IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERICAS MINING CORPORATION, *et al.*, Defendants Below, Appellants, v. MICHAEL THERIAULT, as Trustee for the Theriault Trust, Plaintiff Below, Appellee.	No. 29, 2012 **CD-ROM Version To Be Filed** On Appeal from the Court of Chancery, Consol. C.A. No. 961-CS
SOUTHERN COPPER CORPORATION, formerly known as Southern Peru Copper Corporation, Nominal Defendant Below, Appellant, v. MICHAEL THERIAULT, as Trustee for the Theriault Trust, Plaintiff Below, Appellee.	No. 30, 2012 On Appeal from the Court of Chancery, Consol. C.A. No. 961-CS

AMC APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

Plaintiff asks the Court to uphold an unprecedented judgment in the face of clear reversible error committed during the course of a piecemeal trial conducted over four days. An affirmance would require the Court to support a trial court which arbitrarily and capriciously excluded a witness who could have explained the analysis employed by the Special Committee's financial advisor, Goldman Sachs. The trial court then rejected Goldman's results out-of-hand, presupposing that the analysis was entitled to no weight because — as a rule — special committees and their advisors who are negotiating with a controlling shareholder operate with a "confined mindset." Having discarded Goldman's valuation without hearing from Goldman, the trial court fashioned its own, largely undisclosed valuation model to arrive at a value for Minera. On this basis, the trial court awarded a $2 billion judgment and $300 million in attorneys' fees.

Plaintiff does not dispute that he "engaged in a pattern of litigation delay that compromised the reliability of the record," particularly in that the delay caused a situation where the Goldman witness originally identified to testify was not available to Defendants at trial. After allowing this case to sit for nearly seven years, it was not a surprise, let alone an "unfair surprise," that Defendants were forced to put forward a different Goldman witness to testify at trial about the key issue in the case. Given the trial court's admonition in denying summary judgment that a key question at trial would be "what the bankers for the committee were thinking," precluding that testimony was and remains inexplicable.

Once the trial court made up its mind to exclude the Goldman witness, the trial court compounded that error by applying the faulty logic that if it didn't understand the financial advisor's analysis it must have been corrupt. The arguments advanced by Plaintiff to support the trial court's *sui generis* valuation underscore the lack of legal or evidentiary foundation for the opinion. Plaintiff argues that Minera was not worth $3 billion in cash. But this ignores the fact that the merger at issue was not a cash transaction; it was a stock-for-stock deal. And, Plaintiff has no credible response to the fact that Minera's DCF measure in 2004 was not a reliable measure of the price it would have obtained in the open market, because valuing a *copper* mining company depends largely on the market's expectations regarding future copper prices.

Regarding the burden of proof, Plaintiff fails to address that the trial court's failure to shift the burden of proof before trial left the parties without any clear direction on the case to be presented. Instead, Plaintiff argues that Defendants were not clear enough with the trial court that the burden should be determined prior to the trial. Yet, the very references Plaintiff cites show Defendants indeed argued repeatedly that the burden must be shifted before trial so that the parties would know how to present the case.

Plaintiff does not cite any evidence that supports the trial court's decision on damages. This is no surprise given the trial court's recognition that Plaintiff failed to offer any proof of damages. Separate and apart from everything else, the gigantic damages award lacks any foundation.

Finally, the trial court's award of a $35,000 per hour attorneys' fee was an abuse of discretion on its face. Nowhere in the opposition does Plaintiff provide any basis for affirming such a high hourly fee because no such basis exists. And, it was only after being pushed to trial by two consecutive Vice Chancellors that Plaintiff's counsel began meaningful work on this case. Such an award therefore improperly rewards Plaintiff for a pattern of litigation delay that "compromised the reliability of the record" and allows Plaintiff's counsel to profit as a direct result of their delay by collecting fees on the nearly $700 million in prejudgment interest that accrued while the case languished.

Where the sponsor of a transaction is compelled to defend its fairness at a trial nearly seven years after the fact because the Plaintiff did virtually nothing to prosecute the case, which in turn seriously prejudiced the record, it offends all traditional notions of what a trial is supposed to be in the nation's leading business court to permit this arbitrary and capricious judgment to stand. There is no rational basis for the trial court to have excluded the testimony of the financial advisor at trial, to remain effectively silent as the trial progressed, and then to render a decision which relies on the Chancellor's personal surmise of what Goldman must have been thinking. The judgment should be reversed.

ARGUMENT

I. THERE WAS NO BASIS FOR THE EXCLUSION OF TESTIMONY FROM GOLDMAN

The Court of Chancery's exclusion of testimony from the Special Committee's financial advisor, Goldman Sachs, was reversible error. *Drejka v. Hitchens Tire Serv. Inc.*, 15 A.3d 1221, 1223-24 (Del. 2010); *Sheehan v. Oblates of St. Francis De Sales*, 15 A.3d 1247, 1253 (Del. 2011). The trial court excluded this testimony despite specifically identifying "what the bankers for the committee were thinking" as a key question for trial and despite the fact that the trial court based its opinion almost entirely on criticisms of Goldman's valuation and resulting fairness opinion. The ground for its decision, that Mr. Del Favero was identified too late, and that as a result his testimony would be unfair to Plaintiff, has no legal basis. That ruling was all the more in error because had Plaintiff prosecuted diligently the case rather than allowing it to molder for nearly seven years between the merger and trial, the initial Goldman witness would have been available to testify.

