IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERICAS MINING CORPORATION, et al.,	ORAL ARGUMENT June 7, 2012 No. 29, 2012
Defendants-Below, Appellants,	Court below: Chancery Court of the State of Delaware Hon. Leo E. Strine, Jr.
v.	
MICHAEL THERIAULT, as Trustee for the Theriault Trust,	Cons. C.A. No. 961-CS
Plaintiff-Below, Appellee,	
SOUTHERN COPPER CORPORATION, formerly known as Southern Peru Copper Corporation,	No. 30, 2012
Nominal Defendant-Below, Appellant,	Court Below: Chancery Court of the State of Delaware Hon. Leo E. Strine, Jr.
v.	Cons. C.A. No. 961-CS
MICHAEL THERIAULT, as Trustee for the Theriault Trust,	
Plaintiff-Below, Appellee,	

BEFORE: CHIEF JUSTICE MYRON T. STEELE
JUSTICE RANDY J. HOLLAND
JUSTICE CAROLYN BERGER
JUSTICE HENRY DUPONT RIDGELY
PRESIDENT JUDGE JAMES T. VAUGHN, JR.

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ORIGINAL

APPEARANCES:

BRUCE D. ANGIOLILLO, ESQ.
For Defendants-Below/Appellants

STEPHEN E. JENKINS, ESQ.
For Nominal Defendant-Below/Appellant

RONALD A. BROWN, JR., ESQ.
For Plaintiff-Below/Appellee

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MR. ANGIOLILLO: May it please the Court, good afternoon. Again, my name is Bruce Angiolillo. It is a distinct professional honor every time I have the opportunity to appear before this Court.

I'm going to ask you today to right a wrong, a wrong that comes from the decision of the Court of Chancery after trial in this case, and let me tell you what was wrong and why we think the decision below should be reversed.

First of all, because in the Chancellor's words the key question here was what was Goldman Sachs thinking when it performed its analysis for the Special Committee of Southern Peru.

Since that was the question it was clear error to bar Goldman Sachs from coming to testify at the trial to answer the very question that the Chancellor was posing.

JUSTICE RIDGELY: Can you help me understand, procedurally, was the witness barred? In other words, if he had shown up would he have been allowed to testify during the scheduled trial date?

MR. ANGIOLILLO: The Chancellor barred the Goldman Sachs proposed witness from appearing at trial and testifying as a trial witness. He was precluded from testifying at the trial. That's the first error.

The second error is that the Court compounds it, and the Court compounds this legal error by then resorting, without that testimony, to read Goldman's mind to find that the deal was unfair.

This error or these errors are not inconsequential or harmless. This resulted in a two billion dollar judgment.

Now, let me begin. The Court is looking at this through the prism of Levitt v. Bouvier, and the Court's review of factual findings is deferential only so long as, quote, the findings are supported by the record and the conclusions are the product of an orderly and logical deductive process.

Further, this Court will, quote, set aside the factual findings of the Court of Chancery if they are clearly wrong.

In this case, the Chancellor sat both as judge and jury, and as fact finder he was bound by the record that was presented. There were four fact witnesses: Luis Miguel Palomino, Harold Handelsman, Armando Ortega, and Raul Jacob. They testified uniformly about the work performed and the judgments that were made, and their testimony was unrebutted. The plaintiff did not call any fact witnesses in rebuttal, and they did not cross-examine the witnesses with respect to any of the particulars that the witnesses testified to as suggested, suggested or demonstrated, that the Special Committee was anything other than qualified, experienced, independent and disinterested.

And the record is without, without doubt a record that was unchallenged with respect to the committee hiring very fine legal advisers, very fine financial advisers, very fine mining advisers, that they met 20 times, that they met with Goldman Sachs face-to-face 14 times, and they took eight months to consider and negotiate the transaction.

I've got to just stop and pause and make the observation that, notwithstanding that, the Chancellor at the end of the trial, which was piecemeal over about three days, concluded that the deal was unfair and concluded that the deal was unfair because it was the product of a Special Committee that had a controlled mindset, and that Goldman Sachs was then subject to that controlled mindset, that six months before the Chancellor, after full summary judgment, briefing and argument, concluded, as a matter of law, that the Special Committee, he could find no material question of fact that they have breached their duties of good faith or loyalty.

Now, when a trial court reaches a decision that cannot be supported by the record, and is not the product of an orderly and logical deductive process, it must be reversed, and that's what we are asking the Court to do.

And if I may, I would like to now turn to the two reasons that I first stated at the opening with respect to why this case should be reversed.

First, there was no basis to exclude the proposed Goldman witness from testifying at trial. The standard of review is a judge's evidentiary rulings are reviewed for an abuse of discretion, and I'm citing Barrow versus Abramowicz, and citing the St. Francis De Sales case, quote, When improperly excluded evidence goes to the very heart of a plaintiff's case and might well have affected the outcome of the trial, the exclusion of the evidence warrants a new trial.

It was an abuse of discretion to bar this witness from testifying because there was no legal basis to exclude him.

