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8 **SUPERIOR COURT OF THE STATE OF ARIZONA**

9 **COUNTY OF MARICOPA**

10 **FIERCE INVESTMENTS, LTD.,**

11 Plaintiff,

12 v.

13 **AZTEC COPPER INC., an Arizona**
14 **corporation;**

15 Defendant.

Case No.: CV2018-006866

Case No.: CV2019-005943

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR
MISCELLANEOUS RELIEF**

(Assigned to the Honorable Christopher
Whitten)

16 On the 17th of June 2019 Plaintiff Fierce Investments, Ltd. ("Fierce") moved this Court
17 for Miscellaneous Relief for: (1) a request to allow the Receiver currently in charge of Aztec
18 Copper Inc. ("Aztec") to preside at an upcoming Shareholders' Meeting and to act as the election
19 inspector; (2) issuing an order confirming that Fierce is a shareholder in Aztec; and (3) issuing
20 a modified judgment stating that the number of shares owned by Fierce is forty (40) million.

21 On the 28th day of June 2019, this Court requested input of the Defendant and the Receiver
22 before July 12, 2019 prior to ruling on Fierce's motion for Miscellaneous Relief. This is the
23 formal Response of the Defendant, Aztec.

24 The history of litigation between the Plaintiff and Defendant is as follows: Plaintiff sued
25 Defendant under three separate actions:
26

1 CV2018-003675 To examine corporate books and records (“Books and Records
2 Action”)

3 CV2018-006866 To hold a shareholders’ meeting (“Shareholders’ Meeting Action”)

4 CV2019-005943 To appoint a Receiver (“Receiver Action”)

5 Plaintiff entered default judgments against Defendant in the Books and Records Action
6 and the Shareholders’ Meeting Action. These Judgments provided that the Defendant allow
7 Plaintiff access to the books and records of Aztec and that Aztec was to hold a meeting of the
8 Shareholders and invite Fierce. At the time, there was seemingly no financial incentive for
9 Defendant to defend against and litigate these issues. Indeed, Defendant would have incurred
10 significant costs to defend against these actions.

11 Since then, despite efforts to comply with the Judgements, Fierce brought motions to hold
12 Aztec in contempt in both the Books and Records Action and the Shareholders’ Meeting Action.
13 These motions have been put off by the Court until other matters can be resolved, for which the
14 Court ordered a receiver be appointed to Aztec.

15 With respect to the **first issue**, Defendant does not object to the Receiver acting as
16 Presiding Officer or Election Inspector at the next meeting of shareholders.

17 With respect to the **second issue**, Defendant absolutely opposes Plaintiff’s request for the
18 Court to proclaim that Fierce owns shares in Aztec. Plaintiff’s argument is grounded in the fact
19 that the Court issued default judgments against Aztec and in one of those judgments, Plaintiff
20 was granted permission to attend a meeting of the shareholders of Aztec. Because of this,
21 Plaintiff has interpreted this to mean Fierce must necessarily be a shareholder.

22 Using this logic and mechanism, any individual seeking to become a shareholder in a
23 company would be able to sue said company under the guise that they want to attend a meeting
24 of the shareholders of the company. Having no apparent financial incentive to defend itself, the
25 company would allow the default judgment to be entered not knowing that plaintiff would
26 become a shareholder.

1 Here, as in the foregoing hypothetical, there was no apparent financial incentive for Aztec
2 to defend itself in these actions and therefore defaulted. It was not expected that Plaintiff would
3 use the Default Judgments in the way it is now doing. There is now a clear financial incentive to
4 vigorously defend and litigate this issue, as the ownership of Aztec itself is in question.

5 In its Motion for Miscellaneous Relief, Plaintiff submits and relies on the doctrine of
6 *claim preclusion* in its attempt to bar the Defendant from actually litigating the issue of share
7 ownership. Claim preclusion, as described by the Court of Appeals of Arizona in *Circle K Corp*
8 *v. Indus Comm'n of Ariz.*, 179 Ariz. 422, 425 (App. 1993), “occurs when a party has brought an
9 action and a final, valid judgment is entered after adjudication or default. The party is foreclosed
10 from further litigation on the claim only when the policies justifying preclusion are furthered.”

11 Defendant submits that Plaintiff is erroneously relying on the doctrine of *claim preclusion*
12 when the proper doctrine to be applied in this matter is that of *issue preclusion*. The claim itself
13 is not being re-litigated, but rather *a key issue within the claim* is being litigated. This is what is
14 what is known as collateral estoppel, or *issue preclusion*.

15 Further, *issue preclusion* “occurs when the issue to be litigated was actually litigated in a
16 prior proceeding. In the prior litigation a final judgment was entered, the party against whom the
17 doctrine is to be invoked had a full opportunity to litigate the issue, the party actually did litigate
18 the issue, and the issue was essential to a final judgment” (*Id.* at 425). Further, the Court makes
19 clear that “in the case of a judgment entered by default, issue preclusion is not applied, because
20 none of the issues is litigated. Issue preclusion requires actual litigation. Claim preclusion does
21 not” (*Id.* at 425, emphasis added).

22 Defendant submits that it is not precluded in this case as the judgments for Plaintiff in the
23 Books and Records Action and the Shareholders’ Meeting Action were both entered by default
24 the claim itself is not being re-litigated, but rather an issue within that claim (i.e., share
25 ownership) is currently before this Court. *Issue preclusion* is the only doctrine Plaintiff can rely
26

1 on at this time and that doctrine makes clear that preclusion will not be applied when the issue
2 was not actually litigated (i.e., resulting from default judgment).

3 In the alternative, Defendant submits that claim preclusion cannot be applied here, as the
4 policies justifying preclusion are not furthered in this case (*See Id.* at 426). When the party
5 against whom preclusion is sought had no incentive to litigate the first, preclusion should not
6 apply. Here, as in *Circle K* and *Red Bluff Mines, Inc. v. Industrial Comm'n*, 144 Ariz. 199, at
7 205, there was little to no financial incentive to litigate. The Plaintiff is attempting to circumvent
8 an evidentiary hearing by relying on judgments that were not only established by default, but
9 were established when Defendant had no apparent financial incentive to defend itself.

10 With respect to the **third issue**, we agree that this shareholding issue is binary in nature.
11 However, Fierce has not been a shareholder in Aztec since its shares were voluntarily
12 surrendered and the certificate subsequently cancelled in 2011. With respect to the Court,
13 Defendant submits that an evidentiary hearing should be held to determine the truth of Defendant
14 and Plaintiff's polar opposite positions.

15 Fierce has had the further and sole benefit of deposing Aztec's director, Christine Reeves,
16 and has scheduled to depose Aztec's president, Ronald Arnold. Defendant respectfully asks the
17 Court for the opportunity to depose Fierce's representative prior to an evidentiary hearing and/or
18 signing an order with respect to the issue of share ownership.

19 DATED this 12th day of July 2019.

20 STEPHEN C. RICH, PLLC

21 By /s/ Stephen C. Rich

22 Stephen C. Rich

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1 ORIGINAL OF THE FOREGOING FILED
2 AND COPY MAILED

3 This 12th day of July 2019 to:

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BY /s/ Stephen C. Rich