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8 **ARIZONA SUPERIOR COURT**  
9 **MARICOPA COUNTY**

10 FIERCE INVESTMENTS LTD., ) No. CV2018-006866  
11 ) CV2019-005943  
12 Plaintiff, ) **FIERCE’S OPPOSITION TO AZTEC’S**  
13 v. ) **MOTION PURSUANT TO RULE 7, ARCAP:**  
14 AZTEC COPPER INC., an Arizona ) **(1) TO STAY EXECUTION; AND (2) TO SET**  
15 corporation; ) **SUPERSEDEAS BOND**  
16 Defendant. ) **AND**  
17 ) **MOTION FOR SANCTIONS**  
18 ) (Assigned to the Hon. Christopher Whitten)  
19 ) *(Expedited consideration requested)*

18 Plaintiff Fierce Investments Ltd. hereby responds to and opposes the Motion Pursuant to  
19 Rule 7, ARCAP: (1) to Stay Execution; and (2) to Set Supersedeas Bond (“Stay Motion”) filed  
20 by Aztec Copper Inc. (“Aztec”). The Stay Motion seeks an order staying execution of the  
21 Order Granting Motion for Miscellaneous Relief Relating to Court-Ordered Annual  
22 Shareholder Meeting (“Order re Miscellaneous Relief”), which was entered on September 3,  
23 2019. The Stay Motion must be denied, and Fierce respectfully requests that the Court act on  
24 an expedited basis so that the Aztec shareholder meeting, which is long overdue and has been  
25 noticed by the Receiver for October 1, 2019, can take place as scheduled.

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1 Receiver directed (at ¶ 2(a)) that the “Receiver shall set a shareholder meeting to be held in  
2 Maricopa County within forty (40) days of the date of this order, or as soon as the Receiver  
3 is otherwise able . . . .” (Emphasis added.)

4 The Order Appointing Receiver was an appealable order. *See* A.R.S. § 12-2101(A) (an  
5 appeal may be taken from an order “appointing a receiver”). However, Aztec did not appeal  
6 the Order Appointing Receiver, and the time for doing so has long since passed.

7 While the Receiver was collecting the necessary contact information to notice Aztec’s  
8 shareholders, Fierce filed a Motion for Miscellaneous Relief to assist in the conduct of the  
9 court-ordered shareholder meeting.<sup>2</sup> First, Fierce asked that the Receiver be authorized to  
10 preside over the shareholder meeting and act as the election inspector, a request that Aztec did  
11 not oppose. Second, Fierce asked that the Court confirm that prior orders of this Court  
12 established that Fierce was a shareholder, to avoid any dispute at the meeting about Fierce’s  
13 ability to vote its 40 million shares.

14 At the oral argument held on August 23, 2019, this Court found that “Fierce Investment,  
15 Ltd. owns 40,000,000 shares of Aztec Copper, Inc.” [08/28/19 Minute Entry at 2.] In the  
16 Minute Entry filed by the Clerk of the Court on August 28, 2019, this Court ruled:

17 The issue of Fierce’s ownership interest was litigated in both cases in the  
18 context of a motion to set aside default. The Court expressly considered the  
19 evidence submitted by Aztec and in both proceeding and found it unconvincing.

20 That the result was affirmation of a default judgment rather than a  
21 comprehensive judgment de novo does not deny preclusive effect to portions of  
22 the final judgment based on findings derived from the motion to set aside.

23 ACCORDINGLY, Plaintiff’s Motion for Miscellaneous Relief Relating to  
24 Court Ordered Annual Shareholder Meeting is granted. The Court will sign a  
25 modified version of the Proposed Order attached to the motion.

26 [08/28/19 minute entry at 2) (emphasis added).]

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<sup>2</sup> The Receiver was not able to obtain the necessary contact information for shareholders such  
that the meeting could be set within 40 days of the May 6, 2019 Order, but he has since done so  
and has noticed the shareholder meeting for October 1, 2019.

1 On September 3, 2019, the Clerk of the Court entered the Order re Miscellaneous  
2 Relief, which provided:

3 IT IS HEREBY ORDERED that the court-appointed Receiver preside over  
4 the shareholder meeting that has been ordered by the court, and that the Receiver  
5 (or his designee) serve as the election inspector at the meeting;

6 IT IS HEREBY FURTHER ORDERED granting Plaintiff's motion seeking  
7 confirmation of the court's prior orders that Fierce Investments Ltd. is a  
8 shareholder of Aztec Copper Inc., and that Fierce owns 40 million shares of Aztec  
9 common stock.

