

1 Keith Beauchamp (012434)
2 Roopali H. Desai (024295)
3 **COPPERSMITH BROCKELMAN PLC**
4 2800 North Central Avenue, Suite 1900
5 Phoenix, Arizona 85004
6 T: (602) 381-5490
7 F: (602) 224-6020
8 kbeauchamp@cblawyers.com
9 rdesai@cblawyers.com

10 *Attorneys for Plaintiff*

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

13 FIERCE INVESTMENTS LTD.,
14 Plaintiff,

15 v.

16 AZTEC COPPER INC., an Arizona
17 corporation;

18 Defendant.

) No. CV2018-006866
) CV2019-005943

) **REPLY IN SUPPORT OF MOTION FOR**
) **MISCELLANEOUS RELIEF RELATING**
) **TO COURT-ORDERED ANNUAL**
) **SHAREHOLDER MEETING**

) (Assigned to the Hon. Christopher Whitten)

) (Expedited consideration requested)

19 In its Motion for Miscellaneous Relief Relating to Court-Ordered Shareholder Meeting
20 (“Motion”), Fierce Investments Ltd. (“Fierce”) raised three issues. The Responses filed by the
21 Receiver and Aztec Copper Inc. (“Aztec”) reflect their agreement with Fierce on two of the
22 three issues: All parties agree (1) that the Receiver should preside over the Aztec shareholder
23 meeting and act as the election inspector, and (2) that the share ownership issue is binary, so
24 that if Fierce owns any shares of Aztec, it owns 40 million shares.

25 On the third issue, Aztec asserts that whether Fierce is a shareholder of Aztec has not
26 yet been decided. That is not accurate. Beyond that, Aztec never contested Fierce’s
shareholder status in the two separate cases that were brought against Aztec until after default

1 judgments were entered in both cases. Consistent with its delay tactics dating back to early
2 2018, Aztec now asks—for the first time—that there be a period set aside for discovery,
3 followed by an evidentiary hearing on the question of share ownership, before any shareholder
4 meeting takes place.¹

5 Aztec’s excuse for its failure to contest the issue of Fierce’s share ownership in either of
6 the two lawsuits that preceded this Receivership action is both illogical and legally insufficient:

7 Having no apparent financial incentive to defend itself, the company would allow the
8 default judgment to be entered not knowing that the plaintiff would become a
shareholder.

9 Here . . . there was no apparent financial incentive for Aztec to defend itself in
10 these actions and therefore [it] defaulted. . . . There is now a clear financial
11 incentive to vigorously defend and litigate this issue, as the ownership of Aztec
itself is in question.

12 Aztec Response at 2 and 3.

13 But Fierce’s ownership of Aztec shares is not a new issue. Fierce’s status as a
14 shareholder of Aztec, and its ownership of 40,000,000 shares of Aztec was put into question *in*
15 *the very first paragraph* of the Books and Records Complaint filed more than 16 months ago:
16 **“Fierce is the registered holder of 40,000,000 common shares of the Company (“the**
17 **Fierce Shares”).”** Complaint, ¶ 1 (CV2018-003675) (filed March 6, 2018) (emphasis added).
18 The second paragraph clearly asserted Fierce’s rights as a shareholder pursuant to ARS Title
19 10. These same allegations and assertions were made in the very first two paragraphs of
20 Fierce’s Complaint filed May 4, 2018 in the Shareholder Lawsuit (CV2018-006886). Aztec
21 elected not to contest these allegations. Instead, Aztec and its counsel made the strategic
22 decision not to answer either of the Complaints. Accordingly, Fierce moved for default.

23
24 ¹ Aztec has never sought to schedule a deposition of Fierce or served any discovery upon Fierce
25 in any of the three litigation matters. Also, ironically, Aztec’s principals have previously failed
26 to appear for depositions ordered by this Court and sought delays with respect to even limited
discovery.

