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11 **ARIZONA SUPERIOR COURT**
12 **MARICOPA COUNTY**

11 FIERCE INVESTMENTS LTD.,)	No. CV2018-006866
)	
12 Plaintiff,)	
)	
13 v.)	RESPONSE TO AZTEC COPPER
)	INC.'S MOTION TO SET ASIDE
14 AZTEC COPPER INC., an Arizona)	DEFAULT
15 corporation,)	
)	
16 Defendant.)	(Assigned to Hon. Daniel J. Kiley)
)	
17)	

18
19 Default was entered against Defendant Aztec Copper Inc. (“Aztec” or the “Company”),
20 on July 12, 2018 (ten days after Plaintiff Fierce Investments Ltd. (“Fierce”) filed its
21 Application for Entry of Default) in this shareholder action. Fierce’s claims were not for a sum
22 certain, but rather sought a judicial order compelling the Company to hold an annual
23 shareholder meeting in compliance with Arizona law. Therefore, Commissioner Lindsay
24 Abramson set a default hearing on Fierce’s request for a judgment. On the eve of the default
25 hearing, Aztec hastily filed a Motion to Set Aside Default and a Motion to Vacate Default
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1 Hearing to avoid entry of a final judgment.¹ While the mere filing of these motions required
2 the Commissioner to vacate the default hearing and transfer the matter to this Division, Aztec's
3 motions do not automatically set aside the default that was entered against Defendants two
4 months ago. Indeed, Aztec's Motion to Set Aside Default is wholly inadequate and does not
5 even attempt to establish the basic grounds for setting aside a default. Specifically, Aztec does
6 not (and cannot) show there is good cause to set aside the default; its Motion is devoid of any
7 reasonable excuse for appearing late; and its bare (and incorrect) assertion that Fierce is not a
8 shareholder is based on hearsay, not facts, and is not a meritorious defense.

9 Aztec's Motion to Set Aside Default is deficient under the plain language of Ariz. R.
10 Civ. P. 55(c), as well as the analysis set forth in numerous Arizona cases regarding when a
11 default may be set aside. This Court should not countenance Aztec's cavalier attempt to
12 circumvent these well-established principles. Therefore, Fierce respectfully requests that the
13 Court deny Aztec's Motion to Set Aside Default and enter the proposed Judgment lodged with
14 Fierce's Motion to Set Default Hearing and also filed concurrently herewith.

15 **FACTUAL BACKGROUND**

16 This is a shareholder action brought by Fierce, a registered holder of 40,000,000 common
17 shares of Aztec, to obtain a judicial order pursuant to A.R.S. § 10-703 compelling the Company
18 hold an annual shareholder meeting in compliance with Arizona law.

19 On or about October 15, 2002, Fierce acquired 40,000,000 shares in Aztec pursuant to an
20 agreement between Fierce, Ruero International and Compania Minera Ruero, as sellers, and
21 Aztec and Prime Aztec de Mexico as purchasers (the "Aztec Agreement"). Since becoming a
22 shareholder in the Company, Fierce has become concerned about whether the shares it owns

24 ¹ Aztec filed *exactly* the same Motion to Set Aside Default in two different cases brought by
25 Fierce (CV2018-003675 and CV2018-006866), even though the cases involve different
26 defendants and different claims. Indeed, Aztec was so careless in filing its Motion in the instant
action that it mistakenly included two defendants that are not defendants in this case.

1 have been improperly diluted. It is also concerned about other corporate issues that it has raised
2 in correspondence to the Company. In addition, Fierce has legitimate concerns about whether
3 the Directors and Officers of the Company are properly complying with judgments entered
4 against the Company and/or may have engaged in misconduct.

5 On January 26, 2018, Fierce made a demand to inspect the books and records of Aztec
6 (the "Demand"). A copy of the Demand is attached as Exhibit A. The Demand was promptly
7 delivered to the statutory agent for the Company and to its business address provided in the
8 records of the Arizona Corporation Commission. In its Demand, Fierce sought to inspect certain
9 books and records for "the purposes of obtaining an informed understanding of the true financial
10 condition of the Company; assessing the value of the Fierce Shares; and determining whether
11 the affairs of the Company have been conducted appropriately under applicable law."

