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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

AMC APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDING

Before the trial in this action began, the Court of Chancery determined that the Special Committee of Southern Peru Copper Corporation ("SPCC") was independent and composed of well-qualified, experienced directors. The Special Committee hired experienced legal and financial advisors. Based on these facts, the trial court granted summary judgment dismissing the members of the Special Committee. Yet, after a piecemeal trial conducted over parts of four days, it decided that a breach of fiduciary duty led SPCC to issue too many shares in its merger with Minera México, S.A. de C.V. ("Minera"), a company owned by SPCC's majority shareholder, and awarded $1.9 billion in damages against SPCC's controlling shareholder ("Defendants").

The trial court's decision was a direct result of its reversible error in denying Defendants the right to present testimony from the Special Committee's financial advisor, Goldman Sachs ("Goldman"). The trial court excluded this testimony despite specifically identifying "what the bankers for the committee were thinking" as a key question for trial and despite the fact that the trial court based its opinion almost entirely on criticisms of Goldman's valuation and resulting fairness opinion.

The trial court compounded this reversible error by making its own valuation determinations about the "fair" price for the transaction arbitrarily and capriciously based on assumptions that lack evidentiary support. The trial court based its opinion on its view that special committees addressing controlling shareholders are "afflicted" by a "confined mindset" and its view that the relative valuation analysis employed by Goldman was therefore "alchemy." But in cherry-picking numbers from Goldman presentations – without the aid of Goldman to explain those numbers – the trial court entirely missed the fact that a relative valuation analysis is the best way to perform an accurate comparison of the value of SPCC, a publicly traded mining company, and Minera, a privately held mining company.

The trial court compounded these errors further by failing to determine which side had the burden of proof prior to or during trial – despite its recognition that such a "prism" or "framework" was necessary to an informed decision. Here, Plaintiff should have borne that burden because the Special Committee was independent, well-functioning, and was not unduly influenced by the controlling shareholder. The failure to determine the burden of proof permeated each of the errant inferences drawn by the trial court in examining financial information without the benefit of testimony from Goldman.

For these reasons, and others set forth below, the Court of Chancery's opinion should be reversed.

SUMMARY OF ARGUMENT

1. The trial court impermissibly denied Defendants the opportunity to present a witness from Goldman to explain its valuation process on the grounds that the witness constituted an "unfair surprise." This is not a legal basis for excluding relevant testimony about the central issue in the case – especially where Goldman's valuation process had been a central issue in the case throughout the seven year litigation. Such an exclusion constitutes reversible error. *See Drejka v. Hitchens Tire Serv. Inc.*, 15 A.3d 1221, 1223-24 (Del. 2010). The result of this reversible error is to improperly penalize Defendants for the fact that, in the trial court's words, "the [P]laintiff . . . engaged in a pattern of litigation delay that compromised the reliability of the record."

2. The trial court's determination about the "fair" price for the transaction was arbitrary and capricious. Among other things, the trial court's opinion regularly draws inferences from Goldman documents that were either unsupported or more susceptible to inferences that supported Goldman's valuation, and the trial court reached outside the trial record to fill the evidentiary gap left by its exclusion of testimony from Goldman.

3. The trial court committed reversible error by failing to determine which party bore the burden of proof before trial, and further erred by ultimately allocating the burden to Defendants, because the Special Committee was independent, well-functioning, and did not rely on the controlling shareholder for the information that formed the basis for its recommendation. The trial court's failure to allocate the burden of proof before trial was outcome determinative because Plaintiff failed to prove that the merger was not fair.

4. The trial court's award of damages is not supported by evidence in the record, but rather by impermissible speculation and conjecture. Indeed, Plaintiff failed to offer any evidence proving damages and, absent such proof, the trial court further cherry-picked numbers from Goldman presentations to fashion a remedy based on its own speculation.

5. The trial court's award of attorneys' fees of more than $300 million is a clear abuse of discretion. Delaware's *Sugarland* factors were established to prevent unreasonable results such as the $35,000 per hour rate awarded to Plaintiff's attorneys here. Nor should Plaintiff's attorneys profit as a direct result of their years-long failure to diligently prosecute this case by collecting fees on the nearly $700 million in prejudgment interest.

STATEMENT OF FACTS

I. *SPCC Forms a Special Committee in Response to the Proposed Merger*

On February 3, 2004, Grupo Mexico formally approached SPCC's board of directors regarding a potential merger of privately-held Minera and publicly-held SPCC. *See* A577. Grupo Mexico owned 99.15% of Minera, which was primarily engaged in the mining and processing of copper, molybdenum, zinc, silver, gold and lead through its Mexico-based mining units. *See* A1772 at ¶ 4; A1773 at ¶ 9. SPCC was a publicly-traded corporation also engaged in copper mining. Prior to the merger, Grupo Mexico, through its affiliates, owned 54.17% of SPCC's outstanding common stock and 63.08% of its aggregate voting power.[1]

Grupo Mexico's proposal, which relied on advice from Grupo Mexico's financial advisor, UBS Investment Bank ("UBS"), assumed that Minera's enterprise value was $4.3 billion, inclusive of $1.3 billion in net debt. *See* A1774 at ¶ 13. Grupo Mexico proposed that SPCC would acquire Grupo Mexico's interest in Minera in exchange for approximately 72.3 million shares of SPCC. As a result, Minera would become a 98.84% (later revised to 99.15%) subsidiary of SPCC. *See id.*

In response to Grupo Mexico's proposal, SPCC's board appointed a Special Committee of independent and disinterested directors to evaluate the proposed merger. *See* A577. SPCC's board then publicly announced the proposed merger (the "Proposed Merger") and the formation of the Special Committee. *See id.* The Special Committee was comprised of independent directors Carlos Ruiz Sacristan, Miguel Palomino Bonilla, Harold S. Handelsman, and Gilberto Perezalonso Cifuentes. *See* A577; A579.

II. *The Special Committee Hires Advisors and Begins Due Diligence*

Authorized to engage legal and financial advisors to assist it in overcoming the Proposed Merger's inherent challenge of valuing the privately-held Minera in terms of shares of the publicly-traded SPCC, the Special Committee retained Latham & Watkins LLP ("Latham") as its United States legal advisor; Mijares, Angoitia, Cortes y Fuentes SC ("Mijares") as its Mexican counsel; and Anderson & Schwab, Inc. ("A&S") as its mining consultant. *See*

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[1] Cerro Trading Company, Inc. ("Cerro") and Phelps Dodge Overseas Capital ("Phelps Dodge") held 14.2% and 13.95% SPCC's outstanding capital stock, respectively. See A1773 at ¶ 8.

A1775 at ¶ 20, 22. After interviewing five potential financial advisors, the Special Committee engaged Goldman as its financial advisor in February 2004. *See* A192-98. Over the next eight months, Goldman met with the Special Committee and its advisors no fewer than fourteen times. *See* A578-90. Goldman also met regularly with the management and advisors to SPCC and Minera. *Id.* As new information became available, Goldman made at least eight separate presentations to the Special Committee between March and October 2004 regarding its valuations of Minera and SPCC. *See* A132-91; A199-214; A215-48; A295-350; A351-81; A382-451; A483-518; A519-55.

In early March 2004, the Special Committee and Goldman began reviewing publicly available financial and operational information concerning Minera and SPCC. *See* A578. In April, Goldman began its many months of business, operational, and financial due diligence review of Minera, including several meetings between Goldman, A&S, members of Minera's senior management, and SPCC's senior management. *See* A580.

On March 25, Grupo Mexico delivered a term sheet to the Special Committee, proposing that the consideration to be paid by SPCC would be based on an enterprise value for Minera of approximately $4.3 billion. *See* A579.[2] On May 7, 2004, after several rounds of negotiations between the parties, as is common practice, Grupo Mexico delivered a revised term sheet to the Special Committee, which included a proposal that the number of SPCC shares to be issued would be calculated based on the stock's 20-day average closing price beginning five days prior to the closing of the transaction. *See* A580.

III. *Goldman Presents the Special Committee with a Series of Valuation Analyses as New Information Becomes Available*

To assist the Special Committee in determining how many shares of the publicly-traded SPCC should be offered in exchange for the privately-held Minera, Goldman presented the Special Committee with various valuation analyses based on the information it was gathering from the parties. *See, e.g.*, A299-301; A369; A389-91; A500-01; A540-43. These valuation analyses included, among other things, discounted cash flow ("DCF") calculations of both Minera and SPCC, an analysis of the value of Minera implied by comparable company market multiples, and an analysis of the expected relative contribution of Minera and SPCC based on various performance metrics. *See* A336-38; A373-75; A424-27; A503-06; A546-50.

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[2] Enterprise value consists of the equity value plus net debt.

1. Goldman's Initial DCF Valuations for Minera and SPCC

On June 11, 2004, Goldman presented a preliminary financial review of Minera to the Special Committee. Goldman utilized two forecasts of Minera's expected cash flow for the years 2004 through 2013: one based on Minera's management's projections and one based on adjustments to those projections made by A&S. *See* A336. Although the forecasts mostly agreed, A&S forecasted lower levels of production, higher costs and higher capital expenditures. Based on these projections, Goldman calculated a range of values for Minera as of June 2004. Using a range of long-term copper prices ($0.80/lb to $1.00/lb) and a range of discount rates (7.5% to 9.5%), Goldman performed a preliminary series of DCF calculations for Minera resulting in estimates of equity values ranging from $1.136 billion to $3.053 billion based on then-existing projections:

Illustrative Equity Value (Life of Mine) - A&S Case

Discount Rate	Long Term Copper Price (US$/lb) $0.80	$0.85	$0.90	$0.95	$1.00
9.5 %	$1,136	$1,320	$1,504	$1,688	$1,872
9.0 %	$1,214	$1,408	$1,603	$1,797	$1,991
8.5 %	$1,297	$1,503	$1,709	$1,915	$2,121
8.0 %	$1,387	$1,606	$1,824	$2,043	$2,261
7.5 %	$1,485	$1,718	$1,950	$2,182	$2,414

Illustrative Equity Value (Life of Mine) - Mitt Case

Discount Rate	Long Term Copper Price (US$/lb) $0.80	$0.85	$0.90	$0.95	$1.00
9.5 %	$1,552	$1,752	$1,952	$2,153	$2,353
9.0 %	$1,657	$1,869	$2,081	$2,293	$2,506
8.5 %	$1,771	$1,996	$2,221	$2,446	$2,671
8.0 %	$1,895	$2,135	$2,374	$2,613	$2,853
7.5 %	$2,032	$2,287	$2,543	$2,799	$3,053

A336 (emphasis added). Goldman also presented an analysis illustrating the factors that made up the difference between Goldman's DCF analysis and Grupo Mexico's term sheet, such as reductions in the long-term price of copper (to $0.85/lb) and the value of tax benefits. *See* A335. Goldman calculated an equity value of $1.996 billion of Minera based on the above table. *Id.*

On June 23, 2004, Goldman presented to the Special Committee its preliminary financial review of SPCC. Again, Goldman considered two alternative sets of projections: one based on the assumptions provided by SPCC's management (the "SPPC Case") and one based on the assumptions that the ore grades at two of SPCC's mines would remain constant (the "Alternative Case").[3] *See* A369. Using a range of long-term copper prices ($0.80/lb to $1.00/lb) and a range of discount rates (8% to 10%), Goldman estimated a series of DCF values for SPCC ranging from $1.552 billion to $3.228 billion.

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[3] The Alternative Case also based its estimates of capital expenditures on Wall Street research rather than SPCC's management's estimates. *See* A369.

Illustrative Equity Value (Life of Mine) SPCC Case

Discount Rate	Long Term Copper Price - US$/lb				
	$0.80	$0.85	$0.90	$0.95	$1.00
10.0 %	$1,552	$1,716	$1,881	$2,045	$2,210
9.5 %	$1,621	$1,784	$1,958	$2,141	$2,314
9.0 %	$1,697	$1,879	$2,062	$2,244	$2,427
8.5 %	$1,779	$1,971	$2,164	$2,357	$2,549
8.0 %	$1,868	$2,072	$2,275	$2,479	$2,682

Illustrative Equity Value (Life of Mine) Alternative Case

Discount Rate	Long Term Copper Price - US$/lb				
	$0.80	$0.85	$0.90	$0.95	$1.00
10.0 %	$1,951	$2,130	$2,309	$2,487	$2,666
9.5 %	$2,036	$2,225	$2,413	$2,601	$2,790
9.0 %	$2,128	$2,327	$2,526	$2,725	$2,924
8.5 %	$2,229	$2,439	$2,648	$2,858	$3,070
8.0 %	$2,338	$2,561	$2,783	$3,006	$3,228

See A373 (emphasis added). With the same $0.85/lb copper price assumed in the Minera analysis and a 9.0% discount rate, Goldman calculated SPCC's DCF value as $1.745 billion.[4] *See* A371.

2. Goldman Uses a Relative Valuation

Although Goldman's June 2004 valuations resulted in comparable DCF calculations for Minera and SPCC ($1.996 billion and $1.745 billion, respectively), the equity value of SPCC's stock price at that time was approximately $3.1 billion. *See* A335; A355; A371. Goldman analyzed the source of this discrepancy and its calculations showed that SPCC was trading in the public markets at a multiple of the implied DCF value. *See* A473. Goldman's analysis was confirmed by a UBS analysis, which found that in July 2004, "[c]opper producers [were] trading at a 30% premium to DCF values," likely due to the market's expectation that copper prices would increase, making copper mining companies more valuable. *Id.*

After these June presentations, Goldman began accounting for this additional value an investor would have ascribed to Minera in an environment of rising copper prices. *See, e.g.*, A389-91. To account for this market-recognized element of value, in its July 8th presentation to the Special Committee, Goldman performed a relative valuation by performing stand-alone DCF calculations of both Minera and SPCC and then using the figures to calculate the number of shares that SPCC would need to issue in order to acquire Minera on a fair basis. *See id.* This had the effect of comparing the companies under the same market premium. On the basis of its DCF calculations of Minera and SPCC based on existing projections, Goldman then calculated a range of shares to be issued of between 28.9 million to 71.3 million shares, based on various discount rates and

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[4] Factoring in other variables, such as long-term molybdenum prices and changes in ore grades, Goldman calculated a slightly lower value for SPCC. *See* A374-75.

long-term mineral prices, as well as assumptions regarding royalties and tax rates.[5] *See* A424-26.

IV. *Goldman Updates Its Analysis and the Special Committee Negotiates Concessions*

Goldman and UBS discussed throughout July and August their respective valuations and views on an appropriate exchange ratio, with UBS indicating that Grupo Mexico believed that it should receive over 80 million shares of SPCC. *See* A585. On August 21st, "'after an extraordinary effort to come to an agreement,'" Grupo Mexico agreed to a fixed-share exchange ratio and proposed that SPCC issue 67 million shares as consideration in the Proposed Merger. A1780-81 at ¶ 40. On September 7th, Grupo Mexico's counsel distributed a draft Agreement and Plan of Merger (the "Agreement"). *See* A586.

On September 15th, Goldman presented to the Special Committee an updated relative valuation of the Proposed Merger. On the basis of adjustments for new information obtained through diligence, Goldman calculated a range of between 43.1 million and 84.1 million shares to be issued.[6] *See* A503-05.

On September 23rd, after multiple Special Committee discussions, Latham presented a revised draft of the Agreement to Grupo Mexico's advisors, proposing, among other things, that SPCC issue 64 million shares as consideration, that SPCC pay a $100 million special dividend to its shareholders, and a "majority of the minority" vote of disinterested shareholders. *See* A587-88.

After further negotiations, on October 5th, Grupo Mexico agreed, among other things, that SPCC would issue to Grupo Mexico 67 million shares as

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[5] As an illustrative example, assuming a long-term copper price of $0.90/lb, a $3.50/lb long-term price of molybdenum, a 9% discount rate for SPCC, an 8.5% discount rate for Minera and including the impact of royalties and tax benefits, Goldman calculated a price for Minera of 62.8 million shares of SPCC stock, which was within the range of fair value. *See* A425.

[6] Using the same illustrative example assumptions of long-term copper price of $0.90/lb, a $3.50/lb long-term price of molybdenum, a 9% discount rate for SPCC, an 8.5% discount rate for Minera, and including the impact of royalties and tax benefits, Goldman estimated that a fair price for Minera would be 68.1 million shares of SPCC stock, as opposed to 62.8 million shares in the analysis without the updated information. *See* A503.

consideration for the Proposed Merger,[7] prior to which SPCC would pay a $100 million special dividend to its stockholders. *See* A1781 at ¶ 43. Three days later, on October 8th, the Special Committee and Grupo Mexico agreed that the Proposed Merger would be conditioned on the approval of the holders of two-thirds of the outstanding common stock. *See* A1782 at ¶ 45. On October 21st, Cerro, a minority shareholder, entered into an agreement with the Grupo Mexico affiliate that held a majority stake in SPCC, pursuant to which Cerro agreed to vote in accordance with the Special Committee's recommendation regarding the Proposed Merger, and Grupo Mexico's affiliate agreed to support an underwritten public offering of Cerro's SPCC stock. *See id.* at ¶ 46.

V. *Goldman Issues its Fairness Opinion and the Special Committee Recommends the Proposed Merger*

On October 21, 2004, the Special Committee met with its advisors to consider the final terms of the Proposed Merger. At this meeting, with all of the diligence work completed, Goldman made its final presentation and ultimately advised the Committee that 67.2 million shares of SPCC in exchange for 99.15% ownership of Minera was fair to SPCC. *See* A519-55. Goldman's October analysis used the same relative valuation technique as the July 11th and September 15th presentations, with revisions that included Wall Street research analysts' current averages of copper prices and a reduction in Minera's debt as a result of the proposed terms of the merger agreement. *See* A540. On the basis of these adjustments, Goldman determined that 67.2 million shares of SPCC was a fair price for Minera, using the same long-term copper price and discount rate assumptions as in the July 11th presentation. *See* A546. The members of the Special Committee (other than Mr. Handelsman, who recused himself) voted to recommend the Proposed Merger to SPCC's board based on their determination that it was in the best interests of SPCC's shareholders.[8] *See* A590.

VI. *SPCC's Board and Shareholders Overwhelmingly Approve the Merger*

Upon the recommendation of the Special Committee, the SPCC board recommended that SPCC shareholders approve the Proposed Merger. *See id.* At the March 28, 2005 special shareholder meeting, the holders of more than 90% of

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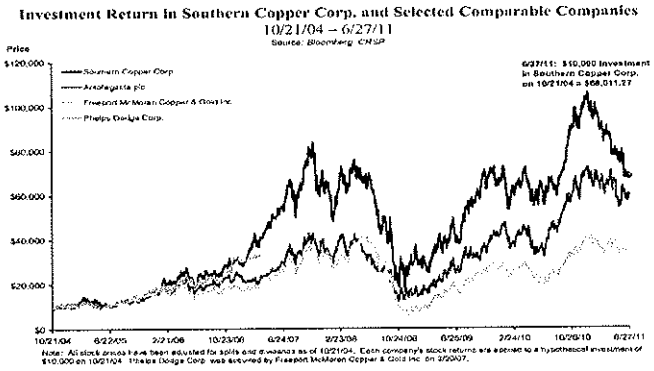
[7] This amount was later revised to 67,207,640 to account for Grupo Mexico's 99.15% ownership of Minera rather than its previously represented 98.84% ownership.

[8] Mr. Handelsman abstained to alleviate any appearance of a conflict resulting from the registration rights to be granted to Cerro. *See* A590.

the outstanding capital stock of SPCC voted to approve the Proposed Merger, including at least one plaintiff who had already filed a complaint challenging the Proposed Merger. *See* A1783 at ¶ 54; A1212. The merger closed on April 1, 2005. *See* A1783 at ¶¶ 54-55.

After a typical initial decline, SPCC's stock price increased after the Proxy's release. *See* A711-15; *see also* Matthew Tagliani, *The Practical Guide to Wall Street: Equities and Derivatives* 62 (2009) ("The most common reaction to news of an acquisition is that the shares of the acquiring company drop in price as investors factor in the costs of the transaction into the valuation of the company . . . ."). The market unambiguously reacted favorably to the Merger's April 1, 2005 closing, with SPCC's stock price rising from its final pre-Merger price of $5.90 to $7.80 by year's end. *See* A711-15. In fact, SPCC's stock continued to be "if not the, one of the best performing stocks on the New York Stock Exchange since the date of this merger." *See* A1998-99 at 180:14-181:7. Additionally, SPCC far outperformed its mining industry competitors after the Merger. *See* A2338-39.



VII. *Several Plaintiffs File Suit but Allow the Case to Sit Dormant for Years*

In late 2004, two months after the Proposed Merger was announced, the first of three complaints was filed in the Court of Chancery against Grupo Mexico's affiliate and its directors, SPCC and the Special Committee directors (the "Special Committee Defendants"), alleging breaches of fiduciary duty. *See* A1160-61. Two additional complaints were filed in early January 2005, and on January 24, 2005, the cases were consolidated with the 2004 complaint designated as the operative complaint (the "Complaint"). *See* A1610-11.

Although the suits were consolidated and Defendants answered the Complaint, Plaintiff failed to prosecute the case for years. In 2009, Vice

Chancellor Lamb admonished Plaintiff for the delays: "I can't quite strongly enough express my displeasure at how delayed this litigation has been and the fact that it wasn't prepared for trial two or three years ago." A747 at 20:14-17. Upon Vice Chancellor Lamb's retirement from the bench, the case was reassigned to Chancellor Strine. *See* Ex. A at 43 n.66. Before Chancellor Strine, Plaintiff's counsel would "take full responsibility" for the delay and admit that "this case was not pursued . . . the way it should have been." A1413 at 38:19-20.

VIII. *After Discovery, the Trial Court Grants the Special Committee Defendants' Motion for Summary Judgment*

On August 11, 2010, the Special Committee Defendants moved for summary judgment, arguing that SPCC's certificate of incorporation exculpated them from liability for any breach of the duty of care, and that Plaintiff had failed to present evidence that the Special Committee breached its duty of loyalty. *See* A1221; A1222-77. Chancellor Strine granted the motion, finding that the Special Committee was independent and loyal. *See* A1498-1503 at 123:22-129:5. Chancellor Strine explained that in order to bring a claim against the Special Committee Defendants, "[y]ou have to have something that is akin to a breach of the duty of loyalty. I see no evidence against any of these directors in the record that would support a rational inference of disloyalty." A1503 at 128:10-14. Chancellor Strine therefore dismissed all claims against the Special Committee Defendants. Plaintiff did not challenge this ruling below or on appeal.

IX. *The Trial Court Denies Plaintiff's Motion for Summary Judgment in Order to Hear "What the Bankers for the Committee Were Thinking"*

It was not until June 30, 2010 — more than five years after initiating the action — that Plaintiff moved for partial summary judgment, arguing that Defendants' "DCF valuation of Minera proves that the transaction was grossly unfair because it shows (consistent with plaintiff's expert's valuation) that Minera was worth more than $1 billion less than the $3.1 billion in stock that Grupo received." A1113 (emphasis omitted). Chancellor Strine denied Plaintiff's motion, finding that "there is a lot that is ambiguous and controverted" about the valuations. A1489 at 114:3-5. Chancellor Strine explained:

> As I'm saying, the approaches of each side make me a bit troubled going into trial, because I fear that I'm going to get kind of hedgy answers from all the experts. I'm not sure the expert testimony is where I'm going to focus the most. ***To me, some of the questions I'm going to have are going to be about . . . what the bankers for the committee were thinking.***

Id. at 114:5-14 (emphasis added). Chancellor Strine stressed that he was "not making any prejudgment," but wanted to "hear in a full-bodied way about what [Goldman and the other advisors] took into account" so that he "[did not] have to narrowly draw inferences in favor of one or the other." A1498 at 123:14-19.

X. *The Trial Court Denies Defendants the Opportunity to Present a Goldman Witness*

During the several years that Plaintiff lackadaisically prosecuted this case, Martin Sanchez, a Goldman investment banker who worked on the team that advised the Special Committee, left Goldman. A1798-1800 at 5:6-7:20. Prior to trial, Mr. Sanchez informed counsel for Defendants that he would not appear at trial. *See* A1798 at 5:6-10. In light of the Court's expressed interest in hearing a Goldman representative's opinion on the valuation methods relied on by the Special Committee, Defendants identified James Del Favero, who is currently head of the fairness committee at Goldman and self-evidently has substantial experience with valuation. *See id.* at 5:11-14.

On June 15, 2011, the morning of a scheduled pre-trial conference call with the trial court, Plaintiff submitted a letter objecting to Mr. Del Favero testifying at trial. *See* A1804-06. Plaintiff contended that Mr. Del Favero's testimony was irrelevant and that the timing of his identification as a witness was unfair to Plaintiff. *See id.* The trial court ultimately agreed that his identification was late – but not that his testimony would be irrelevant. *See* A1800 at 7:1-22.[9]

XI. *The Trial Court Finds in Favor of Plaintiff Without Hearing Testimony from Any Financial Advisor and Based on the Court's Own Review of Goldman Presentations and Undisclosed Computer Analysis*

A bench trial, which took place over the course of one full day and three mornings, commenced on June 21, 2011 and concluded on June 24, 2011. *See* A1819-2313. The bench trial was followed by post-trial submissions and an oral argument on July 12, 2011. *See* A2314-2559.

The trial court issued its opinion on October 14, 2011 and revised that opinion on December 20, 2011 to reflect certain changes to its damages

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[9] Although Mr. Sanchez was deposed in 2009, the trial court specifically found this to be insufficient to support a decision on the fairness of the price: "I think if anyone read the transcripts or read the briefs, the idea that somehow you can make this determination on the cold record -- I mean, somebody just must have a more confident mind than I have." *See* A1488-89 at 113:22-114:14.

calculation. *See* A2560-2665; Ex. A. Without hearing testimony regarding valuation from Goldman, and despite the fact that "the [P]laintiff in this case engaged in a pattern of litigation delay that compromised the reliability of the record," the trial court found for Plaintiff and awarded approximately $1.9 billion in damages, including prejudgment interest. *See* Ex. A at 3-4, 104-05.

In forming this opinion, the trial court apparently disregarded its finding that the Special Committee was independent. Instead, it repeatedly relied upon its new view that this Special Committee – and special committees addressing controlling shareholders generally – was "afflicted" by a "controlled mindset." *See, e.g.*, Ex. A at 1 ("Rather than tell the controller to go mine himself, the special committee and its advisors instead did something that is indicative of the mindset that too often afflicts even good faith fiduciaries trying to address a controller."); *id.* at 68 ("Why was this so? Because the Special Committee was trapped in the controlled mindset, where the only options to be considered are those proposed by the controlling stockholder."); *id.* at 71 ("But, this Special Committee was in the altered state of a controlled mindset.").

The court suggested that, despite being independent, the Special Committee and Goldman bent over backwards to justify the transaction at too-high a price. The court's decision was based on several criticisms and misapprehensions of Goldman's work, such as findings that "Goldman dropped any focus on the value of what [SPCC] was giving from its analyses" and that "both Goldman and the Special Committee believed that [SPCC]'s market price was higher than its fundamental value." *Id.* at 75.

In reaching its decision on the proper amount of damages, moreover, the trial court performed its own valuation based on undisclosed computer models. *See* A2853 at 77:16-20 ("I'm not going to disclose everything that we got on our computer system, but I can tell you that there are very credible remedial approaches in this case that would have resulted in a much higher award."). The trial court also appears to have manipulated two Goldman spreadsheets provided to the trial court in native form during summary judgment, using them to perform his own calculations. *See* Ex. A at 35 n.56, 59 n.120. Defendants were never provided the opportunity to respond to the analyses performed by the trial court; indeed it was never disclosed until the issuance of the opinion.

Following his ruling on liability, on December 19, 2011, Chancellor Strine awarded Plaintiff roughly $285 million in attorneys' fees, representing a rate of "approximately $35,000 an hour." *See* A2855 at 79:21-22. This amount was later revised to roughly $305 million. *See* Ex. B. Defendants filed a notice of appeal on January 20, 2012.

ARGUMENT

I. THE COURT OF CHANCERY IMPROPERLY EXCLUDED CRITICALLY IMPORTANT TESTIMONY FROM THE SPECIAL COMMITTEE'S FINANCIAL ADVISOR

A. Question Presented

Did the Court of Chancery err by excluding the testimony of James Del Favero regarding the advice given to the Special Committee by its financial advisor, on the ground that Mr. Del Favero was identified too late and allowing him to testify would be unfair to the Plaintiff, despite the facts that (i) Plaintiff "engaged in a pattern of litigation delay" that compromised the accessibility of witness and the reliability of the record; (ii) the timing of Mr. Del Favero being identified as a witness was occasioned by the unavailability of another witness who was beyond the court's subpoena power, (iii) the parties were never required to produce comprehensive witness lists, and (iv) Mr. Del Favero was available to be deposed prior to his trial testimony?

This question was preserved in the proceedings below at A1789 and A1794-1803.

B. Scope of Review

A trial judge's evidentiary rulings are reviewed for abuse of discretion. *Barrow v. Abramowicz*, 931 A.2d 424, 429 (Del. 2007). "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." *Sheehan v. Oblates of St. Francis De Sales*, 15 A.3d 1247, 1253 (Del. 2011) (internal quotation marks and alteration marks omitted).

C. Merits of Argument

Despite describing this case as "about . . . what the bankers for the committee were thinking," the trial court excluded trial testimony from the Special Committee's financial advisor. It did so without any legal basis. The trial court's opinion then heavily criticized the presentations prepared by Goldman. The exclusion of such testimony is reversible error. *Drejka*, 15 A.3d at 1223-24.

Since the trial court had ruled during summary judgment that SPCC had constituted a disinterested and independent Special Committee and that the Special Committee had hired qualified legal and financial advisors, the only issue

remaining at trial was whether the transaction was entirely fair. During the summary judgment hearing, the trial court emphasized that it would not be able to decide the case based on deposition transcripts or a paper record. *See* A1488-89 at 113:22-114:2 ("I think if anyone read the transcripts or read the briefs, the idea that somehow you can make this determination on the cold record -- I mean, somebody just must have a more confident mind than I have."). The trial court identified "what the bankers for the committee were thinking" as one of the questions in its mind headed into trial. A1489 at 114:13-14. The trial court then identified the very questions on which it ultimately critiqued Goldman:

> And you can expect at trial that I will be asking questions about whether this is the way it's done, whether banks just fly solo on the wings of relative valuation, whether they consider the value of the acquisition currency, whether they are overpaying, whether they tell clients with a more favorable multiple than the target to equalize that for the benefit of the target, rather than capitalize on it for the benefit of your client?

A1490 at 115:3-11. After all, the court noted, "the entire fairness standard is really about . . . explaining." *Id.* at 115:18-19.

Yet, when it came time to hear from the Special Committee's financial advisor, which could have answered the questions the trial court identified, the court barred the testimony.

1. No Rule, Statute or Principle of Law Rendered the Identification of James Del Favero as a Trial Witness Untimely or His Testimony Inadmissible

There was no basis for the trial court to exclude Mr. Del Favero's testimony, and denying Defendants the chance to present a Goldman witness when the court focused on Goldman's valuation throughout its opinion is reversible error.

The Rules of Evidence provide that "[a]ll relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State." Del. Unif. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Del. Unif. R. Evid. 401. The Delaware Rules of Evidence permit the exclusion of relevant evidence "if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Del. Unif. R. Evid. 403; *see Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 536-37 (Del. 2006). Likewise, the Court of Chancery Rules provide that, "[a]ll evidence *shall be admitted* which is admissible under statute or under the rules of evidence applied in the courts of the State of Delaware." Del. Ch. Ct. R. 43(a) (emphasis added).

The testimony far exceeded the relevance standard that is the touchstone for admissibility because it related to the key issue in the case – the rationale for Goldman's relative valuation of SPCC and Minera. *See* Del. Unif. R. Evid. 402, 403. But, without any explanation at all, the trial court placed a heightened burden on Defendants to establish that a banker from Goldman other than Mr. Sanchez should be permitted to testify:

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

A1796 at 3:21-24. Defendants, of course, had no control over a former employee of the Special Committee's financial advisor (which was independent of the Defendants), nor could they issue a subpoena to a witness that was not within the court's subpoena power. Defendants informed the trial court of their efforts to obtain the presence at trial of a Goldman witness:

> MR. HURD: . . . We have done everything possible in response to Your Honor's we believe preference to have a live witness from Goldman, from the banker that did the work.
>
> The individual, Mr. Sanchez, who we believed was going to testify, just recently informed us that he would not show up. Goldman and the company and the defendants have tried to ask him to come. He's refused to do so.
>
> So we identified Mr. Del Favero. He is, as Your Honor knows, a member of the fairness committee at Goldman Sachs. He actually considered the very opinion that's at issue in the litigation.
>
> We know that Your Honor had commented on at the summary judgment hearing the fairness opinion review

> process at Goldman Sachs and had some questions about that. We believe that he would be in a position to answer those questions.

A1797-98 at 4:21, 5:2-19.

The trial court's next question further underlines the fact that its eventual decision had no basis in any rule of evidence or procedure:

> THE COURT: . . . I'm assuming contention interrogatories were asked earlier about who was likely to be a witness at trial.
>
> MR. HURD: That is incorrect, Your Honor. There were no contention interrogatories propounded.
>
> THE COURT: Is that true, Mr. Brown?
>
> MR. BROWN: It was done on a more informal basis, Your Honor. When we were setting up these depositions, the understanding was we're going to have an agreement on who is going to be testifying at trial, and, you know, we'll take those depositions.

A1799 at 6:3-14. Despite this colloquy, and despite Plaintiff's pattern of litigation delay that compromised access to witnesses and the reliability of the record, the trial court decided that the timing of defendants identifying Mr. Del Favero — eight days before the trial would even begin — constituted "an unfair element of surprise" and was "simply not fair to the plaintiffs." A1800 at 7:7, 7:12.[10] The court gave no legal basis or precedent for this decision, nor did Plaintiff ever articulate such a basis.

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[10] The Court of Chancery explained that, "in the 1930s, we decided with the Rules of Civil Procedure to eliminate surprise, at least insofar as your opponent was diligent and asked questions." A1800 at 7:12-15. Confronted with their failure to propound contention interrogatories, Plaintiff referenced informal discussions about the disclosure of trial witnesses, as quoted above. A1799 at 6:11-14. In other words, the parties contemplated eventually reaching an agreement regarding the identification of trial witnesses. Defendants kept Plaintiff's counsel apprised of their efforts to obtain the appearance of Mr. Sanchez at trial and promptly informed them that in his absence Mr. Del Favero would testify regarding Goldman's work.

The trial court's ruling also ignores that Defendants complied with the only rule on point in identifying Mr. Del Favero – Court of Chancery Rule 16, which requires that all pretrial orders include a list of witnesses. *See* Del. Ch. Ct. R. 16(c)(6). The pretrial order submitted to the trial court listed Mr. Del Favero with a notation indicating that Plaintiff objected to him testifying. *See* A1789. There are no other rules of evidence or procedure that require the disclosure of non-expert witnesses before trial.

2. Exclusion Would Have Been Improper Even if Defendants Had Been Required to Disclose Witnesses Earlier

Even if there had been some obligation to disclose trial witnesses earlier in the proceedings than the pre-trial order, the circumstances regarding the timing of the disclosure of Mr. Del Favero as a trial witness would not have rendered exclusion proper. Defendants notified Plaintiff as soon as Defendants learned that Mr. Sanchez refused to appear at trial, and notified Plaintiff that Defendants were identifying an alternative witness to testify about Goldman's work as the Special Committee's financial advisor. *See* A1808-11. Mr. Sanchez's unavailability, of course, was as much the result of *Plaintiff's* nearly seven year delay in bringing this case to trial, and the trial court recognized that "the plaintiff . . . engaged in a pattern of litigation delay that compromised the reliability of the record." Ex. A at 3. Defendants should not be penalized for Plaintiff's lackadaisical prosecution of this case, particularly when Defendants and Goldman made substantial efforts (albeit unsuccessful) to secure Mr. Sanchez's testimony at trial.

Moreover, even if the Defendants were at fault for failing to identify Mr. Del Favero earlier, the exclusion of a fact witness because the witness was not identified in a timely fashion is an abuse of the trial court's discretion. *See Drejka*, 15 A.3d at 1223-24 (finding that the trial court abused its discretion in excluding testimony and entering judgment because a witness was identified untimely under the trial court's scheduling order); *see also Sheehan*, 15 A.3d at 1253.

3. The Excluded Testimony About the Work Done by the Special Committee's Financial Advisor Was Critical to the Case

The exclusion of a Goldman witness was not merely harmless error. Throughout the trial court's opinion, it uses criticisms of Goldman's valuation and fairness opinion as the centerpiece of its analysis. Among other things, the trial court had the following criticisms of Goldman and its valuation:

- "Goldman and the Special Committee went to strenuous lengths to equalize the values of [SPCC] and Minera. . . . instead of pushing back on Grupo Mexico's analysis, the Special Committee and Goldman devalued [SPCC] and topped up the value of Minera." Ex. A at 70-71.
- "Goldman's presentations to the Special Committee indicate that any A&S adjustments to [SPCC] projections were relatively minor. The record does not reveal any comparable effort to update and optimize [SPCC]'s projections as if it were being sold, as was being done for Minera." *Id.* at 73.
- "As another technique of narrowing the value gap, Goldman shifted from using [SPCC]'s 2004E EBITDA multiple to a range of its 2005E EBITDA multiples in the contribution analyses of the Merger, which also helped to level out the 'give' and the 'get' and thereby rationalize Grupo Mexico's asking price." *Id.* at 74.
- "Goldman dropped any focus on the value of what [SPCC] was giving from its analyses." *Id.* at 75.
- "Goldman and the Special Committee could not generate any responsible estimate of the value of Minera that approached the value of what [SPCC] was being asked to hand over." *Id.* at 78.
- "As the plaintiff points out, Goldman never advised the Special Committee that Minera was worth $3.1 billion, or that Minera could be acquired at, or would trade at, a premium to its DCF value if it were a public company." *Id.* at 78-79.
- "[T]he implied standalone DCF values of Minera and [SPCC] that were used in Goldman's final relative valuation of the companies are hard to discern and have never been fully explained by the source." *Id.* at 96.

The sheer number of times the trial court criticized Goldman's analyses makes evident that the testimony of a Goldman witness would have been amongst the key evidence presented in the case.[11] The exclusion of such important testimony without any legal basis is reversible error.

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[11] In responding to Plaintiff's argument below that he was entitled to an adverse inference, Defendants argued that "Plaintiff's argument (PPTB at 22-23)

II. THE TRIAL COURT'S DECISION WAS BASED ON ITS OWN ARBITRARY CONCLUSION REGARDING PROPER FINANCIAL ANALYSIS RATHER THAN THE EVIDENCE

A. Question Presented

Did the Court of Chancery err by concluding that the merger was unfair, based on its view that Goldman's financial analysis and fairness opinion suffered from methodological flaws?

The question was preserved in the proceedings below at A1624-47; A1711-34; A2320-44; A2386-94; Ex. A at 93.

B. Scope of Review

The Court's review of factual findings is deferential only so long as "the findings are supported by the record and the conclusions are the product of an orderly and logical deductive process." *William Penn P'ship v. Saliba*, 13 A.3d 749, 756 (Del. 2011) (internal quotations omitted). Further, the Court will "set aside the factual findings of the Court of Chancery if they are clearly wrong." *Id.*

C. Merits of Argument

The trial court compounded its reversible error of excluding a Goldman witness by making unsupported assumptions about the financial advisor's analysis of the transaction. The decision cherry-picks from Goldman presentations, often quoting them out of context or misapprehending their meaning, and relies on sparse testimony taken on portions of four days. Indeed, the opinion reveals that the trial court stepped out of its role as fact finder and became an expert witness performing its own investment banking analyses.[12]

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that the absence of a Goldman Sachs witness left 'critical' questions unanswered is nonsense." A2394. This statement does not relate to the questions raised by the court in its opinion — which were not part of Plaintiff's argument at trial.

[12] As discussed below, *see infra* IV.C., when it came to assessing damages, the Court of Chancery conducted its own valuation based on computer models not provided to the parties. *See* A2853 at 77:16-20 ("I'm not going to disclose everything that we got on our computer system, but I can tell you that there are very credible remedial approaches in this case that would have resulted in a much higher award.").

At bottom, the trial court's decision was based on its erroneous view that the relative valuation analysis employed by Goldman was "alchemy." *See* Ex. A at 72. The trial court believed that a proper valuation required calculating a "standalone" value of Minera, expressed in an absolute dollar amount, and then dividing that amount by the publicly-traded share price of SPCC in order to determine the number of shares to be transferred. *See id.* at 76-79. The trial court's preferred approach would compare SPCC's observable market price with a price for Minera calculated based on internal projections and a financial model. *See id.* at 78. In fact, as a Goldman witness could have explained, a relative valuation analysis, rather than the methodology employed by the trial court, is the appropriate way to perform an accurate comparison of the value of SPCC, a publicly-traded company, and Minera, a private company.

1. The Trial Court Determined Without Any Evidentiary Basis that Goldman's Relative Valuation Was Improper

SPCC and Minera were in the exact same business – copper mining – in Peru and Mexico, respectively. *See* A1771-72. A key difference between them, however, was that SPCC had an observable market price (*i.e.* its share price) and Minera did not.[13] *See generally* A1773. The question facing the Special Committee and its financial advisors was, if a transaction was to be recommended, how many shares of SPCC's publicly-traded common stock should be offered in exchange for Minera. *See* A577-92.

As is clear in the record, in June 2004, Goldman first used a DCF model to calculate a value for Minera based on projections of Minera's annual cash flows for the years 2004 through 2013. *See* A336-37. Once the same type of information for SPCC became available, Goldman performed the same analysis on SPCC. *See* A373-75. Goldman presented results across a range of copper prices and discount rates. Upon performing this analysis on SPCC, it became clear that, as is almost always the case, there was a difference between the price

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[13] The valuation for mining companies, which is highly dependent on a commodity price, presents certain unique analytical considerations. Chancellor Strine has never published an opinion in a case involving a copper mining company or the valuation of such a company. Indeed the three published opinions the Chancellor has issued related to resource-extraction industries – like mining – did not involve valuation. *See In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691 (Del. Ch. 2001); *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421 (Del. Ch. 2002); *In re Massey Energy Co. Derivative & Class Action Litig.*, 2011 WL 2176479 (Del. Ch.).

generated by Goldman's DCF analysis and SPCC's observed market price. *See* A2037 at 219:1-15.

The trial court assumed that, given this difference, the only explanation that would justify Goldman continuing to use the DCF methodology to value SPCC was if the Special Committee thought that SPCC's market price was "wrong" – in other words, that it did not accurately reflect the value of SPCC. *See* Ex. A at 4, 76-79. And indeed, the trial court believed that Goldman advised the Special Committee "that SPCC was being overvalued by the market." *Id.* at 77; *see also id.* at 2 ("Apparently perceiving that its own company was overvalued . . .").

There is nothing in the record to support the trial court's assumption. To the contrary, Goldman and the Special Committee believed that SPCC's market price accurately reflected the company's value. *See, e.g.*, A2037 at 219:1-18 ("THE COURT: Markets – I mean, the market is missing way high here? THE WITNESS [Handelsman]: No. I think the market missed way low on Grupo Mexico is what I actually think. . . . So I don't think that the market overvalued SPCC as much as it undervalued Grupo Mexico."). What the difference indicated was that there were certain assumptions reflected in SPCC's market price but not reflected in the DCF analysis, *i.e.* the market's view of future copper price increases. If the DCF analysis was missing some element of value for SPCC, it would also miss that very same element of value for Minera. In short, at the time that Goldman was evaluating Minera, its analysis of SPCC demonstrated that mining companies were trading at a premium to their DCF values. *See* A473. The relative valuation method allowed Goldman to account for this information in its analysis and value Minera fairly.[14]

The trial court did not address this issue. It recognized there was a difference between the DCF calculation for SPCC and its market value, *see* Ex. A at 19, and spent a significant portion of its opinion crossing the line from fact-

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[14] If both companies had been publicly traded, a Special Committee would have been able to use market prices for both SPCC and Minera. The best alternative — where one company is public and one company is private — is to calculate DCFs for each company and use the relative values to determine the number of shares to be transferred in the merger. That is precisely what Goldman did. By contrast, comparing the market value of SPCC (with whatever unstated assumptions it reflected) with the DCF value of Minera (which reflected only the assumptions of management, mining consultants and Goldman), is comparing apples-to-oranges and cannot generate an accurate relative value.

finder to expert witness – by, among other things, discussing alternative strategies that the trial court thought would be advantageous ways of monetizing this difference. *See, e.g.*, *id.* at 69-70. Yet it did not recognize that the difference between SPCC's DCF and market values also implied a difference between Minera's DCF value and its market value.

Based on nothing more than its own view of what must be done in a proper valuation analysis, the trial court arbitrarily and capriciously disregarded Goldman's work as "alchemy." Notably, even Plaintiff's own expert did not contend that the relative valuation method is improper. *See* A928-1047. And Plaintiff did not argue in his post-trial briefing that the relative valuation method was improper — Plaintiff argued only with certain of the inputs used in that valuation or that using it was inappropriate in these circumstances. *See, e.g.*, A2367-69. Indeed, *the only evidence in the trial record is that the relative valuation method is a recognized methodology*. *See* A2255 at 437:18-24 ("Q. And is relative valuation a recognized methodology? A. It is a strict application of valuation technology. There is no magic to this. As I am valuing one company using one methodology, I value the other one using the same methodology with the same assumptions, and I compare them."). The court therefore had to reach outside the trial record — to its own conjecture and speculation — to conclude that the relative valuation process was flawed. That was improper. *See Stroud v. Grace*, 606 A.2d 75, 95-96 (Del. 1992) (reversing the Court of Chancery's ruling in part because "the trial court should not have [made] assum[ptions] on a . . . speculative basis"); *see also* Ex. A at 77 ("It has . . . been said that under Delaware law fair value can be determined 'by any techniques or methods which are generally considered acceptable in the financial community." (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 712-13 (Del. 1983))).

2. The Trial Court Misapprehends Other Parts of Goldman's Analysis

Apart from labeling Goldman's relative valuation based on DCF analyses as "alchemy," the trial court offered other unfounded criticisms of Goldman's analysis. The trial court's criticisms all rest on circular logic. Specifically, because the trial court concluded that the price generated by Goldman's analyses was incorrect, the court assumed that they could have only been the product of a corrupt process, in which Goldman "obscured the actual

value" of Minera in order to "help[] its client rationalize" the merger.[15] Ex. A at 75-76. And because the trial court believed the process was corrupted, it characterizes every decision Goldman made in performing its valuation analyses as an effort to "narrow[] the value gap." *See id.* at 74. The trial court then uses this characterization to discredit Goldman's analysis, thereby confirming its initial assumption that the price was unfair. *See id.* at 75-79. The court's unfounded criticisms of Goldman's analysis did not stop here:

- The trial court criticized Goldman for applying different discount rates in its DCF analyses of Minera and SPCC. *See* Ex. A at 19. Specifically, Goldman used a discount rate for SPCC that was 0.5% higher than the discount rate it used for Minera. Far from being nefarious, this properly accounted for differences in the country risk of Mexico and Peru in 2004. *See* A1057.
- The trial court was concerned that the inputs to Goldman's DCF model were unequal because Minera's projections were "optimized" while SPCC's were not. In reality, as one would expect, Goldman

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[15] A prime example of this is the trial court's criticism of Goldman's alternative multiples-based valuation method, which confirmed the DCF results. Goldman divided SPCC's enterprise value by EBITDA, and calculated SPCC's multiple. *See* Ex. A at 74-75. Thus, for example, in its October 21, 2004 presentation to the Special Committee, Goldman reported that SPCC's multiple to its estimated 2005 EBITDA was 6.4. A549. In other words, Goldman determined that SPCC's enterprise value (calculated based on its public trading price) was 6.4 times SPCC's EBITDA. Goldman then applied this multiple to Minera's estimated 2005 EBITDA, yielding an enterprise value of $4.301 billion. A549. This enterprise value, adjusted for Minera's outstanding debt, resulted in an equity value of $3.264 billion. Among other things, the trial court criticized Goldman for improperly updating its analysis with estimates for 2005 EBITDA when that information became available. But textbook valuation methodology requires using forward-looking information rather than past performance. *See Global GT LP v. Golden Telecom, Inc.*, 993 A.2d 497, 514 (Del. Ch. 2010) (adopting petitioners' valuation as "the most reliable, market-accepted method because their method is 'forward looking' and thus consistent with the purpose of this valuation, which is to determine the value of [the company] based on its prospects in a future, not past, market."). By late 2004 when Goldman updated its analysis, the 2004 EBITDA measures had less of a bearing on future value than did the estimates for the company's future performance (which is what SPCC was buying).

updated both models as additional information became available through the diligence process. *See* A389-91; A500; A540; A542. Some of these changes increased the value of Minera relative to SPCC and others did the opposite. *See id.*

- The trial court criticized Goldman for not adjusting its long-term valuation of the two companies because of short-term results. But the trial court itself has found that short-term results are not material when viewed from the longer-term perspective of a reasonable acquirer. *IBP, Inc. v. Tyson Foods, Inc. & Lasso Acquisition Corp. (In re IBP, Inc. S'holders Litig.)*, 789 A.2d 14, 68 (Del. Ch. 2001) (Strine, C.) (finding that MAC clause did not apply to "short-term hiccup in earnings").

Based on nothing more than speculation and conjecture, the trial court improperly discredited the work done by Goldman and substituted its own investment banking analyses for the evidence in the record. This served to compound the error the trial court made in excluding testimony from Mr. Del Favero.

III. THE COURT OF CHANCERY IMPROPERLY FAILED TO DETERMINE WHICH PARTY BORE THE BURDEN OF PROOF BEFORE TRIAL AND ULTIMATELY ERRONEOUSLY IMPOSED IT ON DEFENDANTS

A. Question Presented

Did the Court of Chancery commit reversible error by failing to determine which party bore the burden of proof before trial and by ultimately allocating that burden to defendants?

The question was preserved in the proceedings below at A1165-1220; A1330-52; A1600-49; A2314-45; A2383-97; Ex. A at 62.

B. Scope of Review

The Court views factual findings with deference but exercises *de novo* review of legal standards. *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997). The Court of Chancery's decision that precedent requires an inquiry into the facts before allocating the burden of proof is a conclusion of law that is reviewed *de novo*. *Id.*

C. Merits of Argument

The trial court misinterpreted Delaware law and committed clear error by failing to allocate the burden of proof before trial. Despite the trial court's statements that the burden of proof did not affect its decision, this error warrants reversal because, if the burden had properly been allocated to Plaintiff, the trial court could not have found for Plaintiff in the absence of any proof that the deal was not fair. By not allocating the burden of proof prior to trial, it was as if the trial court had placed a ball between the parties, told them to play a game with that ball, and then decided a winner without ever telling the parties the rules of the game or how it was to be scored.

Equally as important, moreover, the trial court's decision that a court must engage in a substantive fairness inquiry before determining if the use of a special committee warrants a burden shift renders such committees useless.

1. The Trial Court Should Have Determined Which Party Bore the Burden of Proof Before Trial

The trial court recognized that waiting until after a trial to determine which party bears the burden of proof is a problematic approach:

> If we take seriously the notion, as I do, that a standard of review is meant to serve as a framework through which the court evaluates the parties' evidence and trial testimony in reaching a decision, and, as important, the framework through which the litigants determine how best to prepare their cases for trial, it is problematic to adopt an analytical approach whereby the burden allocation can only be determined in a post-trial opinion, after all the evidence and all the arguments have been presented to the court.

Ex. A at 55-56. Yet the trial court felt obligated to wait to determine the burden of proof until after trial under *Tremont*. In doing so, the court apparently expected the parties to make decisions and to present arguments and witnesses at trial without knowing whether it had the affirmative burden to prove or disprove elements of the case.

Tremont does not require, as the trial court held, that in order "to decide whether the defendant is entitled to a burden shift" a court must "tak[e] into consideration the substantive decisions of the special committee, a fact-intensive exercise that overlaps with the examination of fairness itself." Ex. A at 53. Under the trial court's reading of *Tremont*, the burden of proof issue is circular. If a court finds that a Special Committee reached an unfair deal, it must mean the Special Committee was not well-functioning, and therefore defendants bear the burden of proving the deal was fair. That is not what *Tremont* requires. Rather, it simply requires that a Special Committee be more than an illusion:

> To obtain the benefit of burden shifting, the controlling shareholder must do more than establish a perfunctory special committee of outside directors. . . . Rather, the committee must function in a manner which indicates that the controlling shareholder did not dictate the terms of the transaction and that the committee exercised real bargaining power "at an arms-length."