9 [Order re Miscellaneous Relief, at 1 (09/03/19) (emphasis added).] As this Court has noted on  
10 several occasions, Aztec did not appeal any of the prior orders in this case—or in the related  
11 Books and Records Action—notwithstanding that the issue of Fierce's ownership in Aztec was  
12 litigated and resolved adversely to Aztec in those orders.

13 On September 16, 2019, Aztec filed a Notice of Appeal of the Order re Miscellaneous  
14 Relief. The next day Aztec filed its Stay Motion.

#### 15 ARGUMENT

#### 16 I. The Order re Miscellaneous Relief Is Not an Appealable Order and Thus Is 17 Not Automatically Stayed.

18 Throughout its Stay Motion, and without explanation—or justification—Aztec refers to  
19 the Order re Miscellaneous Relief as a “judgment.” But that miscellaneous order is not a  
20 “judgment,” and it certainly is not a “final judgment” that would be appealable pursuant to  
21 A.R.S. § 12-2101. Nor is it an interim judgment containing Rule 54(b) language.

22 In certain circumstances, Rule 62 of the Arizona Rules of Civil Procedure and ARCAP  
23 7 automatically stay enforcement of judgments on appeal pending payment of an appropriate  
24 supersedeas bond. But that process only applies to appealable judgments and orders, which the  
25 Order re Miscellaneous Relief most certainly is not.

1 Aztec’s Motion for Stay does not automatically stay enforcement of the Order re  
2 Miscellaneous Relief because this is a receivership action. There is a specific statutory  
3 provision relating to receivership actions, and it provides that an order “appointing a receiver”  
4 is appealable. A.R.S. § 12-2101. Thus, the Order Appointing Receiver entered in this case on  
5 May 16, 2019 was appealable. That order directed the Receiver to hold the shareholder  
6 meeting and is one of many orders confirming that Fierce is a shareholder. Yet Aztec did not  
7 appeal the Order Appointing Receiver when it had the chance.

8 Aztec cannot appeal interim orders relating to the receivership. “Section 12-  
9 2101(A)(5)(b) deals only with the appointment of a receiver, and does not provide appellate  
10 jurisdiction to review other types of receivership orders.” *AEA Federal Credit Union v. Yuma*  
11 *Funding, Inc.*, 237 Ariz. 105, 111 ¶ 20, 346 P.3d 991, 997 (App. 2015) (dismissing appeal of  
12 interim receivership order for lack of jurisdiction). As the Court of Appeals explained in  
13 *Magnotta v. Serra*, 2018 WL 1004289 at ¶ 10 (Ariz. App. Feb. 22, 2018): “we do not have  
14 jurisdiction to address the [superior] court subsequently expanding the ‘purposes and powers’  
15 of the temporary receivership.” *See also Ritter v. Arizona Cattle Co.*, 34 Ariz. 278, 285-86,  
16 271 P. 25, 27-28 (1928) (holding interlocutory orders regarding actions made in the course of  
17 receivership “may be reviewed only on appeal from the final judgment”).

18 If Aztec actually goes forward with its threatened appeal, then Fierce will move to  
19 dismiss the appeal for lack of jurisdiction. But in the meantime, this Court should confirm to  
20 the Receiver that this action is not stayed and that the shareholder meeting ordered back on  
21 May 16 and not appealed should take place promptly.<sup>3</sup>

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25 <sup>3</sup> To the extent Aztec is implicitly contesting that Fierce owns 40 million shares of Aztec, that  
26 issue was also resolved long ago in orders in this action and in the Books and Records Action,  
none of which were appealed by Aztec.

1 **II. Even if the Order re Miscellaneous Relief Was an Appealable Order, It**  
2 **Would Not Be Automatically Stayed While on Appeal.**

3 There is good reason why Superior Courts are not divested of jurisdiction and why  
4 proceedings are not stayed when even a proper appeal is made from appointment of a receiver:  
5 “The appointment of a receiver sets in motion a series of events that cannot easily be unwound  
6 and may have significant effects on relationships and transactions involving non-parties.” *AEA*  
7 *Funding*, 237 Ariz. at 110, 346 P.3d at 996 (citation omitted).

8 For that reason, Rule 62 treats orders in receivership and injunction actions differently  
9 than orders entered in cases involving merely monetary judgments. *Compare* Rule 62(c) and  
10 Rule 62(d) (italicized emphasis added):

11 **(c) Stay by Bond or Other Security.** At any time after judgment is entered, a  
12 party may obtain a stay by supersedeas bond or other security as provided in Rule  
13 7 of the Arizona Rules of Civil Appellate Procedure.