Again, at summary judgment the Chancellor said that this case was, quote, about what the bankers for the committee were thinking, close quote.

And as the Court can tell from our appellate briefs, both sides' briefs, there are disputes about exactly what Goldman did and why they did it.

JUSTICE HOLLAND: Does this witness that was excluded have firsthand knowledge of the events?

MR. ANGIOLILLO: This witness who was excluded was part of the team that made the presentation at the time they were hired. He was not part of the deal team. He was a member of the Goldman Fairness Opinion Committee. The Goldman Fairness Opinion Committee is the committee that reviews all fairness opinions. He is the chair of the Fairness Opinion Committee.

He is not, he is not Mr. Sanchez who was the deal team leader. That being said, Your Honor, the reasons why his testimony we believe was key was because he would have been able to answer, as a member of the Fairness Opinion Committee and a member of the Goldman firm, he would have been able to explain the whys. He would have been able --

JUSTICE HOLLAND: My question is: Would he be talking about Goldman procedures generally or would he be talking about this specifically?

Because clearly, if he doesn't have firsthand knowledge and he is attributing things to people there might have been hearsay objections, and if he is simply talking about the Goldman process, then I guess the logical extension would be, here is the process and it was followed in this case.

So that's my question: Was he going to give general information or specific information to this deal?

MR. ANGIOLILLO: He was going to give specific information on this deal.

JUSTICE RIDGELY: Was that proffer made to the Trial Court?

MR. ANGIOLILLO: The record is that the plaintiffs objected five days before trial of the identification of this substitute witness. A telephonic hearing was made. Chancellor Strine ruled orally that it was too late to proffer a substitute witness. That's the extent of the record, Your Honor.

JUSTICE RIDGELY: So there is nothing in the record as to what the excluded witness would have said if allowed to testify?

MR. ANGIOLILLO: There was no proffer made at the trial as to what the witness would have testified.

However, Your Honor, once the Chancellor ruled that he was not going to hear any Goldman witness in a case where he said at the conclusion of summary judgment that what Goldman was thinking and the reasons why Goldman was doing what it did was key, Your Honor, respectfully, we needed to do no more.

And I may also add, Your Honor, that there was not a ground argued either by the plaintiff, nor by the Court in its ruling, that producing a second-best Goldman witness, because the first-best Goldman witness, Your Honor, was unavailable, the plaintiff's lackadaisical prosecution of this case, seven years after the deal, we found ourselves with the witness no longer associated with Goldman in Mexico and not willing voluntarily to travel.

JUSTICE RIDGELY: Just so I understand --

MR. ANGIOLILLO: Yes.

JUSTICE RIDGELY: -- there is not an affidavit, there is not anything of record as to what this witness would have said?

MR. ANGIOLILLO: No, Your Honor. There is no affidavit that was put before the Trial Court. There was no reargument made, effectively, to the Trial Court at the time of trial saying, Chancellor Strine, would you reconsider what you have just done, no, that was not done.

JUSTICE STEELE: Would it have made any difference? And the reason I ask that question is because it sounds to me like the ruling was based upon the period of time between the witness being proffered and the trial, not on the basis of the merits of what the witness might or might not have testified to. Is that incorrect?

MR. ANGIOLILLO: No, Justice Steele, you are exactly right. It was never an issue as to the relevance of the testimony. The entire basis upon which the witness was excluded was it was late.

And, Your Honor, if --

JUSTICE BERGER: Can we turn to that for a moment?

MR. ANGIOLILLO: Sure.

JUSTICE BERGER: Because just as a matter of kind of common sense, if a Goldman Sachs, a specific Goldman Sachs witness is one of the key witnesses for your side, wouldn't you have known that there was an issue with his unwillingness to appear somewhat more in advance than seven days or eight days before trial?

MR. ANGIOLILLO: Justice Berger, as the Court is aware, I was not trial counsel. But the record as you have it indicates that the witness, Mr. Sanchez, was deposed in 2009, and it was not until the eve of trial that he expressed the view that he would not be willing to come.

JUSTICE HOLLAND: Do I understand the record correctly, he indicated he wouldn't be willing to come, although his deposition was presented, and you wanted to present another Goldman witness, but along with your application was a representation that the trial date couldn't be held, that you needed to extend the trial date.

Now, I understand there is the debate about whether the trial date would have been moved anyway. Wasn't it a combined request? We don't have a witness, we have a substitute witness, but we can't keep the trial date if we use our substitute witness? Is that correct?

MR. ANGIOLILLO: We are both at a slight disadvantage, Justice Holland, in that I was not trial counsel. But my best understanding of the record is that the proposal was that this witness, in order to be deposed and to testify, would be presented out of order, and the possibility that he would have to appear on an additional trial day, which at the time Chancellor Strine, given the collateral unrelated circumstances of his elevation to becoming Chancellor, had fit this trial in in bits and pieces and said that because of his own, his own scheduling constraints that they would add another day if that was necessary.

Now, but to answer Justice Berger's question, to complete my answer to Justice Berger's question, it is never the case that admissible evidence, which could be presented by a witness, that the identification of the witness late in the day is a basis to exclude the testimony.

