

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

1 APPEARANCES:

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

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

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

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

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

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

24 Since that was the question it was
clear error to bar Goldman Sachs from coming to



1 testify at the trial to answer the very question
2 that the Chancellor was posing.

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

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

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

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

21 Now, let me begin. The Court is
22 looking at this through the prism of Levitt v.
23 Bouvier, and the Court's review of factual
24 findings is deferential only so long as, quote,



1 the findings are supported by the record and the
2 conclusions are the product of an orderly and
3 logical deductive process.

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

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

22 And the record is without, without
23 doubt a record that was unchallenged with respect
24 to the committee hiring very fine legal advisers,



1 very fine financial advisers, very fine mining
2 advisers, that they met 20 times, that they met
3 with Goldman Sachs face-to-face 14 times, and
4 they took eight months to consider and negotiate
5 the transaction.

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

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



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

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

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

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

23 And as the Court can tell from our
24 appellate briefs, both sides' briefs, there are



1 disputes about exactly what Goldman did and why
2 they did it.

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

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

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

22 JUSTICE HOLLAND: My question is:
23 Would he be talking about Goldman procedures
24 generally or would he be talking about this



1 specifically?

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

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

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

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

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

23 JUSTICE RIDGELY: So there is nothing
24 in the record as to what the excluded witness



1 would have said if allowed to testify?

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

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

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

22 JUSTICE RIDGELY: Just so I
23 understand --

24 MR. ANGIOLILLO: Yes.



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

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

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

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

24 And, Your Honor, if --



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

3 MR. ANGIOLILLO: Sure.

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

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

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



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

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

21 Now, but to answer Justice Berger's
22 question, to complete my answer to Justice
23 Berger's question, it is never the case that
24 admissible evidence, which could be presented by



1 a witness, that the identification of the witness
2 late in the day is a basis to exclude the
3 testimony.

4 Moreover --

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

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

24 Now, let's just say for sake of



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

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

9 JUSTICE BERGER: But let me stop you
10 there.

11 MR. ANGIOLILLO: Yeah.

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

15 MR. ANGIOLILLO: Yes, Your Honor.

16 JUSTICE BERGER: Okay. And when you
17 try to figure out whether another person or
18 another judge abused his discretion, you would
19 like to know what the relevant facts were, and if
20 I were still on the Court of Chancery and I was
21 told, relatively at the last minute, that there
22 would be a substitution, I would be asking
23 questions or, if not asking questions, I would be
24 hoping to hear that something out of the



1 ordinary, something unexpected had happened
2 because, of course, you were preparing for trial
3 for months now and you have just now learned that
4 somebody that was a critical witness is not going
5 to be available.

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

14 Now, Your Honor, in the context of
15 reviewing for abuse of discretion, where the
16 transaction was announced in 2004, the litigation
17 was commenced in 2004, the deal closed in March
18 of 2005, and they don't prosecute a case, and two
19 vice chancellors have to reprimand them and they
20 have to confess, after years and years and years
21 of inaction, that when finally the Chancellor
22 forces a trial in this case, forces one, and my
23 clients have to come and defend themselves, seven
24 years later, an investment banker who worked for



1 the Special Committee, who was dismissed from the
2 case, says he won't come from Mexico City.

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

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

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

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

21 Your Honor, what Chancellor Strine
22 said at that hearing when he barred the witness
23 was he said, Tell me why I should be hearing a
24 new witness at this stage just because an



1 investment banker has chosen not to come and
2 testify in a trial involving his work. And I
3 might say seven years later. All right.

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

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

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

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

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



1 MR. ANGIOLILLO: That's correct.

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

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

7 JUSTICE RIDGELY: The one that was
8 excluded.

9 MR. ANGIOLILLO: Yes.

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

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

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

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

21 JUSTICE RIDGELY: As a live witness?

22 MR. ANGIOLILLO: Right. But also,
23 Your Honor, I also, another part of the argument
24 was, I just have to sort of emphasize, what was



1 the magic of these trial dates?

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

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

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

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

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

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

22 MR. JENKINS: May it please the
23 Court, on behalf of the Nominal Defendants,
24 Southern Copper Corporation, I would like to



1 briefly address the issue of attorneys' fees in
2 this case.

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

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

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

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

23 Why, for example, was the effort here
24 worth an hourly rate ten times that in other



1 cases in which substantial fees were awarded?

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

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

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

17 A JUSTICE: Thank you.

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

20 MR. JENKINS: Yes, sir.

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

24 MR. JENKINS: Yes, Your Honor.



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

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

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

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

23 MR. JENKINS: I think, Your Honor,
24 there has been a declining percentage approach



1 applied by this Court, at least applied by the
2 Chancery Court. I think this Court, as I said,
3 nodded and said, yes, that's correct.

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

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

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

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

24 Thank you, Your Honor.



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

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

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

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

19 The head Goldman Sachs banker, Mr.
20 Sanchez, who was in charge of this engagement was
21 deposed. Everyone knew, he had already left
22 Goldman Sachs in 2006, everyone knew that we
23 couldn't force him to appear at trial, but we had
24 a videotape deposition that we were prepared to



1 use at trial, which is not uncommon in Chancery
2 Court cases, to submit, you know, witness
3 testimony by deposition, and now we do it by
4 videotape, and so he was deposed.

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

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

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

20 JUSTICE STEELE: Let me ask you a
21 question that's a product of being perhaps too
22 many years away from the litigation. There was a
23 time when if you put the other party on notice
24 that you wished to take their witness'



1 deposition, you were to tell them in advance
2 whether it was for discovery or whether it was
3 for trial, and the parties reacted differently at
4 the deposition based upon the reason for which
5 the deposition was noticed.