Tremont, 694 A.2d at 429 (citations omitted). Determining these issues does not require a full trial.[16] Indeed, at the summary judgment stage, the trial court

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[16] To the extent that *Tremont* does require a full trial before any burden shift can be determined, the trial court is correct that it should be overruled. *See, e.g.*, A1453-54 at 78:9-79:22 (noting difference between "what probably ought to be" the rule and the rule the trial court considered to be mandated by *Tremont*).

determined that the Committee was not a mere illusion, found that the Special Committee members had acted loyally and in good faith, and dismissed them from this litigation. *See* A1498-1504 at 123:22-129:5. That determination, not appealed by Plaintiff, cannot be reconciled with the trial court's subsequent conclusion that the Special Committee "was trapped in the controlled mindset."

2. The Trial Court Should Have Shifted the Burden of Proof to Plaintiff

The trial court erred in not shifting the burden of proof to the Plaintiff prior to trial. Specifically, the *Tremont* Court focused on factors that would have called a special committee's independence and capacity for arm's-length negotiation into question, rather than the result of such negotiations (which would render any burden-shifting analysis pointless). The trial court listed a number of factors that the *Tremont* Court identified as problematic:

- the special committee members' "previous business relationships with the controlling stockholder";
- the special committee's "selection of advisors who were affiliated with the controlling stockholder";
- the special committee's "heavy reliance on projections prepared by the controlling shareholder"; and
- the fact that the special committee only made "perfunctory" efforts to actually participate in the process.

Ex. A at 51 (citing *Tremont*, 694 A.2d at 426-27, 430). None of those factors exists here.

Critically, two decisions of this Court have emphasized that the inquiry is to focus on the Special Committee's independence and capacity to negotiate at arm's length, rather than an inquiry into the results of the Special Committee's process. *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1120-21 (Del. 1994) ("*Lynch I*") (("Particular consideration must be given to evidence of whether the special committee was truly independent, fully informed, and *had the freedom to* negotiate at arm's length.") (emphasis added)); *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 82 (Del. 1995) ("*Lynch II*") ("[A]t least two factors are required for this type of negotiation: (1) 'the majority shareholder did not dictate the terms of the merger,' and (2) the committee had real bargaining power so that it could negotiate with the controlling shareholder at arm's length."). Here, the Special Committee could – and did – negotiate at arm's length with the

controlling shareholder, as evidenced by the numerous term sheets and other negotiation documents from the eight month sales process. *See* A577-90.

The factors that drove the *Lynch I* court to hold that the burden remained on defendants further underlines that the trial court erred by failing to shift the burden to Plaintiff. As the *Lynch II* Court explained, the *Lynch I* decision that the burden remained on Defendants was based on the fact that the controlling shareholder short-circuited the negotiation process by threatening a hostile tender offer. 669 A.2d at 83 ("[The controlling shareholder's] use of its disproportionate bargaining power destroyed any approximation to being at arm's length the negotiations otherwise may have had."). The *Lynch II* Court's affirmance of a finding of entire fairness further underlines that the burden of proof is independent of the results of negotiation.

The trial court's decision relied on a newly minted "controlled mindset" doctrine that would alter Delaware law regarding the duty of loyalty and good faith. Each factor that the trial court identified would apply to every case involving a controlling shareholder. As such, the trial court's new doctrine would likely render the concept of independent directors a nullity.

3. The Trial Court's Errors with Respect to the Burden of Proof Warrant Reversal

The trial court attempted to ward off any appeal of this issue by noting that the burden of proof would not have mattered to its decision because it was "not stuck in equipoise about the issue of fairness," *see* Ex. A at 56. This statement stands in stark contradiction, of course, to its statements about the burden of proof serving as the prism by which litigants try their case and by which a court evaluates the evidence. And, proceeding to trial without determining the burden of proof left the parties without the most basic ground rules that were essential to determining, among other things, which evidence to present and which witnesses to call.

In two decisions setting forth the burden of proof under an entire fairness analysis, this Court has found the Court of Chancery's failure to appropriately allocate the burden of proof to be reversible error. In *Lynch I*, for instance, the Delaware Supreme Court held that the Court of Chancery improperly shifted the burden of proof to the plaintiff and reversed the Court of Chancery's order. 638 A.2d at 1112. Similarly, in *Tremont* the Delaware Supreme Court held that the "Court of Chancery erred in shifting the burden of proof . . ." and remanded the case. 694 A.2d at 432-33. Here, failing to shift the burden of proof to Plaintiff was outcome-determinative. As set forth in Part II, *supra*, the trial court's

decision was not supported by any evidence that Plaintiff presented at trial – a complete failure to satisfy its burden.

Additionally, the very purpose of the burden analysis — to encourage companies to constitute special committees — warrants finding reversible error. As Chancellor Strine noted in another case, Delaware gives defendants the benefit of a burden shift on the ultimate issue of fairness "in order to encourage the use of procedural devices such as special committees and Minority Approval Conditions that tended to encourage fair pricing." *In re Cox Commc'ns, Inc.*, 879 A.2d 604, 617 (Del. Ch. 2005); *see also In re Pure Res., Inc. S'holders Litig.*, 808 A.2d at 436 ("The Court did, however, recognize that these safety measures had utility and should be encouraged. Therefore, it held that their deployment could shift the burden of persuasion on the issue of fairness from the controlling stockholders and the target board as proponents of the transaction to shareholder-plaintiffs seeking to invalidate it."). Holding now that the trial court's failure to allocate the burden to Plaintiff is harmless error strips away the remaining procedural benefits associated with these devices.

IV. THE COURT OF CHANCERY'S AWARD OF DAMAGES HAD NO EVIDENTIARY BASIS

A. Question Presented

Did the Court of Chancery err by adopting a speculative methodology for calculating damages in the face of Plaintiff's lack of proof of damages?

This question was preserved in the proceedings below at A2395.

B. Scope of Review

This Court reviews decisions as to an award of damages, including its fashioning of remedies, under an abuse of discretion standard. *See Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002); *Law v. Law*, 753 A.2d 443, 445 (Del. 2000). Factual determinations are given deference only "if they are sufficiently supported by the record." *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999) (internal quotations and alterations omitted).

C. Merits of Argument

The trial court's award of damages is not supported by the record because, among other things, Plaintiff failed to offer any evidence proving damages. Delaware courts have long "refuse[d] to award damages based on mere speculation or conjecture where a plaintiff fails to adequately prove damages." *Encite LLC v. Soni*, 2011 WL 5920896, *25 (Del. Ch.) (internal quotations omitted); *see also Carlson v. Hallinan*, 925 A.2d 506, 539-40 (Del. Ch. 2006) (holding that breach of loyalty claim failed in part for failure to prove damages); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) (remanding for consideration of rescissory damages "if the Chancellor considers them susceptible of proof").

The trial court explicitly recognized that the Plaintiff failed to offer any proof of damages. *See* Ex. A at 98-99 ("[T]he parties have provided no real road map for how to come to a value, and the analyses performed by Goldman and the Special Committee do not lend themselves to an easy resolution."). Plaintiff's expert, in fact, testified that he had not done "any analysis of whether SPCC's shareholders benefitted [sic] from the transaction at issue in this case." A2220 at 402:19-22.

In the face of these failures, the trial court, in an "attempt to do my best on the record before me," performed its own valuation of Minera, and then subtracted the value it estimated from the dollar value of SPCC shares transferred

in the merger. *See* Ex. A at 99. By the court's own admission, its damages calculation "inevitably involves some speculation." *Id.* at 98. In fact, during argument on the fee award, the trial court noted that it essentially became its own expert witness regarding damages by basing its valuation, at least in part, on its own computer models. *See* A2853 at 77:16-20 ("I'm not going to disclose everything that we got on our computer system, but I can tell you that there are very credible remedial approaches in this case that would have resulted in a much higher award."). In the absence of any proof from Plaintiff, this speculation and outside-the-record financial modeling is impermissible. *See Encite*, 2011 WL 5920896, at *25.

Even under the trial court's purported damage calculation methodology, there is no basis for using the Special Committee's counteroffer of July 2004 as a measure of the true value of Minera. *See* Ex. A at 101-102. This was, of course, based only on Goldman's preliminary analyses of the companies before the completion of due diligence. And there was no evidence this was anything other than what it appears to be - a negotiating position. A party's negotiating position, of course, is not a measure of value. *See, e.g., In re OpenLane, Inc. S'holders Litig.*, 2011 WL 4599662, at *15 (Del. Ch.) (rejecting assertion that counteroffer reflected a company's value as inconsistent with "basic negotiating tactics" because "regardless of what a selling party may consider a company's fair value to be, that person will seek the highest price she can receive, even if that price is far above the presumed fair value"). And, its use here is simply pure speculation used to fill a clear gap in Plaintiff's evidentiary record. *See* Ex. A at 99.

Additionally, there can be no doubt that the acquisition of Minera has proven to be profitable for SPCC and its shareholders.[17] *See* A1998-99 at 180:13-181:7. Minera has generated profits for SPCC far in excess of $3.1 billion, in large part because the price of copper has been far in excess of what was anticipated. *See* Ex. A at 92. Had the merger not occurred, because the Special Committee refused to pay more than what the trial court now says is the correct price, SPCC would not have recognized these profits. Without proof that the merger would have occurred at the lower price calculated by the trial court, it is impossible to prove that SPCC was harmed at all – *even if one accepts the trial court's view on the fairness of the transaction.*

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[17] The transaction at issue was a merger not a shareholder freeze out transaction. As such, the post-merger success of the combined company is relevant. *See Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 697 (Del. Ch. 1996) (considering post-merger evidence in a fairness determination). Indeed, the post merger success provides a powerful rebuttal of the trial court's criticisms.

V. THE COURT OF CHANCERY ABUSED ITS DISCRETION BY AWARDING MORE THAN $300 MILLION IN ATTORNEYS FEES – AMOUNTING TO $35,000 PER HOUR

A. Question Presented

Did the Court of Chancery abuse its discretion by awarding more than $300 million in attorneys' fees, which amounts to $35,000 per hour spent by counsel in lackadaisically prosecuting this case?

This question was preserved in the proceedings below at A2694-2717.

B. Scope of Review

When determining whether the Court of Chancery's award of attorneys' fees is excessive and unreasonable, this Court reviews for an abuse of discretion. *See Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980).

C. Merits of Argument

The trial court's award of attorneys' fees of $304,742,604.45 is an abuse of discretion. In determining reasonable attorneys' fees where a litigant confers a monetary benefit on an ascertainable class, this Court has "rejected more mechanical approaches to determining fee awards" and instead adopted "a flexible standard . . . to avoid the pitfalls associated with percentage of the fund and lodestar methods." *Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000); *Sugarland*, 420 A.2d at 149-50.

This Court's *Sugarland* decision instructs courts to look generally to the following factors when determining the appropriate amount for the fee award: (i) the benefit achieved in the action; (ii) the efforts of counsel; (iii) the contingent nature of counsel's engagement; (iv) the difficulty of the litigation; and (v) the standing and ability of counsel involved. *See Sugarland*, 420 A.2d at 149. Delaware courts balance these factors to determine whether "the fees allowed are fair and reasonable." *Id.* at 153 (Duffy, J.). The trial court erroneously focused on only one factor, the benefit achieved, and even there *ignored that the fee award here is nearly equal to the judgment's benefit to minority shareholders.*

The trial court's decision was reversible error for at least two reasons, in addition to those set forth in the nominal defendant's brief, filed simultaneously.

First, Plaintiff's attorneys should not profit as a direct result of their years-long failure to prosecute this case — a delay that Plaintiff's attorneys

admitted was their fault when the trial court repeatedly chided them for the slow pace of the litigation. *See, e.g.*, A1413 at 38:17-20 ("I [Plaintiff's counsel] take full responsibility for it. It's my fault. And there was - - this case was not pursued at the beginning the way it should have been."); A747 at 20:14-17 ("I can't quite strongly enough express my displeasure at how delayed this litigation has been and the fact that it wasn't prepared for trial two or three years ago."). Notwithstanding Plaintiff's counsel's admission of responsibility for the "torpid pace in prosecuting the case," Ex. A at 43 n.66, the trial court awarded attorneys' fees against the entire damages award, inclusive of prejudgment interest. Allowing Plaintiff's attorneys to collect fees premised upon the nearly $700 million in prejudgment interest rewards counsel's inefficient prosecution of this case even in spite of the fact that the delay impeded a full presentation of the evidence. The trial court's ruling also creates the perverse incentive to allow a case to sit idle for years, expending no resources, only to reap significantly increased profits as a result of larger prejudgment interest. This is an abuse of discretion. *See Seinfeld*, 847 A.2d at 333, 336; *Sugarland*, 420 A.2d at 149-150.

Second, Delaware's *Sugarland* factors were established to prevent unreasonable results such as a $35,000 per hour rate for attorneys' fees. Instead of adopting a strict application of percentage of fund or lodestar methods, the *Sugarland* factors were developed, in part, so that courts would "not [be] obligated to award plaintiffs' counsel what might amount to a very high fee as expressed in terms of an hourly rate just because the percentage of the fund would yield such a result." *Seinfeld*, 847 A.2d at 336. While the size of the benefit is traditionally accorded the most weight, *see Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*, 986 A.2d 370, 396 (Del. Ch. 2010), Delaware courts have recognized that the hours invested by plaintiff's counsel should be taken into consideration, and may act as a "backstop check" on the reasonableness of a fee award. *See Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *14 (Del. Ch.) (internal quotations omitted). The trial court's refusal to consider these factors is a clear abuse of discretion.[18]

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[18] The trial court offered several views on potential tests for a fee award including, among others, whether an award constitutes a "windfall" or causes envy on the part of other attorneys. *See, e.g.*, A2801-02 at 25:12-26:4 (12/19/11 Tr. at 25-26) ("I'm trying to have a test. Is it when the 'E' word on the part of -- like, lawyers are hardly entrepreneurial to begin with. And one of the people -- there's a lot of -- frankly, I'll stand up for our profession anytime in M and A and say the most important role in M and A transactions is the lawyer, not the banker. . . . The bankers always make the big fees. The lawyers get hourly rates. Lawyers

Numerous decisions of the Court of Chancery have applied an hourly-rate backstop check on the reasonableness of fee awards and support a conclusion that the trial court's decision here was an abuse of discretion. *See In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *20 (Del. Ch.) (Laster, C.) (holding, after litigation was mooted upon the withdrawal of a tender offer, that "[t]raditionally, we have used hours worked to calculate an effective hourly rate that can be examined to guard against windfall compensation when awarding large fees"); *Julian v. E. States Constr. Serv., Inc.*, 2009 WL 154432, at *2 (Del. Ch.) (Parsons, C.) (holding that when applying a percentage of the benefit approach after a trial, "[t]he fee award also should avoid windfalls"); *Korn v. New Castle Cnty.*, 2007 WL 2981939, at *5 (Del. Ch.) (Chandler, C.) (evaluating fee award under *Sugarland* factors and whether it "is within the range of awards granted previously by this Court and is comparable with awards in" similar cases); *Seinfeld*, 847 A.2d at 338 (Chandler, C.) (rejecting a $2,600 per hour fee award because "[t]his case is not one where the simple calculation of the percentage of the fund correlates with a reasonable hourly rate"). No Delaware case has ever awarded an hourly fee that was even close to the fee awarded here.

Case law from other jurisdictions likewise reveals that a $35,000 per hour award is drastically out of line with reasonable damages awards. *See, e.g.*, *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 261, 270-72 (D.N.H. 2007) ($1,010 hourly rate reasonable for a $3.2 billion settlement); *In re Worldcom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 353-54, 359 (S.D.N.Y. 2005) ($738 hourly rate reasonable for $3.558 billion trial award and settlement); *In re Cendant Corp. Litig.*, 243 F. Supp. 2d 166, 172-74 (D.N.J. 2003) ($1,571 hourly rate reasonable for $3.2 billion settlement); *In re Loral Space & Comm'ns Inc. Consol. Litig.*, Del. Ch., C.A. No. 2808-VCS (TRANSCRIPT), Strine, C. (Dec. 22, 2008) ($1,831 hourly rate reasonable for $100 million trial award); *see also* Opening Br. of Appellant S. Copper Corp. at 22-23.

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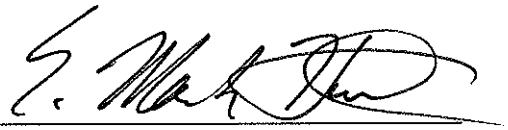
often by temperament are conservative, not risktakers. Plaintiffs' lawyers are more risk taking than the typical lawyer. So is this just -- is it an envy test? Is it when someone looks at a fee and says '[t]hat's just way too high' and no one, despite demonstrated achievement, should get that much money out of one case?").

CONCLUSION

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

MORRIS, NICHOLS, ARSHT & TUNNELL LLP



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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2012, I electronically filed and caused to be served by LexisNexis File and Serve a copy of AMC APPELLANTS' OPENING BRIEF upon the following counsel of record:

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EXHIBIT A

EFiled: Dec 20 2011 3:13PM EST
Transaction ID 41493592
Case No. 961-CS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER CORPORATION SHAREHOLDER DERIVATIVE LITIGATION	)))	C.A. No. 961-CS

OPINION

Date Submitted: July 15, 2011
Date Decided: October 14, 2011
Date Revised: December 20, 2011

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STRINE, Chancellor.

I. Introduction

This is the post-trial decision in an entire fairness case. The controlling stockholder of an NYSE-listed mining company came to the corporation's independent directors with a proposition. How about you buy my non-publicly traded Mexican mining company for approximately $3.1 billion of your NYSE-listed stock? A special committee was set up to "evaluate" this proposal and it retained well-respected legal and financial advisors.

The financial advisor did a great deal of preliminary due diligence, and generated valuations showing that the Mexican mining company, when valued under a discounted cash flow and other measures, was not worth anything close to $3.1 billion. The $3.1 billion was a real number in the crucial business sense that everyone believed that the NYSE-listed company could in fact get cash equivalent to its stock market price for its shares. That is, the cash value of the "give" was known. And the financial advisor told the special committee that the value of the "get" was more than $1 billion less.

Rather than tell the controller to go mine himself, the special committee and its advisors instead did something that is indicative of the mindset that too often afflicts even good faith fiduciaries trying to address a controller. Having been empowered only to evaluate what the controller put on the table and perceiving that other options were off the menu because of the controller's own objectives, the special committee put itself in a world where there was only one strategic option to consider, the one proposed by the controller, and thus entered a dynamic where at best it had two options, either figure out a way to do the deal the controller wanted or say no. Abandoning a focus on whether the

NYSE-listed mining company would get $3.1 billion in value in the exchange, the special committee embarked on a "relative valuation" approach. Apparently perceiving that its own company was overvalued and had a fundamental value less than its stock market trading price, the special committee assured itself that a deal could be fair so long as the "relative value" of the two companies was measured on the same metrics. Thus, its financial advisor generated complicated scenarios pegging the relative value of the companies and obscuring the fundamental fact that the NYSE-listed company had a proven cash value. These scenarios all suggest that the special committee believed that the standalone value of the Mexican company (the "get") was worth far less than the controller's consistent demand for $3.1 billion (the "give"). Rather than reacting to these realities by suggesting that the controller make an offer for the NYSE-listed company at a premium to what the special committee apparently viewed as a plush market price, or making the controller do a deal based on the Mexican company's standalone value, the special committee and its financial advisor instead took strenuous efforts to justify a transaction at the level originally demanded by the controller.

Even on that artificial basis, the special committee had trouble justifying a deal and thus other measures were taken. The cash flows of the Mexican company, but not the NYSE-listed company, were "optimized." The facts that the Mexican company was having trouble paying its bills, that it could not optimize its cash flows with its current capital base, and that, by comparison, the NYSE-listed company was thriving and nearly debt-free, were slighted. The higher multiple of the NYSE-listed company was used as the bottom range of an exercise to value the Mexican company, thus topping up the

target's value by crediting it with the multiple that the acquiror had earned for itself, an act of deal beneficence not characteristic of Jack Welch, and then another dollop of multiple crème fraiche was added to create an even higher top range. When even these measures could not close the divide, the special committee agreed to pay out a special dividend to close the value gap.

But what remained in real economic terms was a transaction where, after a bunch of back and forth, the controller got what it originally demanded: $3.1 billion in real value in exchange for something worth much, much less – hundreds of millions of dollars less. Even worse, the special committee, despite perceiving that the NYSE-listed company's stock price would go up and knowing that the Mexican company was not publicly traded, agreed to a fixed exchange ratio. After falling when the deal was announced and when the preliminary proxy was announced, the NYSE-listed company's stock price rose on its good performance in a rising market for commodities. Thus, the final value of its stock to be delivered to the controller at the time of the actual vote on the transaction was $3.75 billion, much higher than the controller's original demand. Despite having the ability to rescind its recommendation and despite the NYSE-listed company having already exceeded the projections the special committee used for the most recent year by 37% and the Mexican company not having done so, the special committee maintained its recommendation and thus the deal was voted through.

Although the plaintiff in this case engaged in a pattern of litigation delay that compromised the reliability of the record to some extent and thus I apply a conservative approach to shaping a remedy, I am left with the firm conclusion that this transaction was

unfair however one allocates the burden of persuasion under a preponderance of the evidence standard. A focused, aggressive controller extracted a deal that was far better than market, and got real, market-tested value of over $3 billion for something that no member of the special committee, none of its advisors, and no trial expert was willing to say was worth that amount of actual cash. Although directors are free in some situations to act on the belief that the market is wrong, they are not free to believe that they can in fact get $3.1 billion in cash for their own stock but then use that stock to acquire something that they know is worth far less than $3.1 billion in cash or in "fundamental" or "intrinsic" value terms because they believe the market is overvaluing their own stock and that on real "fundamental" or "intrinsic" terms the deal is therefore fair. In plain terms, the special committee turned the "gold" it was holding in trust into "silver" and did an exchange with "silver" on that basis, ignoring that in the real world the gold they held had a much higher market price in cash than silver. That non-adroit act of commercial charity toward the controller resulted in a manifestly unfair transaction.

I remedy that unfairness by ordering the controller to return to the NYSE-listed company a number of shares necessary to remedy the harm. I apply a conservative metric because of the plaintiff's delay, which occasioned some evidentiary uncertainties and which subjected the controller to lengthy market risk. The resulting award is still large, but the record could justify a much larger award.

II. Factual Background

An overview of the facts is perhaps useful.

The controlling stockholder in this case is Grupo México, S.A.B. de C.V. The NYSE-listed mining company is Southern Peru Copper Corporation.[1] The Mexican mining company is Minera México, S.A. de C.V.[2]

In February 2004, Grupo Mexico proposed that Southern Peru buy its 99.15% stake in Minera. At the time, Grupo Mexico owned 54.17% of Southern Peru's outstanding capital stock and could exercise 63.08% of the voting power of Southern Peru, making it Southern Peru's majority stockholder.

Grupo Mexico initially proposed that Southern Peru purchase its equity interest in Minera with 72.3 million shares of newly-issued Southern Peru stock. This "indicative" number assumed that Minera's equity was worth $3.05 billion, because that is what 72.3 million shares of Southern Peru stock were worth then in cash.[3] By stark contrast with Southern Peru, Minera was almost wholly owned by Grupo Mexico and therefore had no market-tested value.

Because of Grupo Mexico's self-interest in the merger proposal, Southern Peru formed a "Special Committee" of disinterested directors to "evaluate" the transaction with Grupo Mexico.[4] The Special Committee spent eight months in an awkward back and forth with Grupo Mexico over the terms of the deal before approving Southern Peru's

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[1] On October 11, 2005, Southern Peru changed its name to "Southern Copper Corporation" and is currently traded on the NYSE under the symbol "SCCO."

[2] Grupo Mexico held — and still holds — its interest in Southern Peru through its wholly-owned subsidiary Americas Mining Corporation ("AMC"). Grupo Mexico also held its 99.15% stake in Minera through AMC. AMC, not Grupo Mexico, is a defendant to this action, but I refer to them collectively as Grupo Mexico in this opinion because that more accurately reflects the story as it happened.

[3] JX-108 (UBS presentation to the Board (February 3, 2004)) at AMC0019912.

[4] JX-16 (resolutions on the establishment of the Special Committee (February 12, 2004)) at SP COMM 000441.

acquisition of 99.15% of Minera's stock in exchange for 67.2 million newly-issued shares of Southern Peru stock (the "Merger") on October 21, 2004. That same day, Southern Peru's board of directors (the "Board") unanimously approved the Merger and Southern Peru and Grupo Mexico entered into a definitive agreement (the "Merger Agreement"). On October 21, 2004, the market value of 67.2 million shares of Southern Peru stock was $3.1 billion. When the Merger closed on April 1, 2005, the value of 67.2 million shares of Southern Peru had grown to $3.75 billion.

This derivative suit was then brought against the Grupo Mexico subsidiary that owned Minera, the Grupo Mexico-affiliated directors of Southern Peru, and the members of the Special Committee, alleging that the Merger was entirely unfair to Southern Peru and its minority stockholders. The parties agree that the appropriate standard of review is entire fairness.

The crux of the plaintiff's argument is that Grupo Mexico received something demonstrably worth more than $3 billion (67.2 million shares of Southern Peru stock) in exchange for something that was not worth nearly that much (99.15% of Minera).[5] The

[5] The remaining plaintiff in this action is Michael Theriault, as trustee of and for the Theriault Trust. The defendants contend that the plaintiff does not qualify as an adequate fiduciary representative. This argument is premised largely on what the defendants see as the plaintiff's lack of familiarity with and understanding of the case. The plaintiff's less than active role in connection with this case, as evidenced by his absence at trial and lack of a fully developed knowledge about all of the litigation details, can in part be explained, though not be excused, by the protracted nature of these proceedings. This case lurched forward over a period of six years largely because of the torpor of the plaintiff's counsel, and the passage of time has had the regrettable effect of producing some turnover within the plaintiffs' ranks. Two of the original plaintiffs are no longer parties, and the remaining plaintiff, Michael Theriault, only became a party in 2008 because he inherited the claims as successor trustee upon the death of his father, an original plaintiff who had brought suit in his trustee capacity. It is against this regrettable backdrop that the defendants challenge Michael Theriault's adequacy as a derivative plaintiff.

plaintiff points to the fact that Goldman Sachs, which served as the Special Committee's financial advisor, never derived a value for Minera that justified paying Grupo Mexico's asking price, instead relying on a "relative" valuation analysis that involved comparing the discounted cash flow ("DCF") values of Southern Peru and Minera, and a contribution analysis that improperly applied Southern Peru's own market EBITDA multiple (and even higher multiples) to Minera's EBITDA projections, to determine an appropriate exchange ratio to use in the Merger. The plaintiff claims that, because the Special Committee and Goldman abandoned the company's market price as a measure of the true value of the give, Southern Peru substantially overpaid in the Merger.

A derivative plaintiff "must be qualified to serve in a fiduciary capacity as a representative of the class of stockholders, whose interest is dependent upon the representative's adequate and fair prosecution of the action." *Emerald Partners v. Berlin*, 564 A.2d 670, 673 (Del. Ch. 1989) (citation omitted). The defendant, however, bears the burden to show "a substantial likelihood that the derivative action is not being maintained for the benefit of the shareholders." *Id.* at 674. Although a number of factors may be relevant to the adequacy determination, *see In re Fuqua Indus., S'holder Litig.*, 752 A.2d 126, 130 (Del. Ch. 1999) (citing factors), our Supreme Court has made clear that this is a very difficult burden unless the plaintiff has an actual economic conflict of interest or has counsel who is incompetent and suffers from such a conflict. *See In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 291 (Del. 2002); *see also In re Fuqua Indus., S'holder Litig.*, 752 A.2d at 130 (expressing principle); *Kahn v. Household Acquisition Corp.*, 1982 WL 8778 (Del. Ch. Jan. 19, 1982); *see generally* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 9.02(b)(1), at 9-32 (2009). The defendants have not met this burden. The defendants offer no evidence of an economic conflict between the plaintiff and the rest of the Southern Peru stockholders such that he would act in furtherance of his own self-interest at their expense. Although the plaintiff's failure to get himself up to speed is not laudable, neither was it such an egregious abdication of his role to supply a basis for disqualification, especially given the absence of facts suggesting an otherwise improper motive for maintaining the suit and the vigor with which his counsel have prosecuted the case since it was transferred to my docket.

The defendants remaining in the case are Grupo Mexico and its affiliate directors who were on the Southern Peru Board at the time of the Merger.[6] These defendants assert that Southern Peru and Minera are similar companies and were properly valued on a relative basis. In other words, the defendants argue that the appropriate way to determine the price to be paid by Southern Peru in the Merger was to compare both companies' values using the same set of assumptions and methodologies, rather than comparing Southern Peru's market capitalization to Minera's DCF value. The defendants do not dispute that shares of Southern Peru stock could have been sold for their market price at the time of the Merger, but they contend that Southern Peru's market price did not reflect the fundamental value of Southern Peru and thus could not appropriately be compared to the DCF value of Minera.

With this brief overview of the basic events and the parties' core arguments in mind, I turn now to a more detailed recitation of the facts as I find them after trial.[7]

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[6] These individual defendants are Germán Larrea Mota-Velasco, Genaro Larrea Mota-Velasco, Oscar González Rocha, Emilio Carrillo Gamboa, Jaime Fernandez Collazo Gonzalez, Xavier García de Quevedo Topete, Armando Ortega Gómez and Juan Rebolledo Gout.

[7] The record in this case was made less reliable by the conduct of both sides. On the plaintiff's side, the prosecution moved slowly. Eventually, the banker from Goldman who worked for the Special Committee, Martin Sanchez, refused to come to Delaware to testify at trial, even though he had sat for a deposition in New York in 2009. Although one would hope that an investment banker would recognize a duty to a former client to come and testify, that expectation might be thought a bit unreasonable as Sanchez, who lives in Latin America, was being asked to testify in 2011 about a deal that closed in 2005, and he had left the employ of Goldman in 2006. His absence is as much or more the fault of the plaintiff's slow pace as it is of the defendants. Another issue seems more the defendants' fault, or at least the fault of the former defendants, who were members of the Special Committee. Many of the minutes of the Special Committee meetings, including all minutes of any Special Committee meeting held after July 20, 2004, were not admitted into evidence by agreement of the parties. The defendants failed to produce minutes of these Special Committee meetings during fact discovery in this case, which ended on March 1, 2010. Then, on January 23, 2011, the defendants produced nearly all of the minutes of

A. The Key Players

Southern Peru operates mining, smelting, and refining facilities in Peru, producing copper and molybdenum as well as silver and small amounts of other metals. Before the Merger, Southern Peru had two classes of stock: common shares that were traded on the New York Stock Exchange; and "Founders Shares" that were owned by Grupo Mexico, Cerro Trading Company, Inc., and Phelps Dodge Corporation (the "Founding Stockholders"). Each Founders Share had five votes per share versus one vote per share for ordinary common stock. Grupo Mexico owned 43.3 million Founders Shares, which translated to 54.17% of Southern Peru's outstanding stock and 63.08% of the voting power. Southern Peru's certificate of incorporation and a stockholders' agreement also gave Grupo Mexico the right to nominate a majority of the Southern Peru Board. The Grupo Mexico-affiliated directors who are defendants in this case held seven of the thirteen Board seats at the time of the Merger. Cerro owned 11.4 million Founders Shares (14.2% of the outstanding common stock) and Phelps Dodge owned 11.2 million

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the Special Committee meetings that took place between July 20, 2004 and October 21, 2004. These minutes were rather obviously responsive to the discovery requests made by the plaintiff and there was no reasonable excuse for their non-production, which seems to have resulted from the migration of an attorney for the Special Committee to another job and a lack of diligence, rather than a lack of good faith, in the production process. The plaintiff moved to strike this post cut-off production, and an oral argument was held on the motion to strike on April 25, 2011. *In re Southern Peru S'holders Litig.*, C.A. No. 961 (Del. Ch. Apr. 25, 2011) (TRANSCRIPT). At argument, the plaintiff's counsel admitted that he had not pressed for discovery of the missing minutes because the defendants' failure to produce them was advantageous to his case. Because the defendants produced the additional Special Committee meeting minutes only a few months before trial and the plaintiff was unwilling to re-depose witnesses and depose new witnesses based on this new information, the parties agreed to stipulate that such meetings occurred but not to admit them into evidence. The defendants never produced minutes for meetings of the Special Committee that defendants allege took place on August 5, 2004 and August 25, 2004. I am therefore missing important evidence which may have helped to inform my analysis of the Special Committee's deliberations.

Founders Shares (13.95% of the outstanding common stock). Among them, therefore, Grupo Mexico, Cerro, and Phelps Dodge owned over 82% of Southern Peru.

Grupo Mexico is a Mexican holding company listed on the Mexican stock exchange. Grupo Mexico is controlled by the Larrea family, and at the time of the Merger defendant Germán Larrea was the Chairman and CEO of Grupo Mexico, as well as the Chairman and CEO of Southern Peru. Before the Merger, Grupo Mexico owned 99.15% of Minera's stock and thus essentially was Minera's sole owner. Minera is a company engaged in the mining and processing of copper, molybdenum, zinc, silver, gold, and lead through its Mexico-based mines. At the time of the Merger, Minera was emerging from – if not still mired in – a period of financial difficulties,[8] and its ability to exploit its assets had been compromised by these financial constraints.[9] By contrast, Southern Peru was in good financial condition and virtually debt-free.[10]

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[8] *See* JX-125 (Mining Mexico Form 20-F (July 14, 2004)) at 9 ("Our results were adversely affected in 2001 and 2002 by decreases in copper prices . . . [U]nder pressure due to low metals prices and the resulting drop in liquidity, we restructured our debt in 2003 because of our failure to make scheduled payments and our noncompliance with certain financial covenants contained in our credit agreements."); *id.* at 19 (stating that in the "several year period prior to 2004," Minera's "competitive and financial position had been negatively influenced" by low metal prices and that Minera had "changed its business plan, including the cessation of all but critically necessary capital expenditures . . . and took several steps to downsize its operations in order to preserve cash resources," but noting that the copper market had improved, which allowed Minera to "increase [its] levels of capital expenditures to levels consistent with [its] anticipated increased earnings growth."); *see also* Tr. at 98 (Palomino) ("Minera [ ] had been in pretty difficult financial conditions until 2002 or beginning of 2003.").

[9] Parker Dep. at 50 ("It was apparent that the Minera properties had been severely cash constrained. There were large pieces of equipment that were parked because they were broken down and there weren't spare parts to repair them.").

[10] *See* JX-105 (Goldman presentation to the Special Committee (September 15, 2004)) at SP COMM 006787 (showing net debt of Southern Peru was $15 million).

B. Grupo Mexico Proposes That Southern Peru Acquire Minera

In 2003, Grupo Mexico began considering combining its Peruvian mining interests with its Mexican mining interests. In September 2003, Grupo Mexico engaged UBS Investment Bank to provide advice with respect to a potential strategic transaction involving Southern Peru and Minera.

Grupo Mexico and UBS made a formal presentation to Southern Peru's Board on February 3, 2004, proposing that Southern Peru acquire Grupo Mexico's interest in Minera from AMC in exchange for newly-issued shares of Southern Peru stock. In that presentation, Grupo Mexico characterized the transaction as "[Southern Peru] to acquire Minera [ ] from AMC in a stock for stock deal financed through the issuance of common shares; initial proposal to issue 72.3 million shares."[11] A footnote to that presentation explained that the 72.3 million shares was "an indicative number" of Southern Peru shares to be issued, assuming an equity value of Minera of $3.05 billion and a Southern Peru share price of $42.20 as of January 29, 2004.[12] In other words, the consideration of 72.3 million shares was indicative in the sense that Grupo Mexico wanted $3.05 billion in dollar value of Southern Peru stock for its stake in Minera, and the number of shares that Southern Peru would have to issue in exchange for Minera would be determined based on Southern Peru's market price. As a result of the proposed merger, Minera would become

[11] JX-108 at AMC0019912.
[12] *Id.*

a virtually wholly-owned subsidiary of Southern Peru. The proposal also contemplated the conversion of all Founders Shares into a single class of common shares.

C. Southern Peru Forms A Special Committee

In response to Grupo Mexico's presentation, the Board met on February 12, 2004 and created a Special Committee to evaluate the proposal. The resolution creating the Special Committee provided that the "duty and sole purpose" of the Special Committee was "to evaluate the [Merger] in such manner as the Special Committee deems to be desirable and in the best interests of the stockholders of [Southern Peru]," and authorized the Special Committee to retain legal and financial advisors at Southern Peru's expense on such terms as the Special Committee deemed appropriate.[13] The resolution did not give the Special Committee express power to negotiate, nor did it authorize the Special Committee to explore other strategic alternatives.

For the purposes relevant to this decision, the Special Committee's makeup as it was finally settled on March 12, 2004 was as follows:

- Harold S. Handelsman: Handelsman graduated from Columbia Law School and worked at Wachtell, Lipton, Rosen & Katz as an M&A lawyer before becoming an attorney for the Pritzker family interests in 1978. The Pritzker family is a wealthy family based in Chicago that owns, through trusts, a myriad of businesses. Handelsman was appointed to the Board in 2002 by Cerro, which was one of those Pritzker-owned businesses.

- Luis Miguel Palomino Bonilla: Palomino has a Ph.D in finance from the Wharton School at the University of Pennsylvania and worked as an economist, analyst and consultant for various banks and financial institutions. Palomino was nominated to the Board by Grupo Mexico upon the recommendation of certain Peruvian

[13] JX-16 at SP COMM 000441.

pension funds that held a large portion of Southern Peru's publicly traded stock.

- Gilberto Perezalonso Cifuentes: Perezalonso has both a law degree and an MBA and has managed multi-billion dollar companies such as Grupo Televisa and AeroMexico Airlines. Perezalonso was nominated to the Board by Grupo Mexico.

- Carlos Ruiz Sacristán: Ruiz, who served as the Special Committee's Chairman, worked as a Mexican government official for 25 years before co-founding an investment bank, where he advises on M&A and financing transactions. Ruiz was nominated to the Board by Grupo Mexico.[14]

D. The Special Committee Hires Advisors And Seeks A Definitive Proposal From Grupo Mexico

The Special Committee began its work by hiring U.S. counsel and a financial advisor. After considering various options, the Special Committee chose Latham & Watkins LLP and Goldman, Sachs & Co. The Special Committee also hired a specialized mining consultant to help Goldman with certain technical aspects of mining valuation. Goldman suggested consultants that the Special Committee might hire to aid in the process; after considering these options, the Special Committee retained Anderson & Schwab ("A&S").

[14] Although both Perezalonso and Ruiz were appointed to the Board by Grupo Mexico, the plaintiff does not contest that they were independent and unaffiliated with Grupo Mexico. *See Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984) ("[I]t is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election. That is the usual way a person becomes a corporate director. It is the care, attention and sense of individual responsibility to the performance of one's duties, not the method of election, that generally touches on independence.").

After hiring its advisors, the Special Committee set out to acquire a "proper" term sheet from Grupo Mexico.[15] The Special Committee did not view the most recent term sheet that Grupo Mexico had sent on March 25, 2004 as containing a price term that would allow the Special Committee to properly evaluate the proposal. For some reason the Special Committee did not get the rather clear message that Grupo Mexico thought Minera was worth $3.05 billion.

Thus, in response to that term sheet, on April 2, 2004, Ruiz sent a letter to Grupo Mexico on behalf of the Special Committee in which he asked for clarification about, among other things, the pricing of the proposed transaction. On May 7, 2004, Grupo Mexico sent to the Special Committee what the Special Committee considered to be the first "proper" term sheet,[16] making even more potent its ask.

E. The May 7 Term Sheet

Grupo Mexico's May 7 term sheet contained more specific details about the proposed consideration to be paid in the Merger. It echoed the original proposal, but increased Grupo Mexico's ask from $3.05 billion worth of Southern Peru stock to $3.147 billion. Specifically, the term sheet provided that:

> The proposed value of Minera [ ] is US$4,3 billion, comprised of an equity value of US$3,147 million [sic] and US$1,153 million [sic] of net debt as of April 2004. The number of [Southern Peru] shares to be issued in respect to the acquisition of Minera [ ] would be calculated by dividing 98.84% of the equity value of Minera [ ] by the 20-day average closing

[15] *See* Tr. at 21 (Palomino); *see also* JX-83 (minutes of Special Committee meeting (April 1, 2004)) (discussing the problems with the term sheet that the Special Committee had received on March 25, 2004).
[16] Tr. at 27 (Palomino).

> share price of [Southern Peru] beginning 5 days prior to closing of the [Merger].[17]

In other words, Grupo Mexico wanted $3.147 billion in market-tested Southern Peru stock in exchange for its stake in Minera. The structure of the proposal, like the previous Grupo Mexico ask, shows that Grupo Mexico was focused on the dollar value of the stock it would receive.

Throughout May 2004, the Special Committee's advisors conducted due diligence to aid their analysis of Grupo Mexico's proposal. As part of this process, A&S visited Minera's mines and adjusted the financial projections of Minera management (*i.e.*, of Grupo Mexico) based on the outcome of their due diligence.

F. Goldman Begins To Analyze Grupo Mexico's Proposal

On June 11, 2004, Goldman made its first presentation to the Special Committee addressing the May 7 term sheet. Although Goldman noted that due diligence was still ongoing, it had already done a great deal of work and was able to provide preliminary valuation analyses of the standalone equity value of Minera, including a DCF analysis, a contribution analysis, and a look-through analysis.

Goldman performed a DCF analysis of Minera based on long-term copper prices ranging from $0.80 to $1.00 per pound and discount rates ranging from 7.5% to 9.5%, utilizing both unadjusted Minera management projections and Minera management projections as adjusted by A&S. The only way that Goldman could derive a value for

[17] JX-156 (term sheet from Grupo Mexico to the Special Committee (May 7, 2004)) at SP COMM 007078. At this point in the negotiation process, Grupo Mexico mistakenly believed that it only owned 98.84% of Minera. As I will note, it later corrects for this error, and the final Merger consideration reflected Grupo Mexico's full 99.15% equity ownership stake in Minera.

Minera close to Grupo Mexico's asking price was by applying its most aggressive assumptions (a modest 7.5% discount rate and its high-end $1.00/lb long-term copper price) to the unadjusted Minera management projections, which yielded an equity value for Minera of $3.05 billion. By applying the same aggressive assumptions to the projections as adjusted by A&S, Goldman's DCF analysis yielded a lower equity value for Minera of $2.41 billion. Goldman's mid-range assumptions (an 8.5% discount rate and $0.90/lb long-term copper price) only generated a $1.7 billion equity value for Minera when applied to the A&S-adjusted projections. That is, the mid-range of the Goldman analysis generated a value for Minera (the "get") a full $1.4 billion less than Grupo Mexico's ask for the give.

It made sense for Goldman to use the $0.90 per pound long term copper price as a mid-range assumption, because this price was being used at the time by both Southern Peru and Minera for purposes of internal planning. The median long-term copper price forecast based on Wall Street research at the time of the Merger was also $0.90 per pound.

Goldman's contribution analysis applied Southern Peru's market-based sales, EBITDA, and copper sales multiples to Minera. This analysis yielded an equity value for Minera ranging only between $1.1 and $1.7 billion. Goldman's look-through analysis, which was a sum-of-the-parts analysis of Grupo Mexico's market capitalization, generated a maximum equity value for Minera of $1.3 billion and a minimum equity value of only $227 million.

Goldman summed up the import of these various analyses in an "Illustrative Give/Get Analysis," which made patent the stark disparity between Grupo Mexico's asking price and Goldman's valuation of Minera: Southern Peru would "give" stock with a market price of $3.1 billion to Grupo Mexico and would "get" in return an asset worth no more than $1.7 billion.[18]

The important assumption reflected in Goldman's June 11 presentation that a bloc of shares of Southern Peru could yield a cash value equal to Southern Peru's actual stock market price and was thus worth its market value is worth pausing over. At trial, the defendants disclaimed any reliance upon a claim that Southern Peru's stock market price was not a reliable indication of the cash value that a very large bloc of shares – such as the 67.2 million paid to Grupo Mexico – could yield in the market.[19] Thus, the price of

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[18] JX-101 (Goldman presentation to the Special Committee (June 11, 2004)) at SP COMM 003381.

[19] *See* Tr. at 221-222 (Handelsman) ("Q [the court]. . . . But again I just want to be clear, I am not here — when I am ultimately looking at them, I am not looking at there is some sort of thing where, you know, the market was somehow overvaluing Southern Peru and that you have to sort of normalize for that. That's not what the committee ever considered. A. No. Q. Right. I just want you to understand there is obviously arguments you can make with respect to a thinly traded security like Southern Peru with the overhang of control that the trading price might not be as informative as something where there is a much more liquid float. A. Oh, I think there would have been a robust market for Southern Peru Copper in the copper industry at or better than the price that it traded at."). Even though Handelsman testified that the Special Committee did not "seriously" consider whether Southern Peru could have sold 67 million shares into the market for some amount of money, because 67 million shares was close to 85% of the then-outstanding Southern Peru stock, *id.* at 202 (Handelsman), when questioned by the court, he conceded that the market price of Southern Peru was a reliable measure of Southern Peru's worth. At the post-trial oral argument, the defendants' counsel further clarified Handelsman's belief that the market price was reliable. *See In re Southern Peru S'holders Litig.*, C.A. No. 961, at 98 (Del. Ch. July 12, 2011) (TRANSCRIPT) ("A. [T]he [market] price [of Southern Peru] was what it was and [Handelsman] believed it . . ."). In further exchange with the court, the defendants' counsel never contested that the market price was not a reliable indicator of Southern Peru's value. *See e.g.*, *id.* at 99 ("Q. . . . [I]f your clients basically tell me the market price is the market price, and the market price is 3.1 billion and you are only up to 2.7 billion, and you are

the "give" was always easy to discern. The question thus becomes what was the value of the "get." Unlike Southern Peru, Minera's value was not the subject of a regular market test. Minera shares were not publicly traded and thus the company was embedded in the overall value of Grupo Mexico.

The June 11 presentation clearly demonstrates that Goldman, in its evaluation of the May 7 term sheet, could not get the get anywhere near the give. Notably, that presentation marked the *first and last time* that a give-get analysis appeared in Goldman's presentations to the Special Committee.

What then happened next is curious. The Special Committee began to *devalue* the "give" in order to make the "get" look closer in value.

The DCF analysis of the value of Minera that Goldman presented initially caused concern. As Handelsman stated at trial, "when [the Special Committee] thought that the value of Southern Peru was its market value and the value of Minera [ ] was its discounted cash flow value . . . those were very different numbers."[20] But, the Special

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trading at a multiple to DCF and you are buying something else at a multiple to DCF, that sounds like a pretty classic dumb deal. A. That's not what my clients believed . . . [t]hey believed, as they testified, that they were getting a bargain; that Minera was worth more than the consideration that Grupo [Mexico] received.); *id.* at 105 ("Q. Let me just say my simplistic view of this is if your clients are not going to challenge, as they did not challenge, the market value of Southern Peru stock, then Southern Peru, the stock they gave up was basically worth the market price . . . A. Right . . ."). It is also worth noting that the Special Committee's advisors never advised it that Southern Peru's stock should be valued at a discount to its market value, that the defendants do not challenge the market price of Southern Peru in their briefs, and that the defendants' trial expert did nothing to question the reliability of the then-current market price. *See* Tr. at 464 (Schwartz) ("I didn't look at the liquidity, I didn't look at the control issues, I didn't look at other issues. I didn't look at other corporate companies that were trading.").

[20] Tr. at 157 (Handelsman).

Committee's view changed when Goldman presented it with a DCF analysis of the value of Southern Peru on June 23, 2004.

In this June 23 presentation, Goldman provided the Special Committee with a preliminary DCF analysis for Southern Peru analogous to the one that it had provided for Minera in the June 11 presentation. But, the discount rates that Goldman applied to Southern Peru's cash flows ranged from 8% to 10% instead of 7.5% to 9.5%. Based on Southern Peru management's projections, the DCF value generated for Southern Peru using mid-range assumptions (a 9% discount rate and $0.90/lb long-term copper price) was $2.06 billion. This was about $1.1 billion shy of Southern Peru's market capitalization as of June 21, 2004 ($3.19 billion). Those values "comforted" the Special Committee.[21]

Again, one must pause over this. "Comfort" is an odd word in this context. What Goldman was basically telling the Special Committee was that Southern Peru was being overvalued by the stock market. That is, Goldman told the Special Committee that even though Southern Peru's stock was worth an obtainable amount in cash, it really was not worth that much in fundamental terms. Thus, although Southern Peru had an actual cash value of $3.19 billion, its "real," "intrinsic,"[22] or "fundamental" value was only $2.06

[21] Tr. at 159 (Handelsman) ("I think the committee was somewhat comforted by the fact that the DCF analysis of Minera [ ] and the DCF analysis of [Southern Peru] were not as different as the discounted cash flow analysis of Minera [ ] and the market value of Southern Peru.").

[22] This is a word I do not use when I have to conduct a necessarily imperfect valuation of an asset. The word itself implies a certainty better attributed to an omniscient creator than a flawed human.

billion, and giving $2.06 billion in fundamental value for $1.7 billion in fundamental value was something more reasonable to consider.

Of course, the more logical reaction of someone not in the confined mindset of directors of a controlled company may have been that it was a good time to capitalize on the market multiple the company was getting and monetize the asset.

A third party in the Special Committee's position might have sold at the top of the market, or returned cash to the Southern Peru stockholders by declaring a special dividend. For example, if it made long-term strategic sense for Grupo Mexico to consolidate Southern Peru and Minera, there was a logical alternative for the Special Committee: ask Grupo Mexico to make a premium to market offer for Southern Peru. Let Grupo Mexico be the buyer, not the seller. If the Special Committee's distinguished bankers believed that Southern Peru was trading at a premium to fundamental value, why not ask Grupo Mexico to make a bid at a premium to that price? By doing so, the Special Committee would have also probed Grupo Mexico about its own weaknesses, including the fact that Minera seemed to be cash-strapped, having trouble paying its regular bills, and thus unable to move forward with an acquisition of its own. That is, if Grupo Mexico could not buy despite the value it held in Minera, that would bespeak weakness and cast doubt on the credibility of its ask. And if it turned out that Grupo Mexico would buy at a premium, the minority stockholders of Southern Peru would benefit.

In other words, by acting like a third-party negotiator with its own money at stake and with the full range of options, the Special Committee would have put Grupo Mexico back on its heels. Doing so would have been consistent with the financial advice it was

getting and seemed to accept as correct. The Special Committee could have also looked to use its market-proven stock to buy a company at a good price (a lower multiple to earnings than Southern Peru's) and then have its value rolled into Southern Peru's higher market multiple to earnings. That could have included buying Minera at a price equal to its fundamental value using Southern Peru's market-proven currency.

Instead of doing any of these things, the Special Committee was "comforted" by the fact that they could devalue that currency and justify paying *more* for Minera than they originally thought they should.[23]

G. The Special Committee Moves Toward Relative Valuation

After the June 23, 2004 presentation, the Special Committee and Goldman began to embrace the idea that the companies should be valued on a relative basis. In a July 8, 2004 presentation to the Special Committee, Goldman included both a revised standalone DCF analysis of Minera and a "Relative Discounted Cash Flow Analysis" in the form of matrices presenting the "indicative number" of Southern Peru shares that should be issued to acquire Minera based on various assumptions.[24] The relative DCF analysis generated a vast range of Southern Peru shares to be issued in the Merger of 28.9 million to 71.3 million. Based on Southern Peru's July 8, 2004 market value of $40.30 per share, 28.9 million shares of Southern Peru stock had a market value of $1.16 billion, and 71.3

[23] *See* Tr. at 42 (Palomino) ("Q. . . . [A]s of . . . June 11, 2004, what was the special committee's view of the transaction that had been proposed by Grupo Mexico? A. That the figures that they were asking were too high . . ."); Tr. at 156-57 (Handelsman) ("Q. What did you learn from these preliminary analyses that Goldman Sachs performed? A. That their results showed that the value of Minera [ ] was substantially less than the asked price of Grupo Mexico by a substantial margin . . .").

[24] JX-103 (Goldman presentation to the Special Committee (July 8, 2004)) at SP COMM 006896 - SP COMM 006898.

million shares were worth $2.87 billion.[25] In other words, even the highest equity value yielded for Minera by this analysis was short of Grupo Mexico's actual cash value asking price.

The revised standalone DCF analysis applied the same discount rate and long-term copper price assumptions that Goldman had used in its June 11 presentation to updated projections. This time, by applying a 7.5% discount rate and $1.00 per pound long-term copper price to Minera management's projections, Goldman was only able to yield an equity value of $2.8 billion for Minera. Applying the same aggressive assumptions to the projections as adjusted by A&S generated a standalone equity value for Minera of only $2.085 billion. Applying mid-range assumptions (a discount rate of 8.5% and $0.90/lb long-term copper price) to the A&S-adjusted projections yielded an equity value for Minera of only $1.358 billion.