Moreover --

JUSTICE BERGER: My question was not whether that's a basis for excluding the testimony, but, rather, what was going on. It is hard to imagine that Mr. Sanchez notified you he wouldn't come to the trial eight days before trial. One would expect that there would have been back and forth going back months before the trial, and I'm trying to figure out whether something happened right at the last minute so that you were all moving along thinking Mr. Sanchez is coming and then he had a heart attack or something else happened.

MR. ANGIOLILLO: Your Honor, it has never been the contention by anyone in the case that defense counsel or the defendants sort of hid in the weeds about this and then didn't disclose it until late in the day. No one has suggested that and, to the best of my knowledge, that is not the case.

Now, let's just say for sake of

argument, Your Honor, let's just say that, posit as a hypothetical that there was tardiness in disclosing that we had learned that Mr. Sanchez had decided he wasn't going to come.

Even if that were the case, I must say to Your Honors that Chancery Court Rule 16, Court of Chancery Rule 16 is the rule which applies to this situation, that is to say --

JUSTICE BERGER: But let me stop you there.

MR. ANGIOLILLO: Yeah.

JUSTICE BERGER: You agree we are reviewing this particular ruling on an abuse of discretion standard, correct?

MR. ANGIOLILLO: Yes, Your Honor.

JUSTICE BERGER: Okay. And when you try to figure out whether another person or another judge abused his discretion, you would like to know what the relevant facts were, and if I were still on the Court of Chancery and I was told, relatively at the last minute, that there would be a substitution, I would be asking questions or, if not asking questions, I would be hoping to hear that something out of the ordinary, something unexpected had happened because, of course, you were preparing for trial for months now and you have just now learned that somebody that was a critical witness is not going to be available.

MR. ANGIOLILLO: That's to the best of my knowledge what happened. He did not work any longer for Goldman Sachs. The best of our knowledge, he consulted with his new employer. His new employer said, Why are you bothering to go to up New York or up to Wilmington, Delaware to sit for a trial? You don't work for Goldman Sachs. And he said he wasn't going to show up.

Now, Your Honor, in the context of reviewing for abuse of discretion, where the transaction was announced in 2004, the litigation was commenced in 2004, the deal closed in March of 2005, and they don't prosecute a case, and two vice chancellors have to reprimand them and they have to confess, after years and years and years of inaction, that when finally the Chancellor forces a trial in this case, forces one, and my clients have to come and defend themselves, seven years later, an investment banker who worked for the Special Committee, who was dismissed from the case, says he won't come from Mexico City.

It is an abuse of discretion when I put forward a substitute Goldman Sachs witness to talk about and explain the 14 different written presentations and answer the questions that Chancellor Strine lays out in 105 pages of an opinion, that's the reason why this is wrong.

And Rule 16 of the rules say that we didn't have to identify the trial witnesses until the pretrial order was prepared, and we did include Mr. Del Favero.

And if the plaintiff wanted to know about Mr. Del Favero earlier or wanted to make the argument, they should have served, as everyone knows, interrogatories.

So the notion that lateness precludes us from producing the witness to address the key issues in the case is frankly unexplicable or inexplicable.

Your Honor, what Chancellor Strine said at that hearing when he barred the witness was he said, 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. And I might say seven years later. All right.

Chancellor Strine answered his own question in his opinion when he says that the reason he is in this dilemma where he is imaging and speculating about what Goldman did, he says the record suffers from issues, including the absence of a Goldman Sachs trial witness. And he then says, And it should be properly laid, quote, at the plaintiff's door.

How you can bar me from calling a Goldman witness, and then write a 105-page opinion --

JUSTICE RIDGELY: Were you barred from taking a trial deposition, a deposition for use at trial?

MR. ANGIOLILLO: Our understanding was we were barred from putting in directly or indirectly any testimony from anyone from Goldman Sachs.

JUSTICE RIDGELY: You knew the trial dates in advance of the pretrial conference, correct?

MR. ANGIOLILLO: That's correct.

JUSTICE RIDGELY: And you knew your witness was unavailable during those trial dates?

MR. ANGIOLILLO: I apologize, Your Honor, I'm not following. Which witness are we talking about?

JUSTICE RIDGELY: The one that was excluded.

MR. ANGIOLILLO: Yes.

JUSTICE RIDGELY: You knew he was not available during those trial dates, or not?

MR. ANGIOLILLO: No. I believe he was available, but the issue was in order to give the plaintiff an opportunity to take a deposition before he testified. That's what I believe was the case.

JUSTICE RIDGELY: So you could have produced him at trial.

MR. ANGIOLILLO: I could have produced him at trial.

JUSTICE RIDGELY: As a live witness?

MR. ANGIOLILLO: Right. But also, Your Honor, I also, another part of the argument was, I just have to sort of emphasize, what was the magic of these trial dates?

What, after seven years, was the magic of one day followed by three mornings? What is the magic?

Given the magnitude of this case, given the prejudice we were suffering by having to defend it seven years later, where we say we have a witness we want to call and it causes an adjustment to the trial schedule, what is the magic of those dates?

