

## Investment Funds Litigation Alert

### New York Court Dismisses Public Company's Defamation Lawsuit Against Short Sellers on Constitutional Grounds

October 1, 2012

On August 16, 2012, New York Supreme Court Justice Carol R. Edmead dismissed a defamation action brought by Silvercorp Metals Inc. ("Silvercorp"), a publicly-traded company, against a hedge fund and a group of other defendants who issued negative reports opining that Silvercorp might be engaging in fraud. This decision has important ramifications for professional investors and analysts who are considering publicizing their opinions regarding companies such as Silvercorp, who may retaliate with the threat of litigation.

Silvercorp, a Canadian based company, is reported to be one of the largest silver producers in China and mines other minerals in both China and Canada. Its securities are traded on both the New York and Toronto Stock Exchanges.

The reports in question, which were issued in August 2011 and September 2011, were prepared by hedge funds and investors looking into the accuracy and integrity of Silvercorp's financials and statements concerning the quality of its mineral reserves. According to the filings in the case, the reports were disseminated anonymously through the Internet and mailings to Canadian securities regulators. The reports were issued by two different groups of defendants who were acting independently of one another. In essence, the reports reached the same conclusion: that Silvercorp was engaged in fraud. The reports were based on documents, both publicly available and privately obtained, which were disclosed with the reports. Among the documents relied on were Chinese news articles regarding an auction of a minority interest in one of Silvercorp's most important mines, reports compiling financial data that was represented as being copied from Chinese regulatory filings, and an analysis of samples of ore that the authors believed came from a Silvercorp mine.

Silvercorp responded aggressively. Immediately after the reports became public, Silvercorp announced its intention to pursue legal action against anyone connected to the reports. Silvercorp launched a public relations campaign accusing the authors and publishers of the reports of engaging in a "short-and-distort" scheme and calling itself the victim of fraud and manipulation. Silvercorp filed a lawsuit against the authors of the reports in New York Supreme Court on September 22, 2011 alleging defamation and other related claims. In the year since, Silvercorp has sought documents and depositions from numerous other hedge funds and investors, both in the U.S. and abroad. While Silvercorp initially filed its complaint against a series of "John Does", the complaint was amended after Silvercorp took discovery to add the actual authors of the reports as defendants.

Justice Edmead dismissed Silvercorp's defamation claims based on the finding that the reports were constitutionally protected opinion and therefore not actionable. In its decision, the court highlighted that the reports were expressed in such a way as to inform the reader that the claims represented the authors' opinions. The court found it important that the reports disclosed that the authors had a short position in Silvercorp, which—even without disclosing the extent of that position or the amount authors stood to gain—suggested to readers that the authors were not disinterested and that the report should be read as opinion. The court also found it important that the authors' reports attached the documents upon which its assertions were based and expressly encouraged the reader to replicate the authors' research. Finally,



the court highlighted the fact that the reports used phrases like the author “believes” and “potential” fraud, which helped demonstrate the authors were expressing statements of opinion.

Although defamation cases depend on specific facts, and the line between a factual assertion and a non-actionable opinion is often thin, the case serves as a reminder of the care that ought to be exercised in drafting public statements concerning third parties. In particular, disclosing an interest in the subject of such an announcement as well as providing the documents and facts relied upon encourages a reader to treat the material as opinion based on the underlying facts and helps reduce potential exposure.

Silvercorp’s defamation action was captioned *Silvercorp Metals Inc. v. Chinastockwatch.com* (New York Supreme Court, Index No. 150374/2011). The lead defendant was represented by Akin Gump Strauss Hauer & Feld LLP. The team responsible for the motion to dismiss included Douglass B. Maynard, Michael A. Asaro, Antonio R. Delgado and Jennifer L. Woodson (contact information below).

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