12 On February 21, 2018, a Canadian lawyer responding on behalf of Aztec asserted that an
13 entity incorporated under Canadian law, "1829752 Alberta Inc.," is the successor-in-interest to
14 Aztec Copper, Inc. A copy of the Response is attached as Exhibit B. The Response asserted
15 that 1829752 Alberta Inc. is incorporated under Alberta statutes and is not subject to the Arizona
16 statute cited in the Demand. Therefore, the request to inspect books and records was rejected.
17 Prior to the Response, Fierce had no information about 1829752 Alberta Inc., and it never
18 received notice of any acquisition, merger or other business combination involving the Company
19 and 1829752 Alberta Inc. This new information only heightened Fierce's legitimate concerns
20 about the financial condition and management of the Company.

21 The Canadian lawyer has refused to provide information about 1829752 Alberta, Inc., its
22 shareholders, how it purportedly became the successor in interest to Aztec, and what interest
23 Fierce may hold in 1829752 Alberta Inc. Further, in response to a lawful request to examine the
24 securities register of 1829752 Alberta Inc., the Canadian lawyer, whose office is also the
25 registered records office of 1829752 Alberta Inc., advised that the corporate records of 1829752
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1 Alberta Inc. do not contain a securities register. Thus, no securities register or shareholder
2 information was made available for inspection.

3 On May 4, 2018, shortly after Fierce’s request to inspect the register and shareholder
4 information of 1829752 Alberta Inc. was rejected, Fierce filed the instant action pursuant to
5 A.R.S. § 10-703, seeking an order from this Court compelling Aztec to hold an annual
6 shareholder meeting.

7 The Summons and Complaint were served on Aztec on May 4, 2018. Aztec failed to
8 answer or otherwise respond to the Complaint by March 24, 2018, the deadline provided for by
9 Ariz. R. Civ. P. 12(a)(1)(A)(i). On July 2, 2018, Fierce filed an Application for Entry of Default
10 pursuant to Ariz. R. Civ. P 55(a) (the “Application”). Aztec was served with the Application on
11 the same day. Pursuant to Ariz. R. Civ. P. 55(a)(4), the default became effective on July 17,
12 2018, ten days after the Application was filed.

13 Because Fierce’s Complaint does not seek a sum certain, it filed a Motion to Set Default
14 Hearing on July 27, 2018. On August 2, Commissioner Lindsay Abramson set a default hearing
15 for August 22, 2018. One day before the hearing, Aztec filed a Motion to Set Aside Default.
16 Aztec’s Motion was filed almost *three months* after Fierce’s Complaint was served, and more
17 than *one month* after default was entered.

18 Aztec’s belated Motion to Set Aside Default is less than two pages, and specious on its
19 face. It is not accompanied by any admissible evidence and rests on conclusory (and inaccurate)
20 assertions. It should be denied.

21 ARGUMENT

22 Aztec bears the burden of showing “good cause” to set aside the default that was entered
23 more than one month ago. *See State ex rel. Corbin v. Marshall*, 161 Ariz. 429, 431–32, 778 P.2d
24 1325, 1327–28 (App.1989) (“The moving party has the burden of demonstrating good cause for
25 vacating the entry of default—that is, grounds such as mistake, inadvertence, excusable neglect
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1 and due diligence.”). Aztec never acknowledges its burden, and comes nowhere close to meeting
2 it.

3 **A. Default Was Properly Entered Against Aztec**

4 Rule 55(a) provides that, “[i]f a party against whom a judgment for affirmative relief is
5 sought has failed to plead or otherwise defend as provided in these rules, default may be
6 obtained” after the party seeking default files an application for default and provides notice as
7 provided by the rules. “The filing of the application for default constitutes the entry of default.
8 A default is effective 10 days after the application for entry of default is filed.” Ariz. R. Civ. P.
9 55(a)(4).

10 Here, Aztec failed to answer or otherwise respond to the Complaint. Fierce filed an
11 application for default on July 2 and served it on Aztec’s statutory agent on the same day. Thus,
12 the default became effective on July 17, 2018. Aztec does not dispute that default was properly
13 entered against it.