It is a bench trial. This is not an injunction. Nothing is going to happen. After all this time, that's what is fundamentally wrong.

Now, in the small amount of time that I have remaining --

JUSTICE STEELE: Well, you are into your rebuttal time, you understand.

MR. ANGIOLILLO: I'm sorry, then, Your Honor, I think I'm going to sit down. Thank you.

MR. JENKINS: May it please the Court, on behalf of the Nominal Defendants, Southern Copper Corporation, I would like to briefly address the issue of attorneys' fees in this case.

As the Court is aware, the Court below awarded plaintiff's counsel a fee in excess of $300 million. We believe that is by far the largest fee awarded in Delaware history. The amount comes to $35,000 per hour, which is the highest effective hourly rate in any case anywhere of which we are aware.

We submit that in awarding this fee the Court below committed three interrelated legal errors that led to an abuse of discretion.

First, although the Court discussed all of the Sugarland factors, in fact, its analysis looks almost exclusively at the benefit to the corporation.

The Court did not look deeply at factors such as the effort expended in this case, and we know here that counsel had previously been severely criticized by the Court for delay, or how the implied hourly rate compared to other cases.

Why, for example, was the effort here worth an hourly rate ten times that in other cases in which substantial fees were awarded?

Indeed, the highest rate of which we are aware, effective hourly rate in any other Delaware case is $4700 an hour.

Second, the Court explicitly rejected those Chancery decisions that had previously held that the Court had a duty to prevent attorneys from receiving a windfall, and it also rejected, we think, the declining percentage approach that had been supported by 30 years of Chancery, a precedent, and which we believe also received the least favorable nod from this Court in Goodrich versus E. F. Hutton.

Finally, we believe that the Court below awarded unreasonable fee in violation of Rule 5.1 (a). Thank you, Your Honors.

A JUSTICE: Thank you.

JUSTICE RIDGELY: I would like to ask you a question.

MR. JENKINS: Yes, sir.

JUSTICE RIDGELY: I thought you referred in your brief that the percentage should be a single digit.

MR. JENKINS: Yes, Your Honor.

JUSTICE RIDGELY: What is the range that you are suggesting it should be?

MR. JENKINS: Well, Your Honor, my suggestion on this would be to look at all the factors in coming up with that decision. I believe you need to look at the effort expended, the hours expended, what has been awarded in others cases as, in our view, Your Honor, it should be no more than approximately an award in the lower tens of millions of dollars.

We are saying here that the important thing is to look at everything together, not to just look at, you get X percent, but to apply all the Sugarland factors together and realize that in this case it did not take the effort of a Smith versus Van Gorkom, of Sugarland, and to award an appropriate fee.

JUSTICE RIDGELY: But the Second Circuit refers to anything over a hundred million is a mega case. Is that your position, that we should sort of set a mega case rule for single digits?

MR. JENKINS: I think, Your Honor, there has been a declining percentage approach applied by this Court, at least applied by the Chancery Court. I think this Court, as I said, nodded and said, yes, that's correct.

But in Sugarland the Court said, the Chancery Court said, I award a fee of X and it is capped here.

In the Shell case, Shell Appraisal, Vice Chancellor Hartnett gave about I guess 7 percent. He gave I think $15 million and said, explicitly -- there was hundreds of millions awarded there -- explicitly, the number has to go down as the case gets bigger.

But, of course, one would also need to look at how many hours. This was 8700 hours, not small, but not huge by any means.

How much effort went into getting that? We think that the Court below in focusing and saying, hey, well, investment bankers and hedge funds get big percentages, why not lawyers, we think it missed the essence of Sugarland, if you look at all the factors to find a reasonable fee that must be reasonable under 1.5, Your Honor.

Thank you, Your Honor.

MR. BROWN: May it please the Court, good afternoon, Your Honors.

Let me talk about the Goldman witness. It is a frustrating argument because it is based on a complete factual, I'll say misunderstanding because counsel here wasn't trial counsel.

First let me talk about -- and, obviously, this is an abuse of discretion issue so the question is whether the decision was based on conscience and reason or whether it was arbitrary and capricious.

Let me start with what is in the record with respect to Goldman Sachs, because when you read their brief they make it sound like there is something missing, there is a big, huge hole with respect to evidence about what Goldman Sachs did in this case.

The head Goldman Sachs banker, Mr. Sanchez, who was in charge of this engagement was deposed. Everyone knew, he had already left Goldman Sachs in 2006, everyone knew that we couldn't force him to appear at trial, but we had a videotape deposition that we were prepared to use at trial, which is not uncommon in Chancery Court cases, to submit, you know, witness testimony by deposition, and now we do it by videotape, and so he was deposed.

And interesting, the defendants actually asked questions after we questioned the witness. So both sides were kind of aware that this might be it for this guy because we can't force him to come to trial.

So, and the actual written transcript and the video was admitted into the trial record, so there is a Goldman witness testimony at trial.