H. The Special Committee Makes A Counterproposal And Suggests A Fixed Exchange Ratio

After Goldman's July 8 presentation, the Special Committee made a counterproposal to Grupo Mexico that was (oddly) not mentioned in Southern Peru's proxy statement describing the Merger (the "Proxy Statement"). In this counterproposal, the Special Committee offered that Southern Peru would acquire Minera by issuing 52 million shares of Southern Peru stock with a then-current market value of $2.095 billion.[26] The Special Committee also proposed implementation of a fixed, rather than a

[25] JX-18 (list of historical stock prices of Southern Peru) at 9 ($40.30 x 28,900,000 = $1,164,670,000; $40.30 x 71,300,000 = $2,873,390,000).
[26] *Id.* ($40.30 x 52,000,000 = $2,095,600,000).

floating, exchange ratio that would set the number of Southern Peru shares issued in the Merger.[27]

From the inception of the Merger, Grupo Mexico had contemplated that the dollar value of the price to be paid by Southern Peru would be fixed (at a number that was always north of $3 billion), while the number of Southern Peru shares to be issued as consideration would float up or down based on Southern Peru's trading price around the time of closing. But, the Special Committee was uncomfortable with having to issue a variable amount of shares in the Merger. Handelsman testified that, in its evaluation of Grupo Mexico's May 7 term sheet, "it was the consensus of the [Special Committee] that a floating exchange rate was a nonstarter" because "no one could predict the number of shares that [Southern Peru] would have to issue in order to come up with the consideration requested."[28] The Special Committee wanted a fixed exchange ratio, which would set the number of shares that Southern Peru would issue in the Merger at the time of signing. The dollar value of the Merger consideration at the time of closing would vary with the fluctuations of Southern Peru's market price. According to the testimony of the Special Committee members, their reasoning was that both Southern Peru's stock and the copper market had been historically volatile, and a fixed exchange ratio would protect Southern Peru's stockholders from a situation in which Southern Peru's stock price went down and Southern Peru would be forced to issue a greater number of shares

[27] The exact terms of the Special Committee's proposed fixed exchange ratio are unclear on this record.
[28] Tr. at 155 (Handelsman).

for Minera in order to meet a fixed dollar value.[29] As I will discuss later, that position is hard to square with the Special Committee and Southern Peru's purported bullishness about the copper market in 2004.[30]

I. Grupo Mexico Sticks To Its Demand

In late July or early August, Grupo Mexico responded to the Special Committee's counterproposal by suggesting that Southern Peru should issue in excess of 80 million shares of common stock to purchase Minera. It is not clear on the record exactly when Grupo Mexico asked for 80 million shares, but given Southern Peru's trading history at that time, the market value of that consideration would have been close to $3.1 billion, basically the same place where Grupo Mexico had started.[31] The Special Committee viewed Grupo Mexico's ask as too high, which is not surprising given that the parties were apparently a full billion dollars in value apart, and negotiations almost broke down.

But, on August 21, 2004, after what is described as "an extraordinary effort" in Southern Peru's Proxy Statement, Grupo Mexico proposed a new asking price of 67 million shares.[32] On August 20, 2004, Southern Peru was trading at $41.20 per share, so 67 million shares were worth about $2.76 billion on the market, a drop in Grupo

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[29] *Id.*

[30] *See id.* at 48 (Palomino) (explaining that his impression at the time negotiations began was that Southern Peru was doing well in the market because "the market was estimating higher ore grades and higher copper prices than we thought were in fact going to be maintained in the long run"); *id.* at 313 (Jacob) (discussing rising copper prices in 2004).

[31] Between July 20, 2004 and August 21, 2004, the average closing price of Southern Peru stock was $38.28. JX-18 at 8-9 ($38.28 x 80,000,000 = $3,062,400,000).

[32] JX-129 (Southern Peru Copper Corporation Schedule 14A (February 25, 2005) (Proxy Statement)) at 22.

Mexico's ask.[33] Grupo Mexico's new offer brought the Special Committee back to the negotiating table.

After receiving two term sheets from Grupo Mexico that reflected the 67 million share asking price, the second of which was received on September 8, 2004, when 67 million shares had risen to be worth $3.06 billion on the market,[34] Goldman made another presentation to the Special Committee on September 15, 2004. In addition to updated relative DCF analyses of Southern Peru and Minera (presented only in terms of the number of shares of Southern Peru stock to be issued in the Merger), this presentation contained a "Multiple Approach at Different EBITDA Scenarios," which was essentially a comparison of Southern Peru and Minera's market-based equity values, as derived from multiples of Southern Peru's 2004 and 2005 estimated (or "E") EBITDA.[35] Goldman also presented these analyses in terms of the number of Southern Peru shares to be issued to Grupo Mexico, rather than generating standalone values for Minera. The range of shares to be issued at the 2004E EBITDA multiple (5.0x) was 44 to 54 million; at the 2005E multiple (6.3x) Goldman's analyses yielded a range of 61 to 72 million shares of Southern Peru stock.[36] Based on Southern Peru's $45.34 share price as of September 15, 2004, 61 to 72 million shares had a cash value of $2.765 billion to $3.26 billion.[37]

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[33] JX-18 at 8 ($41.20 x 67,000,000= $2,760,400,000).
[34] *Id.* ($45.72 x 67,000,000 = $3,063,240,000).
[35] JX-105 at SP COMM 006805.
[36] The EV/2005E EBITDA multiple of 6.3x used in this presentation was not a real market multiple, or even a Wall Street analysis consensus multiple, but an internal Southern Peru management number supposedly based on Southern Peru's internal projections for its 2005E EBITDA, unadjusted for royalty tax owed to the Peruvian government. As will be discussed, it seems aggressive, at the very least.
[37] JX-18 at 8 ($45.34 x 61,000,000 = $2,765,740,000; $45.34 x 72,000,000 = $3,264,480,000).

The Special Committee sent a new proposed term sheet to Grupo Mexico on September 23, 2004. That term sheet provided for a fixed purchase price of 64 million shares of Southern Peru (translating to a $2.95 billion market value based on Southern Peru's then-current closing price).[38] The Special Committee's proposal contained two terms that would protect the minority stockholders of Southern Peru: (1) a 20% collar around the purchase price, which gave both the Special Committee and Grupo Mexico the right to walk away from the Merger if Southern Peru's stock price went outside of the collar before the stockholder vote; and (2) a voting provision requiring that a majority of the minority stockholders of Southern Peru vote in favor of the Merger. Additionally, the proposal called for Minera's net debt, which Southern Peru was going to absorb in the Merger, to be capped at $1.105 billion at closing, and contained various corporate governance provisions.

J. Grupo Mexico Rejects Many Of The Special Committee's Proposed Terms But The Parties Work Out A Deal

On September 30, 2004, Grupo Mexico sent a counterproposal to the Special Committee, in which Grupo Mexico rejected the Special Committee's offer of 64 million shares and held firm to its demand for 67 million shares. Grupo Mexico's counterproposal also rejected the collar and the majority of the minority vote provision, proposing instead that the Merger be conditioned on the vote of two-thirds of the outstanding stock. Grupo Mexico noted that conditioning the Merger on a two-thirds shareholder vote obviated the need for the walk-away right requested by the Special

[38] *Id.* at 8 ($46.22 x 64,000,000 million = $2,958,080,000).

Committee, because Grupo Mexico would be prevented from approving the Merger unilaterally in the event the stock price was materially higher at the time of the stockholder vote than at the time of Board approval. Grupo Mexico did accept the Special Committee's proposed $1.05 billion debt cap at closing, which was not much of a concession in light of the fact that Minera was already contractually obligated to pay down its debt and was in the process of doing so.[39]

After the Special Committee received Grupo Mexico's September 30 counterproposal, the parties reached agreement on certain corporate governance provisions to be included in the Merger Agreement, some of which were originally suggested by Grupo Mexico and some of which were first suggested by the Special Committee. Without saying these provisions were of no benefit at all to Southern Peru and its outside investors, let me just say that they do not factor more importantly in this decision because they do not provide any benefit above the protections of default law that were economically meaningful enough to close the material dollar value gap that existed.

On October 5, 2004, members of the Special Committee met with Grupo Mexico to iron out a final deal. At that meeting, the Special Committee agreed to pay 67 million shares, dropped their demand for the collar, and acceded to most of Grupo Mexico's

[39] Minera was contractually obligated to make mandatory prepayments on its long-term credit facilities when, among other things, the price of copper exceeded $0.88 per pound. *See* JX-125 at 55 ("when the price[ ] of copper. . . exceed[s] $0.88 per pound . . . we will pay an amount equal to 75% of the excess cash flow generated by the sales of such metals at the higher metal price, which will be applied first, to the amortization of Tranche B, then to the amortization of Tranche A."). The price of copper went north of $0.88 per pound on October 15, 2003. The record shows that Minera was paying down its debt, presumably in compliance with its prepayment obligation. *See* JX-103 at SP COMM 006861 (Minera's net debt as of May 31, 2004 was $1.189 million); JX-107 (road show presentation (November 2004)) at SP COMM 006674 (Minera's net debt as of June 30, 2004 was $1.06 billion).

demands. The Special Committee justified paying a higher price through a series of economic contortions. The Special Committee was able to "bridge the gap"[40] between the 64 million and the 67 million figures by decreasing Minera's debt cap by another $105 million, and by getting Grupo Mexico to cause Southern Peru to issue a special dividend of $100 million, which had the effect of decreasing the value of Southern Peru's stock. According to Special Committee member Handelsman, these "bells and whistles"[41] made it so that "the value of what was being . . . acquired in the merger went up, and the value of the specie that was being used in the merger went down . . . ,"[42] giving the Special Committee reason to accept a higher Merger price.

The closing share price of Southern Peru was $53.16 on October 5, 2004, so a purchase price of 67 million shares had a market value of $3.56 billion,[43] which was higher than the dollar value requested by Grupo Mexico in its February 2004 proposal or its original May 7 term sheet.

At that point, the main unresolved issue was the stockholder vote that would be required to approve the Merger. After further negotiations, on October 8, 2004, the Special Committee gave up on its proposed majority of the minority vote provision and agreed to Grupo Mexico's suggestion that the Merger require only the approval of two-

[40] Tr. at 175 (Handelsman).
[41] *Id.* at 185 (Handelsman).
[42] *Id.* at 176 (Handelsman).
[43] JX-18 at 8 ($53.16 x 67,000,000 = $3,561,720,000).

thirds of the outstanding common stock of Southern Peru.[44] Given the size of the holdings of Cerro and Phelps Dodge,[45] Grupo Mexico could achieve a two-thirds vote if either Cerro or Phelps Dodge voted in favor of the Merger.

K. The Multi-Faceted Dimensions Of Controlling Power: Large Stockholders Who Want To Get Out Support A Strategic, Long-Term Acquisition As A Prelude To Their Own Exit As Stockholders

Human relations and motivations are complex. One of the members of the Special Committee, Handelsman, represented a large Founding Stockholder, Cerro. This might be seen in some ways to have ideally positioned Handelsman to be a very aggressive negotiator. But Handelsman had a problem to deal with, which did not involve Cerro having any self-dealing interest in the sense that Grupo Mexico had. Rather, Grupo Mexico had control over Southern Peru and thus over whether Southern Peru would take the steps necessary to make the Founding Stockholders' shares marketable under applicable securities regulations.[46] Cerro and Phelps Dodge, consistent with its name, wanted to monetize their investment in Southern Peru and get out.

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[44] The parties further agreed that for the purposes of the two-thirds vote, each share would only be entitled to one vote. Thus, Grupo Mexico could only vote its 54.17% equity ownership, not the 63.08% voting power it ordinarily held due to the super-voting rights of the Founders Shares.

[45] 14.2% and 13.95% respectively.

[46] The Founders Shares held by Cerro and Phelps Dodge were unregistered and thus could not be publicly sold in the marketplace. Securities Act of 1933 § 5(a), 15 U.S.C. § 77e(a) (2010). SEC Rule 144 provides an exemption from the registration requirements and allows public resale of restricted securities if certain conditions are met. But, Rule 144 contains volume restrictions that made it impossible for Cerro or Phelps Dodge to sell a bloc of their shares. Specifically, Cerro and Phelps Dodge, as "affiliates" of Southern Peru, were prevented from selling an amount greater than one percent of the outstanding Founders Shares in any three-month period. 17 C.F.R. § 230.144(e) (2010). Absent registration, Cerro and Phelps Dodge faced a prolonged goodbye.

Thus, while the Special Committee was negotiating the terms of the Merger, Handelsman was engaged in negotiations of his own with Grupo Mexico.[47] Cerro and Phelps Dodge had been seeking registration rights from Grupo Mexico (in its capacity as Southern Peru's controller) for their shares of Southern Peru stock, which they needed because of the volume restrictions imposed on affiliates of an issuer by SEC Rule 144.[48]

It is not clear which party first proposed liquidity and support for the Founding Stockholders in connection with the Merger. But it is plain that the concept appears throughout the term sheets exchanged between Grupo Mexico and the Special Committee, and it is clear that Handelsman knew that registration rights would be part of the deal from the beginning of the Merger negotiations and that thus the deal would enable Cerro to sell as it desired. The Special Committee did not take the lead in negotiating the specific terms of the registration rights provisions – rather, it took the position that it wanted to leave the back-and-forth over the agreement details to Cerro and Grupo Mexico. Handelsman, however, played a key role in the negotiations with Grupo Mexico on Cerro's behalf.[49]

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[47] Tr. at 182 (Handelsman) ("I had talked to the general counsel both of Grupo Mexico and Southern Peru about registration rights from the time of the first term sheet that Grupo Mexico sent.").

[48] *Id.* at 167 (Handelsman) ("[W]e were all long-term holders, and we all had directors, so we were all affiliates. So none of us could really sell our shares."); *cf. id.* at 184 (Handelsman) (discussing market difficulties of selling stock even if Cerro could cease to be an affiliate for purposes of the volume restrictions of Rule 144).

[49] *See id.* at 205 (Handelsman) ("Q. Do you know whether there were other people on behalf of Cerro that were speaking to Mr. Larrea at about that time [of the agreement to vote Cerro's shares in accordance with the Special Committee in exchange for registration rights] about Cerro's interest in selling its shares? A. I am sure there weren't.").

At trial, Handelsman explained that there were two justifications for pursuing registration rights – one offered benefits exclusive to the Founding Stockholders, and the other offered benefits that would inure to Southern Peru's entire stockholder base. The first justification was that Cerro needed the registration rights in order to sell its shares quickly, and Cerro wanted "to get out" of its investment in Southern Peru.[50] The second justification concerned the public market for Southern Peru stock. Granting registration rights to the Founding Stockholders would allow Cerro and Phelps Dodge to sell their shares, increasing the amount of stock traded on the market and thus increasing Southern Peru's somewhat thin public float. This would in turn improve stockholder liquidity, generate more analyst exposure, and create a more efficient market for Southern Peru shares, all of which would benefit the minority stockholders. Handelsman thus characterized the registration rights situation as a "win-win," because "it permitted us to sell our stock" and "it was good for [Southern Peru] because they had a better float and they had a more organized sale of shares."[51]

Handelsman's tandem negotiations with Grupo Mexico culminated in Southern Peru giving Cerro registration rights for its shares on October 21, 2004, the same day that the Special Committee approved the Merger. In exchange for registration rights, Cerro expressed its intent to vote its shares in favor of the Merger if the Special Committee recommended it. If the Special Committee made a recommendation against the Merger, or withdrew its recommendation in favor of it, Cerro was bound by the agreement to vote

[50] *Id.* at 168 (Handelsman) ("And both we and Phelps Dodge wanted to get out."); *id.* at 167 (Handelsman) ("And quite frankly, we had an interest in selling our shares.").
[51] *Id.* at 184-85 (Handelsman).

against the Merger. Grupo Mexico's initial proposal, which Handelsman received on October 18, 2004 – a mere three days before the Special Committee was to vote on the Merger – was that it would grant Cerro registration rights in exchange for Cerro's agreement to vote in favor of the Merger. The Special Committee and Handelsman suggested instead that Cerro's vote on the Merger be tied to whether or not the Special Committee recommended the Merger. After discussing the matter with the Special Committee, Grupo Mexico agreed.

On December 22, 2004, after the Special Committee approved the Merger but well before the stockholder vote, Phelps Dodge entered into an agreement with Grupo Mexico that was similar to Cerro's, but did not contain a provision requiring Phelps Dodge to vote against the Merger if the Special Committee did. By contrast, Phelps Dodge's agreement only provided that, [t]aking into account that the Special Committee . . . did recommend . . . the approval of the [Merger], Phelps Dodge "express[es] [its] current intent, to [ ] submit its proxies to vote in favor of the [Merger] . . . ."[52] Thus, in the event that the Special Committee later withdrew its recommendation to approve the Merger, Cerro would be contractually bound to vote against it, but Grupo Mexico could still achieve the two-thirds vote required to approve the Merger solely with Phelps Dodge's cooperation. Under the terms of the Merger Agreement, the Special Committee was free to change its recommendation of the Merger, but it was not able to terminate the Merger

[52] JX-15 (letter agreement between AMC and Phelps Dodge (December 22, 2004)) at AMC0024877.

Agreement on the basis of such a change.[53] Rather, a change in the Special Committee's recommendation only gave Grupo Mexico the power to terminate the Merger Agreement.[54]

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This issue again warrants a pause. Although I am not prepared on this record to find that Handelsman consciously agreed to a suboptimal deal for Southern Peru simply to achieve liquidity for Cerro from Grupo Mexico, there is little doubt in my mind that Cerro's own predicament as a *stockholder dependent on Grupo Mexico's whim as a controller for registration rights* influenced how Handelsman approached the situation. That does not mean he consciously gave in, but it does means that he was less than ideally situated to press hard. Put simply, Cerro was even more subject to the dominion of Grupo Mexico than smaller holders because Grupo Mexico had additional power over it because of the unregistered nature of its shares.

Perhaps most important, Cerro's desires when considered alongside the Special Committee's actions illustrate the tendency of control to result in odd behavior. During the negotiations of the Merger, Cerro had no interest in the long-term benefits to Southern Peru of acquiring Minera, nor did Phelps Dodge. Certainly, Cerro did not want any deal so disastrous that it would tank the value of Southern Peru completely, but nor

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[53] JX-13 (Agreement and Plan of Merger (October 21, 2004)) §5.9(b) ("In the event that, prior to the Effective Time the Special Committee believes, in its good faith judgment, after receiving the advice of its outside legal counsel, that failing to do so would create a reasonable likelihood of breaching its fiduciary duties under applicable law, the Special Committee . . . may . . . withdraw or modify its approval or recommendation in favor of the [Merger].").
[54] *Id.* §7.1(d).

did it have a rational incentive to say no to a suboptimal deal if that risked being locked into its investments. Cerro wanted to *sell* and *sell then and there*. But as a Special Committee member, Handelsman did not act consistently with that impulse for all stockholders. He did not suggest that Grupo Mexico make an offer for Southern Peru, but instead pursued a long-term strategic transaction in which Southern Peru was the buyer. A short-term seller of a company's shares caused that company to be a long-term buyer.

L. After One Last Price Adjustment, Goldman Makes Its Final Presentation

On October 13, 2004, Grupo Mexico realized that it owned 99.15% of Minera rather than 98.84%, and the purchase price was adjusted to 67.2 million shares instead of 67 million shares to reflect the change in size of the interest being sold. On October 13, 2004, Southern Peru was trading at $45.90 per share, which meant that 67.2 million shares had a dollar worth of $3.08 billion.[55]

On October 21, 2004, the Special Committee met to consider whether to recommend that the Board approve the Merger. At that meeting, Goldman made a final presentation to the Special Committee. The October 21, 2004 presentation stated that Southern Peru's implied equity value was $3.69 billion based on its then current market capitalization at a stock price of $46.41 and adjusting for debt. Minera's implied equity value is stated as $3.146 billion, which was derived entirely from multiplying 67.2 million shares by Southern Peru's $46.41 stock price and adjusting for the fact that Southern Peru was only buying 99.15% of Minera.

[55] JX-18 at 7 ($45.90 x 67,200,000 = $3,084,480,000).

No standalone equity value of Minera was included in the October 21 presentation.[56] Instead, the presentation included a series of relative DCF analyses and a "Contribution Analysis at Different EBITDA Scenarios," both of which were presented in terms of a hypothetical number of Southern Peru shares to be issued to Grupo Mexico for Minera.[57] Goldman's relative DCF analyses provided various matrices showing the number of shares of Southern Peru that should be issued in exchange for Minera under various assumptions regarding the discount rate, the long-term copper price, the allocation of tax benefits, and the amount of royalties that Southern Peru would need to pay to the Peruvian government. As it had in all of its previous presentations, Goldman used a range of long-term copper prices from $0.80 to $1.00 per pound. The DCF analyses generated a range of the number of shares to be issued in the Merger from 47.2 million to 87.8 million. Based on the then-current stock price of $45.92, this translated to $2.17 billion to $4.03 billion in cash value.[58] Assuming the mid-range figures of a discount rate of 8.5% and a long-term copper price of $0.90 per pound, the analyses yielded a range of shares from 60.7 to 78.7 million.

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[56] During discovery, two Microsoft Excel worksheets were unearthed that appear to suggest the implied equity values of Minera and Southern Peru that underlie Goldman's October 21 presentation. One worksheet, which contains the Minera model, indicates an implied equity value for Minera of $1.25 billion using a long-term copper price of $0.90/lb and a discount rate of 8.5%. The other worksheet, which contains the Southern Peru model, indicates an implied equity value for Southern Peru of $1.6 billion using a copper price of $0.90 and a discount rate of 9.0%, and assuming a royalty tax of 2%. Both the plaintiff's expert and the defendants' expert relied on the projections contained in these worksheets in their reports. The defendants have also not contested the plaintiff's expert's contention that these worksheets include Goldman's discounted cash flow estimates as of October 21, 2004.

[57] JX-106 (Goldman presentation to the Special Committee (October 21, 2004)).

[58] JX-18 at 7 ($45.92 x 47,200,000 = $2,167,424,000; $45.92 x 87,800,000 = $4,031,776,000).

Goldman's contribution analysis generated a range of 42 million to 56 million shares of Southern Peru to be issued based on an annualized 2004E EBITDA multiple (4.6x) and forecasted 2004E EBITDA multiple (5.0x), and a range of 53 million to 73 million shares based on an updated range of estimated 2005E EBITDA multiples (5.6x to 6.5x). Notably, the 2004E EBITDA multiples did not support the issuance of 67.2 million shares of Southern Peru stock in the Merger. But, 67.2 million shares falls at the higher end of the range of shares calculated using Southern Peru's 2005E EBITDA multiples. As notable, these multiples were not the product of the median of the 2005E EBITDA multiples of comparable companies identified by Goldman (4.8x). Instead, the multiples used were even higher than Southern Peru's own higher 2005E EBITDA Wall Street consensus (5.5x) — an adjusted version of which was used as the bottom end of the range. These higher multiples were then attributed to Minera, a non-publicly traded company suffering from a variety of financial and operational problems.

Goldman opined that the Merger was fair from a financial perspective to the stockholders of Southern Peru, and provided a written fairness opinion.

M. The Special Committee And The Board Approve The Merger

After Goldman made its presentation, the Special Committee voted 3-0 to recommend the Merger to the Board. At the last-minute suggestion of Goldman, Handelsman decided not to vote in order to remove any appearance of conflict based on his participation in the negotiation of Cerro's registration rights, despite the fact that he

had been heavily involved in the negotiations from the beginning and his hands had been deep in the dough of the now fully baked deal.[59]

The Board then unanimously approved the Merger and Southern Peru entered into the Merger Agreement.

N. The Market Reacts To The Merger

The market reaction to the Merger was mixed and the parties have not presented any reliable evidence about it. That is, neither party had an expert perform an event study analyzing the market reaction to the Merger. Southern Peru's stock price traded down by 4.6% when the Merger was announced. When the preliminary proxy statement, which provided more financial information regarding the Merger terms, became public on November 22, 2004, Southern Peru's stock price again declined by 1.45%. But the stock price increased for two days after the final Proxy Statement was filed.

Determining what effect the Merger itself had on this rise is difficult because, as the plaintiff points out, this was not, as the defendants contend, the first time that Southern Peru and Minera's financials were presented together. Rather, the same financial statements were in the preliminary Proxy Statement and the stock price fell.

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[59] *See* Tr. at 181-82 (Handelsman) ("We were sitting in Goldman Sachs' office in Mexico City on this October day, and a lawyer from Goldman's counsel called Goldman and said that – did they recognize that I had something that was the appearance of a conflict. And everybody looked at each other, and it was sort of incredulous about this and how it would come up on the morning of the date that the committee was supposed to vote. And I looked at it and I said, Well, if I have a conflict or they think I have a conflict or this is a potential for a conflict or there is an appearance of a conflict, then I won't vote.").

But, as noted, the plaintiff also offers no evidence that these stock market fluctuations provide a reliable basis for assessing the fairness of the deal because it did not conduct a reliable event study.

In fact, against a backdrop of strong copper prices, the trading price of Southern Peru stock increased substantially by the time the Merger closed. By April 1, 2005, Southern Peru's stock price had a market value of $55.89 per share, an increase of approximately 21.7% over the October 21, 2004 closing price. But lest this be attributed to the Merger, other factors were in play. This includes the general direction of copper prices, which lifted the market price of not just Southern Peru, but those of its publicly traded competitors.[60] Furthermore, Southern Peru's own financial performance was very strong, as will soon be discussed.

O. Goldman Does Not Update Its Fairness Analysis

Despite rising Southern Peru share prices and performance, the Special Committee did not ask Goldman to update its fairness analysis at the time of the stockholder vote on the Merger and closing – nearly five months after the Special Committee had voted to recommend it. At trial, Handelsman testified that he called a representative at Goldman

[60] *See, e.g.*, List of Historical Stock Prices of Antofogasta (October 21, 2004 to April 1, 2005), http://uk.finance.yahoo.com/q/hp?s=ANTO.L&b=21&a=09&c=2004&e=1&d=03&f=2005&g=d; List of Historical Stock Prices of FreeportMcMoRan (October 21, 2004 to April 1, 2005), http://finance.yahoo.com/q/hp?s=FCX&a=09&b=21&c=2004&d=03&e=1&f=2005&g=d; List of Historical Stock Prices of Grupo Mexico (October 21, 2004 to April 1, 2005), http://finance.yahoo.com/q/hp?s=GMEXICOB.MX&a=09&b=21&c=2004&d=03&e=1&f=2005&g=d.

to ask whether the transaction was still fair, but Handelsman's phone call hardly constitutes a request for an updated fairness analysis.[61]

The Special Committee's failure to determine whether the Merger was still fair at the time of the Merger vote and closing is curious for two reasons.

First, for whatever the reason, Southern Peru's stock price had gone up substantially since the Merger was announced in October 2004. In March 2005, Southern Peru stock was trading at an average price of $58.56 a share. The Special Committee had agreed to a collarless fixed exchange ratio and did not have a walk-away right. To my mind, an adroit Special Committee would have recognized the need to re-evaluate the Merger in light of Southern Peru's then-current stock price.

Second, Southern Peru's actual 2004 EBITDA became available before the stockholder vote on the Merger took place, and Southern Peru had smashed through the projections that the Special Committee had used for it.[62] In the October 21 presentation, Goldman used a 2004E EBITDA for Southern Peru of $733 million and a 2004E

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[61] Tr. at 187 ("Q. . . . [b]efore the transaction closed at the end of April 2005, did the special committee do anything to determine whether the transaction was still fair? A. Well, I don't know what the special committee did, but I called a representative at Goldman and said, Has anything happened since the transaction was approved by the board that would suggest to you that this transaction was not fair? And I got the answer, no, nothing like that has happened.").

[62] Southern Peru's 2004 full financial performance was publicly disclosed in its 2004 10-K, which was filed on March 16, 2005; the stockholder vote took place on March 28, 2005. Southern Peru's previously filed quarterly reports did not indicate that it would achieve such a high EBITDA. *See, e.g.*, Southern Peru Copper Corporation 10-Q for the quarter ending September 30, 2004 (November 9, 2004) at 3, *available at* http://sec.gov/Archives/edgar/data/1001838/000110465904034621/a04-13088_110q.htm, (showing 2004 EBITDA for the last nine months of $597.8 million). But, the members of the Special Committee, as directors of the company, would have had access to the basic information contained in the 2004 10-K before it became public. Either way, the results were out 12 days before the Merger vote.

EBITDA for Minera of $687 million. Southern Peru's actual 2004 EBITDA was $1.005 billion, 37% more and almost $300 million more than the projections used by Goldman. Minera's actual 2004 EBITDA, by contrast, was $681 million, 0.8% less than the projections used by Goldman. As I mentioned earlier, in its contribution analysis Goldman relied on the values (measured in Southern Peru shares) generated by applying an aggressive range of Southern Peru's 2005E EBITDA multiples to Minera's A&S-adjusted and unadjusted projections, not the 2004E EBITDA multiple, but the inaccuracy of Southern Peru's estimated 2004 EBITDA should have given the Special Committee serious pause. If the 2004 EBITDA projections of Southern Peru – which were not optimized and had been prepared by Grupo Mexico-controlled management – were so grossly low, it provided reason to suspect that the 2005 EBITDA projections, which were even lower than the 2004 EBITDA projections, were also materially inaccurate, and that the assumptions forming the basis of Goldman's contribution analysis should be reconsidered. Moreover, Southern Peru made $303.4 million in EBITDA in the first quarter of 2005, over 52% of the estimate in Goldman's fairness presentation for Southern Peru's 2005 full year performance. Although the first-quarter 2005 financial statements, which covered the period from January 1, 2005 to March 31, 2005, would not have been complete by the time of the stockholder vote, I can reasonably assume that, as directors of Southern Peru, the Special Committee had access to non-public information about Southern Peru's monthly profit and loss statements. Southern Peru later beat its

EBITDA projections for 2005 by a very large margin, 135%,[63] a rate well ahead of Minera's 2005 performance, which beat the deal estimates by a much lower 45%.[64]

The Special Committee's failure to get a fairness update was even more of a concern because Cerro had agreed to vote against the Merger if the Special Committee changed its recommendation. The Special Committee failed to obtain a majority of the minority vote requirement, but it supposedly agreed to a two-thirds vote requirement instead because a two-thirds vote still prevented Grupo Mexico from unilaterally approving the Merger. This out was only meaningful, however, if the Special Committee took the recommendation process seriously. If the Special Committee maintained its recommendation, Cerro had to vote for the Merger, and its vote combined with Grupo Mexico's vote would ensure passage. By contrast, if the Special Committee changed its recommendation, Cerro was obligated to vote against the Merger.

The tying of Cerro's voting agreement to the Special Committee's recommendation was somewhat odd, in another respect. In a situation involving a third-party merger sale of a company without a controlling stockholder, the third party will often want to lock up some votes in support of a deal. A large blocholder and the target board might therefore negotiate a compromise, whereby the blocholder agrees to vote yes if the target board or special committee maintains a recommendation in favor of the transaction. In this situation, however, there is a factor not present here. In an arm's-

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[63] Southern Peru's actual 2005 EBITDA was $1.365 billion, as compared to Southern Peru's 2005E EBITDA based on unadjusted management projections of $581 million.
[64] Minera's actual 2005 EBITDA was $971.6 million, as compared to Minera's 2005E EBITDA based on unadjusted management projections of $672 million.

length deal, the target usually has the flexibility to change its recommendation or terminate the original merger upon certain conditions, including if a superior proposal is available, or an intervening event makes the transaction impossible to recommend in compliance with the target's fiduciary duties. Here, by contrast, Grupo Mexico faced no such risk of a competing superior proposal because it controlled Southern Peru. Furthermore, the fiduciary out that the Special Committee negotiated for in the Merger agreement provided only that the Special Committee could change its recommendation in favor of the Merger, not that it could terminate the Merger altogether or avoid a vote on the Merger. The only utility therefore of the recommendation provision was if the Special Committee seriously considered the events between the time of signing and the stockholder vote and made a renewed determination of whether the deal was fair. There is no evidence of such a serious examination, despite important emerging evidence that the transaction's terms were skewed in favor of Grupo Mexico.

P. Southern Peru's Stockholders Approve The Merger

On March 28, 2005, the stockholders of Southern Peru voted to approve the Merger. More than 90% of the stockholders voted in favor of the Merger. The Merger then closed on April 1, 2005. At the time of closing, 67.2 million shares of Southern Peru had a market value of $3.75 billion.[65]

Q. Cerro Sells Its Shares

On June 15, 2005, Cerro, which had a basis in its stock of only $1.32 per share, sold its entire interest in Southern Peru in an underwritten offering at $40.635 per share.

[65] JX-18 at 5 ($55.89 x 67,200,000 = $3,755,808,000).

Cerro sold its stock at a discount to the then-current market price, as the low-high trading prices for one day before the sale were $43.08 to $44.10 per share. This illustrates Cerro's problematic incentives.

R. The Plaintiff Sues The Defendants And The Special Committee

This derivative suit challenging the Merger, first filed in late 2004, moved too slowly, and it was not until June 30, 2010 that the plaintiff moved for summary judgment.[66] On August 10, 2010, the defendants filed a cross-motion for summary judgment, or in the alternative, to shift the burden of proof to the plaintiff under the entire fairness standard. On August 11, 2010, the individual Special Committee defendants cross-moved for summary judgment on all claims under Southern Peru's exculpatory provision adopted under 8 *Del. C.* § 102(b)(7). At a hearing held on December 21, 2010, I dismissed the Special Committee defendants from the case because the plaintiff had failed to present evidence supporting a non-exculpated breach of their fiduciary duty of loyalty, and I denied all other motions for summary judgment. This, of course, did not mean that the Special Committee had acted adroitly or that the remaining defendants, Grupo Mexico and its affiliates, were immune from liability.

In contrast to the Special Committee defendants, precisely because the remaining directors were employed by Grupo Mexico, which had a self-dealing interest directly in conflict with Southern Peru, the exculpatory charter provision was of no benefit to them

[66] When Vice Chancellor Lamb left the Court in 2009, this case was reassigned to me. By that time, Vice Chancellor Lamb had already admonished the plaintiff for its torpid pace in prosecuting the case. *In re Southern Peru S'holders Litig.*, C.A. No. 961 at 20 (Del. Ch. July 1, 2009) (TRANSCRIPT) ("I can't quite strongly enough express my displeasure at how delayed this litigation has been and the fact that it wasn't prepared for trial two or three years ago.").

at that stage, given the factual question regarding their motivations. At trial, these individual Grupo Mexico-affiliated director defendants made no effort to show that they acted in good faith and were entitled to exculpation despite their lack of independence. In other words, the Grupo Mexico-affiliated directors did nothing to distinguish each other and none of them argued that he should not bear liability for breach of the duty of loyalty if the transaction was unfairly advantageous to Grupo Mexico, which had a direct self-dealing interest in the Merger. Their liability therefore rises or falls with the issue of fairness.[67]

In dismissing the Special Committee members on the summary judgment record, I necessarily treated the predicament faced by Cerro and Handelsman, which involved facing additional economic pressures as a minority stockholder as a result of Grupo Mexico's control, differently than a classic self-dealing interest. I continue, as you will see, to hold that view. Although I believe that Cerro, and therefore Handelsman, were influenced by Cerro's desire for liquidity as a stockholder, it seems to me counterproductive to equate a legitimate concern of a stockholder for liquidity from a controller into a self-dealing interest.[68] I therefore concluded that there had to be a triable

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[67] *Cf. In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *33 (Del. Ch. Sept. 19, 2008) ("For example, being a non-independent director who approved a conflict transaction found unfair does not make one, without more, liable personally for the harm caused. Rather, the court must examine that director's behavior in order to assess whether the director breached her fiduciary duties and, if a § 102(b)(7) clause is in effect, acted with the requisite state of mind to have committed a non-exculpated breach.").

[68] I recognize that this is a close question. The bottom line requirement of loyalty is that a director act in the best interests of the company and its stockholders, rather than for any other reason. *See In re RJR Nabisco, Inc. S'holders Litig.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989). Myriad interests have caused fiduciaries to stray from the straight path. What I struggle with here is that a director would be considered interested because he (or in this case, his

issue regarding whether Handelsman acted in subjective bad faith to force him to trial. I concluded then on that record that no such issue of fact existed and even on the fuller trial record (where the plaintiff actually made much more of an effort to pursue this angle), I still could not find that Handelsman acted in bad faith to purposely accept an unfair deal. But Cerro, and therefore Handelsman, did have the sort of economic concern that ideally should have been addressed upfront and forthrightly in terms of whether the stockholder's interest well positioned its representative to serve on a special committee. Put simply, although I continue to be unpersuaded that one can label Handelsman as having acted with the state of mind required to expose him to liability given the exculpatory charter protection to which he is entitled, I am persuaded that Cerro's desire to sell influenced how Handelsman approached his duties and compromised his effectiveness.

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employer) desired the liquidity available to the other stockholders. Although I do not struggle with finding that a stockholder-representative in this situation has difficult incentives, I believe it would be mistaken to consider this sort of interest as constituting an interest in the formal sense of imposing liability for breach of the duty of loyalty absent a showing that the director in bad faith subordinated the best interests of the company in getting a fair price to his desire to have the liquidity available to other stockholders. Given that summary judgment in Handelsman's favor has already been granted and given the resources of Grupo Mexico and its affiliated defendants, this interesting question does not seem likely to have a real world effect. In view of that, I am even more reluctant to call a stockholder's desire for liquidity an interest, because there is likely utility in having directors who represent stockholders with a deep financial stake that gives them an incentive to monitor management and controlling stockholders closely. In a real way, Cerro and Phelps Dodge were seeking the same liquidity as other minority stockholders, although I realize Handelsman's service on the board was a choice that exacerbated Cerro's problem.

III. Legal Analysis

A. The Standard Of Review Is Entire Fairness

Consistent with the Supreme Court's decision in *Kahn v. Tremont*, both the plaintiff and the defendants agree that the appropriate standard of review for the Merger is entire fairness, regardless of the existence of the Special Committee.[69] Given this agreement, there is no need to consider whether room is open under our law for use of the business judgment rule standard in a circumstance like this, if the transaction were conditioned upon the use of a combination of sufficiently protective procedural devices.[70] Absent some argument by a party to that effect, judicial restraint counsels my accepting the parties' framework. Where, as here, a controlling stockholder stands on both sides of a transaction, the interested defendants are "required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain."[71] In other words, the defendants with a conflicting self-interest must demonstrate that the deal was entirely fair to the other stockholders.[72]

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[69] *See Kahn v. Tremont Corp.*, 694 A.2d 422, 428-29 (Del. 1997) (applying entire fairness review to an interested transaction where the controlling shareholder of a corporation caused it to purchase shares of a second controlled corporation); *Emerald Partners v. Berlin*, 726 A.2d 1215, 1221 (Del. 1999) (applying entire fairness review to a merger whereby a controlled corporation acquired thirteen corporations controlled by the same shareholder); Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 Del. J. Corp. L. 499, 510 (2002).

[70] In *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 443-46 (Del. Ch. 2002); *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 547-51 (Del. Ch. 2003), *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 617 (Del. Ch. 2005), and more recently, *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 406-14 (Del. Ch. 2010), the Court of Chancery has explained why there might be utility to having further guidance from the Supreme Court in this sensitive area of the law and the reasons why the standard articulated in *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1117 (Del. 1994), makes it difficult for parties to actually present questions regarding

The entire fairness standard is well-known and has "two basic aspects" of fairness: process ("fair dealing") and price ("fair price").[73] As explained by our Supreme Court, fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained," and fair price "relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock."[74]

Although the concept of entire fairness has two components, the entire fairness analysis is not bifurcated. Rather, the court "determines entire fairness based on all aspects of the entire transaction."[75] Our Supreme Court has recognized, however, that, at least in non-fraudulent transactions, "price may be the preponderant consideration...."[76]

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the standard to the Supreme Court. *See In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d at 619-22 (explaining why this is so).

[71] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) (citation omitted).

[72] Caution is required here. The entire fairness standard ill suits the inquiry whether *disinterested directors* who approve a self-dealing transaction and are protected by an exculpatory charter provision authorized by 8 *Del. C.* § 102(b)(7) can be held liable for breach of fiduciary duties. Unless there are facts suggesting that the directors consciously approved an unfair transaction, the bad faith preference for some other interest than that of the company and the stockholders that is critical to disloyalty is absent. The fact that the transaction is found to be unfair is of course relevant, but hardly sufficient, to that separate, individualized inquiry. In this sense, the more stringent, strict liability standard applicable to interested parties such as Grupo Mexico is critically different than that which must be used to address directors such as those on the Special Committee.

[73] *See Weinberger*, 457 A.2d at 711.

[74] *Id.*

[75] *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *13 (Del. Ch. Oct. 2, 2009) (citing *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 746 (Del. Ch. 2007)).

[76] *Weinberger*, 457 A.2d at 711.

That is, although evidence of fair dealing may help demonstrate the fairness of the price obtained, what ultimately matters most is that the price was a fair one.[77]

Of course, under our law, the defendants may shift the burden of persuasion on entire fairness to the plaintiff in certain circumstances. I now turn to the defendants' arguments about that issue.

B. Are The Defendants Entitled To Shift The Burden Of Persuasion?

Having served as a trial judge for many years now, it is with some chagrin that I admit that I tried this case without determining in advance which side had the burden of persuasion. But I did not do so lightly. Under the *Lynch* doctrine,[78] when the entire fairness standard applies, controlling stockholders can never escape entire fairness review,[79] but they may shift the burden of persuasion by one of two means: they may show that the transaction was approved either by an independent board majority (or in the

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[77] *See, e.g.*, *Valeant Pharm. Int'l*, 921 A.2d at 746 ("The two components of the entire fairness concept are not independent, but rather the fair dealing prong informs the court as to the fairness of the price obtained through that process.").

[78] *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994).

[79] *See id.* at 1117 ("Nevertheless, even when an interested cash-out merger transaction receives the informed approval of a majority of minority stockholders or an independent committee of disinterested directors, an entire fairness analysis is the only proper standard of review."); *see also In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 435-36 (Del. Ch. 2002) (explaining this reality); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 617 (Del. Ch. 2005) (same); *see also id.* at 617 ("All in all, it is perhaps fairest and more sensible to read *Lynch* as being premised on a sincere concern that mergers with controlling stockholders involve an extraordinary potential for the exploitation by powerful insiders of their informational advantages and their voting clout. Facing the proverbial 800 pound gorilla who wants the rest of the bananas all for himself, chimpanzees like independent directors and disinterested stockholders could not be expected to make sure that the gorilla paid a fair price. Therefore, the residual protection of an unavoidable review of the financial fairness whenever plaintiffs could raise a genuine dispute of fact about that issue was thought to be a necessary final protection.") (citations omitted).

alternative, a special committee of independent directors) or, assuming certain conditions, by an informed vote of the majority of the minority shareholders.[80]

1. Is The Burden Shifted Because Of The Special Committee Process?

In this case, the defendants filed a summary judgment motion arguing that the Special Committee process was entitled to dignity under *Lynch* and shifted the burden of persuasion under the preponderance standard to the plaintiff. I found the summary judgment record insufficient to determine that question for the following reason.

Lynch and its progeny leave doubt in my mind about what is required of a Special Committee to obtain a burden shift. For their part, the defendants argue that what is required is a special committee comprised of independent directors who selected independent advisors and who had the ability to negotiate and reject a transaction. This is, of course, consistent with what one would expect in determining a standard of review that would actually be used in deciding a case. By contrast, the plaintiff stresses that only an effective special committee operates to shift the burden of persuasion,[81] and that a factual determination must be made regarding whether the special committee in fact operated with the degree of ardor and skill one would have expected of an arms-length negotiator with true bargaining power.

To my mind, which has pondered the relevant cases for many years, there remains confusion. In the most relevant case, *Tremont*, the Supreme Court clearly said that to

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[80] *See Lynch*, 638 A.2d at 1117 (citation omitted).

[81] *See* Pl. Op. Post-Tr. Br. at 14 (citing *Kahn v. Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997); *Gesoff v. IIC Indus.*, 902 A.2d 1130, 1148 (Del. Ch. 2006); *Rabkin v. Olin Corp.*, 1990 WL 47648, at *6 (Del. Ch. Apr. 17, 1990)).

obtain a burden shift, however slight those benefits may be,[82] the special committee must "function in a manner which indicates that the controlling shareholder did not dictate the terms of the transaction and that the committee exercised real bargaining power 'at an arms-length.'"[83] A close look at *Tremont* suggests that the inquiry must focus on how the special committee actually negotiated the deal — was it "well functioning"[84] — rather than just how the committee was set up.[85] The test, therefore, seems to contemplate a look back at the substance, and efficacy, of the special committee's negotiations, rather than just a look at the composition and mandate of the special committee.[86] That interpretation is confirmed by a closer look at the Supreme Court's treatment of the factors that the Court found indicated that the special committee "did not operate in an independent or informed manner...."[87] Although the notion of an "independent" and "informed manner" might suggest that the only relevant factors to that inquiry are those

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[82] As I have noted before, it is unclear to me if there is much, if any, practical implication of a burden shift. *See In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 548 (Del. Ch. 2003) ("The practical effect of the *Lynch* doctrine's burden shift is slight. One reason why this is so is that shifting the burden of persuasion under a preponderance standard is not a major move, if one assumes, as I do, that the outcome of very few cases hinges on what happens if . . .the evidence is in equipoise.").

[83] *Tremont*, 694 A.2d at 429 (Del. 1997) (citation omitted).

[84] *Id.* at 428.

[85] *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 617 (Del. Ch. 2005) ("But, in order to encourage the use of procedural devices such as special committees and Minority Approval Conditions that tended to encourage fair pricing, the Court [in *Lynch*] did give transactional proponents a modest procedural benefit – the shifting of the burden of persuasion on the ultimate issue of fairness to the plaintiffs – if the transaction proponents proved, in a factually intensive way, that the procedural devices *had, in fact, operated with integrity.*") (emphasis added) (citation omitted).

[86] *Accord Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1121 ("[U]nless the controlling or dominating shareholder can demonstrate that it has not only formed an independent committee but also replicated a process 'as though each of the contending parties had in fact exerted its bargaining power at arm's length,' the burden of proving entire fairness will not shift.") (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 709-10 n.7 (Del. 1983)).

[87] *Tremont*, 694 A.2d at 424.

that speak to the special committee's ties with the controlling stockholder (i.e., its independence) and its ability to retain independent advisors and say no, the majority and concurring decisions in *Tremont* seem to reveal that was not the approach taken by the Court. *Tremont* seems to focus both on indicia of independence and indicia of procedural and even substantive fairness. For example, the Supreme Court found problematic the supposedly outside directors' previous business relationships with the controlling stockholder that resulted in significant financial compensation or influential board positions [88] and their selection of advisors who were in some capacity affiliated with the controlling stockholder,[89] both of which are factors that speak to the special committee's facial independence.

But, the Supreme Court also seems to call into question the substance of the special committee's actual efforts, noting the special committee directors' heavy reliance on projections prepared by the controlling stockholder,[90] their perfunctory effort at scheduling and attending committee meetings,[91] and the limitation on the exchange of ideas that resulted from the directors' failure to fully participate in an active process.[92]

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[88] *Id.* at 426 ("Although the three men were deemed 'independent' for purposes of this transaction, all had significant prior business relationships with Simmons or Simmons' controlled companies."); *id.* at 429-30 (exploring the significance of the ties).
[89] *Id.* at 426-27 (discussing that the financial advisor was affiliated with the controlling stockholder, that the legal advisor was selected by the general counsel of both the company and the controlling stockholder, that the conflict check was performed by the general counsel, and that the legal advisor had represented the controlling stockholder's company in prior business deals).
[90] *Id.* at 427.
[91] *Id.* (noting that the special committee only met four times, that only one director was able to attend all the meetings, and that he was also the only director to attend the review sessions with the advisors).
[92] *Id.* at 430.

Judge Quillen's concurring opinion[93] most clearly contemplates a focus on both indicia of independence and indicia of substantive fairness in the negotiation process. In confirming the majority's ruling to deny the defendants the benefit of the burden shift, Judge Quillen begins by reviewing the special committee's ties to the controlling stockholder and its selection of questionable advisors (i.e., factors that could be applied early in a case to determine the burden allocation), but then he moves into a discussion where he points to deficiencies in the substance of the special committee's negotiations, which cannot in any easy way be separated from an examination of fairness. The concurrence questions the special committee's failure to take advantage of certain opportunities to exert leverage over the controlling stockholder[94] as well as its failure to negotiate the price of the stock purchase downward when there was indicia of price manipulation,[95] when the controlling stockholder's chief negotiator knew that the stock was worth less than the market,[96] and when the target's stock price dropped precipitously before the date of signing.[97] The concurrence also questions the ultimate fairness of the price and other terms agreed to by the special committee, noting that the substance of the negotiations is "not self-verifying on the independence issue."[98] These references in the concurrence echo the majority opinion itself, which uses phrases like "real bargaining

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[93] Judge Quillen was then a member of the Superior Court and was sitting on the Supreme Court by designation. *Id.* at 423 n.*.
[94] *Id.* at 433 (Quillen, J., concurring) (noting the value of the deal to the controlling stockholder, the difficulties the controlling stockholder would face in trying to accomplish a similar deal with a non-affiliated entity, and the time constraint the controlling stockholder was under to achieve the tax savings).
[95] *Id.*
[96] *Id.*
[97] *Id.* (falling from $16 per share to $12.75 per share).
[98] *Id.*

power"[99] and "well functioning"[100] to describe what is required of the special committee to merit a burden shift, which seem to get at whether the special committee in fact simulated the role that a third-party with negotiating power would have played.[101] Thus, to my mind, *Tremont* implies that there is no way to decide whether the defendant is entitled to a burden shift without taking into consideration the substantive decisions of the special committee, a fact-intensive exercise that overlaps with the examination of fairness itself.

As a trial judge, I note several problems with such an approach. Assuming that the purpose of providing a burden shift is not only to encourage the use of special committees,[102] but also to provide a reliable pre-trial guide to the burden of persuasion,[103] the factors that give rise to the burden shift must be determinable early in the litigation and not so deeply enmeshed in the ultimate fairness analysis. Thus, factors like the

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[99] *Id.* (majority opinion) at 429.
[100] *Id.* at 428.
[101] *See also Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1121 (Del. 1994) (discussing with approval the Supreme Court's conclusion in *Rabkin v. Philip A. Hunt Chem. Corp.* that "the majority stockholder's 'attitude towards the minority,' coupled with the 'apparent absence of any meaningful negotiations as to price,' did not manifest the exercise of arm's length bargaining by the independent committee" and that "the burden on entire fairness would not be shifted by the use of an independent committee which concluded its processes with 'what could be considered a quick surrender' to the dictated terms of the controlling shareholder.") (citing *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1106 (Del. 1985)).
[102] *See, e.g., In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 548 (Del. Ch. 2003) ("Because these devices are thought, however, to be useful and to incline transactions towards fairness, the *Lynch* doctrine encourages them by giving defendants the benefits of a burden shift if either one of the devices is employed.").
[103] *See* William T. Allen et. al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 Bus. L. 1287, 1297 (2001) (explaining that standards of review should be functional, in that they should serve as a "useful tool that aids the court in deciding the fiduciary duty issue" rather than merely "signal the result or outcome.").

independence of the committee and the adequacy of its mandates (i.e., was it given blocking and negotiating power) would be the trigger for the burden shift.

Because the only effect of the burden shift is to make the plaintiff prove unfairness under a preponderance standard, the benefits of clarity in terms of trial presentation and for the formation of special committees would seem to outweigh the costs of such an upfront approach focusing on structural independence. To be clear, such an allocation would still allow the plaintiff to go to trial so long as there was a triable issue regarding fairness. Further, because the burden becomes relevant only when a judge is rooted on the fence post and thus in equipoise, it is not certain that there is really a cost.[104]

By contrast, the alternative approach leads to situations like this and *Tremont* itself, where the burden of proof has to be determined during the trial, and where that

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[104] Obviously, if a more important shift was contingent upon this factor, the cost-benefit analysis would be closer. In part for that reason and, as importantly, because the role of an independent negotiating agent is different from that of an approving principal (to use economic, not legal concepts), *see In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *12 (Del. Ch. Oct. 2, 2009); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 645 (Del. Ch. 2005), and because our statute often contemplates both the requirements of board and stockholder approval in third-party mergers, 8 *Del. C.* § 251, I am more comfortable according business judgment rule standard of review treatment to an interested transaction only if a transaction is contingent in advance on both: i) the negotiation, approval and veto authority of an independent board majority or special committee; and ii) the approval of a majority of the uncoerced, fully informed, and disinterested stockholders. *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d at 643 (noting that such an alteration would "mirro[r] what is contemplated in an arms-length merger under § 251 – independent, disinterested director *and* stockholder approval.") (footnote omitted). Absent the assurance that the stockholders themselves have the opportunity to turn down the transaction freely, the costs of such a move would seem to outweigh the benefits. With a standard that would systemically encourage both the employment of an active independent negotiating agent and the empowerment of disinterested stockholders to protect themselves and hold those agents accountable, the benefits to investors could be considerable and there would be a better chance to focus litigation on those transactions that are most questionable, which would also make the cost-benefit ratio of the representative litigation process better for diversified investors. *See id.* at 643-45 (discussing how this reform would eliminate perverse litigation incentives and "encourage the filing of claims only by plaintiffs and plaintiffs' lawyers who genuinely believed that a wrong had been committed.").

burden determination is enmeshed in the substantive merits.[105] As a trial judge, I take very seriously the standard of review as a prism through which to determine a case. When a standard of review does not function as such, it is not clear what utility it has, and it adds costs and complication to the already expensive and difficult process of complex civil litigation.[106] Subsuming within the burden shift analysis questions of whether the special committee was substantively effective in its negotiations with the controlling stockholder – questions fraught with factual complexity – will, absent unique circumstances, guarantee that the burden shift will rarely be determinable on the basis of the pre-trial record alone.[107] If we take seriously the notion, as I do, that a standard of review is meant to serve as the framework through which the court evaluates the parties' evidence and trial testimony in reaching a decision, and, as important, the framework through which the litigants determine how best to prepare their cases for trial,[108] it is problematic to adopt an analytical approach whereby the burden allocation can only be

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[105] *See In re Cysive, Inc. S'holders Litig.*, 836 A.2d at 548-49 (explaining why this more searching approach tends to conflate the burden-shifting analysis with that of procedural fairness).