The exclusion of a Goldman witness infected the trial court's entire handling of the trial. The trial court failed to determine the burden shift issue before trial (as it should have done) because it felt it needed to question a Goldman representative on the witness stand about the use of valuation approaches. *See* A1496 at 121:2-11 ("I have too many questions to conclude that under the *Tremont* standard, this special committee works a burden shift. And that, again – I hunger for an explanation as to . . . whether this is the approach that the banker has ever taken in a strategic acquisition of this kind.").

A. Plaintiff's Attempt to Distinguish Case Law Fails

In *Drejka*, which Defendants relied upon in their opening brief, this Court found that the trial court abused its discretion by excluding testimony and entering judgment because a witness was identified untimely under the trial court's scheduling order. Plaintiff fails to distinguish *Drejka* or *Sheehan*. Plaintiff contends that the distinction is that *Drejka* and *Sheehan* involved the exclusion of expert testimony, not fact testimony. This makes no difference because there is no basis for Plaintiff's assumption that expert testimony is entitled to special deference that fact testimony is not. And, Plaintiff himself relies on a case involving expert testimony. *See* Pl. Br. at 21 (citing *Goode v. Bayhealth Med. Ctr., Inc.*, 2007 WL 2050761 (Del. Supr.)).

B. Neither the Ground Relied Upon by the Trial Court nor the Alternate Ground Offered by Plaintiff Is a Proper Basis for Exclusion

Plaintiff concedes that the timing of the identification of the substitute Goldman witness is not a lawful basis for exclusion. Instead, Plaintiff argues that receiving testimony from Mr. Del Favero would have required a modification in the trial schedule, and on such a basis, relevant testimony should have been excluded.

As an initial matter, at the time that Mr. Del Favero was identified as a witness, the trial schedule was in flux. In early June, the trial court informed the parties that the schedule needed to be adjusted to accommodate then-Vice Chancellor Strine's elevation to Chancellor. The trial court also informed the parties that in the event the recently adjusted trial dates were insufficient to cover all witnesses, the court would schedule additional dates. *See* AR180 ("Elane from Vice Chancellor Strine's office just phoned and advised that the trial schedule is changed as follows . . . If after Friday additional days are needed, the Court will work to add 2 additional days."). Plaintiff's insistence that Mr. Del Favero's testimony required modification of "long-standing trial dates" is contradicted by the facts.

In the brief telephonic argument regarding the availability and timing of a Goldman witness, the trial court framed the issue as:

> Tell me why I . . . should be hearing a new witness at this stage, just because an investment banker has chosen not to come and testify in a trial involving his work.

A1796 at 3:21-24. The trial court's decision was then based on Defendants' purported failure to "promptly identif[y] this gentleman as a relevant witness and ma[k]e him available for deposition." A1800 at 7:3-7. This decision was wrong for a number of reasons, most of which Plaintiff simply ignores.

First, Defendants had no control over a former Goldman employee. For one thing, Goldman was retained by and performed its work for the Special Committee, all of the members of which were dismissed at the summary judgment stage, and not for Defendants. The witness was no longer at Goldman by the time the trial occurred, nearly seven years after the deal closed. And, the witness did not tell Defendants that he would not appear at trial until early June, shortly before the pre-trial conference, leaving Defendants and Goldman with the task of identifying a new witness to explain the relative valuation method to the trial court. If there is blame to be placed for this series of events, it should be at Plaintiff's — not Defendants' — doorstep.

Second, Defendants identified Mr. Del Favero in the proposed pretrial order, *see* AMC Def. Op. Br. at 17, and he would have been available for a deposition before his trial testimony.

Third, Plaintiff does not contend that Defendants had any obligation to identify Mr. Del Favero earlier than in the pretrial order. Plaintiff cites a case in his 'Scope of Review' section for the proposition that, "'[w]hen a party does not comply with the discovery rules and pre-trial orders, it is not an abuse of discretion for the trial judge to exclude testimony not properly identified.'" Pl. Br. at 21. This merely underscores the fact that exclusion here was improper. Plaintiff does not and cannot contend that Defendants failed to comply with any discovery rule or pretrial order. To the contrary, the Goldman witness was timely identified.

C. Mr. Del Favero's Excluded Testimony Was Relevant

As demonstrated in Defendants' opening brief, the trial court's decision relies heavily on criticisms of Goldman's valuation and fairness opinion. *See* AMC Def. Op. Br. at 17-18. Plaintiff himself takes up the refrain throughout his brief, arguing that the Chancellor's criticism of Goldman was "deserved" and characterizing the relative valuation method used by Goldman in advising the Special Committee as "mystical." Pl. Br. at 9, 31. Plaintiff mentions Goldman by name thirty-three times in his statement of facts alone. And, Plaintiff mentions Goldman eighty-five times throughout his brief. Yet Plaintiff argues — albeit inconsistently with his protests that permitting the testimony would have been prejudicial — that Mr. Del Favero's testimony would have been unimportant and that "Defendants have failed to show how Mr. Del Favero's testimony would have had any probative value." Pl. Br. at 25. To the contrary, Mr. Del Favero's testimony was essential.