Obviously, all Goldman Sachs documents, you know, boxes and boxes were produced. Everyone had a chance to go through them, and nobody was prevented from putting in any documents. You know, everyone put in whatever Goldman Sachs documents they wanted to into the trial record.

JUSTICE STEELE: Let me ask you a question that's a product of being perhaps too many years away from the litigation. There was a time when if you put the other party on notice that you wished to take their witness' deposition, you were to tell them in advance whether it was for discovery or whether it was for trial, and the parties reacted differently at the deposition based upon the reason for which the deposition was noticed.

The deposition of Mr. Sanchez, was it noticed as discovery or was it noticed as a trial deposition? Or does that make any difference now at Chancery?

MR. BROWN: Well, Your Honor, I have been doing it for 23 years. Obviously, everyone here has been doing it a lot longer. That's actually the first time anyone ever said that to me.

I am not even sure there was a notice of deposition. I mean, it is kind of informal. We are working with counsel who we are familiar with, and we are just setting dates for the different witnesses. I believe we did a 30(b)(6) designation and asked for a whole bunch of Goldman people, and Mr. Stone came back to us and said, here is the guy, this is the lead guy, he knows everything, he is the guy we are going to give you.

JUSTICE STEELE: Okay, well, are you telling me the practice as you understand it for the last 23 years, which, of course, is now one year shorter than when I did it last, so 24 years ago is my recollection, you are telling me now that there is no magic in that designation, that all parties should be aware that a deposition that appears to be taken for discovery could be used at trial, and all parties would have an expectation that could happen?

MR. BROWN: That's how it's been done every case I've done in for 23 years.

But the important thing is, this whole argument is -- has to lead to something. It has to lead to -- there is something missing. Right.

And the defendants conceded below, and this is significant, in their posttrial brief, quote, The record here is replete with evidence showing what Goldman Sachs did and why, unquote.

Now they are saying there is something missing? I tell you it is important to understand the context of that because one of our arguments below was, to the Chancellor, you ought to draw some negative inferences here because this, the lead guy at Goldman, he is not coming, and they don't normally do that. They are usually willing to come and defend what they did.

And because it was ridiculous what they did. And we can get into, you know, how it was sort of covered up and how it was a slight of hand in connection with their Board books and the showings of the analyses. But we said that, and their response was, what? The record is voluminous. There is plenty in the record to explain exactly what Goldman Sachs did.

So the argument they are making now that there is something important missing, I mean, it just flatly is contradicted by what they said below. And they didn't just say that. They said in their posttrial brief that, quote, The absence of a Goldman Sachs witness, the argument that, quote, The absence of a Goldman Sachs witness left critical questions unanswered is nonsense. Now they are saying the opposite.

Now, let me talk about, quickly turn to the facts relating to the, quote, excluded witness.

JUSTICE RIDGELY: Well, I would like you to explain, what is the legal basis that allows the Court to exclude a witness when there is no scheduling order, discovery violation involved?

MR. BROWN: Well, the Court didn't exclude the witness. And as Your Honor said, they could have taken his deposition and introduced it into the trial. And we actually, you know, they had identified another surprise witness and they said here he is for deposition, and we deposed him, and he testified at trial.

What happened here was the defendants came in and said, you know, actually, there is e-mail chain and this is all laid out, all the facts are laid out in detail in our briefs because the factual basis for this argument is incorrect.

But sort of right before trial the defendants seemed to have an interest in having a live Goldman witness, and they said they might get this guy and might get that guy, and then we got an e-mail a few days before trial, and it is all in the record, saying we are not going to have a live Goldman witness, and then some point a few days after that we get an e-mail, a proposal to the Court, we have a guy, we have located a guy at Goldman, we want him to testify, he cannot appear at the trial.

They didn't ask for the trial to be rescheduled. They said our proposal is let's have the trial, we want to have the trial, and about a month after the trial, the plaintiff -- he will be available, the plaintiffs can take his deposition, and then at some point after that let's bring him back and have another day of trial.

And our argument was -- you know, we have a couple different arguments, but the first argument was that's not fair. I mean, we can't depose a guy after your whole --

JUSTICE RIDGELY: So you did not oppose him appearing to testify, assuming they sent down a private jet, brought him back during the scheduled trial date, you would have had no opposition to that?

MR. BROWN: Well, except we never got

to the -- we did object to that, Your Honor. Let me explain that in a little more detail. That requires a little explanation.

Mr. Del Favero, we have no idea what he knew, and they never said what it is that he was going to testify to. There was no proffer in this case at the trial level and there isn't one now. What was he going to say?

JUSTICE RIDGELY: Well, the trial date is a discovery cutoff date in itself, isn't it?

MR. BROWN: It sure is.

This process they were proposing, I mean, it is hard to fathom that it is an abuse of discretion to say I reject your proposal to have this deposition after the trial and hold the trial open.

I mean, you know, so I don't think the Chancellor actually said he couldn't come to trial. All he said was your proposal to do it this way, we are not going to do it. That's unfair to the plaintiffs, that they take a deposition after the case goes, and then you bring a guy in to sweep up the case if there is a problem with it.