[106] *See* Allen et. al., *supra* note 103, at 1297-98.

[107] *Cf. In re Cysive, Inc. S'holders Litig.*, 836 A.2d at 549 (noting that "it is unsurprising that few defendants have sought a pre-trial hearing to determine who bears the burden of persuasion on fairness" given "the factually intense nature of the burden-shifting inquiry" and the "modest benefit" gained from the shift).

[108] *See* Allen et. al., *supra* note 103, at 1303-04 n.63 (noting the practical problems litigants face when the burden of proof they are forced to bear is not made clear until after the trial); *cf. In re Cysive, Inc. S'holders Litig.*, 836 A.2d at 549 ("[I]n order to prove that a burden shift occurred because of an effective special committee, the defendants must present evidence of a fair process. Because they must present this affirmatively, they have to act like they have the burden of persuasion throughout the entire trial court process.").

determined in a post-trial opinion, after all the evidence and all the arguments have been presented to the court.[109]

But, I am constrained to adhere faithfully to *Tremont* as written, and I read it and some of its progeny[110] as requiring a factual look at the actual effectiveness of the special committee before awarding a burden shift. For that reason, I will, as you will see, find that the burden of persuasion remained with the defendants, because the Special Committee was not "well functioning."[111] And I will also find, however, that this determination matters little because I am not stuck in equipoise about the issue of fairness. Regardless of who bears the burden, I conclude that the Merger was unfair to Southern Peru and its stockholders.

2. Did The Burden Of Persuasion Shift Because Of The Stockholder Vote?

With much less passion, the defendants also seek to obtain a burden shift by arguing that the Merger ultimately received super-majority support of the stockholders other than Grupo Mexico, and a majority support of the stockholders excluding all of the Founding Stockholders.

The defendants have failed to earn a burden shift for the following reasons. First, in a situation where the entire fairness standard applies because the vote is controlled by

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[109] *See In re Cysive, Inc. S'holders Litig.*, 836 A.2d at 549 (noting that it is inefficient for defendants to seek a pre-trial ruling on the burden-shift unless the discovery process has generated a sufficient factual record to make such a determination).

[110] *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1222-23 (Del. 1999) (describing that the special committee must exert "real bargaining power" in order for defendants to obtain a burden shift); *see also Beam v. Stewart*, 845 A.2d 1040, 1055 n.45 (Del. 2004) (citing *Kahn v. Tremont Corp.*, 694 A.2d 422, 429-30 (Del. 1997)) (noting that the test articulated in *Tremont* requires a determination as to whether the committee members "*in fact*" functioned independently).

[111] *Tremont*, 694 A.2d at 428.

an interested stockholder, any burden-shifting should not depend on the after-the-fact vote result but should instead require that the transaction has been conditioned up-front on the approval of a majority of the disinterested stockholders. Chancellor Chandler, in his *Rabkin v. Olin Corp.* decision,[112] took that view and was affirmed by our Supreme Court, and it remains sound to me in this context.[113] It is a very different thing for stockholders to know that their vote is in fact meaningful and to have a genuine chance to disapprove a transaction than it is to be told, as they were in this case, that the transaction required a two-thirds vote, which would be satisfied certainly because Grupo Mexico,

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[112] *Rabkin v. Olin Corp.*, 1990 WL 47648, at *6 (Del. Ch. Apr. 17, 1990), *aff'd*, 586 A.2d 1202 (Del. 1990) (TABLE) ("If an informed vote of a majority of the minority shareholders has approved a challenged transaction, and in fact the merger is *contingent* on such approval, the burden entirely shifts to the plaintiffs to show that the transaction was unfair to the minority." (emphasis added)); *see also In re Wheelabrator Techs., Inc. S'holders Litig.*, 663 A.2d 1194, 1203 (Del. Ch. 1995) (same).

[113] In a merger where there is no controller and the disinterested electorate controls the outcome from the get go, there is no need to bargain over this element. In such a situation, it has long been my understanding of Delaware law, that the approval of an uncoerced, disinterested electorate of a merger (including a sale) would have the effect of invoking the business judgment rule standard of review. *See, e.g.*, *In re Wheelabrator Techs., Inc. S'holders Litig.*, 663 A.2d at 1201 n.4, 1202-03 (describing the effect of an informed, uncoerced, and disinterested stockholder approval of a merger not involving a controlling stockholder and finding that such approval invokes the business judgment rule standard of review). It may be that a vote in that context does not involve "pure ratification," *see Gantler v. Stephens*, 965 A.2d 695, 712-13 (Del. 2009), but I have long understood that under our law it would invoke the business judgment rule standard of review. *See Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 890, 895-900 (Del. Ch. 1999) (discussing history of the long tradition to invoking the business judgment rule standard when informed, disinterested stockholders approve a third-party merger and the limited waste exception to this effect); *Solomon v. Armstrong*, 747 A.2d 1098, 1113-17 (Del. Ch. 1999), *aff'd,* 746 A.2d 277 (Del. 2000) (citing cases to this effect); s*ee also* Allen et. al., *supra* note 103, at 1307-09 (expressing the policy rationale for giving full "ratification" effect to an uncoerced, disinterested shareholder vote). Perhaps a more nuanced nomenclature is needed to describe the traditional effect that a disinterested stockholder vote has had on the standard of review used to evaluate a challenge to an arm's length, third-party merger and to distinguish it from "classic" or "pure ratification." *See Harbor Finance Partners*, 751 A.2d at 900 n.78 ("For want of better nomenclature, I use the term ["ratification"] as describing a stockholder vote sufficient to invoke the business judgment rule standard of review."). The key is not what you call it, but rather preserving the utility of a long-standing doctrine of our law.

Cerro, and Phelps Dodge had the voting power to satisfy that condition and were clearly intent on voting yes.[114] In the latter situation, the vote has little meaning except as a form of protest, especially in a situation like this when there were no appraisal rights because Southern Peru was the buyer.

Second, the defendants have not met their burden to show that the vote was fully informed.[115] The Proxy Statement left out a material step in the negotiation process, to wit, the Special Committee's July counteroffer, offering to give Grupo Mexico only $2.095 billion worth of Southern Peru stock for Minera in response to Grupo Mexico's ask of $3.1 billion in its May 7, 2004 term sheet. What lends credibility to this counteroffer is that it was made after the Special Committee's July 8, 2004 meeting with Goldman, where Goldman had presented to the Special Committee Minera's operating projections, metal price forecasts, and other valuation metrics. After reviewing this information, the Special Committee was still $1 billion short of Grupo Mexico's ask with an offer that was at the high end of Minera's standalone value but at the low end of its "relative" value.[116] This step showed how deep the value gap was in real cash terms.

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[114] *See In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *13 (Del. Ch. Oct. 2, 2009) ("Moreover, a clear explanation of the pre-conditions to the Merger is necessary to ensure that the minority stockholders are aware of the importance of their votes and their ability to block a transaction they do not believe is fair.").

[115] *See Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 846 (Del. 1987) (citations omitted).

[116] *See* JX-103 at SP COMM 006886 (generating a high-end standalone value of Minera of $2.085 billion, using the A&S-adjusted projections, a 7.5% discount rate, and a long-term copper price of $1.00/lb); *id.* at SP COMM 006898 (generating a mid-range relative value of 58.8 shares of Southern Peru, using A&S-adjusted projections, a 9.0% discount rate, and a long-term copper price of $0.90/lb).

The minority stockholders were being asked to make an important voting decision[117] about an acquisition that would nearly double the size of the Company and materially increase the equity stake of the controlling stockholder[118] – they should have been informed of the value that the Special Committee placed on Minera at a point in the negotiations when it had sufficient financial information to make a serious offer.

That omission combines with less than materially clear disclosure about the method by which Goldman concluded the Merger was fair. In particular, the Proxy Statement did not disclose the standalone implied equity values for Minera generated by the DCF analyses performed in June 2004 and July 2004, which look sound and generated mid-range values of Minera that were far less than what Southern Peru was paying in the Merger,[119] nor did it disclose the standalone implied equity values of either Southern Peru or Minera that were implied by the inputs used in Goldman's relative DCF analysis underlying the fairness opinion.[120] The Proxy Statement thus obscured the fact that the implied equity value of Southern Peru that Goldman used to anchor the relative

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[117] The vote is of no less importance for purposes of the disclosure analysis simply because the result of the vote was effectively a lock. Otherwise, the defendants would reap an analytical benefit from their decision *not* to condition the Merger on a majority of the minority vote.

[118] Grupo Mexico's equity share of Southern Peru increased from 54.2% to 75.1% as a result of the Merger. *See* JX-107.

[119] In its June 11, 2004 presentation, Goldman presented a DCF analysis that generated a mid-range implied equity value for Minera of $1.7 billion, using an 8.5% discount rate, $0.90/lb long-term copper prices, and the A&S adjusted projections. JX-101 at SP COMM 003375. In its July 8, 2004 presentation, Goldman presented a revised DCF analysis, which generated a mid-range implied equity value for Minera of $1.358 billion, using the same 8.5% discount rage, $0.90/lb long-term copper prices, and the A&S adjusted projections. JX-103 at SP COMM 006886.

[120] According to Goldman's spreadsheets produced by the plaintiff in discovery, Goldman arrived at a mid-range implied equity value of $1.254 billion for Minera, using an 8.5% discount rate and a $0.90 long-term copper price. The spreadsheets show that Southern Peru's mid-range implied equity value was $1.6 billion, assuming a 9.5% discount rate, a $0.90 long-term copper price, and a royalty tax rate of 2%.

valuation of Minera was nearly $2 billion less than Southern Peru's *actual* market equity value at the time of signing.[121] There were additional obscurities in connection with the Southern Peru multiples that Goldman used to support its fairness opinion.

The Proxy Statement did disclose that Minera was valued using multiples tied to Southern Peru's own multiples, although it was less than clear as to what those multiples were. The Proxy Statement listed a Wall Street consensus EV/2005E EBITDA multiple for Southern Peru of 5.5x in Goldman's comparable companies chart,[122] but it did not disclose the full range of EV/2005E EBITDA multiples for Southern Peru that Goldman actually used in its contribution analysis to justify the fairness of the relative valuation. The *bottom* of the range was 5.6x, or Southern Peru's EV/2005E multiple listed in the comparable companies analysis as apparently adjusted for the dividend, which itself was much higher than the median comparable companies multiple, which was listed at 4.8x[123] and critically absent from this generous bottom of the contribution analysis. The range of multiples then proceeded northward, to 6.3x, 6.4x, and 6.5x, with a median of 6.4x.[124]

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[121] At the time of signing on October 21, 2004, Southern Peru shares were trading at $45.92. Given its capitalization of 80 million issued shares, Southern Peru's actual market equity value was $3.67 billion.

[122] JX-129 at 34. Southern Peru's EV/2005E EBITDA multiple of 5.5x was based on estimates of future results contained in selected Wall Street research reports, *id.* at 33, and appears to have been unadjusted for the $100 million dividend. *Compare* JX-106 at 24 n.1 (adjusting the multiple to account for the dividend, which increases Southern Peru's EV/2005E EBITDA multiple based on Wall Street consensus to 5.6x).

[123] *Id.* at 34. The comparable company EV/2005E EBITDA multiples were all based on median estimates published by the Institutional Brokers Estimate System. *Id.* at 33.

[124] JX-106 at SP COMM 004926. As discussed above, the 5.6x multiple (5.5x if unadjusted for the dividend) used by Goldman was based on estimates of Southern Peru's 2005E EBITDA as contained in Wall Street research reports. The materially higher 6.3x, 6.4x, and 6.5x multiples, however, were based on Southern Peru's internal projections for its 2005E EBITDA, which reduced the 2005E EBITDA figures to questionably low levels, given its strong performance in

These inflated multiples were based not on real market metrics, but on various scenarios using Southern Peru's internal pessimistic projections for its 2005E EBITDA.[125] By failing to disclose the full range of multiples used in the contribution analysis, the Proxy obscured the fact that only these inflated multiples would justify an issuance of over 67 million shares in exchange for Minera,[126] multiples that were nearly 33% higher than the Wall Street consensus median multiple of the comparable companies used by Goldman for 2005,[127] and 16 % higher than the Wall Street consensus multiple for Southern Peru.[128]

Moreover, Grupo Mexico went on a road show to its investors, bankers, and other members of the financial community in November 2004 to garner support for the Merger, during which Grupo Mexico presented materials stating that a "Key Term" of the Merger was that the Merger implied a Minera EV/2005E EBITDA of 5.6x.[129] This 5.6x multiple was derived from an enterprise value for Minera that itself was calculated by multiplying the 67.2 million shares to be issued by Southern Peru by the stock price of Southern Peru

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2004 coupled with the incentives to decrease the figures in order to arrive at a higher multiple to support a 67.2 million share issuance for Minera.

[125] JX-106 at SP COMM 004926 (internal 2005E EBITDA projections ranging from $570 million to $592 million, where Wall Street projections were $664 million and its 2004 YTD annualized EBITDA was at that point $801 million).

[126] *Id.* (showing that at minimum, either a combination of a 6.4x multiple multiplied by management's unadjusted 2005E EBITDA for Minera or a 6.5x multiple multiplied by the A&S-adjusted 2005E EBITDA for Minera was needed to justify an issuance of over 67 million shares).

[127] The 2005E Wall Street consensus median multiple of the comparable companies used by Goldman for 2005 was 4.8x. JX-129 at 34.

[128] The 2005E Wall Street consensus multiple of Southern was 5.5x (unadjusted for the dividend) or 5.6x (adjusted for the dividend). JX-129 at 34; JX-106 at 24 n.1

[129] JX-107 (Road Show Presentation) at SP COMM 006674. As I will discuss, this multiple was derived from an enterprise value of Minera of $4.1 billion.

as of October 21, 2004, and then adding Minera's debt. This calculation obscures the fact that in order to justify the fairness of the 67.2 million share issuance in the first place, Goldman's fairness presentation did not rely on a 5.6x multiple, but a much higher median multiple of 6.4x.[130] Also, the assumptions behind the road show's advertised 5.6x multiple were not consistent with the assumptions underlying Goldman's financial opinion. Namely, Grupo Mexico was able to "employ" (to use a non-loaded term) a Wall Street consensus multiple only by inflating Minera's estimated 2005 EBITDA over what had been used in the Goldman fairness analysis,[131] a feat accomplished by assuming a higher copper production than the production figures provided by the A&S adjusted projections as well as Minera's *own* unadjusted projections, both of which Goldman used in its final presentation to the Special Committee.[132] Put bluntly, Grupo Mexico went out to investors with information that made the total mix of information available to stockholders materially misleading.

For these reasons, I do not believe a burden shift because of the stockholder vote is appropriate, and in any event, even if the vote shifted the burden of persuasion, it would not change the outcome I reach.

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[130] JX-106 at SP COMM 004926.

[131] Goldman's contribution analysis assumed that Minera's estimated 2005 EBITDA would be $622 million (as adjusted by A&S) or $672 (per the unadjusted management figures). The road show, however, implied an estimated 2005 EBITDA for Minera of $732 million (derived by dividing the listed $4.1 billion enterprise value by the 5.6x EV/2005E EBITDA multiple). JX-107 at SP COMM 006674.

[132] The road show assumed an estimated 2005 copper production of 365.4Mt, JX-107 at SP COMM 006674, whereas, as of October 21, 2004, A&S projected an estimated 2005 copper production of 329.1 Mt, and Minera itself projected an estimated 2005 copper production of 355.0 Mt. JX-106 at SP COMM 004918.

C. Was The Merger Entirely Fair?

Whether the Merger was fair is the question that I now answer.

I find, for the following reasons, that the process by which the Merger was negotiated and approved was not fair and did not result in the payment of a fair price. Because questions as to fair process and fair price are so intertwined in this case, I do not break them out separately, but rather treat them together in an integrated discussion.

1. The Special Committee Gets Lost In The Perspective-Distorting World Of Dealmaking With A Controlling Stockholder

I start my analysis of fairness with an acknowledgement. With one exception, which I will discuss, the independence of the members of the Special Committee has not been challenged by the plaintiff. The Special Committee members were competent, well-qualified individuals with business experience. Moreover, the Special Committee was given the resources to hire outside advisors, and it hired not only respected, top tier of the market financial and legal counsel, but also a mining consultant and Mexican counsel. Despite having been let down by their advisors in terms of record keeping, there is little question but that the members of the Special Committee met frequently. Their hands were on the oars. So why then did their boat go, if anywhere, backward?

This is a story that is, I fear, not new.

From the get-go, the Special Committee extracted a narrow mandate, to "evaluate" a transaction suggested by the majority stockholder.[133] Although I conclude that the Special Committee did in fact go further and engage in negotiations, its approach to

[133] JX-16 at SP COMM 000441.

negotiations was stilted and influenced by its uncertainty about whether it was actually empowered to negotiate. The testimony on the Special Committee members' understanding of their mandate, for example, evidenced their lack of certainty about whether the Special Committee could do more than just evaluate the Merger.[134]

Thus, from inception, the Special Committee fell victim to a controlled mindset and allowed Grupo Mexico to dictate the terms and structure of the Merger. The Special Committee did not insist on the right to look at alternatives; rather, it accepted that only one type of transaction was on the table, a purchase of Minera by Southern Peru. As we shall see, this acceptance influences my ultimate determination of fairness, as it took off the table other options that would have generated a real market check and also deprived the Special Committee of negotiating leverage to extract better terms.

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[134] *See* Tr. at 14 (Palomino) ("Q. To what extent did the Special Committee have the authority to negotiate with Grupo Mexico? A. Well . . .we had to evaluate in any way that deems to be desirable, in such manner as deems to be desirable. While we did not try to make our own proposals to Grupo Mexico, we could negotiate with them in the sense of telling them what it is that we don't agree with; and if we are going to evaluate this in a way that makes this transaction move forward, then you're going to have to change the things that we don't agree with or we won't be able to recommend it."); *id.* at 143-44 (Handelsman) ("Q. To what extent was the Special Committee empowered to negotiate with Grupo Mexico? A. Well, the way I looked at this was that . . . the committee was to educate itself and determine whether they believe that the proposed transaction was a good or bad one. If good, then the transaction would progress in its normal course. And if the committee found that the transaction was not beneficial to the shareholders other than Grupo Mexico of Southern Peru, then the committee would say no. And that if Grupo Mexico determined that it wanted to negotiate in the face of a no, it could do so."); Palomino Dep. at 39-40 ("Our mandate was to evaluate the transaction and to – provided that the transaction was beneficial to all shareholders of [Southern Peru] and to minority shareholders in particular, to recommend to the board that the transaction be approved."); *id.* at 106 ("Our mandate was to evaluate and recommend to the board, so we did . . . I don't recall exactly what, if any, responsibilities were left or any purpose of the Special Committee was left after that."); *see also* Handelsman Dep. at 34-35 (acknowledging that the resolution creating the Special Committee did not say "negotiate").

With this blinkered perspective, the first level of rationalization often begins. For Southern Peru, like most companies, it is good to have growth options. Was it rational to think that combining Southern Peru and Minera might be such a growth option, if Southern Peru's stronger balance sheet and operating capabilities could be brought to bear on Minera? Sure. And if no other opportunities are available because we are a controlled company, shouldn't we make the best of this chance? Already, the mindset has taken a dangerous path.[135]

The predicament of Handelsman helps to illustrate this point. Clearly, from the weak mandate it extracted and its failure to push for the chance to look at other alternatives, the Special Committee viewed itself as dealing with a majority stockholder, Grupo Mexico, that would seek its own advantage. Handelsman, as a key representative of Cerro, was even more susceptible to Grupo Mexico's dominion, precisely because Cerro wanted to be free of its position as a minority stockholder in Grupo Mexico-controlled Southern Peru. Although I am chary to conclude that the desire of a stockholder to be able to sell its shares like other holders is the kind of self-dealing interest that should deem someone like Handelsman interested in the Merger,[136] Handelsman was operating under a constraint that was not shared by all stockholders, which was his employer's desire to sell its holdings in Southern Peru.[137] It follows that

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[135] *See In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *9 (Del. Ch. Sept. 19, 2008).
[136] *But cf. Venoco, Inc. v. Eson*, 2002 WL 1288703, at *7 (Del. Ch. June 7, 2002) ("The primary concern for directors, even if they are minority directors and significant shareholders, must be the best interests of the corporation rather than their own interests as shareholders.").
[137] The defendants suggest that Handelsman's interest in liquidity had less to do with Cerro's wish for registration rights and more with improving Southern Peru's public float for the benefit

Handelsman may not have been solely focused on paying the best price in the Merger (even though all things being equal, Cerro, like any stockholder, would want the best possible price) because he had independent reasons for approving the Merger. That is, as between a Merger and no Merger at all, Handelsman had an interest in favoring the deal because it was clear from the outset that Grupo Mexico was using the prospect of causing Southern Peru to grant registration rights to Cerro (and Phelps Dodge) as an inducement to get them to agree to the Merger.[138] Thus, Handelsman was not well-incentivized to take a hard-line position on what terms the Special Committee would be willing to accept, because as a stockholder over whom Grupo Mexico was exerting another form of pressure, he faced the temptation to find a way to make the deal work at a sub-optimal price if that would facilitate liquidity for his stockholding employer.[139]

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of all minority shareholders. I have no doubts that Handelsman rationalized that granting the registration rights would create a better public float and more efficient market for Southern Peru shareholders, but this seems to me more of a high-minded justification rather than the driving reason why Handelsman pursued such rights. Handelsman has been an attorney for the Pritzker interests since 1978 and has represented them in various business transactions, and he admitted that it was very clear to him that the Pritzkers wanted to sell their shares and liquidate their ownership position in Southern Peru. Put simply, I do not decide the case on the inference that Handelsman, with the prospect of registration rights as part of the Merger dangling in front him, put the Pritzkers' interest wholly aside and only considered the benefit the registration rights created for the minority shareholders.

[138] The August 21, 2004 term sheet sent by Grupo Mexico to the Special Committee included "Liquidity and Support" provisions that would provide registration rights necessary to allow Cerro and Phelps Dodge to liquidate their holdings in Southern Peru after the close of the Merger. JX-157 at SP COMM 010487. The September 23, 2004 term sheet from the Special Committee stated that as to the possibility of Cerro and Phelps Dodge receiving registration rights for the sale of their shares in Southern Peru, the term sheet provided that such rights would be "[a]s determined in good faith by agreement among the Founding Stockholders, with the consultation of the Special Committee." JX-159 at AMC 0027547.

[139] *Cf. Merritt v. Colonial Foods, Inc.*, 505 A.2d 757, 765 (Del. Ch. 1986) ("[T]he law, sensitive to the weakness of human nature and alert to the ever-present inclination to rationalize as right that which is merely beneficial, will accord scant weight to the subjective judgment of an interested director concerning the fairness of a transaction that benefits him." (citation omitted)).

I thus face the question of whether Cerro's liquidity concern and short-term interests – ones not shared with the rest of the non-founding minority stockholders – should have disabled Handelsman from playing any role in the negotiation process. On the one hand, Cerro's sale of a majority of its shares at below market price shortly after it obtained registration rights suggests that its interest in liquidity likely dampened its concern for achieving a fair price for its shares, especially given its low tax basis in the shares. On the other hand, as a large blocholder representative and experienced M&A practitioner, Handelsman had knowledge and an employer with an economic investment that in other respects made him a valuable Special Committee member. After hearing Handelsman's testimony at trial, I cannot conclude that he consciously acted in less than good faith. Handelsman was not in any way in Grupo Mexico's pocket, and I do not believe that he purposely tanked the negotiations. But, Cerro's important liquidity concern had the undeniable effect of extinguishing much of the appetite that one of the key negotiators of the Merger had to say no. Saying no meant no liquidity.

Likewise, Cerro had no intent of sticking around to benefit from the long-term benefits of the Merger, and thus Handelsman was in an odd place to recommend to other stockholders to make a long-term strategic acquisition. In sum, when all these factors are considered, Handelsman was not the ideal candidate to serve as the "defender of interests of minority shareholders in the dynamics of fast moving negotiations."[140] The fact that the Special Committee's investment bankers pointed out the pickle he was in late in the

[140] *Kahn v. Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997).

game and that Handelsman abstained from voting fail to address this concern because the deal was already fully negotiated with Handelsman's active involvement.

To my mind, the more important point that Handelsman's predicament makes plain is the narrow prism through which the Special Committee viewed their role and their available options. For example, consider the misalignment between Cerro's interest in selling its equity position in Southern Peru as soon as possible and the fact that the Merger was billed as a long-term, strategic acquisition for the company. What would have been an obvious solution to this mismatch of interests – where both Cerro and Phelps Dodge wanted to get out of Southern Peru and where Grupo Mexico wanted to stay in – would have been for the Special Committee to say to Grupo Mexico: "Why don't you buy Southern Peru, since you want to increase your equity ownership in this company and everyone else wants to get out?" This simple move would have immediately aligned the interests and investment horizons of Cerro and the rest of the minority shareholders, thus positioning Handelsman as the ideal Special Committee candidate with a maximized level of negotiating gusto. But, the Special Committee did not suggest such a transaction, nor did it even appear to cross the directors' mind as a possibility.

Why was this so? Because the Special Committee was trapped in the controlled mindset, where the only options to be considered are those proposed by the controlling stockholder.[141] When a special committee confines itself to this world, it engages in the

[141] *See In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *9, *24-25 (Del. Ch. Sept. 19, 2008).

self-defeating practice of negotiating with itself – perhaps without even realizing it – through which it nixes certain options before even putting them on the table. Even if the practical reality is that the controlling stockholder has the power to reject any alternate proposal it does not support, the special committee still benefits from a full exploration of its options. What better way to "kick the tires" of the deal proposed by the self-interested controller than to explore what would be available to the company if it were not constrained by the controller's demands? Moreover, the very process of the special committee asking the controlling stockholder to consider alternative options can change the negotiating dynamic. That is, when the special committee engages in a meaningful back-and-forth with the controlling stockholder to discuss the feasibility of alternate terms, the Special Committee might discover certain weaknesses of the controlling stockholder, thus creating an opportunity for the committee to use this new-found negotiating leverage to extract benefits for the minority.

Here, for instance, if the Special Committee had proposed to Grupo Mexico that it buy out Southern Peru at a premium to its rising stock price, it would have opened up the deal dynamic in a way that gave the Special Committee leverage and that was consistent with the Special Committee's sense of the market. Perhaps Grupo Mexico would have been open to the prospect and there would have been a valuable chance for all of the Southern Peru's stockholders to obtain liquidity at a premium to a Southern Peru market price that the Special Committee saw as was high in comparison to Southern Peru's fundamental value. At the very least, it would force Grupo Mexico to explain why it – the party that proposed putting these assets together under its continued control – could

not itself be the buyer and finance such a transaction. Was that because it was cash-strapped and dealing with serious debt problems, in part because Minera was struggling? If you need to be the seller, why? And why are you in a position to ask for a high price? *If Minera is so attractive, why are you seeking to reduce your ownership interest in it?* Part of the negotiation process involves probing and exposing weaknesses, and as a result putting the opponent back on his heels.

In sum, although the Special Committee members were competent businessmen and may have had the best of intentions, they allowed themselves to be hemmed in by the controlling stockholder's demands. Throughout the negotiation process, the Special Committee's and Goldman's focus was on finding a way to get the terms of the Merger structure proposed by Grupo Mexico to make sense, rather than aggressively testing the assumption that the Merger was a good idea in the first place.

2. The Special Committee Could Never Justify The Merger Based On Standalone Valuations Of Minera

This mindset problem is illustrated by what happened when Goldman could not value the "get" – Minera – anywhere near Grupo Mexico's asking price, the "give." From a negotiating perspective, that should have signaled that a strong response to Grupo Mexico was necessary and incited some effort to broaden, not narrow, the lens. Instead, Goldman and the Special Committee went to strenuous lengths to equalize the values of Southern Peru and Minera. The onus should have been on Grupo Mexico to prove Minera was worth $3.1 billion, but instead of pushing back on Grupo Mexico's analysis, the Special Committee and Goldman devalued Southern Peru and topped up the value of

Minera. The actions of the Special Committee and Goldman undermine the defendants' argument that the process leading up to the Merger was fair and lend credence to the plaintiff's contention that the process leading up to the Merger was an exercise in rationalization.

The plaintiff argues that, rather than value Minera so as to obtain the best deal possible for Southern Peru and its minority stockholders, the Special Committee "worked and reworked" their approach to the Merger to meet Grupo Mexico's demands and rationalize paying Grupo Mexico's asking price.[142] The defendants concede that, before settling on relative valuation, Goldman performed a number of other financial analyses of Minera to determine its value, including a standalone DCF analysis, a sum-of-the-parts analysis, a contribution analysis, comparable companies analysis and an ore reserve analysis, and that the results of all of these analyses were substantially lower than Grupo Mexico's asking price of $3.1 billion.

A reasonable special committee would not have taken the results of those analyses by Goldman and blithely moved on to relative valuation, without any continuing and relentless focus on the actual give-get involved in real cash terms. But, this Special Committee was in the altered state of a controlled mindset. Instead of pushing Grupo Mexico into the range suggested by Goldman's analysis of Minera's fundamental value, the Special Committee went backwards to accommodate Grupo Mexico's asking price—an asking price *that never really changed.* As part of its backwards shuffle, the Special Committee compared unstated DCF values of Southern Peru and Minera and applied

[142] Pl. Op. Pre-Tr. Br. at 3.

Southern Peru's own EBITDA multiples to Minera's projections to justify a higher share issuance.

3. The Relative Valuation Technique Is Not Alchemy That Turns A Sub-Optimal Deal Into A Fair One

The defendants portray relative valuation as the only way to perform an "apples-to-apples" comparison of Southern Peru and Minera.[143] But, the evidence does not persuade me that the Special Committee relied on truly equal inputs for its analyses of the two companies. When performing the relative valuation analysis, the cash flows for Minera were optimized to make Minera an attractive acquisition target, but no such dressing up was done for Southern Peru.[144] Grupo Mexico hired two mining engineering firms, Winters, Dorsey & Company and Mintec, Inc., to update Minera's life-of-mine plans and operations. When A&S began conducting due diligence on Minera, it tested the plans prepared by Winters and Mintec for reasonableness.[145] After A&S knocked down some of Minera's projections, Mintec revised its analyses to produce a new optimization plan for Minera's Cananea mine ("Alternative 3") that added material value

[143] *See* Tr. at 49 (Palomino) ("[I]f you used these same numbers for Minera [ ] and Southern Peru [ ] and on the same parameters, then you were comparing apples to apples."); *see also* Def. Op. Post-Tr. Br. at 17 (explaining that one of the major reasons the Special Committee used relative valuation was that it allowed Southern Peru and Minera to be evaluated using the same set of assumptions, "*i.e.*, an apples-to-apples comparison.").

[144] *See* JX-74 (summary of Grupo Mexico/UBS/GS meeting (March 9, 2004)) at SPCOMM 010049 (noting that "mine studies have recently been completed by third party experts for all of [Minera]'s mines to support their life and quality arguments . . . [Grupo Mexico] is aware of no recent reports on [Southern Peru] mines"); *see also* Tr. at 355-56 (Beaulne) (discussing the differences between Minera's updated and optimized life-of-mine plan and the Southern Peru's stale life-of-mine plan).

[145] Parker Dep. at 41.

to Minera's projections.[146] By contrast, no outside consultants were hired to update Southern Peru's life-of-mine plans, although A&S did review Southern Peru management's projections.[147] Goldman's presentations to the Special Committee indicate that any A&S adjustments to Southern Peru projections were relatively minor.[148] The record does not reveal any comparable effort to update and optimize Southern Peru's projections as if it were being sold, as was being done for Minera. In fact, there is evidence to the contrary: no additional analyses were performed on Southern Peru despite A&S informing the Special Committee that there was "expansion potential" at Southern Peru's Toquepala and Cuajone mines and "the conceptual studies should be expanded, similar to Alternative 3 . . .There is no doubt optimization that can be done to the current thinking that will add value at lower capital expenditures."[149] Also, as of the relevant time period, Minera was emerging from—if not still in—a period of financial distress.[150] The Minera projections used in Goldman's final fairness evaluation were further

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[146] *Compare* JX-103 at SP COMM 006883 (discussing Minera projections and noting that "[n]ew optimization plan for Cananea ('Alternative 3'), recently developed by [Grupo Mexico] and Mintec was not included in the projections at this point. According to Mintec, such a plan could yield US$240mm in incremental value on a pre-tax net present value basis prior to any potential adjustments by [A&S], using a 8.76% real discount rate as per [Minera] management") *with* JX-106 at SP COMM 004917 (noting that Minera projections "include new optimization plan for Cananea ('Alternative 3') developed by [Grupo Mexico] and Mintec.").

[147] Parker Dep. at 44.

[148] *See, e.g.*, JX-102 (Goldman presentation to the Special Committee (June 23, 2004)) at SP COMM 006976 (discussing Southern Peru projections and noting that "[A&S] changes to [Southern Peru] Case limited to CapEx assumptions; overall NPV impact of [A&S] changes to the model is about 70mm assuming 9% discount rate").

[149] JX-75 (A&S comments to Goldman following its meeting with Mintec and Minera (June 25, 2004)) at SP COMM 006957.

[150] *See* Parker Dep. at 50; Tr. at 98 (Palomino); *see also* JX-47 (expert report of Daniel Beaulne) (March 16, 2010)) ("Beaulne Report") at 17 (discussing adverse effects of depressed metal prices and lower sales volumes on Minera's financial performance in 2001, 2002, and 2003).

optimized in that they assumed that the deal would take place,[151] which meant that the projections took into account the benefits that Minera would gain by becoming part of Southern Peru. In other words, the process was one where an aggressive seller was stretching to show value in what it was selling, and where the buyer, the Special Committee, was not engaging in a similar exercise regarding its own company's value despite using a relative valuation approach, where that mattered.

As is relevant in other respects, too, before the Merger vote, the Special Committee had evidence that this approach had resulted in estimated cash flows for Southern Peru that were too conservative. For 2004, Goldman projected EBITDA for Southern Peru that turned out to be almost $300 million lower than the EBITDA that Southern Peru actually attained. By contrast, Minera's were close to, but somewhat lower than, the mark.

As another technique of narrowing the value gap, Goldman shifted from using Southern Peru's 2004E EBITDA multiple to a range of its 2005E EBITDA multiples in the contribution analyses of the Merger, which also helped to level out the "give" and the "get" and thereby rationalize Grupo Mexico's asking price. As described previously, applying Southern Peru's 2004E EBITDA multiples did *not* yield a range of values encompassing 67.2 million shares. Instead, Goldman relied on applying Southern Peru's higher 2005E multiples to Minera to justify such a figure.

[151] JX-106 at SP COMM 004917 (noting that Minera projections used in the fairness analysis "assume[ ] that [the Merger] closes on December 31, 2004.").

Goldman's decision to apply Southern Peru's EBITDA multiples to Minera was questionable in the first place. Valuing Minera by applying Southern Peru's multiple was a charitable move on the part of the Special Committee, and reasonable third-party buyers are generally not charitable toward their acquisition targets.[152] Unlike Southern Peru, a Delaware corporation listed on the New York Stock Exchange, Minera was unlisted, subject to Mexican accounting standards, and was not being regulated and overseen by the Securities and Exchange Commission. Moreover, Minera was not in sound financial condition. Why did the Special Committee top up Minera's multiple to Southern Peru's own, instead of exploiting for Southern Peru the market-tested value of its acquisition currency? One of the advantages of overvalued stock is that it is cheap acquisition currency; if an acquiror is trading at a higher multiple than the target, it generally takes advantage of that multiple in the acquisition. The Special Committee's charitable multiple migration is highly suspicious given the involvement of a controlling stockholder on both sides of the deal.

In these respects, the Special Committee was not ideally served by its financial advisors. Goldman dropped any focus on the value of what Southern Peru was giving from its analyses. Taking into account all the testimony and record evidence, both Goldman and the Special Committee believed that Southern Peru's market price was higher than its fundamental value. But instead of acting on that belief, they did something very unusual, in which Goldman shifted its client's focus to an increasingly

[152] *See In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *24 (Del. Ch. Sept. 19, 2008) (criticizing the special committee for its failure "to respond to the realities as an aggressive negotiator seeking advantage would have").

non-real world set of analyses that obscured the actual value of what Southern Peru was getting and that was inclined toward pushing up, rather than down, the value in the negotiations of what Grupo Mexico was seeking to sell. In fairness, I cannot attribute Goldman's behavior to a fee incentive, because Goldman did not have a contingent fee right based on whether or not the Merger was consummated.[153] But Goldman appears to have helped its client rationalize the one strategic option available within the controlled mindset that pervaded the Special Committee's process.

4. The Special Committee Should Not Have Discounted Southern Peru's Market Price

A reasonable third-party buyer free from a controlled mindset would not have ignored a fundamental economic fact that is not in dispute here — in 2004, Southern Peru stock could have been sold for price at which it was trading on the New York Stock Exchange. That is, for whatever reasons, the volatile market in which public companies trade was generating a real-world cash value for Southern Peru's acquisition currency. The defendants concede that whatever bloc of stock Southern Peru gave to Grupo Mexico could have been sold for its market price in American currency, i.e., dollars. Grupo Mexico knew that. The record is clear that Grupo Mexico itself relied on the market price of Southern Peru all along—during the negotiation process, Grupo Mexico kept asking again and again to be paid in approximately $3.1 billion worth of Southern Peru stock measured at its market price.

[153] JX-33 (Goldman engagement letter (March 2, 2004)) at SP COMM 014786-SP COMM 014787 (providing for a flat fee structure).

It has, of course, been said that under Delaware law fair value can be determined "by any techniques or methods which are generally considered acceptable in the financial community,"[154] and "[i]t is not a breach of faith for directors to determine that the present stock market price of shares is not representative of true value or that there may indeed be several market values for any corporation's stock."[155] As former Chancellor Allen wrote in his *Time-Warner* decision, which was affirmed by the Delaware Supreme Court, "[J]ust as the Constitution does not enshrine Mr. Herbert's social statics, neither does the common law of directors' duties elevate the theory of a single, efficient capital market to the dignity of a sacred text."[156] But, there are critical differences between this case and *Time-Warner*. In *Time-Warner*, the board of Time, however wrongly, believed that the value of the *Time-Warner* combination would exceed the value offered by the $200 per share Paramount tender offer when the dust on the Texas deal range ultimately settled.[157]

Here, the Special Committee did not believe that Southern Peru was being undervalued by the stock market. To the contrary, its financial advisor Goldman, after months of study, rendered analyses suggesting that Southern Peru was being overvalued by the market. The corresponding fundamental analyses of Minera showed that Minera was worth nowhere close to the $3.1 billion in real value that Grupo Mexico was demanding. This was not a situation where Goldman and the Special Committee believed that Minera was being undervalued even more than Southern Peru and therefore

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[154] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 712-13 (Del. 1983).
[155] *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 n.12 (Del. 1989).
[156] *Paramount Commc'ns, Inc. v. Time Inc.*, 1989 WL 79880, at *19 (Del Ch. July 14, 1984), *aff'd*, 571 A.2d 1140 (Del. 1989).
[157] *Time*, 571 A.2d at 1149.

that Southern Peru would be getting more than $3.1 billion in value for giving up stock it could sell for $3.1 billion in real cash.

In other words, the Special Committee did not respond to its intuition that Southern Peru was overvalued in a way consistent with its fiduciary duties or the way that a third-party buyer would have. As noted, it did not seek to have Grupo Mexico be the buyer. Nor did it say no to Grupo Mexico's proposed deal. What it did was to turn the gold that it held (market-tested Southern Peru stock worth in cash its trading price) into silver (equating itself on a relative basis to a financially-strapped, non-market tested selling company), and thereby devalue its own acquisition currency. Put bluntly, a reasonable third-party buyer would only go behind the market if it thought the fundamental values were on its side, not retreat from a focus on market if such a move disadvantaged it. If the fundamentals were on Southern Peru's side in this case, the DCF value of Minera would have equaled or exceeded Southern Peru's give. But Goldman and the Special Committee could not generate any responsible estimate of the value of Minera that approached the value of what Southern Peru was being asked to hand over.

Goldman was not able to value Minera at more than $2.8 billion, no matter what valuation methodology it used, even when it based its analysis on Minera management's unadjusted projections.[158] As the plaintiff points out, Goldman never advised the Special

[158] *See* JX-103 at SP COMM 006886. This value was calculated by applying Goldman's most aggressive assumptions (a $1.00 long-term copper price and 7.5% discount rate) to unadjusted projections provided by Minera management. I am not taking into account the $3 billion valuation that was produced under the same assumptions in Goldman's June 11 presentation because at that point due diligence on Minera was still very much a work in progress. *See also* JX-101 at SP COMM 003338 ("Due diligence process is still ongoing . . .").

Committee that Minera was worth $3.1 billion, or that Minera could be acquired at, or would trade at, a premium to its DCF value if it were a public company. Furthermore, the defendants' expert did not produce a standalone equity value for Minera that justified issuing shares of Southern Peru stock worth $3.1 billion at the time the Merger Agreement was signed.

5. Can It All Be Explained By The Mysterious $1.30 Long-Term Copper Price?

At trial, there emerged a defense of great subtlety that went like this. In reality, the Special Committee and Goldman did believe that Minera was worth more than $3.1 billion. Deep down, the Special Committee believed that the long-term direction of copper prices was strongly northward, and that as of the time of the deal were more like $1.30 per pound than the $1.00 that was the high range of Goldman's analysis for the Special Committee. This was, of course, a full $0.40 per pound higher than the $0.90 number used by Southern Peru in its own internal planning documents and its publicly disclosed financial statements, higher than the $0.90 used by Minera in its internal planning process, and higher than the $0.90 median of analyst price estimates identified by Goldman and relied on by Goldman in issuing its fairness opinion.

According to the defendants, as effective negotiators, the Special Committee and Goldman perceived that if one applied this "real" long-term copper price trend to Minera, it would generate very high standalone values for Minera and thus be counterproductive from a negotiating standpoint. Hence, the Special Committee did not use these prices, but rather focused on a relative valuation approach, not because it obscured that Southern

Peru was not obtaining a get as good as the give, but so Grupo Mexico would not recognize how great a deal that Southern Peru was getting.

In support of this theory, the defendants presented a qualified academic, Eduardo Schwartz, who testified that if one valued Southern Peru and Minera on a relative valuation basis using the ultimate Goldman assumptions and a $1.30 copper price, Southern Peru actually paid far too little.[159] The theory of this expert and the defendants is that a rising copper price would have benefited Minera far more than it did Southern Peru.[160] Schwartz also says that Southern Peru's stock market trading price had to be explained by the fact that the stock market was actually using a long-term copper price of $1.30, despite the lower long term price that Southern Peru, other companies, and market analysts were using at the time.[161]

But what the defendants' expert did not do is telling. Despite his eminent qualifications, Schwartz would not opine on the standalone value of Minera, he would

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[159] Tr. at 445 (Schwartz). In his report, Schwartz, who used the same relative valuation methodology as Goldman did, sets forth a continuum of valuation results ranging from those based on the $0.90/lb long-term copper price used by Goldman to the $1.30/lb long-term copper price that he considered to be a reasonable assumption at the time. At $0.90/lb Minera was worth approximately 67.6 million shares of Southern Peru stock, with a then-current market value of $1.7 billion; at $1.30 it was worth approximately 80 million shares, with a then-current market value of $3.7 billion. JX-48 (expert report of Eduardo Schwartz) (April 21, 2010) ("Schwartz Report") ¶ 25 at Ex. 2. These dollar values are derived from determining the number of shares that Southern Peru would issue for Minera under a relative DCF analysis using these copper price assumptions, multiplied by the $45.92 closing price of Southern Peru on October 21, 2004.

[160] Tr. at 437 (Schwartz) ("In this case, Minera [ ] was more sensitive to the price of copper. When we increase the price of copper, the value, the present value of Minera [ ] went higher than [Southern Peru] . . ."); Schwartz Report ¶ 45 ("[A] lower copper price causes the calculated value of Minera to decrease to a greater extent than the value of [Southern Peru] using the same assumptions.").

[161] Schwartz Report ¶¶ 36-43.

not lay his marker down on that. Furthermore, the implication that Minera would benefit more than Southern Peru from rising copper prices resulted from taking the assumptions of the Special Committee process itself,[162] in which great efforts had been made by Grupo Mexico and the Special Committee to optimize Minera's value and nothing comparable had been done to optimize Southern Peru's value. The defendants' expert appears to have given no weight to the nearly $300 million EBITDA underestimate in the 2004 Southern Peru cash flow estimates, or to the fact that the 2005 estimates for Southern Peru also turned out to be close to $800 million less than estimated, whereas Minera did not outperform the 2004 estimates used in the deal and outperformed the 2005 estimates by a far lower percentage than Southern Peru. The defendants' position that the Merger was fair in light of rising copper prices is also, as we shall see, undermined by evidence that they themselves introduced regarding the competitive performance of Southern Peru and Minera from 2005 onward to 2010. That evidence illustrates that in terms of generating EBITDA, Southern Peru continued to be the company with the comparatively strong performance, while Minera lagged behind.

Even more important, I can find no evidence in the actual record of deal negotiations of any actual belief by the Special Committee or Goldman that long-term copper prices were in fact $1.30, that it would be easy to rationalize a deal at the price Grupo Mexico suggested at copper prices of $1.30, but that for sound negotiating reasons, they would not run DCF analyses at that price, but instead move to a relative

[162] Tr. at 481 (Schwartz) ("I got the Excel file from Goldman Sachs as modified by [A&S], and that's the data that I used to value both Minera [ ] and [Southern Peru].").

valuation approach. There is just nothing in the record that supports this as a contemporaneous reality of the negotiating period, as supposed to an after-the-fact rationalization conceived of for litigation purposes.[163]

The Special Committee members who testified admitted that they were taken aback by Goldman's analysis of Minera's standalone value. None said that they insisted that Goldman run models based on higher long-term copper prices or that they believed the long-term price that Southern Peru was using in its public filings was too low. It is hard to believe that if the Special Committee felt deep in its deal bones that the long-term copper price was higher than $1.00, it would not have asked Goldman to perform a DCF analysis on those metrics. Importantly, Southern Peru continued to use a long-term copper price of $0.90 per pound for internal planning purposes until December 31, 2007, when it changed to $1.20.[164] In terms of the negotiating record itself, the only evidence is that a long-term copper price of $1.00 was deemed aggressive by the Special Committee and its advisors and $0.90 as the best estimate.[165] Thus, Schwartz's conclusion that the market was assuming a long-term copper price of $1.30 in valuing Southern Peru appears to be based entirely on post-hoc speculation. Put simply, there is no credible evidence of the Special Committee, in the heat of battle, believing that the long-term copper price was

[163] Defendants point to the testimony of Palomino as evidence of the Special Committee's bargaining strategy. Palomino testified that "strategically, it was to our advantage to try to be conservative with copper prices, because otherwise, the relative valuations would be altered in favor of Minera . . . [t]he fact that the lower the price, the better for us, that was quite clear from the beginning." Tr. at 41 (Palomino). But nowhere does any piece of written evidence support this as being a genuine deal dynamic.

[164] JX-143 at 66 (Southern Copper Corporation Form 10-K (February 29, 2008)).

[165] JX-101; JX-102; JX-103; JX-105; JX-106.

actually $1.30 per pound but using $0.90 instead to give Southern Peru an advantage in the negotiation process.

Furthermore, the Special Committee engaged in no serious analysis of the differential effect, if any, on Southern Peru and Minera of higher copper prices.[166] That is a dynamic question that involves many factors and, as I have found, the Special Committee did not attempt to "optimize" Southern Peru's cash flows in the way it did Minera's. The plaintiff argues that by simply re-running his DCF analyses using a long-term copper price assumption of $1.30, Schwartz glosses over key differences in the effect of an increase in long-term copper prices on the reserves of Minera and Southern Peru. Primarily, the plaintiff argues that if the long-term copper price assumption is increased to $1.30, then Southern Peru's reserves would have increased far more dramatically than Minera's and, therefore, the relative value of the two companies would not remain constant at a higher long-term copper price. The defendants, as discussed above, respond that Minera, not Southern Peru was more sensitive to increases in copper price assumptions, and thus, if higher copper prices are used the deal becomes even more favorable for Southern Peru. It is not clear if anybody really knew, at the time of the Merger, the extent to which the projections of Southern Peru or Minera would have changed in the event that the companies regarded $1.30 per pound as a reliable long-term

[166] The value of copper mining companies is basically related to the reserves they have. A copper mining company's reserves are not fixed based on the amount of ore in the ground, but are rather a representation of how much of that ore can be mined at a profit. That calculation, of course, turns in large part on the long-term copper price. When the long-term copper price goes up, the company's reserves will increase without any new ore being discovered because at a higher price more ore can be taken from the mine at a profit. Accordingly, in the long term, the company will take more copper out of the ground and its projections may change to reflect an increase in its reserves.

copper price. But, the parties' arguments with respect to the relative effects of changes in the long-term copper price on Minera and Southern Peru's reserves end up being of little importance, because there is no evidence in the record that suggests that anyone at the time of the Merger was contemplating a $1.30 long-term copper price.

The idea that the Special Committee and Goldman believed that copper prices were going steeply higher also makes its decision to seek a fixed exchange ratio odd, because the likely result of such price movements would have been, as things turned out, to result in Southern Peru delivering more, not less, in value to Grupo Mexico as a result of stock market price movements. Remember, the Special Committee said it sought such a ratio to protect against a downward price movement.[167] Perhaps this could be yet another indication of just how deeply wise and clandestine the Special Committee's negotiating strategy was. If the Committee asked for a collar or other limitation on the cash value it would pay in its stock, it would tip off Grupo Mexico that Minera was really worth much more than Southern Peru was paying. This sort of concealed motivation and contradiction is usually the stuff of international espionage, not M & A practice. I cannot say that I find a rational basis to accept that it existed here. To find that the original low standalone estimates, the aggressive efforts at optimizing cash flows, the charitable sharing of Southern Peru's own multiples, and, as we shall next discuss, the last-gasp measures to close the resulting value gap that yet still remained were simply a cover for a brilliant, but necessarily secret, negotiating strategy by the Special Committee and

[167] Tr. at 155 (Handelsman).

Goldman is difficult for a mind required to apply secular reasoning, rather than conspiracy theories or mysticism, to the record before me.[168]

6. Grupo Mexico's "Concessions" Were Weak And Did Not Close The Fairness Gap

In their briefs, the defendants point to certain deal terms agreed to by Grupo Mexico as evidence of the Special Committee's negotiating prowess. These provisions include (1) the commitment from Grupo Mexico to reduce Minera's net debt at closing to $1 billion; (2) the $100 million special transaction dividend paid out by Southern Peru as part of the Merger's closing; (3) post-closure corporate governance changes at Southern Peru designed to protect minority stockholders, including a requirement for review of related-party transactions; (4) the super-majority vote required to approve the Merger; and (5) the fixed exchange ratio.

