IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERICAS MINING CORPORATION, *et al.*,	)	
Defendants-Below, Appellants,	)	Nos. 29, 2012 & 30, 2012
v.	)	Court below: Chancery Court of the State of Delaware in and for New Castle County Hon. Leo E. Strine, Jr. Cons. C.A. No. 961-CS
MICHAEL THERIAULT, as Trustee for the Theriault Trust,	)	
Plaintiff-Below, Appellee.	)	

PLAINTIFF-BELOW, APPELLEE'S OPPOSITION TO DEFENDANTS-BELOW, APPELLANTS' MOTION FOR REARGUMENT

Plaintiff-Below, Appellee, hereby opposes Defendants-Below, Appellants' Motion for Reargument ("Motion") and in support thereof shows as follows:

1. Defendants' Motion contends on "reargument" that the "benefit conferred" here for purposes of the fee award was not $2.031 billion as the trial court and this Court held (Op. at 85), but rather 19% of that figure because a defendant owns 81% of the public company that will receive the judgment. This argument should be rejected for the reasons outlined below.

2. The Argument Was Waived. Supreme Court Rule 14(b)(vi)(3) states that "the merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal." The bodies of Defendants' opening briefs did not raise the argument made in the Motion. The AMC defendants' opening brief did not mention this argument at all in the mere three pages they devoted to the fee issue (AMC OB at 32-34) and Southern Peru's opening brief only mentioned the issue vaguely in a footnote

(SP OB at 18 n.8). Arguments in footnotes are precluded by Rule and do not constitute raising an issue in the "body" of the opening brief. *See* Rule 14(d) ("Footnotes shall not be used for argument ordinarily included in the body of a brief"). In sum, the Motion should be denied because it raises an argument that was clearly waived.

3. Nothing Was Overlooked. "On a motion for reargument the only issue is whether the court overlooked something that would have changed the outcome of the underlying decision." *Proctor v. State of Del.*, 2003 Del. LEXIS 314 (Del. June 9, 2003). This is a derivative action. Through this action, Plaintiff obtained a judgment of more than $2 billion in favor of Southern Peru. (Op. at 85). In affirming the judgment and fee award, this Court held that the Chancellor did not abuse his discretion in ruling that "the benefit achieved through the litigation amounts to more than $2 billion." (Op. at 92). In so ruling, the Court clearly did not "overlook" that Grupo Mexico is Southern Peru's controlling stockholder. (*E.g.*, Op. at 5).

4. A "Look-Through" Approach is Not Delaware Law. The trial judge properly rejected the Defendants' "look through" argument below. In assessing the "benefit achieved," the trial court held, and this Court affirmed, that the benefit achieved in a derivative action is the benefit to the corporation. Delaware courts do not analyze the "benefit achieved" as if it were a class action recovery for minority stockholders. The recovery here is to Southern Peru -- not "nominally" but actually. Southern Peru will do what it will with the recovery, and no stockholder has a claim to any particular assets of

the corporation.[1] In rejecting Defendants' "look-through" argument below, the trial court stated:

> There's also this argument that I should only award -- I should basically look at it like it's a class action case and that the benefit is only to the minority stockholders. I don't believe that's our law. And this is a corporate right. And, you know, if you look going back to 1974 . . . there was Wilderman versus Wilderman, 328 A. 2d 456, which talks about not disregarding the corporate form in a derivative action and looking at the benefit to the corporation, to the more recent Carlton – Carlson case, which is not reported, in 925 A. 2d 506 does the same; Emerson Radio, case from 2011, Westlaw 1135006. They all look at it like a derivative action.

(A2844). As the Chancellor pointed out, the "look through" approach to awarding fees in a derivative case was rejected in *Wilderman v. Wilderman*.[2] 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.[3] The Court 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

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[1] *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").

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

[3] *Id*. at 458.

conferred upon the corporation.[4]

5. In sum, the form, requirements and consequences of an action being "derivative" are numerous and are not to be ignored when awarding attorneys' fees.[5] In assessing the benefit conferred in this derivative action the trial court and this Court properly found that the benefit conferred was the amount of the judgment obtained in favor of the corporation. Indeed, that is the very definition of a derivative action – the corporation suffered the harm and gets the recovery.[6] Appellants do not and cannot contend that the Court of Chancery abused its discretion in so holding. The Motion should be denied.

PRICKETT, JONES & ELLIOTT, P.A.

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

OF COUNSEL:

KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

Dated: September 14, 2012

[4] *Id*. at 458-59 (*citing Keenan v. Eshleman*, 2 A.2d 904 (Del. Ch. 1938) (court will not permit recovery in derivative case to be diminished by an amount in proportion to defendants' stockholdings because that would effectively transform a derivative action into a direct action)). *See also 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 minority's 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.").

[5] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004).

[6] *Id*.

CERTIFICATE OF SERVICE

I, Ronald A. Brown, Jr., do hereby certify on this 14th day of September, 2012, that I caused a copy of Plaintiff-Below, Appellee's Opposition to Defendants-Below, Appellants' Motion for Reargument 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

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

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