But, you know, one key point was, you know, they never really said what Del Favero was going to testify to. He wasn't part of the team. He didn't work on the engagement. He went to one Special Committee meeting which was the meeting to pitch, you know, where Goldman pitched its services.

JUSTICE STEELE: Had you directed an interrogatory asking them to identify the experts, the substance of their testimony and the basis for their testimony?

MR. BROWN: Yes. They weren't offering him as an expert witness. They were offering him as a fact witness. And it is one of our arguments to the Chancellor, and it was sort of in briefs, letters and at the pretrial conference was --

JUSTICE RIDGELY: Was there a fact witness interrogatory?

MR. BROWN: You know, it was handled -- there was not, I don't believe. It was handled informally. We said, we were talking to Morris Nichols saying, you know, who is --

JUSTICE RIDGELY: So there is no discovery violation?

MR. BROWN: I don't think there was a discovery violation by this, I'll say that. So they never said what Del Favero was going to testify to. He didn't attend any meetings.

We speculated and said to the Chancellor, you know, we are guessing that what he is going to testify to is Goldman's general practices, because that's really all he knew. He was on this opinion committee that oversaw all the opinions.

And we pointed out that, you know, we did try to ask Mr. Sanchez questions that went beyond what he did in this case and what the practices were, and we were blocked. And, again, that's all cited and reviewed in the briefs that, you know, we -- they said these are fact witnesses, you can ask them what they did in connection with this transaction and that's it.

And so, you know, to me, Your Honor, if you are going to come in and say it is an abuse of discretion to use this procedure, not use this procedure where we hold the trial open and have a witness, you know, depose and testify after the fact, there had to be a proffer at the time. Here is what he was going to say and here is why it would have mattered, especially since they have admitted in their briefs the record with respect to what Goldman Sachs did was complete.

I mean, isn't that the end of the argument? I mean, to me it is. This is sort of -- it wasn't really a big issue. This is something that the appellate lawyers just came up with.

I mean, if you look at the opinion, this argument is focused on the concept that what Goldman Sachs, their analysis, understanding it is very important, well, their expert witness, you know, did the exact same thing that Goldman Sachs did as the Chancellor explained.

Everyone, we all understood exactly what Goldman Sachs did. I mean, there is no issue here that the Chancellor didn't understand what they did.

What they did was, and I'm lapsing into some of the arguments now that weren't addressed, which I was told not to do, but, you know, this case was all about this term relative valuation, because -- let me back up here -- the transaction at issue here was the purchase by Southern Copper of a company Minera Mexico from Southern Copper's controlling shareholder, and the consideration they paid was stock.

And so our expert testified the way to assess the fairness of this transaction is we know what that stock is worth. It's a New York Stock Exchange stock from a large company has a million, more than a million shares trading every week, and it is worth, you know, over three billion dollars, and the trial testimony from the defendants was we could have gotten that, that's what it was worth. They admitted that.

And so the issue our experts said, you know, the issue is what is the value of what you are buying. And both experts, you know, did discounted cash flow valuations, primarily, to a lesser extent comparable company valuations, and both came up with values of about two billion for what was being bought.

And actually the committee, when the

first proposal was made, the testimony was, well, we looked at it and it was way off, it didn't look fair. So Mr. Handelsman testified, and this is all detailed in the opinion, he went to Goldman and said, why don't you do a discounted cash flow valuation of our company, and they did that, and it came up to half the market value, and so they said it is fair.

And it is the most bizarre set of circumstances I've ever seen. If you look at the final Goldman Sachs board presentation book, I defy you to look at it and tell what it is they are doing.

It doesn't say in here what we have done is a discounted cash flow valuation of both companies. One is two billion, more or less, two-four for what the Chancellor called the get and it is about two or whatever for the give. And that is half the market price of the stock.

So, anyway, we all understood what was happening. And they then had an expert come in and sort of regurgitate what Goldman Sachs did and, you know, he testified about this relative valuation issue at trial. So there is nothing in the record that's missing. There is no question that the Chancellor didn't understand what was going on. He, in fact, did understand exactly what was going on, as reflected in a 105-page opinion.

I always understood abuse of discretion standard of review to be it is not whether different judges would have decided things differently. It is that, you know, the appellate court looks at it and says, was this a reasoned, thoughtful process where conscience and reason was applied, or was it some arbitrary and capricious thing.

And if you look at a 105-page opinion, with 206 footnotes, with extensive cites and quotes from the trial transcript, depositions and documents, obviously, there is reason and conscience applied to this.

So, you know, most of their arguments go or just fail flat-out on the basic abuse of discretion level of standards of review.

JUSTICE HOLLAND: Tell us in the final analysis how you characterize the Chancellor's ruling on not hearing from the witness. Is he saying what the witness has to say is not relevant? What we have done in discovery is enough? The witness is too late? Or we are not going to redo the whole trial schedule to accommodate your witness?

MR. BROWN: I think all he said, Your Honor, and I think it is pretty clear from the transcript, was what you have proposed, defendants, is not fair, I'm not going to allow that, which was to have a guy be deposed after the trial is over and then bring him back at some point after that, that that was not allowed.