But, these so-called "concessions" did little to justify the Merger terms. Grupo Mexico was contractually obligated to pay down Minera's debt because of rising copper

[168] In contrast to Schwartz, the plaintiff's expert Daniel Beaulne determined a standalone fair value for Minera. Using a DCF analysis, Beaulne came up with an enterprise value for Minera of $2.785 billion as of October 21, 2004. *See* Beaulne Report at 42. Using a comparable companies analysis, Beaulne came up with an enterprise value for Minera of $2.831 billion as of October 21, 2004. Beaulne then took the average of the two enterprise values from each of the valuation approaches and added Minera's cash balance and subtracted Minera's debt, concluding that the "indicated equity value" of Minera was $1.854 billion as of October 21, 2004. Operating under the assumption that the "publicly traded share price of [Southern Peru] is a fair and accurate representation of the market value of a share of its common stock," Beaulne multiplied the $1.854 billion equity value of Minera by the 99.15% interest that Southern Peru was purchasing and then divided that amount by the publicly-available share price of Southern Peru as of October 21, 2004 adjusted by the $100 million transaction dividend (which translated to $1.25 per share). Out of conservatism, I adopt a different valuation for remedy purposes, but, if I had to make a binary choice, I would favor Beaulne's DCF analysis as more reliable than the Schwartz approval, which largely accepted (without any gumption check for, say, the $300 million in extra EBITDA Southern Peru earned in 2004) the defendant-friendly inputs of a flawed process and used an after-the fact generated copper price along with them to come to a determination of fairness.

prices, and it had already paid down its debt to $1.06 million as of June 30, 2004.[169] The dividend both reduced the value of Southern Peru's stock price, allowing the Special Committee to close the divide between its 64 million share offer and Grupo Mexico's 67.2 million share asking price *and* paid out cash to Grupo Mexico, which got 54% of the dividend. Many of the corporate governance provisions were first proposed by Grupo Mexico, including the review of related party transactions, so that Southern Peru would remain compliant with applicable NYSE rules and Delaware law.[170] Correctly, Grupo Mexico did not regard the Special Committee's corporate governance suggestions as differing much from the "status quo."[171] After proposing a $500,000 threshold for review of related-party transactions by an independent committee of the board,[172] the Special Committee accepted Grupo Mexico's counterproposal for a $10 million threshold.[173] This was more a negotiation defeat than victory.

As for the two-thirds supermajority vote, the Special Committee assented to it after asking for and not obtaining a majority of the minority vote provision. The Special Committee knew that Cerro and Phelps Dodge wanted to sell, and that along with Grupo Mexico, these large holders would guarantee the vote. At best, the Special Committee extracted the chance to potentially block the Merger if post-signing events convinced it to

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[169] JX-125 at 55; JX-107 at SP COMM 006674.
[170] JX-156 at SP COMM 007080.
[171] JX-118 (UBS presentation to Grupo Mexico (July 2004)) at UBS-SCC00005558.
[172] JX-159 at AMC0027547.
[173] *Compare* JX-160 at SP COMM 010497 (offering $10 million threshold) *with* Pre-Tr. Stip at 15 (stipulating that parties agreed to $10 million threshold).

change its recommendation and therefore wield Cerro's vote against the Merger.[174] But, as I will discuss in the next section, the Special Committee did not do any real thinking in the period between its approval of the Merger and the stockholder vote on the Merger. Furthermore, as has been noted, several key material facts regarding the fairness of the Merger were not, in my view, fairly disclosed.

The Special Committee's insistence on a fixed exchange ratio, as discussed, is difficult to reconcile with its purported secret belief that copper prices were on the rise. Other than protection against a falling Southern Peru stock price, the only justification for using a fixed versus floating exchange ratio in the Merger was one often cited to when two public companies that are both subject to market price fluctuations announce a merger, which is that because they are similar companies and proposing to merge, the values of Southern Peru and Minera would rise and fall together after the market reacts initially to the exchange ratio. Handelsman referred to this justification in his testimony.[175] In other words, if the stock price of Southern Peru went up, the value of

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[174] Cerro's voting agreement required it to vote in accordance with the Special Committee's recommendation, but Phelps Dodge's voting agreement, which was entered into two months after the Merger was signed, did not have a similar provision. Rather, the agreement provided that, given the Special Committee's recommendation in favor of the Merger and the Board's approval of the Merger, Phelps Dodge expressed its current intention to vote in favor of the Merger. Although it seems that Phelps Dodge would be contractually entitled to vote against the Merger if the Special Committee had subsequently withdrawn its recommendation, nowhere does the agreement require such a result. Given Phelps Dodge's independent interest in obtaining the liquidity rights that were tied to the Merger, it is unclear how it would have voted if the Special Committee had changed its mind. Thus, because Phelps Dodge's vote by itself would be sufficient to satisfy the two-thirds supermajority vote condition, it is equally unclear what power the Special Committee actually had to stop the Merger once it was signed.

[175] Tr. at 175 (Handelsman) ("I thought the collar had some meaning, but I thought that it was less important because I believed — based on my feeling that a relative value of the two companies made sense, that ships rise with a rising tide and ships fall with a falling tide; and,

Minera would go up as well, and the relative valuation would stay the same. This would make more sense in a merger between two companies in the same industry with publicly traded stock, because both companies would have actual stock prices that might change because of some of the same industry-wide forces and because both stocks might trade largely on the deal, after the initial exchange ratio is absorbed into their prices. Here, by contrast, only Southern Peru's stock had a price that was subject to market movement. These were not two public companies — changes in Southern Peru's stock price were in an important sense a one-sided risk. A rising market would only lift the market-tested value of one side of the transaction, the Southern Peru side. And, of course, the switch to a fixed exchange ratio turned out to be hugely disadvantageous to Southern Peru.[176]

7. The Special Committee Did Not Update Its Fairness Analysis In The Face of Strong Evidence That The Bases For Its Decision Had Changed

The Special Committee had negotiated for the freedom to change its recommendation in favor of the Merger if its fiduciary duties so required, and had the vote of a major minority stockholder (Cerro) tied to a withdrawal of its recommendation, but instead treated the Merger as a foregone conclusion from the time of its October 21, 2004 vote to approve the Merger Agreement. There is no evidence to suggest that the

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therefore, the chances of the value of one getting out of sync with the value of the other was a chance that was worth taking, although it certainly would have been better to have the collar.").

[176] The switch to a fixed exchange ratio turned out to be hugely disadvantageous to Southern Peru. If the Special Committee had instead accepted Grupo Mexico's original May 7, 2004 proposal for Southern Peru to issue $3.1 billion dollars worth of stock with the number of shares to be calculated based on the 20-day average closing price of Southern Peru starting five days before the Merger closed, Southern Peru would have only had to issue 52.7 million shares of Southern Peru stock, based on the 20-day average price at that time of $59.75 per share. In other words, if the Special Committee had done no negotiating at all and had simply accepted Grupo Mexico's first ask, Southern Peru would have issued about 14.5 million fewer shares to purchase Minera than it did after the Special Committee was finished negotiating.

Special Committee or Goldman made any effort to update its fairness analysis in light of the fact that Southern Peru had blown out its EBITDA projections for 2004 and its stock price was steadily rising in the months leading up to the stockholder vote (perhaps because it had greatly exceeded its projections), even though it had agreed to pay Grupo Mexico with a fixed number of Southern Peru shares that *had no collar*. To my mind, the fact that none of these developments caused the Special Committee to consider re-negotiating or re-evaluating the Merger is additional evidence of their controlled mindset. Other than Handelsman's phone call to Goldman, no member of the Special Committee made any effort to inquire into an update on the fairness of the Merger. The Special Committee's failure to get a reasoned update, taken together with the negotiation process and the terms of the Merger, was a regrettable and important lapse.

Although an obvious point, it is worth reiterating that the Special Committee was comprised of directors of Southern Peru. Thus, from internal information, they should have been aware that Southern Peru was far outperforming the projections on which the deal was based. This should have given them pause that the exercise in optimizing Minera had in fact optimized Minera (which essentially made its numbers for 2004) but had undervalued Southern Peru, which had beaten its 2004 EBITDA estimates by 37%, some $300 million. This reality is deepened by the fact that Southern Peru beat its 2005 estimates by 135%, while Minera's 2005 EBITDA was only 45% higher than its estimates. These numbers suggest that it was knowable that the deal pressures had resulted in an approach to valuation that was focused on making Minera look as valuable

as possible, while shortchanging Southern Peru, to justify the single deal that the Special Committee was empowered to evaluate.

Despite this, Goldman and the Special Committee did not reconsider their contribution analysis, even though Southern Peru's blow-out 2004 performance would suggest that reliance on even lower 2005 projections was unreasonable.[177] Indeed, the Merger vote was held on March 28, 2005, when the first quarter of 2005 was almost over.

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[177] In their papers, both the plaintiff and the defendants point to evidence post-dating the Merger to support their arguments. *See, e.g.*, Pl. Op. Post-Tr. Br. at 7-9,18 (discussing post-Merger evidence of reported ore reserves for Southern Peru and post-Merger completion of a significant exploration program relating to Southern Peru's mines); Pl. Ans. Post-Tr. Br. at 12 (citing to evidence of Southern Peru and Minera's 2005 EBITDA performance); Def. Op. Post-Tr. Br. at 22 (including chart that shows investment return in Southern Peru and selected comparable companies from October 21, 2004 to June 27, 2011). Def. Ans. Post-Tr. Br. at Ex. A. As their supplemental letters after post-trial argument show, our law is not entirely clear about the extent to which such evidence can be considered. In an appraisal case, it is of course important to confine oneself to only information that was available as of the date of the transaction giving rise to appraisal. 8 *Del. C.* § 262(h) ("[T]he [c]ourt shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation."). But even in appraisal, there are situations when post-transaction evidence has relevance. *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 499 (Del. 2000) (holding that post-merger evidence that validated a pre-merger forecast was admissible "to show that plans in effect at the time of the merger have born fruition." (citation omitted)); *Cavalier Oil Corp. v. Harnett*, 1988 WL 15816, at *14 (Del. Ch. Feb. 22, 1988), *aff'd*, 564 A.2d 1137 (Del. 1989) ("[p]ost-merger data may be considered" if it meets the *Weinberger* standard pertaining to non-speculative evidence); *see generally* R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* §9.45 (3d ed. 1998) (discussing the court's ability to consider post-merger evidence in the appraisal context). In an entire fairness case, where the influence of control is important, there is a sucker insurance purpose to such evidence. *See Gentile v. Rossette,* 2010 WL 2171613, at *2 (Del. Ch. May 28, 2010) (noting that "[s]ome rumination upon the outcome of the fair price and process dynamic...cannot be avoided); *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 697 (Del. Ch. 1996) (considering post-merger events in determining whether merger price was fair). In this case, for example, the estimated cash flows for Southern Peru, which were not optimized, were important in setting the transaction price. As of the Merger date, the Special Committee and Grupo Mexico had access to results of Southern Peru that showed that the estimates for 2004 had been exceeded by a large amount and that Southern Peru was running well ahead of the 2005 estimate, suggesting that Southern Peru's non-optimized cash flow estimates might have been too low, whereas Minera's optimized cash flows seemed about right. The ultimate results from 2005 also cast serious doubt on the fairness of the relative valuation exercise that was used to justify the transaction.

In that quarter alone, Southern Peru made $303.4 million in EBITDA, over 52% of what Goldman estimated for the entire year.

This brings me to a final, big picture point. In justifying their arguments, each side pointed in some ways to post-Merger evidence. Specifically, the defendants subjected a chart in support of their argument that rising copper prices would have disproportionately benefited Minera over Southern Peru in the form of having greater reserves, and that this justified the defendants' use of a relative valuation technique, and undercut the notion that Minera's value was dressed up, and Southern Peru's weather beaten during the Special Committee process.

The problem for this argument is that reserves are relevant to value because they should generate cash flow. As has been mentioned, Goldman stretched to justify the deal by using a range of multiples that started at the bottom with Southern Peru's Wall Street consensus multiple for 2005E EBITDA and ended at the top with a management-generated multiple of 6.5x. Both of these were well north of the 4.8x median of Goldman's comparables. And, of course, Goldman estimated that Minera would earn nearly as much as Southern Peru in 2004, and more than Southern Peru in 2005. Neither estimate turned out to be even close to true. Indeed, the Merger was premised on the notion that over the period from 2005 to 2010, Minera would generate $1.35 of EBITDA for every $1.00 of Southern Peru. Using the underlying evidence cited in the defendants' own chart,[178] which came from the public financials of Southern Peru, a company under their continued control, after the Merger, my non-mathematician's evaluation of this

[178] Def. Ans. Post-Tr. Br. at Ex. A.

estimate reveals that it turned out to be very far off the mark, with Minera generating only $0.67 for every dollar Southern Peru made in EBITDA. Put simply, even in a rising copper price market, Southern Peru seemed to more than hold its own and, if anything, benefit even more than Minera from the general rise in copper prices.

The charts below addressing the companies' performance in generating EBITDA in comparison to the deal assumptions, if anything, confirms my impression that Minera's value was optimized and Southern Peru's slighted to come to an exchange price no reasonable third party would have supported:

	2005[179]	2006	2007	2008	2009	2010	Sum
Minera	$ 971.6	$1405.5	$1731.2	$ 856.5	$ 661.9	$1078.3	$6705.0
Southern Peru	$1364.8	$1918.4	$2085.4	$1643.5	$1144.8	$1853.8	$10010.7
Ratio MM/SP	.71	.73	.83	.52	.58	.58	.67

	2005E[180]	2006E	2007E	2008E	2009E	2010E	Sum
Minera	$622.0	$530.0	$627.0	$497.0	$523.0	$567.0	$3366.0
Southern Peru	$581.0	$436.0	$415.0	$376.0	$350.0	$329.0	$2487.0
Ratio MM/SP	1.07	1.22	1.51	1.32	1.49	1.72	1.35

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[179] All actual EBITDA numbers are drawn from Southern Peru's post-Merger annual reports, which continue to report the results of the Southern Peru and the Minera businesses separately as operating segments. JX-138; JX-142; JX-143; JX-144; JX-146; JX-147. All numbers are in millions.

[180] All estimated EBITDA numbers are based on the A&S-adjusted projections used in Goldman's October 21, 2004 presentation. The 2005E EBITDA numbers are based on the A&S-adjusted estimates in Goldman's contribution analysis, JX-106 at SP COMM 004926 (which assume a 2% royalty tax on Southern Peru and certain other additional adjustments) and the 2006E-2010E EBITDA numbers are based on the A&S-adjusted projections underlying Goldman's final relative DCF analyses. *Id.* at SP COMM004918; SP COMM004920.

For all these reasons, I conclude that the Merger was unfair, regardless of which party bears the burden of persuasion. The Special Committee's cramped perspective resulted in a strange deal dynamic, in which a majority stockholder kept its eye on the ball – actual value benchmarked to cash – and a Special Committee lost sight of market reality in an attempt to rationalize doing a deal of the kind the majority stockholder proposed. After this game of controlled mindset twister and the contortions it involved, the Special Committee agreed to give away over $3 billion worth of actual cash value in exchange for something worth demonstrably less, and to do so on terms that by consummation made the value gap even worse, without using any of its contractual leverage to stop the deal or renegotiate its terms. Because the deal was unfair, the defendants breached their fiduciary duty of loyalty.

I now fix the remedy for this breach.

IV. Determination Of Damages

A. Introduction

The plaintiff seeks an equitable remedy that cancels or requires the defendants to return to Southern Peru the shares that Southern Peru issued in excess of Minera's fair value. In the alternative, the plaintiff asks for rescissory damages in the amount of the present market value of the excess number of shares that Grupo Mexico holds as a result of Southern Peru paying an unfair price in the Merger. The plaintiff claims, based on Beaulne's expert report, that Southern Peru issued at least 24.7 million shares in excess of

Minera's fair value.[181] The plaintiff asserts that, because Southern Peru effected a 2-for-1 stock split on October 3, 2006 and a 3-for-1 stock split on July 10, 2008, those 24.7 million shares have become 148.2 million shares of Southern Peru stock, and he would have me order that each of those 148.2 million shares be cancelled or returned to Southern Peru, or that the defendants should pay fair value for each of those shares. Measured at a market value of $27.25 per Southern Peru share on October 13, 2011, 148.2 million shares of Southern Peru stock are worth more than $4 billion.

The plaintiff also argues that $60.20 in dividends have been paid on each of the 24.7 million Southern Peru shares (adjusted for stock-splits), and to fully remedy the defendants' breach of fiduciary duty the court must order that the defendants must pay additional damages in the amount of approximately $1.487 billion. Finally, the plaintiff requests pre and post- judgment interest compounded monthly, a request that seems to ignore the effect of the dividends just described.

By contrast, the defendants say that no damages at all are due because the deal was more than fair. Based on the fact that Southern Peru's market value continued on a generally upward trajectory in the years after the Merger – even though it dropped in response to the announcement of the Merger exchange ratio and at the time of the preliminary proxy – the defendants say that Southern Peru stockholders should be grateful for the deal. At the very least, the defendants say that any damage award should be at most a fraction of the amounts sought by the plaintiff, and that the plaintiff has

[181] *See* Beaulne Report at 45. The 24.7 million figure is based on calculations as of the date of closing (April 1, 2005), rather than as of the date of Goldman's fairness opinion and the Special Committee's approval of the Merger (October 21, 2004).

waived the right to seek rescissory damages because of his lethargic approach to litigating the case. The defendants contend that it would be unfair to allow the plaintiff to benefit from increases in Southern Peru's stock price that occurred during the past six years, because Grupo Mexico bore the market risk for so long due to the plaintiff's own torpor. The defendants also argue that the plaintiff's delays warrant elimination of the period upon which pre-judgment interest might otherwise be computed, and that plaintiff should not be entitled to compounded interest.

This court has broad discretion to fashion equitable and monetary relief under the entire fairness standard.[182] Unlike the more exact process followed in an appraisal action, damages resulting from a breach of fiduciary duty are liberally calculated.[183] As long as there is a basis for an estimate of damages, and the plaintiff has suffered harm, "mathematical certainty is not required."[184] In addition to an actual award of monetary relief, this court has the authority to grant pre-and post-judgment interest, and to determine the form of that interest.[185]

The task of determining an appropriate remedy for the plaintiff in this case is difficult, for several reasons. First, as the defendants point out, the plaintiff caused this case to languish and as a result this litigation has gone on for six years. Second, both

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[182] *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439 (Del. 2000) (noting that the Delaware Supreme Court "defer[s] substantially to the discretion of the trial court in determining the proper remedy...."); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) (noting "the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate").

[183] *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996).

[184] *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999), *aff'd*, 766 A.2d 437 (Del. 2000).

[185] *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988).

parties took an odd approach to presenting valuation evidence, particularly the defendants, whose expert consciously chose not to give an estimate of Minera's value at the time of the Merger. Although the plaintiff's expert gave no opinion on the fundamental value of Southern Peru, that did not matter as much as the defendants' expert's failure to give such an opinion, because the defendants themselves conceded that Southern Peru's acquisition currency was worth its stock market value. Third, the parties devoted comparatively few pages of their briefs to the issue of the appropriate remedy. Finally, the implied standalone DCF values of Minera and Southern Peru that were used in Goldman's final relative valuation of the companies are hard to discern and have never been fully explained by the source.

These problems make it more challenging than it would already be to come to a responsible remedy. But, I will, as I must, work with the record I have.

In coming to my remedy, I first address a few of the preliminary issues. For starters, I reject the defendants' argument that the post-Merger performance of Southern Peru's stock eliminates the need for relief here. As noted, the defendants did not bother to present a reliable event study about the market's reaction to the Merger, and there is evidence that the market did not view the Merger as fair in spite of material gaps in disclosure about the fairness of the Merger. Furthermore, even if Southern Peru's stock has outperformed comparable companies since the Merger, the company may have performed even better if the defendants had not overpaid for Minera based on its own fundamentals. Notably, Southern Peru markedly outperformed the EBITDA estimates used in the deal for both 2004 and 2005, and the ratio of Southern Peru's EBITDA to

Minera's EBITDA over the six years since the Merger suggests that the assumptions on which the Merger was based were biased in Minera's favor. A transaction like the Merger can be unfair, in the sense that it is below what a real arms-length deal would have been priced at, while not tanking a strong company with sound fundamentals in a rising market, such as the one in which Southern Peru was a participant. That remains my firm sense here, and if I took into account the full range of post-Merger evidence, my conclusion that the Merger was unfair would be held more firmly, rather than more tentatively.

By contrast, I do agree with the defendants that the plaintiff's delay in litigating the case renders it inequitable to use a rescission-based approach.[186] Rescissory damages are the economic equivalent of rescission and therefore if rescission itself is unwarranted because of the plaintiff's delay, so are rescissory damages.[187] Instead of entering a rescission-based remedy, I will craft from the "panoply of equitable remedies" within this court's discretion a damage award that approximates the difference between the price that the Special Committee would have approved had the Merger been entirely fair (i.e., absent a breach of fiduciary duties) and the price that the Special Committee actually agreed to pay.[188] In other words, I will take the difference between this fair price and the

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[186] *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 699 (Del. Ch. 1996) (highlighting the principle of equity that a plaintiff waives the right to rescission by excessive delay in seeking it, and extending that principle to rescissory damages, based on the policy reason that excessive delay allows plaintiffs to see whether the defendants achieve an increase in the value of the company before deciding to assert a claim).

[187] *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 855 A.2d 1059, 1072 (Del. Ch. 2003).

[188] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983); *Ryan*, 709 A.2d at 699.

market value of 67.2 million shares of Southern Peru stock as of the Merger date.[189] That difference, divided by the average closing price of Southern Peru stock in the 20 trading days preceding the issuance of this opinion, will determine the number of shares that the defendants must return to Southern Peru. Furthermore, because of the plaintiff's delay, I will only grant simple interest on that amount, calculated at the statutory rate since the date of the Merger.

In all my analyses, I fix the fair value of Minera at October 21, 2004, the date on which the Merger Agreement was signed. I do not believe it fair to accord Grupo Mexico any price appreciation after that date due to its own fixation on cash value, the fact that Southern Peru outperformed Minera during this period, and the overall conservatism I employ in my remedial approach, which already reflects leniency toward Grupo Mexico, given the serious fairness concerns evidenced in the record.

B. The Damages Valuation

Having determined the nature of the damage award, I must next determine the appropriate valuation for the price that the Special Committee *should* have paid. Of course, this valuation is not a straightforward exercise and inevitably involves some speculation. There are many ways to fashion a remedy here, given that the parties have provided no real road map for how to come to a value, and the analyses performed by

[189] As discussed earlier in this opinion, the Special Committee should have re-evaluated the Merger between signing and the stockholder vote due to changes in Southern Peru's stock price and Southern Peru's projection-shattering 2004 EBITDA and 2005 year to date performances. Instead, the Special Committee's decision to treat the Merger as a foregone conclusion was a failure in terms of fair process. For this and other related reasons, I am therefore calculating damages with respect to the market value of Southern Peru shares as of the Merger date, April 1, 2005.

Goldman and the Special Committee do not lend themselves to an easy resolution. I will attempt to do my best on the record before me.

Given the difference between the standalone equity values of Minera derived by Goldman and the plaintiff's expert and the actual cash value of the $3.75 billion in Southern Peru stock that was actually paid to Grupo Mexico in the Merger, this record could arguably support a damages award of $2 billion or more. My remedy calculation will be more conservative, and in that manner will intentionally take into account some of the imponderables I previously mentioned, which notably include the uncertainties regarding the market's reaction to the Merger and the reality that the Merger did not stop Southern Peru's stock price from rising over the long term.[190]

To calculate a fair price for remedy purposes, I will balance three values: (1) a standalone DCF value of Minera, calculated by applying the most aggressive discount rate used by Goldman in its DCF analyses (7.5%) and a long-term copper price of $1.10 per pound to the DCF model presented by the plaintiff's expert, Beaulne; (2) the market value of the Special Committee's 52 million share counteroffer made in July 2004, which was sized based on months of due diligence by Goldman about Minera's standalone value, calculated as of the date on which the Special Committee approved the Merger;

[190] I say did not stop rather than did not slow, because they are different. By being conservative in my approach to a remedy, I give the defendants credit for some of their market-based arguments, in a manner that one could even say I should not in a duty of loyalty case. *See Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996) ("Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly."). But I think this is responsible because the record suffers from some issues, including the absence of a Goldman trial witness and likely diminished memories, that are properly laid at the plaintiff's door.

and (3) the equity value of Minera derived from a comparable companies analysis using the comparable companies identified by Goldman.

1. A Standalone DCF Value

The only standalone DCF value for Minera in the record that clearly takes into account the projections for Minera that Goldman was using on October 21, 2004 is Beaulne's DCF analysis of Minera, which yielded an equity value as of October 21, 2004 of $1.838 billion.[191] Beaulne used the same A&S-adjusted projections for Minera that Goldman used in its October 21, 2004 presentation to calculate his standalone DCF value for Minera.[192] He assumes a long-term copper price of $0.90 per pound, which was also relied on by Goldman.[193] The major difference between Beaulne's DCF analysis and the Goldman DCF analysis, other than the fact that Goldman gave up on deriving a standalone equity value for Minera, is that Beaulne uses a lower discount rate than Goldman did—6.5% instead of 8.5%.[194]

Because Beaulne used the same underlying projections in his analysis, and his inputs are not disputed by the defendants or the defendants' expert, I am comfortable using his DCF valuation model. But, I am not at ease with using his discount rate of 6.5%, because it is outside the range of discount rates used by Goldman and seems

[191] Beaulne Report at 44.
[192] *Id.* at 21.
[193] Tr. at 340-341 (Beaulne).
[194] Beaulne Report at 36. Like Beaulne, I disregard the potential tax benefits of $0-131 million for Minera that Goldman factored in to its valuations as of the date of the fairness opinion. JX-106 at SP COMM 004917. The schedules and estimates provided by Minera management to Goldman on the potential tax benefits are not in the record, making them difficult to evaluate. Moreover, Schwartz also disregards these potential tax benefits in his relative valuation analysis, Schwartz Report ¶ 22, and the defendants do not take issue with Beaulne's exclusion of them.

unrealistically low. Instead, I will apply Goldman's lowest discount rate, 7.5%. In the spirit of being conservative in my remedy, I will, by contrast, apply a long-term copper price of $1.10 per pound, which is $0.10 more than the highest long-term copper price used by Goldman in its valuation matrices ($1.00) and is halfway between Goldman's mid-range copper price assumption of $0.90 and the $1.30 per pound long-term copper price that the defendants contend was their secretly held assumption at the time of the Merger. In other words, I use the discount rate assumption from the Goldman analyses that is most favorable to the defendants and a long-term copper price assumption that is even more favorable to the defendants than Goldman's highest long-term copper price, and apply them to the optimized cash flow projections of Minera. Under these defendant-friendly assumptions, a standalone equity value for Minera as of October 21, 2004 of $2.452 billion results.[195]

2. The Value Of The Special Committee's July Proposal

The counteroffer made by the Special Committee in July 2004, in which they proposed to pay for Grupo Mexico's stake in Minera with 52 million shares of Southern Peru stock, is arguably the last proposal made by the Special Committee while they still had some vestige of a "give/get" analysis in mind that a reasonable, uncontrolled Special Committee would have remained in during the entire negotiation process. I therefore

[195] Beaulne's model, adjusted to reflect my inputs, yields an enterprise value for Minera of $3.452 billion, from which I subtracted the $1 billion in debt that Southern Peru assumed in the Merger. To the extent the defendants' gripe about the remedy, using the $0.90 per pound long-term copper price they told the investing public was the right number, the equity value of Minera would be only $1.512 million. At the high end of the long-term copper prices used in Goldman's standalone DCF model, or $1.00 per per pound, Minera's value was only $1.982 million. This underscores the conservatism of my approach, given the record evidence.

believe that the then-current value of 52 million shares is indicative of what the Special Committee thought Minera was really worth.

The Special Committee's July proposal was made between July 8, 2004 and July 12, 2004. The stock price of Southern Peru on July 8, 2004 was $40.30 per share, so the 52 million shares of Southern Peru stock then had a market price of $2.095 billion. Because Grupo Mexico wanted a dollar value of stock, I fix the value at what 52 million Southern Peru shares were worth as of October 21, 2004, the date on which the Special Committee approved the Merger, $2.388 billion,[196] giving Minera credit for the price growth to that date.

3. A Comparable Companies Approach

In its October 21, 2004 presentation, Goldman identified comparable companies and deduced a mean and median 2005 EBITDA multiple (4.8x) that could have been applied Minera's EBITDA projections to value Minera. The comparable companies used by Goldman were Antofagasta, Freeport McMoRan, Grupo Mexico itself, Phelps Dodge and Southern Peru. Goldman did not use this multiple to value Minera. As discussed earlier in this opinion, Goldman instead opted to apply a range of pumped-up Southern Peru 2005E EBITDA multiples to Minera's EBITDA projections so as to generate a value expressed only in terms of the number of Southern Peru shares to be issued.[197]

Applying the median 2005E EBITDA multiple for the comparable companies identified by Goldman to Minera's 2005 EBITDA projections as adjusted by A&S ($622

[196] $45.92 closing price x 52,000,000 = $2,387,840,000.
[197] *See* JX-106 at SP COMM 004913, SP COMM 004925.

million)[198] was the reasonable and fair valuation approach. Doing so yields a result of $1.986 billion.[199]

When using the comparable companies method, it is usually necessary to adjust for the fact that what is being sold is different (control of the entire company and thus over its business plan and full cash flows) than what is measured by the multiples (minority trades in which the buyer has no expectancy of full control over the company's strategy and thus influence over the strategy to maximize and spend its cash flows).[200] That is, the comparable companies method of analysis produces an equity valuation that includes an inherent minority trading discount because all of the data used for purposes of comparison is derived from minority trading values of the companies being used.[201] In appraisal cases, the court, in determining the fair value of the equity under a comparable companies method, must correct this minority discount by adding back a premium.[202]

An adjustment in the form of a control premium is generally applied to the equity value of the company being valued to take into account the reality that healthy, solvent public companies are usually sold at a premium to the unaffected trading price of everyday sales of the company's stock. This method must be used with care, especially as to unlisted companies that have not proven themselves as standalone companies. For that reason, it is conservative that I add a control premium for Minera, given its financial problems and its lack of history as an independent public company. Using the median

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[198] *Id.* at SP COMM 004925.
[199] $1.986 billion = (4.8 x 622 million) – $1 billion net debt.
[200] *Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *16 (Del. Ch. Aug. 19, 2005).
[201] *Borruso v. Commc'ns Telesystems, Int'l*, 753 A.2d 451, 458 (Del. Ch. 1999).
[202] *Agranoff v. Miller*, 791 A.2d 880, 893 (Del. Ch. 2001).

premium for merger transactions in 2004 calculated by Mergerstat of 23.4%,[203] and applying that premium to the value derived from my comparable companies analysis yields a value of $2.45 billion.

4. The Resulting Damages

Giving the values described above equal weight in my damages analysis (($2.452 billion + $2.388 billion + $2.45 billion) / 3), results in a value of $2.43 billion, which I then adjust to reflect the fact that Southern Peru bought 99.15%, not 100%, of Minera, which yields a value of $2.409 billion. The value of 67.2 million Southern Peru shares as of the Merger Date was $3.756 billion.[204] The remedy, therefore, amounts to $1.347 billion.[205] The parties shall implement my remedy as follows. They shall add interest at the statutory rate, without compounding, to the value of $1.347 billion from the Merger date, and that interest shall run until time of the judgment and until payment.

Grupo Mexico may satisfy the judgment by agreeing to return to Southern Peru such number of its shares as are necessary to satisfy this remedy. Any attorneys' fees shall be paid out of the award.[206]

Within fifteen days, the plaintiff shall present an implementing order, approved as to form, or the parties' proposed plan to reach such an order. Too much delay has

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[203] 2006 Mergerstat® Review (Santa Monica: FactSet Mergerstat, LLC, 2006) at 24.
[204] $55.89 closing price x 67,200,000 = $3,755,808,000.
[205] $3.756 billion - $2.409 billion = $1.347 billion.
[206] The plaintiff has not sought to have the defendants pay his attorneys' fees. The parties shall confer regarding whether they can reach agreement on a responsible fee that the court can consider awarding, with the plaintiff's counsel taking into account the reality their own delays affected the remedy awarded and are a basis for conservatism in any fee award.

occurred in this case, and the parties are expected to bring this case to closure promptly, at least at the trial court level.

V. Conclusion

For all these reasons, the defendants breached their fiduciary duty of loyalty and judgment will be entered against them on the basis outlined in this decision.

EXHIBIT B

GRANTED

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER CORPORATION SHAREHOLDER DERIVATIVE LITIGATION	Consolidated C.A. No. 961-CS

REVISED FINAL ORDER AND JUDGMENT

WHEREAS, trial in the above-referenced action (the "Action") took place on June 21 through June 24, 2011; and

WHEREAS, post-trial briefing in the Action concluded on July 8, 2011; and

WHEREAS, post-trial argument in the Action took place on July 12, 2011; and

WHEREAS, post-trial letter submissions were filed with the Court on July 15, 2011; and

WHEREAS, the Court issued its opinion in the Action on October 14, 2011 (hereinafter the "Opinion"); and

WHEREAS, argument on Plaintiff's Petition for Attorneys' Fees and Expenses took place on December 19, 2011; and

WHEREAS, this Order incorporates by reference the definitions in the Opinion and, unless otherwise herein defined, all terms used herein shall have the same meanings as set forth in the Opinion; and

WHEREAS, the average closing price of Southern Copper Corporation ("Southern Copper") stock in the 20 trading days preceding the issuance of the Opinion is $26.96 per share (the "Average Trading Price");

AND NOW, the foregoing matters having been heard and considered after a full trial on the merits,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, this _____ day of December, 2011 as follows:

1. Americas Mining Corporation ("AMC"), Germán Larrea Mota-Velasco, Genaro Larrea Mota-Velasco, Oscar Gonzalez Rocha, Emilio Carrillo Gamboa, Jaime Fernando Collazo Gonzalez, Xavier Garcia de Quevedo Topete, Armando Ortega Gómez, and Juan Rebolledo Gout (collectively the "Defendants"), are jointly and severally liable for damages in the amount calculated as follows:

Damage Award:	$1,347,000,000
Pre-Judgment Interest through October 14, 2011, the date of the Opinion:	$684,617,363
Total Amount of Judgment:	$2,031,617,363

(hereinafter the "Judgment").

2. From October 15, 2011, the Judgment shall continue to accrue interest at the legal rate (currently 5.75% and as adjusted with future changes in the Federal Reserve Discount Rate, if any) until the Judgment is satisfied. The current per diem post-judgment interest due is $212,198.

3. The Judgment may be satisfied by (i) AMC making a cash payment to Southern Copper in the amount of the Judgment plus accrued post-Judgment interest, (ii) AMC transferring to Southern Copper shares of Southern Copper equal to (x) the amount of the Judgment plus accrued post-Judgment interest divided by (y) the Average Trading Price, (iii) AMC agreeing that Southern Copper may cancel a number of shares of Southern Copper owned by AMC equal to (x) the amount of the Judgment plus accrued post-Judgment interest divided by (y) the Average Trading Price, or (iv) any combination of (i)-(iii) elected by AMC so long as the total of such elections is equal to the amount of the Judgment plus accrued post-Judgment interest.[1]

[1] Based on the number of Southern Copper shares outstanding as of the time of the Opinion. In the case of a dilutive event, such as a stock split, stock dividend, or combination of Southern Copper shares, the

4. Plaintiff's counsel are awarded fees and expenses in the amount of 15% of the Judgment, or $304,742,604.45, plus post-Judgment interest at the legal rate from October 15, 2011 until such attorneys' fee and expense award is satisfied, to be paid by Southern Copper by wire transfer to an account designated by plaintiff's counsel. The Court finds this amount to be fair and reasonable for the reasons stated on the record during the December 19, 2011 hearing on Plaintiff's Petition for Attorneys' Fees and Expenses. The Court intends and directs that the fee shall be paid in cash out of the judgment by AMC, not from Southern Copper's existing cash.

5. The Register in Chancery shall forthwith forward to the Prothonotary of the Superior Court a certified copy of this Order to be entered by the Prothonotary in the same amount and form and in the same books and indices as judgments and orders in accordance with 10 Del. C. §4734.

_____
Chancellor

APPROVED as to form:

[signatures follow]

number of shares to be transferred or canceled pursuant to this paragraph shall be appropriately and equitably adjusted.

PRICKETT, JONES & ELLIOTT, P.A.

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This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	Leo E Strine
File & Serve Transaction ID:	41584240
Current Date:	Dec 29, 2011
Case Number:	961-CS
Case Name:	CONF ORDER In re: Southern Peru Copper Corp Shareholder Derivative Litigation
Court Authorizer:	Leo E Strine

/s/ Judge Leo E Strine

EXHIBIT C

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER CORPORATION SHAREHOLDER DERIVATIVE LITIGATION	:	Consolidated Civil Action No. 961-CS

- - -

Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, December 19, 2011
10:10 a.m.

- - -

BEFORE: HON. LEO E. STRINE, JR., Chancellor.

- - -

ORAL ARGUMENT ON PLAINTIFF'S PETITION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES and RULINGS OF THE COURT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

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- - -

THE COURT: Good morning, everyone.

MR. BROWN: Good morning, Your Honor. I'm assuming we can dispense with the introductions since the same people are here that were here for the trial.

THE COURT: You know, I'll leave social niceties to the parties.

MR. BROWN: Thank you, Your Honor.

Your Honor, this is the time set by the Court for consideration of our fee application in this case. The Court's role and responsibility obviously is to apply the Sugarland factors and the Court's broad discretion, fix what the Court feels is a fair and reasonable fee.

The Sugarland -- the Sugarland test is not a mechanical test. It's a highly discretionary application by the Court of --

THE COURT: Do we have any -- any tests that anyone concedes are a mechanical test? Because Unocal is not a mechanical test, either. I just wonder whether there are any that are mechanical. No?

MR. BROWN: Not in the Court of Chancery where it's all what's fair and reasonable.

So, Your Honor, the factors, as Your Honor knows, are the benefit conferred, the effort and time spent by counsel, the contingent nature of the case, the difficulty or complexity of the litigation, and the standing and ability of counsel.

I'll start with the first factor, the benefit conferred, which the Court has held over and over again is the predominant or most important factor. The benefit conferred here is a judgment of 1 -- you know, including interest, of a little over $1.9 billion, which I think, is fair to say, is --

THE COURT: Big.

MR. BROWN: -- big. It's a -- it's a recovery that has really -- there's no other case to compare it to. As far as we could tell, the second biggest derivative recovery, anyway, was $115 million, and that was a settlement. So, you know, the benefit here is unprecedented, and it was obtained obviously after trial.

I do think it's also relevant to consider -- one of the arguments that it seems like that's always made when we're making a fee application is you need to look at the benefit in relation to the size of the transaction. Sometimes if you get a 10 or

$20 million recovery, boy, that seems like a lot of money, you know, looked at in and of itself. But if it came in connection with a $50 billion transaction, defendants are always saying "Well, you knocked the crumb off the table and you caught the crumb. It just so happened that it was a big transaction."

Here, the Court's ultimate finding was that the Mexican mining operations that Southern Peru bought were worth about $2.45 billion. So that the ultimate ruling is that the company overpaid by approximately 50 percent for the -- the business that it bought before the -- the $1.2 billion judgment equates to a 50 -- basically paying 50 percent more than the 2.4 billion that the business was really worth.

So viewed sort of in comparison -- I was going to say "relative," but that's -- in comparison to the transaction, it's -- it's not only a huge economic benefit, it's a huge proportionate recovery relative to the -- to the claim at issue.

So the benefit conferred, you know, we think, warrants a fee, as the Court has said numerous times, at the upper end of the percentage award the Court -- the courts make.

Now, the defendants do have two arguments about the benefit to try to make it seem as if it's not really a benefit. First, they say that if they pay the judgment in stock, as the Court allowed them to do, that it -- there is either no benefit, which I don't really understand, or it's not quantifiable. I mean, I -- honestly, I've struggled --

THE COURT: It's a fund of stock and I gave them charity. I mean, I can take that back.

MR. BROWN: I mean --

THE COURT: I mean, it's really -- this is -- you don't have to spend time --

MR. BROWN: I goes -- it almost goes too far -- I was going to say I really don't need to -- I mean, whether -- the currency used to pay the judgment, whether it's cash or stock, doesn't change the value of the -- the benefit to the company. It's getting $1.9 billion.

THE COURT: No. I -- I understand. And I was, you know, trying to give the defendants an efficient way to satisfy the judgment, not then have them use it to make arguments like this.

MR. BROWN: And so --

THE COURT: I mean -- and so the other one is I am aware -- the company -- when the company says there's no benefit to them, then the board of directors can be sued for waste, because for the last many years the company has been buying back enormous amounts of its stock. So if it's a concession of waste, I mean, you can file a new supplemental complaint and, you know, the company can then -- the directors can be sued for waste. And so I get that.

MR. BROWN: I mean, it's just -- it's really incredible. It's hard to -- you know, we're all here --

THE COURT: I wouldn't spend any time on it.

MR. BROWN: We're making the best arguments we can, and they made one that's sort of -- we don't even need really respond to it.

Now, the other argument is what we call the 80-20 argument. That is, they say, "Well, we, the defendant, Grupo Mexico, ultimately owns" -- "now owns 80 percent of the company. So really the benefit is 20 percent of this."

And the answer to that -- and we cited a bunch of cases that they haven't been able to rebut.

There is no Delaware law support for that. It's a derivative case. We, the shareholders, have to stand in the shoes of the corporation. We don't get to sue directly for indirect harm. And so the consequence of that is you can't, after it's over, say "Well, oh, just treat it as if 20 percent of the judgment is distributed, even though it's not, and you'll only get a fee for that."

I mean, no. What would happen if this was insured? The money goes -- recovery was obtained. All the shareholders, including the defendants, benefit from it. It may be that they have some other det -- that there's a detriment that they had to pay for it; but from a derivative standing, there's absolutely no legal basis for that argument. You cannot pierce the corporate veil and say the -- the Court -- you know, forget about the corporation. I mean, it's funny. When -- when it's to their advantage to argue it's derivative and you have to meet all these requirements, to stand in the shoes of the corporation, you know, they're all over that. When it -- when it doesn't work for them, "Oh, don't worry. Derivative, no. It's really you, the individuals, asserting the claim."

So those arguments, to sort of minimize the benefit, just have absolutely no legal authority behind them at all. And so that's the -- that's the situation.

Now, obviously, you know, Your Honor had mentioned -- has ruled numerous times or said, perhaps in dicta, that we don't have a sliding scale here and that, you know, if you try a big case and you go for it, you know, that's when you get a big percentage recovery. Now, we -- obviously the Court said in the opinion this is not going to be that case and we should be conservative on the fee application. And, honestly, I don't -- I didn't know -- we don't know what Your Honor had in mind.

I mean, basically what we did was we looked to the second biggest case where a 22 1/2 percent fee was awarded, which the Court specifically described as conservative or not overly generous. And so that's what we're asking for here. It's obviously a lot more money in terms of --

THE COURT: Right.

MR. BROWN: -- the amount. But, you know, we tried a big entire fairness case and won. And we'll get to some of the other factors in a

second. So, to me, you know, I -- we felt that a 22 1/2 percent fee award was -- fit within what Your Honor described as a conservative request, given all the -- given the magnitude of the benefit in total for the company and the -- and considering how big it is in relation to the transaction. It's not a -- you know, if you -- if you've got a billion-dollar recovery on a $7 billion transaction, I mean, that's a big recovery; but it's not -- you know, I think a reasonable argument could be made that it's, sort of, you know --

THE COURT: I understand what you're saying, is that you took -- this is not one where Exxon Mobile -- you had some deal with Exxon Mobile and, you know, BP and the -- the deal value was enormous and what was at issue in the litigation is a -- sort of, a small part of a big gigantic --

MR. BROWN: Correct, correct.

So the next factor, obviously is effort and time and focus. We worked -- we put a lot of effort into the case, Your Honor. I mean, there's over 8,000 hours. Now, the defendants say "Gee, that's $50,000 an hour" or whatever the time is. I mean, I don't know what to say, really, other than

when you're talking about recoveries of a billion or $2 billion, the time is never going to -- if you, you know, are trying to look to the hourly rate, it's never going to be comparable to something that's awarded in regular cases. I mean, this is, sort of, probably a once-in-a-lifetime type case or, you know -- I don't know how many of these come along; but, you know, to me, the hours after you try the case --

THE COURT: Well-balanced people don't need more than one.

MR. BROWN: -- and actually -- you're right, Your Honor. One is plenty. One is plenty. As long as they're recoverable.

THE COURT: The thing is that corporate litigators are rarely well-balanced. So it's ...

MR. BROWN: Well, you're -- you're exactly right, Your Honor.

But in terms of the effort, you know, we put a lot of effort in. We went around the world taking depositions and, you know, we hired a -- what we consider to be a nationally recognized investment banking firm, with the top guy in valuing, you know,

natural resource companies. I mean, we -- we did it the best we could.

Now -- so -- but I think, you know, hours in a settlement context may have, you know, more -- there needs to be more of a check, maybe; but here, after you try the case, I think it should be the exact opposite. If you can try an entire fairness case, the less time you can do it in, the more efficient you can be, the better -- the better job you did. So there should be an incentive.

And this is the same argument that's obviously made all the time. Being efficient should be rewarded because if you don't do that, then it's just going to create an incentive for people to just work more hours, put more lawyers on the case and say, you know, "We only get paid if we have, you know, a hundred thousand hours" or whatever.

So, you know, after the trial of an entire fairness case, 8,000 hours, I think, is enough hours; and the effort that was put into this case is is significant enough to warrant a 22 1/2 percent fee, which is not at the upper end of the range. It's, sort, of -- probably at the lower end of the range of percentages that would be -- I would think would be

awarded after trial.

Of course, it's a contingent case. It was fully contingent. So this -- we would have gotten -- obviously we -- we get nothing if we lose. And there's still going to be an appeal. So it's not over yet. And we didn't -- and there was a lot of expense here. Like I said, we didn't -- and we understand that the Court almost always awards a fee that's inclusive of expenses --

THE COURT: They're going to appeal? Really?

MR. BROWN: We're trying to convince them that they ought to give up.

THE COURT: I thought they would just -- you know, this would be one everybody would move on. I kind of figured there would be an appeal.

So you're saying that you're going to have to work those hours, anyway, to --

MR. BROWN: I mean, I think, if we're talking about hours, I mean, I -- you know, I don't know how -- I can't, sort of, say, you know -- my argument is there was -- there's a significant amount of hours --

THE COURT: So you might go down to

$45,000 an hour after the appeal.

MR. BROWN: I don't work by the hour, Your Honor. So, you know, they can say, you know, this is the hourly rate. We get paid for performance. When we do individual appraisal cases, you know, there's no check in there for hours. It's performance. That's what the investors care about, "Have you produced something for me? If you can produce something for me that's really good, I'm happy to give you a third. I don't care -- and if you can do it in 10 hours, good for you. We'll get it done quicker and we're happier with it."

So, I mean, in this context hours have -- I think have minimal significance. It's not no significance. It's something the Court should consider. It's one of the Sugarland factors; but, you know --

THE COURT: Right.

MR. BROWN: -- a fully contingent case -- I mean, we spent $800,000 on -- on our expert because, you know, we went with a national investment banking firm. I mean, that's money that's completely at risk. That's real money paid out, you know, during the course of the case. And we -- you know, we

understand that the Court's preference is to award a fee inclusive of expenses. So we have no reason to pay more than we -- you know, we have a reason to be efficient in terms of our experts. But this was a big case. We wanted to get what we thought was the best guy, and, you know, we did that. And so we were all in on the thing.

And the contingent nature of the case, you know, involved -- created a very significant risk. And so that also, I think, points to a fee, you know, of the magnitude -- of the -- supports the 22 1/2 percent fee requested here.

The difficulty of the litigation. You know, it's hard for me to -- I mean, it was an entire fairness case. And, you know, it was -- it was difficult; but there was one -- there was one thing here that I'll never forget, which was after summary judgment, after pretrial briefing, after the first witness testified, Your Honor said to us, to the lawyers, "I don't see any blood in the water. This doesn't feel like a billion-dollar case."

Now, I understand the Court may say things to counsel during -- at any point in a case for reasons other than conveying exactly what the Court's

thinking. But, you know, everyone at that point on both sides thought this is headed in a specific direction. I mean, to me, it's a difficult case when you have -- when that happens to you at the beginning of the trial.

THE COURT: That's because I was trying to get a feel for the case, to be honest. I mean, it really wasn't an emotional trial. And one would have thought, given what was at stake --

MR. BROWN: And, you know, so --

THE COURT: I believe I also said some things at the end of the trial to people --

MR. BROWN: And so to me --

THE COURT: -- that were a little bit different.

MR. BROWN: I agree, Your Honor. To me -- but to me, the difficulty and complexity of the case is really something -- it's -- you know the answer to that. Whatever I can argue --

THE COURT: No. I agree with you. I mean, in some ways, you know --

MR. BROWN: So -- but I do think --

THE COURT: No. But I think in some ways, honestly, you had to focus on the valuation

issue that was important in the case that I was skeptical of, as you recall, because I didn't -- to some extent, I couldn't really believe anyone did it.

MR. BROWN: It's hard to believe.

THE COURT: And I still kind of can't, which is why -- I mean, when I denied summary judgment, as you recall, summary judgment was about, like, well, wait a minute. Their market price -- their market value isn't real; right? Isn't that going to be their theory? Remember that?

MR. BROWN: Uh-huh.

THE COURT: And at trial I was still going -- and then when they say, "Oh, yeah, it's real," that -- okay. That was the kind of -- and then no one ever -- they never backed away from that, and there never seemed to be any evidence -- that was a pretty big moment. And that was why I went over the record a gazillion times to try to figure out what they were doing.

But you're right. It was a -- I don't know what's a difficult case. There aren't a whole lot of simple cases in the world. This one was a little unusual. And, as I said, I remember you having a kind of more Occam's razor approach that I was

highly resistant of, to be honest. And --

MR. BROWN: So I don't know. Look, to me, it's -- your -- it's up to you to decide, you know, how effective we were in, you know, organizing the case, making arguments, presenting it, structuring it. I mean, that, to me, more than difficulty, I mean -- difficult's a weird concept. I mean, I'm sure if I have to do brain surgery, I mean, it's too difficult, I can't do it; but for a brain surgeon, he can do it. I mean, this is what we do. We try these types of cases.

THE COURT: Uh-huh.

MR. BROWN: So, you know, I'm sure a lawyer that does personal injury, you know, this would be extremely difficult. So, I mean, this was not an easy case. It's not easy to, you know, go up against -- to go into a matter and say the preeminent, if not one of the preeminent investment bankers in the world, Goldman Sachs, was headed in a completely wrong direction and a list of individuals with very impressive resumes, you know, went in a completely wrong direction. And to try to prove that, to me, is a difficult task. And the defendants I think very much believed it was an impossible task, because from

everything, you know, we got from them throughout the case, we were left with the impression, contrary to what they're saying now, that they thought there was zero chance, essentially, of us recovering anything in this case. So, to me, it's a difficult case.

The standing and ability of counsel, again, that we leave that Your Honor. We're here all the time. If we were in a different court where they don't know the lawyers, you know, we would put in a list of cases that we had worked on or results that we had obtained; but we leave that factor to Your Honor, too.

So it seems like, given the amount we're asking for, I should be standing here for more than a half an hour; but that's all I have, Your Honor.

THE COURT: You think you should -- well, I don't really -- we're not duty-bound in Chancery for everything to be longer than a Supreme Court appeal. We really don't have to. So I'm happy for you to reserve.

MR. BROWN: Thank you, Your Honor.

THE COURT: Let me hear from Mr. Stone, Mr. Jenkins, whoever.

MR. JENKINS: Good morning, Your Honor. May it please the Court. I've asked Mr. Cordo -- we have a chart which I'll be referring to in the second part of my presentation. And for those like myself, when I get to that -- who have poor vision, when we get to that point, Mr. Cordo will pass around that chart in -- in the form of a piece of paper.

Your Honor, in my friend, Mr. Brown's, argument this morning there was some assertions about what the company was arguing, which, in fact, are not what the company is arguing. So let me present, in fact, the company's argument. Again, I wasn't here at trial because Mr. Renck stood here in case the company needed defending.

The company in a derivative suit has a limited role. And today our role is heightened because the fee is being sought to be taken from the corporate treasury. And, therefore, we have a legitimate -- legitimate grounds to try to keep that to an appropriate fee.

Under our law, of course, all fees must be reasonable. Your Honor also said the fee here, the fee application should be responsible. We

also know from what Chancellor Chandler has said in the past that the fee may not be a, quote, windfall. That's in the Seinfeld case, the Bank of America case.

THE COURT: Well, what's a windfall? A windfall is someone else bought a Powerball ticket and the wind blew it and it fell in someone's lap?

MR. JENKINS: Well, Your Honor --

THE COURT: I mean, the term "windfall" -- there was -- one of the most important things a client of mine, who was an elected official, did, took two years of behind-the-scenes work fighting in Washington, DC, other things, has resulted in billions of dollars to the state. And it was described by The News Journal as a windfall. And amazing. Sometimes when people do things -- you know, there's nothing that's going to be a windfall about this. Nothing.

MR. JENKINS: Your Honor --

THE COURT: So I -- I mean, really, we need to put this in terms of, you know, what is it about lawyers getting money that's ickier than investment bankers or other people in society. This was -- the judgment -- you know, I don't know what the company will do on appeal. I assume you'll be neutral

except as to the fee, you know?