Before trial, the trial court identified "what the bankers for the committee were thinking" as a key question for trial. A1489 at 114:5-14. Mr. Del Favero's testimony was undoubtedly relevant to this question because his testimony would have gone to the heart of the case: ***why*** Goldman's methodology for calculating a price for Minera was ultimately correct. As Defendants pointed out in the opening brief, the trial court offered extensive criticism of the valuation process that could have been explained through this testimony.[1] *See* AMC Def. Op. Br. at 17-18. As just one example, the trial court lamented that "the implied standalone DCF values of Minera and Southern Peru that were used in Goldman's final relative valuation of the companies are hard to discern and *have never been fully explained by the source.*" Ex. A at 96 (emphasis added).

D. The Record Was Incomplete Without Testimony from a Goldman Witness

Plaintiff also argues that there was sufficient evidence on the issues about which Mr. Del Favero would have testified and that "Defendants themselves argued post-trial [that] the record was 'replete' with relevant Goldman testimony." Pl. Br. at 21. This too is incorrect.

First, the citation in Plaintiff's brief regarding Defendants' purported concession that the record is replete with Goldman testimony does not mention testimony at all. *See* Pl. Br. at 21. It references the Goldman presentations in the record which contain its valuation analysis, but not the explanation of 'why' that the trial court focused on in its opinion.

Second, the deposition of Mr. Sanchez taken by Plaintiff in 2009 is not an adequate substitute for a live trial witness, especially since it was taken well before the trial court identified the key issue it was concerned with during the summary judgment phase. Indeed, during the summary judgment hearing, the trial court emphasized that it would not be able to decide the case based on deposition transcripts or a paper record. *See* A1488-89 at 113:22-114:2 ("I think if anyone read the transcripts or read the briefs, the idea that somehow you can make this determination on the cold record -- I mean, somebody just must have a more confident mind than I have.").

Third, the expert testimony of Professor Schwartz does not serve as an acceptable substitute for fact testimony from a Goldman witness about what the Special Committee's financial advisor actually did and why Goldman did it in 2004. Plaintiff contends that because Professor Schwartz also used a relative valuation methodology in his expert report, his testimony is sufficient. But Professor Schwartz's testimony was not intended to explain what Goldman did

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1 Once the trial court recognized that it would make findings as to Goldman's state of mind regarding the valuation process, it should have revisited the exclusion of a Goldman witness or, at the very least, advised the parties before the trial concluded that this issue would be determinative.

and why – because Professor Schwartz is not a Goldman employee and did not himself consider the analysis that led Goldman to opine in 2004 that the merger was financially fair.

Fourth and finally, to the extent that Plaintiff argues that Defendants were "content" to let the trial court rely on the videotaped deposition of Mr. Sanchez, *see* Pl. Br. at 25, Defendants were never "content" to be prejudiced by the unavailability of Mr. Sanchez. Among other things, the prejudice to Defendants was caused by Plaintiff's delay in prosecuting this case. But Defendants did not control Mr. Sanchez and could not subpoena him for trial. Instead, Defendants worked diligently with Goldman and its counsel to secure an appropriate substitute witness as soon as they learned that Mr. Sanchez refused to appear.

E. A Scheduling Issue – Particularly One Resulting from Plaintiff's Conduct – Provides No Basis for Exclusion of Relevant Testimony

Allowing a proposed trial schedule to dictate which testimony can and cannot be presented by the parties would be the 'tail wagging the dog.' A case with this much at stake cannot and should not be decided on an incomplete record because of a scheduling issue that could easily be accommodated during a bench trial.

Like the trial court, Plaintiff has cited no case supporting his argument that a trial court may exclude evidence because of a proposed trial schedule. The one case Plaintiff cites, *Goode v. Bayhealth Medical Center, Inc.*, 2007 WL 2050761, at *3 (Del. Supr.), did not address the relevant issue here. In that case, the Court had to decide whether the trial court properly limited an expert's testimony to issues for which the expert had been identified before trial. The trial court's decision to limit the expert's testimony was explicitly based on the party's failure to comply with discovery rules and pre-trial orders, which, as noted above, Plaintiff concedes did not occur here. Moreover, in *Goode*, this Court found there was no prejudice because the party offering the testimony prevailed on the issue to which the testimony related.

Plaintiff does not address that it was Plaintiff's own failure to prosecute this case for years that created the scheduling conflict in the first place. As noted by the trial court, Plaintiff's conduct already "compromised the reliability of the record." Ex. A at 3. The trial court found that "the record suffers from some issues, including the absence of a Goldman trial witness and likely diminished memories, that are properly laid at the plaintiff's door." *Id.* at 99 n.190. It was inherently unfair for the trial court to require Defendants to bear the consequences of Plaintiff's conduct by excluding Mr. Del Favero.