Like I said --

JUSTICE HOLLAND: So that's what we are looking at when we are looking at the exercise of discretion, should we allow a witness to testify after all the evidence is otherwise closed, although you would be permitted to depose him and to the extent that a Chancellor said we are not going to do it that way, that's the only ruling, so we don't have any fall-back ruling on, all right, well, if we can't do it that way, can we work him into the trial dates you already have available? So the only exercise of discretion we are looking at is their proposal; is that correct?

MR. BROWN: That is my argument. I mean, that's was what was said before the Chancellor, that was the issue he decided.

Now, I think you can also say this argument also fails because there was never a specific proffer. You can't argue abuse of discretion unless you can show here is what we are saying he would have testified to, here is why it is important.

I mean, what is it? Does anybody know why it is important? What was he going to say?

I mean, they have already admitted the record was replete.

JUSTICE RIDGELY: Aren't they saying that he was going to answer the Chancellor's questions, whatever they may have been?

MR. BROWN: And the Chancellor specifically said, you know, in the transcript, if you thought, if you are bringing him because you think I need him to answer questions, that's not correct. I'll look at the, I'll watch the videotape.

I mean, you know, answers to questions about what? You know, about this case? He didn't know anything about what Goldman Sachs did. He didn't participate in it.

So, we can basically talk about the other issue, the fee. Obviously, there is other arguments that everyone has left to the briefs, and we will too.

We submit the fee determination of the Chancellor here is controlled by the recent decision, of course, recent decision in the EMAK Worldwide case.

The Chancellor unquestionably applied the Sugarland test, admittedly went through all the factors, balanced them, and concluded that a 15 percent, 15 percent of the recovery here, inclusive of expenses, was an appropriate compensation.

JUSTICE RIDGELY: Well, I know he did that. But you agree this is a mega case, with a recovery in excess of a hundred million dollars? That's what the Second Circuit refers to.

MR. BROWN: Yes. And it is not our

understanding that this Court has ever adopted, you know, set forth a rule or changed Sugarland depending on the size of the judgment. Sugarland test applies.

And the Court took into account that it is bigger and reduced the fee from, you know, normally, you know, if you try a big corporate case and get a good recovery, and it is appealed, and you take it to the very end, you know, 25 to 33 percent is the normal range. He departed significantly downward from that here.

JUSTICE RIDGELY: Is it accurate that in looking at other mega cases that it is usually a single digit that is used as a percentage?

MR. BROWN: I don't think that's correct, Your Honor.

I think it is the evolving trend, and this was really briefed, addressed somewhat in the briefs below. We didn't get into it here because of the abuse of discretion standard of review. But the emerging trend is not to reduce it, it is to increase it.

Because you completely diverge the interests, the interests of the lawyer and the client if you have a declining percentage, because you don't want to say, if you get a hundred million you get 30 percent, but if you get 200 million you get something less. So you are encouraging lawyers that are taking these cases on a contingent basis from trying them, from trying to get the big number.

If you are going to get paid the same thing for a 100 million dollar settlement as you are for a 300 million dollar judgment, what is your incentive to take the case to trial?

I mean, I thought the rule here was if you put a million dollars of your firm's money at stake, with 11 partners, and spend 8,000 hours, go around the world taking depositions, and get the biggest recovery ever, not by a little bit, but by a factor of like 20 from the biggest cases you can find, it was fairly recently, the AIG case, it was about 120 million dollar settlement, there was also another 90 million dollar settlement, and they got 22 and a half percent there.

This case is basically 20 times bigger, and it was obtained by judgment, hard-fought judgment. And it is not just a big recovery because it is a big case. I mean, the relative size of the recovery to the transaction is unprecedented.

I mean, the value of what was bought the Chancellor found to be around 2.4 billion, and they paid 3.7 billion. They paid 50 percent more than it was worth.

And to get him, to convince him to make those findings, we had to show that what one of the world's preeminent investment bankers did was completely misguided and top lawyers were misguided, and to convince him that effectively what the Special Committee did, which is, in fact, what was found here, was to not negotiate but was to engage in the process of trying to rationalize why this was fair, which is exactly what happened here.

And so, it is kind of awful to come up here and have to sort of toot your own horn and say we did a great job, but that's the position I'm in.

And we think this case clearly represents the greatest recovery in total in a shareholder class or derivatives litigation in Delaware history, and it really does show the utility of class and shareholder litigation.

And, you know, you have lawyers who come from relatively small firms who went all the way. We hired, we searched and tried to hire the preeminent natural resource investment banker, who cost a lot of money, and we paid all his bills, and, you know, we would have gotten nothing if we lost.

And it was a risky case. It was a case the defendants basically thought we had no chance to win, ever, as far as I know. That's what was communicated to me.

So, you know, in that circumstance is it arbitrary and capricious to say these lawyers are to get 15 percent of it? I don't think you can say it is.

Now, obviously, they say it is $35,000 an hour. Well, I never understood, you know, there is always usually in the opinions on fees a reference to what does this translate to per hour.