MR. JENKINS: That's what I think, Your Honor, yes.

THE COURT: Yeah, the company doesn't get this benefit without the plaintiff's lawyers.

MR. JENKINS: Well, Your Honor, if -- if I might respectfully disagree on two points.

First, the existing law in the Court, Chancellor Chandler does refer to the necessity of preventing windfalls. Now, one can debate --

THE COURT: There's existing -- there are decisions by Chancellor Chandler that say -- and I have the utmost respect. I miss him every day. One of the people I most respect in this world. He also articulated the declining -- he had a couple things where it talked about declining percentage. I don't believe every member of the Court has ever bought into that. I don't believe our Supreme Court has ever said that. And I don't really understand why people can get, like, $1 million, which would be a million times -- well, actually it's an infinite -- it's an infinite number above that received by a class member. Every member of the defense team here has come in and not objected to fees where there's been an infinitely

greater financial benefit to the plaintiff's lawyer that they've negotiated than will go to a class member. Why is it infinite? Because the class got bupkes, zero, nada, nothing. Then we have the Monitor versus Merrimac fees of the '80s. Remember that era?

MR. JENKINS: I was here, Your Honor.

THE COURT: I actually had some hair. You know, I'm not saying it would ever approach the fullness of you or Mr. Brown or Mr. Stone, but I had hair back in the '80s. And people can come in a big deal, and a takeover premium would go up because there's multiple bidders, and then the monitors would get $3 1/2 million for monitoring a bidding contest. Get fees all the time. 33 percent of a financial benefit of 1.4 million on a deal of, you know, a gazillion.

Why aren't they, then, just -- what's a windfall? There's got to be an entire -- just categories of windfalls that you and every defense lawyer in this room have sat there -- not only sat there and not opposed, you have shaped a world of windfalls. We could fuel -- we could actually get rid of carbon if we had turbines fueled by that wind; right?

MR. JENKINS: However, Your Honor --

THE COURT: But, however, we have this one case where it's a windfall after people fully go to trial in an entire fairness case, get a litigated judgment of over a billion dollars despite, frankly, the judge's initial skepticism about their theory, extremely able counsel, and what I award them will be a windfall.

MR. JENKINS: Well, no, Your Honor. We're trying to get you not to award --

THE COURT: No, no. What is the level at which it becomes a windfall?

MR. JENKINS: I think it becomes a windfall, Your Honor -- and I do think that is a useful term. I understand Your Honor saying it's not, and I understand it can be misused; but a windfall refers to something that goes well beyond the rational expectations of the parties and they just luck into it.

Now, Your Honor, I would suggest --

THE COURT: And, again, I just --

MR. JENKINS: As a definition, Your Honor.

THE COURT: Okay. So --

MR. JENKINS: As a definition.

THE COURT: So can we just monitor -- is that the new thing, that we should be applying for executive comp, investment banker fees, the fees of investment advisors? It's even been -- frankly, there have been M and A lawyers or two who have done, you know, pretty good deals for themselves and turned themselves into quasibankers. Is that a windfall?

MR. JENKINS: Your Honor, whether it is or not, that doesn't actually argue against windfalls.

THE COURT: I'm trying to have a test. Is it when the "E" word on the part of -- like, lawyers are hardly entrepreneurial to begin with. And one of the people -- there's a lot of -- frankly, I'll stand up for our profession anytime in M and A and say the most important role in M and A transactions is the lawyer, not the banker. Bankers have ranges. If lawyers miss the particular, everybody gets hosed. The bankers always make the big fees. The lawyers get hourly rates. Lawyers often by temperament are conservative, not risktakers. Plaintiffs' lawyers are more risk taking than the typical lawyer.

So is this just -- is it an envy test?

Is it when someone looks at a fee and says "That's just way too high" and no one, despite demonstrated achievement, should get that much money out of one case?

MR. JENKINS: Your Honor, I will say -- this is not Jenkins talking. This is what I believe the law of Delaware would be -- there will be some limits applied by the Supreme Court. I have little doubt of that, because at a certain level legal fees start to be so high, that they might destabilize the system.

THE COURT: Well, is it really the case that what we're going to be is destabilized by plaintiffs' lawyers -- no; plaintiffs' lawyers who go to the mat for the class or for the derivative company that they represent, that what we have now is a system where it's just -- the incentives are really just too much skewed in favor of the lawyers going to the mat, and it's not these other things that you guys negotiate all the time that are the windfalls, where the only one who gets paid in a case are the defense lawyers who get paid their hourly rate, their conservative hourly rate, to negotiate the not-to-oppose level of the plaintiff's lawyer, who

then gets paid for having delivered a therapeutic, intellectual value to the class of more information about the deal that was sued upon?

MR. JENKINS: With respect, Your Honor, Your Honor just changed --

THE COURT: No, no.

MR. JENKINS: Previously we were talking about --

THE COURT: No, because you're trying to create -- you just said we've got -- the Supreme Court will impose limits because we're going to have a societally -- I'm at a risk of destabilizing the American republic.

MR. JENKINS: I didn't say that, Your Honor.

THE COURT: And -- and -- well, what I'm saying is I don't really get -- I haven't gone to bed any of the years I've been on Chancery with the sense that we have now bred a current generation of plaintiffs' lawyers that are like pit bulls in the sense of, whether they want to or not, whether it's in their self-interest or not, they just can't help but just try to tear at the flesh of whoever is on the other side and that what you have to do is actually

restrain them because they will never ever settle early. They will always -- if -- frankly, if they will have their throat ripped out by the defense, they're going to do it even if it would be rational to just settle peaceably and take the fee, but that we just have bred this generation of just knock-down, drag-out plaintiffs' lawyers where we can't get cases -- frankly, the Court's just filled with plenary hearings. The federal courts are filled with plenary hearings. No one will recognize a good deal and settle for something modest.

Is that really where we are, Mr. Jenkins?

MR. JENKINS: I would say, Your Honor, Your Honor has asked -- has answered a lot of questions that I didn't pose and my answer was not meant to say that.

THE COURT: Okay.

MR. JENKINS: At a certain level, yes, indeed, I think you can run into problems. I did not say today we will run into problems, but I said -- Your Honor posed a hypothetical. Yes, I believe there are certain limits. I believe the investment bankers and others have tested those limits. We have seen not

only societal problems but a lot of political problems derived from that. So is it possible? It certainly is -- is.

Now, the question is whether this is a windfall or not. I would suggest, Your Honor, that the most profound argument in favor it was a windfall, of six years of doing very little and this case almost was dismissed for lack of a prosecution. This is not one's normal case.

Now, Your Honor, I would not sit here today -- stand here today and tell Your Honor there is never a case where a $400 million fee is justified, because I think one can come up with -- there have been such cases before in the federal courts and I think one can come up with such cases. I am not saying, Your Honor, that the risk that these plaintiffs took should not be compensated, nor am I saying that they did, in the end of the day, a bad job. But what I would say, Your Honor, is they showed everybody what they thought of this case. Now, if they thought -- if they thought this was a case that should be pursued aggressively, they could have had this tried in 18 months.

THE COURT: I understand that. And

I've asked -- I mean -- but they've started at 22 1/2 percent of the benefit. That's what they're asking for, which is not, by any means, at the high end of things that have been awarded in this Court, which I assume you would agree would be windfalls.

MR. JENKINS: Not necessarily, Your Honor. I think you have to look at the facts, the specific facts.

THE COURT: Yeah. You know, again, I -- I've learned to get past this. But some of the things that have been, you know, dressed up as financial benefits, right -- this is a percentage of the reduction of a termination fee that was already 1.75 to 1.5. And we factor in the probable thing of the interloper, and it creates a -- you know, a quantifiable financial benefit of $4.2 million. And so we're only asking for 1 -- you know, 1.5. I'm sorry. I've just seen a gazillion of those. I've seen all your briefs in them --

MR. JENKINS: Your Honor --

THE COURT: -- and I --

MR. JENKINS: -- I was objector's counsel in PAX Communications.

THE COURT: I mean -- right. So, you

know -- and -- and so I -- and I also know how slow this case was. I got it moving. I'm sure a lot of people can go back in time on this case, you know, and what it could have been or what it wasn't. That's why people resolve matters, okay? Clients make decisions. And they ultimately, though, went to trial and won.

MR. JENKINS: And it was Your Honor who asked the key questions.

THE COURT: It was --

MR. JENKINS: It was --

THE COURT: you know --

MR. JENKINS: -- Your Honor asked --

THE COURT: -- because I want to be really clear about it. The theory on which this case was eventually won was basically exactly what Mr. Brown got -- tried to get me to grant summary judgment on. It was exactly that. Mr. Brown came in and said "Your Honor, how can you pay" -- "how can you face something" -- "how can you basically treat something that's got a demonstrable market value and treat it like it's got some hypothetical value and buy a controlled company from the controller?"

Now, I am actually pretty -- I'm, you know -- I'm a pretty conservative judge. I don't

lightly buy stuff that doesn't make sense to me, and I didn't buy it at summary judgment. I asked all kinds of questions. They were all inspired by me trying to test out Mr. Brown's theory, which all the defendants were on notice of.

MR. JENKINS: Oh, I'm not saying there was anything wrong.

THE COURT: In terms of putting it to me, this is the Court of Chancery. One of the great things, you don't have a jury, and one of the things can be a skeptical mind. I remember the argument. I remember thinking this can't be real. It's just got to be something. Is it the public float? Is it all that kind of stuff? Does this really have a market value like this? Is this just sort of a -- a thing? Yeah, I asked a lot of questions, precisely because I was skeptical of the theory, which is part of why I'm not sure it was a windfall.

MR. JENKINS: Well, if Your Honor hadn't asked the questions about whether the market value was real, at least my reading of Your Honor's opinion -- I wasn't here in court, but my reading of Your Honor's opinion, really the central fact is -- is whether that market value was real. If Your Honor

hadn't asked those questions, I'm not sure Your Honor could have written that opinion. They --

THE COURT: You know what?

MR. JENKINS: I'm not saying there's anything wrong, because there isn't, with the Court asking those questions.

THE COURT: Well, but how are -- frankly, if I didn't ask the questions, the defendants are going to tell me it was -- it was fiction?

MR. JENKINS: I don't know, Your Honor.

THE COURT: I mean, I gave them a chance. I -- part of what I asked him was to tell me, tell me it's illusory. I mean, it's -- frankly, it's fair notice to people. And when you sit there and say "No; there's a great market for our stock" and you don't understand the implication of your own answer as a -- I mean, that -- that's -- that was why I was doing it, was to test their theory. Frankly, Mr. Brown should -- he should rely on the market price unless there was some argument that it was not a reliable indication of value; right?

MR. JENKINS: Well, Your Honor, I --

THE COURT: He was supposed to prove

it was a real value?

MR. JENKINS: All I'm noting is it was Your Honor's questions.

THE COURT: I did ask -- yeah. Again, it was -- it was because -- as I said, I was here; right? And one of the things -- you know, I have to be the fact finder. I was skeptical to their theory. And so I wanted to test it out before myself before I relied upon it. I wanted to give the defense a chance to tell me -- you know, I was surprised the defense, frankly, didn't have any market efficiency argument or anything like that, because it's kind of -- when you -- if you start from the idea that Southern Peru's stock trading price was real, you know, I'm not sure -- frankly, I think there's an argument under Rule 56 I should have granted the summary judgment motion.

MR. JENKINS: Perhaps, but I know Your Honor didn't.

THE COURT: Well, I didn't because, honestly, I was skeptical of their theory. And that's what I mean about calling it a windfall, which is their theory -- he had -- Mr. Brown had an Occam's razor approach to this in some ways. He came in and

said "We have a proven market value of the currency used in an acquisition. It was worth this on the day of the deal, and there isn't any valuation in the record that suggests that what you got was anywhere near that."

I said, "Come now. Thinly traded currency. Probably not a real value. I'm going to hear the case at trial."

The defendants know all that. The clients know. They're sophisticated people. Grupo Mexico had its eye on the ball the whole time. Whatever happened, it said 3.1 billion. They knew whether they thought it was real or not. So when we get to trial, I know what the theory of plaintiffs is and I'm still kind of skeptical.

But what I'm saying about windfall, did I ask the questions? I mean, yeah. Sometimes it's interesting. As you know, Mr. Jenkins, when a member of this Court -- and I'm not the only one. Vice Chancellor Lamb used to do it all the time, Chancellor Chandler. It's amazing when either -- you know, defense lawyers -- you know, sometimes we have to do this for defense lawyers. You can't get the witness to say yes or no. Someone like me turns to

the left and says "It's been about 10 minutes now. Is it yes or is it no?" And all of a sudden it goes to yes or no. So --

MR. JENKINS: I have no criticism of the Court asking questions. I believe it's part of the Court's job, and I'm not --

THE COURT: But what I'm saying is, in terms of my own actions, because I was here, I was actually -- in terms of the windfall idea, the idea that -- I don't -- the basic idea I ultimately embrace, which is that you do have to make a value -- you do have to match up the value of the acquisition currency, and you can't pretend that we don't live in a nation with money, that was the plaintiff's theory. That wasn't mine.

MR. JENKINS: Having read the briefs, Your Honor, I -- I might think that's not a hundred percent overlap there. But let me --

THE COURT: No, no.

MR. JENKINS: -- at least move on --

THE COURT: And you might say -- look, do I do my own -- do I look at the record hard myself? Of course. I'm a judge. Okay?

MR. JENKINS: That's your job. No,

I'm not saying in any way that's what the Court shouldn't do. What I am suggesting in their application there is a windfall aspect.

And let me turn to this chart, Your Honor. I'll try to make this brief because Your Honor doesn't have all day. If Mr. Cordo can pass this out and let me hand up to the Court and Your Honor's clerk copies, with the Court's permission.

THE COURT: Uh-huh.

MR. JENKINS: Now, Your Honor, I will not swear all these calculations are correct; but I am told that they are made by Excel and, therefore, not attorneys and, therefore, probably more likely to be correct than not.

What we've put here, Your Honor, is they're all federal cases except for this one. All these cases from the federal courts where we have the total hours billed, value of time, blended hourly rate, out-of-pocket expenses, the total fee award all in, the effective hourly rate -- that includes in the calculation the out-of-pocket expenses -- and the multiplier.

And as Your Honor can see, we -- that with all these big federal cases -- some -- most of

them in the end settled. Some I believe did go to trial. Most of them show 2, 3, 4, 5, or 8 times an hourly rate. This case and our friend's fee application would show 123 times the normal hourly rate.

Now, in Delaware we do not only look at the hourly rate, but we do look at -- it is something significant. What is it about this case, Your Honor, I would ask, that makes it so much an order of magnitude, almost an order and a half of magnitude in that column --

THE COURT: Was the Enron case tried?

MR. JENKINS: I don't believe so, Your Honor.

THE COURT: Was, like, every other plaintiff's lawyer in the United States of America putatively billing on the Enron matter?

MR. JENKINS: Yes, Your Honor.

One of the things -- if Your Honor says, you know, some of these hourly -- these hourly totals, would I trust all those hours? No, Your Honor --

THE COURT: How many of these --

MR. JENKINS: -- whereas I do trust

them here.

THE COURT: -- were tried?

MR. JENKINS: I would have to check, Your Honor. Most of them were settled, but most of them were huge -- huge matters. The trial in this case did not take --

THE COURT: Most of these were also matters in which the principal fee should have gone to the people of the United States of America or the people of particular states of the United States of America.

MR. JENKINS: I think the stockholders were cheated in most of these companies, too, Your Honor.

THE COURT: No. No. What I mean is if there was any fee to be awarded for remediation in many of these cases, it was because -- remember -- I mean, I don't -- I'm not saying that the plaintiffs' bar doesn't do some good work. Without the Securities and Exchange Commission, state attorney generals and U.S. attorneys and accounting standards, most of the stuff just doesn't even happen. And -- and, you know, you're coming in and you resolve the civil actions as part of the governmental, you know, thing -- I mean,

I'm not saying people didn't do good work in Enron. I mean, in the whole system there was massive fraud. But my sense is that, you know, there were people went to prison, I believe.

MR. JENKINS: Yes, Your Honor, they did. And in other of these -- it's a variety of things.

But if we look at this as a reality check -- and I think, at a minimum, what our cases say is the hours should be looked at, reality checked. The suggestion here is this is an order of magnitude greater than any of these other a hundred million-dollar fee award cases. And I would ask what is it about this case? Was it tried? Yes.

THE COURT: Were any of the other ones tried?

MR. JENKINS: I believe so, Your Honor, but I'm going to have to -- I cannot -- standing here, I can't tell Your Honor. I can get back to Your Honor on which.

And trial is important. I'm not -- I'm not saying that trial isn't important, going through trial. But in this case trial was a couple of weeks. It wasn't -- it wasn't one of these --

THE COURT: No. And in fairness, it was a couple weeks. It was shorter than that.

MR. JENKINS: Well, it was -- it was not an enormous --

THE COURT: It just felt like a couple weeks.

MR. JENKINS: I know Mr. Renck was gone for -- maybe he wasn't telling me quite where he was that whole time.

THE COURT: Well, I'm sure he doesn't; but that's been a problem of his for a long time we've all known about.

MR. JENKINS: WorldCom 2005 and Allapattah, Mr. Cordo tells me, were, indeed, tried.

THE COURT: Okay.

MR. JENKINS: But the trial here was not -- it was big, but it wasn't enormous. It wasn't out of control. It wasn't anything like that.

Effort, real effort was put in this case, but it took place over six years -- years. And I suggest, Your Honor, the reality check of that says there would be, in fact, something incorrect about what they're seeking.

Now let me explain why, Your Honor.

This is where I think I heard before about well, we're wrong on what we're arguing. And I don't think we're arguing what my friends think we are.

First, the benefit claimed is 1.9 billion. That includes approximately 600 million of interest.

THE COURT: Yes.

MR. JENKINS: I believe, Your Honor, given the -- given the six -- six and some years that it took to get this case on, it is inappropriate to compensate counsel out of the interest.

The second is -- then we're down to about 1.263 billion. That -- that stock will be coming back to my client. Now, I think Your Honor -- Your Honor says you award stock to make it easier to pay; but when you think of this as an equitable remedy, since too much stock was issued, according to Your Honor's opinion, the logical remedy is, in fact, to cut that stock award --

THE COURT: No, I don't need to play Revlon/Time-Warner games. I'm not a CEO trying to avoid Revlon duties.

MR. JENKINS: I'm not talking about Revlon duties, Your Honor.

THE COURT: I mean, I don't find -- the fact that it was a stock deal to me doesn't have any logical translation into that the damage award to the company should be in stock versus cash. I was simply -- you know, whether people believe it or not on the defense side, I tried to be conservative in the remedy. There were many remedial options here which were even more substantial for Grupo Mexico. I thought, as a financing matter, it would be, frankly, easier for them and would have -- because of the nature of the company and the effect for the company, it was a way that you could do it which would be more defendant-friendly without any real harm to the company in terms of the benefit it was receiving. So I -- I don't distinguish it at all.

And, again, if the directors wish to sue themselves for waste for their substantial stock buybacks -- I mean, there was some implication -- I'm a pretty good reader of briefs, and I'm not the only fairly good reader of briefs in my chambers. And we all got the impression that people were basically saying there wasn't any fund, there really wasn't a benefit to the company because, you know, it's just a reduction in the stock and --

MR. JENKINS: There is no benefit to the company. There is benefit to the minority stockholders, Your Honor. Let me explain why.

THE COURT: Yeah. See, I don't want to hear about it, because unless your directors want to plead -- really, unless the directors wish to plead a declaratory judgment against themselves for waste for their approval of -- I think I have it here --

MR. JENKINS: They buy back stock all the time, Your Honor.

THE COURT: They have -- since 19 -- since 2000 -- I still think it's, like, the last century. Since 2008, do you know how much they bought back?

MR. JENKINS: They bought back tens of millions of shares, Your Honor.

THE COURT: Oh, no; more than that. Don't trivialize their commitment to this nonbenefit to themselves as a company. They have -- they have purchased $715 million of their shares.

MR. JENKINS: That would be tens of millions of shares, Your Honor.

THE COURT: Oh, no. I understand. You were saying 10. See, we all know. You're a

great -- really good litigator.

MR. JENKINS: I said tens of millions of shares, Your Honor.

THE COURT: Oh, tens of millions of shares. Okay.

MR. JENKINS: Yeah. It's not tens of millions of dollars. It's tens of millions of shares.

THE COURT: Right. So the point is the directors of the company have a demonstrated 700 million -- in excess -- they've actually approved up to a billion in authority to do this thing. I'm assuming that they're good directors, faithful fiduciaries who are trying to benefit what's called Southern Copper now, I think, by taking beneficial action. And if you can, therefore -- if you're paying actual market value, 700 million bucks, if you can reduce your outstanding shares in this way, that's a huge benefit to directors who have approved that program.

And I'm just going to -- I'll let you -- if you wish to appeal, you can make the argument to the Supreme Court; but I'm just -- my mind, Mr. Jenkins, in the preholiday mode, my mind is not sufficiently elastic and -- to hold in these

incompatible ideas -- these seemingly incompatible ideas. And so I'm -- I'm not able --

MR. JENKINS: Three minutes, Your Honor?

THE COURT: No.

MR. JENKINS: One minute?

THE COURT: No.

MR. JENKINS: Can I say they're not incompatible?

THE COURT: You can say that, and I'll accept you believe that the distinction between receiving back a ginormous amount of shares from the controller is of no benefit to the company, but buying back a ginormous amount of shares from the public at market is. That's --

MR. JENKINS: I don't -- I don't argue that, Your Honor. I say they both help the stockholders.

THE COURT: What I'm saying is -- no. See, here's my other -- I'm going to say a simple thing about my acknowledgment about what our law is about. When boards of directors act on behalf of companies and the company is solvent, the reason they take action is to benefit the equity holders, assuming

they satisfy all the contract claims and legal obligations. And that's why it's never made sense in cash mergers when people say the objective of a cash merger is obviously to benefit the stockholders. You can negotiate a cash merger because you think it's good for the stockholders to sell the company.

Derivative actions, the reason it's called a derivative action, it's about who gets to control things. It's not that stockholders don't get to benefit from a derivative action. Of course they do, but they benefit derivatively of the company and the control goes to the company. And we don't disregard the corporate entity.

So I believe there's a huge corporate benefit that's perfectly in accordance with the board's own demonstrated stock buyback program. And if -- we disagree about -- it's really not going to affect the fee. I mean, it may affect it on the Supreme Court. But what I'm saying, Mr. Jenkins, I read your brief, I read Mr. Stone's. You know, I don't really get it. And so --

MR. JENKINS: Your Honor, if Your Honor instructs me not to -- but I do think the stock buyback's like a dividend. I think it helps the

stockholders.

THE COURT: And if it's -- if a stock buyback is like a dividend in the sense that, you know, it makes the rest more valuable --

MR. JENKINS: Yes.

THE COURT: -- then so does this.

MR. JENKINS: It increases -- buyback increases the per-share value.

THE COURT: This is like a free stock buyback program funded by the --

MR. JENKINS: It's exactly that.

THE COURT: And that's why it's a benefit to the company, just like the existing buyback program.

MR. JENKINS: If you take the existing buyback program as a benefit to the stockholders like a dividend is, you don't reach that conclusion. It doesn't increase the enterprise value of the company at all.

THE COURT: Many things that companies do -- again, that's not the point of a derivative action. If you want -- again, if you want me to have it be paid in cash, that's a different argument. You can factor it into cash, too.

So, you know, if you -- you know -- and there are ways to do it. But I'm not going to discount it. Again, my simplest way of dealing with these kind of arguments is simply take away the charity I gave for an efficient way to satisfy judgment and to say, in equity, I did it in equity. It's now being wielded as some sort of boomerang. And I'll just simply end the game and it can just be satisfied in cash, in which case there won't be any -- any question.

MR. JENKINS: And economically, Your Honor, the two have a different effect --

THE COURT: Well --

MR. JENKINS: -- is all I'm saying. I believe if -- I will not go into it, Your Honor, because I've -- I've heard Your Honor --

THE COURT: I'm sure it has a complicated -- I'm sure, especially in a nation like ours, where we still lead in -- we do lead in the innovative area of tax complications, that I'm sure that there is. But, you know, if you and Mr. Stone, if you all agree on this side of the table you want to structure it as a cash award, I really -- I'm not sure that Mr. Brown and his folks would really care.

MR. JENKINS: And, Your Honor, on -- for the company, it's not for us to say what the award is. What I'm saying is if the award is stock, it does have certain ramifications. I believe those are inarguable as a matter of economics, just like any stock buyback. I am not arguing stock buybacks are wrong.

THE COURT: Is it a bad approach? Do you not want it?

MR. JENKINS: Pardon?

THE COURT: Why would you not want it? Why would the company not want it? The company still has, like, 289 million of stock buybacks to do.

MR. JENKINS: It's -- it has a -- a lot of authority, and it probably in the future will get more, assuming the price of copper stays up.

THE COURT: Right. So, again, I think -- here's what I would say. I believe if Warren Buffett was planning to buy back a billion dollars in stock at market over the next three years and he could get a billion dollars of the stock back for nothing, I think Warren Buffett would like that.

MR. JENKINS: He probably would, Your Honor. Warren Buffett has also argued stock buybacks

help the stockholders. He's never argued they helped the corporations.

THE COURT: Okay. Again, you're in a different universe than I am where you believe that the purpose of derivative action, when it measures whether the first impact is on the company or something like that, that that means that when boards -- that the recovery has to be measured simply in terms of the balance sheet of the company as opposed to whether it's a benefit to the company's policies. Your clients are on record saying that it is good for the company and its stockholders to buy back masses amounts of stock.

MR. JENKINS: That's correct, Your Honor.

THE COURT: When they go -- if you want to go on appeal, say that I shouldn't think it's a benefit to the company and that -- and that your clients are confessing that they're engaged in ridiculously inappropriate behavior, that's fine; but people run companies when they're solvent for the benefit of the stockholders. There's nothing wrong with that. And there's nothing wrong in a derivative action that stockholders of the company get healthier.

The derivative action is an instrument to make sure that the stuff is controlled for the benefit of the company as a whole.

MR. JENKINS: I agree, Your Honor.

THE COURT: And I don't hear your clients objecting to the form of the remedy. I just hear them really saying it's not really a benefit; it's just a benefit to the stockholders. Well, companies try to make money for stockholders.

MR. JENKINS: Your Honor, we're not saying benefit for the stockholders is a bad thing.

THE COURT: And guess what? I can quantify one of the benefits to the company really easily.

MR. JENKINS: I'm sorry, Your Honor.

THE COURT: Well, if the company was allocating an additional $289 million to buying back stock in the foreseeable future, now I don't have to do that. Right? Or you get -- or, if the company really wants to still buy back another 289 on top of this, it just shows what a wicked cool benefit it really is to the company. Well, if the company's board still believes it's good for the company to still do the full billion plus this, it's just got to

be wicked great.

MR. JENKINS: What -- what I would just argue, Your Honor, is -- is -- I understand what Your Honor is saying, that the substitutes could substitute for another buyback and the company has money. But otherwise I would just say I hear what Your Honor is saying.

THE COURT: Uh-huh.

MR. JENKINS: But the arguments Your Honor is making for our side aren't quite what we're saying.

THE COURT: Okay. Well, I -- I'm not -- and that's what I said. Sometimes things are too subtle for me.

MR. JENKINS: I -- I -- Your Honor, okay. Very well.

THE COURT: I got your point. And I'm -- and -- and your papers were excellent, and I've -- and I get your central point, too, on the legal fee, Mr. Jenkins.

MR. JENKINS: In which case, Your Honor, I should sit down.

THE COURT: Uh-huh.

Mr. Stone.

MR. STONE: Your Honor, I really don't have anything to add. I think Mr. Jenkins and you have had plenty of discussion about some of the issues. I don't want to agitate the Court by trying my hand at the same arguments.

I would only mention that I just think it's not realistic to think that there are not limits on the common benefit doctrine. There have got to be some limits. At some point a fee award becomes unconscionable. And we would suggest that the Sugarland test was set up for that reason. It's got eight factors, not one. And we believe that the time and effort has to be a check on the size of any fee award. And in this case it's wildly excessive.

THE COURT: Thank you, Mr. Stone.

Mr. Brown.

MR. BROWN: Just a couple of things, Your Honor.

All these cases are federal securities cases. And what happens in federal court is these -- these are cases handled by huge federal securities class action firms. And they know very well in federal court you don't get paid unless you have hours -- you know, just hours out the wazoo. And so what

happens is they just throw -- and that's -- that's not our approach here in Delaware, and that's just not what we do. And if it means we don't get a fee like they do, then that's what it is. We're not just going to throw --

THE COURT: You have to have a huge lodestar out your wazoo --

MR. BROWN: I mean, we're --

THE COURT: -- is that the idea?

MR. BROWN: I mean -- and so that's just a reality of what happens. I mean, they know lodestar is real important. So just boatloads of lawyers are thrown at things. And, you know, I'm not criticizing it. That's just the -- that's the incentive process that's been created. And so that's what happens.

A couple little points. You know, it is correct, Your Honor asked very important questions; but, you know, Mr. Jenkins wasn't at the trial. He doesn't really know what happened. We're all talking about the key witness of Mr. Handelsman. We asked the question, "What's the stock worth?" And he said, "It's worth the market price." I mean, we -- we kind of left it because we were afraid the guy was going to

wake up and give answers helpful to the defendants. And when Your Honor started pressing him, we were oh, like, no. He's going to get a chance to -- he might wake up here. And he didn't.

So, I mean, it's not that we didn't ask the right questions, I don't think. I mean, Your Honor really pressed him on the important point where we brought him to where we thought, you know -- to the praecipe where we were kind of afraid to --

THE COURT: Well, no. I get -- I mean, you're -- I'm in a different position than you are.

MR. BROWN: I understand that.

THE COURT: I asked the why. I asked the, you know -- you're, like, "I got him so far where I need him to go and I don't need the devastating" --

MR. BROWN: So basically what they're saying is, you know, we didn't do a good job at the trial, we didn't ask the right questions, it was all the Court's questioning. It's funny. In these cases, to some extent it is all the Court's doing. You wrote the 105-page opinion. You do all the analysis. But that's the process here. And so, I mean, I -- you know, we leave it up to Your Honor to make the

assessment and -- of, you know -- that's appropriate in the case.

Now, you know, I -- it's incredible to me that the -- the guy -- the person who's purportedly representing the company can stand up here and say -- in effect, what he's saying is Your Honor's made -- there's an inadvertent effect of Your Honor's decision; that is, you're really not granting them a $1.2 billion recovery because you're letting the company -- the defendant repay it in stock. He has an ethical obligation to come in here, if he's representing the company, and argue that that should be taken out of the opinion because it -- it's really not a benefit to the company. And so the company's position is, and has to be based on Mr. Jenkins' arguments, that that should be taken out of the opinion, that they should be made to pay it in cash because they believe the -- that even though the Court wasn't attempting -- or we don't believe the Court was trying to lessen the -- the judgment, it, in fact, does.

So, I mean, I think the company's here on record saying that that should be -- the option to pay in stock should be removed because that has to be

their position. Because if they're trying to -- if they're --

THE COURT: Are you looking for that yourself? Do you understand that argument? I mean, I --

MR. BROWN: I don't think it matters. I mean, I don't know why Southern -- why Grupo Mexico won't just tell us what they're going to do.

THE COURT: I assume they're going to appeal.

MR. BROWN: But whether they're going to pay it in cash or stock, anyway --

THE COURT: That would be my -- you know, unless you-all, you know --

MR. BROWN: Right, right.

THE COURT: -- work something out. And you haven't done it to date. So ...

MR. BROWN: There's never going -- this is beyond working out, this case. This is going to the very, very, very end; petition for cert., I'm sure. I mean, they'll do -- it's just not something that's ever going to be resolved.

Now, Mr. Jenkins did say we shouldn't get a fee on the interest. Well, first of all, I

think we're already -- that's already factored into this, you know, the -- the conservative nature of the -- but, you know -- I'm not going to -- I'm not here in any way, shape, or form to reargue about what happened.

But the fact of the matter is basically, you know, there was 18 months of this case, from '96 through the first half of '97, where there were document requests outstanding to the defendants that they were basically dragging their feet, not responding to; and we let it sit or we didn't press them as hard as we should. And, honestly, though, I think -- from -- when you're dealing with a long-term money damage case, some of the most successful ones my firm has ever had, you know, take a long time. But letting it get some whiskers is not per se an inappropriate strategy, where it's the defendants that are dragging their feet. They could have produced the documents and said "We want a scheduling order." And, you know, the fact that we --

THE COURT: I don't think you really want to rest much of your argument on, you know, the vigor of the early stages of this litigation, do you?

MR. BROWN: No. And, you know,

we've -- we're -- we've tried to ask for -- I know it's a lot of money, but we've asked for, you know, a percentage that's a lot less than -- or that's significantly less than what the Court said it would award or indicated it would be awarded in cases like this that are tried.

So, you know, if that's -- if we ask for too much, then Your Honor's going to reward whatever Your Honor thinks is appropriate. And you have broad discretion to -- to do that.

So ... that's all I have, unless Your Honor has anything else.

THE COURT: Mr. Jenkins?

MR. JENKINS: Might I just be heard on the matter of my ethical obligation, Your Honor? And I --

THE COURT: Yeah. That's a bad word.

MR. JENKINS: I know my friend, Mr. Brown, did not mean it as a personal disparagement. I've settled a lot of cases, derivative cases, Your Honor, with the benefit going to the stockholders. There's no problem, I think, in settling a derivative case with a benefit going to the stockholders --

THE COURT: Uh-huh.

MR. JENKINS: -- even though it's a derivative, not a class action. What we acknowledge, Your Honor, what we tried to acknowledge in the brief, is there's a significant benefit here to the minority stockholders that is worth in the hundreds of millions of dollars. I do not think that there's any ethical obligation for me to say that well, no, that's not good. I think that is, under Your Honor's opinion, the appropriate remedy based on -- on what Your Honor found.

So helping out the minority stockholders would, in fact, given Your Honor's opinion, be appropriate. I don't think I have violated any ethical duty to my clients, nor to the stockholders.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Jenkins.

And thank you, Counsel. I know this is a difficult -- it is an unusual case. And if -- if anyone thinks that I didn't wrestle with it a long time before I issued this decision, I did. And that's why, when I -- honestly, when I hear things like "windfall," which I understand -- I mean, I get the --

where reasonable minds in good faith would come to using that word, it's one I'm resistant of, to be honest, in this context, because I do know that I did not immediately embrace Mr. Brown's theory and ask an awful lot of questions about that theory to people throughout the process. And I continued to ask it after, you know, argument, post-trial argument, and went over and over it against the record to test it.

So I'm going to give you a ruling today. I'm going to let you move on. I have no doubt you'll be going to Dover and it will be an interesting oral argument down there.

As an initial matter, I have to address something that no one touched upon today, but -- which is that the plaintiff raised the question by a letter of whether I should have adjusted for the hundred million-dollar transaction dividend when I calculated the remedy owed Southern Peru. And the plaintiff pointed out that the dividend had already been paid by the date on which the merger between Southern Peru and Minera closed and that it was a mistake to adjust the price as of the closing date downward to reflect the dividend. That was a mistake. This was not a clerical error. It was a mistake in

analysis and an oversight on my part. And the purpose of my remedy calculation, as clearly stated in the opinion, was to take the difference between what Southern Peru paid for Minera on the date of closing as determined by its then-current market price and the price that Southern Peru should have paid, absent a breach of fiduciary duty. Because the dividend had already been paid, Southern Peru's share price as of April 1st, 2005, was an accurate reflection of its market value and should not have been adjusted for the dividend.

I know that the plaintiffs -- the defendants took issues with this substantively. Honestly, I think the plaintiffs should have used the formality of a motion. You know, this is not Abigail Adams and John Adams, do a hundred million-dollar letter. I think you could, you know -- might want to sharpen your pencils and do a motion. But I will treat it as a motion.

I did not -- and the defendants' response to it, which is that it would be a double payment to the stockholders, that didn't make any sense to me. I -- I was trying to be conservative in my remedy but not in making this analytical mistake.

In fact, you know, the formula I used, one of the things that I did to be conservative was actually to use a bargaining position of the special committee. And I used it not because I thought it was an aggressive bargaining position of the special committee, but to give the special committee and its advisors some credit for thinking. It was one of the few indications in the record of something that they thought was actually a responsible value.

And so it was actually not put in there in any way to inflate. It was actually to give some credit to the special committee. If I had thought that it was an absurd ask, I would have never used it. I didn't think it was any, really, aggressive bargaining move. I didn't actually see any aggressive bargaining moves by the special committee. I saw some innovative valuation moves, but I didn't see any aggressive bargaining moves.

But I'm going to amend the opinion, treat the plaintiff's letter -- having treated the plaintiff's letter essentially as a motion under Rule 59(e). And I made a substantive error in calculating the remedy, and I'm going to correct them.

The -- I am now going to address the

central issue of the day, which is the petition for attorneys' fees.

And Mr. Brown and his team have asked for a total of fees and expenses in the amount of $22 1/2 million. That's -- 22 1/2 percent. They would like -- usually $22 1/2 million would be a lot. It's just peanuts, you know, today. But 22 1/2 percent of the derivative recovery in this action. And, you know, the law is pretty settled here. When the efforts of a plaintiff on behalf of a corporation result in the creation of a common fund, the Court should award reasonable attorneys' fees and expenses incurred by the plaintiff in achieving the benefit. Typically a-percentage-of-the-benefit approach is used if the benefit achieved is quantifiable. You know, however it's paid here, it's a fund. If you give back the company shares worth X, it's a fund of shares. In a world where you can factor assets into money, it's a fund. Would a fund not be gold? Would a fund not be, you know, other things that are of value? Yeah. It's a fund. And a litigant -- and, you know, oftentimes we look in Delaware at the fund as a kind of focal point. And determining the percentage of the fund to award is a matter within the Court's discretion.

The aptly-named Sugarland factor, perhaps never more aptly-named than today, tell us to look at the benefit achieved, the difficulty and complexity of the litigation, the effort expended, the risk-taking, the standing and ability of counsel. But the most important factor, the cases suggest, is the benefit. In this case it's enormous - a common fund of over 1.3 billion plus interest.

Now, we went through -- Mr. Jenkins and I talked a little bit about -- the defendants sort of say there's not really a common fund because there's not any actual payment of cash to Southern Peru. You know, I just don't even buy that. I can actually -- you know, I can change my thing. If everybody wants -- but I'm not going to do that to the defendants. They're allowed -- I'm allowing them to have stock canceled. For a company that has a billion-dollar set-aside -- had set aside a billion dollars to do stock buybacks, has done $711 million worth of them in the last couple years, is still doing more, again, a simpleton like me doesn't understand that when -- how when the board does it at market, it's a benefit to the company and its stockholders and a proper fiduciary decision; but when it's received by

virtue of efforts by plaintiff's counsel and the company will get the shares for free, how it's not a benefit. But, again, that may be just the limits of my mind. I just -- I'm not -- you know, I'm not seeing the Emersonian, nonfoolish inconsistency. I just don't have that level of genius to hold the incompatible ideas in the mind.

It's clear when Southern Peru does it, it's a proper fiduciary thing that's good for the company and its stockholders, but if you get it through litigation, it's not. I'm going to leave that to higher-order brains to resolve.

I also think this idea of, you know, making -- I am going to want to say the fee I award, the defendants can turn the plaintiff's part into cash. I'm concerned with some of the arguments that there's going to be games-playing. So whatever I award the defendants can turn into cash and play -- pay to the plaintiff's lawyers's lawyers. They can certainly use their stock as an asset, you know, if they want to sell the stock, whatever they want to do; but I'm just not going to make the -- and I think that's also fair. The company's in a different thing than the plaintiffs. The company can benefit as its

own buyback program; at least to a simpleton like me, suggests the company can benefit by simply canceling the shares. The plaintiff's lawyers's lawyers are in a different position. And I just don't see why I would ask them to factor it.

So I think this is a common fund case. I can easily make it a common fund case by just turning it into a cash remedy. I'm not going to do that to the defendants, and I don't think the company has really taken the position of arguing for that.

There's also this argument that I should only award -- I should basically look at it like it's a class action case and that the benefit is only to the minority stockholders. I don't believe that's our law. And this is a corporate right. And, you know, if you look going back to 1974, you know, when Nixon was still President for much of the year, there was Wilderman versus Wilderman, 328 A. 2d 456, which talks about not disregarding the corporate form in a derivative action and looking at the benefit to the corporation, to the more recent Carlton -- Carlson case, which is not reported, in 925 A. 2d 506 does the same; Emerson Radio, case from 2011, Westlaw 1135006. They all look at it like a derivative action.

And I think the plaintiff's point here, too, is, you know, it's not easy to be a derivative plaintiff. There's all kinds of rules and that to then start looking through the benefit and saying "Well, the controller, it's" -- "really only" -- "looks size up to the minority." Well, controllers get a lot of benefits from derivative action, you know, rules in Delaware. If you remember, you know, the one that we all cite for the business judgment rule was basically a controlling stockholder case, Aronson versus Lewis. By any indication, if you put Kahn v Lynch next to Aronson v Lewis, it's clear there was a controlling stockholder in Aronson v Lewis.

So it's difficult for plaintiffs in a derivative context. You focus on the company. And the benefit here is to the company. And, again, I -- this may be something that -- that the parties will take up with the Supreme Court. I think companies act to benefit their stockholders. The stock buyback program that's existing shows that companies do that. That's why companies try to make money. That's not inconsistent with calling it a benefit to the company. What we're doing is divvying it up. And, really, in their capacity as a existing thing, the benefit -- you

know, the controller will -- the value of its Southern Peru shares will go up, the remaining shares. You know, this is a way that they can satisfy. It's an option to give the shares.

So I'm going to look at the whole benefit. I think that that's the law. And I don't think that you look through -- and we pretend that for purposes of pleading and other standards the controller and the defendant have all the benefits of calling it a derivative action; then if the plaintiffs actually succeed, let's call it a class action -- because I've had many defendants, frankly, argue about the derivative form of the recovery, making sure it's rigorously a derivative recovery and not a class recovery and all that kind of good stuff. And that was the framework here. And that's why -- I mean, frankly, Mr. Jenkins' point of me shaping a remedy to give an award directly to the class? I don't think Mr. Brown raised it, and I think he would have expected defendants would have resisted it, precisely because it is a derivative case.

As I said, it's in the public filings. That's how much Southern Peru is engaged in stock buybacks. They've spent over $700 million of

stockholder -- company money, presumably to benefit the stockholders, since 2008. And I believe there's another large tranche of money still left because they've approved a billion-dollar buyback program.

Now, how we get to the big issue, which is the -- how do you shape a key -- a fee here and what is reasonable in this context? The plaintiffs here indisputably prosecuted this action through trial and secured an immense economic benefit for Southern Peru. I've already said -- and I'm going to take into account -- I already encouraged the plaintiffs to be conservative in their application because they weren't as rapid in moving this as I would have liked. I don't think, though, that you can sort of ignore them, to say because they didn't invest six years on this case on an entirely contingent basis, deal with very complex financial and valuation issues, and ignore the fact that they were up against major league, first-rate legal talent.

Now, I have a perspective on this that I think is fairly well-known. I don't think that we wish to create an even more -- more of an incentive for early settling. I stand by the colloquy I had with Mr. Jenkins. If there is a windfall in the

representative litigation context, it is not in cases like this. It is in early-settled cases where, in many of those cases, the only one who gets paid is the plaintiff's counsel, and many of the others, the benefit to the class is a trifle and the benefit to plaintiff's counsel is substantial. That's where windfalls -- that's a wind farm. As I said, we could harness all the energy of that. We could go a long way to reducing our carbon footprint.

It's not cases where people go to trial. I understand this chart. I get it. I know what's on my mind. And I know what's on the defense -- the idea. And I know, frankly, it might appeal to some people to say it's just too big, the things are too big. I see the chart. I look at many of those cases, and I think -- I know that the federal government and other investigative resources of the public unearthed most of what went down. Here, anything that was achieved was by this litigation by these plaintiffs. And there wasn't a settlement, and they went to trial.

And so I think we got to be careful about this idea that the more that plaintiffs take risk on behalf of their class to actually get real

achievement, the more the Court's going to reduce the percentage that they should get. What's the theory? Is it one to benefit courts so we don't have to adjudicate cases so that if someone comes up and there's a deal worth -- you know, it's a $4 billion deal and they get 1.4 million in extra consideration for the class, they get 33 percent of that? And, actually, probably more of that because we've often seen the case where there's some financial benefit, and the lawyers get even more because they've got therapeutic benefits along with the financial benefits. And so it's okay to have really highly percentages of early-settling cases because early-settling cases are the best example of where a lawyer's interests are aligned with a hypothetical client.

And, see, I think if you want to do the hypothetical bargain -- I'm going to talk a little bit about this -- you tell me going in, if I'm a class member, "I'm going to" -- you tell me as a lawyer, "I'm going to get really rich like a banker or hedge fund manager if I get you a billion dollars, but I want to get really rich to get you a billion dollars." And what I'm -- the client's going to turn that down,

EXHIBIT D

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER CORPORATION SHAREHOLDER DERIVATIVE LITIGATION	:	Consolidated Civil Action No. 961-VCS

- - -

Chambers
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, June 15, 2011
3:18 p.m.

- - -

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

- - -

TELEPHONIC PRETRIAL CONFERENCE

- - -

APPEARANCES: (via telephone)

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MIA C. KOROT, ESQ.
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Milbank, Tweed, Hadley & McCloy LLP
for Defendants Americas Mining Corporation,German Larrea Mota-Velasco, Genaro Larrea Mota-Velasco, Oscar Gonzalez Rocha, Emilio Carillo Gamboa, Jaime Fernando Collazo Gonzalez, Xavier Garcia de Quevedo Topete, Armando Ortega Gomez, and Juan Rebolledo Gout

RICHARD L. RENCK, ESQ.
Ashby & Geddes, P.A.
for Nominal Defendant Southern Peru Copper Corporation (now known as Southern Copper Corporation)

- - -

THE COURT: Good afternoon. May we have appearances for the record, please?

MR. BROWN: Yes, Your Honor. Chip Brown from Prickett Jones for the plaintiff along with Marcus Montejo of my office.

MR. HURD: Good afternoon, Your Honor. It's Mark Hurd at Morris Nichols. I have Kevin Coen with me. Also on the phone, who have been admitted pro hac vice from Milbank are Doug Henkin and Mia Korot for the AMC defendants.

MR. RENCK: Good afternoon, Your Honor. Your Honor, Richard Renck from Ashby & Geddes for the nominal defendants.

THE COURT: Okay. I'm on trial break. My understanding is we really only have one issue in dispute. Is that correct?

MR. BROWN: I think that's correct, Your Honor.

THE COURT: Who wants to speak to it from each side very succinctly? You have a minute each. I've read the pretrial order. Tell me why I didn't 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.

MR. BROWN: Your Honor, it's Chip Brown for the plaintiff.

Obviously, you've read what's in the letter. I will say the original -- the Goldman representative that was most knowledgeable testified and we got it on videotape. Both sides asked questions.

So it's not as though there is not going to be a Goldman witness. There is a Goldman witness who both sides did ask questions to and had an opportunity to fully find out what each side wanted to find out; and it's on videotape, so you'll be able to see it, Your Honor. It may not be quiet as good as a live witness.

Bringing in a new witness who we don't get to depose until after the trial and who appears to have, you know, really either no or extremely limited firsthand knowledge of anything that's relevant to this case, doesn't make -- we think is unfair to the plaintiff.

MR. HURD: Your Honor, it's Mark Hurd at Morris Nichols. I apologize that Mr. Stone is involved with a preliminary injunction hearing that's gone longer than anticipated with live witnesses, so

he was not able to be on the phone.

We have done everything possible in response to Your Honor's we believe preference to have a live witness from Goldman, from the banker that did the work.

The individual, Mr. Sanchez, who we believed was going to testify, just recently informed us that he would not show up. Goldman and the company and the defendants have tried to ask him to come. He's refused to do so.

So we identified Mr. Del Favero. He is, as Your Honor knows, a member of the fairness committee at Goldman Sachs. He actually considered the very opinion that's at issue in the litigation.

We know that Your Honor had commented on at the summary judgment hearing the fairness opinion review process at Goldman Sachs and had some questions about that. We believe that he would be in a position to answer those questions.

It is not our expectation at this time that the trial, with the revised schedule, will be able to conclude next week, so we are prepared certainly to make him available in advance of a trial testimony date which we assume would be at

Your Honor's convenience sometime to adjourn the trial.

THE COURT: That doesn't -- I'm assuming contention interrogatories were asked earlier about who was likely to be a witness at trial.

MR. HURD: That is incorrect, Your Honor. There were no contention interrogatories propounded.

THE COURT: Is that true, Mr. Brown?

MR. BROWN: It was done on a more informal basis, Your Honor. When we were setting up these depositions, the understanding was we're going to have an agreement on who is going to be testifying at trial, and, you know, we'll take those depositions. And, you know, that went with the people in Mexico and Peru and, you know --

THE COURT: Mr. Hurd, is that correct?

MR. HURD: Your Honor, I do not have firsthand knowledge because that was primarily Mr. Stone that was --

THE COURT: Do you have any reason to doubt that that would be the case?

MR. HURD: I have no reason to doubt it.

THE COURT: Let me just say whatever comments I made at some oral argument a while ago were a while ago. And if the defendants thought it was about me and my interests, then I expect that you would have promptly identified this gentleman as a relevant witness and made him available for deposition. It's simply not fair to the plaintiffs.

Because the other thing about people who want to be witnesses is they get deposed, and when they get deposed, you learn things, and you might ask other people or shape your trial strategy differently. It just adds an unfair element of surprise. And in the 1930s, we decided with the Rules of Civil Procedure to eliminate surprise, at least insofar as your opponent was diligent and asked questions.

It's regrettable that the lead banker for a client, even with the passage of time, would decline coming to testify. I understand he may be at a different institution, but, you know, he was the lead banker.

So I'll watch the video and we'll deal with it then. Otherwise, we have a fairly truncated set-up of live witnesses; correct?

MR. HURD: Yes, Your Honor. We've

certainly worked to try to narrow the number of witnesses. We're skeptical we'll actually be able to complete the trial next week.

THE COURT: No, I understand that. And if you don't, I don't want anybody on the edge of their seat rushing through because events a bit out of everybody's control have truncated the trial time next week. Okay? There has been nothing about this case that has proceeded on an emergency basis to date.

Now, I am going to tell you, we are going to finish the trial -- if we have to have extra days, we're going to come back relatively promptly. And you will come out of the trial in preliminary injunction mode, which is expect to have your opening briefs due in something like five calendar days and then answers in something like three or four, and to have a post-trial argument. Okay?

MR. HURD: Understood, Your Honor.

THE COURT: Because my team on this, the people who are up to speed on this is me and someone else, and we're going to get to work on this with me and someone else. So I'm not having any post-trial argument August 20th. So I would be looking at trial each day, shaping your brief from

that.

And you'll be getting obviously, daily transcript from our excellent reporting staff.

MR. HURD: We'll be ready, Your Honor.

THE COURT: Okay. Good. Thank you all, and I will wait to see you next week.

MR. HURD: Thank you, Your Honor.

MR. BROWN: Thank you, Your Honor.

(Conference adjourned at 3:25 p.m.)

CERTIFICATE

I, JEANNE CAHILL, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 9 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand this 22nd day of June, 2011.

/s/ Jeanne Cahill

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 160-PS
Expiration: Permanent

EXHIBIT E

EFiled: Jan 24 2011 4:08PM EST
Transaction ID 35541815
Case No. 961-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SOUTHERN PERU COPPER CORPORATION SHAREHOLDER DERIVATIVE LITIGATION	)	CONSOLIDATED C.A. No. 961-VCS

- - -

Chancery Courtroom No. 12B
New Castle County Courthouse
Wilmington, Delaware
Tuesday, December 21, 2010
10:06 a.m.

- - -

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

- - -

ARGUMENT AND RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

- - -

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-and-
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for Carlos Ruiz Sacristan, Harold S. Handelsman, Gilberto Perezalonso Cifuentes and Luis Miguel Palomino Bonilla

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for Nominal Defendant Southern Peru Copper Corporation

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THE COURT: Good morning, Mr. Brown.

MR. BROWN: Good morning, Your Honor. First, let me do the introductions. And I think -- I guess the defendants will do that, too.

With me at counsel table, the first counsel table, is James Miller and Eric Zagar. Table behind them, Marc Topaz and Lee Rudy, all of our cocounsel, the Barroway Topaz firm.

You guys --

THE COURT: They would prefer to be anonymous.

MR. BROWN: Your Honor, this is the time set by the Court for the oral argument on a series of motions for summary judgment in this case.

