney fees. In affirming, this Court noted that "[t]he common fund doctrine is founded on the equitable principle that those who have profited from litigation should share its costs" and that the "first and most important" factor is "the benefit achieved" by the litigation. Op. 87, 92. But the Court left unaddressed a crucial aspect of the "benefit" here: 81% of the \$2.021 billion judgment in effect will be paid by AMC as judgment debtor to itself as majority stockholder. From an economic standpoint, the only real "benefit" is the 19% that inures to Southern Peru's minority stockholders—i.e., "those who have profited from [the] litigation." This is true whether the judgment is paid in cash or Southern Peru stock. See 12/19/11 Tr. 7, 43-53.

2. Generally, courts calculating the "benefit" attained by counsel in a "percentage of recovery" case look to the true economic benefit, not to a nominal "fund" that exceeds the actual recovery to aggrieved parties. In *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039 (Del. 1996), a stockholder class action, this Court analyzed the "actual benefit" by reference to the "claims actually submitted," rather than as "a percentage of the total common fund created for the benefit of the class," *id.* at 1048, 1049—that is, the real economic benefit to those claiming as opposed to the theoretical "benefit" represented by the entire fund. This approach reflected both "concern about whether the common fund was an accurate quantification of the actual benefit that had been conferred," and the need to "correlate

the attorneys' compensation" with the benefits the attorneys secured for the class. *Id.* at 1049. Other courts use the same approach in setting "percentage of recovery" fees in a wide variety of contexts, defining the relevant "fund" as the *actual economic benefit* created by the litigation, not a larger hypothetical recovery.<sup>2</sup>

3. The Chancellor here declined to inquire into the true economic benefit, reasoning that because this is a *derivative* action with recovery going initially to the company, using an amount less than the full award would improperly disregard the corporate form. 12/19/11 Tr. 68-70. Plaintiffs offered a similar argument in their briefing. Pl. Ans.Br. 47. But there is not, and should not be, an exception to the "actual economic benefit" rule for derivative actions, and it does no disrespect to the corporate form to evaluate the real benefit that an attorney creates, as is done in other types of cases. This is particularly so where, as here, the action is based on the "entire fairness" doctrine—a mechanism specifically designed to protect the interests of minority stockholders as against the majority.<sup>3</sup> It is fully consistent with that form of action to view the

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<sup>2</sup> See *In re Diet Drugs Prods. Liab. Litig.*, 553 F. Supp. 2d 442, 471-72 (E.D. Pa. 2008) (actual amounts paid to class members); *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 852-53 (5th Cir. 1998) ("actual results of the settlement"; counsel's higher number was "illusory"); *Nolte v. Hudson Nav. Co.*, 47 F.2d 166, 168 (2d Cir. 1931) (settlement funded by those who benefited); *Vincent v. Hughes Air W., Inc.*, 557 F.3d 759, 770 (9th Cir. 1977) (actual benefits from fund).

<sup>3</sup> See *Gesoff v. IIC Ind., Inc.*, 902 A.2d 1130, 1144 (Del. Ch. 2006) (entire fairness review "serves to protect the minority stockholders"); *In re Marriott Hotel Prop. II Ltd. Partnership*, 2000 WL 128875, 14 (Del. Ch. 2000) (entire fairness test is meant "to protect minority stockholders from the tyranny of the controlling entity"); see also *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 109-10 (Del. 1952) ("entire fairness" review applied to enforce fiduciary duties of majority to minority stockholders).

"benefit" as the economic value created for minority stockholders in whose interests the action is brought. Indeed, disregarding the relation of fees to the real benefit where, as here, the true "benefit" to the minority is dwarfed by the nominal amount of the judgment, would raise the same federal due process problems as do disproportionate punitive damages awards.<sup>4</sup> Cf. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 426 (2003); AMC Op. Br. 34.

4. This Court has not specifically addressed the application of the "actual economic benefit" rule to an "entire fairness" derivative action. At least one other state Supreme Court has held that courts must look to the real economic benefit in derivative actions and base fees on the benefit to the non-defendant stockholders, not the corporation as a whole. See *Lane v. Head*, 566 So.2d 508 (Fla. 1990). Given the importance of the issue, this Court should not create, *sub silentio*, an exception to the "actual economic benefit" rule for derivative or "entire fairness" cases.

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<sup>4</sup> For example, if a defendant owned 95% of the company, a 15% fee on a \$1 billion award would be triple the "actual benefit" to the minority.

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2012, I caused to be served by Lexis Nexis File and Serve the foregoing APPELLANTS' MOTION FOR REARGUMENT upon the following counsel of record:

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