But I think this, it kind of breaks

down when you get to after trial, an entire fairness case, and they say we didn't put in much effort. I mean it was a lot of effort. We worked hard and put in a huge amount of effort and a huge amount of expense and had a huge amount of risk.

And as the Chancellor said, you know, we were asking for a lot of money and it was very skeptical, he was skeptical going into summary judgment, he told us that. He was skeptical going into the trial. He was skeptical after the first witness, which is something he told us.

And in the end he explained that the fee ruling, these lawyers really brought me around. They got me to focus and understand and explain this.

So I think in that respect to say it is a windfall -- I mean, a windfall is something you didn't do anything to get. I mean, we litigated a huge case and got an unprecedented result. And it is an extraordinarily large fee, and we are humbled by it.

But we think, you know, we think it is fair compensation and really, again, I think this Court's role is not to say, well, gee, what would we have awarded if we were doing it. It is to look, as all of the fee rulings of this Court reflect, look to see that he applied the Sugarland factors, considered each of them, and made a reasoned determination here.

He didn't give us what we were asking for. Our argument was in the second and third biggest cases ever they got 22 and a half percent, and they didn't even try it. And we tried it. Why should we get less than that, basically was the argument.

And he rejected that and he took into account that he felt there was some inappropriate delay leading into the case, which I would love to get into my, but my time is up, is almost up.

So under the abuse of discretion standard of review, our contention is the Chancellor, it is obvious from his bench ruling that he applied conscience and reason. This wasn't some arbitrary picking a number. I mean he looked at other cases, he considered the effort, he specifically talked about the particular usefulness of things that we had done in the case.

And, obviously, they say, well, all he really was focused on was the benefit conferred. Well, it is the biggest, it is supposed to be the biggest factor, and you are talking about a benefit so far beyond any other benefit obtained in any Chancery Court or any Delaware shareholder class or derivative case, that it does call for a fee that is not comparable to the fees awarded in any other case.

Unless you want me to answer any questions, my time is up.

JUSTICE STEELE: We will ask them.

MR. BROWN: Thank you, Your Honor.

JUSTICE STEELE: Thank you.

MR. BROWN: Thank you, Your Honor. For the reasons I explained, the ruling of the Court of Chancery should be affirmed. Thank you.

MR. ANGIOLILLO: May it please the Court, in my limited amount of time remaining let me just address again the Goldman witness in response to counsel's comments.

What we heard is that counsel has not identified any legal basis for excluding Del

Favero's testimony. None.

There is no legal requirement for a proffer after the Court ruled against me.

With respect to the deposition question, yes, they served formal notices of deposition. With respect to his point about, well, why didn't you make a bigger deposition record with Mr. Sanchez, the problem was --

JUSTICE RIDGELY: As I understand the proposal that the Chancellor was ruling upon, according to the other side, was to essentially interrupt the trial, allow a deposition, and then resume the trial at a later time other than when it had been scheduled. Is that the proposal that was ruled upon?

MR. ANGIOLILLO: I do not believe that that accurately represents the proposal at the time.

That being said, let's just take that at face value. All right. What the Court ruled on, however, and the ruling is quoted in our briefs, the ruling is it is just that you identify him too late. Not that it would adjust the trial schedule. It is just that he is too late.

Now, with respect to the deposition of Mr. Sanchez in 2009, several years before the trial, the argument is you should have asked more questions. The problem with that is it wasn't until December of 2010 that Chancellor Strine identified the questions that he was interested in.

The problem with excluding this witness from the trial is that he could have answered those questions. Chancellor Strine could have disregarded it. But we are entitled to put a witness on to answer those questions, fundamentally.

If you wait seven years, to borrow Chancellor Strine's analogy, seven years to taste the bread, don't blame the ingredients. And if you are going to do that, you got to at least let the baker come into court and explain the recipe. You got to do that. That's why this case should be reversed.

I also believe --

JUSTICE STEELE: Counsel, have you answered Justice Ridgely's question, do you think? Because your time is up.

MR. ANGIOLILLO: Justice Ridgely, we were not conditioning the production of this witness only on requiring that the entire trial scheduled would have to be changed.

I further submit that even if that had been the case, seven years after the fact, in a bench trial that was being fit in piecemeal over several days, and an adjustment of a week, or a month, or two months was without any consequence, and even if that was the condition upon which we were making this request, it was an abuse of discretion not to adjourn the trial for several weeks, or a month, or whatever it was going to do, that fundamentally is an error of law. Thank you.

JUSTICE STEELE: Thank you, counsel.

Thank you, counsel, for the argument. We will take the case under advisement and recess.

(Conclusion of Proceedings.)

State of Delaware)
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New Castle County)

CERTIFICATE OF REPORTER

I, Eleanor J. Schwandt, Registered Professional Reporter and Notary Public, do hereby certify that the foregoing record, pages 1 to 50 inclusive, is a true and accurate transcript of the above-entitled matter, transcribed via digital recording to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 24th day of September, 2012, at Wilmington.

ORIGINAL

Eleanor J. Schwandt

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