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

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

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



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

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

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

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

22 Now they are saying there is
23 something missing? I tell you it is important to
24 understand the context of that because one of our



1 arguments below was, to the Chancellor, you ought
2 to draw some negative inferences here because
3 this, the lead guy at Goldman, he is not coming,
4 and they don't normally do that. They are
5 usually willing to come and defend what they did.

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

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

23 Now, let me talk about, quickly turn
24 to the facts relating to the, quote, excluded



1 witness.

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

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

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

20 But sort of right before trial the
21 defendants seemed to have an interest in having a
22 live Goldman witness, and they said they might
23 get this guy and might get that guy, and then we
24 got an e-mail a few days before trial, and it is



1 all in the record, saying we are not going to
2 have a live Goldman witness, and then some point
3 a few days after that we get an e-mail, a
4 proposal to the Court, we have a guy, we have
5 located a guy at Goldman, we want him to testify,
6 he cannot appear at the trial.

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

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

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

24 MR. BROWN: Well, except we never got



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

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

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

12 MR. BROWN: It sure is.

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

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



1 problem with it.

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

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

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

19 JUSTICE RIDGELY: Was there a fact
20 witness interrogatory?

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



1 JUSTICE RIDGELY: So there is no
2 discovery violation?

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

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

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

21 And so, you know, to me, Your Honor,
22 if you are going to come in and say it is an
23 abuse of discretion to use this procedure, not
24 use this procedure where we hold the trial open



1 and have a witness, you know, depose and testify
2 after the fact, there had to be a proffer at the
3 time. Here is what he was going to say and here
4 is why it would have mattered, especially since
5 they have admitted in their briefs the record
6 with respect to what Goldman Sachs did was
7 complete.

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

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

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

23 What they did was, and I'm lapsing
24 into some of the arguments now that weren't



1 addressed, which I was told not to do, but, you
2 know, this case was all about this term relative
3 valuation, because -- let me back up here -- the
4 transaction at issue here was the purchase by
5 Southern Copper of a company Minera Mexico from
6 Southern Copper's controlling shareholder, and
7 the consideration they paid was stock.

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

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

24 And actually the committee, when the



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

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

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

20 So, anyway, we all understood what
21 was happening. And they then had an expert come
22 in and sort of regurgitate what Goldman Sachs did
23 and, you know, he testified about this relative
24 valuation issue at trial. So there is nothing in



1 the record that's missing. There is no question
2 that the Chancellor didn't understand what was
3 going on. He, in fact, did understand exactly
4 what was going on, as reflected in a 105-page
5 opinion.

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

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

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

22 JUSTICE HOLLAND: Tell us in the
23 final analysis how you characterize the
24 Chancellor's ruling on not hearing from the



1 witness. Is he saying what the witness has to
2 say is not relevant? What we have done in
3 discovery is enough? The witness is too late?
4 Or we are not going to redo the whole trial
5 schedule to accommodate your witness?

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

13 Like I said --

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



1 are looking at is their proposal; is that
2 correct?

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

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

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

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

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

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



1 videotape.

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

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

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

14 The Chancellor unquestionably applied
15 the Sugarland test, admittedly went through all
16 the factors, balanced them, and concluded that a
17 15 percent, 15 percent of the recovery here,
18 inclusive of expenses, was an appropriate
19 compensation.

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

24 MR. BROWN: Yes. And it is not our



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

5 And the Court took into account that
6 it is bigger and reduced the fee from, you know,
7 normally, you know, if you try a big corporate
8 case and get a good recovery, and it is appealed,
9 and you take it to the very end, you know, 25 to
10 33 percent is the normal range. He departed
11 significantly downward from that here.

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

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

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

23 Because you completely diverge the
24 interests, the interests of the lawyer and the



1 client if you have a declining percentage,
2 because you don't want to say, if you get a
3 hundred million you get 30 percent, but if you
4 get 200 million you get something less. So you
5 are encouraging lawyers that are taking these
6 cases on a contingent basis from trying them,
7 from trying to get the big number.

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

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

23 This case is basically 20 times
24 bigger, and it was obtained by judgment,



1 hard-fought judgment. And it is not just a big
2 recovery because it is a big case. I mean, the
3 relative size of the recovery to the transaction
4 is unprecedented.

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

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

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

23 And we think this case clearly
24 represents the greatest recovery in total in a



1 shareholder class or derivatives litigation in
2 Delaware history, and it really does show the
3 utility of class and shareholder litigation.

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

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

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

19 Now, obviously, they say it is
20 \$35,000 an hour. Well, I never understood, you
21 know, there is always usually in the opinions on
22 fees a reference to what does this translate to
23 per hour.

24 But I think this, it kind of breaks



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

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

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

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

23 But we think, you know, we think it
24 is fair compensation and really, again, I think



1 this Court's role is not to say, well, gee, what
2 would we have awarded if we were doing it. It is
3 to look, as all of the fee rulings of this Court
4 reflect, look to see that he applied the
5 Sugarland factors, considered each of them, and
6 made a reasoned determination here.

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

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

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



1 in the case.

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

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

13 JUSTICE STEELE: We will ask them.

14 MR. BROWN: Thank you, Your Honor.

15 JUSTICE STEELE: Thank you.

16 MR. BROWN: Thank you, Your Honor.

17 For the reasons I explained, the ruling of the
18 Court of Chancery should be affirmed. Thank you.

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

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



1 Favero's testimony. None.

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

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

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

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

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



1 late.

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

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

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

22 I also believe --

23 JUSTICE STEELE: Counsel, have you
24 answered Justice Ridgely's question, do you



1 think? Because your time is up.

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

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

17 JUSTICE STEELE: Thank you, counsel.

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

21 (Conclusion of Proceedings.)
22
23
24



1 State of Delaware)
2 New Castle County)

3
4
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