14 **B. Aztec’s Motion to Set Aside Is Insufficient**

15 It was only when final judgment was about to be entered that Aztec appeared. But, even
16 then, its Motion to Set Aside Default is insufficient.

17 Rule 55(c) provides that a “court may set aside an entry of default *for good cause*, and it
18 may set aside a final default judgment under Rule 60(c).” (Emphasis added.) The Supreme
19 Court of Arizona has consistently held that in considering a request to set aside an entry of default
20 under Rule 55(c), the “good cause” requirement is the same as the requirements for setting aside
21 a judgment under Rule 60(c). *DeHoney v. Hernandez*, 122 Ariz. 367, 371, 595 P.2d 159, 163
22 (1970); *Harper v. Canyon Land Dev. LLC*, 219 Ariz. 535, 200 P.3d 1032 (App. 2008).

23 To set aside a default that has been entered, the moving party has the burden to show (i)
24 that it acted promptly in seeking relief from entry of default, (ii) that its failure to file a timely
25 answer was due to either mistake, inadvertence, surprise or excusable neglect, and (iii) that it
26 had a meritorious defense, supported by sufficient facts *offered under oath*. *Richas v. Superior*

1 *Court of Ariz. in and for Maricopa Cty.*, 133 Ariz. 512, 652 P.2d 1035 (1982); *see also Webb v.*
2 *Erickson*, 134 Ariz. 182, 185–86, 655 P.2d 6, 9–10 (1982) (holding that, to satisfy Rule 55(c),
3 the moving party must show each of the following: (1) his actions were “excused by one of the
4 grounds enumerated in Rule 60(c)”); (2) “he acted promptly in seeking relief from the entry of
5 default”; and (3) “he had a meritorious defense”); *Evans v. C & B Dev. Corp.*, 417 P.2d 372, 373
6 (App. 1966) (“It is requisite that the party asking for relief show (1) mistake, inadvertence,
7 surprise or excusable neglect, and (2) a substantial and meritorious defense and of what it
8 consists, under oath.”). Here, Aztec does not satisfy any of these requirements, much less all of
9 them.

10 **1. Aztec did not take prompt action in seeking relief.**

11 Aztec’s Motion to Set Aside ignores the issue of promptness. Aztec does not claim that
12 it acted promptly, nor could it when it waited almost five months after the Complaint was filed
13 and more than two months after default was entered to seek relief from the Court. The moving
14 party has the burden to adequately explain the delay in order for the court to exercise its
15 discretion to set aside a default. *See Richas*, 133 Ariz. at 515, 652 P.2d at 1038 (“The burden of
16 explanation is upon the party seeking to set aside the entry of default.”) (*citing Sloan v. Florida–*
17 *Vanderbilt Dev. Corp.*, 22 Ariz. 572, 574, 529 P.2d 726, 728 (App. 1974)). Aztec does not
18 provide *any* explanation for its delay.

19 But even if Aztec had not conceded this point, the Court need look no further than the
20 undisputed facts in this case to determine that Aztec did not act promptly: (1) service was
21 properly made on Aztec; (2) Aztec is a corporate entity represented by counsel; and (3) counsel
22 for Defendants was aware of the filings in this case, yet, Aztec did nothing for months to defend
23 the action.

24 In short, Aztec did not take prompt action in seeking relief from the entry of default. This
25 alone requires denial of the Motion. *See Hirsch v. Nat’l Van Lines, Inc.*, 136 Ariz. 304, 309, 666
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1 P.2d 49, 54 (1983) (holding that because defendant failed to establish one of the elements
2 necessary to obtain relief under Rule 55(c), the court need not consider the other requirements).