1 Aztec did not “. . . allow the default judgment to be entered . . .” Further, Aztec’s
2 assertions in its Response (at 4) that it “had no financial incentive to litigate” the lawsuits filed
3 by Fierce is not only inaccurate, but also belied by the facts. On the eve of the default hearing
4 set by Commissioner Abramson, Fierce sought to further delay resolution by filing a Motion to
5 Set Aside Default in each of the lawsuits on August 20, 2018. The mere filing of those
6 motions required the default hearing to be cancelled and the matter transferred from the
7 Commissioner, resulting in substantial delay.

8 Moreover, in its Motions to Set Aside Default, Aztec raised the same issues it is once
9 again raising in its Response. It contested Fierce’s status as a shareholder (and the court’s
10 jurisdiction), claiming that default should not be entered because “there is a meritorious defense
11 for Aztec, namely that [Fierce] is not a shareholder and has no basis for asking this Court to enter
12 the Orders requested.”² See Motions to Set Aside Default at p. 2. [Copies of the Motion to Set
13 Aside Default filed in each of the cases are attached as Exhibit 1 and Exhibit 2] Fierce
14 responded to the Motion to Set Aside Default in each case by, among other things, supplying
15 evidence that it owns Aztec shares. [Copies of the Responses filed by Fierce are attached as
16 Exhibit 3 and Exhibit 4]. Aztec elected not to file a Reply to Fierce’s Response in either of the
17 cases.

18 **Aztec’s defense that Fierce is not a shareholder was rejected in separate rulings**
19 **issued in each case.** Thus, the issue has been decided. In the Shareholder Lawsuit, Judge
20 Whitten reasoned:

21 [T]he supposedly dispositive “review of Aztec’s current shareholders” is a letter
22 dated April 1, 2011 from Glen D. Harder, apparently an attorney in Vancouver.
23 Even ignoring that the letter is unsworn and appears to have been based on self-
24 serving hearsay, it does not show that Fierce Investments is not a shareholder

25 ² Thus, Aztec clearly knew about Fierce’s assertions that it was a shareholder and owned
26 40,000,000 shares of Aztec. Aztec’s claim that it did not know that Fierce’s status as a
shareholder was at issue in the lawsuits is simply implausible.

1 and/or was not a shareholder at a material time. **Aztec has not shown that its**
2 **defense is meritorious.**

3 [Nov. 7, 2018 Minute Entry at 1 (emphasis added)]

4 In the Books and Records Lawsuit, Judge Kiley also rejected Aztec's claim that Fierce
5 is not a shareholder:

6 Aztec asserts that it has a "meritorious defense" to the Plaintiff's claims because,
7 it contends . . . Fierce "has produced no evidence to support its assertion" that it is
8 an Aztec shareholder, and therefore that Fierce has failed to establish "standing"
9 to "inspect" Aztec's books and records. *Id.* **Fierce disputes Aztec's contention**
10 **that Fierce is not a shareholder.** Response at pp. 8-9.

11 . . . Here, as Fierce correctly notes, Aztec has not supported its contention about
12 its purportedly meritorious defense with any affidavit or other evidence. Instead,
13 it supports its contention that Fierce is not a shareholder with an unsworn letter
14 from Aztec's former attorney stating, without identifying any supporting evidence,
15 that "Fierce voluntarily cancelled its 40,000,000 Aztec shares..." Exhibit A to
16 Motion at p. 2. **The unsworn and conclusory letter submitted by Aztec falls far**
17 **short of establishing that Aztec had a meritorious defense to Fierce's claims.**

18 [October 10, 2018 Minute Entry at p. 2 (No. CV 2018-003675) (emphasis added)]

19 In sum, Aztec's defense that Fierce does not own shares in Aztec was expressly rejected
20 in both the Books and Records Lawsuit and in the Shareholder Lawsuit. Following these
21 rulings, final judgments were entered. Notwithstanding these adverse rulings on the issue of
22 Fierce's share ownership, Aztec elected not to appeal either judgment.