Southern Peru Copper Corporation was a copper mining corporation traded on the New York Stock Exchange. It was controlled by a company named Grupo Mexico, which owned 54 percent of its outstanding common stock. The transaction at issue here is -- is the sale by Grupo of its Mexican copper mining operations, known as Minera Mexico, to Southern Peru, for which Grupo was paid 67 million, approximately, newly issued shares of Southern Peru common stock.

The fact discovery in the case is

complete. Expert reports have been exchanged. Expert discovery is also complete. And at this point, no trial is scheduled. All parties have moved for summary judgment to one extent or another. So let me turn to the plaintiffs' motion for summary judgment.

It's actually -- our motion I think is narrow and simple. Whether it's simple maybe is -- remains to be seen. But it's definitely fairly easy to explain. I think really the question presented by our motion is: How is the Court to assess the economic fairness, or fair price, in connection with the application of the entire fairness test, to a transaction like this; that is, one in which a publicly-traded New York Stock Exchange company issues shares to its controlling shareholder to buy a business that it owns.

The two experts actually agree on some things here. Our expert, Mr. Beaulne, from Duff & Phelps, approached this transaction by applying generally accepted valuation techniques, comparable company valuation and a discounted cash flow valuation to Minera Mexico, arrived at an equity value of approximately 1.85 billion for Minera Mexico. And then to him the relevant question following that was:

Were 67.5 million shares of Southern Peru worth more or less than 1.85 billion? And it's a fairly simple calculation. The shares, millions of shares, of Southern Peru traded every week, was followed by nine or more analysts. And so the generally accepted methodology, according to our expert, would be to use the market price to value the consideration that the company paid. That was the value of the consideration to Southern Peru, that it was issuing, and it was the value that Grupo Mexico received.

THE COURT: But isn't there some tension in all the papers here about this, which is one of the things that you suggest is that these registration rights were particularly important to the Pritzker family. And one of the real questions is: What was the real value of this kind of block on the market if it were actually sold or bought -- sold as a block? Right?

MR. BROWN: Correct. Well, I have several responses. Let me say, preliminarily, the defendants didn't argue that. I mean, in their expert report -- they didn't get a trading expert and say, "We couldn't sell these shares. They would be worth..." -- you know, through expert testimony try to

establish that the shares really aren't worth $3.1 billion. I will get to this in a minute, but Minera Mexico is on record as that is how they valued it, at market. I will get to those quotes in a second, but -- so my first response is they have not really said that. If you look through Mr. Schwartz's expert report, there is nothing in there that says you can't value the shares at market because they couldn't -- the 67 million shares couldn't be sold at market.

But my second response is the registration rights -- Grupo Mexico and its subsidiary, AMC, controlled the company. The Pritzkers needed to get their cooperation, because they are the ones that can authorize the registration statement. So getting -- having a registration statement, if that's what was needed, was not a problem for the controlling shareholder. They could do that at any time.

Furthermore -- and so maybe someone could have said, "Well, you just couldn't sell that many shares. You couldn't dump them. If you dribble -- maybe you could dribble them out over time," and someone could make an argument you wouldn't realize this market price, but they could sell the company.

So they have the ability -- they are the controlling shareholder.

THE COURT: But that is a different -- the fact that the controlling shareholder could sell the company doesn't really answer what the question of the value of a block of minority shares of that size is in Southern Peru -- right? -- and what would happen if that was on the market all of a sudden.

I mean, I admit they have got issues. Right? There is no question about that. This is a rather unusual situation. But there is -- you know, we see it all the time. The fact that a certain number of shares can trade at a certain level doesn't necessarily mean that a larger but noncontrolling block would sell at the same level. In fact, I think what you suggest is that when the Pritzkers actually got registration rights, they sold at a discount to the preexisting market price.

MR. BROWN: It was the -- well, I need to explain. It was a five percent discount to the price on the day that that transaction closed. I mean, if you actually looked at an average price, you know, as they were negotiating their deal, it's -- my argument would be it's not materially different from

the market price. But even if it was a minor discount, there is -- there is evidence. There is 11 million shares trading.

THE COURT: At what price? Still around 40. Right?

MR. BROWN: Yeah. I believe -- it's in our papers. A little above 40 and change. I mean -- in our case, we have a lot of room for -- there is a lot of room here. I mean, their analysis, essentially, is that the stock's value was in the mid-twenties. And in order to get the numbers to match, that is essentially what they are saying. I will get to that in a second. That might be unfair. It's more complicated than that. But even if --

I don't think the issue is, you know: Could they sell it right away? What would they get if they sold it? Obviously, they weren't sold. There is no way to prove exactly what they would have got if they sold it. But it's -- but I think -- isn't it reasonable, I mean, to assume -- I mean from the value to the company. These are its shares. They could do an offering and sell them. They are not going to sell them for less than the market price, or anything materially less than the market price. So the value

going out, from Southern Peru's perspective, is approximately the New York --

THE COURT: That's what I said. It depends. One of the things I'm going to ask your friends about is whether there was any sort of inquiry like that in the process, because one could imagine where issuing that -- no, you wouldn't actually get anywhere near $40 per share. You might actually get something materially south of that per share, in which case the shares aren't worth that. I mean, you know, one of the things that I think we sometimes lose sight of is that if you can't bench mark something to the dollar, you know, it's just not worth -- you know, if you need it now, it's not worth a buck if -- by factoring it to get it to now, it's worth 67 cents. It's not worth a buck. Right?

MR. BROWN: Yeah.

THE COURT: That is part of the point about the Pritzkers. They are bargaining for liquidity because they have value locked up. Right?

MR. BROWN: Correct. That was their position. They wanted out. So --

THE COURT: And absent a registration, they would have had to -- what? -- resign from the

board and then sort of trickle out their shares over --

MR. BROWN: Right. I think that is in Mr. Handelsman's deposition. They could do this. They could sell these shares. They were claiming they didn't need it, but clearly, it was of great value to them, because it enabled them to maximize the value of the -- the sale of the stock, and do it in an efficient way.

But I have a couple of other points. I mean, I understand the Court's issue, that both -- well, how can you -- "I can't give you summary judgment, because there is no proof of what these shares -- what the actual value was if they had been sold." I have two responses, in addition to the other points I made:

First, it actually isn't -- doesn't require proof that they couldn't have sold for that. What we are talking about is a methodology to value the shares. And in the financial community, you know, where you have a New York Stock Exchange company that has millions of shares trading, it is an acceptable way to value a block of the shares, a bigger block of the shares, to look at the market price. Yes, it's

not -- it might not be perfect. A discounted cash flow valuation isn't perfect. But that is the -- that is the accepted methodology. As far as we are concerned, there is no other accepted methodology to value shares being issued in a transaction like this.

So it's not that -- the issue really doesn't turn on what they could -- what they would have been sold for. It's: This is how you value. This is the appropriate method. Just saying look at the market, I mean -- characterizing that as a methodology may seem a little bit of an overstatement, but that is the point. I mean, that is the point of our expert report. That is why there is an analysis of, you know, the trading activity and then analysts.

But I think maybe somewhat more importantly, this is how Grupo Mexico wanted the shares to be valued. The ironic thing -- let me read the quote. But what is unfair here is when they are supposedly negotiating the transaction, they wanted $3.1 billion of stock measured at the market price. That is how they were measuring it. Now that the numbers don't work out, now they have an expert in here with a discounted cash flow valuation saying -- essentially saying the stock is worth half of the

market price.

So, Your Honor, when they, in their -- this is in our opening brief at page 40. In Grupo Mexico's May 7, 2004 term sheet, they said, "The proposed value of Minera Mexico is U.S. 4.3 billion, comprised of equity value of U.S. 3.147 billion and U.S. 1.153 billion of debt as of April 2004. The number of SPCC shares to be issued in respect of the acquisition of Minera Mexico would be calculated by dividing 98.84 percent of the equity value of Minera Mexico," which is about 3.1 billion, "by the 20-day average closing share price of SPCC beginning five days prior to the closing of the transaction."

The 98 percent was that they didn't actually own 100 percent of Minera Mexico. This was how they were asking the value of the consideration that they would receive to be set.

THE COURT: Then it obviously went in a different direction. Right?

MR. BROWN: That sort of goes to some of the other motions, but what happened, actually, just to dip my toe into it, is that the special committee took the position that they wanted a fixed number of shares. And as a result of that, things did

go in a little bit different direction. But in the end -- so there were different numbers of shares talked about at that point. But that is because -- then the share price at the time became relevant. You couldn't just characterize it like this. The number of shares discussed was changing. But it never varied very much from 3.1 billion, because as the share price was changing, the numbers, the total, the fixed number, would change.

So, I mean, if you look at this -- at these negotiations -- I mean, throughout the whole process, Minera -- I mean Grupo's point was "We are delivering a company to you that we say has an equity value of 3.1 billion. We want 3.1 billion in stock." And that's what they got. The 67 million shares on October -- on the date the board approved the transaction in October, times the market price on that day or, you know, a couple-day average, was $3.1 billion. So they got what they were asking for. I will get to actually how they ended up with a lot more than they were asking for later, but to me, I don't think it's reasonable for the -- in an entire fairness case, for the shareholder that is -- that is on both sides, that is doing the transaction, to say,

"Here is what we want," to get it, and then when they are challenged in court, to flip and say, "You can't use the market price."

And there is -- the issue here, too, is not just: Is it the market price or is it a DCF valuation? Because what the defendants are saying is -- at least my characterization of what they are saying is that "The market price is essentially irrelevant. You can't look at it."

Someone could have said -- I suppose the Court could say, "50 percent weight to the market, 50 percent weight to the DCF," but I don't think under Delaware law you can ignore the market price. And that is what their analysis does.

Let me turn -- so that is a reason in and of itself why their evidence fails. You cannot -- their whole case rests on the Court not giving any weight to the market price of the 67 million shares that were paid.

But what the defendants' expert, Mr. Schwartz, did is -- on the Minera Mexico side, we agree he did a discounted cash flow valuation. His value was slightly less than our expert's. His number came in at 1.7 versus the 1.8.

THE COURT: What you are saying is what they do is if -- the concern is if they do a stand-alone valuation of Minera, then they just come up with assumptions to take down the value of Southern Peru below the market value? Right?

MR. BROWN: Right. They couldn't -- I don't think they could come up with -- I mean, where is the valuation -- where is the valuation that says Minera Mexico is worth 3.1 billion? They were saying that all through the negotiations. There isn't one. Now they are in court. Where is it? You said it was worth 3.1 billion.

I mean, to me it's -- there is a lot of sort of smoke and mirrors and shifting balls around, because it's simple. They bought -- Southern Peru bought a company from its controlling shareholder, and they issued shares. So you start with what is -- what is the value of what we are buying? And, you know, the board actually didn't even know. There was no -- there is this relative valuation, which I'm going to discuss in detail in a minute, but the -- back to the defendants' expert, I mean, his discounted cash flow valuation is -- we have no beef with it.

Obviously, the difference is instead of looking to the market or considering the market, he did a discounted cash flow valuation of Southern Peru, which is -- came out to, you know, the mid-twenties, and -- which is basically -- you know, there is a lot of rounding going on here, but approximately half of the market price. So they say, "Well, that is fair." There is a lot of explanation for this that I honestly -- I think is hard to follow. They call it a relative valuation. But there is no -- and we have -- this is all in the expert's depositions, and it's in the briefs. There is no explanation of relative valuation in any valuation treatises or in any -- in any -- I mean, it's not a methodology, a relative valuation. All you are doing is using generally accepted valuation techniques, valuing two things and comparing them.

THE COURT: But is the idea to use sort of similar assumptions about inputs and see -- and apply them to the two companies, and see what values you get for each of the companies, and the relationship, therefore, of their value to each other?

If you assume, for example, a certain price for copper, and you use that in valuing each

company, and you use certain other sorts of metrics that would be applicable to each company, then see what is their relative valuation?

MR. BROWN: Yes. We went through, at his deposition, what things he changed. And it's really only the price, long-term price, of copper. That is the -- that is the issue here. And that's -- their point is, you know --

THE COURT: And if you -- is their assumption that if you apply the same price of copper to each company based on those metrics, then you end up with a fair exchange ratio?

MR. BROWN: And they say -- I'm trying to be fair. And you -- they say, actually, it doesn't matter what price of copper you use. Pretty much, it will always be fair, because -- and they say, "If you want to have it come out that Southern Peru is actually worth its market price, just use $1.30 for the copper price."

But I think that whole thing collapses on itself, because there was a -- an accepted and used long-term copper price at the time. There was a long term -- long-term copper price projection that Southern Peru used for internal planning purposes.

They didn't say, "We can't -- we can't project, you know, into the future what is going to happen with copper." They projected it and used it in their business plans. So did Grupo Mexico. Their number was a little higher. It was about a dollar. It wasn't $1.30. And the consensus from the analysts was 90 cents. That was what everyone was using for the long-term copper price.

THE COURT: What rationally explains the market price for Southern Peru?

MR. BROWN: I don't think there was anything wrong with the market price for Southern Peru. I think the projections they are using for the discounted cash flow valuation are unrealistic. I mean, it's the valuation.

THE COURT: Wait a minute. Just go back so I capture your point. You are saying that they were using low -- in your view, low-ball projections?

MR. BROWN: Well, I think the projections that Mr. Schwartz is using, and the inputs he is using in his discounted cash flow valuation, are flawed. There is not a flaw with the market. If there was -- if Southern Peru actually believed the

market is so misguided that they are overvaluing our company by several billion dollars, they would have to say that, I would think, if there is some misunderstanding.

THE COURT: They would have to say it in the litigation, you are saying?

MR. BROWN: They would have to say it in the litigation, and they would have to disclose facts at the time that --

THE COURT: Yeah. Obviously, very rarely do CEOs claim their company is being overvalued by the market, although this is a little bit different situation, because it's -- it's a controlled-company situation. But the -- did your expert do a DCF of Southern Peru?

MR. BROWN: No. We -- his analysis was in this context: The financial community, the methodologies they would use, is to just look at the market price. That is how -- that is the appropriate methodology to value consideration like this. And fortunately, there is a case that I'm sure --

THE COURT: That is a posttrial decision.

MR. BROWN: It is, but it is --

THE COURT: It goes on for pages considering the actual economic evidence, and what people testified about, and stuff like that, which I won't have the chance to see.

MR. BROWN: I don't think, Your Honor, a fair reading of the case would be that the decision to say -- or to rule that the value of the consideration going out was based on some -- this testimony, or based on -- I think it's more of a legal decision, honestly. The case is very, very similar. I mean, Associated Imports -- ASG Industries was the sort of public company. Hubbard Group -- there was 3 million shares outstanding of ASG Industries. Hubbard Group owned 1.7 million of the three million shares. And there were 1.3 million shares owned by the minority public shareholders trading in the market.

Hubbard Group owned a subsidiary, Fourco. And they sold Fourco to their controlled subsidiary, ASG Industries, and took back -- they were paid 2.8 million shares of ASG stock. I mean, a huge -- relatively huge block compared to 3 million total outstanding and the 1.7 they owned before the deal. And the Court said turning -- I'm reading from the

opinion, which I think is quoted in our brief, but, "Turning now to the fairness question, I begin with that side of the equation which the Hubbard Group received, i.e., the 2.8 million shares of ASG stock. On the date of the transaction the closing bid price of ASG was $4.875 per share. I am satisfied that that market consensus is an appropriate and fair standard of value for determining what ASG gave up."

I mean, I don't see -- there is no factual recitation of that. You know, when you are dealing with a New York Stock Exchange company issuing shares to its controlling shareholder in an entire fairness case, the method to value the shares, or to value the consideration going out -- really there are two issues, I think, when you are talking about is it fair. Is it fair to Southern Peru, and is it fair to Grupo Mexico? Because they may be the exact opposites of the same coin, but they might not be.

THE COURT: No. I mean, in some ways it comes down to this: Imagine you have -- I mean, you can imagine a situation where on very similar metrics for some reason there are two companies, and one persistently has a market premium to the other, but if you run DCF after DCF, it looks like they

should be the same. Right?

MR. BROWN: Right.

THE COURT: I think what you are saying is if in fact -- regardless of whether it's somehow rational, if in fact in the market you can turn the value of the one into something worth 25 percent more than the other, you can't ignore that in this context.

MR. BROWN: Yes. Exactly. You cannot. And that's why -- for us to win, Your Honor, you don't have to say -- I don't think we have to convince you that it's only the market price; you must look only to the market price.

The point is -- it's in Weinberger and other cases. You cannot ignore it. You can't say it has no relevance, which is essentially what they are doing. I'm sure we will hear a better explanation of what Mr. Schwartz did from Mr. Stone, but their position is, "We did these DCF valuations of both sides, and basically, you cannot use them for anything other than comparing them to each other." You can't do what I'm doing. You can't say, "He valued Minera Mexico."

THE COURT: One of the problems I have

is I can't do that with your guy's thing, either. Right? Your guy didn't take Southern Peru and put aside the market valuation of its minority trading shares, its shares traded in minority blocks, and do a DCF analysis. Right?

MR. BROWN: Absolutely correct.

THE COURT: Both sides have sort of blinded me -- I mean, as a judge, someone who is not a partisan, I'm not sure I applaud either approach.

MR. BROWN: Everybody was going all or nothing in this one.

THE COURT: Right. Yeah. But I mean, in a way, what you did is neither did a full exploration of what you would do -- if I did what you did -- you guys did in an appraisal, I would get smack.

MR. BROWN: But this is not --

THE COURT: I did not say -- all I'm saying, if you look at the Delaware Supreme Court views on value -- right? -- if you did an appraisal and you sort of said, "I'm just going to go with the market price," and you didn't even do any kind of fundamental valuation, I think the Supreme Court would say no. Similarly, if there was some relevant market

price and you didn't even take a peek at it and give it any weight, they would say no. And on both sides, there is a bit of that, which is, you know, you put your horse in the gate with the blinders on, and they are just different -- the blinders were faced in different kinds of directions. And here is a very practical question. One of the things -- one of the many things that I admire about you as a practitioner is that you are very practical. If I grant summary judgment for you, what does that do?

MR. BROWN: It simplifies the trial greatly, because the issue will be: What is the remedy, money or canceling the shares? I think.

THE COURT: Canceling all the shares?

MR. BROWN: Well, no. I mean, the number of shares to make it -- to bring it down to the number of shares they should have gotten, which is actually somewhat complicated, because there were stock splits and things happened. There would need to be a trial and explanation of what would be involved in that.

But let me summarize, because I think there are -- I am restating, but there are several points that are key. First, which I think is very

significant: This is how Grupo Mexico was asking for the consideration to be paid to it to be set, to be valued. Number one, they shouldn't get to come in with an expert in an entire fairness case and take a different approach and say don't look at the market, when that's what they wanted all along; in fact, what they got.

THE COURT: The controller did. Right? There is a dynamic that comes out of this.

MR. BROWN: Right.

THE COURT: What is the standard for getting a burden shift, by the way? I'm shifting gears a little bit to the special committee. What is it about the special committee that doesn't earn them a momentous burden shift?

MR. BROWN: There are three things, Your Honor. Well, number one, I'm not sure the extent they are really seriously arguing it. But the shareholder vote doesn't get them a burden shift. Right? They were -- the vote was locked up between Cerro, Phelps Dodge and --

THE COURT: What you are saying there is -- in an interesting way, that comes together with the ability of the committee to say no. Right?

MR. BROWN: Yes.

THE COURT: Which is in some ways you can -- your friends can make the argument, "Look, this committee wielded substantial power, because one of the things that it suggests -- it secured for itself was, essentially, the ability to wield the vote of a large blockholder." Did it also get Phelps Dodge's vote? The record is not as clear.

MR. BROWN: No, Your Honor.

THE COURT: Just the Pritzkers?

MR. BROWN: Yes.

THE COURT: But without the Pritzkers, it was going to be fairly difficult, I guess, to get the vote. Right?

MR. BROWN: They had 54 percent, and they needed 66-and-two-thirds.

THE COURT: But if the committee went yea, then the vote was pretty much foreordained? Right?

MR. BROWN: Correct.

THE COURT: So that creates an interesting situation. Do you give the vote any independent significance in that situation? But does that also not mean that the committee itself had very

strong negotiating positions, because as I understand it, the Pritzkers -- if the committee said no, the Pritzkers voted no; if the committee said yes, the Pritzkers voted yes, which meant that the committee wielded not only negotiating power in its own way, of saying, "We say no. If you want to proceed with it, you are going to tell the world that you are proceeding over the objection of the special committee, and not only that, but one of the biggest minority holders is going to vote no."

MR. BROWN: There is a lot in there that I want to respond to.

THE COURT: It's complicated. I have been looking back over the cases. There is a case that none of you have cited, that rhymes with a part of a deer that gets mentioned a lot at this time of year. And nobody really focused on its implications for this. Can you guess the case?

MR. BROWN: We will go back and look.

THE COURT: Gantler. Rhymes with antler, I believe. Gantler purports to clarify something in a way that is still rather breathtakingly astonishing, because prior cases cited by it seem to be relatively clear. One of the things that Gantler

raises is this issue that you raise, whether you have to condition something on the majority of the minority. Nobody talks about this, but this is the situation here, where, as I said, isn't it the case that if the committee gets to wield the Pritzker vote, that means they have a pretty potent ability to say no?

MR. BROWN: But there was a three-way negotiation going on at the time this was going on. The Pritzkers, through Mr. Handelsman, were negotiating directly with Grupo to get their registration rights. So basically, Grupo got the vote, bought the vote from them, by giving them the registration rights they wanted.

THE COURT: Wait a minute. Grupo did not get a yes vote in favor of the transaction from them. Right? I mean, when did they -- I thought there was an agreement secured where the Pritzkers would vote as the special committee recommended. I mean, if the special committee didn't ultimately recommend the merger, Pritzkers would vote no.

MR. BROWN: Okay, Your Honor.

THE COURT: Am I wrong? I mean, I thought --

MR. BROWN: I'm going to make sure before --

THE COURT: Your friends -- that is what your friend's contention is. Honestly, I will say on both sides, these look more like trial briefs than summary judgment briefs. The undisputed facts from which you argue pure issues of law are set forth over dozens of pages.

MR. BROWN: Lawyers can't -- it's hard for us not to move for summary judgment.

THE COURT: I mean, I understand it's hard not to do something. I'm not being -- it's more common for people to move than it is for people to think about whether this is a case where you should move. I get that. But let's stick on the committee approval. What is it -- because we will break this down. But assume in this context something that might help you on the vote not mattering, which is that if the committee really did bargain to get the Pritzker voting power, yea or nay, the committee negotiated. They may -- they certainly didn't negotiate in a way that you think is adroit, but they extracted certain concessions. They just went on for a long time. They had Goldman Sachs, which I know you are saying is

unqualified, but, you know, there are many, many special committee cases that would have come out a lot better for both the special committee and minority stockholders had they hired Goldman Sachs rather than some of the people they did. They hired a very well-known law firm, that is extremely experienced. Why don't they get a burden shift?

MR. BROWN: A number of reasons. First of all, they approved the sale of 67 million shares without a valuation of what they were buying, that, you know -- that was anywhere near the market price of those shares. To me, it's bizarre.

THE COURT: That's what I'm asking about. One of the things -- again, I went back and read all these cases. Is what you are saying that I cannot even grant a burden shift if there is a question about whether a careful fiduciary would have approved this?

MR. BROWN: I think that you can't grant a burden shift on summary judgment. I mean --

THE COURT: I understand that. You realize I'm being a trial judge. I'm a practical guy. Burden shifts in the middle of my posttrial opinion, one wonders why -- one would wonder why one is doing

that sort of thing.

MR. BROWN: I agree totally. To me, the whole burden shift is -- everyone is so consumed with it, but where is there a case where it ever mattered? Is there really going to be a case of this magnitude where the evidence is exactly 50/50?

THE COURT: What I'm trying to get at is to get on the exact test, which is if I have a question about whether -- about the care of the committee, is that -- why does that prevent a burden shift?

MR. BROWN: Because really what it comes down to is: Did the -- this is an imprecise test, the way I'm articulating it. So if I had some time to write out -- but the ultimate question is: Did the special committee function properly? And if they didn't, you know -- if they ignored obvious valuation issues or didn't understand what was in the board book -- I mean, when Mr. Handelsman was asked, "What was the value," you know -- what was the value being attributed to the two sides here in the Goldman presentation?

Honestly, the Goldman presentation, the final board book is one of the most incredible

documents, next to the proxy statement -- which I will get to in a second -- that I've ever seen. If you look at that document, you can't tell what values they are attributing to Southern Peru.

I mean, they obviously knew it looked sort of ludicrous to do a discounted cash flow valuation and come up with a number so far below the market cap. It's covered over. It's not in there. So it's funny. If you look at these depositions in sequence of when they were taken, Mr. Handelsman first, he did not -- he didn't understand it. And then by the last deposition, now they suddenly -- they understand the relative valuation, and they are all spouting the company line, that it doesn't matter.

I think in this case, at least on this record, I think the Court, looking closely at the depositions in sequence and the documents, can conclude that the special committee really didn't understand this. They didn't understand why Goldman -- what the real basis was for saying this was a fair deal, because I think a rational director of reasonable intelligence would say, "Wait a minute. We are buying Minera Mexico. What is it worth? Someone give me a valuation of Minera Mexico and tell me what

it is. Okay. Now what are we paying? What is it, and what's it worth? Let's make sure that they match up."

That wasn't done here. Really, they may -- I don't -- it's hard to explain how it happened, but they made a negotiating -- I will call it a blunder -- that cost Southern Peru at least $400 million. I read the quote from the May 7 term sheet. The one thing about that, that the special committee didn't like, is they didn't like a floating exchange ratio. According to Mr. Handelsman, the stock was volatile. "We wanted to have it be fixed."

The only reason you would have it be fixed is if you had a reason to believe that the stock price might go down in a meaningful way. Fixed without a collar. So that's -- they pressed for that, and they got that fixed exchange ratio. The stock price went up. If they had agreed to the terms in the May 7 term sheet there, there would be 57 million shares issued, not 67 million. 10 million shares at -- trading at --

THE COURT: Go over this again. The term sheet was proposed by?

MR. BROWN: Grupo Mexico. They had no

basis to -- they were asked, you know. Mr. Handelsman was asked, because he was the first one where this issue came up: "What were you thinking? Why did you want a fixed exchange ratio?"

At some point, they did try to get a collar on it. That was denied, which cost them dearly. If you are going to make that kind of decision, you have got to have a basis. I think there has to be some basis for it. When asked, "Did you have any reason to believe that the stock price was going to go down," which would be the reason that you would want to fix the exchange ratio or seek a change in what was proposed, the answer was no.

So when you look at -- a lot of these negotiating points -- I mean, they don't amount to anything. They got a 100 million-dollar transaction dividend. Obviously, just taking $100 million out of Southern Peru and giving every shareholder their proportionate share of it in a dividend, to me, that is not negotiating. That is not taking something from the Grupo Mexico side.

THE COURT: What you are saying, it wasn't a hundred-million-dollar special dividend to the non-Grupo Mexico stockholders.

MR. BROWN: Grupo Mexico got 54 percent of it. My suspicion is that it was proposed by Mr. Handelsman. They wanted to get some cash out before they sold their -- before they sold their shares. But that -- they are saying that was a negotiating point? I mean, that is not -- negotiation means something was taken away from Grupo Mexico and given to the company or the minority shareholders. That wasn't it. I mean, the one thing that they kind of obtained was the amount of debt wasn't a little over a billion. It was capped at a billion. There is some significance to that.

But when you look at these so-called negotiations, they were not serious negotiations. From the beginning, Grupo's point was "We are delivering a company to you with an equity value of 3.1 billion." That never changed materially. And they wanted $3.1 billion of stock, and that's what they got, measured at the market price. That is how it actually turned out.

There is another issue here, too, as to what the date is for assessing entire fairness. The defendants say it's the day that the board voted on the transaction. It closed about five or six

months later. We actually have an analysis in our expert stuff of the fairness at the later date. There is not a big difference, but the defendants wanted this date. So for purposes --

THE COURT: When did the stockholders formally vote? The later date?

MR. BROWN: It was March 28th, 2005. It was October 2004, the board approved it. Took time to get the proxy. That was March. Closed in April.

THE COURT: Did the special committee reserve a right to change its recommendation?

MR. BROWN: No, they didn't. That is a big issue, unless -- they didn't. It was -- it's strange. If you look at Handelsman's deposition, one question we had was: "Did you go back to Goldman?" A lot of time had passed, and the stock price had changed. "Did you go back to Goldman?" His testimony was, "Yes, we went back, and I got another opinion."

The Goldman people said that never happened. There is no written evidence of that. Handelsman knew at his deposition that it -- this looked bad. There was a big delay. Maybe it took longer than expected, or the stock price changed more than they expected, and -- maybe there is -- whatever

was done before wasn't really relevant -- arguably, might not be relevant anymore.

So there is this weird testimony, that is unsupported by documents or other witnesses, that some of the special committee members went back to get another opinion. So it really makes this whole committee process seem a bit -- at least at this stage I don't see how the Court can say there is no evidence -- there is no evidence that creates a triable issue of fact of whether it functioned properly.

THE COURT: Did you ever get the board minutes from the other meetings?

MR. BROWN: No. That is another whole issue. I think that issue, in and of itself, that there is a huge block of board minutes missing, from midsummer through the October approval -- where there is no minutes of the special committee meetings? I think, honestly, in and of itself, I don't think you should get burden shifting if there is no minutes for meetings that occurred during a material point in time.

THE COURT: How about your plaintiff? Did he ever go through his father's boxes and update his discovery?

MR. BROWN: We did. We have done so, and we have more documents to produce.

THE COURT: You mean he did it, but he hasn't produced them yet?

MR. BROWN: We -- we just got them. We were working on getting them, and we just got them.

THE COURT: Why is that the case? I mean, there is an attack on the adequacy of the plaintiff. You would think that one would wish to cure any problems relatively rapidly, given -- I mean, this is a wonderful case for me, because I get it on my docket, and it immediately earned a place of pride. Do you know what the place of pride is?

MR. BROWN: The oldest case? Yes. I want to say, Your Honor --

THE COURT: I --

MR. BROWN: -- it is -- I take full responsibility for it. It's my fault. And there was -- this case was not pursued at the beginning the way it should have been. But there was a point -- and I am not going to make excuses for it. There were settlement negotiations. We did actually hire a consultant to make a presentation to the defendants. It's not like nothing was happening. But it certainly

should have been -- proceeded differently from this. But there was a point in time where the fire was lit under us, and we went around the world taking depositions, and the cases -- a lot of effort has been put into the case.

THE COURT: I understand. But I'm saying it's a bit surprising that you are only now going to produce these documents, when I am assuming they were due quite some time ago.

MR. STONE: Your Honor, I don't mean to interrupt, but we received an e-mail from Mr. Montejo while we were doing our briefing saying that Mr. Theriault had gone through his boxes and found no responsive documents. We are quite surprised there are more documents.

MR. BROWN: We thought we produced what was requested. The defendants followed up with a request for monthly statements for several years. And the client at one point didn't think he had them or could get them. And now we have determined that he can get them, and we are going to get them and produce them.

THE COURT: That's the only documents? It's not documents he found among his father's

effects?

MR. BROWN: Correct. There are no documents other than the account statements.

THE COURT: Okay.

MR. BROWN: I mean, on the --

THE COURT: Why is it that I would not grant summary judgment for the special committee defendants? Doesn't mean that you wouldn't potentially be able to get a judgment against Grupo Mexico. But these folks have a 102(b)(7) clause that protects them. And the fact that somebody is not adroit doesn't expose them to monetary liability.

MR. BROWN: Well, I have three answers. First, under Emerald Partners, the Supreme Court did say pretrial dismissal on 102(b)(7) grounds in an entire fairness case is not appropriate.

THE COURT: They did. And then there were cases after that to suggest that maybe, for about seven to ten good and sufficient reasons, that really couldn't be the law.

MR. BROWN: But as far as I know, it's not reversed, and it says that.

THE COURT: It's not reversed. There is a lot of things that aren't reversed in that flat

out kind of way. But we dismiss cases all the time on the basis of the 102(b)(7) clause.

MR. BROWN: Well, then, if they are dismissed, can the Court make a finding after they are out of the case that they breached their duty of care?

THE COURT: I think what you would find -- I don't even know why you would do it that way. What you would find is it's an entire fairness case, that the efforts of the special committee were not sufficient to result in a fair transaction, and the delta between what was fair and what the deal price was gets quantified, and then the interested party has to make that good. That is the part about being the interested party. Your subjective good faith is not really at issue; you are the interested party.

But for the independent directors, if they are simply, frankly, not as adroit as one in an after-the-fact review would think they should have been, that doesn't make them liable when they are exculpated for liability for breach of their duty of care.

MR. BROWN: I have no desire to keep people in the case -- we try to file cases and not

name everybody and his brother where it's not necessary. Obviously, AMC, which I refer to as Grupo Mexico, that is where the relief is going to come from. They are either going to have to pay money or shares are going to have to be canceled. But you know, I think findings about -- I think if the Court dismisses the special committee members, then can you still make findings that they breached their duty of care? I think you can't say at the pretrial stage --

THE COURT: The whole point of this is it doesn't matter. You can assume that they breached their duty of care and they should be dismissed from the case. That is the point, is they are immunized.

MR. BROWN: For monetary liability.

THE COURT: Well, what disgorgement remedy would exist against them?

MR. BROWN: Well --

THE COURT: Shaming, I leave to others. I'm not into that. I recommend many -- one of the dangers of when you assign literature is that you can condemn a great piece of art to being seen as a high school assignment. I commend to everybody in the room if you haven't reread The Scarlet Letter as an adult, read it as an adult. It's a totally

different thing than reading it when you are 13 years old. It's an amazingly mature and relevant novel.

I'm not in the business of shaming. I'm a judge. I'm supposed to decide things that matter in commercial cases. And the whole idea of the 102(b)(7) clause is if all you can fault them for is some lapse in care, then they are out.

MR. BROWN: Certainly, Handelsman is different.

THE COURT: Well, that is what you need to tell me about, because I'm not -- in some ways -- what you are saying is they are in a different position because they are actually at a worse position as a minority stockholder than anybody else. Your client, your individual client, he can buy and sell his five and ten shares, or whatever he had, you know, not affect the market. But because the Pritzker family owned a big block of this, they were locked up. Right?

MR. BROWN: Correct.

THE COURT: Does that mean they were indifferent as to price?

MR. BROWN: No, but they are in a different position.

THE COURT: In some ways, they had a much greater interest in price than your client ever had, because your client -- they took -- arguably, they took a fairly sizable block, that was actually a nondiversifiable risk that they took in this company, which means that -- not that they are not interested in liquidity, but it can't be that they would want to disastrously affect the value of Southern Peru and get -- such that when they got registration rights, they would sell way below the mark. Right?

MR. BROWN: Right.

THE COURT: So what, exactly, is the standard here in this type of conflict? Because in some ways what you posit is that stockholders who would seem to have, in some ways really great incentives to seek a good price, because they have a big block, are compromised if they want liquidity, if they actually want to sell at the same price as everybody else.

MR. BROWN: I would say it slightly differently, but yes.

THE COURT: Say it how you would say it.

MR. BROWN: Handelsman --

Mr. Handelsman was -- he had clear marching orders from the Pritzkers. They wanted to get out of this investment.

THE COURT: Right.

MR. BROWN: And so at the same time, he is negotiating a deal that is -- that -- where he is getting and supposedly relying on information that the company is worth half of its market value. He is out arranging a deal for the Pritzkers to sell the stock at market value. I mean, he is -- on the one hand, he is negotiating with Grupo, and supposedly believing in some analysis that the company is not even worth -- barely worth half its market price. And he is arranging their deal and getting the agreements he needs from Grupo to get -- to get a whole lot more money for him and his affiliates. I mean, if you look at the deposition testimony, the other members of the committee really had no understanding of this. I can cite the pages to you now, Your Honor.

THE COURT: Or they didn't really know exactly what was going on.

MR. BROWN: They didn't understand Cerro. Some of them didn't even understand who Cerro was or what --

THE COURT: Where is there this link between the suboptimal pricing of this deal and the registration rights? How is it that it somehow affected the bargaining dynamic? Is it that Handelsman is somehow this really savvy dude, who actually knew that everybody else on the committee was foolish, and he would have corrected the mispricing absent securing these registration rights?

MR. BROWN: Yes, but that -- there is no smoking gun. There is no piece of paper. I think if you look at all the evidence, what the Pritzkers -- what his marching orders were -- and he is one of the Pritzker soldiers. His job is to get them out of this investment. And so he is in a situation where Grupo will give him something; he can give them something, not press them on the terms that they want; and everybody is happy.

THE COURT: But where is there any evidence that he ever affected, in some negative way, the bargaining position of the special committee?

MR. BROWN: I mean, I can't single out something he did separate from the committee.

THE COURT: I'm just trying to figure out. In a way, the Pritzkers were simply asking for

the same liquidity that other minority stockholders had. Right?

MR. BROWN: Well, they had unregistered shares. They were asking for their shares to be registered. They were --

THE COURT: Your clients had registered shares?

MR. BROWN: Sure. The shares that are trading are registered. To trade, I guess they have to be registered. There has to be a registration statement covering them. They were just in a different position, and they needed --

THE COURT: They were also -- by selling, they were going to give up their board appointment rights. When they sold the shares, the shares became ordinary common shares?

MR. BROWN: Right. When they sold, they were gone.

THE COURT: No. I understand they were gone. But the shares -- once they sold the shares, the shares became ordinary common shares?

MR. BROWN: That is certainly my understanding.

THE COURT: So the rule I would be

setting up here is that some -- that large blockholders, large minority blockholders, can't serve on special committees if, in connection with the transaction, they wanted to actually get registered, registrations?

MR. BROWN: No. I think if this committee had functioned properly, all they would have needed to say is, "We will negotiate these registration rights. We not going to let one member of the committee deal separately with Grupo, when the committee..." --

THE COURT: What did they --

MR. BROWN: "...is trying to negotiate with Grupo at the same time."

THE COURT: What they did was -- what did Grupo extract except that they would vote the way the special committee would vote? Right?

MR. BROWN: Right. But that all happened on the day all the papers were signed. It was a simultaneous --

THE COURT: You are saying there was never any bargain struck beforehand; it all came together at once.

MR. BROWN: Bang, at the end. I mean,

I hate -- I'm reluctant to go back to the main point, but, I mean, I think, you know, there is -- a good -- a triable issue of whether their good faith was exercised here is created by the fact that you have got 67 million shares going out, and where is the valuation that the committee had that it was -- for Minera Mexico, that it was worth, you know -- it was worth the market price, or worth any particular price that was even close to the market price.

So, I mean, whether you characterize that as an extreme due care issue or good faith gets a little cloudy, but to me, I don't think it's fair to say at this stage, "I'm not going to hear any evidence. I will just let them out."

Again, it's 102(b)(7). They are not immune from liability. There is no bar to a liability finding against them. It's just that one remedy is not available.

THE COURT: If you -- see, one of the things I think that is really important to do is not confuse yourself with the divine. I never confuse myself with the divine. I have two sons and a wife who would make sure that I never did.

I don't make liability findings on

people just to do liability findings. There has to be some rational connection to a remedy. Right? You wouldn't be here to get a liability declaration against somebody if there wasn't a remedy.

MR. BROWN: I think that's correct, Your Honor.

THE COURT: So, you know, we are not going to have a trial about some dude's liability unless you can actually get relief from it.

MR. BROWN: Our position, to make it clear, is that their -- findings about their liability can't be separated from the question of what the remedy should be against Grupo Mexico.

THE COURT: But it can be. What you would have to be arguing is some plausible scenario whereby the gain of registration rights for the Pritzkers outweighed the knowing injury they were inflicting on the value of the shares that they were going to free up to sell. Right?

MR. BROWN: I don't think it's -- honestly, I would say --

THE COURT: It has to be thought of that way. What they are going to be selling is shares of Southern Peru after this transaction has been

absorbed by the market. Right?

MR. BROWN: Correct.

THE COURT: If the transaction stinks and the value of Southern Peru shares fall, even though the Pritzkers have secured liquidity, they now will secure a lower value in the sales they make, and they would have to figure out that somehow they were still better off selling at this pace, in this registration thing, at a lower value, than if they simply resign from the board and did, you know, a kind of more painstaking 144 wind-out. Right?

MR. BROWN: Yes, but I'm not totally sure what I just said yes to.

THE COURT: It's a complicated mix for them. If the transaction stinks and the value of the asset that they wish to sell when they get liquidity goes down, the value they are going to realize is lower. Right?

MR. BROWN: Right. I agree.

THE COURT: So they have got to have had a play here where Handelsman has this complicated issue in his mind where, "I'm willing to go this much suboptimal in the transaction, because the negative effect it's going to have on the value of our holding

is worth taking because of the benefit of the liquidity we get from registration in comparison with a wind-out under 144." And if you --

And I admit that I am being tough on you in the sense that you are standing on your feet and I'm asking you a very complicated question, but that is the complicated equation that you are selling to me as motivating the Pritzkers.

MR. BROWN: But I think the mistake in that line of reasoning is that it needs to be quantified at this stage. Maybe at trial, you know, the Court could conclude or the trier of fact could conclude I need to --

THE COURT: No. The reason why you are here with all your buckets of evidence on each side is that you have concluded discovery. You know, when is it that you are going to come up with this theory that motivated Handelsman, and when is it going to become economically plausible such that I could actually make it the basis for concluding that this was his motivation?

MR. BROWN: The best -- our argument at this point -- and our best argument, which we stand and fall on, is he was simultaneously negotiating with

Grupo for the committee and for his affiliates, and the other members of the committee didn't understand that, and it created the potential for interests to diverge. And you know, I can't say, you know -- we found some files where he was doing a calculation, and you know, he understood how -- exactly how unfair the Minera Mexico purchase was, compared to --

THE COURT: In fact, the market price of the company stock did not go down after the transaction was consummated. Right?

MR. BROWN: Absolutely correct.

THE COURT: How do you explain that?

MR. BROWN: The price of copper went up.

THE COURT: So you are saying the price of copper -- the gains from that offset the injury to the company from the transaction?

MR. BROWN: No. Something happened after the transaction. The market changed on certain things. But that didn't affect the values at the time. In fact, we have done the analysis. Our expert did the analysis at the time of the closing, six months later, when the stock price went up. It didn't really -- doesn't change the unfairness of the

transaction. If you do the analysis, it comes out to a similar number.

THE COURT: Okay. Anything else at this stage?

MR. BROWN: Not unless Your Honor has any other questions. We would ask that the Court grant our motion for summary judgment -- partial summary judgment, and deny the defendants' partial and the special committee's complete motion for summary judgment. Thank you, Your Honor.

THE COURT: Mr. Stone?

MR. STONE: Your Honor, good morning. Maybe I'm confused, or maybe Mr. Brown is confused, but he brought a motion saying you can only use the market price. We are not here saying that the market price is irrelevant. In fact, our expert looked at the market price.

Your Honor asked the question: What rationally explains the market price? Our expert looked at that. And what rationally explains it is the copper price. In fact, there is a high correlation between both the spot and forward markets for copper and the price of all copper companies. So not surprising. But --

So Mr. Brown's motion here I think really is more like a motion in limine. He is saying, "Your Honor, you shouldn't allow them to put on evidence of what the DCF of SPCC is." So I think that is the motion we are dealing with today, unless I'm somehow confused.

THE COURT: I think one of the issues, though, that I thought Mr. Brown said, that you would have to assume that the market -- if you looked at what analysts were saying about the copper prices, it doesn't really explain -- you would have to have an assumption about copper pricing that no one had in the market for it to equalize these valuations.

MR. STONE: Right. And you know, I think that Mr. Brown says, "Well, consensus was 90 cents," or something like that. Maybe that was consensus, and those are analysts out there. But the fact is that the market price of not just SPCC, but other copper companies, had an expectation, in fact, that the copper price was going up. And it did. I mean, by the time of the closing of the transaction, copper was a buck fifty.

THE COURT: So you are saying the consensus was for what, one-year-out pricing?

MR. STONE: I think it was probably even a shorter term than that. It really does depend on what time frame they are looking at. There are market surveys that companies do, and they look at three, six, nine, twelve months, and further.

So I'm not sure what analyst reports he is referring to, but the fact is that one of the things our expert does is look at it and says, "The only thing that can really explain this stock price is an expectation that copper is going up."

THE COURT: What about this absence of -- the bankers for the special committee never did a stand-alone valuation of either company?

MR. STONE: Your Honor, the bankers, Goldman Sachs, did precisely what our expert did, which is that they did a DCF for both companies using a variety of assumptions for copper prices, and using the same copper prices, same assumptions, for each of the companies, so that they could compare apples to apples, and said: What is the relative value? What would be a fair exchange ratio? That is what they did.

THE COURT: So what you are saying is when you use the same assumptions, it validated the

fairness of this exchange?

MR. STONE: Absolutely.

THE COURT: So that -- and the copper pricing, you would have to assume to justify the Southern Peru market price, was something like $1.30?

MR. STONE: That depends on a variety of things. I don't think that is necessarily true, Your Honor. I think that there is -- in our view, based on the relative valuation, there is a range of copper prices that would say this is a fair transaction between 90 cents and $1.30. If you use any copper price in between 90 cents and $1.30, it's a fair transaction, using the relative valuation methodology.

THE COURT: But get to this issue that Mr. Brown is saying, that what you actually gave up was -- what is the answer as to what you -- did the committee look at what the actual value of the stock it was giving up was in terms of dollar terms?

MR. STONE: The committee was aware of the stock price. No question about it. It was simple math to take the number of shares outstanding and multiply it by the stock price.

THE COURT: It is. But could you make

a secondary offering and get that much cash in? And what could you do with that cash? If you could do that, why would you give that number of shares, if the real value of the target was much less than that value?

MR. STONE: Well, Your Honor, it wasn't. I mean, this relative valuation, one of the nice things about it is it takes into account the earning power of both of the companies. And importantly with copper companies, in particular, and all mining companies, really, what really matters are reserves.

Minera Mexico has the largest copper reserves in the world. SPCC has relatively small reserves. And looking at the earning power of both of them, by comparing DCFs, using the same assumptions, gets you to a fair exchange ratio. So it takes all of that into account. And what the market is -- is or is not saying about what this company is worth is not irrelevant. It's certainly a fact that you can take into account. But it's very difficult to understand what that market price means. Indeed, Mr. Beaulne, the plaintiff's expert, was asked whether he knew what the reason was that the price of the stock was

whatever it was.

He said, "I didn't look. I have no idea why the stock was trading at that price." He didn't analyze it. He didn't look at the efficiency of the market. He really just didn't examine the stock price himself. He just blindly took that stock price and didn't even do an analysis to determine whether that was really reflective of the value of the company.

Your Honor, relative valuation is not a foreign concept. I mean, let's think about this. The ASG case that they rely on, Justice Duffy, in that case, found each of the methodologies employed by the three experts in that case to be valid under Weinberger, and one of those methodologies was relative valuation. This is not something that is made up by our expert or by Goldman Sachs. It's used all the time in stock-for-stock mergers.

THE COURT: I think what is a little unusual here is no one actually sort of said: "Okay. If we are going to do a DCF of the target, here is what our assumptions are within a reasonable range of what the target's value is. Then if you want to do the relative thing, we will do it ourselves. We are

going to actually make that analysis. But then if it turns out that somehow as an actual factual matter our stock is worth more than the valuation is demonstrating, and we can turn -- we could go out into the market and, for some inexplicable reason, turn our stock into a higher level of currency than the other company could..." -- if you turned this hypothetical stock in suddenly -- "...then we can't just ignore that."

MR. STONE: I agree with that.

THE COURT: And frankly, no one in a third-party deal -- say that some company is getting a market bump. I don't know. Yahoo Group, whatever these things are, they are getting some sort of market bump. And when you -- two hard-headed women of valuation science from Wharton and HBS and Chicago come together, and they do the relative valuation, and they say these things should be on par. But in fact the one is a public company. Its stock price has been maintained for ten years.

In a third-party deal, you would never overpay for the target simply based on some, you know, purist notion that my relative valuation suggests that these things should be essentially equal. Right?

MR. STONE: Yes. And we didn't overpay here. And nobody made the determination that the stock price times the number of shares is actually higher than a stand-alone value you could get using a DCF, using reasonable assumptions for SPCC. It wasn't done. They haven't proven it, either. They didn't do a DCF for SPCC. Nobody came to that conclusion. They didn't have to, Your Honor.

THE COURT: That's what I'm saying. One of the weird things here is that no one actually did that analysis and even looked at any anomaly.

MR. STONE: What you would have to do is take a matrix of DCFs, using different assumptions about the copper price -- different reasonable assumptions about the copper price, and then compare that to the market value times the number of shares outstanding.

THE COURT: Right.

MR. STONE: Right. That's right. Our -- Goldman didn't do that, and our expert didn't do that, and their expert didn't do that.

THE COURT: One of the things is -- actually, if for whatever reason you are getting a strange premium for your stock, in terms of the cash

you can get for it, one of the things you ought to do is do a secondary offering, rather than buying in some other company. Right?

MR. STONE: Right, Your Honor. But if you can buy in the other company for something that is fair for those assets, that might be rational, as well.

THE COURT: Sure. I think that is one of the things that I don't -- I guess what I don't understand is when these folks say, "Oh, but don't press me on what the stand-alone valuation is, because I won't do that. I won't think about it," or, "I refuse to think about it," or, "The limits I was given by my instructors on either side were I won't think about that."

Actually seems pretty childish.

MR. STONE: Right. Nobody told our expert not to think about that. Our expert reached his own conclusion about the right methodology for a stock-for-stock merger, and he came to the conclusion that the right way to determine if the exchange ratio was fair was to use a relative valuation.

THE COURT: But people do stock-for-stock mergers all the time, and relative

valuation is not -- I mean, I don't even know that it's a predominant means of the thing. People almost always value the target. You almost always value the asset you are going to buy, and then you determine what price it is. You don't ignore -- as I said, if for some inexplicable reason the market place values you more highly than it values the target, you don't overpay.

MR. STONE: I don't disagree with that, Your Honor.

THE COURT: Like, for example, General Electric, it would be some sort of egalitarian -- if you went backwards in history, what I understand you would do is if GE was, say, eight times EBITDA, and the company they were buying was four, what you just do is turn their four into an eight, and GE would buy companies based on eight times EBITDA.

MR. STONE: That is not at all what the relative valuation does, Your Honor.

THE COURT: Okay. Then tell me what it does.

MR. STONE: What it does is looks at the characteristics of each of those companies and says, "What is the earning power of this one

versus..." --

THE COURT: That's why when you tell me that no one can give me -- what was Goldman Sachs' DCF range for the target?

MR. STONE: Their DCF range for the target?

THE COURT: Yeah. What did they come up with on the DCF value of the target in this transaction?

MR. STONE: Yeah. I mean, I would have to look at the analysis. I don't know it off the top of my head, Your Honor.

THE COURT: Did they do it, or did they bury it in this relative thing such that you can't -- they would deny that they ever did it?

MR. STONE: Well, I don't know that they would deny that they ever did it. They certainly ran more than one DCF of the Minera Mexico.

THE COURT: My point about the multiple with GE is really apt. One of the reasons why GE would make acquisitions is people would assume, frankly, if you acquired a business and then you put it into GE, it would -- a lot of times the market would attribute the GE multiple to what had been

acquired. I don't think what GE did was then devalue its acquisition currency or devalue the cash by saying, "Let's assume that you are already worth eight times EBITDA."

MR. STONE: Right.

THE COURT: "Do the acquisition that way, so we will up the value of the target, and then give you currency that equals that."

I think what GE would say is: "You are worth four times EBITDA. We can pay cash or something else for it. When we get it and it's within GE, the market will now, frankly, load it in with our other earnings, apply the higher eight times multiple, and our stock price will continue to grow."

This idea of leveling -- as I said, it's a very, very charitable thing, in a way. I'm reluctant, I will say, to jump a trial on a lot of this stuff. But it's not immediately intuitive to me that when you have actually endured the cost of being a public company -- see, that is another thing that the Southern Peru stockholders had which the Minera stockholders didn't. Right? Southern Peru had proven itself as a public company and had taken on those costs -- I assume it was subject to Sarbanes Oxley and

other public accounting standards -- and demonstrated its value in the public markets. And then what Goldman does for its client is to essentially just say, "Let's make everything equal"?

MR. STONE: I would respectfully disagree that that's what Goldman did.

THE COURT: But what they did not do, right, is they never valued the target independently, said what it was worth, and then determined -- began to say, "What would we pay for that? And by the way, our stock, if it's worth 2 billion, you are asking for $3.1 billion in our stock, and our stock has a proven public value, and yours doesn't, and there is a 1 billion-dollar value gap."

That is what one would kind of expect, at least -- even that would you get bargained back from that position, that -- you would at least get bargained into the relative valuation rubric, not sort of dive in there like you had a few beers and you just finished your last finals. Not that I ever did that sort of thing. You see what I'm saying? I'm still trying to figure out why you would start -- as a negotiating position, why you would go down this relative valuation road.