14 **(d) Stay of an Injunction or Receivership.** Subject to Rule 7(a)(2) of the Arizona  
15 Rules of Civil Appellate Procedure *and unless the court orders otherwise*, an  
interlocutory or final *judgment in an action for* an injunction or *receivership is*  
*not stayed after being entered, even if an appeal is taken.*

16 Despite this distinction, Aztec’s Stay Motion asserts without explanation that the phrase  
17 “Subject to Rule 7(a)(2) of the Arizona Rules of Civil Appellate Procedure” in Rule 62(d)  
18 means that seeking a supersedeas bond under Rule 7 stays a receivership action just the same  
19 as actions involving monetary judgments. But that construction would render the distinction  
20 between subsections (d) and (e) in Rule 62 a nullity. The only appropriate interpretation of  
21 that phrase is that other provisions in Rule 7(a)(2) may be considered inappropriate  
22 circumstances. One example of such a provision is that ARCAP 7 permits the Court to “enter  
23 any further order, in lieu of or in addition to the bond, which maybe appropriate . . . .” It  
24 would make no sense to construe the phrase “[s]ubject to Rule 7(a)(2)” to mean the general  
25 allowance for an automatic stay in ARCAP 7 trumps the specific exemption from the  
26 automatic stay found in Rule 62(d).

1 Relatedly, and equally significant, Aztec ignores the phrase “and unless the court orders  
2 otherwise” found in Rule 62(d). Here, this Court has not and should not “order otherwise.”  
3 Until and unless this Court “orders otherwise,” the Order re Miscellaneous Relief is an  
4 enforceable order that must be respected by the Receiver and which is not stayed by the  
5 specious Notice of Appeal and Motion for Stay filed by Aztec.

6 **III. Aztec and Its Counsel Should Be Sanctioned.**

7 As explained above, there is no substantial justification for Aztec’s position that the  
8 Order re Miscellaneous Relief is a “judgment,” as asserted throughout the Stay Motion. The  
9 order is an interim order that would not be appealable in any case, and certainly is not  
10 appealable in a receivership action. This is merely the latest in a long string of improper  
11 actions taken in this litigation by Aztec, which have caused unreasonable delay and significant  
12 expense to Fierce.

13 The purpose here, obviously, is to unreasonably delay the shareholder meeting that this  
14 Court originally ordered Aztec to hold in Maricopa County no later than January 14, 2019  
15 (within 40 days of the Judgment entered on December 4, 2018). Due in large part to Aztec’s  
16 failure to hold that meeting in accordance with the Judgment entered on December 4, 2018,  
17 this Court appointed a Receiver on May 16, 2019 and directed the Receiver to hold the  
18 meeting. Aztec did not appeal the Judgment, nor did it appeal the Order Appointing Receiver.  
19 Yet now it improperly claims that the Order re Miscellaneous Relief is an appealable order and  
20 misconstrues Rule 62(d) in yet another gambit to prevent Fierce (and other shareholders) from  
21 exercising their rights at the shareholder meeting.

22 Because there is no basis for Aztec’s assertion that the Order re Miscellaneous Relief is  
23 a judgment that may be appealed, Aztec and its counsel should be required to appear and show  
24 cause why they should not be held liable, jointly and severally, for the reasonable attorneys’  
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1 fees and costs incurred by Fierce in opposing this Motion for Stay. *See* A.R.S. §§ 12-349  
2 & -350.<sup>4</sup>

3 **CONCLUSION**

4 Aztec's dilatory tactics have long delayed the Shareholder meeting that this Court first  
5 ordered take place more than nine months ago. Holding a Shareholder meeting was the  
6 primary purpose of this action and now that the meeting is on the verge of happening, Aztec is  
7 seeking to appeal a non-appealable interim order. Aztec's actions are not substantially justified  
8 and are intended to expand and delay this proceeding. Fierce respectfully requests that the  
9 Court reject Aztec's Motion to Stay and Set Supersedeas Bond on an expedited basis.

10  
11 Respectfully submitted this 23rd day of September, 2019.

12 **COPPERSMITH BROCKELMAN PLC**

13 By /s/ Keith Beauchamp

14 Keith Beauchamp

15 Roopali H. Desai

16 *Attorneys for Plaintiff*

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24 <sup>4</sup> Fierce reserves its right to also seek sanctions under Rule 11. Undersigned counsel sent  
25 emails to Aztec's counsel on September 17 and 19 advising that the Order re Miscellaneous  
26 Relief was not appealable, and seeking some explanation for Aztec's position. Aztec's counsel  
has not responded. However, the 10-day period set out in Rule 11(c)(2) has not yet passed, so  
a motion pursuant to Rule 11(c)(3) would be premature at this time.



1 COPY served September 23, 2019,  
via hand delivery and email upon:

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13  
14 /s/ Sheri McAlister \_\_\_\_\_

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