3 **2. Aztec does not demonstrate excusable neglect in failing to answer or**
4 **otherwise respond to Fierce’s Complaint.**

5 Aztec also ignores that it bears the burden to show excusable neglect. It is black letter
6 law that there must be some legal justification and a substantial factual basis to set aside a default.
7 *See Richas*, 133 Ariz. at 514. Even where the moving party submits an affidavit, the Supreme
8 Court has held that, “[t]he affidavit or testimony must be based upon personal knowledge and
9 must allege facts sufficient to establish what occurred and explain why it should be found
10 excusable.” *Id.* at 515; see also *Western Coach Corp. v. Mark V Mobile Homes Sales, Inc.*, 23
11 Ariz. 546, 534 P.2d 760 (App. 1975) (holding that affidavit that presented no factual explanation
12 at all as to why statutory agent neglected to forward summons and complaint to principal and
13 which was not based on personal knowledge was insufficient to establish “excusable neglect”
14 on part of agent).

15 Here, Aztec made no effort to provide any legal justification for its failure to file a timely
16 answer. Aztec also failed to supply any factual basis – much less sworn testimony in an affidavit
17 – that would warrant setting aside the default. Because Aztec has not demonstrated that
18 excusable neglect caused its failure to answer or otherwise respond, its Motion must be denied.

19 **3. Aztec does not satisfy its burden to show that it has a substantial and**
20 **meritorious defense.**

21 The only argument raised in Aztec’s Motion is that “there is a meritorious defense for
22 Aztec, namely, that Plaintiff [purportedly] is not a shareholder and has no basis for asking this
23 Court to enter the Orders requested.” [Motion at 2] However, Aztec provided only self-serving
24 second-hand hearsay, with no affidavit, to support its claim of a meritorious defense. Aztec now
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26

1 claims [at 1] that Aztec cancelled Fierce’s 40,000,000 shares in 2006.² In support of this bare
2 assertion, Aztec attaches a unauthenticated, self-serving “summary of a corporate review of
3 Aztec’s current shareholders, done by Harder & Company, a Canadian law firm located in
4 Vancouver, B.C.” [Motion at 2] According to Aztec, this document, purportedly prepared on
5 April Fool’s Day in 2011, establishes that Fierce is no longer a shareholder of Aztec. But an
6 unauthenticated, self-serving “summary” purportedly prepared by Aztec’s own counsel comes
7 nowhere close to satisfying Aztec’s burden of showing facts under oath that would be sufficient
8 to demonstrate a meritorious defense. *See Richas*, 133 Ariz. 512, 652 P.2d 1035.

9 Aztec’s unwillingness to provide testimony under penalty of perjury to support its belated
10 claim about share cancellation is understandable; one of the documents that Fierce does possess
11 are minutes from the November 2009 Aztec shareholder meeting. At this meeting, some three
12 years after Aztec purportedly cancelled Fierce’s shares (according to the argument made in its
13 Motion), Fierce was recognized as an Aztec shareholder. A copy of the meeting minutes are
14 attached as Exhibit C. The existence of these 2009 minutes – which flatly contradict Aztec’s
15 claim about share cancellation – underscores that Arizona requires sworn testimony to set aside
16 a default because some parties will say or do almost anything to avoid judgment being entered,
17 and the Court should not waste its time when that party has already failed to answer in a timely
18 manner.

19 CONCLUSION

20 Aztec has not met its burden of showing “good cause” to set aside the default entered two
21 months ago. It makes no effort to satisfy two of the three elements required under Arizona law
22 to set aside a default, and makes only a minimal and inadequate effort to satisfy the third element,
23

24 ² Aztec also asserts [at 1] that Fierce has not come forward with evidence that it owned the
25 40,000,000 shares, ignoring that (1) Fierce has no obligation to supply evidence at the pleading
26 stage and (2) Aztec concedes that Fierce was issued the shares, since there would have been no
reason for Aztec to have (purportedly) canceled the shares in 2006 had they not been issued!

1 in support of which it supplies self-serving hearsay rather than the requisite sworn testimony.
2 Aztec's motion should be denied. Fierce is entitled to the relief sought in its Complaint and
3 respectfully requests that the Court sign the Judgment previously lodged with the Court.
4

5 Respectfully submitted this 10th day of September, 2018.

6 **COPPERSMITH BROCKELMAN PLC**

7 By /s/ Roopali H. Desai

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11 ORIGINAL efiled on September 10, 2018.

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