MR. STONE: I think you would go down the relative valuation road, Your Honor, because it is the best way to determine how fair the exchange ratio is, because sure, I mean, you can do a stand-alone of Minera Mexico, but it depends on what your assumptions are for the stock price of the target. And then once do you that, the only way to really compare apples to apples for what you are paying in stock is to use that same matrix of copper prices on the currency, to make sure that there is a fair exchange. That is why you get there.

THE COURT: I'm saying if you make a judgment independent about the value of the target based on your own sense of copper prices and it turns out that the target is worth 2.4 billion, and that on the same assumptions, on paper, you are only worth -- let's just say there is 2.4 billion. Right? The fact that that comes up on paper worth 2.4 billion, but in reality, if you took the number of shares, you could get 3 billion in the marketplace, all the time I would have defense lawyers coming in and people arguing to me in appraisal, "You don't follow what is on paper, Your Honor. The markets matter."

You would expect, frankly, a bank the

quality of Goldman -- markets do matter. If for some reason the market will give you $3 billion for it, for some irrational reason, and you can get $3 billion worth of value for something, rather than 2.4, isn't it your fiduciary duty to get the three, or to at least not pay -- overpay?

MR. STONE: Yes, Your Honor. But, I mean -- again, I think my expert will be able to explain this better than I, but if you back into the long-term copper price that is needed to explain the price at which SPCC is trading, and you use that same long-term copper price for Minera Mexico, Minera Mexico comes out much more valuable, and it makes this exchange ratio look like a really good deal.

THE COURT: That is the problem I'm having with the record. If that were the case, rather than backing in in some sort of timid, kind of awkward way into something -- if instead of that what you saw is a committee that worked with Goldman Sachs and with their mining expert and said, "Look, this is the target price for copper. Here is why we are going into Minera. And when Minera is valued at what we think of as the realistic target price for copper, this is a very good deal."

In that circumstance, as I understand it, you generate a valuation for Minera, if it's a really good deal, where Minera's valuation, based on a stand-alone thing, would approximate what you would be paying from Southern Peru. But that would also seem that somebody from the committee or Goldman Sachs could stand up and say, "Yeah, I valued Minera. It's worth $3 billion. Based on the reasonable assumption we did about copper, that is what it's worth."

As I understand it, the record is devoid of any forthright testimony like that. It's more a thing of, "No, we are really -- we are not really worth as much as the market was valuing us at, and that's what levels Minera."

MR. STONE: I don't think that is a fair representation of the record, Your Honor.

THE COURT: Where is it where they said, "Minera is worth 3 billion"?

MR. STONE: Mr. Brown says that that is what Grupo Mexico said. That is the only reference I know to 3.1 billion. There is actually several matrices in the Goldman report that go through these various scenarios for copper prices, and some other scenarios related to tax benefits. They do put

stand-alone values on Minera Mexico at various copper prices. But it's really a matrix that they are looking at.

THE COURT: A matrix that is so wide -- what I'm asking is: They never did what you would expect, that you would traditionally see, which is they never did an actual stand-alone valuation of Minera, where they came up with a DCF range. Right?

MR. STONE: They did about 15 of them.

THE COURT: I don't care what bankers and their analysts do in the middle of the night with their spreadsheets. I'm talking about something -- I'm not asking them to do what we are asked to do in an appraisal, where we come up with a point estimate. I'm talking about what they do all the time, which is they did not say that the range -- that Minera was worth between 2.8 billion and 3.2 billion under reasonable assumptions, and have a reasonable assumption about a range of copper pricing, a range -- they did not do that. Right? They had every assumption. They had a matrix where it went from 5 cents for copper up to two bucks. Right?

MR. STONE: Well, not that wide a range, but yes.

THE COURT: They didn't even do their football field. Right?

MR. STONE: They do have a football field.

THE COURT: For Minera? What is the value of Minera in the football field?

MR. STONE: Bear with me a moment, Your Honor. Struggling to read it, Your Honor, but they do have an equity value -- implied equity value of 3.1 billion; implied enterprise value of 4.1 billion.

THE COURT: Implied from what?

MR. STONE: Implied from the number of shares to be issued, 67.2 million.

THE COURT: That is alchemy. I mean, that is one -- that takes the -- all that does is take the deal price and then determine the value of Minera from what was paid for it. Right?

MR. STONE: That's right, Your Honor. But that deal price was based on --

THE COURT: That's what I'm saying. Where in the record is there a discounted cash flow valuation of the target company in this buy-side merger where Goldman Sachs said, "This is the range of

fair value for Minera"?

MR. STONE: They did not present their analysis that way, Your Honor.

THE COURT: Did they ever do that when they represent a buyer in any kind of strategic acquisition?

MR. STONE: I'm sure they -- I'm sure that they have done that before.

THE COURT: In a buy-side representation of a third-party strategic acquisition, where Goldman Sachs did not do a stand-alone valuation of the target, to advise its buy-side client on what it should pay?

MR. STONE: I don't know what Goldman Sachs did, Your Honor, but -- I mean, what they do in other cases -- I know what they did here.

THE COURT: I have never seen it. One of the things you do in a buy-side -- a genuine buy-side representation is to advise your client on the currency it should use.

MR. STONE: Correct.

THE COURT: Right? And if one of the advantages of overvalued currency -- so-called overvalued currency is it's -- they call it cheap

acquisition currency. Right? If you are trading at a higher multiple than the target, you take advantage of that multiple in buying. Right? So if you have got a higher multiple to EBITDA, you use that to go out and make acquisitions; right?

MR. STONE: Sure.

THE COURT: And bankers say all the time, "This is a good time for you to make acquisitions. You are getting a really good multiple. You can use your currency because of the multiple you are getting. That is a great thing to use to buy companies."

I don't think they go out and say, "Let's discount down your currency to the level of the target."

MR. STONE: Right. I don't think that's what was done here, Your Honor.

THE COURT: Again, why should -- why the inexplicable absence of a simple target side valuation?

MR. STONE: Your Honor, I don't know. The directors, the special committee, relied on their financial advisors, who used the methodologies that they thought were the best ones to use under the

circumstances. And it is the case that in stock-for-stock mergers all the time you see contribution analyses and relative valuations.

THE COURT: I understand that. You do not see them in isolation. I also think it would be very rare to see something where the target currency is worth -- say $3 billion on the market, and the stand-alone valuation -- the buyer's currency that is being offered to buy the target is worth $3 billion in cash, and the target DCF value is $2 billion, but that the banker gives a fairness opinion because its relative valuation suggests that its buy-side client's stock is being overvalued by the stock market.

MR. STONE: Right. That didn't happen here, Your Honor.

THE COURT: Right. I'm just wondering whether this isn't -- why would I jump, again -- Mr. Brown is asking me to jump to judgment. You are asking me to give a burden shift.

MR. STONE: Yes, Your Honor.

THE COURT: Why isn't this issue alone, which is the fact that there is, in my mind, a fairly troubling absence of confidence that this is the same approach that would have been taken in a

buy-side representation that wasn't conflicted -- why isn't that enough not to do a burden shift at this stage?

MR. STONE: The reason, Your Honor, that it is the right time to do a burden shift is because, A, there is no evidence of any breach of the duty of loyalty. There really are no allegations, no claim here, that the special committee was not independent. And B, the things that they are really complaining about are breaches of the duty of care. The standard for duty of care is gross negligence. I think it would be very difficult to find that these directors -- by the way, who are very well qualified. Mr. Brown says they didn't understand. They understood completely. Take a look at the credentials of some of these folks. Ph.D. in economics from the Wharton School. Mr. Ruiz, investment banker, former director of communications for the Mexican government; Mr. Perezalonzo, former CEO of Televisa. These are very sophisticated people. They understood what was going on. They relied on their advisors, as they are entitled to do under Section 141.

THE COURT: This is a different question of what -- you are representing, right, Grupo

Mexico?

MR. STONE: Yes. Americas Mining.

THE COURT: Whether they get out -- they can get out, and it would be of no comfort to your client. That is the whole point of the entire fairness standard, which is they can be -- on paper, they can try to do the right thing, but if they don't do it in a way that resulted in an entirely fair transaction, doesn't really matter for your client. It matters a lot for them, that they tried to do the right thing. But even to get a burden shift -- I -- one of my problems with these cases, I reread them. They look like posttrial opinions to get to a burden shift.

Poor Chancellor Allen, he should have just had the trial and forget the burden shift. He had to go through Tremont. Remember? It ultimately was entirely fair, after the special committee failed. Why did the special committee fail? Because there were possible arguments about its effectiveness. So the Supreme Court said you couldn't have a burden shift.

So I have been trying to figure out for years what this is all about, honestly, because it

seems to be a lot of things where -- a hazard over who wins in equapoise. But you are pushing me, now, to give your client -- the special committee wants this -- to a burden shift. And how do I do that?

You said they are entitled to rely on their advisors. But for the purpose of the burden shift, what I'm supposed to find is that there a sufficiently confidence-inspiring effort that there is apparently no question about the due care of the committee at all. And in this, you look at the effectiveness of advisors. And I have no evidence in the record that the buy-side advisors gave the full range of advice you would typically give a buy-side client. Or at least what I have seen. Again, I find it very odd that there isn't any specific advice about the value of the acquisition currency and a specific dilation on the target.

MR. STONE: Your Honor, I did find, by the way, Goldman Sachs did do a stand-alone preliminary DCF analysis.

THE COURT: Preliminary. Did it do anything in terms of with its final fairness presentation?

MR. STONE: No, Your Honor. But

nonetheless, the committee certainly had some information about what the stand-alone value was. That analysis certainly changed during the course of their engagement. But there is -- I mean, they had it. But the point, I think, is I think what Your Honor has to find was there was a properly functioning special committee. These were independent people who did their best and relied on their advisors.

THE COURT: I'm not unsympathetic to your position, at all, in the sense of what probably ought to be. But what ought to be and what is, how can I read Tremont as not actually requiring -- see, to me, you could have a perfectly sensible standard, where you simply say, "Look, if you appoint a special committee that meets, basically, the independence requirements, and they in fact study and negotiate the transaction, you get a burden shift."

We are not making a big deal of the burden shift. The plaintiff still gets a big chance that they don't get under the business judgment rule, which is you still get a litigable question about fairness, but you just shift the burden to the plaintiff. I'm not even sure Mr. Brown or other people on the plaintiff's side would care that much if

it would simplify things and say, "Okay. We will take our shot under a preponderance standard." And we would all get that. That isn't really Tremont, though, and it's not really what Emerald Partners suggests. Right?

MR. STONE: Well, I don't know that that is necessarily true, Your Honor.

THE COURT: "The circumstances surrounding the retaining of the special committee's advisors, as well as the advice given, casts serious doubt of the effectiveness of the special committee." That is a quote right from Tremont, which then goes on to conclude that they couldn't give a burden shift. And again, it suggests that there were, again, questions of due care about the performance of the committee, all related to whether -- not the ultimate question of whether the transaction was fair, because as we know, Chancellor Allen ultimately found it was fair, and he got affirmed, but on whether he appropriately -- he couldn't give a burden shift. The Supreme Court remanded and said no burden shift. Right?

MR. STONE: Your Honor, what is raised here -- first of all, there is no motivation for these

directors to do anything but the right thing. Secondly, they spent eight months with a mining expert and Goldman Sachs, and relied on the work that those advisors did.

THE COURT: Where are the minutes?

MR. STONE: Your Honor, they were -- the minutes of all formal meetings, as I understand, have been produced. The other times they met were informal meetings. They were, "Let's check in. Let's see what is going on," that type of thing.

THE COURT: Without advisors?

MR. STONE: They met 24 times. Well, they met with their lawyers, at least. Goldman Sachs was not --

THE COURT: When you have a meeting, no matter how brief, it's typical that you would minute it.

MR. STONE: I don't know that that is necessarily true, Your Honor.

THE COURT: Well, then, is it either -- a meeting, or is it not?

MR. STONE: Right. It's not a formal meeting if you don't do the minutes.

THE COURT: They had 10 meetings or

they had 14, or whatever.

MR. STONE: They had 14 meetings, but they actually met by phone ten more times than that. There is nothing being hidden here. It's not as if the process isn't documented. And the fact that they had these informal meetings is a good thing. It shows they were exercising due care, and they were keeping on top of the process.

And so, I mean, I think what we are talking about here, in terms of the breach of the duty of care, if the supposed lapses are not going to amount to gross negligence, and -- I struggle to think that even if Your Honor believes that there should have been some presentation by Goldman Sachs that there wasn't, that these directors are somehow going to be found grossly negligent because they didn't demand that type of a presentation from their retained experts -- I struggle to think that that is somehow gross negligence. And I think if you are not talking about gross negligence, I think it is a properly functioning special committee and we get the burden shift.

THE COURT: So if it was mere negligence, you get a burden shift?

MR. STONE: I'm sorry?

THE COURT: If it's mere negligence, you get a burden shift?

MR. STONE: I would think so, Your Honor. I mean, what we are talking about here is whether they exercised proper due care. It is not the same kind of standard that you would apply to a special litigation committee, for instance.

These were well-intentioned, well informed, very sophisticated special committee members, who were trying to do the right thing here. And they relied on their advisors, who are the experts.

THE COURT: What do I make on the -- the absence of an actual valuation of the target and an actual valuation of the value of the acquisition currency?

MR. STONE: What do you make of that?

THE COURT: At this stage.

MR. STONE: At this stage, you --

THE COURT: Especially, as I said -- I will admit, I don't think this would have been done this way in a buy-side representation of a strategic acquiror of a third-party target. Do not think the

special committee would have received a banker's analysis. Again, that is my sense. That is why we have trials, is to kind of talk about that. But having seen a fair number of cases in my time, I have yet to see anybody just -- any bank just fly solo on the wings of a relative valuation in representing a strategic buyer. I just have never seen it.

MR. STONE: Right.

THE COURT: And I am a bit skeptical that the fairness committee at a big bank would do that, particularly if there was a fairly large value gap, potentially, between the acquisition currency and the target's value. So what do I make of that on this? I should just -- that is to quibble, and I give you a burden shift at this stage, or is that the sort of thing where I have got to have a trial?

MR. STONE: You are going to have a trial anyway, Your Honor.

THE COURT: I understand that.

MR. STONE: The point is --

THE COURT: That is one of the issues.

MR. STONE: Whose burden is it to show that that is somehow unfair? I think that you -- the appropriate thing to do is to give the special

committee members the benefit of the doubt here, because A, they are independent; and B, they were relying on their advisors.

THE COURT: The problem is that under the case law from our Supreme Court, you have the burden. The burden to get the burden shift is on you.

MR. STONE: Understood, Your Honor.

THE COURT: I'm saying I do think there is --

MR. STONE: I have met --

THE COURT: This is an area of the law where I have spent a lot of time. I think there is a way to make it a lot clearer. We haven't found it yet. But it's your burden. Right? You have to persuade me that undisputed facts suggest that you get a burden shift.

MR. STONE: Right.

THE COURT: I don't envy your task. Again, you are down deep in the weeds of, you know, these cases. But --

MR. STONE: I understand that I have the burden, Your Honor. I'm trying to meet that burden. I think what satisfies the burden is the independence of these directors, which is not

challenged, and the fact that they were relying on their advisors. They weren't do so blindly. They are very sophisticated people, but they were relying on an expert -- two experts.

THE COURT: But one of the things, Tremont says -- this gets to directly my point about whether this is the way the banker would have approached this in a thing, is whether this -- the committee's outside -- the special committee appropriately simulated an arm's-length transaction. And I have a doubt, for example, about whether they approached it in the same way as they would have approached a genuinely arm's-length transaction. Can I give a burden shift? This is precisely in the -- this is 694 A.2nd 422, Tremont. Right? And it's right in talking about the burden shift. This is not the opinion on the ultimate merits. It's on the burden shift.

MR. STONE: As our case law says, the arm's-length negotiations can happen in any number of ways, and the courts are not not going to impose upon every board and every committee how they should proceed precisely in a transaction.

THE COURT: That is particularly in

the case when you are in arm's length.

MR. STONE: That's right, Your Honor.

THE COURT: This is a situation when you are not at arm's length, whether you are doing something that simulates arm's length.

MR. STONE: Right. These are, again, directors who had no motivation other than to do the right thing.

THE COURT: Tell me your take on the Pritzker situation.

MR. STONE: My take on the Pritzker situation is there is no conflict at all, that Cerro's motivations here were to get the best deal possible for their shares, meaning SPCC. There is no conflict here at all. They had been asking for registration rights for quite some time. This is not something that Grupo offered them. When they came to the committee, the committee said, "Well, look, that is something you are, in the first instance, going to have to negotiate with Grupo Mexico. We don't have any power over that. It's not within our charge, but we want to see what you negotiate."

They came back to them with an agreement where Grupo was demanding that in exchange

for the registration rights, they would vote in favor of the transaction. And the committee said "No, that is not acceptable, but if we do a provision that says that you will vote with the way that the committee recommends, it's acceptable."

THE COURT: When did this get done? I think, as Mr. Brown said, one of the problems with this transaction -- did that get formally documented only on the day that the merger agreement got approved?

MR. STONE: It did. The negotiations, as I recall, with Cerro and Phelps Dodge, which happened separately, at different times -- the Phelps Dodge one happened later than the Cerro one -- is that they started relatively shortly before the actual vote took place on the transaction, in late March of 2005.

THE COURT: Yeah -- so what you are saying is by the time the negotiations started -- it wasn't as if like six months before the negotiations started, you struck this deal on registration and that the Pritzkers gave their vote to the committee. They really struck their bargain at a time when the committee --

MR. STONE: I'm mistaken on that, Your

Honor. I was maybe thinking of the Phelps Dodge. The Cerro deal was done in October of 2004.

THE COURT: When was the --

MR. STONE: That was when the deal was signed up.

THE COURT: That was when the merger agreement was signed up?

MR. STONE: Yes.

THE COURT: Which means -- in your briefs, the whole idea was, "No. No. No. Gave leverage to the special committee. The special committee, if they said no, the Pritzkers would say no," blah, blah, blah. Everybody got happy the same day.

MR. STONE: I'm sorry?

THE COURT: Everybody got happy the same day. It wasn't like Grupo Mexico, your clients, were saying, "What is the special committee going to do?"

MR. STONE: No. They didn't know what the special committee was going to do.

THE COURT: They didn't?

MR. STONE: At that point, they did, yeah. It was late in the process.

THE COURT: Right. So they vote. It was basically, "We are going to vote yes," right, in practical terms?

MR. STONE: Well, in practical terms, the negotiation of this started months before.

THE COURT: What is pitched in your briefs, frankly -- yours and the special committee's briefs -- the committee -- what they actually did was that Grupo Mexico, your clients, said, "We want a yes vote on the merger," and Cerro and the special committee said, "No."

MR. STONE: Right.

THE COURT: "We are only going to give -- we'll vote the way the special committee does."

MR. STONE: Right.

THE COURT: But that bargain wasn't struck --

MR. STONE: It was struck before the special committee voted, but shortly --

THE COURT: The same day.

MR. STONE: No. No. No, Your Honor. The bargain was struck before then.

THE COURT: When?

MR. STONE: It was signed the same

day.

THE COURT: When was it struck?

MR. STONE: I would have to go back to Mr. Handelsman's deposition. Looks like the Cerro registration rights agreement was presented to the special committee on October 18th, 2004. And the deal was announced --

THE COURT: The 24th?

MR. STONE: 21st.

THE COURT: That's what I say. This wasn't like it was done very early in the process, where it was clear you were going to get your registration rights. "We said no. We are not going to vote yes in terms of this deal. We'll give our vote to the special committee. That's as good as it gets. Now, let's go negotiate."

MR. STONE: The committee had its final presentation from Goldman on the 21st.

THE COURT: Right. They already had an agreement in principle.

MR. STONE: With Cerro.

THE COURT: With Grupo Mexico, too.

MR. STONE: Agreement in principle in what sense? You are talking about in the

negotiations?

THE COURT: Yes.

MR. STONE: Yes.

THE COURT: Goldman will go to its fairness committee once you get -- they go with the baked price.

MR. STONE: Right. But we shouldn't downplay the fact that they still had the right on the 21st, after hearing the presentation, to say, "We don't think it's fair. We are not going to go forward."

THE COURT: Right. If these liquidity rights weren't valuable, why did Phelps Dodge keep begging for them, when they supposedly had resigned and were already selling into the market?

MR. STONE: Well, they were valuable not just to Phelps Dodge and Cerro. They did have some value. I mean, the value to them is --

THE COURT: I don't assume Phelps Dodge was like really caring that much about everybody else except itself. I'm not saying they were trying to injure people, but I am assuming --

MR. STONE: Phelps Dodge had a very rocky relationship with Grupo Mexico, and they clearly

wanted, A, to get the best price that they could for their shares, and, B, wanted to be able to sell in a way that they were weren't going to have to take a huge discount. That was the value to them and was the value to Cerro. The value to the public was that they weren't going to have these big stockholders dumping huge amounts of shares into the market at lower prices?

THE COURT: I get that. There was this case called McMullin vs. Beran, which is a bit odd.

MR. STONE: Yes. I'm aware of that.

THE COURT: But it implies in a situation like this that there is a danger that Cerro will accept something suboptimal in the merger in order to secure liquidity. That presents a conflict. How do I sort of ignore that precedent and jump confidently, on a summary judgment record, that there is not any kind of there there in terms of Cerro's interests?

MR. STONE: You can ignore that precedent, as many courts have done. That opinion is shocking in the sense that it is not consistent with the rational economic motivations of shareholders. So

I think the rational thing for both Cerro and Phelps Dodge was to get the best price that they could. And getting the best price that they could --

THE COURT: Even if your clients just turned down registration?

MR. STONE: Sure. Absolutely. They still want to get the best price that they can. Still their motivation --

THE COURT: What if Grupo Mexico says you can have one or the other?

MR. STONE: One or the other of what?

THE COURT: "Our next move is we are not changing the pricing, but we will give you registration."

And Cerro says, "Well, you know, it's not -- obviously, we would like a better deal, but we mostly want to get out at this stage, and taking a bit of a haircut, we are willing to do that, because we need to get liquidity."

MR. STONE: Right. I'm not sure where that is coming from, Your Honor. That is certainly not consistent with the facts in the record. But you know, their motivation was to get the best price under any circumstances, whether they had registration

rights or not.

THE COURT: But your client is the one that connected this up to the deal.

MR. STONE: That's correct, Your Honor. The special committee fought back.

THE COURT: Why did your client connect it to the deal?

MR. STONE: They wanted the deal to go through.

THE COURT: So this was leverage?

MR. STONE: Well, it was leverage that -- it was and it wasn't.

THE COURT: Well, but if it wasn't, then why ask?

MR. STONE: Why ask?

THE COURT: If it's not connected, you know -- if it isn't some part of softening up Cerro about the merger, why ask for anything related to the merger in connection with granting registration?

MR. STONE: Right. From AMC and Grupo Mexico's standpoint, it clearly was some leverage on their part, something that they wanted to use to their advantage. From the special committee's standpoint, they wanted to separate that negotiation from the

transaction. That was always their intention, which is why they said, "Don't talk to us about registration rights. You need to go talk to Grupo Mexico."

And when they realized there was a link, they tried to break that link. So, I mean, I think they did the right thing. From my client's standpoint, they were negotiating to get the best deal that they could.

THE COURT: Right. But -- you get my point about -- creates a little cognitive dissonance if you are sitting here telling me there is no connection, when your client is the one connecting it.

MR. STONE: My client tried to connect it, yes.

THE COURT: And ultimately, only did the deal when it knew -- essentially, knew the special committee was going to approve it. I'm taking it that these negotiations have been going on for awhile over registration.

MR. STONE: They had.

THE COURT: And this chance of doing the deal simply based on the -- voting the way the special committee wanted was on the table at earlier stages, but never assented to?

MR. STONE: I don't know that we got into that much detail in the record, Your Honor. I don't think the record reflects that at this point.

THE COURT: Do you have anything else to add at this point, Mr. Stone?

MR. STONE: Your Honor, I think that --

THE COURT: I mean, it's an exhaustive record, I know. We have been at this for two hours.

MR. STONE: We are happy to talk about the adequacy of the representative if Your Honor wants to entertain that. I will turn it over to Mr. Henkin if Your Honor wants to hear on that.

THE COURT: I do not.

MR. STONE: Okay. I will just say, Your Honor, that I know that the bar has essentially been buried in this state with respect to the adequacy of representatives. But I mean, if there ever was any standard whatsoever, this guy just doesn't meet it. I mean, it's really crazy.

THE COURT: How do I deal with the fact that he also inherited this position? Are we supposed to assume, I mean, that they can't just carry on the cause of action? The person who comes in the

wake of someone's death is never going to be exactly the same, in the same position.

MR. STONE: It's really remarkable when this person knows he is having his deposition taken, has never met his lawyers until the day before, never read the complaints, said during his deposition he really didn't know what position he was taking on the allegations of the complaint.

THE COURT: I understand that that is dismaying, and I am continually shocked by the approach that some named plaintiffs take to depositions, given the relatively light burden that they have as a named plaintiff. You would think you could get through the deposition courteously.

On the other hand, the standard is -- that our Supreme Court has set is pretty low. What reason do I have to believe that Mr. Brown's client doesn't want to kick your client's butt for the best interests of the stockholders of the company?

MR. STONE: Read his deposition. I'm not sure he does. You know, the other thing is, Your Honor, I don't know what we do about the fact that his father, from whom he inherited this position, was trading frequently in this stock, including the day

after the announcement of the merger.

THE COURT: Because there is another argument. People buy -- appraisal petitioners buy -- they can say -- look, I have a case on appeal now where I gave a pretty big appraisal award and they bought positions after the merger announcement. And one of the things is, "This is a terrible deal for the company. I'm going to right the wrong. I'm not buying because it's a good deal. I'm buying because it stinks."

You did have the chance -- I mean, regrettably, several -- the passage of time, we have lost a few plaintiffs along the way. I don't think they wished to be lost in the way that they were, but you had the chance to take the father's deposition during his lifetime. Right?

MR. STONE: Sure. If we wanted to activate a case that was dormant for three-and-a-half years, sure.

THE COURT: I'm not faulting. Again, I don't -- this is the oldest case on my docket. And you know, I don't mind getting transferred cases, but I tend not to like having them jump immediately to be the oldest piece of thing on my docket. But the -- I

can't just dismiss it. My sense is that the judge who had it, if he had the confidence -- and he is a very, very bright guy, and one of my -- I miss him dearly to this day. If he felt like he could dismiss, he would have done it. Right?

MR. STONE: Right.

THE COURT: Thank you, Mr. Stone.

MR. STONE: Thank you, Your Honor.

THE COURT: Mr. Brandt?

MR. BRANDT: Your Honor, I'm going to be very brief, because we have been at this for awhile, but I'm only here on behalf of the individual members of the special committee with respect to their 102(b)(7).

THE COURT: Why don't you just focus on our dude from Cerro, Mr. Handelsman.

MR. BRANDT: There has been a lot of conversation back and forth. So long as we are on the topic of being practical, I would like to discuss Pritzker and Mr. Handelsman and the question of practicality, because there is a small piece of analysis that the Court has not quite gotten to.

It's absolutely clear that the Pritzkers had an interest in the stock price of the

company. I hear the Court raising a concern, which I do not share -- but raising a concern about, hey, could Mr. Handelsman have gotten in a position where, in return for liquidity -- you know, the right to do a registered offering, which clearly was in the Pritzkers' interests. It's what they wanted -- whether he might not have coughed up a little bit of value in order to have this liquidity option.

But that is not what the plaintiffs are talking about here. We are not talking about a situation where somebody comes at the last negotiating turn to Mr. Handelsman and basically says, "Okay, boychick. Here is your choice at the very last minute. It's this last bump in the stock price or it's registration rights." We are talking about half the value of the company. That is what the plaintiffs are talking about.

The mistake here is that the special committee gave away half the value of the company. You know, to begin with, if you look at the stock price post the deal -- and I have some charts here I can hand up to the Court. It's ludicrous on its face. There is no reaction in the market that indicates anything like half the value of the company was going.

In fact, the stock price is up 500 percent since the day of the deal. But as to Mr. Handelsman, the notion that he cut some kind of a deal in a disloyal way to give away half the value of the company when the Pritzkers were about to do a registered offering is obviously false.

It's false for two reasons: One, it's in the Pritzkers economic interest; and, two, this is a registered offering. It was underwritten. It was underwritten by Merrill Lynch. You don't -- they would have had to -- he would have had to fool three sophisticated members of the special committee, former director of transportation for the government of Mexico, the former CFO of Cifra, which was the predecessor to Wal-Mart in Mexico; a Wharton Ph.D., who was the CEO of Merrill Lynch for Peru, who was on the special committee as a representative of Peruvian miners. I have never seen that many Peruvian miners at one place at one time, but my guess is you don't get them angry by giving away half their value. And then he had to fool Merrill Lynch, which did diligence before it had to do its registered offering, and take the risk that when you dump this block of stock into the market in an underwritten offering, later the

bottom wasn't going to come out of the market when everybody figures out that you have given away half the value of the company, and deal with the securities lawsuits.

THE COURT: How long would it have taken them to wind out their position without registration?

MR. BRANDT: You know, I don't know, exactly, the answer. I'm not a banker, so I haven't asked. The answer is it would not have been immediate, particularly if Phelps Dodge was doing it at the same time.

THE COURT: Two to three years?

MR. BRANDT: I would be making it up, but it wouldn't surprise me. Let me say this about that topic: That topic proves exactly the point that I think Mr. Stone was trying to make, which is a major risk with respect to the public stock, the public stock at Southern Copper, is the lack of liquidity. If you went through the analyst reports, the public analyst reports that were published at the beginning of this deal and through the course of the deal, a major concern the analysts express is the lack of liquidity in the market about this stock. A major

concern that Goldman Sachs expressed was the lack of liquidity about the public stock. Each of the special committee members expressed that concern, and they are pretty darn sophisticated guys.

THE COURT: No. It makes sense. One of the things, I guess, no one ever explored was the using cash to make this acquisition? Was that ever explored?

MR. STONE: I don't think using cash to make this acquisition was ever explored. I don't --

THE COURT: Part of what happened with the liquidity was you were actually making the liquidity situation worse by doing this transaction, because Grupo Mexico's control level was going to get even higher. Right?

MR. BRANDT: I think Grupo Mexico was going to have a higher level of control as a result of this. And you know, I don't want to jump on --

THE COURT: I did have to smile about whoever was -- had enough chutzpah to put in the thing that this increased the voting power of the public minority.

MR. BRANDT: Yeah. Well, obviously --

but the reality --

THE COURT: Mathematically, it worked.

MR. BRANDT: Reality of it is --

THE COURT: They had a higher level of ineffectual votes.

MR. BRANDT: Right. They had a higher level of ineffectual votes. But Grupo had control of this coming right out of the box.

THE COURT: What did they end up with, 70 --

MR. BRANDT: Higher.

THE COURT: 78, 80?

MR. BRANDT: 74 percent. The public stockholders who are buying into this company are basically in the Land of the Giants to begin with. Between Grupo, Phelps Dodge, Cerro, these are all major copper companies, whose interest in this company, by the way -- it gets me into an area I do not belong, because it's not our argument, but the value of these two companies is the value of the copper that they own. That is why when you look at what the public stock price here looks like -- I'm glad to hand this up to the Court. This just tracks commodity pricing. That is all that the value of

these companies do. These companies are only, you know, the value of the copper that is in the mine. That is why the trick in this valuation context is the higher the value of copper you predict, the higher Minera Mexico's value goes, because it has bigger reserves. That is all that is really going on here.

Again, I don't want to get into this argument. Our client would be, I can tell you, substantially surprised at anybody's view that they did not handle themselves properly in this process from a due care point of view. They are incredibly bright, sophisticated people, and certainly as to Miguel Palomino, who was on as a designee of the Peruvian miners, and a CEO of Merrill Lynch -- did not miss what this Court would typically look at in connection with the buy-side matter.

But what we are talking about here is the duty of loyalty stuff. So as to the first three guys, Carlos Ruiz, Gilberto Perezalonso and Miguel Palomino, there is not a breath, and they really should be dropped immediately. As to Hank Handelsman, his view -- there is a document, PX 4, where he announced that he was there as a representative of Cerro. He did not believe this was a conflict for the

reasons --

THE COURT: How do I deal with some of your clients' misunderstanding of Mr. Handelsman's relationship with Cerro?

MR. BRANDT: I don't think they have a misunderstanding. I think what there is is a language gap. I think there are two issues going on. First, they are refusing to testify about the explicit corporate relationship between the Pritzkers and Cerro.

THE COURT: Okay.

MR. BRANDT: They are being asked questions like, "Did you know the Pritzkers controlled Cerro?" If you are a foreigner and somebody asks you that and you think you are getting asked who owns what stock, who is the -- you know, that is not a question they know.

THE COURT: They knew that Handelsman was Cerro's guy?

MR. BRANDT: I believe that they all did.

THE COURT: There is not any --

MR. BRANDT: The only one who testified in a wild way about that -- and it was the

day his brother-in-law passed away. He appeared for a deposition. Gilbert Perezalonso is a recipient of PX 4, which is the document where Hank announces he was Cerro.

I just really want to say one other topic about that. I'm not here to throw stones at people because the lawsuit waited three-and-a-half years to get going. But when you take the deposition of a retired guy --

THE COURT: No. I get that.

MR. BRANDT: -- the day his brother-in-law dies, five years after the transaction, you know, occurred, and your view is, "We gotcha," because he forgot something or he testified --

THE COURT: No. Believe me, I will take that into account. I had a case called Clements versus Rogers, where I actually commented on that. I don't think -- I do think it does an injustice to people to make them testify, you know -- one, I teach -- I teach at law schools. One of the things I always teach about Van Gorkom that is really important for people to realize is that the decision in Van Gorkom came out in 1985, and it was about a transaction in '79, '80, and there had been a half a decade of very

rapid development in M&A practice that had occurred all since the TransUnion board had engaged in that. And then you just -- you load on to them anachronistic assumptions about how to deal with it. It comes -- it's a lot easier to criticize people.

I realize, in trying to give your accurate testimony about something that occurred -- it's hard when it occurred three months ago, much less three or four years ago.

MR. BRANDT: You know, where Hank is concerned, like I said, he is a former Wachtell M&A guy.

THE COURT: Why alone shouldn't that be a reason for making him face trial?

MR. BRANDT: That's how I feel. But they knew they would end up here in front of you. He understood -- I mean, his view was, "Look. It's no conflict, because we want to get the most money for the Pritzkers, and that's what we want to get for the public stock. Liquidity is good for everybody. Everybody has said it is. So we will do a registered offering, you know, and we will sell it."

There is every indicia the Court could want --

THE COURT: Both Phelps Dodge and the Pritzkers got out entirely?

MR. BRANDT: Yeah. Including Hank selling his own 600 shares, I believe. So 102(b)(7), we think our group should be dismissed on judgment, Your Honor. Thank you.

(A brief discussion was held off the record).

MR. BROWN: Your Honor, on -- just -- these are some miscellaneous points that I wanted to respond to.

Mr. Stone had said the market had an expectation the copper rate was going up. There is references to long-term copper price. I just want to make sure there is a difference between the long-term copper price and the expected copper prices in the next one, two, three, four years.

If you look at the October 21, 2004 Goldman board book, they do list on page 28 the price forecasts for the various firms. And everyone was forecasting, you know, for 2005, for the following year, sharp jumps in the copper price, $1.30, $1.18, $1.20. Goldman was at $1.25, still higher in 2006, seven. "Long term" means 2008 and beyond at the time,

2004. They were all 90 cents. There is this --

THE COURT: Wait a minute. Wait a minute. They were all 90 cents.

MR. BROWN: All -- the consensus of all the firms that were projecting long term, which means five years out and beyond, were in the 90-cent range. So that is what we are talking about when we say long term.

THE COURT: At five years out, the prices would go down to 90 cents?

MR. BROWN: Yes. That is what was projected.

THE COURT: Okay. But as you know, not all parts -- not all pricing is equal, and how does that affect the valuation of Minera? Your friends might say under a DCF, the thing that matters the most would be the first five years, and that if the price was going up at these levels, what would it suggest about Minera's valuation?

MR. BROWN: That it's lower. Here is why. The other point that was made a couple of times is it's all about the reserves. And that, you know -- that may not be 100 percent correct, but there is some truth to that. But it's -- all reserves are not

equal. There are reserves that are just -- that are high quality, where all the copper is together, and it's easy to get out of the ground; it's not too deep, and so forth. Those were the Southern Peru reserves. A short-term increase in copper prices would cause Southern Peru to have more value. They had shorter-lived reserves, but it was easy to get it out and cost less.

Minera Mexico did have much more reserves, but they were poorer quality and cost a lot more to get it out of the ground. A short term increase in the copper prices didn't necessarily have as much effect on Minera Mexico. It was more what you projected for the long term for Minera Mexico, because they had the long-lived reserves that cost a lot of money to get them out of the ground.

That is one of the problems with a relative valuation, because if you are going to say, "The item that we going to move is copper prices," it has to be -- has to effect both companies the same way, and it didn't. This is in the briefing and in the reports, but -- so I'm not really sure where this fits into the argument. It doesn't really relate to our main point, which is they should have done a

stand-alone valuation of Minera Mexico to start with.

On the board minutes, Mr. Stone said it was only the informal meetings. Well, then there were no meetings. There were no formal meetings at all, including a final meeting to approve the transaction, following July 20th. There were no meetings August, September, October, the three months where it was getting down to the wire. The last minutes we have, we put in footnote 11, on page 25 of -- I believe it was our opening brief.

THE COURT: There are no minutes of the final approval?

MR. BROWN: No. And that's right. The final approval was informal, based on Mr. Stone's argument, at least as far as I understand.

And then lastly -- this is a minor point, but the defendants are really keen to keep referring to this as a stock-for-stock merger and talk about the exchange ratio. I mean, Minera Mexico -- Grupo owned 99 percent. It doesn't matter whether there was one share representing the 99 percent. The exchange ratio -- no. They were buying -- Southern Peru was buying Minera Mexico. I think the reason they like to refer to it in their briefs and at the

argument as a stock-for-stock merger -- which it was, technically. They were buying the stock and issuing stock as consideration -- because that somehow makes it sound like Time/Paramount, or something, where maybe there should be something like a relative valuation, which really isn't what this was. This was, as some of the references in the term sheet say, Southern Peru acquiring Minera Mexico and, as you say, the deal consideration was stock.

That's really all I had, unless Your Honor had any others questions.

THE COURT: I do not.

MR. BROWN: Thank you, Your Honor.

THE COURT: Thank you, all, for your preholiday arguments. One thing that I came away from the briefs convinced of is that there has to be a trial in this matter.

Let me tell you what I'm not going to decide today. I am not going to decide whether this transaction was fair. I think Mr. Brown makes some fairly powerful points, but they are not ones that are uncontroverted. I think if anyone read the transcripts or read the briefs, the idea that somehow you can make this determination on the cold record --

I mean, somebody just must have a more confident mind than I have.

I think there is a lot that is ambiguous and controverted about this that will become clearer when people testify about things. As I'm saying, the approaches of each side make me a bit troubled going into trial, because I fear that I'm going to get kind of hedgy answers from all the experts. I'm not sure the expert testimony is where I'm going to focus the most. To me, some of the questions I'm going to have are going to be about what the committee actually did, what the negotiating dynamic was, and what the bankers for the committee were thinking. So I just don't believe --

I understand the kind of Ockham's Razor approach. I get why the plaintiffs would want to do it. Even if I grant it, again, it wouldn't answer one -- it wouldn't answer the precise delta. And that is sort of the issue, although I say, I'm troubled by some of the same things that the plaintiffs are. I come at this, and I -- I do not believe this would be the typical record created by a committee or a board on the buy side of a third-party deal, stock-for-stock deal, where you have a market

value of the acquisition currency. I just -- I don't get -- I mean --

And you can expect at trial that I will be asking questions about whether this is the way it's done, whether banks just fly solo on the wings of relative valuation, whether they consider the value of the acquisition currency, whether they are overpaying, whether they tell clients with a more favorable multiple than the target to equalize that for the benefit of the target, rather than capitalize on it for the benefit of your client? It just strikes me as a little bit odd.

Again, I have a really open mind about this. I hunger for the trial. You have got a very distinguished investment bank, very distinguished law firm representing the special committee. The special committee has real smart folks. It may all make sense, but part of what the entire fairness standard is really about is explaining. It reverses the normal order of things. When there is a conflict, the first -- the explanation has to come from the parties proposing the transaction.

So I'm not going to grant Mr. Brown's summary judgment motion.

Nor, do I regret, am I even going to do the minor burden shifts. Let me start with the vote. I take this business really seriously. And I take this area of the law very seriously, and I have got very good law firms. Your engagement with the actual consequences of the vote here on both sides is pretty thin. Mr. Brown cites Rabkin. Rabkin says what it says. Rabkin cites Michelson, and it cites other things. If you look back at the other cases, Rosenblatt, they don't seem to suggest any kind -- that you have to condition it on a majority of the minority. Seem to just count the votes.

There are decisions that I have written, and others -- I have written decisions suggesting that if we were going to change the Lynch standard, the majority of the minority thing, if it was going to be given effect, shouldn't be some part of a bargain that you throw in at the end. It should be up front, to mirror what you have in the third-party thing. But that is not clear, that that's what the law is. But then there is the -- as I said, the case that rhymes with something on a reindeer's head, that no one even discusses, which is what effect Gantler has in this area. Gantler would suggest more

of a Rabkin sort of thing, where you would have to actually condition the vote on a majority of the minority.

The other layer of complication -- there are two layers of complication here. One is what we talk about with this whole idea of the Pritzkers giving their vote to the committee, which may give the committee leverage, although in the discussion of the chronology at argument, I'm not convinced it gave the committee any leverage at all. But in terms of the vote, even if it gave the committee leverage, it appears to have kind of diluted the effect of the vote, actually, because it really made it -- whatever effect the Pritzker vote had was just a question of the committee's leverage, because the Pritzkers weren't voting. And in fact, the recitation today is that the Pritzkers essentially, in exchange for registration rights, agreed the committee could have their vote at a time when the committee was going to approve the transaction. And given the approval condition was basically going to be met by those votes, it's not clear to me what independent cleansing effect you can give to the vote in this context.

I'm not ruling out that I will do some burden shift later on, but people haven't focused on the chain of the cases, the implications of Gantler, the fact that it wasn't an explicit majority-of-the-minority provision. It was, in fact, a two-thirds provision, that the two-thirds was virtually guaranteed before the vote by the agreement of Pritzker to give its vote to the committee at a time when the committee had essentially had an agreement in principle with Grupo Mexico. I'm just not sure what I can make of the vote in that context.

I also say I'm not opening up the door for Mr. Brown to invent other disclosure claims, but when I had my colloquy with Mr. Stone, he hit on something that was an area of concern I had from Mr. Brown's briefing, which is how the transaction was described to stockholders, in which the way the value of Minera seemed to be determined was simply multiplying the deal price by the number of shares. And it's not clear to me what disclosure there was of any stand-alone valuation of Minera. And, you know, if you look back at cases like Rosenblatt, which I have up here, Tremont, others, you know, the burden to get the burden shift is on the defendants. And I'm

not sure in this area -- again, I'm not into factual issues. I wish it were otherwise. I don't really think that is the way we ought to be sort of going about it. But I will get to explore those questions on a full record pretty soon. And I have a lot, frankly, of factual questions in my head about that, which suggest to me that in light of the precedent, and what it teaches about this area, that I ought to have a trial.

With respect to the burden shift of the committee, it's the same. Unfortunately, I don't think you can read Tremont and Emerald Partners as suggesting that there is something that you just set up a committee; if the committee, on its face, meets independent standards and hires qualified investors, and there appears to have been an effort to consider and negotiate the transaction, that you get a burden shift. That would actually be a fairly elegant addition to the law. Then you just you go in and the plaintiffs have the burden of proof, but they got blown out. You don't get a summary judgment. We would all know what was going on. And then you focus on the actual effectiveness, and all, of the committee in the trial.

It seems to be a blend. You read Tremont, and it refers to did this simulate the way things would happen in a third party's dealing at arm's length. Was there an effective special committee? I respect that we use gross negligence as the liability standard for holding a director liable for a breach of the duty of care. That is the liability standard. It's set for a reason, which is that in a situation where the party is not burdened by a conflict of interest, the judgment is that we don't want to hold them responsible in damages for a breach of the duty of care, even -- unless there is gross negligence. Right?

I don't know that we import, necessarily, into the question of entire fairness the notion of, "Well, yeah, the committee was negligent, but not grossly negligent, so the controller is not held liable." I don't really think that that is the case. It doesn't exactly marry up well. I think it doesn't necessarily help independent directors to think about it that way. You are going to see some of the cognitive dissonance, because I am going to rule dispositively on some things.

But when I look at Tremont and I look

at Emerald Partners and then I look at this record, I just -- I have too many questions to conclude that under the Tremont standard, this special committee works a burden shift. And that, again -- I hunger for an explanation as to why there was not a stand-alone valuation of the target, why there wasn't a consideration of the acquisition currency's value in light of that, whether this is the approach that the banker has ever taken in a strategic acquisition of this kind, that was not freighted with a conflict of interest.

Frankly, the absence of board minutes -- for example, we just talked about when the whole thing came together with Pritzker, when the deal was done. If there are not board minutes that reflect the final approval of the committee -- you know, at a trial, I may give you the burden shift. The reality is it all comes together in one sort of analysis, anyway. But for now, I actually -- just as it would be, I think, premature for me to conclude that it's undisputed that this is fair, I think there are some fairly basic questions, fundamental questions, about whether the special committee, however well-intentioned, actually simulated genuine arm's-length

bargaining.

One of the reasons why advisors are so important in these contexts is however sophisticated directors are, they often are not repeat players in M&A, and they do depend on advisors. And one of the things that is very important for advisors is to make sure -- one of the things that people ought to always be bench marking how they approach a special committee assignment is: Are we on the buy side or are we on the sell side? If there wasn't a conflict of interest, how would we approach this representation? Are we doing everything we would normally do in approaching it from the buy side that we -- are we doing that all now, or are we doing something different? Is the reason we are doing something different is because there is a control overlay, and our perception of the discretionary room we have to make choices is that it's much more confined?

And I think we see many situations where people -- committees manage themselves. It's Revlon. This could be construed as Revlon. Instead of a special committee saying, "That is great. That means we need to market test everything," the special committee says, "Let's structure the deal with the

controller, or with someone who looks like a controller, in a way so that Revlon doesn't technically apply."

That is a great way for a special committee not to do its job, because instead of focusing on its mission of getting the best transaction it can for the people it's designed to represent, it's managing legal expectations. A lot of this is how the advisors approach things. This could be one of the most wonderful deals in the world. One of the things that Mr. Brown is going to have to deal with at the trial is how the market reacted to this supposedly stinky deal.

I'm not making any prejudgment. I just think one of the great things about the trial is I get to hear from everybody. I get to hear in a full-bodied way about what they took into account. I don't have to narrowly draw inferences in favor of one or the other. I can have people explain to me. I'm much more comfortable on even the burden shift issue doing it.

Where I am going to grant summary judgment is for the members of the special committee. 102(b)(7) is in our law. It's an important thing.

It's optional for companies to adopt that kind of protection, but when they provide it, it's important. Even if these independent directors were grossly negligent, they cannot be held liable and owe any money damages to the corporation. If you want to have a hypothetical trial about their liability with their agreement at some law school, if you can strike a bargain with them, you can do that sometime down the line. That's not what the Delaware Court of Chancery is for. Doesn't mean these folks won't have to come and testify at trial. They will obviously -- I expect they will be witnesses and other things.

But the reality is that the plaintiffs have not, to my mind, pled anything and put in evidence of any kind of nonexculpated behavior on the part of any member of the special committee including Mr. Handelsman. And you know, that is the closest question, obviously, because you have McMullin versus Beran out there, and clearly, the Pritzkers were interested in obtaining something to get liquidity.

And I suppose you could make a plausible case that there is a circumstance in which the Pritzkers would -- if the only way to get liquidity was to give Grupo Mexico this transaction at

somewhat of a suboptimal price, that there may be some conceivable situation in which that kind of trade-off could be made. As I said to Mr. Stone, I would urge people -- folks like Grupo Mexico not to create your own problems. They connected this dot.

But Mr. Brandt said something that has been on my mind, which is that there has to be some plausibility about it, because the disadvantage, you know, if you want to cast stones at someone like the Pritzkers -- "Well, they need liquidity. They needed something different." That is a disadvantage, I guess, in terms of their participation in this. There is also another thing. They own a heck of a lot of this stock. They have a far deeper hunger than the named plaintiff to actually get a good deal, because they have much more money at stake. And that something where they just make a deal for liquidity in connection with a transaction that is going to make the value of the company plummet is kind of crazy. And there is no evidence on the record that the Pritzkers were in extremis, that they needed a deal at any price.

There is no rational connection between any bargaining process that was going on and

any advantage to the Pritzkers such that they were willing -- I do take this serious. The plaintiffs are saying this was a disastrously mispriced deal, which is both an opportunity for them and a risk. But in terms of their claim against Mr. Handelsman, huh? I mean, if it really was off that much, any gain the Pritzkers would make by registration rights would be offset by how disastrous this is.

We are at summary judgment. There has been the chance to take everybody's deposition, get all the documents. There has to be some plausible linkage to the decision of the special committee and what the Pritzkers would take. It's an odd -- we have to be very careful in Delaware, I think, to penalize blockholders, minority blockholders, who take a nondiversifiable risk, who, frankly, can act as a protector of other stockholders, by saying that if they want some sort of liquidity because they can be held up by the majority in some ways, because they need registration, that that is going to be treated like some sort of self-dealing interest.

I mean, in fact, the Pritzkers didn't get treated equally with somebody who had 100 shares. They actually did take a discount when they sold into

the market, even in the registration, because they took a minority block discount. May be five to seven percent, but it's five to seven percent. It's not like they are seeking a premium. In some ways, they are seeking to be placed on a level with everyone else. And here there were really plausible corresponding benefits to the minority by creating a better public float.

On a more particularized record, perhaps a plaintiff could show that this sort of thing was a genuine conflict, but I think after full discovery, there is really an obligation on the part of a plaintiff who is targeting a major blockholder representative, whose only conflict is seeking registration rights, to show that there was a plausible economic case that they actually traded out what was best for the company for this.

And it may have been the case that Mr. Handelsman and Pritzker weren't particularly adroit. Right? But I see no basis in this record to conclude that they were -- if -- if they were not adroit, it was for any reason other than the other members of the special committee, if you get my drift. There had to be some inference here that the reason

why -- that Handelsman and -- that they kind of knew it was stinky, and they did it for registration rights, whereas the other members of the committee just did it because they were, frankly, having a Goober Pyle moment.

I don't get that. And so I don't really distinguish him. For that reason -- I can assume here, even -- that there could be grounds for a due care claim, but that is what 102(b)(7) is about. You don't get to have a trial about that. You have to have something that is akin to a breach of the duty of loyalty. I see no evidence against any of these directors in the record that would support a rational inference of disloyalty. And I am going to grant summary judgment as to them.

That obviously gives Mr. Brown and the plaintiff the core essence of what is usually at stake in a fairness trial, which is: Should the interested party be held liable in damages or in some sort of rescissory way for any unfairness? The dismissal of the special committee defendants doesn't do anything to diminish the right to recover against the interested party. It represents no finding about the effectiveness of the special committee. It simply

means that I don't believe the record contains evidence supporting a rational inference of a nonexculpated breach of fiduciary duty claim against those defendants, and I'm going to grant their dismissal.

That is my pre-Christmas ruling for you all. It's been fascinating to read your briefs. I hope everybody has every wonderful holiday that exists at this time of year and enjoys whatever 17th-rate bowl game is on TV tonight. Why don't you talk about a trial schedule? As you know, wisdom never comes too late. You have at least gotten some feedback from me about some of the vulnerabilities and some of the questions that I have about the record. Trial will be expensive. There is a lot sunk costs. So sometimes it's good to take these things into account and have some conversations.

But I would like to hear by, say -- what is the next month? Could I hear by January 14th about a schedule for trial briefs and a trial? I will also grant the defendants this: I am not granting summary judgment on the adequacy of the plaintiff, but you can keep that issue alive. If you need a deposition of the plaintiff because of the late

production of documents -- don't do it just to do it, but if you think there is some reason for it, then I expect the plaintiff to make himself available at a time convenient and location convenient to the defendants.

But why don't I hear from you by January 14th. If somebody could put in a letter to that effect, that you will let me know. That will give you time to get past the holidays but tell me whether you want to go forward with a trial, and digest today and see if you can work it out.

Thank you, all.

(Recess at 12:55 p.m.)

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CERTIFICATE

I, WILLIAM J. DAWSON, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 130 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 12th day of January, 2011.

/s/William J. Dawson
Official Court Reporter
of the Chancery Court
State of Delaware