Plaintiff argues that Mr. Del Favero's testimony would have required the bench trial to "be continued ***for weeks***." Pl. Br. at 25 (emphasis in original). It is difficult to see any harm — let alone unfair harm — caused by such delay when Plaintiff allowed this case to languish unprosecuted ***for many years***. And, as noted above, the trial court had already told the parties that it would be available for additional days after the first week of trial because of its need to reschedule certain trial times in light of Chancellor Strine's upcoming confirmation hearings. After nearly seven years of delay, what would the prejudice have been to postpone this bench trial — that was sandwiched into the trial court's schedule — for a few weeks or even a month?

Finally, Plaintiff contends that allowing Mr. Del Favero to testify would have been unfair because he would have testified after other witnesses. *See* Pl. Br. at 23. Plaintiff misses the point because, among other things, he fails to recognize that this was a bench trial being conducted many years after the relevant events. A defendant always has the opportunity to present its witnesses after a plaintiff has rested its case. If deposing Mr. Del Favero after other trial testimony would have been problematic, the only fair solution would have been to postpone the trial for a short period to avoid prejudicing Defendants. Again, Plaintiff is silent on how such a modest delay would have prejudiced him in any way.

II. THE COURT OF CHANCERY IGNORED THE RECORD IN VALUING MINERA

The Court of Chancery compounded its reversible error in excluding testimony from Goldman by making its own valuation determinations about the "fair" price for the transaction, arbitrarily and capriciously, by cherry-picking numbers from Goldman presentations. The opinion reveals that the trial court went from the role of fact finder to expert witness performing its own investment banking analyses.

What the trial court did not understand about the Goldman analysis, it called "alchemy." From there, the trial court generalized — with the pronouncement of a new rule — that special committees negotiating with controlling shareholders must be afflicted with a "controlled mindset" that causes them to tailor their result to the controlling shareholder's wishes, even though it had granted summary judgment to the members of the Special Committee having concluded that there was no genuine issue that they acted loyally and in good faith. Having made up its mind, the trial court excluded testimony from a Goldman witness who could have explained that the analysis Goldman used is the appropriate way to assess, from a financial point of view, the value of SPCC, a publicly-traded company, relative to Minera, a private company, and that such a valuation analysis has been routinely used in other transactions in the mining industry.

Plaintiff admits that the trial court's decision on valuation was not based on the trial record, conceding that the trial court did not accept either party's expert opinion and "craft[ed] a valuation model" itself. Pl. Br. at 29. Plaintiff also admits that the trial court acted as its own expert witness. *Id.*; *see also id.* at 28 ("To further support his finding the Chancellor dug even deeper into the record and independently reviewed Southern Peru's post-Merger annual reports submitted as joint exhibits at trial."). But a trial court must render a judgment based on the evidence presented at trial. *Deibler v. Atl. Props. Grp., Inc.*, 652 A.2d 553, 560 (Del. 1995) (noting as "elementary" the rule that "a court must decide disputed facts on the record evidence"). In not doing so, the trial court compounded its reversible error of excluding a Goldman witness by making unsupported assumptions about Goldman's analysis.

Without a grounding in the evidence in the record, the trial court's decision is based on impermissible speculation and conjecture. It is no surprise that in defending the trial court's decision, Plaintiff repeatedly cites the opinion itself, without citation to the underlying record.[2] For example, as discussed in greater detail below, Plaintiff asserts that SPCC's cash flows were not "optimized," but cites ***only*** the trial court opinion – since there is no actual support in the record. *See* Pl. Br. at 27-28. In fact, as demonstrated in the opening brief, Goldman updated the model for both Minera and SPCC as additional information became available through the diligence process. *See* A389-91; A500; A540; A542.

A. The Court of Chancery Fundamentally Misapprehended How Goldman Calculated a Fair Price for the Transaction

Goldman's fundamental task was measuring the true value of Minera; that is, the price that market participants would have been willing to pay to purchase Minera. The trial court, acting as its own expert, concluded that a stand-alone DCF calculation is the way to calculate that value. But in 2004, DCF calculations of copper companies did not yield accurate market valuations.

Goldman's June 23, 2004 presentation, for example, shows that a DCF calculation of SPCC, using the conservative long-term copper prices mandated by the SEC resulted in a value $1.35 billion *less* than the value indicated by its observable market price. A355; A371; A473. Market participants were accounting for elements of value in copper companies at that time that DCF calculations based on conservative long-term copper prices were not capturing. *See* A473.[3] Goldman recognized the obvious: that just because Minera was a private company, there was no reason to assume that market participants did not see those same elements of value in Minera.[4] *See, e.g.*, A389-91. At the time of

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2 In an attempt to distract from the issues relevant to this appeal, Plaintiff salts his brief with various irrelevant issues such as matters concerning Mr. Handelsman and SPCC's proxy statement. These issues were not raised in the appeal because they are irrelevant to the issues presented. And, of course, neither bears on the key issues: whether a Goldman witness was wrongfully barred from testifying and whether the trial court's resulting analysis had a basis in the record.