23 Aztec's defense that Fierce does not own shares in Aztec was also implicitly rejected by
24 entry of the judgment entered in the Shareholder Lawsuit and the judgment entered in the
25 Books and Records Lawsuit. In his Judgment in the Shareholder Lawsuit, Judge Whitten
26 ordered and declared that, "**Plaintiff has the right to participate in annual shareholder**
meetings of Aztec pursuant to A.R.S. § 10-703 and the Bylaws of the Company," and he
ordered Aztec to promptly hold a meeting. [Dec. 4, 2018 Judgment at 1 (emphasis added)] In
his Judgment in the Books and Records Lawsuit, Judge Kiley ordered and declared that,
"Plaintiff Fierce has the right to inspect the books and records of Aztec under A.R.S.

1 § 10-1602 but has been denied its right to conduct such inspection,” and he ordered Aztec to
2 makes its books and records available to Fierce for inspection. [Dec. 4, 2018 Judgment at 1
3 (emphasis added)]

4 Both of those judgments establish that Fierce is a shareholder of Aztec, because
5 otherwise Fierce would have no right, under the relevant statutes, to inspect Aztec’s books and
6 records or to successfully demand that a shareholder meeting be held in which it has a right to
7 participate. As this Court aptly explained at the hearing on April 19, 2019: “It has been
8 established in the judgments that Fierce is a shareholder. Those two judgments, otherwise,
9 make no sense.” (Transcript of April 19, 2019 hearing, at 24). “[W]e’ve litigated whether
10 Fierce is a shareholder. That issue has been resolved in two different judgments.” (*Id.* at 22).

11 On these facts, Aztec is precluded as a matter of law from now belatedly challenging
12 (again) Fierce’s status as an Aztec shareholder. *See Pettit v. Pettit*, 218 Ariz. 529, 533 ¶ 10
13 (App. 2008) (holding that under the doctrine of claim preclusion “a second claim is precluded
14 ‘not only upon facts actually litigated but also upon those points which might have been
15 litigated.’”) (citations omitted); *Circle K Corp. v. Indus. Comm’n of Ariz.*, 179 Ariz. 422, 425
16 (App. 1993). Section 18 of the Restatement (Second) of Judgments—cited favorably in
17 *Pettit*—provides that “[i]n action upon the judgment, the defendant cannot avail himself of
18 defenses he might have interposed, or did interpose, in the first action. Restatement (Second)
19 of Judgments § 18, cmt. c, illustration 4. This issue was decided in the final judgment in each
20 of the Books and Records Lawsuit and the Shareholder Lawsuit, after Aztec put the issue
21 forward as a “meritorious defense.” Any limitations in Aztec raising this issue as a defense in
22 those actions were entirely as a result of Aztec’s own strategic decisions. Aztec should not
23 now be able to use its own strategic failures as a defense against the Motion. The principal of
24 finality in proceedings must be given effect. To do otherwise would delay matters even further
25 and open up the potential of conflicting decisions, including conflicting decisions from the
26 same court on the same issue.

1 For the reasons set out above, Fierce respectfully requests that the Court enter the
2 proposed form of order submitted with Fierce's Motion for Miscellaneous Relief Relating to
3 Court-Ordered Shareholder Meeting, so that an Aztec shareholder meeting may be scheduled
4 and held as required by the Order Appointing Receiver and that Fierce may vote its 40 million
5 shares at that meeting.

6 Respectfully submitted this 24th day of July, 2019.

7 **COPPERSMITH BROCKELMAN PLC**

8 By /s/ Keith Beauchamp

9 Keith Beauchamp

10 Roopali H. Desai

11 *Attorneys for Plaintiff*

12 COPY served via email and U.S. mail
13 on July 24, 2019, upon:

14 Stephen C. Rich
15 Stephen C. Rich, PLLC
16 3401 East Elwood, Suite 101
17 Phoenix, AZ 85040
18 scr@srichlaw.com
19 *Attorney for Defendant*

20 W. Scott Jenkins, Jr.
21 Molly J. Kjartanson
22 Quarles & Brady LLP
23 Two North Central Avenue
24 Phoenix, Arizona 85004-2391
25 Scott.Jenkins@quarles.com
26 Molly.Kjartanson@quarles.com
Attorneys for Receiver
MCA Financial Group, Ltd.

/s/ Sheri McAlister