3 This reflects the fact that, as is typical in industries where company values are heavily based on cyclical commodity prices, the market price incorporated market expectations of future copper prices. Copper prices are in turn strongly influenced by expectations of economic growth. *See* George A. Fontanills, *Getting Started in Commodities* 59 (2007).

4 Minera's purported operational difficulties at the time are of no consequence. Any capital constraints it faced would have been removed by any

the merger, DCF calculations were not reliable measures of market prices for copper mining companies because they materially ***understated*** their market values. Thus, Minera's DCF was not a reliable measure of the price it would have fetched in the open market. Minera was worth more — just as Southern Peru was worth more than its DCF would suggest.

By focusing on purported shortcomings with the inputs used in Goldman's relative valuation methodology, Plaintiff attempts to obscure the reality that Minera's standalone DCF value is much less than what market participants would have paid for it. *See* Pl. Br. at 28. Yet it was this standalone DCF value that the trial court embraced erroneously in concluding what the value of the "get" was in the merger.

Plaintiff also attempts to discredit Goldman's relative valuation analysis conducted in 2004 in connection with the merger by attacking Professor Schwartz's testimony at trial in 2011. *See* Pl. Br. at 30. But Professor Schwartz was describing his own analysis, not Goldman's. The trial court's description of Professor Schwartz's analysis as "post-hoc speculation" misses the point entirely. Ex. A at 82. In fact, it only illustrates the gap in the record created by the trial court's exclusion of Mr. Del Favero's testimony.

In any event, the trial court and Plaintiff mischaracterize Professor Schwartz's testimony with respect to the market's view of copper prices in an attempt to discredit his testimony. Specifically, Plaintiff focuses on Professor Schwartz's observation that an assumption of long-term copper prices of $1.30 would have explained the discrepancy between Southern Peru's DCF value and market value. *See* A2278 at 460:6-10 ("[G]iven that the market price of SPCC was much higher than the $2 billion that I got here, it was implying - - that market price was implying a long-term copper price of $1.30."). Plaintiff labeled this observation "academic bunk" because there was no evidence that the parties projected $1.30 long-term copper prices. But Professor Schwartz did not testify that the parties actually projected $1.30 long-term copper prices, nor did his conclusions rely on this $1.30 figure. He merely observed that such a price would have explained the discrepancy between the DCF value for Southern Peru and its market price. Despite that fact, the trial court discarded Professor Schwartz's entire analysis based on this single observation.

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purchaser seeking to exploit the value contained in Minera's mines. Plaintiff's contention that "some copper companies were trading at a premium" but Minera would not have done so, Pl. Br. at 31-32, has no basis given that any purported capital constraints on Minera would be eliminated in any sale. *See* AR83-86.

The fundamental point is that the market was ascribing greater value to copper mining companies than their DCFs based on $0.90 copper prices would suggest. Whether or not the market was projecting long-term prices of $1.30 or some other number is beside the point. Goldman's analysis plainly demonstrated that the market was valuing copper mining companies at a higher price than their DCFs. *See* A355; A371. Plaintiff has done nothing to refute this key point. This in and of itself undermines entirely the trial court's conclusions about Minera's value.

B. Plaintiff Cannot Exploit the Absence of Testimony from Goldman to Mischaracterize Goldman's Analysis

Trying to capitalize on Goldman's absence at trial, Plaintiff purports to identify certain flaws in Goldman's analysis based on speculation and conjecture from the trial court's opinion. These criticisms are not based on any fair reading of the underlying trial record.

First, Plaintiff criticizes Goldman for using a model in its relative valuation analysis that incorporated life-of-mine projections for Minera and SPCC, rather than five years of cash flow projections and a terminal value. *See* Pl. Br. at 27. But a life-of-mine projection is how market participants value mining companies. A DCF based on five years of cash flows uses a terminal value as a simplifying assumption to capture all of the value of the company into the future. Typically, the analysis assumes that cash flows in year five will continue into perpetuity, discounted accordingly. Goldman's relative valuation based on life-of-mine plans also discounted future cash flows, so its use of life-of-mine projections rather than five years of projections plus a terminal value simply means that its analysis was more precise and in line with industry practice.

Second, Plaintiff contends that the inputs used in the relative valuation were not equal for Minera and SPCC. *See* Pl. Br. at 28. In the opinion, the trial court said it was unconvinced "that the Special Committee relied on truly equal inputs for its analyses of the two companies." Ex. A at 72. But Plaintiff and the trial court could not reasonably reach that conclusion after the exclusion of testimony about what Goldman did and why. A Goldman witness could have explained the inputs and answered any questions about them. In any event, the inputs were not unequal as Plaintiff contends. Goldman relied on management projections for both Minera and SPCC, as modified by the Special Committee's independent mining consultant. *See* A336; A369. Goldman then applied its own estimates of long-term copper prices. *See* A336; A369.

Moreover, Plaintiff relies only on the trial court's opinion to support this argument, including reference to the trial court's "independent" review and analysis of post-merger results. *See* Pl. Br. at 28. The central assumption of the trial court's decision and Plaintiff's brief is that prior to the merger, SPCC's management developed projections for their own internal business planning process that intentionally understated SPCC's performance, and that by using SPCC management's internal business projections in its analysis, Goldman's analysis was flawed. *See* Ex. A at 72-74. But there is no evidence in the record that this was the case. The trial court assumed this was the case based on its circular logic that because the price was unfair, SPCC, its management, and its advisors must have been corrupted. *See* Ex. A. at 75-76. Both the trial court and Plaintiff ignore that an independent mining consultant reviewed SPCC management's projections and made adjustments they considered appropriate. *See* A369. The resulting adjustments were minor, and Goldman factored them into its analysis. *See id.*

Third, Plaintiff conflates the distinct concepts of production and reserves. *See* Pl. Br. at 30. A copper mining company's reserves are how much copper is in the ground. AR119. A copper mining company's production is how much it extracts and refines in a given time period. *See* AR29-33. Nonetheless, Plaintiff contends that "Defendants' relative valuation model assumed that production would remain constant as long-term copper prices increased." Pl. Br. at 30. In support, Plaintiff claims that "when long-term copper prices increased from $0.90 to $1.261 per pound, Southern Peru's reserves increased by 116% while Minera's increased by only 44%." *Id.* But reserves are not the same as production. Production does not change unless facilities are added. *See* A2287 at 469:3-6.

Moreover, comparing the change of reserves at the two companies at higher copper prices does not answer the question of how the value of the companies would change at higher copper prices. In order to properly answer that question Plaintiff would need to know the costs of extracting the additional copper and would also have to consider the effect that higher copper prices would have on each company's existing reserves. *See* A2285 at 467:4-16. Minera's existing reserves at the time of the merger were greater than SPCC's. A1053 at ¶ 15 n.4. The trial evidence uniformly showed that while both Minera and SPCC would benefit from higher copper prices, the positive effect on Minera's value would be ***larger***. A1858-59 at 40:10-41:13 (Palomino) (explaining the Special Committee made the strategic decision to use a conservative long-term copper price because it would be more beneficial to SPCC and its minority stockholders); *see also* A2263 at 445:13-24 (Schwartz) (confirming that negotiating based on a lower long-term copper price was advantageous to SPCC); A1065-66 at ¶¶ 44-45.

Fourth and finally, Plaintiff tries to prop up the trial court's criticism of Goldman's multiples-based analysis. *See* Pl. Br. at 31. These criticisms are again based on the unsupported assumption that, independent of the merger, SPCC management was understating its projections of future performance and reporting those understated projections to the market. *See id.* Plaintiff's ex-post observation that Southern Peru's 2005 EBITDA exceeded forecasts reveals only that copper prices continued to increase beyond expectations in 2005. It is not evidence that SPCC's management knowingly underestimated its future earnings. Had Goldman assumed in 2004 the higher copper prices that actually occurred in 2005, this would have increased the value not only of SPCC but Minera as well.

III. THE COURT OF CHANCERY'S FAILURE TO DETERMINE THE BURDEN OF PROOF BEFORE TRIAL WARRANTS REVERSAL

The trial court misinterpreted Delaware law and committed clear error by failing to allocate the burden of proof before trial. As demonstrated in the opening brief, if the burden had properly been allocated to Plaintiff, the trial court could not have found for Plaintiff in the absence of proof that the deal was not fair. Equally as important, the trial court's decision that a court must engage in a substantive fairness inquiry *before* determining if the use of a special committee warrants a burden shift effectively eliminates the practical benefit of such committees.

Plaintiff's only responses are that Defendants raised the burden of proof for the first time on appeal and that, even if the burden of proof had been decided before trial, it would not have mattered. *See* Pl. Br at 33. Neither is true.

A. Defendants Repeatedly Argued Below that the Burden of Proof Should Have Been Allocated Before Trial

Plaintiff's contention that "Defendants never argued below that the Court of Chancery must allocate the burden of proof before trial," Pl. Br. at 34, ignores the record. Defendants' motion for summary judgment specifically requested that the court make a pretrial "determination that Plaintiff bears the burden of proof as to entire fairness." *See* A1165. Indeed, Defendants argued that "who bears the burden of proof with respect to entire fairness is critical here [pre-trial] and can and should be decided on the record as it exists now." A1191. Defendants repeated this argument multiple times during summary judgment briefing. *See* A1176 ("The AMC Defendants have also cross-moved to . . . determine that the burden of proof with respect to the entire fairness standard should be shifted from Defendants to [Plaintiff]."); A1191, A1200, A1219. And, Defendants continued to argue that the burden shift should be decided pretrial at the summary judgment oral argument. *See* A1450, A1452, A1458.

The trial court itself repeatedly acknowledged that failing to determine the burden shift before trial, as Defendants requested, created evidentiary problems for the court and the parties. *See, e.g.*, Ex. A at 53-56. Indeed, at the summary judgment stage, Chancellor Strine expressed his disagreement with a rule that would have a burden shift decided at trial rather than pretrial. *See* A1405-1406 at 30:23-31:1 ("Burden shifts in the middle of my post trial opinion, one wonders why – one would wonder why one is doing that sort of thing."). And, the trial court's preference for a rule mandating the pretrial determination of the burden shift became even more explicit in its post-trial opinion. *See* Ex. A at

54 (noting that the burden shift should be decided pretrial because "the benefits of clarity in terms of trial presentation and for the formation of special committees would seem to outweigh the costs of such an upfront approach focusing on structural independence").

B. Plaintiff's Argument that the Burden of Proof is Meaningless Is Contradicted by the Trial Court's Position that the Burden of Proof Is "the prism through which to determine a case"

Contrary to Plaintiff's claim that "who shouldered the burden of proof at trial was meaningless," Pl. Br. at 37, the trial court explained that the burden of proof "is meant to serve as the framework through which the court evaluates the parties' evidence and trial testimony in reaching a decision, and, as important, the framework through which the litigants determine how best to prepare their cases for trial." Ex. A at 55-56 ("it is problematic to adopt an analytical approach whereby the burden allocation can only be determined in a post-trial opinion, after all the evidence and all the arguments have been presented to the court"). The trial court explained that because "the purpose of providing a burden shift is not only to encourage the use of special committees, but also to provide a reliable pre-trial guide to the burden of persuasion . . . the burden shift must be determinable early in the litigation." *Id.* at 53. The trial court's failure to determine the burden of proof pre-trial deprived the parties of a reliable guide to the burden of persuasion.

Plaintiff's claim that "the burden of proof had no bearing on [the] trial verdict," Pl. Br. at 37, ignores the trial court's concerns and fails to explain how parties can prepare for trial in the absence of a burden of proof. As the trial court stated "it [was] with some chagrin" that it "tried this case without determining in advance which side had the burden of persuasion." Ex. A at 48.

Plaintiff also tries to excuse the trial court's refusal to allocate the burden of proof before trial by claiming that "[i]n any event" Plaintiff proved various sweeping propositions such as the merger price was "wildly unfair." *See* Pl. Br. at 38. Each of these propositions assumes the conclusion and none of them relies on a record cite. *Id.* The fact that after failing to allocate the burden of proof to Plaintiff the trial court decided certain issues in Plaintiff's favor does not mean that the burden of proof did not matter. Nor does it matter that "the parties adapted seamlessly" to the trial court's refusal to allocate the burden of proof before trial by having each witness other than Plaintiff's expert called by Defendants. Pl. Br. at 38. The order of presentation of witnesses has no bearing on the fact, acknowledged by the trial court, that the burden of proof was the "prism" through which all the evidence was considered. *See* Ex. A at 55.

C. The Newly-Minted "Confined Mindset" Theory Is Arbitrary and Would Not Have Been Appropriate if the Trial Court Had Determined that Plaintiff Bore the Burden Before Trial

Nothing in Plaintiff's brief changes the fact that, under the "confined mindset" standard articulated for the first time in the trial court's opinion, setting up a special committee to negotiate with a controlling shareholder would be useless. In this case, there was no evidence that the Special Committee lacked bargaining power. And, there is nothing about the process to suggest that the Special Committee's mandate was too narrow. In fact, the Special Committee here conducted months-long negotiations and there was no evidence that the Special Committee was unduly influenced during those negotiations by the controlling shareholder. The trial court dismissed the members of the Special Committee at the summary judgment stage. Ex. A at 43.

Had the trial court properly determined that Plaintiff bore the burden of proof, Plaintiff could not have proved that the merger was not entirely fair. Indeed, the "controlled mindset" theory is arbitrary, lacks any legal foundation and is impossible to apply, leaving the outcome entirely at the whims of an unreviewable finder of fact. The theory operates to the disadvantage of whoever has the burden of proof because it is unclear what evidence would be necessary to prove or disprove the theory's application. In this context, the allocation of the burden of proof dictates the outcome of the case. And, this outcome-guaranteeing framework is exactly what happened in this case. After incorrectly determining that Plaintiff did not bear the burden of proof, the trial court used this standard "as the framework through which [it] evaluate[d] the parties' evidence and trial testimony in reaching [its] decision." Ex. A at 55. Under this framework, the trial court intuited that "the Special Committee fell victim to a controlled mindset," *id.* at 64, a supposition which drove how the trial court viewed all other facts and formed the foundation upon which it ultimately rested its decision. Most specifically, since it did not understand the Goldman analysis, it concluded it must be "alchemy" because it was generated in service to a compliant Special Committee that the trial court presumed lacked free will.

IV. THERE WAS NO BASIS FOR THE COURT OF CHANCERY'S AWARD OF DAMAGES

The trial court's damage award is based on speculation and a clear misunderstanding of how to properly value a mining company. For this reason alone, the Court should set aside the judgment and require a further inquiry by the Court of Chancery into the proper value of Minera.

The trial court explicitly recognized that Plaintiff failed to offer any proof of damages. *See* Ex. A at 98-99 ("[T]he parties have provided no real road map for how to come to a value, and the analyses performed by Goldman and the Special Committee do not lend themselves to an easy resolution."). Plaintiff's response is that the record was voluminous and the trial court's opinion was long. *See* Pl. Br. at 40-41. Yet Plaintiff does not cite a single piece of evidence that supports the trial court's decision on damages. He does not, because he cannot. The trial court performed its own valuation of Minera to fill the significant evidentiary gap left by Plaintiff's failure to offer any evidence of damages. *See* Ex. A at 99-104.

Plaintiff also does nothing to dispute the trial court's acknowledgement that, in light of the evidentiary gap in the record, its damages calculation "inevitably involves some speculation." Ex. A at 98. During argument on the fee award, the trial court explained that its damages calculation relied, at least in part, on the trial court's own computer models which it did not (and said it would not) disclose to the parties. A2853 at 77:16-20. This speculation and independent financial modeling based on unknown computer models is impermissible. *See* *Encite LLC v. Soni*, 2011 WL 5920896, *25 (Del. Ch.).

Plaintiff also ignores another critical flaw in the trial court's damages calculation, which assumed that AMC would have been willing to sell Minera for whatever price was generated by the court's own model. *See* AMC Def. Op. Br. at 31. There is no evidence that this would have been so. At a hypothetical lower price generated by the trial court's modeling, for example, no merger may have occurred. Had no merger occurred, SPCC would not have recognized the profits generated by the legacy-Minera assets since the merger — profits far in excess of the price paid. *See* Ex. A at 92. Thus, unless Plaintiff could prove that the merger would have occurred at some hypothetical lower price, there was insufficient proof that SPCC was harmed at all. Plaintiff has no response because he introduced no such evidence.

V. ATTORNEYS' FEES AMOUNTING TO $35,000 PER HOUR IS AN ABUSE OF DISCRETION – ESPECIALLY FOR AN ADMITTEDLY DELAYED PROSECUTION

The Court of Chancery's astonishing award of attorneys' fees of $304,742,604.45 is a clear abuse of discretion. Delaware's *Sugarland* factors were established to prevent unreasonable results such as the $35,000 per hour rate awarded to Plaintiff's attorneys here. The trial court's fee award also allows Plaintiff's counsel to profit as a direct result of their years-long failure to prosecute this case diligently by collecting fees on the nearly $700 million in prejudgment interest that accrued during that delay. Plaintiff's brief offers no justification for the award.

Plaintiff argues that the trial court properly relied on the size of the benefit, and that the time and effort expended by counsel is of secondary importance. *See* Pl. Br. at 49. The case upon which Plaintiff relies to defend the per hour fee, in fact, rejects a cursory application of the "time and effort" factor and requires that this factor "serve[] as a cross-check on the reasonableness of a fee award." *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *13 (Del. Ch.) (internal quotations omitted).[5] As Defendants demonstrated in their opening brief, a $35,000 per hour fee award is way out of line with the prevailing Delaware standards of reasonableness. *See* AMC Def. Op. Br. at 34.

Plaintiff insists that "[t]he Chancellor was mindful of" the $35,000 hourly rate he awarded. Pl. Br. at 48, 49. But Plaintiff does not – and cannot – cite any case or principle of law that would justify this hourly rate. Instead, he ignores the unreasonable hourly fee and argues that "more important than hours is effort, as in what plaintiff's counsel actually did." Pl. Br. at 49 (alterations omitted). Plaintiff suggests that his counsel is entitled to an outsized fee award because the case went to trial. But trial was effectively forced on Plaintiff. Plaintiff failed to prosecute the case until chided by two different Vice Chancellors. And, when Plaintiff finally tried the case seven years later, he did so based on an old, compromised record. And, the trial that supposedly justifies a $300 million fee award lasted less than eighteen hours (including closing argument), meaning the attorney fee award equates to over $16 million per trial hour. Taking this case to trial posed *de minimus* risk to Plaintiff's counsel, as there were no unusually large out of pocket expenditures, or lost opportunity costs given the minimal work they performed during the course of this litigation.

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[5] Notably, in *Del Monte*, the Court analyzed whether an award of $2.75 million was reasonable for lead counsel's 4,708 hours of work – an implied hourly rate of $575. *See id.* at *13-16.

Plaintiff offers no support for the trial court's decision to allow Plaintiff to collect attorneys' fees on the nearly $700 million in prejudgment interest that accrued during the lackadaisical prosecution of this case, other than summarily claiming that the "decision was not arbitrary or capricious." Pl. Br. at 46. The trial court's award is, by definition, arbitrary and capricious because it ignores the uncontested fact that Plaintiff's counsel allowed the case to sit dormant ***for years***, *see* A1413 at 38:17-20, directly causing the accrual of hundreds of millions of dollars of prejudgment interest. *See Willdel Realty, Inc. v. New Castle Cnty.*, 270 A.2d 174, 178 (Del. Ch. 1970) (defining arbitrary and capricious as "action taken without consideration of and in disregard of the facts and circumstances of [a] case"). Plaintiff does not dispute that his failure to prosecute this case directly resulted in the accrual of nearly $700 million in prejudgment interest, but glibly characterizes his counsel's failure as just taking "too long to win at trial." Pl. Br. at 46. Plaintiff's failure to diligently prosecute the case is the only reason that hundreds of millions of dollars of prejudgment interest accrued and his counsel should not be rewarded for that neglect.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2012, I caused to be served by Lexis Nexis File and Serve AMC APPELLANTS' REPLY BRIEF upon the following counsel of record:

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